A Prosecutorial Perspective on Sexual Assault

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In this paper, I provide an overview of some of the key issues facing prosecutors in sexual assault trials. Many of the problems that have plagued sexual assault prosecutions, and made the experience particularly unpalatable for victims, have been the subject of legal reform across all Australian jurisdictions over the last twenty years or so. However, there remain a number of aspects of sexual assault trials that pose a challenge for prosecutors, make the experience a harrowing one for victims, and arguably contribute to the continuing low conviction rates in matters of this nature.

I begin here by providing an overview of reporting and conviction rates for sexual assault in Australian jurisdictions. I then go on to describe briefly some of the legal reforms that have taken place in sexual assault trials, before outlining some continuing issues from a prosecutorial perspective.

Overview of reporting and conviction rates for sexual assault

It is difficult to accurately ascertain incidence of sexual assault, as victims may be reluctant to report for a variety of reasons. Reporting rates are also affected by the definitions of 'sexual assault' used, and the design and administration of surveys. As a result of these factors, figures that are available for the incidence of sexual assault are likely to underestimate the extent of the problem.[2]

According to the Australian Bureau of Statistics *Personal Safety Survey* in 2005, in the 12 months prior to the survey, 126,100 or 1.6 percent of women had experienced sexual assault or the threat of it.[3] When that was expanded to incorporate experience of sexual assault since the age of 15, the number increased to 1,293,100 (17 percent) of women experiencing sexual assault and 353,700 (4.6 percent) experiencing threat of sexual violence. Thus more than 21 percent of women have experienced sexual assault or its threat since the age of 15, compared to 5.7 percent of men.

Despite the high incidence of sexual assault, the proportion of women who report to police is very low. In the *Personal Safety Survey,* of those women who experienced sexual violence in the 12

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[2] ALRC, *Family Violence – A National Legal Response,* 2010, 1101-2.

[3] 'Sexual assault' was defined in the survey as an act of a sexual nature carried out against the person's will.

months prior to the survey, only 19 percent reported it to police. Other studies have found reporting rates varying between 15 and 33 percent.[4]

'Stranger sexual assault' is not the typical experience of victims of sexual assault, for men or women. In the 2005 survey, of those women who had experienced sexual assault in the last 12 months, 22 percent were assaulted by a stranger in the most recent incident, compared to 21 percent by a previous partner, 39 percent by a family member or friend and 32 percent by another known person. By comparison, for male victims, 44 percent had been sexually assaulted by a family member or friend, 35 percent by another known person and 33 percent by a stranger.[5]

Low conviction rates in sexual assault prosecutions are notorious. The Australian Institute of Criminology reports that in 2006, more than 18,000 victim incidents of sexual assault and related offences were recorded across Australia by police, estimated to represent at most 30 percent of actual incidents. Less than 20 percent (<3,600) of these were estimated to result in criminal proceedings being initiated. Of those 3,600, between one quarter and one third were dismissed without hearing, with a similar proportion resulting in a plea of guilty. Of matters going to trial, about 4 in 10 defendants were found guilty, resulting in a conviction rate (pleas of guilty and findings of guilty) of about 10 percent of reported sexual assaults.[6]

In 2010 in NSW, of matters proceeding to hearing or trial, 41.5 percent of sexual assault charges were found proved, compared to 77.1 percent of charges for all offences. By comparison, 60.5 percent of assault charges, 65.1 percent of robbery charges and 81.4 percent of theft charges were found proved. The only offence types with lower conviction rates than sexual assaults were murder (41.0 percent); attempted murder (22.2 percent) and defamation (2 percent).[7]

In terms of trial outcomes, in 2004 defendants charged with sex offences against an adult victim were more likely to be acquitted (74 percent) than those charged with sexual offences against a child (61 percent).[8]

Significantly, people charged with sexual offences are also less likely to plead guilty than defendants on average. In NSW in 2004, only 35 percent of persons charged with a sexual offence pleaded guilty compared to an average of 71 percent of all defendants, and 65 percent of persons charged with assault.[9] Defendants charged with sex offences against a child are more likely to plead guilty (45 percent) than defendants charged with sex offences against adults (23 percent).

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[4] 15 percent in the *Women's Safety Survey Australia* (1996), 20 percent in the *Voices of the Survivors* survey and one third in the NSW *Sexual Assault Phone in Report*, reported in Easteal, P, 'The Cultural Context of Rape and Reform' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 1-12, 6.

[5] Figures add to more than 100 percent due to some victims being assaulted by more than one perpetrator type in most recent incident.

[6] Australian Institute of Criminology, *Guilty Outcomes in reported sexual assault and related offence incidents,* 18 December 2007.

[7] NSW Bureau of Crime Statistics and Research, *Number and proportion of charges that are proven in NSW criminal courts,* last updated 9 May 2011.

[8] Fitzgerald, J, 'The attrition of sexual offences from the New South Wales criminal justice system' (2006) 92 *Contemporary Issues in Crime and Justice,* 7-8.

[9] Fitzgerald, n8*,* 7-8.

What all of this means is that any changes to procedure and practice of the prosecution of sexual assault trials will only impact on a very small proportion of men and women who actually experience sexual assault. However, consideration of how to improve conviction rates in sexual assault matters has two-fold importance: first, as long as conviction rates in sexual assault matters remain so low, it is apparent that a particular class of victims is being consistently short-changed by the criminal justice system. Secondly, improving conviction rates in sexual assault proceedings will hopefully have a flow-on effect in terms of encouraging more victims of sexual assault to report their crimes and proceed to prosecution, and will likely result in an increased rate of guilty pleas by defendants.

Overview of reforms in sexual assault law and procedure

Since the 1970s, there has been a swag of legislative reforms in all jurisdictions designed to ease the process of giving evidence for complainants. While there is some variation across jurisdictions,[10] these measures include the ability to give evidence from a different room via CCTV, the use of a screen to shield the accused from the complainant's sight, the presence of a support person, the use of police interviews as evidence-in-chief for children and intellectually disabled persons, and the giving of pre-trial evidence for children and complainants who can demonstrate a special vulnerability.[11]

Although questions have been raised as to whether such mechanisms (particularly giving evidence from a different room) actually make the experience any easier for complainants,[12] my own personal experience is that sexual assault complainants are almost uniformly positive about such measures. The look of relief on the face of most complainants when I meet with them and explain that they will not need to be in the same room as the accused is palpable.

However, there is no indication that these reforms – while having a positive effect in terms of victims' experience of the court process[13] – have resulted in any tangible improvement in conviction rates for sexual assault prosecutions (though it is likely that it results in an increase in the proportion of complainants who willingly proceed to trial). This is perhaps not surprising, given that these reforms are not designed to affect the substantive evidence that a complainant gives at trial, which is likely to determine the outcome of the proceeding. In this paper, I am concerned with those substantive areas of a witness's evidence in sexual assault prosecutions, and whether

[10] ALRC, *Family Violence – A National Legal Response,* 2010, Chapter 28.
[11] For examples of relevant legislation see *Evidence (Miscellaneous Provisions) Act 1991* (ACT); *Criminal Procedure Act 1986* (NSW); *Criminal Procedure Act 2009* (Vic); *Evidence Act 1906* (WA); *Evidence (Children and Special Witnesses) Act 2001* (Tas).
[12] Freckelton, I, 'Sexual Offence Prosecutions: A Barrister's Perspective' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 143-58, 150-1.
[13] In a 2003 report it was noted that while WA consistently used CCTV for child complainants in sexual assault matters, Queensland and NSW used CCTV inconsistently. A significantly higher percentage of complainants in WA than in the other two jurisdictions indicated that they would report sexual abuse if it happened again: Eastwood, C, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2003) 250 *Trends and Issues in Crime and Criminal Justice.* Children in WA were not cross-examined at committal, were cross-examined for shorter periods than in the other jurisdictions, and benefited from being able to give evidence via CCTV.

reconsideration of some of these aspects of trial process may have an impact on the poor conviction rates in such matters.

Areas for consideration

The definition of sexual intercourse

An aspect of sexual assault trials that is often particularly harrowing for complainants is giving evidence about the sexual act that is the subject of the charge. This is exacerbated by the legal requirement to establish penetration of the genitalia to the requisite degree.[14] Given the technical definition of vagina, to establish this degree of penetration can be more onerous than the common law requirement of rape to demonstrate penetration of the vulva only.[15] Since the High Court's decision in *Holland v R*,[16] all jurisdictions except the ACT changed laws to make it clear that penetration of the labia or external genitalia will suffice to constitute 'sexual intercourse' or 'sexual penetration'.[17] However, where the definition doesn't so specify, complainants need to give sufficient detail in their evidence-in-chief to establish that the requisite degree of penetration has occurred.

In a study of sexual assault cases in the District Court in New South Wales, Pia van de Zandt found that on average, complainants were asked 16 questions about their sexual organs, and the most number of questions asked was 145.[18] Not surprisingly, having to go into excruciating detail about one's genital area and what was done to it is a source of great embarrassment and distress to many complainants.

It is unavoidable that in a criminal proceeding where an element of the offence is that sexual intercourse, or an indecent act of some description, has occurred, a complainant will need to give evidence sufficient to establish that element of the offence. However, prosecutors can give more thought to how they go about eliciting that evidence. One way might be to establish at the outset what a complainant means when they refer to 'sex' or 'sexual intercourse' or 'oral sex' or 'anal sex'. The complainant could then be allowed to use that expression when describing what has happened to her, rather than having to outline in relation to each act, exactly what took place in clinical terms.

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[14] *Crimes Act 1900* (ACT) s 50 (penetration of the vagina or anus); *Crimes Act 1900* (NSW) s 61H(1) (penetration to any extent of the genitalia (including a surgically constructed vagina) or anus); *Crimes Act 1958* (Vic) s 35 (introduction into the vagina or anus – 'vagina' defined as 'the external genitalia' and a 'surgically constructed vagina'); *Criminal Code* (Qld) s 229D (penetration of the vagina (including a surgically constructed vagina), vulva or anus); *Criminal Law Consolidation Act 1935* (SA) s 5 (penetration of the vagina, labia majora or anus, including surgically constructed); *Criminal Code* (NT) s 1 (penetration of the vagina or anus – 'vagina' means the external and internal female genitalia and includes a surgically constructed vagina).

[15] *R v Lines* (1844) 1 Car & Kir 393.

[16] (1993) 67 ALJR 946 – indicated that penetration of the 'vagina' requires penetration of the vaginal canal.

[17] *Criminal Code* (Qld) s 229D (includes penetration of the vulva) – marginal and monentary digital penetration can form the basis of a rape conviction: *R v PS* [2005] QCA 474 [1]; *Criminal Law Consolidation Act* (SA) s 5 (includes penetration of the labia majora); *Crimes Act 1958* (Vic) s 35 (vagina defined as 'the external genitalia'); *Criminal Code* (WA) s 319(1) (penetration of the vagina (including the labia majora, the anus or urethra).

[18] Van de Zandt, P, 'Heroines of Fortitude' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 127-42, 128.

Additional complications arise in relation to children, who may not only be embarrassed and traumatised by having to speak in public about their private parts, but also lack the terminology to do so. One mechanism for making it easier for children to give evidence of such acts is to allow the use of demonstration utilising dolls or figurines, removing the need for child complainants to give complex verbal descriptions of whose body was where.[19]

Prosecutors and judges should also be alert to s 41 of the Uniform Evidence Acts which provides that a court must not allow a question to be asked if it is (inter alia) offensive.[20] Research indicates that section 41 and its equivalents are often not utilised effectively to prevent harassing cross-examination, particularly of children.[21] Detailed questions in cross-examination about a person's genitalia (e.g. whether her pubic region was shaved or the size of her labia), or the number of fingers used for penetration will rarely be relevant and will primarily serve to cause further distress to the complainant.

Absence of consent as a legal element

Historically, proof of rape required proof that the perpetrator used force or the threat of violence and that the victim physically resisted.[22] While the law changed to rely upon the concept of 'lack of consent' rather than the need to demonstrate resistance, the importance of physical resistance continued to be reflected in judicial statements that consent may be conveyed by the complainant 'remaining inactive'.[23]

Most jurisdictions subsequently enacted provisions to the effect that a failure to offer physical resistance to a sexual assault does not of itself constitute consent.[24] However, this does not change the fact that in many jurisdictions the prosecution is required to prove the accused's knowledge or recklessness of the absence of consent, which often amounts to proving in some way that the lack of consent was *communicated* to the accused, usually by evidence of physical or verbal resistance.[25] The interaction between the physical and fault elements of the offence is therefore complex and evidence required to establish the latter continues to impact on the evidence required to prove the former.

Most jurisdictions now define consent as 'free agreement' and set out a range of situations in which free agreement will not be present.[26] Some jurisdictions go beyond this to incorporate a positive

[19] Such demonstrations would appear to be allowed by virtue of ss 26 and 29 of the Uniform Evidence Acts.
[20] See also *Evidence Act 1977* (Qld) s 21; *Evidence Act 1906* (WA) s 26; *Evidence Act 2001* (Tas) s 41; *Evidence Act 1939* (NT) s 16.
[21] Eastwood, n13.
[22] McSherry, B, 'Constructing lack of consent' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 26-40, 27.
[23] *Maes* [1975] VR 541, 548.
[24] For example *Crimes Act 1900* (ACT) s 67(2); *Crimes Act 1900* (NSW) s 61HA(7); *Criminal Code* (WA) s 319(2)(b); *Crimes Act 1958* (Vic) s 37AAA(e).
[25] McSherry, B, n22, 30 and studies referred to therein. In Code jurisdictions where the Crown does not need to prove knowledge or recklessness, the Crown still needs to be able to rebut the defence of 'honest but mistaken belief in consent'.
[26] *Criminal Code* (Cth) s 192(1); *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Code* (NT) s 192(1); *Criminal Code* (Qld) s 348(1); *Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code* (Tas) s 2A(1); *Crimes Act 1958* (Vic) s 36;

consent standard. In Tasmania, as a matter of law, there is no consent in the absence of free agreement verbally or physically communicated.[27] Victorian law requires judges in relevant cases to direct a jury that the fact that a person did not say or do anything to indicate free agreement is normally enough to show that the act took place without that person's free agreement.[28] These provisions incorporate a 'communicative model of sexuality' in which passive submission or acquiescence is indicative of absence of consent, rather than its existence.[29]

However, in jurisdictions other than Tasmania and Victoria, the prosecution is still required to demonstrate that lack of consent has been manifested in some way, unless one of the legislated circumstances for lack of consent can be made out. While consent is a subjective state of mind, in the absence of a 'communicative model' such as those referred to above, the lack of physical or verbal resistance will generally be treated as relevant to consent, as well as to the accused's knowledge as to consent. The most obvious means of proving lack of consent is by adducing evidence of physical or verbal resistance. However, research indicates that victims of sexual assault, for a range of reasons, commonly do not manifest an absence of consent in such a way.[30] Indeed, a popular school of thought is that the best thing to do if sexually assaulted is *not* to physically resist, so as to avoid the infliction of *additional* physical injury.[31] That physical inaction should then be portrayed to a jury as consent is obviously inaccurate.

Many people are still more likely to label an act as rape if the victim has protested verbally and physically at an early stage.[32] It is also a common assumption that sexual assault will be evidenced by some form of physical injury. In fact, less than half of sexual assault victims experience additional physical injury in the context of the assault.[33]

In many jurisdictions, the law now specifies that a jury must not be directed that the absence of verbal or physical protest is indicative of consent. For example, in the ACT, the judge is required, 'in a relevant case' to direct the jury that a person is not to be regarded as having consented to a sexual act just because the person did not say or do anything to indicate that they did not consent; did not

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Criminal Code (WA) s 319(2)(a). Cf the ACT, where there is no statutory definition of consent: *Crimes Act 1900* (ACT) Chapter 3.

[27] *Criminal Code* (Tas) s 2A(2)(a).

[28] *Crimes Act 1958* (Vic) s 37AAA(d).

[29] McSherry, n22, 32-3.

[30] Easteal, n4, 7.

[31] Easteal, P, 'Rape prevention: Combating the myths', in Easteal, P (ed), *Without Consent: Confronting Adult Sexual Violence: Proceedings of a Conference held 27-29 October 1992*, Australian Institute of Criminology, Canberra, 314.

[32] Shotland, R and Goodstein, L, 'Just Because She Doesn't Want to Doesn't Mean it's Rape: an Experimentally Based Causal Model of the Perception of Rape in a Dating Situation' (1983) 46(3) *Social Psychology Quarterly* 220-32. Recent Victorian research found that 29 percent of respondents were uncertain or agreed that a 20-yr-old victim was partially responsible for sexual abuse if she did not verbally protest, and 15 percent believe that in relation to a failure to physically resist: Klettke, B and Simonis, S, 'Attitudes regarding the perceived culpability of adolescent and adult victims of sexual assault' (2011) 26 *ACSSA Aware.*

[33] Easteal, P, *Voices of the Survivors,* Spinifex Press, Melbourne, 1994, 2. The 1996 ABS *Women's Safety Survey* found that only 26 percent of women who had been sexually assaulted since the age of 15 had sustained physical injuries: Table 3.14.

protest or physically resist; did not sustain a physical injury; or on that or an earlier occasion had consented to engage in a sexual act with the accused or another person.[34]

However, the giving of such a direction is dependent on judges and prosecutors being aware of it, and judges being prepared to give the direction. In a Victorian study of 27 trials, there were six trials where judges did not direct juries in accordance with a similar provision, even though the direction may have been relevant on the facts.[35]

Juries may benefit from expert evidence in relation to some aspects of victim behaviour during and post-assault. For example, it may be difficult for jurors to understand that a common reaction to the experience of sexual assault is 'freezing', or what has been referred to as an 'immobility response'.[36] However, it is also important to create more opportunities for such evidence to be led from victims themselves so that the court is not presented with an artificial or unduly limited picture of the victim's experience.

One mechanism for doing so is for prosecutors to ask more 'why' questions of complainants i.e. 'why did you not get up at that point and walk out the door'? 'Why did you not call for help?' Allowing complainants the opportunity to rebut common assumptions through providing an explanation of their behaviour will go some way towards ensuring that jurors properly understand why a lack of consent may be manifested in a variety of ways.

The fault element – the accused's awareness of lack of consent

The fault element in the sexual assault law of most jurisdictions still effectively places the onus on the complainant to in some way communicate lack of consent to the accused. In NSW, Victoria, South Australia and the ACT, the Prosecution must prove that the accused knew the victim was not consenting or was reckless as to whether there was consent.[37] In Queensland, Western Australia and Tasmania, the Prosecution must prove intention.[38]

In many jurisdictions, a defence of 'mistake of fact' operates to allow a defendant to argue an 'honest and reasonable belief' that the complainant was consenting to sexual intercourse. In some jurisdictions, there is no requirement that the belief be reasonable.[39]

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[34] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 72.
[35] McSherry, n22, 35 citing Heenan, M and McKelvie, H, *Rape Law Reform Evaluation Projec,t Report No 2: The Crimes (Rape) Act 1991: An Evaluation Project,* Melbourne, 296.
[36] Galliano, G, Noble, L, Puechl, C and Travis, L, 'Victim Reactions During Rape/Sexual Assault: a Preliminary Study of the Immobility Response and its Correlates' (1993) 8 *Journal of Interpersonal Violence* 109-14.
[37] *Crimes Act 1900* (NSW) s 61HA(3); *Crimes Act 1958* (Vic) s 38(2); *Criminal Law Consolidation Act* 1935 (SA) s 48; *Crimes Act 1900* (ACT) s 54.
[38] *Criminal Code* (Qld) s 349; *Criminal Code* (NT) s 192(3)(b)(strict liability); *Criminal Code* (Tas) s 185; *Criminal Code* (WA) s 325.
[39] *DPP v Morgan* [1976] AC 182. For example, in the ACT, the defence of 'mistake of fact' is based on an honest belief as to the existence of a state of facts. Section 73 of the *Evidence (Miscellaneous Provisions) Act 1991* provides that in a relevant case the jury must be directed that they *may* consider whether that belief was reasonable in determining whether such a belief existed, however the legislation gives no direction as to what constitutes a 'relevant case'.

Notwithstanding the 'free agreement' consent standard outlined above, the operation of mistake of fact provisions will often place an insurmountable burden on the prosecution to rebut the defence. For example, in a recent article, Dr Jonathan Crowe drew attention to a number of Queensland cases where convictions were overturned on the basis that 'honest and reasonable mistake of fact' should have been left to the jury notwithstanding the fact that the complainant had been the victim of ongoing violence and/or had physically resisted sexual activity.[40]

In NSW, s 61HA(3) of the *Crimes Act 1900* provides a number of circumstances where the accused will be taken to know that there is no consent, and also specifies that the trier of fact must have regard to all the circumstances of the case, including *any steps taken by the person to ascertain whether the other person consents to the sexual intercourse.* This legislative provision significantly limits the extent to which an accused can rely on 'mistake of fact' as a defence.

It has been recommended that other states and territories adopt legislation based on the NSW model.[41] However, even in the absence of such legislative change, it is arguable that there is room for a direction to the jury that they should consider in determining the fault element whether there were any steps taken by the person to ascertain consent. This would appear to be entirely consistent with the definition of consent in terms of 'free and voluntary agreement' that exists in some forms in most jurisdictions. Such a direction does not remove the complainant's actions as an area of focus, but also requires the jury to consider whether the accused took any steps to determine whether consent was present, which is compatible with the communicative model of sexuality outlined above.

The operation of rape myths in cross-examination and judicial directions

Many common attitudes and perceptions about sexual assault victims play a part in cross-examination of complainants.[42] In his article 'Rape Myths' US Judge Richard Andrias identifies a number of common rape myths:[43]

- A real victim of rape will immediately complain to family, friends or the police;
- Rape usually occurs at night, outside and between strangers, with the use of a weapon and involving physical injury;
- Rape is an expression of sexual desire;
- Women falsely accuse men of rape;
- The woman invited the sexual assault by dress, behaviour or being alone in the wrong place;
- Prior consensual sexual relations with the accused (or others known to him) implies consent;
- A woman impaired by drugs or alcohol deserves to be raped.

[40] Crowe, J, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 34-7. Cases cite are *Parsons* [2001] 1 Q R 655; *Kovacs* [2007] QCA 143; *Dunrobin* [2008] QCA 116. Crowe suggests that it is difficult to see how these cases are consistent with a robust application of the 'reasonableness' requirement of mistake of fact.
[41] ALRC, *Family Violence – A National Legal Response,* 2010, 1165.
[42] For an outline of some of these myths see ALRC, *Family Violence – A National Legal Response,* 2010, 1111-4.
[43] Andrias, R, 'Rape myths: a persistent problem in defining and prosecuting rape' (1992) 7 *Criminal Justice* 3.

Recent mock jury research indicates that these myths reflect commonly-held views and actively operate to influence juror perception of victim credibility.[44]

Some of these assumptions are now the subject of legislatively-mandated directions e.g. the direction (examined below) that the absence of recent complaint does not mean that an allegation is fabricated, and 'rape shield' laws that prohibit calling evidence of sexual reputation. However, a number of these assumptions continue to form the basis for lines of cross-examination of complainants that are both distressing and in some instances, offensive.

Section 41 of the Uniform Evidence Act provides a mechanism for the prosecution to object to certain questions in cross-examination where the question is 'unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive', 'is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate' or 'has no basis other than a stereotype'. However, in making its determination the court must take into account the nature of the offence to which the proceeding relates, and the legislation also provides that a question is not disallowable merely because it requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

Therefore in relation to questions other than those that are unduly repetitive or asked in a belittling tone, in many ways relevance remains the key determinant of whether or not the question will be allowed. This allows the assumptions outlined above to continue to play a key role in cross-examination of sexual assault complainants, depending on the interpretation of what evidence is 'relevant'. In this sense, there is considerable scope for lawyers and judges to engage in discussion and debate as to what is 'relevant' evidence and what is merely reflective of now-discredited myths and assumptions about sexual assault.

Jury directions are important in the sense that they provide a means of countering community misperceptions about sexual assault and rape myths.[45] Prosecutors and judges should be alert to the existence of legislatively-mandated directions and also whether the facts in issue are indicative of a 'relevant case' in which directions should be given. As the ALRC notes:[46]

> *Such myths bear no relationship to reality and hence do not concern the accused and the right to a fair trial, but rather foster implicit prejudices to raise 'doubts' about the complainant's credibility generally, and specifically credibility as a 'true' victim of sexual assault.*

Women falsely accuse men of rape

One of the most common assumptions underlying cross-examination is that women frequently fabricate allegations of sexual assault.[47] This assumption was clearly reflected in Lord Justice Salmon's well-known statement in *R v Henry and Manning*:[48]

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[44] Taylor, N, 'Juror attitudes and biases in sexual assault cases' (2007) 344 *Trends and Issues in Criminal Justice.*
[45] ALRC, *Family Violence – A National Legal Response,* 2010, Chapter 28.
[46] ALRC, *Family Violence – A National Legal Response,* 2010, 1118.
[47] In a study by Patricia Easteal, almost 3/10 males agreed or were undecided with the statement 'most charges of rape are unfounded': Easteal, n4, 10. More recently, nearly one in four respondents disagreed with

> *... in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate and sometimes for no reason at all.*

Juries can no longer be directed that complainants constitute an unreliable class of witness.[49] The once-common mandatory warning about the danger of convicting in the absence of corroboration has also been abolished in all jurisdictions.[50]

However, while legislation abolishes the *requirement* for such a direction, it is not prohibited. Particularly following on the High Court's decision in *Longman*,[51] such warnings are routinely given.[52] While there is no prescribed form for the Longman direction, it has been suggested that the words 'dangerous/unsafe to convict' are commonly used.[53] Although the Longman direction is restricted to cases of delay, there has been judicial comment to the effect that a prudent approach is to consider any delay between offence and complaint as requiring consideration of a Longman direction.[54] The Uniform Evidence Acts now provide that a Longman direction should only be given where the accused has suffered forensic disadvantage as a result of the delay.[55]

In NSW, a 'Murray' direction is often given, requiring the jury to 'scrutinise the complainant's evidence with great care' where her evidence is the only evidence. The direction has been criticised as superfluous, given directions about the standard of proof in criminal cases.[56] The NSW Law Reform Commission's Consultation Paper on Jury Directions in 2008 doubted whether legislative reforms would have the effect of prohibiting a Murray direction.[57]

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the statement that 'women rarely make up false claims of being raped' and a further 11 percent were unsure: Victorian Health Promotion Fund, *Two steps forward, one step back: community attitudes to violence against women – progress and challenges in creating safe and healthy environments for Victorian women (summary findings)* (2006).

[48] [1968] 53 Cr App R 150, 153.

[49] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69 (complainants); *Criminal Procedure Act 1986* (NSW) s 2494AA (complainants); *Crimes Act 1958* (Vic) s 61(1)(a) (complainants); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

[50] *Evidence Act 1995* (Cth) s 164; *Evidence Act 1995* (NSW) ss 164; *Criminal Code* (Qld) s 632(2); *Criminal Code* (Tas) s 136 (warning not to be given unless justified in the circumstances); *Evidence Act 1906* (WA) s 50 (warning not to be given unless justified in all the circumstances); *Crimes Act 2008* (Vic) s 585(1)(a); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5); *Evidence Act 1929* (SA) s 34L(5) (warning not required).

[51] (1989) 168 CLR 79.

[52] In a NSW study of 92 trials no warning was given in only 18 cases. In 59 percent of cases, the judge told the jury to scrutinise the complainant's evidence with great care (*R v Murray* (1987) 11 NSWLR 12) or assess her evidence in light of common human experience (*Longman).* In 40 percent of cases the judge gave an old-style corroboration warning: *Heroines of Fortitudes*, 188-90.

[53] NSWLRC, *Jury Directions,* CP 4, 2008, [7.53].

[54] *R v BWT* (2002) 54 NSWLR 241; [2002] NSWCCA 60, [95] (Sully J).

[55] Uniform Evidence Acts s 165B.

[56] NSWLRC, n52, [7.38].

[57] NSWLRC, n52, [7.39].

Despite the legislative changes, the assumption that women frequently lie about sexual assault continues to prevail, and is a common theme in cross-examination.[58] The issue is exacerbated by an apparent 'double standard' in the treatment of complainants and accused in sexual assault trials.

A complainant can, and indeed frequently is, cross-examined on the basis that she has fabricated an allegation of sexual assault, in particular that she has engaged in consensual sexual activity and then 'cried rape' due to subsequent remorse or a desire for revenge if she feels she has been 'used' by her sexual partner.[59] Although an understandable avenue for cross-examination from a defence perspective, such lines of questioning are particularly offensive and traumatic for victims of sexual assault. The mere existence of a motive to lie, if established, may 'substantially affect the assessment of the credibility of the witness',[60] even in the absence of evidence that the witness has in fact fabricated an allegation.

Where the defence case asserts a motive to lie, the standard summing-up contains a direction that the accused bears no onus to prove a motive to lie and that rejection of the asserted motive does not necessarily mean that the witness is telling the truth.[61] Thus there is no disadvantage to an accused in raising a spurious allegation of fabrication – a witness can be cross-examined about having a motive to lie, and even in circumstances where she is able to refute the suggestion, it will not operate to her benefit. However, a prosecutor is precluded from asking the accused if they are aware of any reason why the complainant would lie, or of posing the question 'Why would the complainant lie?' in closing address.[62]

Thus the directions given to a jury in relation to motive to lie are weighted firmly in favour of the accused. Under cross-examination, all sorts of propositions will be put to complainants as to why they have 'fabricated' allegations of sexual assault. The trauma that sexual assault victims experience in enduring the criminal justice process is a powerful factor that many people might consider supports the credibility of sexual assault complainants. Although isolated instances will occur from time to time of fabricated sexual assault allegations – and those instances tend to be made much of by the media and sometimes by courts – the trauma and indignity of giving evidence in a sexual assault trial is the strongest disincentive imaginable to continuing with a fabricated sexual assault allegation. However, the law precludes the prosecution from even raising the spectre of this feature of a witness's evidence, which might be thought to be strongly corroborative.

A related area of cross-examination designed to attack the reliability and credibility of witnesses is cross-examination as to inconsistencies in peripheral areas of evidence, e.g. details about surrounding circumstances and details that bear little relevance to the substance of the charge. This type of cross-examination is particularly frustrating for victims as they (understandably) do not see how such details are relevant to the sexual assault, and feel (correctly) that inconsistencies in

[58] The *Heroines of Fortitude* study found that in 84 percent of trials complainants were asked questions about lying and in 54 percent of trials, the complainant was cross-examined about a possible motive for making a false report to the police. Van de Zandt, n18, 130.
[59] Other motives suggested to complainants in cross-examination for fabrication are to evade paying money owed to the accused, cover up for adulterous behaviour or to gain an advantage in Family Court proceedings, or obtain victim's compensation: Van de Zandt, P, n18, 130-1.
[60] *Evidence Act 1995* (Cth) ss 103, 106(2)(a).
[61] *Doe v R* (2008) 187 A Crim R 328 at [58]; NSW Judicial Benchbook [3-625].
[62] *Palmer v The Queen* (1998) 193 CLR 1 at [8].

relation to trivial details will be used to discredit them. Expert evidence may in some cases be of assistance in helping to explain the inability of victims to recall minute details of an experience of sexual assault.

The position is summed up as follows by Ian Freckelton:[63]

> *The reality is that most people who have been severely traumatised do not retain detail-perfect recollection of what happened. That is not the way that the human memory works – we are not machines. Thus, it is not very fair to judge complainants adversely for failure to be able to retain such matters with high levels of accuracy. Yet, juries are commonly invited by defence counsel to draw adverse inferences from complainants' inability to provide a full tapestry of detail or sequence when they are called upon to describe what happened to them in the course of a rape or a series of sexual assaults.*

The potential for the Crown to object to this kind of questioning is limited – although objection can be made on the basis that questions are irrelevant, the right to cross-examine a witness in relation to credibility creates a broad scope for questioning on all kinds of trivial and peripheral topics.[64] However, there is scope in directions to the jury for judges to place these kinds of inconsistencies into perspective, as illustrated by the following example from a sexual assault trial:[65]

> *Bear this in mind, just how difficult it is for anybody to give you an exact description of an event which occurred in the dark, in a bedroom over two years ago, especially if you accept that she was being forcibly assaulted. Test it this way. Try and remember how you behaved in a bed with your partner in entirely regular sexual intercourse over three or four weeks ago.*

I suggest that consideration should be given to giving this type of direction as a matter of routine in sexual assault trials, and in particular where cross-examination of the complainant has resulted in little inconsistency in terms of the substantive details of the offence. While such a direction might be said to simply accord with ordinary human experience, incorporating it in a direction gives it judicial imprimatur.

A further example of the 'double standard' is the use of character evidence. An accused may call evidence of good character as an exception to the credibility rule.[66] Such evidence may be used to bolster the accused's credibility, and also in relation to the issue of whether he is guilty of the offence charged. However, the prosecution cannot call evidence of the complainant's good character to demonstrate that she is unlikely to manufacture allegations of sexual assault.

A woman invites sexual assault through the way she dresses or behaves

[63] Freckelton, I, 'Sexual Offence Prosecutions: A Barrister's Perspective' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 143-58, 146.
[64] The test laid out in s 103 of the uniform Evidence Acts is whether the evidence 'could substantially affect the assessment of the credibility of the witness'.
[65] Van de Zandt, n18, 138.
[66] Uniform Evidence Acts, ss 102 and 110.

The assumption that women invite sexual assault by dressing or behaving in a particular way, and its operation in sexual assault trials, has been the subject of significant critique. The myth that dress invites sexual assault was most recently the subject of significant discussion when a comment made by a Toronto police officer to university students that if they wanted to avoid rape they should avoid 'dressing like sluts' initiated a series of so-called 'slut-walks' in Canada, the United Kingdom and Australia.[67]

In Australian research, more than one-quarter of respondents either disagreed or were undecided about the statement that 'there is no behaviour on the part of a woman that should be considered justification for rape'.[68] The idea that women are partially to blame for sexual assault if they wear sexually revealing clothing or behave in a sexually provocative manner continues to operate in modern society.[69]

Examples of assumptions about women and their dress and behaviour continue to abound in sexual assault trials, albeit that they are sometimes more subtle than in the past. Research conducted in NSW found that defence counsel often asked questions inferring that the complainant was partly responsible for the sexual assault through her behaviour by the way she dressed, by drinking or some other aspect of her behaviour.[70]

For example, a recent sexual assault trial I was involved in involved allegations that the complainant had been subjected to various sexual acts while in an intoxicated state at a party, where she had been placed in a bedroom to sleep off the effects of her intoxication. The issue at trial was consent, and the following exchange occurred:

> *Defence: And did you take some time to apply makeup before you went out? – Yes.*
>
> *Defence: Did you take time to make yourself look attractive?*
>
> *Prosecutor: Well really, your Honour. Relevance? Objection.*
>
> *Judge: Mr [x]. Is this relevant?*
>
> *Defence: I thought it was self-evident, but if it's not, I'm happy to have the debate in the absence of the witness.*
>
> *Judge: All right, I'll allow it for the moment.*
>
> *Defence: Did you take the time to make yourself look attractive? – Obviously.*
>
> *Defence: Was your intention to make yourself attractive to members of the opposite sex? – No, my intention was to look good for myself.*

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[67] 'London gets its Slut Walk', *The Australian,* 12 June 2011; 'Sydney 'SlutWalk' small but powerful', *The Australian,* 13 June 2011.

[68] Easteal, P, 'Beliefs about Rape: a National Survey', Australian Institute of Criminology, 1993, 26.

[69] Klettke, B and Simonis, S, 'Attitudes regarding the perceived culpability of adolescent and adult victims of sexual assault' (2011) 26 *ACSSA Aware.* More than 10 percent of respondents were uncertain or agreed that a woman who wears sexually revealing clothing can be attributed (partial) blame for her sexual assault. Twenty-six percent *disagreed* with the statement that 'Even if a 20-year-old female behaves in a sexually provocative manner, she should not be attributed (partial) guilt if she is sexually abused'.

[70] Van de Zandt, P, n18, 134.

Defence: Not in any way to look good for the benefit of others? – No, for myself.

The assumption behind such a line of cross-examination is evident – the insinuation is that the complainant, by dressing up and putting on make-up, is doing so in order to make herself attractive to members of the opposite sex. Ergo, she is more likely to be willing to engage in sexual activity with someone she meets at the party that night, more so than if she had gone to the party with a naked face and in jeans and a baggy jumper. Witnesses understand what this questioning is about, and what it implies, and they (understandably) find it highly offensive.

Prosecutors and judges should be alert to lines of cross-examination (such as that cited above) where the basis for the cross-examination is a 'myth' or assumption about the behaviour of sexual assault victims. The basis for such cross-examination may be 'self-evident' but that does not make it relevant, and it does not make the evidence admissible. Requiring defence counsel to outline the real reason for such questions, rather than relying on the argument that it is 'self-evident' may assist in exposing the basis for cross-examination, and determining whether or not it should be allowed.

Prior consensual sexual activity implies consent

A further area of cross-examination that causes considerable distress for complainants is cross-examination about previous sexual history. Although legislation in all jurisdictions prohibits cross-examination of this nature, the prohibition does not in all jurisdictions extend to sexual history with the accused.[71] Thus in the ACT for example, the prohibition has been interpreted not to extend to previous sexual activity with the accused.[72] In New South Wales, the prohibition is a general one, but does not apply if the evidence relates to a relationship between the accused and the complainant that was 'existing or recent' at the time of the offence.

It is easier to imagine situations of prior sexual activity with an accused where that may have significant probative value than instances of sexual activity with a person other than the accused, which one might think will rarely have probative value. However, there is no apparent reason why sexual history with the accused should not be subject to the same restrictions as other sexual history cross-examination. In instances where, for example, prior sexual relationship occurred some time ago, it may not be possible for the defendant to demonstrate significant probative value of sexual history evidence. New South Wales and South Australian legislation apparently reflects this in limiting the exception for prohibition on sexual history evidence to situations where the relationship between the accused and the complainant is 'existing or recent'.

A possible improvement to the experience of victims of sexual assault of cross-examination was mooted by the Victorian rape law reform evaluation: that legislation should require prosecution and

[71] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51(2); *Criminal Procedure Act 2009* (Vic) s 340 (prohibition does apply to sexual history with the accused); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4 (prohibition extends to sexual activities with 'any person'); *Evidence Act 1906* (WA) s 36BC; *Evidence Act 1929* (SA) s 34L(1) (prohibition does not cover 'recent sexual activities with the accused'); *Evidence Act 2001* (Tas) s 194M(1) (prohibition includes sexual activities other than forming part of the events and circumstances of the charge); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4 (prohibition extends to sexual activities with 'any other person').

[72] *R v CH and JW* [2010] ACTSC 75 (30 July 2010), [48] ff.

defence to determine relevant issues for trial before it commences.[73] Such a recommendation is in line with general case management procedures operative in several jurisdictions, and has the advantage of maximising the use of court time and limiting waste of valuable court resources. Where either party wishes to question the complainant about prior sexual history they should be required to do so a specified period in advance of the trial, and be precluded from raising the issue if they have not complied with these requirements.

Complaint and victim behaviour post-assault

Historically, the law has treated early complaint by a victim of sexual assault as evidence that enhances her credibility, and correspondingly, the absence of complaint has been treated as adversely affecting credibility. This can be traced to the medieval common law that a true victim of violent crime would raise a 'hue and cry' and present their injuries for inspection to 'men of good repute'.[74] Thus in *Kilby v The Queen,* Barwick CJ stated:[75]

> *It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape, and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule to be given.*

A more recent example of such a direction is given in the *Heroines of Fortitude* study:[76]

> *A complaint is admissible if made at the earliest reasonable opportunity – if a man runs out of a house and doesn't tell anyone the house is burning until the night following, it is not consistent with him believing that the house was on fire when he ran out of it.*

The assumption of recent complaint was originally embodied in the 'Kilby direction' that evidence of recent complaint is relevant to the credibility of the victim and that a failure to make a complaint at the earliest available opportunity can correspondingly be used to impugn the credibility of the complainant.[77]

However, the general assumption that the victim of a sexual offence will complain at the earliest reasonable opportunity has been doubted judicially,[78] and by research.[79] Reasons for failure to report are varied, and include fear of reprisals, being scared or ashamed, fear of police or the court

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[73] Heenan, M and McKelvie, H, *The Crimes (Rape) Act 1991: An Evaluation Report No. 2,* 1997, AG's Legislation and Policy Branch, Dept of Justice, Melbourne, 53.
[74] Bronitt, S, 'The Rules of Recent Complaint' in Easteal, P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture,* Federation Press, Sydney, 1998, 41-58, 44.
[75] (1973) 129 CLR 460 at 465.
[76] Van de Zandt, n18, 137.
[77] *Kilby v The Queen* (1973) 129 CLR 460.
[78] *Suresh v The Queen* (1998) 72 ALJR 769 at [5] per Gaudron and Gummow JJ.
[79] See for example ALRC, NSWLRC and VLRC, *Uniform Evidence Law* Report 102, NSWLRC Report 112, VLRC FR (2005) [18.72]-[18.73].

process and fear of not being believed.[80] Particularly in the US, delay in complaint has been explained through expert evidence of 'Rape Trauma Syndrome',[81] though this has not been without controversy.[82]

In all jurisdictions, legislation now provides that juries must be warned where appropriate that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; there may be good reason for delay in making complaint of sexual assault; and must not warn the jury that delay is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.[83] However, lack of recent complaint remains an issue in sexual offence trials, notwithstanding that research indicates a variety of reasons why victims of sexual assault may fail to report it at the earliest opportunity. For example, in *Crofts v R* (1996) 139 ALR 455, the High Court held that lack of recent complaint could still be used to impugn the credibility of the victim 'in fairness to the accused'.

The *Crofts* direction is encapsulated in legislation in some jurisdictions.[84] In New South Wales, for example, the jury may be warned that delay is relevant to the victim's credibility where there is 'sufficient evidence' to justify such a warning. There is at present no judicial authority on what will constitute 'sufficient evidence',[85] however the Criminal Justice Sexual Offences Taskforce expressed the view that a warning should only be given where there is something more than delay.[86]

The effect of the statutory provision with its attending ambiguity is that judges may give a *Crofts* direction as a general rule, regardless of whether reasons exist for delay and whether there is other corroborating evidence, in order to limit the risk of a successful appeal.[87] The direction may be given even in cases where there has been no delay; in a VLRC study of 11 cases where the Crofts warning was given, only two cases involved a delay in complaint.[88]

Even where complaint is made at a relatively early stage, if it is not *immediate* this is commonly raised by defence. Research in NSW found that delay was raised by defence in 50 percent of trials where the complainant told someone about the assault *within five hours* of it occurring.[89]

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[80] Dept for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault,* Sydney, 1996, 209.

[81] Freckleton describes 'rape trauma syndrome' as having two main aspects: (1) disorganisation in lifestyle ranging from fear, humiliation and embarrassment to anger and desire for revenge; and (2) a long-term process of physical and emotional reorganisation: 'Contemporary Comment: When Plight Makes Right – The Forensic Abuse Syndrome' (1994) 18 *Criminal Law Journal* 29.

[82] Bronitt, S, n73, 50-1.

[83] For example, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Criminal Procedure Act 1986* (NSW) s 294 (all three components); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1929* (SA) s 34M(1); *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Code* (Tas) s 371A (first two components); *Evidence Act 1906* (WA) s 36BD; *Sexual Offences (Evidence and Procedure) Act 1994* (NT) s 4(5) (first two components).

[84] *Criminal Procedure Act 1986* (NSW) s 294(2)(c).

[85] Judicial Benchbook of NSW, [2-640].

[86] Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward', Attorney-General's Dept (NSW), Sydney, 2006, 100-3.

[87] *R v Markuleski* (2001) 52 NSWLR 82 [175], [187].

[88] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure, Final Report* (2004) [7.88].

[89] Van de Zandt, P, n18, 135.

Difficulties for the prosecution in relation to complaint are exacerbated by the operation of the credibility rule. The Prosecution may be aware that there are very good reasons why a victim of sexual assault failed to report it. However, these reasons cannot be led as part of evidence-in-chief as it is generally inadmissible as credibility evidence.

The prosecution is therefore limited to the possibility of introducing explanatory evidence in re-examination as a means of re-establishing credibility if the lack of complaint is raised in cross-examination.[90] However, the absence of complaint is something a jury will usually be interested in, thus the credibility rule operates as a significant limitation on the prosecution.

One possible improvement may lie in the exception to the credibility rule that applies if it is to be suggested to a witness that her evidence is fabricated. As it will sometimes be clear from the outset of the trial whether this is likely to be the case, the prosecution should proactively consider whether to elicit evidence of a prior consistent statement of the witness as an exception to the credibility rule.[91] If defence objects to such a line of questioning, they could be asked to indicate whether there will be a suggestion that the complainant has fabricated her evidence. Unless defence indicates that such an allegation will not be put to the complainant, then this line of questioning by the prosecution to bolster credibility should be permitted. This would, for example, allow the Prosecution to lead evidence of complaint that is not otherwise admissible as evidence of 'recent complaint'.

Recidivist offenders – applicability of tendency, coincidence and relationship evidence

A key impediment to justice is the restriction on leading evidence of sexual offending against other victims by an accused, and problems with leading 'relationship evidence'. This is particularly the case in relation to child sexual assault.

Research indicates that those who sexually offend against children will frequently engage in a drawn-out and complicated process of 'grooming' their victims to facilitate their offending.[92] This may involve the giving of gifts, singling a victim out for special attention, the keeping of secrets, isolation of the victim from family supports, and the gradual introduction of sexual behaviour through minor touching. However, such evidence can also appear innocuous, particularly without an understanding of the dynamics of sexual abuse, meaning that it may be excluded as irrelevant or unfairly prejudicial. This has the effect of divorcing the sexual assault from a context in which the accused has arguably engaged in a preliminary process of grooming behaviour prior to the assault.

[90] Uniform Evidence Acts s 108.
[91] Uniform Evidence Acts s 108.
[92] Reid, B, 'Tactics used by Child Sex Offenders', 2005.

As a general rule, for evidence of sexual offending against other victims to be led in evidence, it must satisfy the requirements for the admissibility of tendency and/or coincidence evidence. In terms of the Uniform Evidence Act, this means the prosecution must establish that:[93]

- The evidence will have significant probative value; and
- The probative value substantially outweighs any prejudicial effect it may have on the accused.

The previous requirement of 'striking similarity' for such evidence at common law is no longer part of the requirement under the Evidence Act rules for admissibility of tendency and coincidence evidence.[94] More recent cases have demonstrated an increased willingness on the part of courts to allow evidence of sexual offending against other victims where the similarities between cases are of a more general nature.[95]

However, the requirement that the probative value of the evidence substantially outweigh its prejudicial effect continues to impose a significant limitation on its admissibility. This results in a significant disadvantage to the prosecution, in the sense that it must adduce evidence of an 'isolated instance' of sexual assault divorced from the broader context of the offender's behaviour.

Take child sexual assault as an example. The application of the rules outlined above means that evidence of sexual assaults against children other than the immediate complainant will only be admissible if there is a sufficient degree of similarity between them to give the evidence 'significant probative value'. Where the incidents of abuse are far apart, the children are different ages, and the mode of abuse is different, the evidence is unlikely to be admissible on a tendency/coincidence basis. Research suggests that those who sexually abuse children are likely to do so against multiple victims, making it more likely that a person who has sexually abused a child in the past will do so again.[96]

From the perspective of most ordinary people in the community, I suggest, knowledge that an accused has offended against children in the past will make it more likely that they have offended against this particular victim. That is not because members of the community take an automatic set against child sex offenders (although that may happen), but because there is an increasing awareness in the community about the dynamics of child sex offending and the fact that child sex offenders do often offend against multiple victims. I would also argue that to have a sexual interest in children is unusual to the extent that the existence of such an interest in relation to one child should prima facie be considered of significant probative value in relation to whether there is a sexual interest in another child.

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[93] Uniform Evidence Acts ss 97, 98, 101.

[94] *CGL v DPP* [2010] VSCA 26 (8 Feb 2010), [30]; *R v Ford* [2009] NSWCCA 306 [125].

[95] See for example *R v Ford* [2009] NSWCCA 306 (on appeal, evidence of different sexual assaults against women sleeping over at A's house at parties allowed); *NAM v The Queen* [2010] VSCA 95 (sexual acts against two granddaughters unremarkable but significant similarities in peripheral circumstances of offending).

[96] Reid, B, 'Tactics used by Child Sex Offenders', 2005, 4, citing figures that between 44 and 66 percent of incestuous fathers in studies had offended against another victim in addition to their daughter. High rates of reconviction have been reported amongst serious child sex offenders in the US and Canada: Grubin, D, 'Sex offending against children: Understanding the risk', *Police Research Series Paper 99,* 1998.

The exclusion of tendency/coincidence evidence makes it particularly frustrating for prosecutors that other aspects of sexual assault trials discussed here operate as they do. An accused who has previously offended against other children will still be entitled to cross-examine the complainant about having fabricated the allegation, or motives for lying, or absence of recent complaint. This operates in a context where the accused's actions are constructed as an isolated instance of alleged offending, rather than the jury being aware of the fact that the accused has offended against children in the past, making it 'improbable that the events occurred coincidentally'. The assumptions about children, and complainants generally, lying about sexual assault continue to operate, but without the prosecution having the benefit of pointing to the unlikelihood of *multiple* complainants making false allegations against the same accused.

Similarly, it is arguable that tendency/coincidence evidence is significantly probative in adult sexual assault matters even in the absence of significant similarities in factual circumstances. It has been pointed out that evidence of absence of consent on one occasion cannot be relevant to establish that consent was absent on another occasion.[97] While this is true, it is also the case that such evidence *is* potentially relevant to establishing the relevant fault element. The fact that an accused has been the subject of a complaint of sexual assault previously in circumstances where the issue has been knowledge/recklessness as to lack of consent would be relevant to establishing knowledge/recklessness on a subsequent occasion. For example, the fact that an accused had been subject of a complaint after having sex with a seriously intoxicated person could be considered relevant as placing the accused 'on notice' that another, similarly intoxicated complainant may not be consenting.

Ultimately, it may be that there needs to be legislative reform to allow for evidence of prior sexual offending to be adduced as tendency/coincidence evidence regardless of similarity. However, I believe that there is also scope within the existing provisions to recognise that evidence of prior sexual offending, even where the acts are significantly different in their physical nature, is of substantial probative value. It may be that prosecutors need to consider the possibility of adducing expert evidence in relation to patterns of offending behaviour, in order to demonstrate the 'significant probative value' of such evidence.

Conclusion

The principle of 'innocence until guilt is proven' is a fundamental feature of our criminal justice system, and for good reason. However, the appalling conviction rates in sexual assault cases Australia-wide can only lead us to conclude that for every person convicted of a sexual offence, there are dozens of 'guilty' ones who are ultimately acquitted or not charged or prosecuted at all.

How do we balance the need for fairness to the accused with the need for justice for the victim? Can the former continue to trump the latter so thoroughly and spectacularly? Or is it perhaps time to rebalance the scales so that a sexual assault victim has at least an even chance that the traumatic experience of giving evidence results in the conviction of the accused?

[97] *Phillips v The Queen* (2006) 225 CLR 303.

From time to time friends ask me whether, if I were to be sexually assaulted, I would report the matter to police and see it through the criminal justice process. I can honestly say that most days, I am not able to give a firm answer one way or another.[98] That I am not able to give an unequivocally positive response bothers me, and it should bother most people who work in the criminal justice system, and who still believe that – for all its shortcomings – the law is ultimately about the quest for justice.

[98] It appears that I am not alone in this view – in a study of legal participants in the criminal justice process, only one-third of respondents indicated that they would want their child involved in a prosecution if s/he was a victim of serious sexual assault: Eastwood, n13.