



NSW LAW REFORM COMMISSION

REPORT 101

Questioning of complainants
by unrepresented accused in
sexual offence trials

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Questioning of complainants by unrepresented accused in sexual offence trials

We make this Report pursuant to the reference to this Commission dated 27 March 2002.

A handwritten signature in black ink, appearing to read 'M Adams', with a stylized, cursive script.

The Hon Justice Michael Adams
Chairperson

Associate Professor Jane Goodman-Delahunty

The Hon Justice Greg James

The Hon Justice Ruth McColl

The Hon Justice Jeff Shaw

Professor Michael Tilbury

June 2003

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TERMS OF REFERENCE

Cross-examination by an unrepresented accused

In a letter to the Commission dated 27 March 2002, the Attorney General, the Hon R J Debus MP referred the following matter for inquiry:

Whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine a complainant. Specifically, whether courts should have the power to appoint a person other than an unrepresented accused to cross-examine complainants in sexual offence cases whether or not the accused consents.

PARTICIPANTS

Division Members

Pursuant to section 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams

Associate Professor Jane Goodman-Delahunty

The Hon Justice Greg James

The Hon Justice Ruth McColl

The Hon Justice Jeff Shaw (Commissioner-in-Charge)

Professor Michael Tilbury

Officers of the Commission

Executive Director

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RECOMMENDATIONS

Refer to the pages listed below for a full discussion of the proposed Recommendations.

Recommendation 1 | see page 48

An unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding.

Recommendation 2 | see page 61

“Sexual offence proceeding” should refer to a prescribed sexual offence as defined in section 3 of the *Criminal Procedure Act 1986* (NSW).

Recommendation 3 | see page 62

Notwithstanding section 28 of the *Evidence (Children) Act 1997* (NSW), the recommendations in this Report should be applied in all sexual offence proceedings involving children.

Recommendation 4 | see page 71

A legal practitioner must cross-examine the complainant in sexual offence proceedings where the accused is unrepresented.

Recommendation 5 | see page 72

The accused must be advised, at the earliest possible time after arrest and no later than the commencement of proceedings, that legal representation is necessary in sexual offence proceedings if he or she wishes the complainant to be cross-examined. The accused must be invited to make arrangements for representation and be given the opportunity to do so.

Recommendation 6 | see page 76

Where the accused is unwilling to make arrangements for representation because legal aid is unavailable in the circumstances, the court must direct the Legal Aid Commission to provide the accused with legal assistance for the purpose of cross-examining the complainant only.

Recommendation 7 | see page 78

The court-appointed legal representative has the same obligations and authority as if he or she were engaged by the accused. In particular, the legal representative has a duty to ascertain, advise concerning and act upon the accused's instructions. Where the accused gives no instructions, or where the instructions given are inadequate or perverse, the duty of the legal representative is to act in the best interests of the accused in the same way as if there were a conventional retainer.

Recommendation 8 | see page 83

An unrepresented accused should be warned, in general terms, about the potential application in the proceedings of the rule in *Browne v Dunn* at the same time as the consequences of not retaining legal representation are explained.

Recommendation 9 | see page 84

The court must inform the jury that an accused is not permitted personally to cross-examine the complainant. Where a complainant is cross-examined by a court-appointed legal representative, the court must warn the jury that:

- (a) it is standard procedure in such cases for the court to appoint a legal practitioner to conduct the cross-examination;
- (b) no adverse inferences are to be drawn against the accused person by reason of the procedure; and
- (c) the evidence of the complainant is not to be given any greater or lesser weight because of the use of the procedure.

Recommendation 10 | see page 99

- A complainant who gives evidence in proceedings for a sexual offence should be entitled to give evidence by means of closed circuit television unless the court orders that such means not be used. The court should only make such an order if it is satisfied that it is not in the interests of justice for the complainant's evidence to be given by such means.
- If a court is not equipped with closed circuit television facilities, the court should be able to adjourn the proceedings or any part of the proceedings to a place that is equipped with such facilities so the complainant's evidence may be given by such means.
- If the complainant does not give evidence by means of closed circuit television, the court may, if the interests of justice so require, make alternative arrangements for the giving of evidence by the complainant in order to restrict contact (including visual contact) between the complainant and the accused. Such arrangements may include the use of screens, planned seating arrangements or the adjournment of the proceedings or any part of the proceedings to other premises.
- A complainant may choose not to use any alternative arrangements, including closed circuit television.
- Where a complainant gives evidence using alternative arrangements, the judge should inform the jury that it is standard procedure for complainants' evidence in such cases to be given by those means, and warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of the arrangements.

1. Introduction

- Background to the reference
- The issues

BACKGROUND TO THE REFERENCE

Terms of reference

1.1 In a letter to the Commission dated 27 March 2002, the Attorney General, the Hon R J Debus MP, referred the following matter for inquiry:

Whether an unrepresented accused in a sexual offence trial should be permitted to cross-examine a complainant. Specifically, whether courts should have the power to appoint a person other than an unrepresented accused to cross-examine complainants in sexual offence cases whether or not the accused consents.

1.2 The terms of reference refer to “sexual offence” cases. For the purposes of this Report, “sexual offence” means a prescribed sexual offence as defined by section 3 of the *Criminal Procedure Act 1986* (NSW). This includes sexual assault and a range of other offences of a sexual nature.¹

Issues Paper 22

1.3 In August 2002 the Commission published Issues Paper 22, *Questioning of Complainants by Unrepresented Accused in Sexual Assault Trials*. The purpose of the Issues Paper was to outline the current operation of the law; suggest possible options for reform; and provoke comment about these options.

1.4 The Issues Paper was circulated to a large number of people identified as being potentially interested in the subject, including sexual assault services, court assistance schemes, practitioners, judges and legal academics. The Commission received 19 submissions from various organisations and individuals in the community. A list of the submissions appears in Appendix A of this Report.

1. Under s 3 of the *Criminal Procedure Act 1986* (NSW) (as amended by the *Crimes Amendment (Sexual Offences) Act 2003* (NSW)) “prescribed sexual offence” means:

“(a) an offence under section 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66F or 80A of the Crimes Act 1900, or

(b) an offence that includes the commission, or an intention to commit, an offence referred to in paragraph (a), or

(c) an offence that, at the time it was committed, was a prescribed sexual offence for the purposes of this Act or the Crimes Act 1900, or an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c).”

See further para 4.30-4.32.

Recent consideration of the issue by the Government

1.5 On 17 March 2003, the Premier of New South Wales, the Hon R J Carr MP, announced plans to prohibit cross-examination of complainants by an unrepresented accused in sexual assault trials, on the grounds that cross-examination in person can be a tactical move to intimidate the complainant.² He pointed out that cross-examination by the accused in person is “very, very distressing for a victim and just knowing it could happen is a disincentive to the victim to come forward”.³ Cross-examination would instead be undertaken by the judge or by a lawyer.⁴

1.6 The Commission has continued its independent review of the issue. This Report recommends abolishing the right of an unrepresented accused personally to cross-examine a complainant in a sexual offence trial. It also makes recommendations concerning the scope of the proposed prohibition and the procedure for its implementation.

THE ISSUES

1.7 It is a fundamental rule of natural justice that people on trial for criminal offences have the right to test the evidence against them. This is usually done by the accused’s lawyer cross-examining witnesses for the prosecution. However, in some cases, the accused will not have legal representation and undertakes the defence case in person. Thus, the alleged victim (“the complainant”) is liable to be, and almost invariably is, cross-examined by the very person charged with attacking her or him. Many complainants are very likely to find this highly distressing, perhaps to the point where the quality of the evidence is undermined. If the accused is guilty, this confrontation may fairly be regarded as inconsistent with one purpose of the criminal law, namely, the protection of victims.

1.8 This Report considers whether an accused should be allowed to cross-examine a complainant in person and, if not, how the right to test the prosecution’s case can be maintained. The issues central to this consideration are:

- whether or not current law strikes an acceptable balance between, on the one hand, the accused’s right to test all relevant evidence and, on the other hand, the need to reduce the potential distress and humiliation to complainants from being cross-examined by an unrepresented accused; and

2. Premier of New South Wales, “Labor announces sweeping reforms to tackle sexual assault and domestic violence” (News Release, 17 March 2003).

3. N O’Malley, “Grilling of sexual assault victims to end: Carr”, *Sydney Morning Herald* (18 March 2003) at 12.

4. Premier of New South Wales, “Labor announces sweeping reforms to tackle sexual assault and domestic violence” (News Release, 17 March 2003).

- if not, how that balance ought to be struck without undermining the accused's right not to be tried unfairly.⁵

1.9 Some of the most important, often conflicting, factors relevant to locating the appropriate balance in sexual offence cases are these:

- The fundamental right of the accused to test all relevant evidence and, generally, to defend himself or herself either in person or through legal assistance;⁶
- The fact that, whether the accused is represented or not, complainants in sexual assault cases are likely to suffer distress simply from having to appear in court; from seeing the accused; from giving evidence; and, especially, from being cross-examined on their evidence;⁷
- Victims of crime must always be treated with compassion and respect.⁸ The difficulty is, of course, that whether a complainant is a victim can only be known at the end of the trial, not at the outset. And then, a complainant may be a victim even if the defendant is acquitted. An acquittal indicates not that the accused is innocent, but that the prosecution has failed to prove guilt beyond reasonable doubt.
- Current law allows the judge to control proceedings, including the power to disallow improper questions put to witnesses in cross-examination.⁹

Extent of the problem

1.10 This Report is limited to the question whether an unrepresented accused's right to cross-examine a complainant in person should be limited in sexual offence cases. The issue arises only in cases in which there is a trial. Statistics for 2001 reveal that 64.8% of appearances in NSW Local Courts of persons charged on at least one count of sexual assault or related offence, did not proceed to trial; while in the District and Supreme Courts 59.6% of cases that included at least one such offence did not result in a trial. A guilty plea to the charges accounted for this in 25.3% of cases in the Local Courts and in 32.7% in the higher courts.¹⁰

1.11 There are no statistics to indicate the extent of self-representation for the cases that do go to trial. Anecdotal information available to the Commission is that the situation arises in a relatively small, but not insignificant, number of cases in New South Wales each year. In a recent discussion paper, the Victorian Law Reform Commission was unaware of any

5. See *Dietrich v The Queen* (1992) 177 CLR 292.

6. See Chapter 3.

7. See Chapter 2.

8. See para 3.22.

9. See para 3.14-3.20.

10. Statistics provided by the NSW Bureau of Crime Statistics and Research: see Appendix B.

case in Victoria in which a person accused of a sexual offence had cross-examined the complainant.¹¹ Since publication of the paper, however, an accused charged with a number of sexual offences has personally cross-examined two complainants in the County Court of Victoria.¹²

1.12 While there is some evidence of an increasing trend towards self-representation in common law countries, especially in civil litigation,¹³ the Commission has no reason to believe that the extent of self-representation in sexual offence trials will increase in the future. The Commission is, however, of the view that the problem should be addressed even if the number of sexual offence cases in which the accused is unrepresented is small. Not only is it important that every victim should be protected from further victimisation, but also that any risk of further victimisation be diminished in order to increase the readiness of victims to report offences.

Reasons for self-representation

1.13 An accused may be unrepresented either because legal aid is not available or by choice.

Legal aid unavailable

1.14 All accused persons are entitled to seek financial aid through the Legal Aid Commission for the purpose of obtaining legal representation. Although the Legal Aid Commission does not solicit casework, the general availability of its services is widely known in the community. As a matter of policy, legal aid is available for all criminal law matters where there is a possibility of

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11. Victorian Law Reform Commission, *Sexual offences: law and procedure* (Discussion Paper, 2001).
 12. *R v Kerbatich* (County Court of Victoria, Duggan J, 17 February 2003, unreported). The Commission thanks the Victorian Law Reform Commission for this reference.
 13. The effect of this trend on the justice system, particularly (with the decreasing availability of legal aid) on the civil justice system, has attracted a great deal of attention in recent years. see, for example, Law Reform Commission of Western Australia, *Review of the criminal and civil justice system* (Final Report, 1999) ch 18; Australian Law Reform Commission, *Managing justice: a review of the federal civil justice system* (ALRC 89, 2000) ch 5. See also G Appelby, "The growth of litigants in person in English civil proceedings" (1997) 16 *Civil Justice Quarterly* 127; Justice Dean Mildren, "Don't give me any LIP – the problem of the unrepresented litigant in criminal trials" (1999) 19 *Australian Bar Review* 30; L Byrne and C J Leggalt, "Litigants in person – procedural and ethical issues for barristers" (1999) 19 *Australian Bar Review* 41; Chief Justice Murray Gleeson, "The state of the judiciary" (2000) 74 *Australian Law Journal* 147 at 155-156; C Cameron and E Kelly, "Litigants in person in civil proceedings: part I" (2002) 32 *Hong Kong Law Journal* 313; C R Glube, "The impact of self-represented litigants on judges and court staff", paper presented at the 13th Commonwealth Law Conference (Melbourne, April 2003).

imprisonment, including indictable matters that are dealt with summarily in the local courts, committal proceedings, and indictable offences and criminal appeals in the District and Supreme Courts.

1.15 To be eligible for legal aid, applicants must satisfy a means test.¹⁴ The applicants' income and assets are assessed, as well as the means of any people who give them financial support. Applicants in court for sexual offences will satisfy the means test if their net weekly income is less than \$190 a week.¹⁵

1.16 Over the three year period from 2000 to 2002, the number of persons accused of sexual offences who were denied legal aid for any reason was 11.7%. Of these, 6.2% (or just over half) were refused legal aid on the basis that they failed to satisfy the means test.¹⁶ It is unknown how many persons denied legal aid are later unrepresented at trial. It is likely that a number of persons accused of sexual offences fail to apply for legal aid since they realise that they will fail the means test (which, in view of its low limit, is very stringent). Most people without legal aid do have legal representation at trial, even where its cost entails considerable financial hardship.

Unrepresented by choice

1.17 Accused persons may choose to be unrepresented for a number of reasons. They may have an aversion to lawyers, or may simply have a strong desire to defend themselves. However, they may wish to use the opportunity to intimidate or overbear the complainant in court, in the hope of obtaining an acquittal.

The structure of this Report

1.18 This Report consists of six chapters.

Chapter 1 sets out the course of this reference and the issues to which it gives rise.

14. For criminal appeals, the applicant must also satisfy a merit test, based on the likelihood of the case's success. Before approving an application for a grant of legal aid, the Legal Aid Commission asks whether, in all the circumstances, such a grant would be reasonable. The merit test is not applied where applicants request legal representation for committal proceedings or first instance hearings.

15. That is, \$190 per week after allowable deductions, which include such expenses as a housing allowance of up to \$230 a week if applicants live in Sydney, or up to \$135 if they live elsewhere. Information supplied by B Donnellan, NSW Legal Aid Commission (7 February 2003).

16. Statistics provided by the NSW Legal Aid Commission: see Appendix C.

Chapter 2 addresses the impact of sexual offence proceedings on complainants and the reform of the law relating to sexual offence proceedings.

Chapter 3 sets out the legal process of, and the current limitations on, cross-examination. It discusses the advantages and disadvantages of prohibiting cross-examination in person by an unrepresented accused. It concludes with the Commission's view and recommendation.

Chapter 4 discusses the scope of the recommended prohibition. It considers whether the court should retain a discretion to allow cross-examination in person by an unrepresented accused. It then discusses whether the prohibition should apply to complainants in sexual offence proceedings only or more broadly, and makes recommendations.

Chapter 5 makes recommendations concerning the procedure for testing the complainant's evidence in the light of the suggested prohibition.

Chapter 6 discusses alternative arrangements for giving evidence, including the use of closed circuit television and screens.

2. The nature of sexual offence proceedings

- The distinctive nature of sexual offence trials
- Responding to the distinctive nature of sexual offence trials

2.1 This chapter discusses the impact of sexual offence proceedings on complainants. It discusses the distinctive nature of sexual offence trials and why they are particularly distressing for complainants, a topic addressed at length in a number of inquiries and studies in New South Wales and elsewhere.¹ The chapter also considers the legislative response to the modern understanding of the distinctive nature of sexual offences, including legislative interventions to restrict the cross-examination in person by an unrepresented accused in sexual offence cases.

THE DISTINCTIVE NATURE OF SEXUAL OFFENCE TRIALS

2.2 There are at least three factors that make sexual offence trials particularly distressing for complainants:

- the nature of the crime;
- the role of consent with its focus on the credibility of the complainant; and
- the likelihood that the accused and complainant knew each other before the alleged assault occurred.

1. See NSW Sexual Assault Committee, *Sexual assault phone-in report*, Ministry for the Status and Advancement of Women (Sydney, 1993); Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1* (Report 6, 1993); Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, addressing the crime: inquiry into the incidence of sexual offences in NSW: part 2* (Report 9, 1996); NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996); NSW Department for Women, *Heroines of fortitude: the experiences of women in court as victims of sexual assault* (Gender Bias and the Law Project, Sydney, 1996); NSW Law Reform Commission, *Review of section 409B of the Crimes Act 1900 (NSW)* (Report 87, 1998); Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002); Queensland, Department of the Premier and Cabinet, Office for Women, *Report of the taskforce on women and the criminal code* (2000); Queensland Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children* (Report 55, 2000); Victorian Law Reform Commission, *Rape: reform of law and procedure* (Appendices to Interim Report 42, 1991); M Heenan and H McKelvie, *The Crimes (Rape) Act 1991: an evaluation report* (Rape Law Reform Evaluation Project, Report 2, Victorian Attorney General's Department, Legislation and Policy, Department of Justice, 1996); United Kingdom, Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (Home Office, 1998); New Zealand, Law Commission, *Evidence* (Report 55, 1999) vol 1; New Zealand, Law Commission, *The evidence of children and other vulnerable witnesses: a discussion paper* (Preliminary Paper 26, 1996).

Nature of the crime

2.3 Sexual offences involve the exercise of power by one person over another.² A victim of a sexual offence is likely to respond differently to, for example, a victim of a property offence or even a non-sexual assault. In 1993, the New South Wales Legislative Council Standing Committee on Social Issues wrote:³

The crime experienced by sexual violence victims is more than an assault. The sexual nature of the act adds an additional and highly complex dimension ... The sexual violence victim is often confronted with a range of additional feelings resulting from the social stigma and physical invasiveness of the incident. These feelings can include shame, guilt, embarrassment, confusion, feeling dirty and used. Feelings of self-blame and self-recrimination are particularly common among sexual violence victims.

2.4 The New South Wales Sexual Assault Committee found that 97% of those who participated in a phone-in in 1992 reported ongoing emotional harm as a result of the assault. Others reported physical harm, ongoing problems in their interpersonal relationships, disruption to their normal daily life, disruption to their education or employment and financial harm.⁴ The findings from the Phone-In “powerfully illustrate the fact that sexual assault is not just another form of physical assault. It is an assault on a person’s body, senses, emotions and whole self”.⁵

2.5 The trial process is particularly difficult for complainants in a number of ways.⁶ First, the vast majority of complainants identify seeing the accused as one of the worst features of having to attend court.⁷ Complainants have commented that “we should not have to face the accused in court”.⁸ Secondly, in order to establish the elements of the particular offence, complainants are usually required to recount the sexual violence against them in explicit detail, either in examination-in-chief or in cross-examination, and many

2. See Westmead Sexual Assault Service, *Submission* at 1.

3. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1* (Report 6, 1993) at para 1.1.1-1.1.2.

4. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 23-25.

5. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 25.

6. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 39.

7. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 32. See also NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 43; Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at 11-15.

8. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 44.

complainants find this humiliating and distressing.⁹ Having to give details of a sexually intimate nature can be especially distressing for women who are from cultural backgrounds in which such matters are not conventionally discussed in front of men.¹⁰

2.6 The treatment of such matters in cross-examination, where complainants are likely to be cross-examined for a longer period of time than victims of other types of assault,¹¹ is a particular focus of concern.¹² One of the most common appeals of complainants is for greater control on cross-examination so as to make the process less stressful.¹³

Focus on complainant's credibility

2.7 The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour which is ordinarily legal becomes illegal in the absence of consent. Where the alleged offence occurs in private, it often comes down to the word of the complainant against the word of the accused. Even where supporting evidence is available, sexual offence trials often turn on the credibility of the complainant.

2.8 Submissions observed that the role of consent gives sexual offence trials a distinctive dynamic.¹⁴ This is also documented in the literature on sexual assault. The *Sexual Assault Phone-In Report* observed that “the fact that consent is the central issue in most adult sexual assault cases means

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9. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 39.
 10. Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, Part II, 1994) at para 7.28.
 11. D Brereton, “How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials” (1997) 37 *British Journal of Criminology* 242 at 257-258.
 12. For example, Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at 11-15.
 13. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 54; NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 45.
 14. “Sexual assault trials still turn on the credibility of the complainant because, in the great majority of cases, the alleged conduct occurs in private, consent plays a pivotal role, and the only prosecution evidence in relation to the issue of consent is the evidence of the complainant”: NSW Legal Aid Commission, *Submission* at 1-2. The NSW Department for Women made a similar comment, that “because the sexual activity itself is often not contested by the accused, particularly where forensic evidence is available, the main point at issue tends to be the consent of the victim. Since the complainant is generally the only witness, the main thrust of the defence usually rests on attempts to cast doubt on the credibility of the complainant as a reliable witness”: NSW Department for Women, *Submission* at 1.

that the victim's character is put on trial in ways that are unparalleled in other areas of the law".¹⁵ The New South Wales Legislative Council Standing Committee on Social Issues has similarly commented that "many victims feel they have to prove their innocence. It is not uncommon for victims to feel that they are the focus of the trial, and it is their actions, not those of the alleged offender, that are dissected and debated".¹⁶ A Victorian study found that:

Almost all the barristers, judges and magistrates interviewed thought that rape complainants have a significantly different experience as witnesses than victims of other forms of personal violence. Some attributed this to the nature of the offence and consequently the intimate character of the evidence rape complainants must give in front of strangers. Others thought that rape complainants were attacked on their motives for lying, and were generally treated more "savagely" or "thoroughly" by defence counsel than other witnesses.¹⁷

2.9 Given the inherent nature of the trial process, it will be necessary for the defence to use cross-examination to attack the credibility of the complainant if any significant fact is disputed. It is vital to bear in mind that accusations of sexual offences can be unreliable and that guilt cannot be assumed. But where the accused is guilty (whatever the verdict), the effect of the trial will be to victimise the complainant further and to aggravate the humiliation and distress already inflicted by the accused.

Relationship between complainant and accused

2.10 Unlike some other types of crime, it is very likely that the complainant and accused knew each other before the offence occurred,¹⁸ and that repeat

15. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 39.

16. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1* (Report 6, 1993) at para 1.1.9. See also NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 38; Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, Part II, 1994) at para 7.28; Queensland, Department of the Premier and Cabinet, Office for Women, *Report of the taskforce on women and the criminal code* (2000) at 311: "Some victims report feeling as if they are on trial, that the court process is humiliating and worse than the rape. Some describe it as 'secondary rape'".

17. M Heenan and H McKelvie, *The Crimes (Rape) Act 1991: an evaluation report* (Rape Law Reform Evaluation Project, Report 2, Victorian Attorney General's Department, Legislation and Policy, Department of Justice, 1996) at 244.

18. Results of the 1998 *Crime and Safety Survey* showed that about 83% of females aged 18 years and over who indicated that they had been a victim of sexual assault were assaulted by someone they knew: Australian Bureau of Statistics, "ABS report shows how crime affects Australians", Media Release, 25 August 1999. Similarly, in the 1996 *NSW Bureau of Crime Statistics and Research*

victimisation has or will occur.¹⁹ This is one reason why trials are concerned with consent rather than with the identity of the assailant. A pre-existing relationship between the complainant and the accused “adds a complicating factor as there is the additional burden of having been betrayed by someone once trusted”.²⁰

2.11 Some submissions observed that, where the accused is unrepresented, the fact that the complainant already knew the accused is likely to compound the difficulties and distress experienced by the complainant when undergoing cross-examination.²¹

RESPONDING TO THE DISTINCTIVE NATURE OF SEXUAL OFFENCE TRIALS

General reforms

2.12 Not surprisingly, many complainants in sexual offence proceedings have considered themselves disadvantaged by the criminal justice process,²² arising from the emphasis on the rights of the accused at the cost of the privacy, feelings or emotional welfare of the complainant. At common law, a complainant could be cross-examined about previous sexual experience. This was thought relevant to the issue whether the complainant consented to the sexual conduct in question and to the complainant’s credibility as a witness. The evidence of complainants in sexual offence cases also required

Survey, 78% of complainants knew the accused before the alleged offence took place: NSW Bureau of Crime Statistics and Research, The criminal justice response to sexual assault victims (General Report Series, 1996) at 15. In the vast majority of cases (90%) in the Heroines of fortitude study, the complainant knew the accused in some way before the alleged offence took place: NSW Department for Women, Heroines of fortitude: the experiences of women in court as victims of sexual assault (Gender Bias and the Law Project, Sydney, 1996) at 57. Only 14% of all the sexual assaults reported to the 1993 phone-in involved a stranger: NSW, Sexual assault phone-in report (NSW Sexual Assault Committee, 1993) at 20.

19. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at iii.
20. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1* (Report 6, 1993) at para 1.1.7.
21. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 1; NSW Department for Women, *Submission* at 2.
22. See P Eastaie (ed), *Balancing the scales: rape, law reform and Australian culture* (The Federation Press, Sydney, 1998); J Barga and E Fishwick, *Sexual assault law reform: a national perspective* (Office of the Status of Women, 1995); Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, 1994); Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Gender bias in the judiciary* (Report, 1994).

corroboration, or the jury was warned that their evidence must be approached with considerable caution.²³ Lengthy, hostile cross-examination exploring intimate sexual conduct and attacking honesty and reliability, as well as motive, are a feature of these trials.

2.13 Since the 1970s, a better understanding of the distinctive nature of sexual offences has led to widespread reform to sexual offence laws, both internationally and in Australia. In New South Wales, the substantive law was amended in order to reflect the gravity of the crime and the violent nature of sexual assault.²⁴ There have also been major changes to the way sexual offences are prosecuted. For example, evidence relating to the complainant's sexual experience is now generally inadmissible,²⁵ and corroboration requirements have been abolished.²⁶ Complainants no longer have to give evidence at committal hearings unless there are special reasons why, in the interest of justice, they should be called to give evidence.²⁷ Increased awareness of the impact of proceedings on complainants has also led to measures such as police training in how to deal with sexual offences, increased services for victims and the presence of support persons in court.

2.14 Notwithstanding these changes, many complainants in sexual offence proceedings are still likely to be injured by the criminal justice process. Because the events giving rise to the charge will often have occurred in private, and because consent often plays such a pivotal role, the trial will turn on the credibility of the complainant. The accused will almost invariably seek to show the complainant's testimony is fabricated in one way or another, or at least unreliable, in order to raise a reasonable doubt as to the accused's guilt. The accused may also allege that the complainant has

23. For example, *Henry; Manning* (1969) 53 Cr App R 150 at 153 (Salmon LJ). See also Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, Part II, 1994) at para 2.17.

24. See *Crimes (Sexual Assault) Amendment Act 1981* (NSW); *Crimes (Amendment) Act 1989* (NSW) and *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW). The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) fixes standard minimum non-parole periods for the following offences: sexual assault (7 years), aggravated sexual assault (10 years), aggravated sexual assault in company (15 years) and aggravated indecent assault (5 years).

25. *Criminal Procedure Act 1986* (NSW) s 105. The Commission has previously addressed the need for the exclusion of evidence relating to sexual experience: NSW Law Reform Commission, *Review of section 409B of the Crimes Act 1900* (NSW) (Report 87, 1998) at para 3.17.

26. *Evidence Act 1995* (NSW) s 164. However, the judge's discretion to warn the jury about unreliable evidence is preserved: s 165.

27. *Justices Act 1902* (NSW) s 48AA, 48E. This legislation will be repealed by Sch 1 of the *Justices Legislation Repeal and Amendment Act 2001* (NSW) which is expected to commence in July 2003. Information supplied by Legislation and Policy Division, NSW Attorney General's Department (13 June 2003).

unworthy motives for making the complaint. Even though such allegations are very likely to cause distress, if they represent the defence case, they must be put and the complainant given the opportunity to refute them. The question is whether or not the accused's right to cross-examine the complainant about these matters directly without the interposition of a lawyer or another person should be limited in order to obviate the risk that the accused will use the opportunity of cross-examination to aggravate the humiliation and distress already suffered by the complainant.

Cross-examination in person by an unrepresented accused

2.15 Legislative provisions exist in a number of jurisdictions addressing the right of an unrepresented accused to cross-examine a complainant in person in sexual offence proceedings. The provisions vary in their coverage. Some are not limited to sexual offence proceedings but apply more broadly. Others apply a prohibition on cross-examination to witnesses generally, rather than only to the complainant. Yet others place limitations only on the cross-examination of children.

2.16 The issue is currently under active consideration in Victoria and New Zealand. The Victorian Law Reform Commission has been asked, in the context of a general review of the law relating to sexual offences, to consider whether or not Victoria should adopt legislation prohibiting a person who is on trial for a sexual offence from personally cross-examining the complainant and, if so, whether the court should be required to appoint a legal practitioner to cross-examine the complainant in lieu of the accused.²⁸ The Commission is expected to indicate its position in an Interim Report to be published later this year.²⁹

2.17 The New Zealand Law Commission addressed the issue in its 1996 preliminary paper, *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper*³⁰ and again in its 1999 report, *Evidence*.³¹

28. See Victorian Law Reform Commission, *Sexual offences: law and procedure* (Discussion Paper, 2001) at para 8.29-8.43. The Victorian Drugs and Crime Prevention Committee, in a 1996 report, described cross-examination in person by an unrepresented accused as a significant problem. It noted that because accused persons have a right to self-representation, they have direct access to complainants during cross-examination. It recommended that, where a complainant is overly distressed, the court should appoint an independent intermediary for the purposes of cross-examination: Parliament of Victoria, Drugs and Crime Prevention Committee, *Combating sexual assault against adult men and women* (Report, 1996).

29. Information supplied by M Heenan, Legal Officer, Victorian Law Reform Commission (5 May 2003).

30. New Zealand, Law Commission, *The Evidence of children and other vulnerable witnesses: a discussion paper* (Preliminary Paper 26, 1996).

31. New Zealand, Law Commission, *Evidence* (Report 55, 1999) vol 1, at 414-419.

It recommended that the existing prohibition on personal cross-examination of child sexual offence complainants by the accused³² be extended to apply to all sexual offence trials, and also to cases concerning domestic violence or harassment, regardless of the complainant's age. It considered that prohibiting the accused from personally cross-examining the complainant would reduce the stress suffered by the complainant, and therefore improve the quality of the evidence. This recommendation formed part of a draft *Evidence Code*, which is yet to be implemented. The Ministry of Justice expects to send a paper to Cabinet some time in 2003 seeking approval for the introduction of a Bill based on the Law Commission's *Evidence Code*.³³ If passed in its current form, the legislation would prohibit the cross-examination of the complainant by an unrepresented accused in all sexual assault trials throughout New Zealand.

New South Wales

2.18 Unless the interests of justice demand otherwise,³⁴ the *Evidence (Children) Act 1997* (NSW) requires that, in any criminal proceeding or civil proceeding arising from the commission of a personal assault offence,³⁵ a child witness (other than the accused or defendant) must be examined in chief, cross-examined or re-examined by a person appointed by the court (rather than by the accused or the defendant).³⁶ The court appointed person can only put to the child the questions requested by the accused or defendant³⁷ and cannot give the accused or defendant any legal or other advice.³⁸

Commonwealth

2.19 In the Commonwealth jurisdiction, an unrepresented accused may not cross-examine a child complainant in person³⁹ in a sexual offence proceeding.⁴⁰ Rather, a person appointed by the court asks the child such questions as the accused requests be put to the child.⁴¹ An unrepresented

32. Section 23F of the *Evidence Act 1908* (NZ) prohibits an unrepresented accused from cross-examining in person a child complainant or a mentally disabled complainant of any age (see s 23C) who gives evidence in a sexual offence trial. It provides that cross-examination is to be conducted by an intermediary who is to act as the mouthpiece for the unrepresented accused.

33. New Zealand, Ministry of Justice, *Justice matters, issue 13* (Report, 2003). Additional information supplied by K Belt, New Zealand Ministry of Justice (1 August 2002; 5 May 2003).

34. *Evidence (Children) Act 1997* (NSW) s 28(4).

35. *Evidence (Children) Act 1997* (NSW) s 28(1).

36. *Evidence (Children) Act 1997* (NSW) s 28(2).

37. *Evidence (Children) Act 1997* (NSW) s 28(3).

38. *Evidence (Children) Act 1997* (NSW) s 28(3A).

39. *Crimes Act 1914* (Cth) s 15YF(1).

40. As defined in *Crimes Act 1914* (Cth) s 15Y.

41. *Crimes Act 1914* (Cth) s 15YF(2).

accused is also prohibited from cross-examining a child witness in such proceedings without the leave of the court,⁴² which will only be given where the court is satisfied that the child's ability to testify will not be adversely affected by such cross-examination,⁴³ having regard to the trauma that it would cause to the witness.⁴⁴ If the court refuses leave, a person appointed by the court must ask the child witness any questions that the defendant requests the person to ask the child.⁴⁵

Queensland

2.20 In Queensland, the accused is prohibited from cross-examining a "protected witness" in person.⁴⁶ "Protected witness" includes alleged victims of sexual offences and serious offences of violence, child witnesses and witnesses who are intellectually impaired. It also includes, in the court's discretion, alleged victims of less serious offences (involving assaults or threats), in which case the court must be satisfied that the witness would be disadvantaged as a witness or likely to suffer severe emotional trauma if cross-examined by the accused.⁴⁷ Where the prohibition applies, the Court arranges for a lawyer, funded by Legal Aid, to conduct the cross-examination.⁴⁸ The lawyer is the accused's legal representative for the purposes only of cross-examination.⁴⁹

2.21 The legislation was passed following a report of the Queensland Law Reform Commission⁵⁰ (which had made recommendations restricting the cross-examination of children or witnesses with an intellectual disability), and the *Report of the Taskforce on Women and the Criminal Code*⁵¹ (which had overwhelmingly favoured an absolute prohibition on the cross-examination of victims of sexual or violent crime by the accused in person).⁵²

42. *Crimes Act 1914* (Cth) s 15YG(1).

43. *Crimes Act 1914* (Cth) s 15YF(2).

44. *Crimes Act 1914* (Cth) s 15YF(3). Further, a represented accused may only cross-examine a child witness through counsel: s 15YH.

45. *Crimes Act 1914* (Cth) s 15YF(5).

46. *Evidence Act 1977* (Qld) s 21N.

47. *Evidence Act 1977* (Qld) s 21M.

48. *Evidence Act 1977* (Qld) s 21O.

49. *Evidence Act 1977* (Qld) s 21P.

50. See Queensland Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children* (Report 55, Part 2, 2000) Recommendation 14.1.

51. Queensland, Department of the Premier and Cabinet, Office for Women, *Report of the taskforce on women and the criminal code* (2000). See also C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002).

52. Queensland, Department of the Premier and Cabinet, Office for Women, *Report of the taskforce on women and the criminal code* (2000) at 327 and Recommendation 75.

Northern Territory

2.22 In the Northern Territory, a complainant in a sexual offence case⁵³ cannot be cross-examined directly by an unrepresented accused.⁵⁴ Rather the unrepresented defendant must put any question to the complainant by stating the question to the Justice, Judge or another person approved by the Court, who must then repeat the question accurately to the complainant.⁵⁵ A similar (but discretionary) regime applies in domestic violence proceedings to the direct cross-examination by the defendant of a person with whom the defendant is in a domestic relationship.⁵⁶ There is also a presumption against cross-examination in person in restraining order proceedings.⁵⁷ Alternative arrangements, including the use of screens and closed circuit television, are available for “vulnerable witnesses”. This includes alleged victims of sexual assault, child witnesses, witnesses who have an intellectual disability and witnesses who are under a special disability because of the circumstances of the case or of the witness.⁵⁸

Western Australia

2.23 In Western Australia, only child witnesses are specifically protected against cross-examination in person by an unrepresented accused.⁵⁹ However, the court may declare a person to be a “special witness”, in which case alternative arrangements are available to assist the witness to give evidence. A “special witness” is one who, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence or any other relevant factor, would be likely to suffer severe emotional trauma, or would be so intimidated or distressed as to be unable to give evidence satisfactorily. It also includes a witness who, by reason of physical disability or mental impairment, would be unable to give evidence satisfactorily. Alternative arrangements include the use of screens, giving evidence via video link, video taping evidence prior to the trial at a special hearing and having a support person present in court.⁶⁰

England

2.24 In England, an unrepresented accused is prohibited from cross-examining an alleged victim of rape or other prescribed sexual offence. In other cases, the court has a discretion to disallow cross-examination in person by an unrepresented accused. In such cases, the court must be satisfied that this would improve the quality of the witness’ evidence and

53. As defined in the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 3.

54. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(a).

55. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

56. *Domestic Violence Act 1992* (NT) s 20AD.

57. *Domestic Violence Amendment Act 2001* (NT) s 10.

58. *Evidence Act 1939* (NT) s 21A.

59. *Evidence Act 1906* (WA) s 106G.

60. *Evidence Act 1906* (WA) s 106R.

would not be contrary to the interests of justice. The court must consider any views expressed by the witness, the nature of the questions likely to be asked, the accused's behaviour during proceedings and any relationship between the witness and accused.⁶¹ Special measures are also available on a discretionary basis for vulnerable and intimidated witnesses, including witnesses with a physical or intellectual disability, and witnesses whose evidence is likely to be affected by reason of fear or distress. The court takes into account the nature and circumstances of the offence, the behaviour of the accused and the witness' age, cultural background, employment, religious beliefs and political opinions.⁶²

2.25 The legislation responds to the 1998 Home Office report, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, which recommended a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault,⁶³ recognising that, while giving evidence may be stressful for any witness, it is particularly traumatic for complainants in sexual offence trials. The report found that the trauma suffered by sexual offence complainants who give evidence at trial where the accused is unrepresented is uniformly greater than that of complainants in trials where the accused is represented, for, although the court has inherent power to prevent a self-represented accused from abusing court process, the English Court of Appeal has held that that power is to be exercised sparingly so as not to impinge on the accused's ability to conduct his or her defence.⁶⁴

2.26 The Home Office report itself was published following two prominent sexual assault cases in which the defendants (who were both later convicted), used the opportunity of cross-examination in person to humiliate and intimidate their victims. In one case, the accused cross-examined the complainant over a period of 6 days and wore the same clothes in court that he had worn throughout the repeated sexual attacks on the victim.⁶⁵ In the

61. *Youth Justice and Criminal Evidence Act 1999* (UK) s 34, 36.

62. *Youth Justice and Criminal Evidence Act 1999* (UK) s 16, 17.

63. United Kingdom, Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (1998), Recommendation 58.

64. *R v Morley* [1988] QB 601, 87 Cr App R 218. The report noted the tendency of trial judges to allow greater latitude in cross-examination in cases where the accused is self-represented so as to decrease the likelihood of a successful appeal on the grounds that the defendant was not afforded the opportunity to defend him or herself adequately: United Kingdom Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (1998) at para 9.32.

65. *R v Edwards* (England, Central Criminal Court, Goddard J, 22 August 1996, unreported). At trial the accused was convicted of two offences of rape and was

second case, the trial judge expressed his frustration at being unable to control the manner in which the accused cross-examined the complainant, saying:

It is a highly regrettable and extremely sad aspect of this case that despite my repeated efforts during the first two days of your trial you insisted on dispensing with the services of highly competent leading and junior counsel and solicitors, the third set you had been allocated at public expense, thereafter subjecting your victims to merciless cross-examination clearly designed only to intimidate and humiliate them ... Although I took what steps I could to minimise that ordeal by repeated efforts to prevent repetitious and irrelevant questioning, nevertheless the whole experience must for those women have been horrifying and it is highly regrettable in my view, and a matter of understandable public concern, that the law as it stands permits a situation where an unrepresented defendant in a sexual assault case has a virtually unfettered right personally to question his victim in such needlessly extended and agonising detail for the obvious purpose of intimidation and humiliation.⁶⁶

2.27 On appeal, the Lord Chief Justice emphasised the need to strike a balance between the rights of the accused and the interests of the other parties:

The trial judge is ... obliged to have regard not only to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses, and among witnesses particularly those who are obliged to re-live by describing in the witness box an ordeal to which they say they have been subject. It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants. Furthermore, a trial is not fair if a defendant, by choosing to represent himself, gains the advantage he would not have had if represented of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned.⁶⁷

Scotland

2.28 In 2001, the Scottish Executive published its report *Redressing the Balance: Cross-examination in Rape and Sexual Offence Trials, Report on Responses to Consultation*. This led to the enactment of the *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* (UK), which requires a person accused of certain sexual offences, including rape, to be legally represented throughout the trial. The legislation came into force on 1 November 2002.

sentenced on 9 October 1996 to life imprisonment. His appeal against the duration of the sentence was dismissed in *R v Edwards* [1997] EWCA Crim 1679.

66. Quoted on appeal, see *R v Brown* [1998] 2 Cr App R 364 at 368-369 (Bingham LCJ).

67. *R v Brown* [1998] 2 Cr App R 364 at 371 (Bingham LCJ).

3. Prohibition on cross-examination

- The trial process
- The requirements of a fair trial
- The arguments for and against prohibition
- The Commission's view
- Minority views

3.1 This chapter describes the legal process of trying a person charged with a sexual offence and the current limitations on cross-examination of complainants generally. It discusses the adequacy of these limitations as well as the advantages and disadvantages of prohibiting cross-examination in person by an unrepresented accused, including the impact of any such prohibition on the fairness of the trial.

THE TRIAL PROCESS

The various proceedings

3.2 When a complainant reports an alleged sexual offence, the police will take a detailed statement and determine whether or not to lay a charge. The criminal process distinguishes between summary and indictable offences. A summary offence is heard in a Local Court by a single magistrate. An indictable offence, which is more serious, is heard in the District or Supreme Court, usually by both judge and jury.¹ Sexual assault is an indictable offence, but some sexual offences may be heard summarily.² The District Court determines the bulk of sexual offence cases, hearing appeals from the Local Court as well as its own first instance casework.

Committal hearing

3.3 The first stage of proceedings for an indictable offence is the committal hearing. Committals are heard in a Local Court. The purpose of the hearing is to determine whether there is enough evidence for the case to proceed to trial. If the accused pleads not guilty (or does not enter a plea), and the magistrate decides there is a reasonable prospect of conviction, the accused is committed for trial in the District or Supreme Court. The prosecution does not have to prove that the accused is guilty, only that there is sufficient evidence to justify a trial. An accused who pleads guilty will be committed for sentence.

3.4 A complainant cannot be called to give oral evidence or be cross-examined at the committal hearing unless the magistrate decides that there are special reasons why, in the interests of justice, the witness should be called to give evidence.³ If the prosecution witnesses do not give oral evidence, the committal hearing will be dealt with as a “paper committal”. The restriction on calling witnesses to give oral evidence means that most committals for sexual

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1. Criminal proceedings in the Supreme or District Courts are tried by jury, unless the accused elects to be tried by judge alone. Trial by judge alone requires the consent of the Director of Public Prosecutions: *Criminal Procedure Act 1986* (NSW) s 15, 16.
 2. All offences are treated as indictable offences in the absence of statutory provision to the contrary. Most sexual offences are indictable offences. However, the *Criminal Procedure Act 1986* (NSW) s 20 provides that some sexual offences may be tried summarily unless the prosecuting authority or the accused elects otherwise.
 3. *Justices Act 1902* (NSW) s 48AA, 48E. See *Kant v DPP* (1994) 73 A Crim R 481.

offences are paper committals. Where the magistrate permits a complainant to be called, the court may limit the issues to be subject to cross-examination. Apart from this qualification, the procedural considerations applying to an unrepresented accused at trial also apply to committal proceedings.

Trial

3.5 At trial, the prosecution is the first party to presents its case. The Crown prosecutor begins the proceedings by giving an opening address. The witnesses for the prosecution are then called to give evidence. The Crown will lead the complainant's evidence-in-chief, after which the complainant is almost invariably cross-examined by the defence. Cross-examination is conducted by defence counsel unless the accused is self-represented, in which case cross-examination will be conducted by the accused in person. The complainant will then be re-examined by the Crown prosecutor. After the Crown has presented its case, the defence presents its evidence. The accused may choose to give evidence, in which case the Crown will cross-examine him or her.

3.6 After all the evidence is heard, the judge summarises the evidence and issues any appropriate warnings to the jury. The jury retires to consider its verdict. If the jury returns a verdict of guilty, the offender will be sentenced at a further hearing. If found not guilty, the accused is acquitted of the charge.

Appeal

3.7 Any person convicted of a crime has the right to appeal against either or both of the conviction and the sentence. An appeal after a trial on indictment is not a retrial; its purpose is to redress any error that occurred at trial. Unless the circumstances are exceptional, the court will not substitute its own findings of fact for those of the trial judge. Appeals against Supreme and District Court verdicts on indictment are heard in the Court of Criminal Appeal. Appeals against Local Court decisions, which are retrials on the written record of evidence, are heard in the District Court.⁴

3.8 It is rare for oral evidence to be led in an appeal to the Court of Criminal Appeal or the District Court. The Court of Criminal Appeal will only hear fresh evidence where it was unavailable at the time of trial and is of such a quality that, in combination with the evidence given at trial, there is a significant possibility that the jury, acting reasonably, would have acquitted the accused or (in an alternative formulation) that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused if all the evidence had been before it.⁵ The Commission is unaware of

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4. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 17, 18. The Act is not yet in force, but will, upon commencement, replace s 132 and s 133 of the *Justices Act 1902* (NSW), which are substantially similar. The Act is expected to commence in July 2003: information supplied by Legislation and Policy Division, NSW Attorney General's Department (13 June 2003).
 5. *Mickelberg v The Queen* (1989) 167 CLR 259 at 273 (Mason CJ), 275 (Brennan J), 288 (Deane J), 301 (Toohey and Gaudron JJ).

any instance in which a complainant has been called to give evidence on appeal. The District Court has power to grant leave to receive fresh evidence if it is in the interests of justice to do so.⁶ Whether the evidence is fresh or not, the District Court may call the complainant to give evidence if the court is satisfied that there are special reasons why, in the interests of justice, he or she should attend and give evidence.⁷

The role of cross-examination

3.9 *Cross on Evidence* describes the object of cross-examination as:

First, to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and, secondly, to cast doubt upon the accuracy of the evidence in chief given against such a party.⁸

Cross-examination promotes the reliability of the trial by testing the witness' evidence. It has been described as "the greatest legal engine ever invented for the discovery of truth".⁹ This assumes that face to face confrontation is likely to elicit truthful testimony and, accordingly, will enhance the accuracy of fact finding.¹⁰

3.10 Notwithstanding the views of some commentators,¹¹ cross-examination is still the principal, and often the only, means by which the accused can test the prosecution's case. There is little doubt that in some cases it can be very effective in exposing weaknesses or errors in a witness' testimony, or in obtaining information indicating innocence. Where the accused also gives evidence, the jury will be in a relatively good position to evaluate the comparative truthfulness and reliability of the opposing evidence.

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6. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 18(2). See also s 17. And see note 4 above.
 7. *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) s 19(1)(a). See note 4 above.
 8. D Byrne and J D Heydon, *Cross on evidence* (Loose leaf edition, Butterworths, 1996) vol 1 at [17430].
 9. J H Wigmore, *A treatise on the Anglo-American system of evidence in trials at common law* (3rd edition, 1940) vol V, § 1367 at 29.
 10. See *Maryland v Craig* (1990) 497 US 836.
 11. For example, C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002) at 4-5: "The purpose of cross-examination has very little, if anything to do with accuracy or truth. Rather the purpose of cross-examination is more a process of manipulating the witness through suggestive questioning, avoiding unfavourable disclosures and obtaining jury sympathy. Cross-examination techniques are specifically designed to damage the effectiveness of the testimony and mute the voice of the complainant".

3.11 It is vital that a complainant who gives evidence in sexual offence proceedings undergoes cross-examination. The complainant is making a very serious accusation. The accused faces the prospect of imprisonment if convicted, and in the meantime must bear the stigma of being an alleged sex offender. It is imperative in the interests of justice that the accused has a full opportunity to test the complainant's evidence in an open forum. This is especially so if the complainant is the only witness to the alleged offence.

3.12 As a matter of policy, the complainant should generally undergo cross-examination once during the criminal process. Legislation limits cross-examination at the committal stage and on appeal to ensure that victims of crime are not cross-examined on more than one occasion unless there are good reasons for doing so.¹²

Limitations on questioning

3.13 An accused (or his or her lawyer) does not have free rein when questioning a complainant. Cross-examination is limited by the following:

The court's inherent power to control proceedings

3.14 The right to question a witness is subject to the inherent power of the court to control its proceedings.¹³ In particular, the court may make such orders as it considers just in relation to the way in which witnesses are questioned, and the presence and behaviour of any person in connection with the questioning of witnesses.¹⁴ This power can be used to protect complainants from unnecessary distress.

The court's power to disallow improper questions

3.15 Section 41 of the *Evidence Act 1995* (NSW) provides that the court may disallow a question put to the witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading, or "unduly annoying, harassing, intimidating, offensive, oppressive or repetitive".¹⁵ The court must take into account "any relevant condition or characteristic of the witness, including age, personality and education", and "any mental, intellectual or physical disability to which the witness is or appears to be subject".¹⁶

12. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 17 September 1998, the Hon J Shaw, Attorney General, at 7596.

13. *Evidence Act 1995* (NSW) s 11. See also *Barton v The Queen* (1980) 147 CLR 75 at 96: "There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial" (Gibbs ACJ and Mason J).

14. *Evidence Act 1995* (NSW) s 26(a), 26(d).

15. *Evidence Act 1995* (NSW) s 41(1).

16. *Evidence Act 1995* (NSW) s 41(2).

Exclusion of irrelevant evidence

3.16 Section 56(2) of the *Evidence Act 1995* (NSW) provides that “evidence that is not relevant in the proceeding is not admissible”. Relevant evidence is defined as evidence that “could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding”.¹⁷ Questions put in cross-examination must, therefore, be relevant to the issues raised, or, so far as they go to credit and involve matters collateral to facts in issue, must tend “rationally and logically to weaken confidence in the witness’s veracity or trustworthiness as a witness of truth”.¹⁸

Exclusion of evidence of sexual experience

3.17 In sexual offence proceedings, witnesses cannot be questioned on their sexual history. Evidence relating to the complainant’s sexual reputation or experience is generally inadmissible.¹⁹ However, evidence of sexual experience is admissible if the alleged activity occurred at or about the time the offence occurred, and it forms part of a connected set of circumstances, or if it relates to a recent relationship between the accused and the complainant. Certain evidence is admissible if the accused denies that the alleged sexual intercourse took place. Where the prosecution adduces evidence of the complainant’s sexual experience, cross-examination on the evidence is allowed if the accused would be unfairly prejudiced if cross-examination were prohibited. Importantly, evidence relating to sexual experience is only admissible where its probative value outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.²⁰

3.18 The accused cannot question the complainant on sexual experience unless the court has previously decided that the evidence would, if given, be admissible.²¹ This provision prevents the accused from asking distressing or humiliating questions despite the fact that the answers would be inadmissible as evidence.

3.19 The general exclusion of evidence of complainants’ sexual reputation or experience recognises the special issues surrounding sexual assault cases, and the need for witnesses in such proceedings to be protected from unnecessary distress, humiliation or embarrassment. The restriction was reviewed by the Commission in its *Review of Section 409B of the Crimes Act 1900 (NSW)*.²²

17. *Evidence Act 1995* (NSW) s 55(1).

18. *Cross on evidence* at [17510]. For a recent example, see *R v Slack* [2003] NSWCCA 93.

19. *Criminal Procedure Act 1986* (NSW) s 105. This section replaces the former s 409B of the *Crimes Act 1900* (NSW).

20. *Criminal Procedure Act 1986* (NSW) s 105(4).

21. *Criminal Procedure Act 1986* (NSW) s 105(5).

22. NSW Law Reform Commission, *Review of section 409B of the Crimes Act 1900 (NSW)* (Report 87, 1998).

Prohibition of cross-examination of child witnesses in person

3.20 As already noted,²³ section 28 of the *Evidence (Children) Act 1997* (NSW) sets out a presumptive prohibition on an unrepresented accused questioning a child witness. It applies to an unrepresented accused in any criminal proceedings and an unrepresented defendant in civil proceedings arising from a personal assault offence. It requires a witness who is under the age of 16 years to be cross-examined by a person appointed by the court instead of by the accused. If the court appoints such a person, that person is to ask the child any questions that the accused requests be put to the child, provided that the question is not “unduly annoying, harassing, intimidating, offensive, oppressive or repetitive”.²⁴ However, the court may choose not to appoint such a person if it considers that it is not in the interests of justice to do so.

3.21 A recent amendment to the Act clarifies the role of the court-appointed intermediary.²⁵ The person is appointed merely to ask questions on behalf of the accused, and is not to give any legal or other advice. The intermediary is a mere mouthpiece and is not to influence the course of cross-examination in any way.²⁶

Charter of Victims Rights

3.22 The Charter of Victims Rights provides that “a victim should be treated with courtesy, compassion and respect for the victim’s rights and dignity”²⁷ and that “a victim should be protected from unnecessary contact with the accused and defence witnesses during the course of proceedings”.²⁸ However, the Charter is a statement of principle only, and creates no legal rights. It does not affect the validity of any judicial act or omission.²⁹

THE REQUIREMENTS OF A FAIR TRIAL

The notion of a fair trial

3.23 The right of an accused to receive a fair trial has been described as a “central pillar” and “fundamental element” of our criminal justice system,³⁰

23. See para 2.18.

24. *Evidence Act 1995* (NSW) s 41.

25. See *Evidence (Children) Act 1997* (NSW) s 28(3A), introduced by the *Evidence Legislation Amendment Act 2001* (NSW) Sch 2 cl 2, which came into force on 26 July 2002.

26. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 11 December 2001, the Hon J Hatzistergos, Second Reading Speech, at 19903. See *Evidence (Children) Act 1997* (NSW) s 28(3A).

27. *Victims Rights Act 1996* (NSW) s 6.1.

28. *Victims Rights Act 1996* (NSW) s 6.7.

29. *Victims Rights Act 1996* (NSW) s 8.

30. *Dietrich v The Queen* (1992) 177 CLR 292 at 298-299 (Mason CJ and McHugh J).

one that inheres in every civilized system of law.³¹ Not surprisingly, it is clearly established that an accused person has a right to receive a fair trial,³² though this is more accurately expressed as “a right not to be tried unfairly” or “an immunity against conviction otherwise than after a fair trial”.³³ It is impossible to give a comprehensive statement of the attributes of a fair trial.³⁴ Fairness depends on the interests of justice³⁵ in the light of all relevant circumstances surrounding the trial.³⁶ It accommodates the interests of both parties (that is, the Crown and the accused; the complainant is not a party).³⁷ It requires no more than that the trial is as fair as the courts can make it.³⁸ The loss of some advantage normally available to the accused (such as the availability of committal proceedings) will not necessarily undermine the fairness of a trial.³⁹

3.24 A trial judge who believes that the fairness of a trial is in question, may exercise his or her powers:

- to control proceedings and to give forthright directions to the jury.⁴⁰ This power, which is inherently flexible, includes moulding the procedures of the trial to avoid, or at least, minimise prejudice to either party;⁴¹
- to stay the proceedings to prevent an abuse of process. The judge will exercise this power where he or she is unable, in the circumstances, to ensure a fair trial to the accused.⁴² Proceedings may be stayed either until

31. *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 541 (Isaacs J).

32. *Dietrich v The Queen* (1992) 177 CLR 292 at 299 and 311 (Mason CJ and McHugh J), 325 (Brennan J, dissenting), 326 (Deane J), 350 (Toohey J). See also *Jago v The District Court of NSW* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J).

33. *Jago v District Court of NSW* at 57 (Deane J). See also *Dietrich v The Queen* at 299 (Mason CJ and McHugh JJ).

34. *Dietrich v The Queen* at 300 (Mason CJ and McHugh J), 353 (Toohey J); *Jago v The District Court of NSW* at 57 (Deane J).

35. See *Barton v The Queen* (1980) 147 CLR 75 at 101 (Gibbs ACJ and Mason J).

36. Especially *Dietrich v The Queen* at 311 (Mason CJ and McHugh J), 324 (Brennan J, dissenting), 350 (Toohey J).

37. Clearly put by Dawson J in his dissenting judgment in *McKinney v The Queen* (1991) 171 CLR 468 at 488. See also *Barton v The Queen* at 101 (Gibbs ACJ and Mason J); *Jago v The District Court of NSW* at 33 (Mason CJ), 50 (Brennan J), 72 (Toohey J).

38. *Dietrich v The Queen* at 324 (Brennan J, dissenting), 350 (Dawson J, dissenting), 365 (Gaudron J).

39. *Barton v The Queen* at 114 (Wilson J). See also *Varley v The Queen* (1976) 51 ALJR 242 (no miscarriage of justice in the circumstances of the case where Solicitor General departed from the Crown's traditional practice – a practice not now followed in NSW – not to address the jury where an accused is unrepresented).

40. Especially, *Jago v The District Court of NSW* at 49 (Brennan J).

41. *Jago v The District Court of NSW* at 47-48 (Brennan J).

42. Especially, *Barton v The Queen*.

the unfairness can be overcome or permanently.⁴³ However, a trial may not be stayed because of unfairness that arises from the operation of a constitutionally valid statutory provision prohibiting certain evidence from being given.⁴⁴

3.25 If an appellate court finds a trial to have been unfair, it may quash the conviction of the accused.⁴⁵ It may then order an acquittal or a retrial. The complainant will almost certainly be required to give evidence again at a retrial.

3.26 By its very nature, and all other things being equal, the standard adversarial trial with its reliance on cross-examination as a tool for discovering the truth provides a classic model of a fair trial for a number of reasons. The starting point of all criminal trials is that the accused is presumed innocent until proved guilty beyond reasonable doubt. The defence is given the opportunity to cross-examine prosecution witnesses in order to challenge their credibility and expose any unreliability or untruthfulness in their evidence. Although this may be difficult for certain witnesses, it is essential that their evidence be tested in an open forum. It follows that, if the accused cannot test the evidence personally, someone else must.

3.27 At least at first glance, any restriction on cross-examination upsets the classical model of the criminal trial and runs the risk of interfering with the accused's right not to be tried unfairly. Not surprisingly, many submissions emphasised that a restriction on cross-examination in person must not detract from the accused's right to a fair trial,⁴⁶ arguing that "it is a drastic step to reduce the legal rights of an accused simply because the accused is unrepresented".⁴⁷ There are at least two reasons why restricting the ability of an unrepresented accused to cross-examine the complainant in person can be seen as interfering with the accused's right not to be treated unfairly:

- the accused is denied the ability to present his or her case personally; and

43. Though a permanent stay of proceedings will be rare, since "to justify a permanent stay of proceedings, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences": *Jago v The District Court of NSW* (1989) 168 CLR 23 at 34 (Mason CJ).

44. *R v PJE* (NSWCCA, No 60216/95, 9 October 1995, unreported).

45. For example, *Whitehorn v The Queen* (1983) 152 CLR 657, especially at 665 (Deane J).

46. NSW Legal Aid Commission, *Submission* at 2; NSW Department for Women, *Submission* at 3; Law Society of NSW, *Submission* at 1; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 1.

47. NSW Legal Aid Commission, *Submission* at 2.

- even if other arrangements can be made, the accused is denied the ability to test the complainant's evidence in cross-examination in the "normal" way.

It is therefore essential to determine whether a restriction or departure from the standard expressions of these "rights" means that the trial will be unfair to any significant extent.

Self-representation

3.28 Persons accused of a criminal offence are entitled to defend themselves in court either personally or through legal representation of their choice.⁴⁸ If accused persons want to represent themselves, they cannot be prevented from doing so as the law presently stands. Thus, accused persons may generally dismiss their legal representatives and take over their case in person.⁴⁹ Further, there is authority for the proposition that persons charged with a criminal offence cannot have counsel forced upon them against their will. In *R v Woodward*,⁵⁰ the appellant appealed against his conviction for larceny and receiving stolen goods on the ground that he had been represented by counsel against his wishes. At trial he stated that he would prefer to conduct his own defence as he had not been given an opportunity to see his counsel prior to the trial. The English Court of Criminal Appeal quashed the conviction, stating that, in the circumstances, it was an injustice to the accused not to let him conduct his own defence.⁵¹

3.29 That injustice arose because an unwanted counsel was forced on the accused. There is no authority in the common law of Australia or the statutory law of New South Wales for the broader propositions that there is an absolute right to self-representation or that a denial of self-representation necessarily results in an unfair trial. Dicta assume the contrary,⁵² though the issue has not been expressly considered. The leading cases deal rather with the question of whether or not an accused without legal representation has, in the circumstances, been denied a fair trial.⁵³

48. However, generally the court will not receive parallel and conflicting submissions from both the accused's counsel and the accused himself or herself: see *R v Wati* [1993] 3 NZLR 475.

49. *R v Varley* [1973] 2 NSWLR 427 at 429 (CCA); affirmed by the High Court in *Varley v The Queen* (1976) 51 ALJR 243.

50. *R v Woodward* [1944] 1 KB 118.

51. *R v Woodward* [1944] 1 KB 118 at 120 (Viscount Caldecote CJ).

52. *Dietrich v The Queen* (1992) 177 CLR 292 at 335-336 (Deane J), 365 (Gaudron J); *Attorney General (NSW) v Milat* (1995) 37 NSWLR 370 at 374.

53. *McInnes v The Queen* (1979) 143 CLR 575; *Dietrich v The Queen* (1992) 177 CLR 292.

3.30 In international law, Article 14 of the *International Covenant on Civil and Political Rights* and Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (which are aimed at guaranteeing fair and public hearings by independent tribunals in both civil and criminal cases),⁵⁴ provide that anyone charged with a criminal offence is entitled, as one of a number of minimum guarantees, to defend himself or herself in person or through legal assistance of his or her own choosing.⁵⁵ The right of self-representation is not, however, absolute. The European Court of Human Rights has held that a State law obliging a court to appoint, where the interests of justice so require, legal counsel to defend an accused person (even against that person's wishes), does not offend the provisions of Article 6.⁵⁶

Cross-examination

3.31 The High Court has stated that “confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial”.⁵⁷ An accused has a basic right to test the evidence against him or her,⁵⁸ and this normally extends to a facility to cross-examine

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54. See, among other authorities, *Artico v Italy* (1980) (App No 6694/74, 13 May 1980, Ser A/37) at 15, § 32; *Delta v France* (App No 11444/85, 19 December 1990, Ser A/191-A) at 15, § 34; *Vacher v France* (App No 64/95, 17 December 1996, Reports 1996-VI) at 2147, § 22; *Melin v France* (App No 12914/87, 22 June 1993, Ser A/261-A) at 11, § 21; *Foucher v France* (App No 22209/93, 18 March 1997, Reports 1997-II) at 464, § 30; *Asch v Austria* (App No 12398/86, 26 April 1991, Ser A/203) at 10, § 25; *Vidal v Belgium* (App No 12351/86, 22 April 1992, Ser A/235-B) at 32-33, § 33; *Doorson v the Netherlands* (App No 20524/92, 26 March 1996, Reports 1996-II) at 470, § 67; *Van Mechelen v the Netherlands* (App No 21363/93, 23 April 1997, Reports 1997-III) at 711, § 50.
 55. *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(d); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 1 September 1953) art 6(3)(c). See generally, R Clayton and H Tomlinson, *The law of human rights* (OUP, 2000) at para 11.245-11.251.
 56. *Croissant v Germany* (App No 13611/88, 25 September 1992, Ser A/237-B) especially at § 29. See also *Morris v the United Kingdom* (App No 38784/97, 26 February 2002) (representation of complainant at court martial by a defending army officer and not an independent legal practitioner did not violate the right to legal representation of complainant's choosing); *Meftah v France* (App No 32911/96, 26 July 2002); *Lagerblom v Sweden* (App No 26891/95, 14 January 2003) at § 54.
 57. *Lee v The Queen* (1998) 195 CLR 594 at 602.
 58. See *Whitehorn v The Queen* (1983) 152 CLR 657 at 661 (Murphy J); *Kant v DPP* (1994) 73 A Crim R 481; *Astill v The Queen* (1992) 63 A Crim R 157. See also *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 17 (Young J) (civil proceedings).

prosecution witnesses.⁵⁹ However, the court's unquestionable power to regulate cross-examination⁶⁰ has been recognised from early times,⁶¹ and there is no doubt that Parliament can restrict cross-examination of victims in order to strike an appropriate balance between the rights of an accused person and the need to reduce the trauma that court proceedings impose on the victims of crime.⁶² This means that the general liability of witnesses to cross-examination is subject to the overriding discretion of the court to control its own processes and ensure that the trial is fair.⁶³

3.32 The position in Australian law reflects that in international law. Both Article 14(3)(e) of the *International Covenant on Civil and Political Rights* and Article 6(3)(d) of the *European Convention* guarantee to accused persons the entitlement to examine, or have examined, the witnesses who testify against them — an entitlement that applies regardless of the trial procedure (principally adversarial or inquisitorial) of the jurisdiction in question. A prohibition on cross-examination in person by an unrepresented accused would not breach the express words of these articles, provided that the accused retained the opportunity to have the witnesses against him or her effectively examined by someone else. That said, the articles do not expressly require the interests of witnesses generally, or those of victims called upon to testify, to be taken into account at trial. However, the European Court of Human Rights has held that Article 8 of the *European Convention* (dealing essentially with the right to respect for private and family life, home and correspondence)⁶⁴ imposes a concurrent obligation on contracting States to protect the life, liberty or security of witnesses.⁶⁵ Accordingly, the law and trial procedure must balance the rights of the accused against the interests of witnesses or victims called upon to testify.⁶⁶ In this respect the European Court has acknowledged that the prosecution of sexual offences, particularly those involving minors, may justify protections

59. *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 17 (Young J). See also D Byrne and J D Heydon, *Cross on evidence* (Loose leaf edition, Butterworths, 1996) vol 1 at [17475].

60. See para 3.14-3.21.

61. For example, *R v Chubb* (1863) 2 SCR (NSW) 282 at 284, 287; *R v O'Brien* (1878) 1 SCR (NSW) 146.

62. *Kant v DPP* (1994) 73 A Crim R 481 at 488 (Gleeson CJ).

63. *R v McLennan* [1999] 2 Qd R 297 at 303 (Davies J).

64. See also *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

65. *Doorson v the Netherlands* (App No 20524/92, 26 March 1996, Reports 1996-II); *Van Mechelen v the Netherlands* (App No 21363/93, 23 April 1997, Reports 1997-III).

66. See *Doorson v the Netherlands* (App No 20524/92, 26 March 1996, Reports 1996-II); *Van Mechelen v the Netherlands* (App No 21363/93, 23 April 1997, Reports 1997-III); *Lüdi v Switzerland* (App No 12433/86, 15 June 1992, Ser A/238); *PS v Germany* (App No 33900/96, 20 December 2001).

being put in place to ensure the wellbeing of complainant witnesses. In one case it noted:

The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.⁶⁷ In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.⁶⁸

3.33 In recognition of the unique nature of sexual offence trials, the Court has held that the right expressed in Article 6(3)(d) does not require that questions testing the evidence of a prosecution witness be put directly by the accused or his or her legal counsel (through cross-examination or other means) in all cases.⁶⁹ In *SN v Sweden*,⁷⁰ a case involving an applicant convicted of child sexual assault, the European Court held (by a majority of 5:2) that, although the evidence of the complainant was virtually the sole evidence on which the trial court convicted the accused,⁷¹ the fact that counsel for the defence had been permitted to test the complainant's evidence by putting questions to him through the interviewing police officer meant that the applicant had not been denied a fair trial. By contrast, in *PS v Germany*,⁷² where the applicant had also been convicted of sexual offences against a minor, the only direct evidence of the alleged assault was that of the complainant, an 8-year old girl. The complainant had given statements to the police but was never questioned by the trial judge, the defendant or counsel for the defence. The European Court held that the trial court's heavy reliance on the complainant's evidence, which the defence had not been afforded the opportunity to test, imposed such limitations on the rights of the defence as to preclude the accused from receiving a fair trial.

3.34 The most dramatic example of a defendant's right to cross-examine the prosecution's witnesses occurs in the United States, where a right to confront

67. *Baegen v The Netherlands* (App No 16696/90, 27 October 1995, Ser A/327-B) at 44, § 77.

68. *Doorson v the Netherlands* (App No 20524/92, 26 March 1996, Reports 1996-II) at 471, § 72. See also *PS v Germany* (App No 33900/96, 20 December 2001) at § 23.

69. *SN v Sweden* (App No 34209/96, 2 July 2002) at § 52.

70. *SN v Sweden* (App No 34209/96, 2 July 2002).

71. *SN v Sweden* (App No 34209/96, 2 July 2002) at § 46.

72. *PS v Germany* (App No 33900/96, 20 December 2001).

hostile witnesses is enshrined in the Constitution.⁷³ The Supreme Court has expressed the opinion that confrontation in court between the accused and the complainant is essential to uncover the truth of the matter between the parties:

[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution ... It is always more difficult to tell a lie about a person “to his face” than “behind his back” ... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.⁷⁴

3.35 The right to confrontation does not, however, extend to *personal* confrontation. In *Maryland v Craig*,⁷⁵ the Supreme Court considered whether the use of closed circuit television violated the accused’s right to confront her accuser. It held that so long as the essential elements of confrontation were preserved, face to face confrontation was dispensable. Because closed circuit television is “functionally equivalent” to live testimony, cross-examination in these circumstances did not violate the accused’s right to confrontation.⁷⁶ The court also stated that the general preference for face to face confrontation can give way to public policy. Specifically, the State’s interest in protecting victims of sexual offences may, in some cases, outweigh the accused’s interest in facing his or her accusers in person.⁷⁷

THE ARGUMENTS FOR AND AGAINST PROHIBITION

The case against prohibition

3.36 The various arguments against the introduction of a prohibition of cross-examination of the complainant witness by an unrepresented accused in sexual offence trials include that such a measure:

- runs the risk of undermining the fairness of the trial;
- is unnecessary in view of existing controls on cross-examination;
- involves solutions that are unwieldy;
- would make an adverse impression on the jury; and
- would be of no real benefit to complainants.

73. *Constitution* (USA) Amendment VI: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”.

74. *Coy v Iowa* (1988) 487 US 1012 at 1017-1020. In this case, placing a screen between a child witness and the accused was found to breach the accused’s right to confrontation, even though cross-examination was not otherwise limited.

75. *Maryland v Craig* (1990) 497 US 836.

76. *Maryland v Craig* (1990) 497 US 836 at 851-852.

77. *Maryland v Craig* (1990) 497 US 836 at 852-855.

3.37 Three submissions to the Commission argued against a blanket prohibition on cross-examination by an unrepresented accused, suggesting that there should be greater judicial control of proceedings.⁷⁸ It was argued that adequate control could be achieved through judicial education,⁷⁹ and be reinforced by appellate guidelines.⁸⁰

Fairness of the trial under threat

3.38 One submission argued that prohibiting an unrepresented accused from cross-examining a complainant would undermine the fairness of the trial.⁸¹

3.39 First, the due administration of justice requires that accused persons know of the case against them and are given sufficient opportunity to answer it. Sexual offence trials involve the complainant making a very serious accusation, which must be tested in an open forum. The accused has the right to present a defence and, consequently, has the right to test the evidence by questioning witnesses called by the prosecution. It is dangerous to convict an accused who has not been given the full opportunity to test the evidence in this way. While a complainant may find the experience unpleasant, the whole purpose of cross-examination is to challenge the credibility of the witness, and expose inconsistencies in his or her evidence. Vigorous cross-examination is arguably more important in instances where the complainant is the only witness to the alleged assault. The presumption of innocence cannot be displaced merely because evidence is scarce and prosecution difficult.

3.40 Secondly, it may be argued that the right to self-representation is inviolable and that it is quite inappropriate to impose legal representation upon people who represent themselves by choice.⁸²

Prohibition is unnecessary

3.41 Two submissions argued that judges have sufficient power to protect complainants from unwarranted questioning.⁸³ An unrepresented accused is not given free rein when questioning a complainant. Improper questioning is already covered by section 41 of the *Evidence Act 1995* (NSW).⁸⁴ Both the

78. NSW Legal Aid Commission, *Submission* at 2; NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2; Law Society of NSW, *Submission* at 2.

79. NSW Legal Aid Commission, *Submission* at 2; Law Society of NSW, *Submission* at 1.

80. NSW Legal Aid Commission, *Submission* at 2; NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2.

81. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2.

82. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 3.

83. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2; Law Society of NSW, *Submission* at 1.

84. See para 3.15.

prosecution and the judge have the opportunity to prevent abusive or inappropriate questioning and no further protection is necessary.

Proposed solutions are unwieldy

3.42 One submission argued that appointing a person on behalf of an unrepresented accused to cross-examine complainants in sexual offence cases “introduces more problems than it solves”, and that such a procedure “is likely to render proceedings chaotic, ill-directed and liable to challenge on appeal”.⁸⁵

Adverse impression on the jury

3.43 Where the arrangements for giving evidence are not standard, the jury may infer that the accused is guilty. While prejudice to the accused could possibly be overcome by issuing an appropriate warning to the jury – for example, that such procedures are routine and that no adverse inference should be drawn – prohibiting an accused from cross-examining a complainant in person may create an unfavourable impression on the jury, even where an appropriate warning is issued by the judge.⁸⁶

No real benefit to complainants

3.44 Having to appear in court and give evidence is likely to be distressing for complainants in sexual offence cases, regardless of whether the accused is represented or not. Numerous reports on sexual assault document how distressing sexual assault trials are for complainants, without even considering the issue of self-representation.⁸⁷ Appointing a third party to conduct cross-examination on behalf of an unrepresented accused does nothing to address these concerns.

3.45 Further, as one submission pointed out, a complainant may actually find cross-examination by a barrister more distressing than cross-examination by the accused.

It should be recognised that cross-examination of a complainant in a sexual assault trial always has the potential of being a harrowing experience for the complainant, because the aim of cross-examination is to challenge and cast a reasonable doubt on the evidence of the prosecution. Indeed this potential can be greater where there is effective cross-examination by counsel as opposed to questions by an unrepresented accused.⁸⁸

85. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 1-2.

86. NSW Legal Aid Commission, *Submission* at 5; Law Society of NSW, *Submission* at 4.

87. See para 2.2-2.11.

88. NSW Legal Aid Commission, *Submission* at 1.

3.46 Another submission pointed out that an unrepresented accused who cross-examines a complainant in an abusive manner is likely to make a poor impression on the jury, more so than when cross-examination is conducted by an experienced barrister.⁸⁹

3.47 The literature on sexual assault consistently identifies cross-examination by defence counsel as one of the most distressing aspects of the trial. Complainants surveyed in a report by the New South Wales Bureau of Crime Statistics and Research identified the attempt by defence counsel to embarrass them as being the worst part of cross-examination.⁹⁰ The report *Sexual Violence, Addressing the Crime: Inquiry into the Incidence of Sexual Offences in NSW* found that cross-examination by defence counsel is “especially harrowing” for many complainants because “the style of questioning used by many defence counsel may cause the victim/survivor witness to feel under attack”.⁹¹ The report criticised “the unnecessarily invasive nature of the substance of certain cross-examinations and, just as significantly, the failure of many judges to curb the excesses of defence counsel in relation to their style of cross-examination”.⁹²

3.48 In some cases however, a complainant may want to confront the offender directly, and afterwards may find it helpful to have done so. In cases where an accused is unrepresented, preventing cross-examination by the accused in person may actually conflict with the complainant’s wishes.

The case for prohibition

3.49 The arguments in favour of prohibiting an unrepresented accused in a sexual offence trial from cross-examining the complainant in person are that:

- current measures for controlling cross-examination are inadequate;
- prohibition would reduce unnecessary distress to the complainant;
- prohibition would enable complainants to give evidence more accurately;
- prohibition is consistent with other reforms to sexual assault law in New South Wales and elsewhere; and
- prohibition would encourage reporting of sexual offences.

89. NSW Attorney General’s Department Regional Violence Against Women Specialist Unit (Southern NSW), *Submission*.

90. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 37.

91. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, addressing the crime: inquiry into the incidence of sexual offences in NSW: part 2* (Report 9, 1996) (“NSW Standing Committee on Social Issues (Report 9)”) at 152.

92. NSW Standing Committee on Social Issues (Report 9) at 153.

3.50 The vast majority of submissions received by the Commission were of the view that an accused should be prohibited from cross-examining a complainant in person in a sexual offence trial.⁹³

Inadequacy of current measures

3.51 Most submissions were of the view that the current measures for controlling cross-examination are ineffective. First, no amount of judicial intervention can protect the complainant where the very fact of cross-examination in person (rather than the manner or form of the questions) is distressing.⁹⁴ Secondly, although mechanisms exist to enable judges to control intimidating or offensive cross-examination, judicial control is widely perceived as inadequate. Trial judges already have adequate powers to control cross-examination, but some complainants are still subjected to what is felt to be aggressive, offensive or intimidating cross-examination because these safeguards are not used appropriately. Many argued that judicial control is inconsistent, and cannot guarantee systematic protection for complainants.⁹⁵

3.52 The adversarial nature of proceedings makes it difficult in practice for a judge to protect complainants from some distress or intimidation.⁹⁶ In some

93. NSW Legal Aid Commission, *Submission* at 1; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2; Law and Justice Foundation of NSW, *Submission* at 1; NSW Department for Women, *Submission* at 3; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3; C Vernon, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 2; Westmead Sexual Assault Service, *Submission* at 2; Illawarra Area Health Service, *Submission* at 1; Central Coast Health, *Submission* at 2; Macquarie Area Health Service, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 2; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern NSW), *Submission*.

94. Westmead Sexual Assault Service, *Submission* at 2. The Law and Justice Foundation similarly argued that the existing limitations are inadequate because they take the form and substance of the questions into account without addressing the risks to the welfare of the complainant: Law and Justice Foundation of NSW, *Submission* at 1.

95. Women's Legal Resources Centre, *Submission* at 2; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2; NSW Department for Women, *Submission* at 4; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 4; Law and Justice Foundation of NSW, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern NSW), *Submission*; Westmead Sexual Assault Service, *Submission* at 2; D Purcell, *Submission* at 2.

96. NSW Department for Women, *Submission* at 3; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2.

instances, it may be difficult to draw the line between robust cross-examination, which is legitimate, and one which is improperly aggressive. Some judges may be reluctant to intervene because it could create a perception of bias, and may give rise to an appeal.⁹⁷

3.53 Some submissions pointed out that the judge may not be aware that questioning is, in the circumstances, intimidating or offensive. Intimidation may not be obvious to others in the courtroom where the questions relate specifically to the relationship between the complainant and the accused. The nature of the questions, tone of voice, physical gestures and body language may impact considerably on the complainant.⁹⁸ Seemingly innocent mannerisms, actions, words or phrases may be similar to those used in the assault.⁹⁹ In the nature of things, these are difficult to control. It should also be remembered that the occasion is likely to be very stressful for the accused.

3.54 A number of submissions also argued that judges are less strict in disallowing inappropriate questioning where an accused is unrepresented. The Director of Public Prosecutions commented that “there is a great deal of accommodating the so-called disadvantaged position of the unrepresented accused to ensure fairness”.¹⁰⁰ Others argued that unrepresented defendants are given greater leeway to harass complainants, as it is seen as ignorance of the rules rather than a specific tactic to confuse or intimidate the witness.¹⁰¹

3.55 The inadequacy of judicial intervention is a recurring theme in the literature on sexual assault. In 1996, the Legislative Council's Standing Committee on Social Issues highlighted the failure of many judges to prevent unnecessarily invasive cross-examination,¹⁰² noting that the existing powers to restrict inappropriate cross-examination were invoked very rarely.¹⁰³ It also reported inappropriate attitudes towards sexual offences in some sectors of the judiciary.¹⁰⁴ In 1994, a report by the Senate Standing Committee on Legal and Constitutional Affairs which focused on sexual violence against women argued that it is not an adequate response to hold

97. NSW Standing Committee on Social Issues (Report 9) at 153.

98. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2-3; Westmead Sexual Assault Service, *Submission* at 2.

99. Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 1.

100. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2.

101. NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 4 and Illawarra Area Health Service, *Submission* at 2. See also para 2.25 note 64.

102. NSW Standing Committee on Social Issues (Report 9) at 153.

103. NSW Standing Committee on Social Issues (Report 9) at 154.

104. NSW Standing Committee on Social Issues (Report 9) at 125-127.

individual judges responsible given that “a problem exists that is wider than a handful of isolated incidents”.¹⁰⁵

3.56 The literature on child sexual offences also questions the ability of judicial control to prevent inappropriate cross-examination. The authors of *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* were of the opinion that judges are generally unwilling to “enter the arena”,¹⁰⁶ and that many would not recognise oppressive or intimidating questioning. They also point out that, even where judges try to control aggressive cross-examination, and direct the witness that he or she need not answer a particular question, the mode of questioning can still have the effect desired by the person conducting cross-examination.¹⁰⁷ The recent *Report on Child Sexual Assault Prosecutions* by the New South Wales Legislative Council Standing Committee on Law and Justice similarly concluded that judges “appear disinclined to curtail harsh or confusing cross-examination”.¹⁰⁸

3.57 While some of these criticisms may be overstated in the sense that they suggest, on subjective evidence, shortcomings in the attitudes of judicial officers, their substance must be accepted. The most important cause of these problems is the inherent character of the trial itself. This involves rigorous testing in public of the evidence presented.

Reduce unnecessary distress

3.58 Submissions observed that, regardless of whether the accused is represented or not, complainants in sexual offence trials experience significant distress and humiliation when giving evidence.¹⁰⁹ The process of cross-examination in itself is traumatic and is usually identified as the worst part of the trial for the complainant.¹¹⁰ Where an accused cross-examines a complainant in person, the personal confrontation between complainant and accused is likely to be an additional or underlying cause of distress.¹¹¹

105. Commonwealth Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Gender bias and the judiciary* (Canberra, 1994) at para 4.52.

106. C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002) at 126.

107. Eastwood and Patton at 126.

108. Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at xiv.

109. NSW Legal Aid Commission, *Submission* at 1; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 1; NSW Department for Women, *Submission* at 1-2; Women’s Legal Resources Centre, *Submission* at 2; D Purcell, *Submission* at 2.

110. Illawarra Area Health Service, *Submission* at 1; NSW Department for Women, *Submission* at 2.

111. NSW Legal Aid Commission, *Submission* at 1.

This will be aggravated where an accused uses the opportunity of cross-examination to intimidate or humiliate the complainant.¹¹²

Enable complainants to give evidence accurately

3.59 Many submissions argued that the evidence of an angry, distressed or confused witness is less likely to be accurate,¹¹³ and that cross-examination in person by an unrepresented accused is likely to upset the witness.

If the relationship is characterised by a power imbalance in favour of the accused, as is likely in cases where a sexual assault has been alleged, this may operate to intimidate the complainant to such a degree that the quality and/or accuracy of the complainant's evidence is seriously or completely compromised.¹¹⁴

Reducing a complainant's distress is likely to promote the reliability of the complainant's testimony; "providing a safe environment to elicit the best possible evidence from witnesses is part of a fair and just process, for both the accused and the victim".¹¹⁵

3.60 A submission from one sexual assault service¹¹⁶ reported that many victims of sexual violence view the assault as a life threatening event, and that proximity to the accused commonly triggers a range of trauma responses. The service helps complainants to develop strategies to contain their fear of seeing the accused in court so they do not "freeze" while giving evidence. The submission argued that the prospect of facing cross-examination by an unrepresented accused reduces a complainant's ability to give evidence as accurately and coherently as possible.¹¹⁷

112. NSW Legal Aid Commission, *Submission* at 1; NSW Department for Women, *Submission* at 2; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3.

113. For example, Central Coast Health, *Submission* at 2. *Cross on evidence* notes that the principles underlying the prohibition on improper questioning "are that truth will out more readily from the lips of a calm witness, or one who has been calmly induced to assert inconsistent propositions, than from one in a state of justifiable terror or rage, or fatigue": D Byrne and J D Heydon, *Cross on evidence* (Loose leaf edition, Butterworths, 1996) vol 1 at [17510].

114. NSW Department for Women, *Submission* at 2. Similar comments were made by the NSW Legal Aid Commission, *Submission* at 1; Women's Legal Resources Centre, *Submission* at 2; Illawarra Area Health Service, *Submission* at 1; Central Coast Health, *Submission* at 2.

115. NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3.

116. Westmead Sexual Assault Service, *Submission* at 1 (citing J Herman, *Trauma and recovery* (Harper Collins, 1992) at 33).

117. Westmead Sexual Assault Service, *Submission* at 1.

Consistency with other reforms

3.61 Some submissions supported a prohibition in adult sexual offence cases as an appropriate extension of the existing laws that protect child witnesses.¹¹⁸ Other submissions supported a prohibition on the basis that it would bring New South Wales into line with other jurisdictions which protect complainants in this way.¹¹⁹ Cross-examination by an unrepresented accused is now variously prohibited in Queensland¹²⁰ and the Northern Territory,¹²¹ as well as in other common law jurisdictions including England,¹²² Scotland¹²³ and (to a limited extent) New Zealand.¹²⁴

Encourage reporting

3.62 Another argument for prohibiting an unrepresented accused from cross-examining a complainant in person is that it would encourage victims to report sexual offences.¹²⁵ Sexual assault is notoriously underreported.¹²⁶ Sexual assault victims' anxiety about the court process is a likely contributing factor to the apparently low reporting rates of sexual offences.¹²⁷

Prohibition or alternative arrangements?

3.63 One of the questions raised in Issues Paper 22 was whether alternative arrangements should be available for complainants when giving evidence in

118. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2; NSW Department for Women, *Submission* at 4; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 4; Law and Justice Foundation of NSW, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; Central Coast Health, *Submission* at 3.

119. NSW Department for Women, *Submission* at 4; Women's Legal Resources Centre, *Submission* at 1; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; Illawarra Area Health Service, *Submission* at 1; Central Coast Health, *Submission* at 3.

120. See para 2.20.

121. See para 2.21.

122. See para 2.24.

123. See para 2.28.

124. See para 2.17.

125. NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 9.

126. Sexual assault is the least likely of all criminal offences to be reported to the police: NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 1. Two thirds of the people who participated in the 1993 Sexual Assault phone-in had not reported the assault to the police: NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 7.

127. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 4.

sexual offence proceedings.¹²⁸ For example, if a complainant is apprehensive about seeing the accused in court, a screen can be placed to obscure the accused from the complainant's sight. However, this places an unrepresented accused who is cross-examining a complainant at a marked disadvantage and may, therefore, be inappropriate in the circumstances. Where the facilities are available, a complainant can give evidence from outside the courtroom, and have the evidence transmitted to the courtroom by closed circuit television. Previous studies have found that such arrangements can reduce distress and enable a complainant to give evidence more accurately.¹²⁹

3.64 Some submissions expressed a preference for making alternative arrangements rather than prohibiting cross-examination in person by an unrepresented accused.¹³⁰ Arguably, such arrangements could minimise a complainant's distress without detracting from the accused's right to self-representation. It is, however, doubtful that arrangements such as closed circuit television or screens will be effective in reducing a complainant's distress, where it is the very fact that the accused is asking the questions that complainants find so distressing.

THE COMMISSION'S VIEW

3.65 The central issue in this reference is whether or not current law strikes an appropriate balance between, on the one hand, the accused's entitlement to test all relevant evidence by questioning a complainant and, on the other hand, the need to reduce the potential distress and humiliation to complainants from being personally cross-examined by an unrepresented accused. The majority of the Commission is of the view that it does not – given a right to cross-examination by a legal practitioner.

3.66 First, the Commission approaches the issue from the perspective of what is demanded by a fair trial. The Commission accepts that the first and overwhelming element of the public interest in the administration of justice is that the accused is fairly tried. This does not mean, however, that the *interests* of the accused take priority over all other interests that may be affected by the proceedings. There is a public interest in the protection of these other interests — for example, in preventing certain kinds of confidential information from being exposed (such as the identities of informers or matters covered by legal professional privilege). Thus, although hectoring or insult may serve the interests of the accused, limits on cross-examination are imposed, not only in sexual assault cases, to protect witnesses from

128. NSW Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual assault trials* (Issues Paper 22, 2002), Issues 13 and 14.

129. The use of alternative arrangements is reviewed in Chapter 6 of this Report.

130. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 4; Law Society of NSW; *Submission* at 2.

unnecessary offence or distress.¹³¹ These rules are unaffected by the accused's guilt or innocence. Indeed, he or she is presumed to be innocent. There is a substantial public interest in ensuring that witnesses are not subjected to procedures that might be oppressive or humiliating although they must answer all questions that fairly test their evidence. This is not only to ensure, as far as possible, that potential witnesses are not discouraged from coming forward and that actual witnesses are not bullied into giving untrue or inaccurate evidence, but also because such conduct must undermine public confidence in the administration of justice. Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument of justice. The crucial question therefore is not whether the *interests* of the accused might be prejudiced but whether the fairness of the trial might be called into question if an unrepresented accused is prohibited from cross-examining a complainant in person.

3.67 Secondly, the Commission takes the view that the nature of the questions that must be put to the complainant in sexual assault proceedings makes it inherently offensive to the proper administration of justice that those questions should be put personally by an alleged attacker (whether he or she is guilty or not), even where those questions are put with objective propriety. Those questions deal with matters of considerable intimacy, relating to sexual approach, sexual caresses, details of intercourse and the aftermath. This is certainly true of “consent cases”, that is, cases in which intercourse between the complainant and the accused is admitted but the accused alleges that the complainant consented, and where the focus of the trial is on the issue of consent. It is also true in most “denial cases”, that is, cases (often involving children) in which the accused denies that intercourse took place at all, and where the defence is aimed at suggesting that intercourse could not have physically occurred, or at questioning the veracity of the account of the incident given by the complainant in the witness box by pointing to the complainant's different account of the incident on some other occasion.

3.68 It is true that evidence of detailed intimacy is not as prominent in “identification cases”, that is, cases where it is admitted that the complainant is the victim of a sexual assault but the accused denies that he or she was the perpetrator. However, personal confrontation must also cause great distress to the complainant in these cases, especially where the accused is in a family or other relationship with the complainant. In such cases, whether the accused is guilty or not, it is also inappropriate that he or she should be able to gain any advantage out of the relationship that may be conferred by personal confrontation.

3.69 The likelihood that the questions necessarily put to the complainant in sexual assault proceedings are of such a nature as to cause the complainant to feel demeaned or humiliated, underlines and reinforces the Commission's

131. See para 3.12-3.21.

view that it is inherently unsatisfactory for the accused to put those questions personally. Since the Commission considers that appropriate testing of the complainant's evidence can be undertaken by a legal representative appointed by the court,¹³² the fairness of the trial, from the accused's point of view is not, in its judgment, significantly compromised by prohibiting the accused from conducting the cross-examination in person.¹³³

3.70 Thirdly, to accommodate the accused's wish to cross-examine the complainant personally is to confer an inappropriate advantage on the accused. Leaving aside those cases in which the accused is refused legal aid and cannot otherwise afford legal representation, the most likely motive for refusing representation is the desire to obtain an advantage by virtue of the intense character of direct personal confrontation. This advantage has never been part of the function of a trial or an element of fairness. It results in an oppression that should not be permitted unless there is a real, as distinct from fanciful, risk of prejudicing a fair trial. This is not to say that all accused persons who are unrepresented by choice have an improper motive. However, in the Commission's view, other motives are likely to be rare. In any event, motives cannot be allowed to convert the proceedings into a trial that is unnecessarily and inappropriately oppressive to the complainant.

3.71 In sum, the Commission's view is that provided there are other ways in which the complainant's evidence can effectively be tested (as the Commission believes there are),¹³⁴ there can be no justifiable reason for subjecting the complainant to cross-examination by the accused. Confrontation with the accused and cross-examination are distressful enough without adding the element of direct personal (verbal) attack. Judicial control of cross-examination cannot provide systematic protection because of the inherent nature of the proceedings and the need for judges to remain neutral. And, even where judicial discretion is exercised to prevent abusive or improper questioning, it cannot protect the complainant from the effects of direct confrontation with the alleged offender who wishes to cross-examine personally.

3.72 Accused persons who are prevented from cross-examining complainants in person will not be *unfairly* disadvantaged. They will still be given the opportunity to present their case and test the evidence against them. By contrast, preventing cross-examination in person by unrepresented accused would be of significant benefit to both the wellbeing and testimony of complainants, and to the perceived fairness of the trial process. If complainants are able to give their evidence more effectively, the prohibition is in the interests of justice. It is the view of the Commission that the benefit to complainants and to the community in general outweighs any perceived

132. See Recommendation 6.

133. See para 5.26-5.27.

134. See Chapter 5.

detriment to accused persons. This view essentially stems from the conclusion that, if cross-examination can be provided by a legal practitioner, the potential or perceived advantage of personal confrontation sought by an accused who chooses to be unrepresented is neither a necessary nor a desirable element of the administration of justice.

RECOMMENDATION 1

An unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding.

MINORITY VIEWS

3.73 Two members of this Division of the Commission, Justice Greg James and Justice Ruth McColl, dissent from Recommendation 1. Their view is that it is undesirable that there should be a blanket prohibition on cross-examination of a complainant by an unrepresented accused in sexual offence trials. Such a prohibition effectively compromises the fairness of the trial.

3.74 It cannot always be assumed that an accused person who cross-examines a complainant in person is obtaining an inappropriate advantage rather than merely participating personally in the trial process. It has long been accepted in our adversarial system that persons charged with criminal offences are entitled to defend themselves in court either personally or through legal representation of their choice. Indeed, it can be argued that the “right of confrontation”, although rarely referred to as such outside the United States, is an essential feature of the common law adversarial process and reflects the notion of self-representation. It also accounts, amongst other reasons, for the rule that an accused must be personally present at a jury trial. A prohibition on the right of an accused to cross-examine the complainant in person is inconsistent with the right to self-representation and potentially undermines the cross-examination itself. This is not cured by imposing an unwanted counsel on the accused. As *R v Woodward*¹³⁵ makes clear, an accused person has a right to put his or her own defence to the jury rather than having it made by counsel.

3.75 A radical assault on the traditional trial process could only be justified if there were evidence to show that complainants are so distressed by subjection to cross-examination in person by an unrepresented accused that the fairness of the trial is called into question. There is no evidence to support such a conclusion. The evidence assembled in the various inquiries considered in Chapter 2 of this Report establishes only that, generally, cross-examination is distressing (often very distressing), for complainants in

135. *R v Woodward* [1944] 1 KB 118.

sexual assault trials. It does not address the particular question faced in this Report, namely, whether cross-examination is any more distressing than usual where the accused is self-represented and conducts the cross-examination in person. The conclusion also overlooks the evidence of those with practical experience in this area of law that some complainants in sexual offence trials may in fact welcome the opportunity to confront the accused in person in court. This is referred to elsewhere in this Report.¹³⁶ The implementation of Recommendation 1 will preclude them from doing so.

3.76 Justices Greg James and Ruth McColl are of the view that adequate provisions already exist in the law to minimise the distress caused to complainants in cross-examination in sexual offence cases, whether that cross-examination is undertaken by counsel or by the accused in person.¹³⁷ The issues highlighted in the submissions and in the majority view can be acknowledged and accommodated, in their view, by:

- a statutory extension of the trial judge's discretion to restrict or prohibit cross-examination; and
- empowering the trial judge to order the provision of counsel for the purposes of cross-examination in a particular case;¹³⁸ and
- giving effect to the suggestion of the Law Society¹³⁹ and the Legal Aid Commission¹⁴⁰ that provisions such as these could be strengthened through judicial education.

3.77 If the recommendation of the majority of the Commission is translated into legislation, Justice Greg James agrees with the procedure proposed for a legal practitioner to cross-examine the accused – assuming the accused has been given the opportunity to arrange representation but has failed to do so – and, generally, with the rest of this Report.

3.78 Justice McColl, however, is of the view that if the accused is required to be represented, then that representation should be for the entire trial. She accepts the Law Society's submission¹⁴¹ that the legal representative will be unable to represent an accused adequately unless fully acquainted with all the trial issues. The risk of appointing legal representation for only a limited portion of the trial is that the accused's right to a fair trial will be prejudiced. If the radical step of removing the accused's right to control how the trial is to be conducted is to be removed, that should not be at the price of potentially jeopardising a fair trial. Appointing legal representation for the

136. See para 3.48.

137. See para 3.14-3.21.

138. The majority expands its view in favour of a blanket prohibition with no discretion in paras 4.14-4.15.

139. Law Society of NSW, *Submission* at 1.

140. NSW Legal Aid Commission, *Submission* at 2.

141. Law Society of NSW, *Submission* at 4.

whole trial would not affect the victim's rights issues addressed elsewhere in this Report.

3.79 Finally, Justices Greg James and Ruth McColl express a concern that the use of alternative arrangements advocated in Chapter 6, together with the restriction on self-representation, may, in their cumulative effect, render a particular trial unfair; and that the unfairness might not, in the circumstances, be cured by directions to the jury that seek to overcome the prejudice.

4. Scope of the prohibition

- A discretion to allow cross-examination in person
- To whom should the prohibition apply?
- Proceedings covered by the prohibition

4.1 This chapter considers the scope of the prohibition in Recommendation 1. It discusses whether the court should retain a discretion to allow cross-examination in person by an unrepresented accused. It examines whether the prohibition should apply only to complainants in sexual offence proceedings or to prosecution witnesses in general. It then identifies the proceedings to which the prohibition should apply.

A DISCRETION TO ALLOW CROSS-EXAMINATION IN PERSON

4.2 Submissions expressed a range of views as to whether, assuming a general prohibition on the cross-examination of complainants by unrepresented accused in sexual offence trials, the court should nevertheless retain a discretion to allow cross-examination in person by an unrepresented accused.¹

Arguments in favour of a discretion

4.3 Some submissions argued that the court should retain a discretion to allow cross-examination in person by an unrepresented accused.² The Legal Aid Commission submitted that:

While it is clear that limits should be applied where unrepresented accused use cross-examination as an abusive tool, a reduction of the rights of an accused simply because the accused is unrepresented should not of itself be sufficient justification without consideration of the circumstances of the particular case.³

4.4 In the view of the Legal Aid Commission, prohibition should depend on the gravity of the alleged offence since sexual offence proceedings cover such a wide range of behaviour. A mandatory limitation would create a broad and potentially large class of witnesses to whom the limitation would apply, in many cases unnecessarily. Extending the prohibition to witnesses unnecessarily would impose a significant cost on the criminal justice system, and result in longer trials.⁴

4.5 A discretion to allow cross-examination in person would also be advantageous where a complainant would rather be cross-examined by the accused than by defence counsel, for example, because the accused is not legally trained and lacks the skills and experience to conduct an effective

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1. The Commission discussed the role of judicial discretion in the context of sexual offence trials in NSW Law Reform Commission, *Review of section 409B of the Crimes Act 1900 (NSW)* (Report 87, 1998) at para 6.35-6.63.
 2. NSW Legal Aid Commission, *Submission* at 2; NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2; Law Society of NSW, *Submission* at 1; Macquarie Area Health Service, *Submission* at 2.
 3. NSW Legal Aid Commission, *Submission* at 2.
 4. NSW Legal Aid Commission, *Submission* at 2-3.

cross-examination. A mandatory prohibition may force complainants to undergo cross-examination by defence counsel against their wishes.

4.6 A prohibition against cross-examination in person with a discretion to allow it in certain circumstances would effectively create a presumption against cross-examination in person. In practice, the complainant would automatically be protected against it and would lose this protection only if evidence was led to show that he or she did not require such protection. This is what currently happens in the case of child witnesses – an unrepresented accused is prohibited from cross-examining a child witness in person, unless the prohibition is not in the interests of justice.⁵

Arguments against a discretion

4.7 A number of submissions argued against a discretion to allow cross-examination in person by an unrepresented accused.⁶ A mandatory prohibition is uniform and fair.⁷ It would ensure systematic protection, and would avoid court time being spent on applications by accused persons for the right to cross-examine the complainant in person. Victims of sexual offences could be certain that they would be protected against this type of harassment when deciding whether to press charges, which may encourage reporting.⁸

4.8 Many submissions maintained that the effectiveness of a discretion depends on the individual judge.⁹ The current limitations on cross-examination are discretionary, and there is widespread concern that these do not afford effective protection against inappropriate questioning.¹⁰

5. *Evidence (Children) Act 1997* (NSW) s 28(4). See para 2.18.

6. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2; NSW Department for Women, *Submission* at 4; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3; Law and Justice Foundation of NSW, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; Central Coast Health, *Submission* at 3; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*; Westmead Sexual Assault Service, *Submission* at 2; D Purcell, *Submission* at 2; Illawarra Area Health Service, *Submission* at 2.

7. D Purcell, *Submission* at 2.

8. Illawarra Area Health Service, *Submission* at 1.

9. NSW Department for Women, *Submission* at 3; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 5; Women's Legal Resources Centre, *Submission* at 2; Illawarra Area Health Service, *Submission* at 1.

10. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 2; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 4; Women's Legal Resources Centre, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; NSW Attorney

4.9 One sexual assault service argued that a discretion to allow cross-examination in person would create an unreasonable level of uncertainty for complainants. The period leading up to the trial is highly stressful for complainants. An absolute prohibition would give them certainty about the trial process and may help to reduce their stress.¹¹

4.10 A discretion to allow cross-examination may also be impractical. The court will have to exercise its discretion before an accused commences cross-examination of the complainant, but at this stage it is not known how the accused will behave during cross-examination.¹²

4.11 Other jurisdictions in which special measures for giving evidence are available on a discretionary basis have found this to be ineffective. For example, the Queensland legislation was recently strengthened because, in practice, discretionary provisions protecting special witnesses were rarely used.¹³ Now there is a mandatory prohibition on cross-examination in person by an unrepresented accused.¹⁴ Similarly, the discretionary use of alternative arrangements for child witnesses has been criticised. In one study, the use of arrangements designed to make it easier for child witnesses to give evidence in sexual offence proceedings was compared across three jurisdictions, Queensland, New South Wales and Western Australia.¹⁵ It found that use of alternative arrangements was “sporadic and inconsistent” where left to judicial discretion. The decision was usually made just prior to the child giving evidence, which added to the complainant’s stress. By contrast, alternative arrangements were much more effective where their use was standard.¹⁶

4.12 In New South Wales, there is a presumption in favour of child witnesses giving evidence via closed circuit television. The child is denied the use of closed circuit television only where the court is satisfied that its use is not in the interests of justice, or that the urgency of the matter makes its use inappropriate.¹⁷

General’s Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*.

11. Westmead Sexual Assault Service, *Submission* at 3.

12. See the Scottish Parliament Information Centre, *Sexual Offences (Procedure and Evidence) (Scotland) Bill* (Research Paper 01/10, 2001) at 9.

13. Queensland, Department of the Premier and Cabinet, Office for Women, *Report of the taskforce on women and the criminal code* (2000) at 304.

14. *Evidence Act 1977* (Qld) s 21N. See para 2.20.

15. C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002).

16. Eastwood and Patton at 118-121.

17. *Evidence (Children) Act 1997* (NSW) s 18(4).

4.13 However, a recent report of the Legislative Council's Standing Committee on Law and Justice reported that:¹⁸

Orders for the non-use of CCTV appear to be relatively frequent ... Courts have been overly restrictive in their interpretation of the interests of justice and have over-emphasised the likely prejudice to the accused.

The report concluded that the statutory right to give evidence by alternative arrangements has failed to give children uniform protection, and recommended curbing the current discretion.¹⁹

The Commission's view

4.14 The Commission's objection to the cross-examination of a complainant by an unrepresented accused in sexual offence proceedings is based on the view that, provided the complainant is cross-examined by a legal practitioner, the fairness of the trial is compromised if the accused (whether guilty or not) is able to obtain an advantage by personally cross-examining an accused on matters of the most intimate kind, in view of the distressing effect that such cross-examination is likely to have on the complainant.²⁰ The qualification of the Commission's recommendation that such cross-examination be prohibited by a judicial discretion to allow cross-examination, would simply fail to meet these policy considerations. In any event, it would be practically impossible in most cases to obtain an adequate evidentiary basis for exercising any such discretion. A mandatory prohibition has the benefits of consistency, certainty and simplicity. It is also less prejudicial to accused persons because the procedure is routine.

4.15 The Commission acknowledges that a blanket prohibition fails to take all the circumstances of every possible case into account. However, the Commission is of the view that the prohibition does not unfairly or inappropriately disadvantage the accused, and sees no reason why it should not apply in every case.²¹ The advantages of prohibition outweigh the problem of preventing cross-examination in person in the few cases where a complainant does not, in the circumstances, require it.

18. Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at para 6.67 and 6.89.

19. Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002), Recommendation 33.

20. See para 3.65-3.72.

21. By contrast, the mandatory exclusion of evidence relating to sexual experience may unfairly disadvantage an accused where relevant evidence is not admitted and the accused is subsequently convicted. Prohibiting cross-examination in person does not change the course of the trial as the evidence is still admitted and tested; it just removes the opportunity for the accused to question the complainant in person.

TO WHOM SHOULD THE PROHIBITION APPLY?

4.16 The prohibition could apply to complainants in sexual offence proceedings only. Alternatively, it could apply more broadly, to other types of proceedings and other types of witnesses.

Sexual offence complainants only

4.17 Some submissions, recognising the distinctive impact of sexual offence trials on complainants,²² argued that cross-examination of complainants by an unrepresented accused should be prohibited in sexual offence proceedings only. The Legal Aid Commission submitted:

Sexual assault trials are distinctive ... A major aim of law reform has been to reduce the distress of the complainant inherent in sexual assault trials. Given the reduction in legal rights and serious implications for a fair trial arising from a limitation on cross-examination by an unrepresented person, there does not appear to be sufficient justification for extending the limitation to a broader category of offences.²³

4.18 Arguably the nature of a sexual offence makes cross-examination in person a more distressing ordeal for complainant witnesses than for witnesses generally. One sexual assault service²⁴ maintained that because sexual violence “is so intrusive upon the victim’s own body and sense of personal integrity” it “has a special status unlike any other crime”. It argued that cross-examination in person “does not fit with the purpose of the proceedings, that is, to establish the guilt ... of the accused”. Rather, it gives the accused further opportunity to humiliate the victim, and for this reason has the character of a “secondary act of trauma”, or a continuation of the original assault.²⁵

A broader application

4.19 Alternatively, the prohibition could apply to witnesses in circumstances other than sexual offence proceedings. The scope of the prohibition could depend on the type of offence, the personal characteristics of the witness or a combination of both.

22. See para 2.2-2.11.

23. NSW Legal Aid Commission, *Submission* at 3-4.

24. See Westmead Sexual Assault Service, *Submission*.

25. Westmead Sexual Assault Service, *Submission* at 1-2. The NSW Attorney General’s Department Violence Against Women Specialist Unit made a similar point: *Submission* at 3.

4.20 Several submissions were in favour of a mandatory prohibition in sexual offence proceedings and a discretionary limitation in other types of proceedings²⁶ or for other kinds of witnesses.²⁷

Type of offence

4.21 The legislation currently prohibiting the cross-examination of child witnesses in person is quite broad. It applies to criminal proceedings in any court, as well as civil proceedings arising from the commission of a personal assault offence.²⁸

4.22 A number of submissions urged that the prohibition on cross-examination in person by an unrepresented accused be extended beyond sexual offence trials to include proceedings such as domestic violence matters.²⁹ Many pointed to parallels between sexual offences and domestic violence, including the power imbalance between the parties, the likelihood that the perpetrator and victim knew each other before the alleged assault occurred and the potential for the accused to use cross-examination in person to humiliate the witness further. Arguably, all witnesses who are vulnerable due to the nature and seriousness of the alleged offence should be protected against cross-examination in person by an unrepresented accused.

4.23 Some submissions also argued that the prohibition should apply in civil proceedings in matters involving personal violence.³⁰ Some proposed that cross-examination in person be prohibited in applications for Apprehended

26. NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 6; Women's Legal Resources Centre, *Submission* at 2; Law and Justice Foundation of NSW, *Submission* at 2; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*.

27. Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 5.

28. *Evidence (Children) Act 1997* (NSW) s 28(1).

29. Law and Justice Foundation of NSW, *Submission* at 1; NSW Department for Women, *Submission* at 5; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 6; Westmead Sexual Assault Service, *Submission* at 3; Macquarie Area Health Service, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 2; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; Central Coast Health, *Submission* at 3; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*; D Purcell, *Submission* at 3.

30. Illawarra Area Health Service, *Submission* at 2; Macquarie Area Health Service, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; D Purcell, *Submission* at 3.

Violence Orders.³¹ The Director of Public Prosecutions noted that these proceedings are often related to criminal proceedings, and witnesses can be required to give evidence in both.³²

4.24 Other submissions were of the view that the prohibition should apply in criminal proceedings only.³³ The Legal Aid Commission argued that there is insufficient justification for extending the prohibition to civil proceedings, where the implications of an adverse result are not, at least potentially, as serious for the defendant as they can be in a criminal case.³⁴ The Law and Justice Foundation pointed out that a prohibition is resource intensive and may not be justified in civil proceedings.³⁵

Characteristics of the witness

4.25 Some submissions argued that cross-examination of all vulnerable witnesses by the accused in person should be prohibited regardless of the type of proceedings, especially where a witness' vulnerability stems from personal characteristics such as age, intellectual disability or the relationship between the witness and the accused.³⁶

4.26 A number of submissions argued that witnesses other than alleged victims should be protected against cross-examination in person by an unrepresented accused. For example, the Department for Women pointed out that in families affected by domestic violence, the power exerted by the perpetrator often extends to other members of the family. Other witnesses may be intimidated by the accused in court if they are testifying for the complainant.³⁷ A submission from an area health service suggested that mothers of children who have been sexually assaulted should not be cross-examined in person by an unrepresented accused.³⁸

31. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 3; NSW Department for Women, *Submission* at 6; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 6.

32. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 3.

33. NSW Legal Aid Commission, *Submission* at 4, Law and Justice Foundation of NSW, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 3.

34. NSW Legal Aid Commission, *Submission* at 4.

35. Law and Justice Foundation of NSW, *Submission* at 2.

36. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 3; NSW Legal Aid Commission, *Submission* at 4; Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 5; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 6; Women's Legal Resources Centre, *Submission* at 2; Illawarra Area Health Service, *Submission* at 2; Macquarie Area Health Service, *Submission* at 1; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 2-3; Hawkesbury Nepean Community Legal Centre, *Submission* at 2; D Purcell, *Submission* at 3.

37. NSW Department for Women, *Submission* at 5.

38. Illawarra Area Health Service, *Submission* at 2.

A combined approach

4.27 A number of jurisdictions take account of both the type of offence and characteristics of the witness in the determining the scope of prohibitions on the ability of self-represented persons to cross-examine in person. These include Queensland, the Northern Territory, Western Australia, England and New Zealand.³⁹ The Director of Public Prosecutions expressed a preference for a combined approach where all “vulnerable witnesses” are protected against cross-examination in person by an unrepresented accused.⁴⁰ Whether a person qualifies as a “vulnerable witness” would depend on the nature and gravity of the alleged offence and any relevant personal characteristics, including the witness’ age, cultural background and any disability (including any physical or intellectual disability, mental illness or communication difficulty). It could also take into account any relationship between the witness and accused, and any power imbalance between them. It should also take into account the fact that the accused has chosen to be self-represented and does not want a third party to cross-examine the complainant on his or her behalf. In contrast, another submission argued that, as it is difficult to know in advance what factors make a witness vulnerable, extending the prohibition to all vulnerable witnesses is impractical.⁴¹

The Commission’s view

4.28 The Commission is of the view that the prohibition should apply in sexual offence cases. A number of factors make sexual offence trials particularly distressing for complainants, including the nature of the crime; the role of consent and consequential focus on the complainant’s credibility; and the likelihood that the accused and complainant knew each other before the alleged assault occurred. Sexual offence trials are characterised by an unavoidably distinctive dynamic which makes cross-examination in person by an unrepresented accused particularly inappropriate.⁴²

4.29 The Commission accepts that cross-examination may also be very distressing for other witnesses who are questioned by the accused in person, for example in proceedings for domestic violence offences. However, any consideration of the extension of the prohibition in Recommendation 1 is beyond the terms of this reference and requires further analysis and consultation. That analysis would have to take account of the consideration that accused persons are generally entitled to conduct their own defence and that prohibiting cross-examination by an unrepresented accused in any category of case is exceptional and requires distinct justification. It would

39. See para 2.15-2.28.

40. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 3.

41. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2.

42. See Chapter 2.

also need to examine the likelihood that a broad, discretionary prohibition – for example, one applicable to “vulnerable witnesses” generally – may be applied inconsistently.

PROCEEDINGS COVERED BY THE PROHIBITION

Which offences?

4.30 Section 3 of the *Criminal Procedure Act 1986* (NSW)⁴³ defines “prescribed sexual offence” as:

- (a) an offence under section 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66F or 80A of the *Crimes Act 1900*, or
- (b) an offence that includes the commission, or an intention to commit, an offence referred to in paragraph (a), or
- (c) an offence that, at the time it was committed, was a prescribed sexual offence for the purposes of this Act or the *Crimes Act 1900*, or
- (d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c).

4.31 The Commission is of the view that cross-examination of complainants by an unrepresented accused should be prohibited in proceedings for a “prescribed sexual offence”, as defined by section 3 of the *Criminal Procedure Act 1986* (NSW). This would cover any criminal proceedings in which the accused is charged with:

- sexual assault (s 61I)
- aggravated sexual assault (61J)
- aggravated sexual assault in company (61JA)
- assault with intent to have sexual intercourse (61K)
- indecent assault (61L)
- aggravated indecent assault (61M)
- act of indecency (61N)
- aggravated act of indecency (61O)

43. As amended by the *Crimes Amendment (Sexual Offences) Act 2003* (NSW), which received Assent on 5 June 2003. Amendments effected by the new Act that are relevant to this Report include the repeal of s 78K and s 78L of the *Crimes Act 1900* (NSW) by s 3 and Sch 1, cl 18; and the repeal of the reference in s 3(a) of the *Criminal Procedure Act 1986* (NSW) to s 78H, 78I, 78K, 78L of the *Crimes Act 1900* (NSW) by s 4 and Sch 2, cl 2.1(1) of the new Act. The former s 78H and 78I, which related to the offences of homosexual intercourse with a male under 10 and attempt, or assault with intent thereof, were repealed by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) s 3 and Sch 2, cl 3.

- sexual intercourse procured by intimidation, coercion and other non-violent threats (65A)
- sexual intercourse with a child under 10 (66A)
- attempting, or assaulting with intent, to have sexual intercourse with a child under 10 (66B)
- sexual intercourse with a child between 10 and 16 (66C)⁴⁴
- attempting, or assaulting with intent, to have sexual intercourse with a child between 10 and 16 (66D)
- sexual intercourse with a person with an intellectual disability (66F)
- sexual assault by forced self-manipulation (80A)

4.32 The prohibition would also cover an offence of attempting, or of conspiracy or incitement, to commit any of the above offences, and would also cover an offence that, at the time it was committed, was a prescribed sexual offence for the purpose of the *Criminal Procedure Act 1986* (NSW) or the *Crimes Act 1900* (NSW).

RECOMMENDATION 2

“Sexual offence proceeding” should refer to a prescribed sexual offence as defined in section 3 of the *Criminal Procedure Act 1986* (NSW).

Sexual offence proceedings involving children

4.33 Some of the offences listed in Recommendation 2 deal with child sexual offences.⁴⁵ Although accused persons are already prohibited from cross-examining child witnesses in person, this only applies in relation to evidence given by a child who is under the age of 16 years at the time the evidence is given.⁴⁶ The Commission intends that the recommendations in this Report should apply in all proceedings involving child sexual offences. An important difference between the recommendations in this Report and the regime currently in place for child complainants⁴⁷ is that our recommendations require (with no discretion in the court) that the person appointed by the court for the purpose of cross-examination be a legal practitioner⁴⁸ and that

44. As amended by s 3 and Sch 1, cl 9 of the *Crimes Amendment (Sexual Offences) Act 2003* (NSW). Upon the repeal of s 78K and s 78L of the *Crimes Act 1900* (NSW) by s 4 and Sch 2 cl 2.1(1) of the *Crimes Amendment (Sexual Offences) Act 2003* (NSW), the age of consent of for both males and females is 16.

45. Offences under s 66A, 66B, 66C, 66D of the *Crimes Act 1900* (NSW).

46. *Evidence (Children) Act 1997* (NSW) s 6.

47. See para 2.18.

48. See Recommendation 4.

the normal client-practitioner relationship should apply in this situation.⁴⁹ To avoid the application of the maxim that the general does not detract from the particular,⁵⁰ and generally to avoid doubt, the Commission recommends that the legislative implementation of the recommendations in this Report should make it clear that they apply to sexual offences involving children.

RECOMMENDATION 3

Notwithstanding section 28 of the *Evidence (Children) Act 1997* (NSW), the recommendations in this Report should be applied in all sexual offence proceedings involving children.

Which stages of the criminal process?

4.34 The Commission is of the view that cross-examination of complainants by an unrepresented accused should be prohibited at all stages of the criminal process, that is, at committal hearings, at trial and on appeal.⁵¹ The Commission can see no reason for the prohibition contained in Recommendation 1 of this Report to be confined to any particular stage of the criminal process. Complainants should be protected from unnecessary distress at all stages of the criminal process.

49. See Recommendation 7.

50. *Generalia specialibus non derogant*: see F Bennion, *Statutory interpretation: a code* (4th edition, Butterworths, London, 2002) at 255-256.

51. See paras 3.2-3.8.

5. Procedure

- **Testing the complainant's evidence**
- **The role of the legal practitioner**
- **Impact of the recommendations**

5.1 This chapter makes recommendations concerning the procedure to be followed where an unrepresented accused is prevented from cross-examining a complainant in person.

TESTING THE COMPLAINANT'S EVIDENCE

Must the evidence be tested?

5.2 If an accused is prevented from cross-examining a complainant in person, either the court must arrange an alternative means of questioning the complainant, or that person's evidence simply remains untested.

5.3 It is, of course, axiomatic that the accused must always be given an opportunity to test the complainant's evidence, a proposition overwhelmingly supported in submissions to the Commission. It is generally considered inappropriate to require the trial judge to decide on a case by case basis whether or not it is necessary in the interests of justice that the evidence be tested. Providing an alternative means of questioning the witness is thus considered essential to ensuring a fair trial and reducing the likelihood of an appeal.¹

Who should ask the questions?

5.4 The questions could be asked by:

- a legal practitioner;
- the trial judge; or
- a neutral intermediary.

A legal practitioner

5.5 Submissions expressed a range of views as to whether the person asking the questions on behalf of the accused should be a legal practitioner.

5.6 Some submissions argued that it is not necessary for the person asking the questions to be a legal practitioner.² The accused has, for whatever

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1. NSW Legal Aid Commission, *Submission* at 4-5; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 3-4; NSW Public Defenders (P Zahra and C Loukas), *Submission* at 3; Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 6; Women's Legal Resources Centre, *Submission* at 3; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 3.
 2. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 4; NSW Department for Women, *Submission* at 6; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 7; Illawarra Area Health Service, *Submission* at 2; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; NSW Attorney General's

reason, already decided against legal representation.³ The court could appoint a person to ask questions on behalf of the accused, who would not give legal advice or influence cross-examination in any way. This would mirror the provisions of the *Evidence (Children) Act 1997* (NSW).⁴

5.7 Other submissions argued that there are good reasons why the person asking the questions should be a legal practitioner.⁵ A legal practitioner has a professional duty both to the court, and to the client.⁶ As well as possessing the necessary skills that a layperson is very unlikely to have, a legal practitioner would bring knowledge of the rules against improper questioning contained in the *Evidence Act 1995* (NSW) and the rules of evidence, including those excluding evidence of sexual experience contained in the *Criminal Procedure Act 1986* (NSW).⁷ The provision of a legal practitioner would be consistent with the legislation prohibiting cross-examination in person by an unrepresented accused in Queensland,⁸ England,⁹ Scotland¹⁰ and Canada.¹¹

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- Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*; D Purcell, *Submission* at 4.
3. NSW Department for Women, *Submission* at 6.
 4. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 4; NSW Department for Women, *Submission* at 6.
 5. NSW Legal Aid Commission, *Submission* at 5; Law Society of NSW, *Submission* at 2; Law and Justice Foundation of NSW, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 3; J Tippet, *Submission* at 1; Westmead Sexual Assault Service, *Submission* at 4; Macquarie Area Health Service, *Submission* at 2; Central Coast Health, *Submission* at 2. NSW Public Defenders (P Zahra and C Loukas) argued that it is inappropriate to force legal representation upon accused persons but, if an accused person is to be prohibited from cross-examining a complainant in person, the person appointed to question the complainant must be a legal practitioner: *Submission* at 3.
 6. See NSW Bar Association, *The New South Wales Barristers' Rules*, Preamble and Rules 16, 17, 17A, 17B (made under s 57A of the *Legal Profession Act 1987* (NSW), consolidated April 2001 by gazettal in the *NSW Government Gazette*, No 67 (12 April 2001) at 1880). Also see, Law Society of NSW, *The Revised Professional Conduct and Practice Rules 1995* r 1-16 (duty to client), r 17-24 (duty to court) (made pursuant to s 57B of the *Legal Profession Act 1987* (NSW)).
 7. NSW Legal Aid Commission, *Submission* at 5; Law and Justice Foundation of NSW, *Submission* at 2; Macquarie Area Health Service, *Submission* at 2.
 8. See para 2.20.
 9. See para 2.24.
 10. See para 2.28.
 11. In Canada, a person charged with a sexual offence or offence of violence cannot cross-examine a child witness in person, unless, in the opinion of the court, the proper administration of justice requires it. Where the accused is prohibited from conducting the cross-examination in person, the court appoints counsel for the purpose of cross-examination: *Criminal Code*, RS 1985, s 486 (2.3). Note that the prohibition applies with respect to child witnesses only.

5.8 Arguably, an experienced criminal advocate is in the best position to protect the interests of the accused as well as the public interest in ensuring that the evidence is appropriately tested.¹² If cross-examination was to be conducted by someone other than a legal practitioner, the complainant's evidence is unlikely to be tested effectively.¹³

5.9 Having a legal practitioner question the complainant is, of course, consistent with the general practice of parties to both criminal and civil proceedings being represented by counsel. The desirability of this general practice, as opposed to self-representation or representation by a person who is not a legal practitioner, cannot be gainsaid.¹⁴ Put simply, the complicated and sometimes obscure rules of criminal law, evidence and procedure, are best handled by experts in the area.¹⁵ Further, an unrepresented accused will usually be unable dispassionately to assess and present his or her case in the same manner as a legal practitioner, especially in cross-examination and in an address to the jury.¹⁶ Identifying relevant facts and marshalling them in a sensible and useful fashion is often difficult to do even for the experienced legal practitioner. It is obviously very difficult for the layperson, especially where the facts are not simple; and simple cases are rare.

5.10 The almost inevitable imbalance in the quality of the case presented by an unrepresented accused and the Crown means that it is generally in the best interests of the administration of justice that an accused be represented. In *Dietrich v The Queen*, Justice Brennan said that: “[i]t cannot be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel”.¹⁷ And Justice Dawson said: “if trials were to move closer to the attainment of perfect justice, every accused would be represented by competent counsel”.¹⁸

12. Law and Justice Foundation of NSW, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 3.

13. NSW Legal Aid Commission, *Submission* at 5; Law Society of NSW, *Submission* at 3.

14. Especially *Dietrich v The Queen* (1992) 177 CLR 292 at 302 (Mason CJ and McHugh J), 334 (Deane J), 344 (Dawson J, dissenting), 353-354 (Toohey J), 372-373 (Gaudron J). See also A M Gleeson, “Current issues for the Australian judiciary”, speech given to the Supreme Court of Japan (Tokyo, 17 January 2000), available at «http://www.hcourt.gov.au/speeches/cj/cj_Japanj.htm».

15. Especially *McInnes v The Queen* (1979) 143 CLR 575 at 590 (Murphy J); *Dietrich v The Queen* at 302 (Mason CJ and McHugh J).

16. *McInnes v The Queen* at 590 (Murphy J).

17. *Dietrich v The Queen* at 316 (dissenting).

18. *Dietrich v The Queen* at 345 (dissenting).

The trial judge

5.11 In several jurisdictions, the questions are put to the complainant by the trial judge.¹⁹ Submissions to the Commission were overwhelmingly of the view that the questions should not be asked by the trial judge.²⁰ Judges who ask questions on behalf of an accused run the risk of compromising their neutrality;²¹ indeed, they may be perceived as being biased.²² The judge would have no factual foundation for asking questions, and it is inappropriate for a judge to adopt such a role.²³ The Queensland Law Reform Commission,²⁴ the English Home Office²⁵ and the Scottish Executive²⁶ have expressed similar views.

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19. In the Northern Territory, the unrepresented party puts the question to the judge or other approved person, who then repeats the question accurately to the complainant: *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1). Western Australia adopts the same model for the cross-examination of child witnesses: *Evidence Act 1906* (WA) s 106G. Under the model recommended by the New Zealand Law Commission, unrepresented defendants who are prevented from cross-examining a witness in person would have their questions put to the witness by the judge, or a person appointed by the judge for the purpose: *Evidence Code and Commentary* (NZ?) s 95(5). This is the model currently in place in New Zealand for the questioning of child witnesses by an unrepresented accused: *Evidence Act 1908* (NZ) s 23F.
 20. NSW Legal Aid Commission, *Submission* at 7; Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 7; Women's Legal Resources Centre, *Submission* at 3; J Tippet, *Submission* at 1; Illawarra Area Health Service, *Submission* at 3; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 3; D Purcell, *Submission* at 4. The NSW Attorney General's Department Violence Against Women Specialist Unit submitted that the judge should ask the questions only where a more appropriate third party is not available: *Submission* at 8.
 21. NSW Department for Women, *Submission* at 7; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 8; Women's Legal Resources Centre, *Submission* at 3, Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; Illawarra Area Health Service, *Submission* at 3.
 22. Law and Justice Foundation of NSW, *Submission* at 2.
 23. NSW Legal Aid Commission, *Submission* at 7.
 24. Queensland Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children* (Report 55, 2000) at 291-292.
 25. United Kingdom Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (Home Office, 1998) at para 9.50.
 26. Scottish Executive, *Redressing the balance: cross-examination in rape and sexual offence trials: a pre-legislative consultation document* (Scottish Executive, 2000) at para 52.

5.12 It is the fundamental role of a judge to ensure the propriety and fairness of the trial and to instruct the jury in the relevant law.²⁷ As a general rule, this means that it is for the parties to question witnesses, the judge asking questions only to remove apparent ambiguities.²⁸ Recent decades have seen an increase in judicial intervention in criminal trials. One factor contributing to this is the increasing number of unrepresented defendants.²⁹ In *MacPherson v The Queen*, the High Court held that a trial judge has a positive duty to “give an unrepresented accused such information as is necessary to enable him to have a fair trial”.³⁰ However, this does not extend to an obligation to advise accused persons how to exercise their rights. In *Dietrich v The Queen*, the High Court stressed that it is no part of the function of the trial judge to advise an accused about possible defences or about the possible consequences of cross-examination, nor to advise on the conduct of the case for the defence at trial.³¹ As Chief Justice Mason and Justice McHugh said:

[The proposition that] in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a ‘helping hand’ to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems.³²

A neutral intermediary

5.13 A neutral intermediary could ask the questions. This is what currently happens with child witnesses. The *Evidence (Children) Act 1997* (NSW) requires that, subject to the interests of justice,³³ a child witness be cross-examined by a person appointed by the court instead of by an unrepresented accused.³⁴ The intermediary is to ask the child only the questions that the accused requests the intermediary to put to the child,³⁵ and must not give the

27. *Ratten v The Queen* (1974) 131 CLR 510 at 517 (Barwick CJ). See also *Jones v National Coal Board* [1957] 2 QB 55; *Yuill v Yuill* [1945] 1 All ER 193.

28. *R v Damic* [1982] 2 NSWLR 750 at 762-763 (Street CJ); *Galea v Galea* (1990) 19 NSWLR 263 at 280-282 (Kirby ACJ).

29. See D Ipp, “Judicial intervention in the trial process” (1995) 69 *Australian Law Journal* 365.

30. *MacPherson v The Queen* (1981) 147 CLR 512 at 524 (Gibbs CJ and Wilson J). See also *R v Gidley* [1984] 3 NSWLR 168 at 180-181 (Hunt J).

31. *Dietrich v The Queen* (1992) 177 CLR 292 at 302 (Mason CJ and McHugh J), 335 (Deane J), 354 (Toohey J).

32. *Dietrich v The Queen* at 302 (Mason CJ and McHugh J).

33. *Evidence (Children) Act 1997* (NSW) s 28(4).

34. *Evidence (Children) Act 1997* (NSW) s 28(2).

35. *Evidence (Children) Act 1997* (NSW) s 28(3).

accused legal or other advice.³⁶ The intermediary is a mere mouthpiece and is not to influence the course of cross-examination in any way.³⁷

5.14 Some submissions supported the appointment of a neutral intermediary to question adult complainants on behalf of unrepresented accused. Suggestions of neutral intermediaries included the judicial officer's assistant or associate; a person employed by the Attorney General's Department; a friend of the court; or a specially trained court officer. It was generally acknowledged that it would be inappropriate to allow certain people, for example friends or relatives of the accused, to ask the questions.³⁸

5.15 Other submissions opposed the appointment of a neutral intermediary.³⁹ Even where the intermediary is a mere mouthpiece for the accused rather than an advocate, the accused may be seriously disadvantaged as the procedure is quite artificial. Effective cross-examination requires responsive questioning, the line of questioning being moulded to the witness' previous answers. Having to rely on a prepared list of questions means that the necessary flexibility is lost and the accused's right to confront the prosecution witness compromised.⁴⁰ Moreover, the dynamics of cross-examination are impeded where a third person relays the questions to the witness. The process is stilted and the impact of the evidence is altered. Where each question is asked first by the accused and then repeated by the intermediary, the complainant would have time to deliberate before answering the questions. The element of surprise may be destroyed, making it more difficult to assess the veracity of the complainant's testimony.⁴¹

5.16 The Legal Aid Commission argued that, if the person asking the questions is not legally trained, and simply acts as a mouthpiece for the accused, the witness might not be adequately shielded from inappropriate

36. *Evidence (Children) Act 1997* (NSW) s 28(3A).

37. *Evidence (Children) Act 1997* (NSW) s 28. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 11 December 2001, the Hon J Hatzistergos, Second Reading Speech, at 19903.

38. NSW Legal Aid Commission, *Submission* at 7; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 4; Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 7; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 7; Women's Legal Resources Centre, *Submission* at 3; Illawarra Area Health Service, *Submission* at 3; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 3, NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*; D Purcell, *Submission* at 5.

39. NSW Legal Aid Commission, *Submission* at 6; Law Society of NSW, *Submission* at 2.

40. Queensland Law Reform Commission, *The receipt of evidence by Queensland courts: the evidence of children* (Report 55, 2000) at 292.

41. J Tippet, *Submission* at 1.

questioning. There is nothing to stop the accused from putting offensive or intimidating questions to the complainant through the intermediary.⁴² The New South Wales Law Society was critical of the procedures adopted for child witnesses, which “merely separate the child by one degree from direct questioning by the accused”,⁴³ arguing that the provisions do little to minimise the witness’ trauma. In contrast, retaining a legal practitioner creates a desirable level of distance between the complainant and the accused.⁴⁴

5.17 The New South Wales Court of Appeal has recently pointed to the undesirability of lay advocates presenting cases on behalf of persons who are not legally represented. In *Damjanovic v Maley*,⁴⁵ a lay advocate was refused leave to appear on behalf of the appellant. The appellant had indicated that he could afford legal representation, but did not trust lawyers. He did not wish to be self-represented because of his poor command of English. The court stated that, as a general rule, the public interest in the effective, efficient and expeditious disposal of litigation in the courts requires the representation of parties by qualified lawyers.⁴⁶ It pointed out that advocacy is a difficult skill to acquire without qualifications, training and practice.⁴⁷ Lay advocates are unqualified, unaccredited and uninsured, and place the client at a distinct disadvantage. Further, in the absence of a disciplinary code and duty to the court, it is generally inappropriate to permit unqualified people to appear before the court.⁴⁸ The Commission also points out that it is essential that the person putting the questions be able to advise the accused about the nature of the questions to be asked; the line of questioning; the issues as legally defined at trial; the admissibility of evidence; and the duty of practitioners to the court.

The Commission’s view

5.18 The accused must be permitted to test the evidence if he or she wishes to challenge it in some way. A restriction on the accused’s ability to cross-examine a complainant in person is only acceptable where the complainant’s evidence may be effectively tested in some other way.

5.19 The Commission is of the view that a legal practitioner should cross-examine the complainant. This is not only in the interests of the accused, but also of the administration of justice, particularly since sexual offences are such serious charges. A legal practitioner brings the necessary skills, knowledge and experience to enable the complainant’s evidence to be tested

42. NSW Legal Aid Commission, *Submission* at 5.

43. Law Society of NSW, *Submission* at 4.

44. Law and Justice Foundation of NSW, *Submission* at 2.

45. *Damjanovic v Maley* [2002] NSWCA 230.

46. *Damjanovic v Maley* at para 83 (Stein JA, Mason P and Sheller JA agreeing).

47. *Damjanovic v Maley* at para 86 (Stein JA, Mason P and Sheller JA agreeing).

48. *Damjanovic v Maley* at para 77-78 (Stein JA, Mason P and Sheller JA agreeing).

effectively. He or she is also bound by the rules of professional probity. The legal practitioner will be able to raise issues such as consent or belief in consent in cross-examination in a way that is most fair to the witness. Attacks on the complainant's credibility will be professional. The cross-examination will reduce the likelihood of the accused subsequently raising in address matters not raised in evidence.⁴⁹

5.20 The appointment of a legal representative for the purposes of cross-examination only impacts in the least intrusive way on current practices in order to prevent abuse and harassment. Although it involves imposing counsel on the accused, the view of the Commission is that the benefit to complainants, and to the administration of justice generally, outweighs any potential disadvantage to the accused.

5.21 It is inappropriate for questions to be directed through the trial judge. This will compromise the judge's neutrality and create a perception of bias. An adequate cross-examination by the judge is, in any event, wellnigh impossible. Appointing a neutral intermediary to ask the questions on behalf of the accused is undesirable, whether the person acts as an advocate or mere mouthpiece for the accused. Just as with the judge, the intermediary will not have any factual foundation for the questioning, and the effectiveness of the process will be seriously compromised by inexperience. Moreover, such cross-examination will be perceived as significantly unfair to the accused; it will make it more difficult for juries to be confident about their assessment of a complainant's credibility; and it is too great a distortion of the trial process. It also highlights the situation of the complainant and renders him or her an obviously special class of witness.

RECOMMENDATION 4

A legal practitioner must cross-examine the complainant in sexual offence proceedings where the accused is unrepresented.

THE ROLE OF THE LEGAL PRACTITIONER

Where the accused arranges legal representation

5.22 Accused persons who are prohibited from questioning complainants in person should be encouraged to arrange their own legal representation, either through the Legal Aid Commission or by retaining a lawyer of their choice.⁵⁰

49. See para 5.44-5.54.

50. NSW Legal Aid Commission, *Submission* at 5; Law Society of NSW, *Submission* at 3.

5.23 In Scotland, accused persons are formally encouraged to arrange their own representation prior to the trial. Upon arrest, a person charged with a sexual offence is warned that legal representation will be necessary at the trial, that it is in the accused's interest to seek the assistance of a legal practitioner, and that unless the accused arranges representation, the court will appoint a legal representative. This warning is given at other occasions in the process. If an accused is in custody, the warning is given on the first occasion that the accused appears in court. If the accused has not been remanded in custody, the warning is included in the other papers served on the accused with the indictment.⁵¹ This aims to maximise the opportunity for accused persons to arrange their own representation.⁵²

5.24 The Commission considers that this procedure should be adopted in New South Wales. Accused persons should be warned that they will not be allowed to cross-examine complainants in person, so they should arrange for legal representation, either privately or through legal aid. The Commission believes that if the prohibition is made sufficiently clear to accused persons at an early stage in the proceedings, most will arrange for legal representation in the conventional way. This is especially true if the accused only wants to be self-represented in order to intimidate or overbear the complainant in court, in the hope of obtaining an acquittal.

5.25 In practice, the Commission expects that a legal practitioner will ordinarily be retained for the duration of the trial. However, if an accused genuinely wishes to run the defence case in person, representation should be confined to cross-examination of the complainant. This would pose no particular problem. Although it is uncommon, counsel are retained from time to time to test particular evidence or to cross-examine particular witnesses.⁵³

RECOMMENDATION 5

The accused must be advised, at the earliest possible time after arrest and no later than the commencement of proceedings, that legal representation is necessary in sexual offence proceedings if he or she wishes the complainant to be cross-examined. The accused must be invited to make arrangements for representation and be given the opportunity to do so.

51. Scottish Executive, *Redressing the balance: cross-examination in rape and sexual offence trials: a pre-legislative consultation document* (Scottish Executive, 2000) at para 59-63.

52. Scottish Executive, *Redressing the balance: cross-examination in rape and sexual offence trials: a pre-legislative consultation document* (Scottish Executive, 2000) at para 67.

53. See para 5.29-5.30.

Where the accused is unwilling to provide legal representation

5.26 There is no right to be provided with legal assistance at public expense.⁵⁴ A person charged with a sexual offence may apply for legal aid, but grants are means tested, and may be refused.⁵⁵ If an accused is prohibited from cross-examining a complainant in person and is not eligible for legal aid, he or she must pay for private counsel or forego the opportunity to have the complainant cross-examined. The Commission is of the view that, to ensure testing of the complainant's evidence, the court should appoint a legal representative who, at public expense, will cross-examine the complainant. This situation will arise very rarely, as persons charged with a sexual offence are seldom refused legal aid.⁵⁶

5.27 The Commission's recommendation mirrors similar regimes in Queensland⁵⁷ and England.⁵⁸

Scope of appointment

5.28 The Commission's proposal is that where an accused cannot arrange his own representation but wishes the complainant to be cross-examined, the court should appoint a lawyer solely for the purpose of cross-examining the complainant.⁵⁹ The purpose of the court-appointed legal practitioner would be to prevent the accused from questioning the witness in person, not to provide general legal advice or conduct the defence case. The practitioner would, however, be able to advise the accused about the nature of the questions that should be put; the line of questioning in cross-examination; the issues as legally defined at trial so far as they affect that cross examination; the admissibility of evidence; and the duty of the practitioner to the court.

5.29 Some submissions received by the Commission question the suitability of such a recommendation. The Law Society argued that injecting a lawyer into a potentially lengthy trial specifically for the purpose of cross-examination of the primary witness is undesirable, and that if an accused is not allowed to question a complainant in person, he or she should be legally represented for the duration of the trial.⁶⁰ Effective cross-examination requires a broad understanding of the issues raised by all the evidence at trial, not just the evidence of the complainant. It may be unrealistic to expect legal representatives to conduct cross-examination effectively where they

54. *Dietrich v The Queen* (1992) 177 CLR 292.

55. See para 1.14-1.16.

56. See para 1.16.

57. *Evidence Act 1977* (Qld) s 21O, 21P.

58. *Youth and Criminal Evidence Act 1999* (Eng) s 34.

59. NSW Legal Aid Commission, *Submission* at 6; Law and Justice Foundation of NSW, *Submission* at 2; Women's Legal Resources Centre, *Submission* at 3; Illawarra Area Health Service, *Submission* at 3; Central Coast Health, *Submission* at 3.

60. Law Society of NSW, *Submission* at 4.

have only limited participation in the trial. Limited participation means that the lawyer may not be able effectively to build upon, or repair damage already done to the case by, the complainant's testimony; alternatively, it may mean that the accused lacks the skill to build upon the case for which the lawyer may have laid a foundation in cross-examination.⁶¹ By contrast, appointing counsel for the duration of the trial would enable the legal representative to exercise his or her judgment as to how the defence case should be presented, without being restricted by the accused's line of argument. It would also minimise any adverse impression on the jury, as the trial would follow the usual trial procedure.⁶²

5.30 After careful consideration, the Commission has rejected the suggestion that counsel should be appointed to conduct the entire trial for the following reasons:

- First, appointing counsel to conduct the entire trial would be a greater invasion of the accused's right to self-representation than is strictly necessary. On general principles, the accused would be bound by the way in which the appointed legal representative conducts the trial.⁶³ The solution would go further than is required to achieve the objective of protecting the complainant from undue distress.⁶⁴
- Secondly, the experience of some members of the Commission is that, where counsel has been briefed to conduct only part of a case, this has generally worked satisfactorily; it is certainly not inherently unfair.
- Thirdly, that experience is supported by evidence from Queensland, where unrepresented accused are prohibited from cross-examining complainants in sexual offence proceedings and counsel is imposed for the purpose of cross-examination only.⁶⁵ The matter is brought on for mention prior to the trial and counsel funded by legal aid is organised to appear for the

61. See Scottish Executive, *Redressing the balance: cross-examination in rape and sexual offence trials: a pre-legislative consultation document* (Scottish Executive, 2000) at para 39. In Scotland, where an accused is prohibited from questioning a complainant in person, the court appoints a legal representative for the duration of the trial. The Scottish Executive was of the view that significant procedural differences in the way in which trials are conducted in Scotland (as compared with England) make the appointment of a legal representative for the purpose of cross-examination only less suitable in the Scottish context: see para 34.

62. Scottish Executive, *Redressing the balance: cross-examination in rape and sexual offence trials: a pre-legislative consultation document* (Scottish Executive, 2000) at para 46.

63. *R v Birks* (1990) 19 NSWLR 677 at 683, 685 (Gleeson CJ). See also *R v Lawson* [2000] NSWCCA 214; *R v Ignjatic* (1993) 68 A Crim R 333; *Hunter v The Queen* [1999] NSWCCA 5; *R v Sandford* (1994) 72 A Crim R 160.

64. See Scottish Parliament Information Centre, *Sexual Offences (Procedure and Evidence) (Scotland) Bill* (Research Paper 01/10, 2001) at 9.

65. *Evidence Act 1977* (Qld) s 21O, 21P.

purpose of cross-examining the protected witness. The Queensland Office of the Director of Public Prosecutions has informed the Commission that, in its opinion, the procedure works well in practice.⁶⁶

- Fourthly, and in any event, once faced with the compulsory appointment of counsel, the overwhelming likelihood is that the accused would seek representation for the entire trial.

Funding court-appointed representatives

5.31 The Commission is of the view that an accused who is prohibited by law from questioning a witness should not have to bear the burden of paying the costs of a court-appointed representative. If that were the case, the accused would be forced not only to accept legal representation against his or her wishes, but to pay for it as well. Otherwise, the accused would have to forego the opportunity to have the complainant cross-examined. Submissions addressing this issue generally argued that legal aid should automatically be available for an accused prohibited from questioning a complainant in person.⁶⁷ This is the policy in Queensland⁶⁸ and in Scotland.⁶⁹

5.32 On the other hand, if legal aid were automatically available, there is arguably less incentive for accused persons to arrange their own legal representation. Some submissions raised the concern that making legal aid available for all unrepresented accused in sexual offence trials would undermine the stringent means test used for assessing grants of legal aid: “It would soon become known that if a person is refused legal aid for defending [a sexual offence charge], they should then opt to self-represent because this would trigger an automatic grant of legal aid”.⁷⁰ It would place an unreasonable burden on the Legal Aid Commission to require funding for accused persons who would otherwise be ineligible for legal aid.⁷¹ However, given the relatively few unrepresented accused in sexual offence trials, the costs of providing representation to those who would not otherwise be eligible for legal aid would not be significant. Moreover, legal aid (where the accused was not otherwise qualified to obtain a grant) would only be granted for cross-examination of the complainant.

66. Information supplied by L Logan, Qld Department of Justice (23 May 2002).

67. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 3; Law Society of NSW, *Submission* at 5; Illawarra Area Health Service, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 3.

68. *Evidence Act 1977* (Qld) s 21O, 21P.

69. See *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002*.

70. Women’s Legal Resources Centre, *Submission* at 3. The Law and Justice Foundation of NSW made a similar point: see *Submission* at 2.

71. See NSW Legal Aid Commission, *Submission* at 6.

RECOMMENDATION 6

Where the accused is unwilling to make arrangements for representation because legal aid is unavailable in the circumstances, the court must direct the Legal Aid Commission to provide the accused with legal assistance for the purpose of cross-examining the complainant only.

The client-practitioner relationship

5.33 A legal practitioner has a positive duty to act in a client's best interests in accordance with the law.⁷² The lawyer presents the case in the best interests of the client in accordance with, and after consideration of, the client's instructions and those of the instructing solicitor (if any). However, the lawyer is not the mouthpiece of the client or the instructing solicitor.⁷³ The client is bound by the conduct of the practitioner, including the forensic judgments that he or she makes in the presentation of the case. An accused has no right of appeal merely because an advocate acts differently from or even contrary to the instructions of the accused, especially in relation to the method adopted by the advocate to advance the client's case. Appellate intervention is only warranted if there has been a miscarriage of justice.⁷⁴

5.34 Where an accused is prevented from cross-examining a complainant in person and the court appoints a lawyer because the accused is ineligible for legal aid and has decided not to retain a private lawyer, the ordinary client-practitioner relationship is displaced given that the practitioner is neither appointed nor retained by the client. Submissions demonstrated a lack of consensus on the role of court-appointed legal representatives in these circumstances and highlighted a lack of clarity in the ethical obligations of a court-appointed legal practitioner.⁷⁵ Submissions voiced two main concerns.

5.35 First, there is the question of whether or not it is appropriate to apply the ethics and duties of the ordinary client-practitioner relationship where that relationship does not originate in a consensual arrangement between the client and the practitioner. The Commission sees no reason in principle

72. NSW Bar Association, *The New South Wales Barristers' Rules*, Advocacy Rule 16, (made under s 57A of the *Legal Profession Act 1987* (NSW), consolidated April 2001 by gazettal in the *NSW Government Gazette*, No 67 (12 April 2001) at 1880).

73. NSW Bar Association, *The New South Wales Barristers' Rules*, Advocacy Rule 18, (made under s 57A of the *Legal Profession Act 1987* (NSW), consolidated April 2001 by gazettal in the *NSW Government Gazette*, No 67 (12 April 2001) at 1880).

74. *R v Birks* (1990) 19 NSWLR 677. See also *R v Lawson* [2000] NSWCCA 214; *R v Ignjatic* (1993) 68 A Crim R 333; *Hunter v The Queen* [1999] NSWCCA 5; *R v Sandford* (1994) 72 A Crim R 160.

75. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 2; NSW Legal Aid Commission, *Submission* at 6; Law Society of NSW, *Submission* at 4-5.

why the ordinary rules cannot apply. Indeed, the Commission points out that in an ordinary criminal trial, an accused who has been granted legal aid does not usually have a right to a lawyer of his or her choice. Rather, he or she is practically obliged to accept a Public Defender if one is assigned to his or her defence. Similarly, under the procedure recommended by the Commission, the accused is obliged to accept the lawyer appointed by the court, or otherwise forego the opportunity to have the complainant cross-examined.

5.36 Secondly, there is the question of whether it is practically possible to apply the ethics and duties of the ordinary client-practitioner relationship to a non-consensual arrangement. The Commission acknowledges that court-appointed legal representatives may have difficulty fulfilling the ordinary duty they owe to clients. There may be communication problems between the accused and the legal representative. The accused may be uncooperative, and may refuse to give instructions. Litigants can normally dismiss counsel if such problems arise, but an accused who is prevented from questioning the complainant in person would be required to retain the court-appointed representative for cross-examination to occur.

5.37 For this reason, some submissions argued that the representative should only put questions prepared by the accused to the complainant, and should give no further assistance or legal advice to the accused.⁷⁶ They argued that court-appointed representatives should not be instructed by the accused; nor should they be responsible to them.⁷⁷ This is the position in England.⁷⁸ This protects the immunity of court-appointed legal representatives, and recognises that in light of a barrister's professional duty to put the case on behalf of the client, there may be difficulties for counsel who conduct cross-examination only.⁷⁹

5.38 The Commission rejects the English approach. Rather, we agree with those submissions that have argued that the terms of engagement should be, as far as possible, those governing the ordinary lawyer-client relationship, thereby preserving (as far as possible) the practitioner's legal, professional and ethical obligations to both the client and to the court.⁸⁰ In our view, the court-

76. Women's Legal Resources Centre, *Submission* at 3.

77. The NSW Legal Aid Commission submitted that court-appointed practitioners should not be instructed by accused persons, nor be responsible to them, but that they should still, so far as possible, be required to act in the best interests of the accused: *Submission* at 6.

78. *Youth Justice and Criminal Evidence Act 1999* (UK) s 38.

79. United Kingdom, Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (Home Office, 1998) at para 9.45.

80. Law Society of NSW, *Submission* at 3. The Public Defenders submitted that any "halfway position where a lawyer appears in anything less than an advocate's proper role, with professional discretion to frame questions as he or she deems

appointed legal representative should, in the first instance, take instructions from, and (as far as possible) be responsible to, the accused. This would place the court-appointed legal representatives in the best position to fulfil their obligations both to the client and to the court. Where the accused gives no instructions, or inadequate or perverse instructions, the court-appointed representative should simply strive to act in the best interests of the accused,⁸¹ as he or she would if there were a conventional retainer. The advocate is never at liberty to invent a defence case and is bound by instructions as to facts. Some testing of the evidence can be undertaken in the absence of instructions about events⁸² but if the accused declines to give such instructions, the possibly inadequate cross-examination is the result of the accused's decision. This is not unfair. In all other respects, the court-appointed representative should have the same obligations and authority as if engaged by the accused.⁸³

RECOMMENDATION 7

The court-appointed legal representative has the same obligations and authority as if he or she were engaged by the accused. In particular, the legal representative has a duty to ascertain, advise concerning and act upon the accused's instructions. Where the accused gives no instructions, or where the instructions given are inadequate or perverse, the duty of the legal representative is to act in the best interests of the accused in the same way as if there were a conventional retainer.

IMPACT OF THE RECOMMENDATIONS

5.39 The above recommendations are capable of impacting on:

- The fairness of the trial where the accused refuses to accept legal representation;
- The rule in *Browne v Dunn*;⁸⁴ and
- The jury's perception of the case.

fit, consistent with instructions and advocate's rules of conduct", would be impractical: NSW Public Defenders (P Zahra and C Loukas), *Submission* at 4.

81. Consider *Criminal Procedure (Scotland) Act 1995* s 288D(4).

82. This may occur where, for example, the accused has lost his or her memory of relevant events or some aspects of them.

83. Consider *Criminal Procedure (Scotland) Act 1995* s 288D(5). There is, perhaps, a real danger that a court-appointed lawyer will fail to act in the best interests of the accused as did the lawyer in *Tuckiar v The King* (1934) 52 CLR 335 who was severely criticised in the High Court for his grave misconduct.

84. *Browne v Dunn* (1894) 6 R 67.

The fairness of the trial

5.40 It is possible that an unrepresented accused who is prohibited from cross-examining a complainant in person will refuse to accept court-appointed legal representation, or refuse to give adequate or appropriate instructions. The consequence of such a refusal is that the accused would not be allowed to test, or test completely, the complainant's evidence.

5.41 The Commission is of the view that a trial in which an accused is prohibited from questioning a complainant in person, but refuses to take advantage of available legal representation will not be unfair.⁸⁵ There are two reasons for this.

5.42 First, in the leading case of *Dietrich v The Queen*,⁸⁶ the High Court established that a trial may be unfair where a person charged with a serious offence is unrepresented through no fault of his or her own. But, as Justices Dean⁸⁷ and Gaudron⁸⁸ pointed out (obiter), an accused who desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation that is available can hardly turn around and argue that the trial is unfair. Thus, "[t]here is nothing in *Dietrich* to suggest that an indigent accused can frustrate attempts to bring the accused to trial simply by rejecting offers of legal aid or other assistance".⁸⁹

5.43 Secondly, the prohibition on cross-examination of complainants by an unrepresented accused in a sexual offence trial will be imposed by statute. In *R v PJE*,⁹⁰ the Court of Criminal Appeal held that a trial cannot be stayed simply because of any unfairness arising from the operation of a constitutionally valid statutory provision prohibiting certain evidence from being given.

The rule in *Browne v Dunn*

What is the rule?

5.44 In *Browne v Dunn*,⁹¹ the House of Lords held that a party wishing to adduce evidence inconsistent with that given by a witness for the opposing party must give that witness an opportunity during cross-examination to comment on the contradictory evidence to be led. The rule has two distinct limbs. First, the cross-examining party must put to a witness as much of its case as concerns that witness. Secondly, where an allegation is to be made

85. A minority of the Commission considers, however, that there should not be a blanket prohibition on cross-examination but a determination on a case by case basis of whether such a prohibition is necessary: see para 3.73-3.76.

86. *Dietrich v The Queen* (1992) 177 CLR 292.

87. *Dietrich v The Queen* at 335-336 (Deane J).

88. *Dietrich v The Queen* at 365 (Gaudron J).

89. *Attorney General (NSW) v Milat* (1995) 37 NSWLR 370 at 374 (the Court).

90. *R v PJE* (NSWCCA, No 60216/95, 9 October 1995, unreported).

91. *Browne v Dunn* (1894) 6 R 67.

against the evidence adduced by the witness, or a discrepancy identified in it, that challenge must be put to the witness during cross-examination.

5.45 The central purpose of the rule in *Browne v Dunn* is “to secure fairness in the conduct of adversary proceedings”.⁹² The rule is necessary to give the witness an opportunity to deal with that other evidence (or the inferences to be drawn from it), and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.⁹³ The rule is essential to the adversarial process, as it ensures that contradictory bodies of evidence are brought into conflict rather than being allowed to “serenely pass one another by like two trains in the night”.⁹⁴

5.46 In criminal proceedings, the procedural fairness dictated by the rule operates in favour of the Crown.⁹⁵

Reconciling the recommendations with the rule

5.47 The operation of the rule in *Browne v Dunn* might mean that, where an accused is prohibited from cross-examining a complainant in person but refuses court-appointed representation, the accused would be prevented from adducing any evidence that is inconsistent with that given by the complainant. This might have serious implications for the fairness of the trial. Given that the accused and the complainant are often the only witnesses to the alleged offence, it is vital that the accused be given the opportunity to present his or her version of events. Denying the accused that opportunity would keep relevant evidence from the court and would frustrate the adversarial process.

5.48 The Commission is of the view that the recommendations in this report can be reconciled with the rule in *Browne v Dunn*. As Chief Justice Gleeson explained in *R v Birks*, there is a need for flexibility in the application of the rule:

The central purpose of the rule is to secure fairness in the conduct of adversary proceedings. That consideration provides the best guide, both to the practical requirements of the rule in a given case, and to the consequences which may properly flow from its non-observance, including the remedies that are available to deal with a problem so created.⁹⁶

92. *R v Birks* (1990) 19 NSWLR 677 at 688 (Gleeson CJ).

93. *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* (1983) 1 NSWLR 1 at 16 (Hunt J).

94. *Reid v Kerr* (1974) 9 SASR 367 at 374 (Wells J).

95. *Eastman v The Queen* (1997) 76 FCR 9 at 94 (von Doussa, O’Loughlin and Cooper JJ). See also *R v Hines* (1991) 24 NSWLR 737 at 743; *R v Howson* (1981) 74 Cr App R 172 at 179; *R v McHardie* [1983] 2 NSWLR 733 at 745; *R v Schneidas (No 2)* (1981) 4 A Crim R 101 at 110.

96. *R v Birks* (1990) 19 NSWLR 677 at 688 (Gleeson CJ).

5.49 The appropriate remedy for a breach of the rule is a discretionary matter for the judge, and often depends on the stage that the trial has reached.⁹⁷ Potential remedies include:⁹⁸

- allowing the contradictory evidence to be admitted so long as the witness whose evidence has been disputed is recalled;⁹⁹
- excluding the evidence adduced by the breaching party;¹⁰⁰
- limiting the use of the evidence to specific purposes;
- accepting the evidence, although drawing an adverse inference regarding its reliability in light of the breach;¹⁰¹
- preventing the party in breach of the rule from contradicting the witness' evidence in closing address; or
- commenting on the breach of the rule to the jury, something which is not uncommonly done by the Crown Prosecutor in address and the trial judge in summing-up.

5.50 In *R v Birks*,¹⁰² Chief Justice Gleeson observed that:

An accused at a criminal trial may be unrepresented, and it would ordinarily be quite inappropriate to expect such a person to be bound by, and suffer the consequence of a breach of, what was originally described in the House of Lords as “a rule of professional practice” ... It is quite common for an accused person at a criminal trial, whether represented or unrepresented, and whether in evidence or an unsworn statement, to come out with a version of the facts that has not been put to the Crown witnesses.

5.51 Chief Justice Gleeson recommended that, in cases where an accused is unrepresented, the trial judge should allow the accused to give contradictory

97. See G Roberts, “Browne v Dunn revisited” (1998) 72 *Law Institute Journal* 54 at 55.

98. See Australian Law Reform Commission, *Evidence* (Interim Report 26, 1985) at para 635.

99. As provided by the *Evidence Act 1995* (NSW) s 46.

100. This course was taken by the Full Court of the Federal Court in *Eastman v The Queen* (1997) 76 FCR 9 even though the accused was unrepresented. In NSW, the courts have seen fit to exclude evidence led in breach of the rule in civil cases: see *Ghazal v GIO* (1992) 29 NSWLR 336, but not in criminal cases: see *R v Zorad* (1990) 19 NSWLR 91. However, such a move has been suggested: see *R v Schneidas (No 2)* (1981) 4 A Crim R 101.

101. However, the court has previously warned against drawing adverse inference from a failure to cross-examine, as there may be other explanations for that omission: *R v Manunta* (1989) 54 SASR 17 at 23 (King CJ). Alternate explanations for the failure to cross-examine might include a misunderstanding by counsel of the witness' response, less than full cooperation by the witness and innocent oversight.

102. *R v Birks* (1990) 19 NSWLR 677 at 688 (Gleeson CJ). See also *McInnis v The Queen* (1979) 143 CLR 575.

evidence (which is otherwise admissible) and recall the earlier witness whose evidence has been disputed.¹⁰³ Section 46 of the *Evidence Act 1995* (NSW) now sanctions this approach in general terms:

The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:

- (a) it contradicts evidence about the matter given by the witness in examination in chief, or
- (b) the witness could have given evidence about the matter in examination in chief.¹⁰⁴

5.52 There will no doubt often be a case for leave to be granted under section 46 where an unrepresented accused has not put contradictory evidence to a complainant in cross-examination because he or she is prohibited from questioning the complainant in person and has refused court-appointed representation or has given inadequate instructions to the appointed practitioner. In such a case, the accused cannot, generally, be expected to respect the rule in *Browne v Dunn* when giving evidence-in-chief. Recalling the witness ensures that any contradictory bodies of evidence are brought into conflict. The accused is able to give his or her version of events, and the complainant is then given the opportunity to explain any inconsistencies raised by the accused. This may strike an appropriate balance, preserving the fairness of the trial and sparing the complainant unnecessary contact with the accused.

5.53 However, it will not always be appropriate for leave to be granted under s 46. One such situation is where, before the close of its case, the Crown knows of the case that the accused is likely to put (for example, because the accused revealed that case in a statement to the police), or ought reasonably to have inferred the nature of the accused's case from the circumstances. Here, unless the circumstances are exceptional, there is generally no basis for recalling a witness who has already testified since the details and issues surrounding the accused's case and the refuting evidence ought to have been put in chief.¹⁰⁵ Another situation where the court may exercise its power not to recall the complainant is where, in the circumstances, the evidence that the complainant will give will have an inflated importance on the jury since it is the last piece of evidence that the jury will hear and it may tilt the scales unfairly in the prosecution's favour.¹⁰⁶

103. *R v Birks* (1990) 19 NSWLR 677 at 692 (Gleeson CJ).

104. *Evidence Act 1995* (NSW) s 46.

105. See generally *Shaw v The Queen* (1952) 85 CLR 365.

106. See especially *Killick v The Queen* (1981) 147 CLR 565 at 568.

5.54 The operation of the rule in *Browne v Dunn* is complex, discretionary and fact-specific, and the procedures for dealing with its breach are wide. The Commission is of the view that an unrepresented accused should be warned, at least in general terms, about its potential application in the case at the same time as the consequences of not retaining legal representation are explained.

RECOMMENDATION 8

An unrepresented accused should be warned, in general terms, about the potential application in the proceedings of the rule in *Browne v Dunn* at the same time as the consequences of not retaining legal representation are explained.

Effect on the jury

5.55 It is a fundamental principle of the common law that a person is presumed innocent until found guilty beyond a reasonable doubt. Arguably, where the arrangements for giving evidence are not standard, the jury may infer that special measures are required due to the personal characteristics of the accused. Prohibiting an accused from cross-examining a complainant in person may imply that the accused is menacing, violent or even guilty. As such, it may be said that appointing a legal representative to cross-examine the primary witness “carries an unfortunate implication of assumed guilt”.¹⁰⁷

5.56 Any adverse impression created by the recommended procedure could be overcome by issuing an appropriate warning to the jury. Warnings are routinely given to facilitate the avoidance of unsafe convictions. The general law requires a warning to be given whenever necessary in order to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case.¹⁰⁸

5.57 Several submissions argued that where an accused is prevented from cross-examining a complainant in person, the judge should be required to issue an appropriate warning to the jury.¹⁰⁹ This would be consistent with the practice in other jurisdictions.¹¹⁰ It would also be consistent with the New South Wales legislation dealing with cross-examination of child witnesses.

107. NSW Public Defenders (P Zahra and C Loukas), *Submission* at 1.

108. *Longman v The Queen* (1989) 168 CLR 79 at 86 (Brennan, Dawson and Toohey JJ). See also *Evidence Act 1995* (NSW) s 165.

109. NSW Legal Aid Commission, *Submission* at 5; Law Society of NSW, *Submission* at 4.

110. For example, see *Evidence Act 1977* (Qld) s 21R; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(2); *Evidence Act 1939* (NT) s 21A(3); *Evidence Act 1906* (WA) s 106P; *Youth Justice and Criminal Evidence Act 1999* (UK) s 39.

Section 25 of the *Evidence (Children) Act 1997* (NSW) provides that, where a court-appointed intermediary conducts cross-examination of the child complainant on behalf of the unrepresented accused, the judge must:

- (a) inform the jury that it is standard procedure in such cases for alternative arrangements to be used when children give evidence, and
- (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those alternative arrangements.¹¹¹

5.58 The Commission is of the view that issuing a warning to the jury is both necessary and sufficient to overcome any adverse impression that the recommended procedure may create. There is no reason for thinking that the jury will act otherwise than in accordance with the warning.

RECOMMENDATION 9

The court must inform the jury that an accused is not permitted personally to cross-examine the complainant. Where a complainant is cross-examined by a court-appointed legal representative, the court must warn the jury that:

- (a) it is standard procedure in such cases for the court to appoint a legal practitioner to conduct the cross-examination;
- (b) no adverse inferences are to be drawn against the accused person by reason of the procedure; and
- (c) the evidence of the complainant is not to be given any greater or lesser weight because of the use of the procedure.

111. *Evidence (Children) Act 1997* (NSW) s 25(4).

6. Alternative arrangements

- Introduction
- What are “alternative arrangements”?
- Current law and practice
- Are current provisions adequate?
- Views in previous inquiries and in submissions
- Options for reform
- The Commission’s view

INTRODUCTION

6.1 One of the questions raised in Issues Paper 22 was whether alternative arrangements such as screens or closed circuit television¹ should be available for complainants when giving evidence in sexual offence proceedings.² Such arrangements may help reduce distress and enable a complainant to give evidence more effectively.

6.2 The Commission is of the view that, where an accused is unrepresented, appointing a legal practitioner for the purpose of cross-examining the complainant is preferable to relying on alternative arrangements.³ However, it may be desirable to make such arrangements available whether the accused is represented or not. This chapter discusses the advantages and disadvantages of using alternative arrangements in sexual offence proceedings generally.

WHAT ARE “ALTERNATIVE ARRANGEMENTS”?

6.3 Ordinary court procedure may not accommodate the needs of all witnesses. For example, a witness may find it distressing being in the same room as the accused to such an extent that he or she is unable to give evidence effectively. It may be possible to depart from ordinary court procedure in order to accommodate the interests of such a witness, using arrangements such as closed circuit television, screens or other physical arrangements. It is, however, essential that such accommodation should not undermine the fairness of the trial.

Closed circuit television

6.4 Closed circuit television involves the transmission of video and audio signals from one site to another. The witness is able to give evidence from a remote location, usually a room within the court precincts, which is equipped with the appropriate technology. The evidence is transmitted to the courtroom from the remote site, so the court can see and hear the witness.

6.5 Sixty-six (66) out of 171 locations around New South Wales currently have remote witness facilities. Most of these facilities were installed to enable child witnesses to give evidence using closed circuit television in

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1. The *Evidence (Children) Act 1997* (NSW) uses the term “closed circuit television”, whereas the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) uses the term “audio visual link”. The two terms are used interchangeably in this Report.
 2. NSW Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual assault trials* (Issues Paper 22, 2002), Issues 13 and 14.
 3. See para 3.63-3.64, 5.18-5.21.

sexual offence proceedings, but there is no reason why they cannot also be used by adult witnesses.⁴

Screens and other physical arrangements

6.6 A mobile screen can be used to obstruct a witness' view of the accused. Other physical arrangements may be used to facilitate this, such as a special seating arrangement. Screens have been available in all courts across New South Wales since 1992.⁵

CURRENT LAW AND PRACTICE

Child witnesses

6.7 Section 18(1) of the *Evidence (Children) Act 1997* (NSW) provides that child witnesses are entitled to give evidence by closed circuit television. The child can choose not to give evidence by these means,⁶ and the court has power to order that the child's evidence should not be given by these means if the interests of justice or the urgency of the matter so dictate.⁷ If the courtroom does not have closed circuit television facilities, the court must make alternative arrangements in order to restrict contact (including visual contact) between the child and accused. This may include the use of screens and planned seating arrangements.⁸ Alternatively, the court may adjourn proceedings to another place to enable the child to give evidence by closed circuit television.⁹

Adult witnesses

6.8 The common law generally requires that a witness be physically present in the courtroom and be in the presence of the accused at the time of giving testimony.¹⁰ However, the court has the power to make alternative arrangements for giving evidence at common law and, to a limited extent, under statute.

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4. There are 420 courtrooms in New South Wales, throughout 171 locations. 103 courtrooms in 66 locations have remote witness facilities. Information supplied by A Nasser, NSW Attorney General's Department (1 April 2003).
 5. NSW Attorney General's Department, *Report of the children's evidence taskforce: taking evidence in court* (1994) at para 3.8.
 6. *Evidence (Children) Act 1997* (NSW) s 18(2).
 7. *Evidence (Children) Act 1997* (NSW) s 18(4).
 8. *Evidence (Children) Act 1997* (NSW) s 24.
 9. *Evidence (Children) Act 1997* (NSW) s 22.
 10. *R v Dunne* (1929) 21 Cr App R 176; *R v Reynolds* [1950] 1 KB 606.

At common law

6.9 A court has the inherent power to control its proceedings. This includes the power to make alternative arrangements for a witness to give evidence.¹¹ In exercising its discretion, the court will assess whether such an arrangement advances the course of justice.¹²

6.10 In the English case of *R v Smellie*,¹³ the accused was ordered to sit on the stairs going out of the dock, obscuring him from the complainant's sight while she gave evidence. On appeal, the court held that it is in the interests of justice for the judge to prevent the complainant from seeing the accused where the judge considers that the presence of the accused would intimidate the witness. In *R v West*,¹⁴ the Supreme Court of Queensland affirmed the power at common law to direct that an accused be obscured from the view of a witness. In *R v Ngo*,¹⁵ the New South Wales Supreme Court confirmed that special arrangements for giving evidence can be made, in appropriate cases, to ensure that the accused cannot see the witnesses or vice versa. In that case, special arrangements were made for two witnesses who feared giving evidence against the accused to give that evidence by closed circuit television. The court ordered that the television be visible to the jury but not to the accused, so the accused could not identify the witnesses.

Under statute

6.11 Section 26(a) of the *Evidence Act 1995* (NSW) provides that the court “may make such orders as it considers just in relation to the way in which witnesses are to be questioned”. Further, s 5B(1) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) provides:

A NSW court may, either on its own motion in, or on the application of a party to, a proceeding before the court, direct that a person (whether or not a party to the proceeding) give evidence or make a submission to the court by audio link or audio visual link from any place within or outside New South Wales, including a place outside Australia, other than the courtroom or other place at which the court is sitting.

6.12 The court cannot direct a witness to give evidence by closed circuit television if the necessary facilities are unavailable, if the evidence can more conveniently be given in the courtroom, or if it would be unfair to a party.¹⁶ If a party opposes an application for the use of an audio visual link, the court

11. *R v West* [1992] 1 Qd R 227 at 230 (Thomas J); *R v Smellie* (1919) 14 Cr App R 128; *R v Sparkes* (Tasmania, Supreme Court, No 47 of 1996, A58/1996, 1 October 1996, unreported); *Park v Citibank Savings Ltd* (1993) 31 NSWLR 219; *R v DJX* (1990) 91 Cr App R 36 at 41 (Hutchison LCJ).

12. *Park v Citibank Savings Ltd* at 225 (Powell J).

13. *R v Smellie* at 130 (Coleridge J).

14. *R v West* at 230-231 (Williams J).

15. *R v Ngo* [2001] NSWSC 339 at para 20 (Dunford J).

16. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B(2).

cannot allow its use unless it is in the interests of the administration of justice to do so.¹⁷

6.13 The original purpose of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) was to enable New South Wales to participate in a uniform scheme for taking evidence from witnesses who were in another participating State. It aimed to help courts overcome the tyrannies of distance within Australia by reducing costs of travel and use of court time.¹⁸ In 2000, the Act was extended to cover places within New South Wales and places outside Australia.¹⁹ It now applies to any proceedings, including criminal proceedings, in or before a New South Wales Court.²⁰ In 2001, the Act was further amended to facilitate its use in criminal proceedings.²¹ The 2001 amendments aimed to reduce the risks and costs associated with inmate transportation by enabling people to give evidence while in custody – for example in bail proceedings,²² where (at least in the Supreme Court) the evidence of applicants is routinely given by video link.

Use of alternative arrangements in practice

6.14 While there have been some positive evaluations of the use of closed circuit television in court proceedings in the context of child witnesses,²³ the New South Wales Legislative Council Standing Committee on Law and Justice has reported that people in the justice system are unwilling to embrace the technology, and that this is a serious impediment to its use.²⁴ There remains a strong preference for having witnesses physically present when giving evidence. The Committee has also separately reported that,

17. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B(3).

18. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 14 October 1998, the Hon J Shaw, Attorney General, Second Reading Speech, at 8187.

19. *Evidence (Audio and Audio Visual Links) Amendment Act 2001* (NSW). See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 5 April 2000, the Hon I MacDonald, Parliamentary Secretary, Second Reading Speech, at 4098.

20. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5A(1).

21. *Evidence (Audio and Audio Visual Links) Amendment Act 2001* (NSW).

22. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 June 2001, Mr Crittenden, on behalf of the Hon R J Debus, NSW Attorney General, Second Reading Speech, at 15238.

23. See Australian Law Reform Commission, *Children's evidence: closed circuit TV* (Report 63, 1992); C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002); C O'Grady, *Child witnesses and jury trials: an evaluation of the use of closed circuit television and removable screens in Western Australia* (WA Ministry of Justice, 1996) at 150; Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002).

24. Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at para 6.63 and 6.72.

despite a child's statutory right to give evidence using closed circuit television, the use of such technology is "far from consistent".²⁵ One study reported that the use of closed circuit television was refused in 43% of the child sexual assault cases that went to trial.²⁶ The use of closed circuit television in trials will, no doubt, increase as resources expand and people in the legal system become more comfortable with the technology.²⁷

6.15 Anecdotal information indicates that screening and other physical arrangements, which have been available far longer than closed circuit television, are rarely used.²⁸ One reason is that a screen may not be sufficient to reduce a complainant's distress, as the complainant can still hear the accused and is aware of the accused's physical proximity. In the context of child witnesses, one study reported that screening is an unpopular and ineffective response to witness distress.²⁹ The Children's Evidence Taskforce also reported that it "had significant doubts about the benefits of using screens to shield a child witness from the accused".³⁰ It observed:

There is very little support within the legal profession for the use of screens as it is felt that the use of screens gives a strong impression of guilt and so is highly prejudicial to the accused. It is also argued that use of screens can upset the dynamics of the proceedings, make the logistics of questioning the witness more difficult and diminish the audibility of the witness within the courtroom. There may also be difficulties involved in ensuring that the witness' view of the accused is obstructed while still ensuring that the jury is able to see the witness.³¹

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- 25. Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at para 6.66.
 - 26. Eastwood and Patton at 55.
 - 27. See NSW Legal Aid Commission, *Submission* at 7.
 - 28. See NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 9; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*. Compare however, The Victorian Bar, *Submission* at para 4.3.
 - 29. See Eastwood and Patton at 118.
 - 30. NSW Attorney General's Department, *Report of the children's evidence taskforce: taking evidence in court* (1994) at para 6.2.8.
 - 31. NSW Attorney General's Department, *Report of the children's evidence taskforce: taking evidence in court* (1994) at para 5.2.21. This is consistent with a Western Australian study on child witnesses, which found that most judges and witnesses, and many counsel, preferred closed circuit television over screens: C O'Grady, *Child witnesses and jury trials: an evaluation of the use of closed circuit television and removable screens in Western Australia* (WA Ministry of Justice, 1996) at para 10.3. Judges' reasons were "that removable screens do not remove as many sources of stress for the witness, and that screens are more likely to be interpreted as being prejudicial to the accused": at para 8.4. The report concluded that, "screens are not an adequate substitute for closed circuit television", Recommendation E-1.

6.16 The Legal Aid Commission has also submitted that screens create an artificial barrier, are distracting and can be highly prejudicial in the adverse impression they make on the jury.³² Some submissions indicated a clear preference for closed circuit television over screening and other physical arrangements.³³

ARE CURRENT PROVISIONS ADEQUATE?

6.17 There is wide power in the existing law of New South Wales for courts to authorise the giving of evidence by alternative arrangements in sexual offence, as in other, proceedings.³⁴ In particular, the recent amendments to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW)³⁵ may suggest that it unnecessary for New South Wales to enact special legislation for the benefit of adult complainants in sexual offence (or other) proceedings. On the other hand, it may be argued that these provisions, which are clearly not specifically aimed at the use of alternative arrangements by complainants in sexual offence proceedings, neither facilitate the use of such arrangements nor go far enough as far as sexual offence proceedings are concerned. At the moment, the prosecution has to apply to use the arrangement, and must convince the judge that the arrangement is warranted by the special circumstances of the case. Additionally, the availability of alternative measures may be subject to a number of qualifications.

6.18 Every State and Territory in Australia other than New South Wales has legislation variously facilitating the use of alternative arrangements by vulnerable witnesses.³⁶ This accords with developments in common law jurisdictions overseas.³⁷

6.19 The arguments in favour of making alternative arrangements specifically available to complainants in sexual offence proceedings (whether the accused is represented or not) centre on the distinctive nature of sexual offence

32. NSW Legal Aid Commission, *Submission* at 7.

33. NSW Legal Aid Commission, *Submission* at 7; Law and Justice Foundation of NSW, *Submission* at 2-3.

34. See para 6.11-6.13.

35. See para 6.13.

36. See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4-6; *Evidence Act 1939* (NT) s 21A; *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1910* (Tas) s 122I; *Evidence Act 1958* (Vic) s 37C; *Evidence Act 1906* (WA) s 106N, 106R.

37. For example, a range of special measures are available to adult sexual assault complainants under the *Youth Justice and Criminal Evidence Act 1999* (UK). See L Hoyano, "Striking a balance between the rights of defendants and vulnerable witnesses: will special measures directions contravene guarantees of a fair trial?" [2001] *Criminal Law Review* 948; J Temkin, *Rape and the legal process* (2nd edition, Oxford University Press, 2002) at 318-320.

proceedings.³⁸ There is also an argument in favour of making alternative arrangements available in such cases based on the notion of the fairness of the trial.³⁹

The distinctive nature of sexual offence proceedings

6.20 Complainants often find being in the same room as the accused one of the most difficult aspects of the trial process.⁴⁰ Physical proximity to the accused can be very distressing, especially where the courtroom itself is small.⁴¹

6.21 These arguments suggest that distress to complainants is reduced where they know that alternative arrangements for giving evidence will be available as a matter of course. Indeed, there is some evidence that complainants find giving evidence using closed circuit television less onerous than giving evidence in court in the presence of the accused.⁴² Taking the complainant's evidence from a remote location physically separates the complainant from the accused, prevents unnecessary contact between them and enables the complainant to give evidence more accurately.⁴³ It is also asserted, but without any empirical evidence, that obscuring the accused from the complainant's sight using a mobile screen also reduces the complainant's distress.⁴⁴

38. See also para 2.2-2.11.

39. See also para 3.23-3.25.

40. See above at para 2.5.

41. NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*.

42. Many of the evaluations of closed circuit television focus on child witnesses, for example Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002); Australian Law Reform Commission, *Children's evidence: closed circuit TV* (Report 63, 1992); C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002); C O'Grady, *Child witnesses and jury trials: an evaluation of the use of closed circuit television and removable screens in Western Australia* (WA Ministry of Justice, 1996) at 150. However, there is also support for the use of closed circuit television by certain adult witnesses. For example, see ACT Law Reform Commission, *Report on the laws relating to sexual assault* (Report 18, 2001); United Kingdom Home Office, *Speaking up for justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (Home Office, 1998) at para 8.3 to 8.8.

43. Westmead Sexual Assault Service, *Submission* at 4.

44. See *R v West* [1992] 1 Qd R 227 at 231 (Williams J); *R v Sparkes* (Tasmania, Supreme Court, No 47 of 1996; A58/1996, Underwood J, 1 October 1996, unreported); *R v DJX* (1990) 91 Cr App R 36 at 40. In England, the courts have indicated some reluctance to allow adult witnesses to use screens: see *R v Cooper* [1994] *Criminal Law Review* 531. However, their use has been approved by the Court of Appeal in *R v Foster* [1995] *Criminal Law Review* 333 and by the European Commission of Human Rights in *X v United Kingdom* (1993) 15 ECHR 113.

Impact on the fairness of the trial

6.22 The most important arguments surrounding the use of alternative arrangements in sexual offence proceedings deal with the possible impact of such arrangements on the fairness of the trial. It must be remembered that the fairness of any trial is necessarily judged on a case by case basis and that the trial judge's power to control proceedings includes the power to stay proceedings where the accused cannot, in the circumstances, be given a fair trial.⁴⁵

6.23 On the one hand, the fairness of the trial may require the use of alternative arrangements in order to enable the complainant to give evidence accurately in those circumstances where the complainant's apprehension of giving evidence in front of the alleged attacker compromises the reliability of the evidence. In an English sexual assault case, a screen was placed to obscure the complainants from seeing or being seen by the accused. The Lord Chief Justice stated:

The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies ... In the circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.⁴⁶

6.24 The Lord Chief Justice described the use of the screen as "a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses".⁴⁷

6.25 On the other hand, the use of alternative arrangements may, in the circumstances of the case, prejudice:

- the defence case;
- the case for the prosecution;
- the flow of the proceedings; and
- the jury's perception of the case.

45. See para 3.24.

46. *R v DJX* at 40 (Hutchison LCJ).

47. *R v DJX* at 41 (Hutchison LCJ).

The defence case

6.26 Concerns have been expressed that allowing a complainant to give evidence from a remote location may disadvantage the accused.⁴⁸ Video screens, which are generally not large and usually show the witness from the shoulders up,⁴⁹ are seen from a distance. The witness' total body language is obscured. A proper assessment of the demeanour, reliability and credibility of an untruthful witness is, therefore, difficult.

6.27 In *R v Yates*,⁵⁰ the Court of Criminal Appeal held that the trial judge in a murder case had properly exercised his discretion, under the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), to allow a witness to give evidence by way of closed circuit television in circumstances where the witness was so concerned for her health and that of her unborn child that she was distracted from properly addressing the factual issues on which she could give evidence. The witness was regarded by the accused (one of whom was her de facto spouse) their families and associates as having provided assistance to the police and authorities. While acknowledging that giving evidence by video-link may well impose disadvantages in cross-examination because of its tendency to obscure the demeanour of an untruthful witness, the Court pointed out that the administration of justice also has an interest in promoting the reliability of evidence. Here greater reliability was possible if closed circuit television was used. The Court further emphasised the need "to keep the appearance and demeanour of a witness in perspective, and to weigh that aspect in the light of the more objective considerations".⁵¹

The prosecution case

6.28 The difficulties that closed circuit television present for the assessment of the demeanour, reliability and credibility of a witness may also impact adversely on the prosecution case.⁵² On the one hand, a conviction may be more likely if the witness is less distressed, and hence able to give evidence more confidently and more effectively. On the other hand, a conviction may be less likely if the jury fails to develop a rapport with the witness: "the evidence may have an appearance of artificiality and a jury may not have the same degree of sympathy for a person whom they see only on a television screen

48. See ACT Law Reform Commission, *Report on the laws relating to sexual assault* (Report 18, 2001) at para 87. In the context of child witnesses, see Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at para 6.41-6.44.

49. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, addressing the crime: inquiry into the incidence of sexual offences in NSW: part II* (Report 9, 1996) at 164.

50. *R v Yates* [2002] NSWCCA 520 (20 December 2002).

51. *R v Yates* at para 218 (20 December 2002).

52. See Parliament of NSW, Legislative Council, Standing Committee on Law and Justice, *Report on child sexual assault prosecutions* (Report 22, 2002) at para 6.45-6.46.

rather than in person.”⁵³ Arguably, the use of closed circuit television reduces the impact of the complainant’s testimony on the jury.⁵⁴ For these reasons, allowing a complainant to give evidence from a remote location may disadvantage the prosecution case.⁵⁵

Flow of proceedings

6.29 Use of closed circuit television may delay proceedings. For example, if the person asking the questions wishes to show the complainant a document or photograph, there will be a delay while it is taken from the courtroom to the remote site, a delay which is reduced by the use of fax machines. Where there is a delay, this interrupts the flow of evidence, which in turn may influence the impression the complainant’s evidence makes on the jury.⁵⁶

The jury’s perception of the case

6.30 Use of closed circuit television may also create an adverse impression on jury members, as we have seen in para 6.26-6.28. Further, the jury may infer that the necessity for these measures arises because the accused is guilty, or, for example, that the accused is violent.⁵⁷ Such adverse impression may, of course, be overcome by issuing an appropriate warning to the jury.

VIEWS IN PREVIOUS INQUIRIES AND IN SUBMISSIONS

6.31 Previous inquiries have consistently recommended making alternative arrangements available to complainants in sexual offence proceedings. Use of closed circuit television has been raised or recommended in studies by the New South Wales Bureau of Crime Statistics and Research,⁵⁸ the New South Wales Sexual Assault Committee,⁵⁹ the New South Wales Legislative Council Standing Committee on Social Issues⁶⁰ and the Australian Law

53. ACT Law Reform Commission, *Report on the laws relating to sexual assault* (Report 18, 2001) at para 87. See also C Eastwood and W Patton, *The experiences of child complainants of sexual abuse in the criminal justice system* (Queensland University of Technology, 2002).

54. See Australian Law Reform Commission, *Children’s evidence: closed circuit TV* (Report 63, 1992) at 30.

55. See ACT Law Reform Commission, *Report on the laws relating to sexual assault* (Report 18, 2001) at para 85.

56. ACT Law Reform Commission, Report 18 at para 86.

57. ACT Law Reform Commission, Report 18 at para 87.

58. NSW Bureau of Crime Statistics and Research, *The criminal justice response to sexual assault victims* (General Report Series, 1996) at 44, 53.

59. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 43.

60. Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Sexual violence, addressing the crime: inquiry into the incidence of sexual offences in NSW: part II* (Report 9, 1996) at 166 and Recommendation 54.

Reform Commission.⁶¹ Use of screens to remove the accused from the complainant's line of sight has been recommended by the New South Wales Sexual Assault Committee⁶² and the Australian Law Reform Commission.⁶³

6.32 Submissions to the Commission overwhelmingly expressed the view that alternative arrangements should be more readily available for complainants giving evidence in sexual offence proceedings.⁶⁴ Suggestions included the use of closed circuit television, screens, alternative seating arrangements, closed courts, support persons, non-publication orders, scheduled breaks, written rather than oral evidence and pre-recorded evidence. Most submissions were in favour of making closed circuit television available to complainants giving evidence in sexual offence proceedings.⁶⁵

61. Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, Part I, 1994). The Commission recommended closed circuit television be provided for witnesses "in all cases in which witnesses may suffer emotional trauma or be intimidated or distressed or unable to give evidence by reason of the subject matter of the evidence, particularly in domestic violence and sexual assault cases": Recommendation 7.8.

62. NSW, *Sexual assault phone-in report* (NSW Sexual Assault Committee, 1993) at 43, 45.

63. "At the very least, screens could be provided to remove the offender from the victim's line of vision while she gives evidence ... Having the offender out of sight eases the strain on the victim and can give a woman confidence that she is being listened to": Australian Law Reform Commission, *Equality before the law: justice for women* (Report 69, Part I, 1994) at para 7.32.

64. NSW Legal Aid Commission, *Submission* at 7; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 5; Law Society of NSW, *Submission* at 2; Law and Justice Foundation of NSW, *Submission* at 2-3; NSW Department for Women, *Submission* at 7-8; Women's Legal Resources Centre, *Submission* at 4; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 8; Westmead Sexual Assault Service, *Submission* at 4; Illawarra Area Health Service, *Submission* at 3; Macquarie Area Health Service, *Submission* at 2; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 4; Central Coast Health, *Submission* at 3; Hawkesbury Nepean Community Legal Centre, *Submission* at 4; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission* and D Purcell, *Submission* at 5.

65. NSW Legal Aid Commission, *Submission* at 7; NSW Director of Public Prosecutions (N Cowdery), *Submission* at 6; Law Society of NSW, *Submission* at 2; Law and Justice Foundation of NSW, *Submission* at 2; NSW Department for Women, *Submission* at 7; Women's Legal Resources Centre, *Submission* at 4; Illawarra Area Health Service, *Submission* at 3; Macquarie Area Health Service, *Submission* at 2; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 4; Hawkesbury Nepean Community Legal Centre, *Submission* at 4; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*.

6.33 Some submissions argued that such arrangements should be available in all sexual offence cases, whether the accused is represented or not.⁶⁶ Some argued that complainants should be entitled to the use of alternative arrangements,⁶⁷ while others were of the view that such arrangements should be available in the judge's discretion.⁶⁸

6.34 Most submissions put the argument in favour of the use of alternative arrangements on the basis that such arrangements can enhance the quality of a complainant's evidence by reducing fear and distress, thereby promoting the overall fairness of the trial.⁶⁹

OPTIONS FOR REFORM

6.35 One option would be to extend the application of the provisions dealing with child witnesses to adult complainants in sexual offence proceedings. This would give complainants the right to use alternative arrangements, subject to the court's discretion not to allow them where it is not in the interests of justice to do so.⁷⁰

6.36 Alternatively, there could be specific legislation providing for the use of alternative arrangements by witnesses who are likely to be so intimidated, distressed or embarrassed that they are unable to give evidence effectively. Alternative arrangements are available in several other jurisdictions on this basis.⁷¹

6.37 A third option would be to include an objects statement in the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) to facilitate the use of closed circuit television by complainants in sexual offence proceedings.

66. Law and Justice Foundation of NSW, *Submission* at 2.

67. NSW Director of Public Prosecutions (N Cowdery), *Submission* at 5; Law and Justice Foundation of NSW, *Submission* at 3; NSW Department for Women, *Submission* at 8; Women's Legal Resources Centre, *Submission* at 4; NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 9; Illawarra Area Health Service, *Submission* at 3; Macquarie Area Health Service, *Submission* at 2; Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme, *Submission* at 4; NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), *Submission*.

68. NSW Legal Aid Commission, *Submission* at 8; NSW Public Defenders (P Zahra and C Loukas), *Submission* at 4.

69. NSW Attorney General's Department Violence Against Women Specialist Unit, *Submission* at 3; Westmead Sexual Assault Service, *Submission* at 1; Women's Legal Resources Centre, *Submission* at 2; Illawarra Area Health Service, *Submission* at 1; NSW Department for Women, *Submission* at 3.

70. See *Evidence (Children) Act 1997* (NSW) s 18.

71. See *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1910* (Tas) s 122I; *Evidence Act 1906* (WA) s 106N, 106R.

Although the courts have confirmed that section 5B authorises the use of closed circuit television by intimidated witnesses, the legislation was enacted for quite different purposes,⁷² and makes no mention of the technology being used to minimise distress or to prevent unnecessary contact between a witness and accused. An objects statement may be a simple means of encouraging courts to allow complainants in sexual offence proceedings to give evidence from a remote location.

THE COMMISSION'S VIEW

6.38 The Commission is of the view that alternative arrangements for giving evidence should be readily available for complainants in sexual offence proceedings, whether the accused is represented or not. Such arrangements can help reduce distress and can enable a complainant to give evidence more accurately.

6.39 The Commission has concluded that the best means of giving effect to this view is to make alternative arrangements available to adult complainants in sexual offence proceedings on a basis resembling their availability to child witnesses under s 18 of the *Evidence (Children) Act 1997* (NSW). This would give complainants a statutory right to use alternative arrangements, subject to the court's discretion not to allow them where it is not in the interests of justice to do so.

6.40 Closed circuit television is the preferred solution to assist complainants giving evidence. Enabling a complainant to give evidence from a location outside the courtroom prevents unnecessary contact between the complainant and accused. However, closed circuit television should not be used if the complainant does not wish to use it, or if the court is satisfied that it is not in the interests of justice for the complainant's evidence to be given by such means.

6.41 Screens and other alternative physical arrangements should continue to be available in the court's discretion. They may be used where closed circuit television facilities are not available and their use does not prejudice the fairness of the trial. Alternatively, the court should adjourn proceedings to another place to enable the complainant to give evidence by closed circuit television. It is not appropriate for screens to be used where an unrepresented accused is conducting his or her case in person. The accused must be able to observe everything, including the demeanour and behaviour of all witnesses who give evidence (including the complainant).

6.42 Any adverse impression created by the departure from ordinary court procedure must be overcome by issuing an appropriate warning to the jury. The judge should inform the jury that it is standard procedure in such cases

72. See para 6.13.

for alternative arrangements to be used when complainants give evidence, and should warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of the arrangement.

RECOMMENDATION 10

- A complainant who gives evidence in proceedings for a sexual offence should be entitled to give evidence by means of closed circuit television unless the court orders that such means not be used. The court should only make such an order if it is satisfied that it is not in the interests of justice for the complainant's evidence to be given by such means.
- If a court is not equipped with closed circuit television facilities, the court should be able to adjourn the proceedings or any part of the proceedings to a place that is equipped with such facilities so the complainant's evidence may be given by such means.
- If the complainant does not give evidence by means of closed circuit television, the court may, if the interests of justice so require, make alternative arrangements for the giving of evidence by the complainant in order to restrict contact (including visual contact) between the complainant and the accused. Such arrangements may include the use of screens, planned seating arrangements or the adjournment of the proceedings or any part of the proceedings to other premises.
- A complainant may choose not to use any alternative arrangements, including closed circuit television.
- Where a complainant gives evidence using alternative arrangements, the judge should inform the jury that it is standard procedure for complainants' evidence in such cases to be given by those means, and warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of the arrangements.

Appendices

- **Appendix A: Submissions received**
- **Appendix B: Persons charged with “sexual assault and related offences”**
- **Appendix C: Legal aid statistics**

APPENDIX A

SUBMISSIONS RECEIVED

NAME	ORGANISATION OR AGENCY	DATE
Jon Tippet	Barrister (Darwin, NT)	04/02/2003
Jon Blackwell	Central Coast Health	05/12/2002
Christine Foreman	Dubbo/Wellington Women's Domestic Violence Court Assistance Scheme	11/11/2002
Sara Blazey	Hawkesbury Nepean Community Legal Centre	25/10/2002
Tony Sherbon	Illawarra Area Health Service	25/11/2002
Del Purcell	Individual	14/01/2003
Geoff Mulherin	Law and Justice Foundation of NSW	08/11/2002
Kim Cull	Law Society of NSW	10/12/2002
Jeannine Biviano	Macquarie Area Health Service	21/11/2002
Claire Vernon	NSW Attorney General's Department Victims Services	31/10/2002
Tashe Long	NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region) (by telephone)	11/12/2002
April Pham	NSW Attorney General's Department Violence Against Women Specialist Unit	31/01/2003
Robyn Henderson	NSW Department for Women	13/12/2002
Nicholas Cowdery	NSW Director of Public Prosecutions	05/12/2002
Doug Humphreys	NSW Legal Aid Commission	30/10/2002
Peter Zahra and Chrissa Loukas	NSW Public Defenders	05/12/2002
Ross Nankivell	The Victorian Bar	22/11/2002
Lynn Mitchell	Westmead Sexual Assault Service	23/12/2002
Catherine Carney	Women's Legal Resources Centre	29/11/2002

APPENDIX B

PERSONS CHARGED WITH “SEXUAL ASSAULT AND RELATED OFFENCES”¹

Table 1: NSW Local Criminal Courts Statistics 2001²

OUTCOME OF APPEARANCE	SEXUAL ASSAULT ³	NON-ASSAULTIVE SEXUAL OFFENCES ⁴	TOTAL	% OF TOTAL
Defended hearing: all charges dismissed	152	1	153	21.3
Defended hearing: guilty of at least one charge	82	5	87	12.1
Defended hearing: other outcome ⁵	13	0	13	1.8
Convicted ex parte	59	4	63	8.8
All charges dismissed without hearing	189	3	192	26.7
Guilty plea to all charges	168	14	182	25.3
All charges otherwise disposed of	27	1	28	3.9
TOTAL PERSONS CHARGED	690	28	718	100.0

1. The offence category “sexual assault and related offences” and its subcategories (sexual assault and non-assaultive sexual offences) are defined by the Australian Standard Offence Classification (ASOC), issued by the Australian Bureau of Statistics (ABS 1997, Cat No 1234.0). The definitions of these subcategories are provided in the following footnotes.
2. Source: NSW Bureau of Crime Statistics and Research (ref: vk031220).
3. In both tables, “sexual assault” means: “Physical contact of a sexual nature directed toward another person where that person does not give consent, gives consent as a result of intimidation or fraud, or consent is proscribed (ie the person is legally deemed incapable of giving consent because of youth, temporary/permanent (mental) incapacity or there is a familial relationship)” (ASOC, ABS 1997, Cat No 1234.0). This category involves acts of aggravated and non-aggravated sexual assault, including, for example, incest, rape, unlawful sexual intercourse, unlawful fellatio/cunnilingus, carnal knowledge and indecent assault not involving any aggravating circumstances.
4. In both tables, the term “non-assaultive sexual offences” means: “Offences of a sexual nature against another person which do not involve physical contact with the person and where the person does not give consent, gives consent as a result of intimidation or fraud, or consent is proscribed (ie the person is legally deemed incapable of giving consent because of youth, temporary/permanent (mental) incapacity or there is a familial relationship)” (ASOC, ABS 1997, Cat No 1234.0). The term encompasses, for example, procuring a child for prostitution, forcing a child to witness an act of sexual intercourse, voyeurism, and gross indecency.
5. “Defended hearing: other outcome” includes persons for whom one or more charges were dismissed after a defended hearing, but who either (1) pleaded guilty to other charges or (2) were convicted ex parte of other charges.

Table 2: NSW Higher Criminal Courts⁶ Statistics 2001⁷

OUTCOME OF CHARGE	SEXUAL ASSAULT	NON- ASSAULTIVE SEXUAL OFFENCES	TOTAL	% OF TOTAL
Trial: Acquitted of all charges	159	2	161	27.4
Trial: Guilty of at least one charge	72	1	73	12.4
Trial: Acquitted, had other guilty plea	3	0	3	0.5
Proceeded to sentence only ⁸	187	5	192	32.7
No charges proceeded with	130	3	133	22.7
All charges otherwise disposed of ⁹	23	2	25	4.3
TOTAL PERSONS CHARGED	574	13	587	100.0

6. “NSW Higher Criminal Courts” refers to NSW District and Supreme Courts.
7. Source: NSW Bureau of Crime Statistics and Research (ref: vk031220).
8. “Proceeded to sentence only” refers to persons who entered a plea of guilty at the committal hearing and were then committed for sentencing to a Higher Court.
9. “All charges otherwise disposed of” refers to cases in which the accused died or absconded.

APPENDIX C

LEGAL AID STATISTICS

Table 1: Outcome of legal aid applications for persons accused of sexual assault¹⁰

YEAR	GRANTS	REFUSALS	APPLICATIONS RECEIVED
2000	643	73	736
2001	557	90	648
2002	321	38	367
TOTAL	152	201	173

10. Source: B Donnellan, NSW Legal Aid Commission (14 May, 2003). Note that the statistics are limited to sexual assault offences only, they do not include legal aid applicants who have been accused of other sexual offences. Further, for all the years listed, the composite figures do not add up to the total number of applications received in that year. This is because, in any given time period, not all applications received are determined, and conversely, not all applications determined were received in that same period. This is particularly so in appellate matters where the Commission may need additional time to determine the merit of a proposed appeal to the Court of Criminal Appeal on a sexual assault conviction.

Table 2: Reasons for refusal of legal aid to persons charged with sexual assault¹¹

REASON FOR REFUSAL	2000	2001	2002
Guidelines	8	4	6
Guidelines and Means	1	2	3
Means	35	53	18
Means, Merits and Guidelines ¹²	0	1	0
Merit	3	3	0
Merit and Guidelines	2	3	1
Other	6	9	5
Withdrawn ¹³	18	15	5
ANNUAL TOTAL OF REFUSALS	73	98	38

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11. Source: B Donnellan, NSW Legal Aid Commission (14 May, 2003). Note that the statistics are limited to sexual assault offences only, they do not relate to persons accused of other sexual offences.
12. In most cases, a combined merits/means test will only apply to an applicant accused of a sexual offence in the event that he or she decided to appeal against a conviction at trial. However, there are certain exceptions and restrictions on the availability of aid that are dependent upon the precise nature of the appeal.
13. There are numerous, and often complex, reasons why accused persons withdraw their applications for legal aid prior to the determination of that application. Some reasons may be that charges are dropped or varied, and/or pleas are changed. Withdrawals may also relate to applicants who intended to self-fund the litigation if possible, but lodged an application for legal aid as a safety net, and subsequently found themselves in a position to self-fund. Some may also withdraw when it becomes apparent that a private solicitor of choice will not be approved if legal aid is granted. In many other cases the reasons are unknown, as the Legal Aid Commission is simply not privy to the reason/s why some applicants choose to withdraw an application.

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