CAN WE LEGISLATE FOR SAFER FORENSIC SPEAKING ROLES FOR SEXUAL ASSAULT SURVIVORS?

*The Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)*

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Thesis Abstract

This thesis examines the changes made by the Australian Capital Territory Sexual and Violent Offences Legislation Amendment Act 2008, which aimed to reduce the trauma of a trial for victims of violence. These changes are examined within the context of similar legislative changes throughout Australia and by providing an understanding of the tension between the right of a victim to be protected from further trauma and the right of an accused to a fair trial. The research focuses on the effect of the reforms on the experiences of adult, non-disabled victims of sexual assault. The history and creation of the legislation is analysed first to determine how and why the changes came about and whether the final piece of legislation reflected what was lobbied for by various agencies. The effects of the Sexual and Violent Offences Legislation Amendment Act 2008 on the trial process is then examined by listening to the voices of those closest to the reforms: judicial officers, legal practitioners, victim support personnel and victim witnesses. The findings of this study highlight the ubiquitous discretionary nature of Australian law and illustrate how the presence of discretion can result in legislative reforms not achieving their original aims. It also highlights the importance of having procedural policies alongside legislative reform, as the former can impact on the ability to apply the new legislation. Although this study is limited in terms of sample size, it provides a qualitative understanding of the benefits and limitations of these reforms to date.
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Chapter Five

Legislative reform to ameliorate plight: implementation and judicial interpretation of cross-examination substance

Sexual history law reform

New South Wales (NSW)
Victoria
South Australia
Western Australia
Tasmania
Queensland
Northern Territory
How have these changes worked in practice?

Improper questions during cross-examination

New South Wales
Victoria
Tasmania
South Australia
Western Australia
Northern Territory
Queensland
How have these changes worked in practice?

Summary

Chapter Six

Other jurisdictions—legislative reform to ameliorate plight: implementation and judicial interpretation of Cross-Examination (Procedure) Law Reform

Cross-examination by an unrepresented accused

Other procedural law reform

Committal hearings
Pre-trial or 'special' hearings
Use of statement or interview as evidence-in-chief
Use of recorded evidence in subsequent hearings
Audiovisual links/screens
Open/closed court

How have these changes worked in practice?

Committal hearings
Pre-trial hearings and use of recorded evidence
Audiovisual links/screens
Open/closed court............................................................................................................. 112
Summary.......................................................................................................................... 112

Chapter Seven .................................................................................................................. 115

The history and politics of cross-examination (procedure) law reform in the ACT .................. 115

Procedural law reform in the ACT before 2008 ................................................................. 115
Closed circuit television (CCTV) provisions..................................................................... 115
Open/closed court provisions............................................................................................ 117
Provisions governing the admission of written statements ............................................. 118
Provisions governing the cross-examination of victim–witnesses by self-represented defendants ......................................................................................................................................... 119

How did the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) come
about? ................................................................................................................................. 119
  1999..................................................................................................................................... 120
  2001..................................................................................................................................... 120
  2002..................................................................................................................................... 121
  2003..................................................................................................................................... 121
  2004–2005......................................................................................................................... 123
  2006–2007......................................................................................................................... 127
  2008..................................................................................................................................... 131
Summary.......................................................................................................................... 137

Chapter Eight .................................................................................................................... 139

Deconstruction of the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) ......................................................................................................................... 139

Changes to the Evidence (Miscellaneous Provisions) Act 1991 (ACT) ................................. 139
  New section 38C—Accused may be screened from witness in court .................................. 139
  New section 38D—Examination of witness by self-represented accused person—procedure ............................................................................................................................................... 140
  New section 38E—Witness may have support person in court........................................... 141
  Revised section 39—Sexual and violent offence proceeding—evidence to be given in closed court................................................................................................................................................ 141
  New section 40P—Meaning of witness—Division 4.2B ........................................................ 142
  New section 40Q—Witness may give evidence at pre-trial hearing .................................... 143
  New section 40R—Who may be present at pre-trial hearing .............................................. 145
  New section 40S—Evidence of witness at pre-trial hearing to be evidence at hearing ....... 146
  New section 40T—Witness may be required to attend hearing ......................................... 147
  New section 40U—Evidence of witness at pre-trial hearing—jury trial ............................. 147
  New section 40V—Recording of witness’s evidence at pre-trial hearing admissible in related hearing................................................................................................................................................ 148
  Revised section 43—Giving evidence from place other than courtroom .......................... 149

Changes to the Magistrates Court Act 1930 (ACT) ............................................................. 150
  New subsection 90AA(11)—Written statements may be admitted in evidence.................. 150
Summary.......................................................................................................................... 151

Chapter Nine ..................................................................................................................... 155

Legal practitioners, judicial officers and victims’ (‘players’) views of the changes ................. 155

How are the new indeterminate sections of the Evidence (Miscellaneous Provisions) Act 1991 (ACT) working in practice? ........................................................................................................... 155
  New section 38C—Accused may be screened from witness in court .................................. 155
  New section 38E—Witness may have support person in court .......................................... 159
Revised section 39—Sexual and violent offence proceeding—evidence to be given in closed court .......................................................................................................................... 161
New section 40P—Meaning of witness—Division 4.2B .......................................................................................................................... 165
New section 40R—Who may be present at pre-trial hearing .................................................................................................................. 171
New section 40T—Witness may be required to attend hearing .................................................................................................................. 172
New section 40V—Recording of witness’s evidence at pre-trial hearing admissible in related hearing .......................................................................................................................... 174
Revised section 43—Giving evidence from place other than courtroom .................................................................................................. 175

**How are the new indeterminate sections of the Magistrates Court Act 1930 (ACT) working in practice?** .................................................................................................................. 177
New subsection 90AA(8)—Written statements may be admitted in evidence .................................................................................................................. 177

**Have the changes made to Section 41 of the Evidence Act 1995 (Cth) resulted in more questions being disallowed?** .................................................................................................................. 183

**Summary** .................................................................................................................................................................................. 186

**Chapter 10** .................................................................................................................................................................................. 187

**Conclusion** .................................................................................................................................................................................. 187

**Sexual assault mythology** .................................................................................................................................................. 187

**Legal indeterminacy** .................................................................................................................................................. 188

**The principle of a fair trial** .................................................................................................................................................. 188

**Trauma and re-trauma** .................................................................................................................................................. 189

**Legislative reforms to cross-examination substance** .................................................................................................................................................. 189

**Legislative reforms to cross-examination procedure** .................................................................................................................................................. 189

**The history of cross-examination procedure law reform in the ACT** .................................................................................................................................................. 190

**A new legislative framework for the Australian Capital Territory (ACT)** .................................................................................................................................................. 190

**Vulnerable witnesses? The impact of the reforms?** .................................................................................................................................................. 191

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) significantly altered the trial process for victims of sexual assault?** .................................................................................................................................................. 192

The victim support personnel surveyed indicated that, from their perspective, the process has only changed ‘in relation to people being able to give evidence earlier’; and victims being ‘more willing to participate in the process’. One support worker noted, however, that the changes have ‘sped up the process’. .................................................................................................................................................. 193

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) alleviated the trauma of a trial for sexual assault victim—witnesses?** .................................................................................................................................................. 193

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) maintained the accused’s right to be tried fairly?** .................................................................................................................................................. 196

It must be noted again that the amending legislation aimed to reduce the trauma of a trial for victims of sexual assault. However, as I discussed in Chapter Two, it aimed to do this without prejudicing the accused’s ‘right’ to a fair trial. The judicial officers surveyed were confident that this right had been maintained despite the changes, although, again, they were careful to explain that there have not been many trials to test it: .................................................................................................................................................. 196

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) contributed to improving the quality of sexual assault victim—witness evidence?** .................................................................................................................................................. 197

**Summary** .................................................................................................................................................................................. 199

**Thinking ahead: some ideas for the future** .................................................................................................................................................. 200

**Reference list** .................................................................................................................................................................................. 205

**Articles, books and reports** .................................................................................................................................................. 205

**Legislation, rules and treaties** .................................................................................................................................................. 218

**Cases** .................................................................................................................................................................................. 221

**Appendix A** .................................................................................................................................................................................. 223
Appendix B ................................................................................................................................. 225
Appendix C ................................................................................................................................. 229
Chapter One

Setting the scene

In sexual assault cases, the victims are not a party to the proceedings; rather they are the primary witness to the crime. Cross-examination of complainants in sexual assault trials often involves an arduous test of their credibility. The Evidence Act 1995 (Cth) defines credibility as including ‘the witness’s ability to observe or remember facts and events about which the witness has given, is giving, or is to give evidence’. However, it appears that these are not the only factors that are considered when assessing a victim’s credibility. One Australian study found that Defence counsel are often permitted to ask questions during cross-examination that attack the complainant’s credibility and appear substantially irrelevant to the facts in issue at the trial.

This research primarily seeks to investigate the impact and effectiveness of law reform designed to protect non-disabled, adult victims of sexual assault. It does this by examining reform in the context of legal indeterminacy, judicial discretion and sexual assault mythology. There have been numerous legislative amendments around Australia that addressed these issues and aimed to better protect victims of sexual assault, whilst maintaining the accused’s right to a fair trial. However, the indeterminacy of the amendments, coupled with how they have been interpreted by judges and legal counsel, have restricted their application. Research has shown that when there are statutory grey areas such as exceptions or lack of clarity, a very broad and diverse interpretation of the statutes ensues. For example, in the 1980s, all Australian jurisdictions abolished the requirement to warn about the dangers of convicting an accused of a sexual offence on the uncorroborated evidence of the victim. However, the High Court clarified this rule

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2 Department for Women, Heroines of fortitude: the experiences of women in court as victims of sexual assault (1996) Sydney, Office for Women: NSW Department of Premier and Cabinet.
4 See: Evidence Act 1995 (Cth) s 164(3); Evidence Act 1929 (SA) s 34(i)(5); Crimes Act 1900 (NSW) s 405C(2) (now repealed and replaced by Evidence Act 1995 (NSW) ss 164–165); Criminal Code (Tas) s 136; Evidence Act 1906 (WA) s 36BE (now repealed and replaced by s 50); EvidenceAct 1971 (ACT) s 76F (now repealed.
in *Longman v The Queen*. In that case the court held that although the requirement for corroboration warnings had been abolished, judges retained the discretion to give a corroboration warning if they deemed it necessary. Further, in *Doggett v The Queen*, the High Court declared that the corroboration warning should continue to be given as a blanket warning in all sexual assault trials; regardless of corroborating evidence.

There have also been many reforms relating to issues of consent and admission of sexual history evidence. These were intended to ‘improve the chances of a fair trial on legally relevant issues and reduce the risk of unjust acquittals’. This is discussed at length in Chapter Five. However, despite this, rape and sexual assault trials maintain a focus on the complainant’s actions rather than those of the accused. The admission of evidence of the victim’s sexual history is now generally impermissible. Yet it is still admitted, often without reference to the relevant legislation. This is due to the broad interpretations that the courts have applied to the statutory exceptions. These have resulted, contrary to the aims of the legislation, in extensive opportunities for the Defence to adduce sexual experience evidence.

Furthermore, as discussed in Chapter Three, the focus in sexual assault trials is often on the accused's right to a fair trial. Their rights are seen to outweigh those of the victim. Judges are forced to choose between conflicting moral imperatives within a legal system that emphasizes the fair trial principle.

Thus, as a result of the combination of indeterminate legislation; the notion of a fair trial for the accused; and the many myths about sexual assault, cross-examination of victims of rape and sexual assault can be traumatic. Victims of sexual assault often feel scared, anxious, sad, angry, shameful, responsible and unconfident after the assault. Cross-
examination of these victims can re-trigger these emotions and augment the trauma of the circumstances. Rape survivors in one study indicated that as a result of their contact with legal system personnel:

- 87 per cent felt bad about themselves
- 71 per cent felt depressed
- 89 per cent felt violated
- 53 per cent felt distrustful of others
- 80 per cent were reluctant to seek further help.

The *Heroines of Fortitude* study examined the experiences of sexual assault victims in court and the effectiveness of legislative provisions to protect their rights. This study found that cross-examination of victim–witnesses was often extensive and distressing; and that, on average, it lasted more than twice as long as examination-in-chief. Furthermore, in 65 per cent of trials there were two or more interruptions to evidence due to the distress of the witness. Another study conducted in 1998 reported that 80 per cent of victim–witnesses had negative feelings towards testifying—including feelings of loneliness, humiliation and embarrassment. The study showed that this increased their levels of angst and trauma. Despite this, there have been some recent improvements. A report published by the Victorian Department of Justice assessed the impact of Victorian reforms very similar to those discussed in this thesis. It found that ‘for many, but not all, victims of sexual assault their experience of the criminal justice system is vastly improved’.

The experiences that sexual assault victims have in the criminal justice system can compound their trauma and victimisation, resulting in the discouragement of victims from reporting and/or continuing with their case. Accordingly, the 2007 ABS Victims Crime Survey indicates that only 25 per cent of sexual assault offences are reported to

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15 Department for Women, above n 2.
16 Ibid., 1.
17 Ibid., 4.
18 Department for Women, above n 2, 127–128.
police.\textsuperscript{22} This low reporting rate is due to several barriers including, but not limited to:

...fear of being disbelieved; fear of retribution by the offender or others connected to the offender; feelings of shame; embarrassment; living in an isolated environment; fear of being blamed; lack of confidence or trust in the legal system; and lack of confidence or trust in police.\textsuperscript{23}

Further, research suggests that some women are so traumatised as a result of the preliminary hearing that they are either unwilling or unable to follow through with the complaint.\textsuperscript{24}

As a result of extensive research demonstrating the re-victimisation of witnesses in sexual assault trials,\textsuperscript{25} the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) was enacted. The \textit{Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)} (SVOLAA) amended the \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT)} and the \textit{Magistrates Court Act 1930 (ACT)} in relation to sexual and violent offences.\textsuperscript{26} The amendments modified the committal hearing process by enabling a transcript or written statement of an audio or visual recording between police and a witness to be admissible as evidence for all sexual assault victims.\textsuperscript{27} It also introduced the concept of a pre-trial hearing for non-disabled, adult victims of sexual assault who are especially vulnerable.\textsuperscript{28} This hearing is to be held as soon after the committal as possible and before the actual trial.\textsuperscript{29} The pre-trial hearing aims to reduce the amount of time before the witness has to give evidence and the amount of cross-examination in these cases.

The \textit{SVOLAA} included new sections about the use of Closed Circuit Television (CCTV), as well as amendments which restrict the victim's view of the accused,\textsuperscript{30} prohibit cross-
examination by a self-represented accused,\textsuperscript{31} allow support people for witnesses to be present,\textsuperscript{32} and ensure closure of the court to the public in certain circumstances.\textsuperscript{33} The amendments in the new legislation aimed to:

...achieve the dual objectives of treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused.\textsuperscript{34} They provided special measures for the giving of evidence in court proceedings and were ‘designed to extract the “best” evidence possible from witnesses who may otherwise suffer a disadvantage’.\textsuperscript{35}

The \textit{Evidence Amendment Act 2008} (Cth), which also aims to reduce the trauma of a trial for victim–witnesses, came into force on 1 January 2009. This Act amended the \textit{Evidence Act 1995} (Cth); most importantly section 41. This amendment now makes it mandatory for judicial officers to intervene where they are of the opinion that a question put to the victim–witness is ‘improper’.\textsuperscript{36} The amending Act also broadened the definition of improper questions. It now includes questions that are ‘misleading or confusing...unduly annoying, harassing, intimidating, offensive, humiliating or repetitive...belittling, insulting or otherwise inappropriate’.\textsuperscript{37}

The \textit{SVOLAA} and the \textit{Evidence Amendment Act} both aimed to reduce the trauma and revictimisation of sexual assault victims in court. However, as mentioned above, extensive research has demonstrated the impact that legal indeterminacy, judicial discretion and sexual assault mythology can have on indeterminate law reform and its application.\textsuperscript{38}

\textbf{Sexual assault mythology}

Myths are powerful tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change, and the law is full of

\begin{itemize}
\item \textsuperscript{31} \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38D.}
\item \textsuperscript{32} Ibid., s 38E.
\item \textsuperscript{33} Ibid., s 39.
\item \textsuperscript{34} Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
\item \textsuperscript{35} Ibid.
\item \textsuperscript{36} \textit{Evidence Act 1995} (Cth) s 41(1).
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} Patricia Easteal, above n 3. See also: Patricia Easteal (ed.) \textit{Balancing the scales: rape, law reform and Australian culture} (1998) Sydney, Federation Press.
\end{itemize}
mythology. Women are particularly at its mercy... mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration.\footnote{Helena Kennedy, \textit{Eve was framed: women and British justice} (Vintage, 1993) 32.}

Judicial officers’ measurement of harm is shaped by the:

...many myths about sexual assault, [which] are made from building belief blocks of male sexuality, females as a sex and certain ideas about how the reasonable woman is supposed to react to sexual aggression.\footnote{Patricia Eastal, \textit{Less than equal: women and the Australian legal system} (2001) Sydney, Butterworths, 120.}

The continuing dominance of the judicial profession by ‘middle-class, middle aged white males...ensures a continuance of the traditional stereotypical attitudes to women’.\footnote{Helena Kennedy, above n 39, 32.} A recent national survey found that although there have been ‘important, positive shifts’ in community beliefs, ‘attitudes that excuse, trivialise and or justify violence against women persist, and some have even worsened’.\footnote{VicHealth, ‘National survey on community attitudes to violence against women 2009: changing cultures, changing attitudes—preventing violence against women’ (2010) 67.} These beliefs continue to permeate the judicial arena as well;\footnote{Ibid.} although members of the judiciary may not recognise that they bring their own biases to the bench. When interviewed, judicial officers in one United Kingdom study:

...failed to mention that they too, as a group, might be implicated in the problems surrounding rape trials through their own attitudes which affect the way they apply the law.\footnote{Ibid.}

Because judicial officers are able to be influenced by these myths—whether consciously or not\footnote{Ibid.}—woven throughout the practices of legal interpretation are misconceptions about the nature and extent of sexual offending and a gendered application of the law.\footnote{See: Melanie Heenan, \textit{Trial and error: rape, law reform and feminism} (Degree of Doctor of Philosophy (Sociology) Thesis, Monash University, 2001); Natalie Taylor and Jenny Mouzos, ‘Community Attitudes to Violence Against Women Survey 2006’ (1, Australian Institute of Criminology, 2006); Patricia Eastal and Miriam Gani, ‘Sexual assault by male partners: a study of sentencing variables’ (2005) 9 \textit{Southern Cross University Law Review} 39.}

There is a real concern that judges may diminish the seriousness of sexual offences that do not conform to dominant, but factually wrong, stereotypes about rape and sexual assault.

\footnote{See: Haley Clark, ‘Judging rape: public attitudes and sentencing’ (2007) 14 \textit{ACSSA Aware} 17; Mary Heath, ‘The law and sexual offences against adults in Australia’ (2005) 4 \textit{Australian Centre for the Study of Sexual Assault Issues} 1; Jennifer Temkin, \textit{Rape and the legal process} (Oxford University Press, 2\textsuperscript{nd} ed, 2002); A Young, ‘The waste land of the law, the wordless song of the rape victim’ (1998) 22(2) \textit{Melbourne University Law Review} 442.}
Prevailing notions of sexuality and sexual behaviour come from a stereotypical definition of ‘real’ or ‘legitimate’ rape and stereotypical constructions of the ‘good’ victim and ‘reasonable’ responses. 47 ‘Real’ rape is defined as ‘vaginal penetration and physical injury perpetrated by an armed stranger in a public place’ 48 with physical resistance by the victim, followed by a prompt complaint to the police. In addition, societal views continue to question the ‘provocative’ actions of the complainant and sympathise with men’s ‘uncontrollable’ desire for sex. 50 In a 2007 national study, …nearly all participants (98 per cent) considered myth factors—such as those relating to the victim’s dress, behaviour, chastity and alcohol consumption, as well as prior acquaintance and the offender’s social status—as relevant in determining the seriousness of any particular offence. 51

As one judicial officer professed:

First and foremost, other things being equal, rape by a cohabitee or ex-cohabitee, though horrible, as all rape is, cannot be so horrible and terrifying as rape by a stranger. I speak with the handicap of being a male, but a male can empathise with the female victims of crime, and anyway I take courage from the support of some women (including the woman most important to me), even though they are not the vociferous ones.

Secondly, the stranger who pounces, perhaps wearing a mask, is a greater menace to society and a greater terror to women than the known attacker who acts in pursuance of what he misguidedly thinks of as his rights, or who is suffering from an unbearable sense of the loss of his partner by separation (he may even, stupidly, think that by forcing himself upon her he may regain her affection). 52

In one national survey, ‘one quarter disagreed that “women are more likely to be raped by someone they know than a stranger”’. 53 However, numerous studies around the world have demonstrated that these beliefs do not correlate with the circumstances in

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48 Ibid., 3.
51 Clark, above n 46, 22.
52 Judicial officer quoted in G Williams, ‘Rape is rape’ (1992) 142 New law Journal 11.
53 Patricia Easteal, above n 3, 124.
which the majority of rapes occur. A 2007 study on sexual assault and related offences in the Australian Capital Territory (ACT) found that sexual offences were mostly perpetrated by offenders known to the victim and mostly took place in residential settings. The Crime and Safety survey conducted by the Australian Bureau of Statistics (ABS) estimated that 58 per cent of female victims were sexually assaulted by a person known to them and 67 per cent of sexual assault victims were attacked in a residential setting. In these scenarios, a large proportion of offenders were intimate partners, ex-partners, or other family members. Furthermore, in nearly 99 per cent of all sexual assaults recorded by police in 2003, the offender did not use a weapon. From this evidence, it is apparent that the mythological understandings of rape exclude most incidents from the category of ‘real’ rape, thus minimising and trivialising the seriousness of the majority of all sexual assaults.

From the stereotype of ‘real rape’ come several other misconceptions that continue to permeate society and influence the perceptions of judicial officers. These rape myths are familiar to us all:

• women are ‘asking for it’ when they wear skimpy clothing or dance provocatively
• if a women has consented to sex before, there is no reason to believe her if she says ‘no’
• women who ‘tease’ men deserve to be raped
• women make false accusations of rape to cover up an infidelity or illegitimate pregnancy
• a man can not control his libido once a woman has ‘aroused’ him.

‘Women who are raped often ask for it’

The recent national survey by Victorian Health Promotion Foundation (VicHealth) found that five per cent of the general community continues to believe that ‘women who are

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55 Maria Borzycki, above n 54, viii–ix.
56 Ibid., 21.
57 Denise Lievore, above n 47, 3.
58 Maria Borzycki, above n 54, 21.
59 VicHealth, above n 42.
raped often ask for it'. The many myths behind this belief include that women ask for it when they wear provocative clothing, drink alcohol, go to bars or walk down the street alone at night, ‘tease’ men or make them sexually excited. Overseas research suggests that victims perceived to be dressed ‘less modestly and more suggestively’ are seen as more responsible and more deserving of the assault than victims who are dressed more soberly. Further, in a United Kingdom study, some participants suggested that the complainant should be seen as more responsible because she had not consumed any alcohol: ‘she’s not even drunk either, so you can’t use that as an excuse, she knew what she was doing’. This means that in cases reflecting the ‘real rape’ scenario, offenders are consistently ascribed more blame and responsibility, and victims less.

Evidently, victim-blaming attitudes continue to permeate society. Research suggests that judicial officers who hold these attitudes ‘respond with less empathy and support to victims...[and] are less likely to work in ways which will provide justice and redress for them’.

‘Rape results from men not being able to control their need for sex’
The VicHealth survey conducted in 2009 found that 38 per cent of men and 30 per cent of women believe that sexual assault results ‘from men being unable to control their need for sex’. This view stems from the persisting stereotype that men have an ‘inability to curb [their] sexual desires once ignited’. It is used to explain, and often justify, the defendant’s conduct, removing any responsibility for the rape from them. In a recent United Kingdom study, participants often displayed a ‘sympathetic slant’ towards the accused and depicted him as being as much at the mercy of his sexual drives as the victim: ‘a woman can stop right up to the last second...a man cannot, he’s just got to keep going, he’s like a train, he’s just got to keep going’.

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60 Ibid., 42.
61 M Torrey, ‘When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions’ (1990) 24 U.C. Davis Law Review 1013, 1015.
63 Ellison and Munro, above n 50, 304.
64 Clark, above n 46, 22.
65 VicHealth, above n 42, 42.
67 VicHealth, above n 42, 41.
68 Ellison and Munro, above n 50, 297.
69 Ellison and Munro, above n 50, 298.
Substantial research evidence, however, refutes this belief. The research argues that if sexual assault results from a 'biologically based "need" for sex', then rates of sexual violence would be similar across all cultures. However, rates of sexual violence vary greatly between societies, and even between communities within societies. This evidence suggests that sexual violence is social in origin, rather than biological, and rates of violence are influenced by the views within the particular community. Further, research suggests that '[r]ape is not a sexual act ...[it] is an act of violence which uses sex as a weapon...[and] is motivated by aggression and by the desire to exert power and humiliate' rather than by sexual desire. It also suggests that many incidents of sexual assault are premeditated and planned rather than resulting from a lack of control. This view of sexual assault as a sexual act is said to be 'one of the most pervasive, enduring, and damaging myths', and it continues to influence society's understandings of 'real' rape.

**Real rape requires an ‘immediate outcry’**

By the beginning of the eighteenth century, a failure to complain immediately had evolved into a presumption of fabrication on the part of the rape complainant. Since the rule was based on 'the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness whose credibility could be boosted by evidence of recent complaint.

Although numerous studies have provided evidence to the contrary, the belief that 'real' victims of sexual assault will report the incident to a third party immediately is widely held within society and the criminal justice system. An immediate or prompt complaint is not a statutory requirement in any jurisdiction in Australia. However, a delay in complaint is still often used to attack the victim's credibility and argue that they have falsely accused the defendant of sexual assault. This demonstrates that many are still

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70 VicHealth, above n 42, 40.
72 Patricia Eastal, *Voices of the survivors* (Spinifex Press Pty Ltd, 1994) 3.
73 VicHealth, above n 42, 41.
74 Eastal, above n 72, 4.
75 Torrey, above n 61, 1015.
77 See: Eastal, above n 3; Heath, above n 9; Torrey, above n 61.
78 Eastal, above n 3.
unfamiliar with the reality of most rape victims: ‘many rape victims do not report sexual assaults promptly to their family or friends, much less to a stranger...[and] because of the stigma attached to rape in our society, many women’s “natural” reaction is not to make an immediate outcry’.\(^{79}\) For the minority who do make a report to the police, most do not do so immediately.\(^ {80}\)

‘Women make dishonest claims of rape...for self-interested, malicious, or vindictive reasons’\(^ {81}\)

The evidence of victims of sexual assault is assumed to be intrinsically untrustworthy, and it is a common perception that victims are prone to fabricate allegations of sexual offences out of ‘jealousy, spite, regret, or even “for no reason at all” and that such allegations are “very easy to fabricate but extremely difficult to refute”’.\(^ {82}\) While it is likely that false allegations are sometimes made, there is no evidence to suggest that fabrication occurs more often in cases of rape than in other crimes.\(^ {83}\) In an analysis of 850 sexual assaults reported to Victorian police over three years, only 2.1 per cent were identified as being false.\(^ {84}\) The fact that false allegations of sexual assault are rare is now recognised by the majority of our society (61 per cent). However, research suggests that 25 per cent continue to believe that ‘false allegations of sexual assault made by women are frequent or common’.\(^ {85}\)

Research has shown the effect of rape myths on judicial decision-making in many ways.\(^ {86}\) In the trial context, a victim's character and credibility is most closely scrutinised because judicial officers can have:

...negative stereotypes of rape victims, holding them responsible for victimisation, unless the assault contexts and elements conform to the 'real rape' stereotype (stranger relations, visible physical injury, weapon use).\(^ {87}\)

\(^{79}\) Torrey, above n 61, 1016 (emphasis original).

\(^{80}\) Easteal, above n 3. See also: Jody Clay-Warner and Callie Harbin Burt, 'Rape reporting after reforms: have times really changed?' (2005) 11(2) Violence against Women 150; Bonnie S Fisher et al, 'Reporting sexual victimization to the police and others: results from a national-level study of college women' (2003) 30(1) Criminal Justice and Behavior 6; Jan Jordan, Reporting rape: women's experiences with the police, doctors and support agencies (Institute of Criminology, 1998).

\(^{81}\) VicHealth, above n 42.


\(^{83}\) Jennifer Temkin, Rape and the legal process (2nd ed, 2002) Melbourne, Oxford University Press, 5.


\(^{85}\) VicHealth, above n 42, 43.

\(^{86}\) See: Kylie Weston-Scheuber, 'A prosecutorial perspective on sexual assault' (Paper presented at the Australasian Institute of Judicial Administration Conference, Sydney, 7–9 September 2011).
Some studies suggest that judges may draw negatively on the victim’s supposed character or sexual history and that the nature of the relationship between victim and offender affects judicial weighting in sentencing. For example, mitigating variables used in sentencing, although similar for all categories of defendants, were given more weight where the defendant was related to the victim. This reflects the myth that rape by someone known to the victim is not as bad as rape by a stranger. The high rates of attrition in certain types of cases are further evidence that a ‘real rape’ template persists amongst at least some in the judiciary. In one study of rape and attrition across five countries, the researchers found that the decrease in conviction rate could be partially explained by a higher number of rapes that do not accord with the real rape construct being reported to the police. At ‘the same time, police, prosecutorial, and court decisions continue to operate with the real rape construct in mind’.

These persisting misconceptions continue to influence judicial perceptions. As a result, indeterminate legislation, and provisions that require judicial discretion in their application, continue to be interpreted in this light.

What is legal indeterminacy and is it an integral part of law?

What is determined is decided and fixed; its meaning is found rather than created. What is indeterminate is not fixed; its meaning is interpreted in an act of creation rather than location.

Views about indeterminacy and law range between those formulated by legal formalists, positivists, realists and critical legal theorists. Legal formalism states that judicial officers find the law rather than make it. Legal realism provides that judges do make law

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87 Kathleen Daly, ‘Conventional and innovative justice responses to sexual violence’ (2011) 12 ACSSA Issues 6.
and their decisions can be affected by their personal views. Indeterminacy, however, is found in individual cases rather than at the core of legal meaning.  

Legal positivist, Hart, concedes that a large proportion of the law is indeterminate, but that this indeterminacy is only a marginal part of our legal system. He states that the indeterminacy of the law is generally a result of the 'open-texture' of natural language. He concludes that at some stage, for all general terms and phrases, whether or not they apply to some particular is arguable.

Ronald Dworkin on the other hand, argues that the inclusion of principles and ideals in the law resolves the problem of indeterminacy. He states that legal principles take judicial officers 'past the point where it would be accurate to say that any test of pedigree exists'; that legal principles indicate the intended scope of the rules and resolve any conflict by indicating how the rule should apply to the current legal problem.

Critical legal studies, including feminist legal theory, argue that law can never reasonably induce determinate results on a case-by-case basis. The critical legal theory states that indeterminacy is inescapable and fundamentally affects the decisions made by judicial officers: 'the law is infused with irresolvably opposed principles and ideals'.

All of these theories promulgate completely different arguments. However, they basically agree that at some stage, to some extent, a court must make a decision that is not dictated by law—that indeterminacy in the law exists. At its most extreme, the 'indeterminacy of law' thesis provides that judicial officers are free to come to any decision they like in a case, according to personal inclination. The critical legal studies approach towards indeterminacy 'opened up the possibility of the infinite manipulation

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98 *See: McCormick, above n 93; Solum, above n 93.
of legal principle and the consequent collapse of the rule of law’. Thus, Dworkin’s theory of incorporating principles and ideals to address these issues would fail from a critical legal theorist’s point of view. According to Dworkin, this is because ‘we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future’.100

One correlate of laws’ substantive indeterminacy is interpretation by judges. Judicial discretion appears in legislation usually because the existing sections are unclear or ambiguous. However, the ability of judges to exercise discretion is also an aspect of judicial independence under the doctrine of the separation of powers. In the legal sense of the term, judicial discretion is defined as:

...the ability of a judge to exercise autonomy in making decisions in the absence of determinate rules, using individual judgement or assessment to arrive at a just and fair result'.

More broadly, Pound describes discretion as the power conferred by law to act on the official’s own judgement and morality in certain cases. Pound also introduces the idea that discretion integrates moralities into the law: discretion ‘is an idea of morals, belonging to the twilight zone between law and morals’.

In Norbis v Norbis, Brennan J rationalised that ‘an unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process’. This means that discretionary power is usually limited by guidelines or principles; or by reference to other factors that must be considered when coming to a decision. For example, as will be demonstrated below:

...in deciding whether to order that the court be closed to the public, the court must consider whether the witness wants to give evidence in open court; and [whether] it is in

100 Duncan Kennedy, 'Form and substance in private law adjudication' (1976) 89 Harvard Law Review 1605, 1605, referring to the work of Ronald Dworkin.
102 "judicial discretion" in Trischa Mann, above n 92.
104 Ibid., 926.
the interests of justice that the witness give evidence in open court.107

Schneider argues that the judicial nature of the exercise means that discretion is not a matter of personal conscience or inclination; that ‘limitations on discretion are as inevitable and abundant as the sources of discretion...[that] discretionary decisions are rarely as unfettered as they look’.108 However, although discretionary powers are never absolute, they are exercised within a broader legal and social context. As discussed above, this context is susceptible to influence by mythology and common legal and societal beliefs. In the example just given, the relevant beliefs would be those concerning what constitutes the ‘interests of justice’.

From a feminist perspective, this broader social context and its values and justice-related priorities are understood as being male dominated. It is therefore permeated with overt, covert, and even unconscious gender biases: the ‘hidden gender’ of the law.109

Feminist scholarship uniformly rejects the positivist characterization of the law as a science of rules which can be understood apart from its historical origins and from the political, social and economic conditions which have given it form and shape.110

This means that the ‘guidelines’, ‘principles’ and legal concept signposts do not exist in a legal vacuum. Therefore, the judicial discretion in interpreting them could be seen as ‘shaped by the discriminatory and stereotypical reasoning embedded in the substantive law’.111 Feminist legal theorists describe the law as seeing and treating women ‘the way men see and treat women’.112 That is, that it speaks ‘to men while it alienates and excludes women’.113 Thus, from this vantage point, discretion can be seen as occurring in a legal arena in which these so-called objective standards are in reality ‘not neutral and

110 Sandra Berns, Concise jurisprudence (Federation Press, 1993) 120.
113 Margaret Davies, Asking the law question (The Law Book Company, 1994) 191.
inevitable, but are constructed in cultural images of masculine and feminine'.

They 'operate in a partial and specifically gendered fashion'.

Of course, there are many interpretations and forms of judicial discretion. However, this thesis focuses on what Dworkin refers to as ‘weak’ discretion. Weak or ‘concealed’
discretion describes rules that leave the judicial officer with considerable freedom of choice. This is because the provisions ‘contain value-qualified precepts which require a personal assessment of the circumstances’. Provisions that contain vague standards such as ‘reasonable’, ‘just’, ‘necessary’, ‘fair’; or which allow the judge to choose whether to follow a statutory requirement—for example, the court ‘may’ order that the court be closed to the public—are all examples of weak or concealed discretion.

So, why is judicial discretion a ‘central and inevitable part of the legal order’?

‘All legal systems which have endured have had to develop, by experience, principles of exercise of discretion.’ Schneider argues that the rules of law cannot possibly regulate the behaviour of millions of individuals; and so the rules that are used must be broadly applicable. However, broad rules cannot dictate a result for all cases in all situations. Thus, judicial discretion is needed to minimise the disadvantages. Further, Dworkin and Pattenden argue that justice demands that the circumstances surrounding the individual case must be considered—sometimes it is necessary for the judge to exercise judicial discretion and choose the appropriate solution.

In a legal system in which regard is paid to the particular circumstances of the case, of the offence and of the offender, the existence of discretion is an essential factor. Individualization cannot be achieved without a discretion being exercised.

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115 Rosemary Hunter, Domestic violence law reform and women’s experience in court: the implementation of feminismReforms in civil proceedings (Cambria Press, 2008) 41.
118 Ibid., 2.
120 Pound, above n 103, 927.
121 Schneider, above n 108, 47.
122 Ibid.
123 See: Dworkin, above n 116, 624; Pattenden, above n 117, 13.
Pound points to the complexity of modern life to explain this need for ‘individualising [the] application of the law’.\textsuperscript{125} He compares the result of judicial discretion to the hand-made, as compared to the machine-made product:

The specialised skill of the workman gives us something infinitely more subtle than can be expressed in rules. In law some situations call for the product of hands, not machines, for they involve not repetition, where the general elements are significant, but unique events, in which the special circumstances are significant.\textsuperscript{126}

Judicial discretion is needed to cope with the complexity of society, with the burden on the legislature and the growing dependence upon specialist knowledge in the courts. In addition, some legal theorists argue that:

...law-makers want to remain as silent as possible on controversial or complex matters of public policy; in these circumstances, awards of discretion to legal bureaucracies allow legislatures to duck or fudge hard issues.\textsuperscript{127}

To some extent, judicial discretion is evidently an essential part of our legal system. However, its use ‘dilutes the advantages of rules and creates the risk that discretion may be abused’.\textsuperscript{128} Wexler argues that society’s aversion to discretion derives from a widely shared mistrust of the ability of others to make decisions for us where the result is not predetermined by law:

If the men who make legal decisions do not make them on the basis of rules then we are afraid that they can only make them, as our fantasy tyrants do, on the basis of evil and dishonest motives, biases, and personal quirks, and sheer perversity. We are not confident that men can exercise intelligent and honest personal discretion...\textsuperscript{129}

It is true that problems requiring legal indeterminacy or judicial discretion can only be solved correctly in a fantastical sociocultural void or vacuum. Judicial discretion is open to abuse, and decisions made using discretion may differ depending on the individual beliefs of the judge. However, judicial officers and legal theorists have argued that this is ‘a lesser risk than attempting to shackle the judge’s power within a straightjacket’;\textsuperscript{130} that ‘discretion is the lesser evil’.\textsuperscript{131}

\textsuperscript{125} Pound, above n 103, 932.
\textsuperscript{126} Roscoe Pound, \textit{An introduction to the philosophy of law} (The Lawbook Exchange, Ltd., 2003) 142.
\textsuperscript{127} Hawkins, above n 119, 12.
\textsuperscript{128} Schneider, above n 108, 47.
\textsuperscript{129} Steve Wexler, ‘Discretion: the unacknowledged side of law’ (1975) 25 \textit{University of Toronto Law Journal} 120, 123.
\textsuperscript{130} Selvey v Director of Public Prosecutions [1968] 2 WLR 1494, 1524G (Lord Guest).
\textsuperscript{131} Pattenden, above n 117, 14.
It is the gap between the law and the law in action which is an essential component of the justice chasm in sex cases. It seems that law itself, which must ultimately be interpreted and applied by the judges, cannot entirely withstand an attitude problem which, in some cases, is too entrenched to budge.\textsuperscript{132}

For a legal system to achieve justice, it is necessary to work out an appropriate balance between the rules of law and the use of judicial discretion. This balance would ensure that rules are comprehensive and judicial discretion is limited. With sexual assault legislation, ‘justice’ could also be better facilitated if judicial officers’ values and measurement of harm are more in harmony with the victims.

International research suggests that across many common and civil law jurisdictions, as well as adversarial and inquisitorial systems:

...a consistent frustration emerges with procedural reforms [like the \textit{Sexual and Violent Offences Legislation Amendment Act 2008}] which—though well-intentioned—have failed to live up to their promise in terms of respecting the rights and dignity of rape complainants.\textsuperscript{133}

So how will this necessary element of legal indeterminacy, and the continuing presence of sexual assault mythology affect the implementation of the changes made by the \textit{SVOLAA}? This is the main question that I seek to answer in this thesis.

\textbf{The current research}

It is within a social climate of a need for better protections for victims of sexual assault whilst giving evidence that I conducted my research. In this research I focus on the perceptions of those involved—judicial officers, legal practitioners, victim support personnel, and victim–witnesses on the trauma of a trial for victims of sexual assault; and how the changes made by the \textit{SVOLAA} have or have not improved victims’ safe speaking. In conducting this research I aim to highlight the effect that legal indeterminacy—coupled with sexual assault mythology in the adversarial system—can have on the implementation law reform. The primary aim of my research is to investigate the impact and effectiveness of sexual assault victim protection law reform on non-disabled, adult victims of sexual assault by:

\textsuperscript{132} Temkin and Krahe, above n 44, 158.

\textsuperscript{133} Clare McGlynn and Vanessa E Munro, ‘Rethinking rape law: an introduction’ in Clare McGlynn and Vanessa E Munro (eds), \textit{Rethinking rape law: international and comparative perspectives} (Routledge, 2010).
• determining the extent and legal context of victim trauma in the courtroom before the 2008 amendments
• studying the impact of previous legislative changes aimed at improving victims’ safe speaking in all jurisdictions
• discovering the reasons behind the enactment of the SVOLAA, outlining its discretionary sections, and theorising how they might be interpreted by judicial officers
• analysing the implementation of the legislation and determining the impact the changes have had on the experiences of victims of sexual assault.

In Chapter Two I outline how I measured the efficacy of the amendments. That is, the methodology and methods I used to investigate the implementation of the SVOLAA so far.

In Chapter Three I discuss the principle of a fair trial in the context of the adversarial process, and how it may apply differently in sexual assault cases. This concept needs to be explored further as there are many who believe that the new legislation affects the accused’s right to a fair trial.

In Chapter Four I explain the need for legislative change. I do this by describing the trauma that victims are subject to following sexual assault and how they can be re-victimised by the criminal justice system.

In Chapter Five I focus on legislative reform to ameliorate the plight of sexual assault victims in all jurisdictions—specifically, changes to sexual history and improper questions legislation. I then discuss how these changes have been interpreted and implemented. In this chapter I describe the background to some law reform on cross-examination in sexual assault trials and the impact that legal indeterminacy and sexual assault mythology can have on its implementation. This background leads to predictions about how these factors might affect the implementation of the new reforms.

In Chapter Six I discuss changes to legislation in other jurisdictions that are similar to those implemented by the SVOLAA—specifically, changes to trial procedure. This provides a comparison to the ACT legislation and enables a discussion of the impact of mythology on these reforms; and hence their efficacy. This in turn helps to predict how mythology might affect the implementation of the new reforms.
In Chapter Seven I look at the history of trial procedure law reform in the ACT before 2008. Using surveys and interviews with people who played a role in the initiation of the research, the drafting of the legislation and the enactment of the reform, I describe how and why the reforms were enacted. This demonstrates further where the need for law reform came from and how it was achieved.

In Chapter Eight, I deconstruct the SVOLAA to highlight the discretionary sections of the legislation. I then discuss how the provisions might improve victims’ safe speaking and how they might be affected by mythology when they are interpreted by legal personnel.

Chapter Nine contains the findings from my surveys of judicial officers, legal practitioners, victim support personnel and victim–witnesses together with a discussion of these findings in the context of the earlier chapters. The findings illustrate the key players’ views of the changes. In particular I discuss how the sections are being interpreted and whether, in their opinion, they have fulfilled the aim of improving victims’ safe speaking and maintaining the accused’s right to a fair trial.

Chapter Ten contains the concluding comments as well as some recommendations for reform.

**Summary**

Victims of sexual assault have a traumatic experience of the criminal justice system. Given this, it is necessary to investigate the impact and effectiveness of legislation designed to ameliorate this. The changes made by the legislation that is the focus of this thesis—the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)—will be assessed in the context of the prevalence of sexual assault mythology, legal indeterminacy and judicial discretion, as discussed above. The following chapter will discuss the methods used to conduct this assessment.
Chapter Two

Research design and methodology

In this chapter I outline the methodology and methods employed in my research. My aim is to determine whether, in the context of the issues discussed in the previous chapter, legislative reforms to trial procedure can reduce the trauma of a trial for non-disabled, adult victims of sexual assault. The methods used enabled me to listen to the voices of those closest to the new ACT reforms. I conducted interviews with, and surveys of, people involved in the law reform process, those involved in applying the new legislation, and victims. These multiple perspectives on the research question enabled me to triangulate the data. Triangulation increases confidence in research data, creates innovative ways of understanding a phenomenon, reveals unique findings, challenges or integrates theories, and provides a clearer understanding of the problem.\(^1\)

The methodology progressed through two main phases. The first of these was a background analysis of the context of legislative change and the events leading up to the enactment of the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) (*SVOLAA*). The second phase was an investigation of experience of changed legislation. The first stage of the analysis included a review of literature, legislation and case law, as well as interviews with, and surveys of, those involved in the introduction of the changes. In the second stage I used surveys of judicial officers, legal practitioners, victim support personnel and victim–witnesses along with a study of recent cases in the ACT.

Research design

My research design is underpinned with reflexivity,\(^2\) social justice\(^3\) and feminist principles,\(^4\) including building a research relationship between the participants and myself.\(^5\)

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\(^1\) Veronica A Thurmond, 'The point of triangulation' (2001) 33(3) *Journal of Nursing Scholarship* 254, 254.
\(^4\) See: J Fook, above n 3; J Spencer, above n 2.
The feminist principles employed centre on the patriarchal nature of the law and the legal system, both of which have been resistant to feminist change.\(^5\) The theory behind this resistance to change is that each person’s perspective, including my own, is framed through the feminist ‘kaleidoscope of reality’ as outlined by Easteal.\(^7\) This perspective diametrically conflicts with an ‘objective, universally valid’ Kantian epistemology.

My research focuses on the idea of creating a society or institution based on principles of equality and solidarity that understands and values human rights and recognises the dignity of every human being.

Reflexivity occurs when the observations or actions of observers in the social system affect the very situations they are observing; or when the theory being formulated is disseminated to, and affects, the behaviour of the individuals or systems it is meant to be objectively modelling.\(^8\) In my research, I was aware that this could very well be the case; that the participants may have been affected by my presence or knowledge of the theory behind my research. However, it was important in this research to encourage and facilitate the relationship between the participants and myself. The relationship that I built with all participants enabled them to feel comfortable and willing to share information.

The empirical research in this dissertation was conducted using qualitative social research methods to suit the research's aim of investigating the history and impact of the legislation. Qualitative methods are now acknowledged as being suitable for researching sensitive and gendered issues. For example, Taylor,\(^9\) Easteal and

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\(^7\) Patricia Eastal, Less than Equal: Women and the Australian Legal System (Butterworths, 2001).

\(^8\) Wanda S Pillow, ‘Confession, Catharsis, or cure? Rethinking the uses of reflexivity as methodological power in qualitative research’ (2003) 16(2) Qualitative Studies in Education 175-196.

McOrmond–Plummer, Campbell and Jordan all used qualitative methods in their research involving sexual assault. Campbell also used qualitative methods in her research investigating police officers’, medical professionals’, support workers’ and survivors’ perceptions of the medical and criminal justice response to rape. In the domestic violence context, several researchers emphasised the importance of using the voices of support workers and abused women themselves; and this also applies to sexual assault research.

Qualitative interviews and open-ended surveys enabled me to explore participants’ experiences in detail and with the necessary sensitivity. By using qualitative data, I was able to comprehensively investigate the history of the legislation, and adequately compare participants’ experiences and observations before the amendments with those following the commencement of the legislation.

**Background research**

Along with empirical data, I also used secondary resources including published articles, books, cases, legislation and law reform reports to support the survey results. This background research enabled me to highlight the need for reform in this area and to provide the context in which sexual assault legislation exists in Australia.

I firstly conducted an extensive literature review on the principle of a fair trial in Australia and how it applies in sexual assault trials. Australian literature was used to discuss the constitutional significance of the right to a fair trial. International treaties and the *Human Rights Act 2004* (ACT) were used to illustrate the potential conflicts between the principle and certain provisions amended by the *SVOLAA*.

I then conducted another literature review on the effects of sexual assault and the various ways in which victims have been maltreated or re-victimised whilst providing testimony. This library research sought to answer the questions:

- why was reform needed to assist victim–witnesses in the courtroom?

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13 Campbell et al, above n 5.
• what trauma were/are the victims subject to on the witness stand?
• what is the legal context of victim–witnesses’ experiences in court?

Legislation analysis

In addition to library research and examining law reports, I used legislation analysis techniques to examine previous legislative changes to cross-examination processes in all jurisdictions—specifically changes to improper questions and admission of sexual history evidence. Changes to the relevant legislation were traced back from the date of the research using online databases to see all of the changes over the past 40 years. This analysis provided an illustration of previous sexual assault law reform aimed at ameliorating the plight of victims. It enabled me to discuss whether the changes achieved—or partially achieved—the purposes for which they were enacted (and why or why not). Using the same methods, I also examined previous legislative changes surrounding cross-examination trial procedure in sexual assault trials from all jurisdictions, excluding the ACT, to determine how and why these changes were implemented. This enabled me to discuss whether mythology may have had an effect on the implementation of the amendments. It also helped me to predict how rape mythology might affect the implementation of the new ACT reforms. I also used these methods to research procedural law reform in the ACT before 2008. This research provided a history of, and background to, the current reforms.

Case research

I also conducted a search of all ACT sexual assault judgments from July 2009–October 2011 identifying judicial references to the new provisions. In only one matter did a judge discuss the application of the provisions as they applied to non-disabled, adult victims of sexual assault.  

History and politics interview/survey

This component of the research was conducted to determine the historical antecedents and political processes behind the SVOLAA: that is, how it evolved. This part of the research was vital to illustrate the context in which the reforms arose and the aims of those behind the reforms. To achieve this research goal, I chose to listen to the voices of the people who played a role in the research behind the Act, the drafting of the legislation, and the enactment of the reforms. Specifically, this involved a targeted purposive sample: 25 people from both government and non-government organisations were invited to participate in a qualitative email survey or face-to-face interview. I then used a thematic analysis to analyse the data gathered from the research instruments for interpretation.

Participants

Of the 25 people invited to participate in the research, 10 provided responses: nine email survey responses and one face-to-face interview. The research participants were recruited from the Australian Federal Police (AFP), the ACT Office of the Director of Public Prosecutions (DPP), the ACT Supreme Court, the Office of the Victims of Crime Coordinator (VoCC), the University of Canberra, the Canberra Rape Crisis Centre (CRCC), and ACT Forensic and Medical Sexual Assault Care (FAMSAC).

Potential respondents were identified from the Appendix of submissions to the Sexual Assault Response Program (SARP) report17 and through preliminary talks with some key individuals. Each respondent was involved somehow in the law reform process; either as a researcher, lobbyist, or member of the SARP Reference Group—a group formed to provide input to the legislative reforms and to oversee a process of implementation. The nature and breadth of their experience meant that the participants were in a unique position to provide insight into the history and politics behind the SVOLAA.

Interview design and scope*

For the nine email survey responses, separate email surveys were distributed to the

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16 The University of Canberra’s Committee for Ethics in Human Research approved the project on 2 August 2010. Protecting the anonymity of participants was the main ethical consideration in this project. Before responding to the survey, participants had to read the participant information form and sign a consent form, both of which stated that all responses would be de-identified. This is further discussed on pages 33-34.

17 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, ‘Responding to sexual assault: the challenge of change’ (March 2005). This report was prepared by the DPP and the AFP and ultimately led to the introduction of the reforms.

* Please see Appendix A for the full interview schedules.
participants. The one face-to-face interview was conducted using the same instrument and the discussion was recorded and later transcribed.\(^{18}\) The survey instrument gathered some basic background information about the participants which included how they were involved in the legislation’s development. Participants were also asked a series of questions about the original aims and intentions of the reforms and who was involved in lobbying for them. Finally, several questions sought views on how the Sexual and Violent Offences Legislation Amendment Bill evolved—including the lobbying and drafting processes—and its enactment. These questions were designed to enable participants to tell the story behind the enactment of the reforms and illustrate the changes that were being lobbied for at the time.

**Analysis**

All of the email responses were gathered by a single reply email from the participant. However, after the survey responses were collected, it became obvious that there were some questions still unanswered. So I sent a second email to three of the participants, whom I believed would have the requisite knowledge, asking them to clarify or expand on their answers.

I examined the open-ended participant responses qualitatively using thematic coding.\(^{19}\) Because answers were generally short, this process was informal and unstructured. But it involved studying every passage of the surveys and interview transcript to determine exactly what was said and to label each passage with an adequate code or label. This process helped me to identify the common themes that arose and to summarise and observe the patterns in the responses.

**Judicial officer and legal practitioner survey\(^{20}\)**

In this part of the research I aimed to determine how the indeterminate sections of the *SVOLAA* are being interpreted; and thus the Act’s impact on the criminal justice process for sexual assault victims. For this second goal, I chose to obtain the views of judicial officers and legal practitioners. These participants were able to provide their

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\(^{18}\) This participant chose to participate in a face-to-face interview because of time constraints and also because the participant was particularly interested in the content of the research.

\(^{19}\) Matthew Miles and Michael Huberman, *Qualitative data analysis: an expanded sourcebook* (2nd ed, 1994) 40–43.

\(^{20}\) The University of Canberra’s Committee for Ethics in Human Research approved the project on 27 October 2010. Protecting the anonymity of participants was the main ethical consideration in this project. Before responding to the survey or participating in an interview, participants had to read the participant information form and sign a consent form, both of which stated that all responses would be de-identified. This is further discussed on pages 33-34.
opinion of how the legislation is working in practice and whether it is achieving the proposed balance of victim and accused’s rights—from a legal point of view. Again this involved using a targeted purposive sample: a total of 29 judicial officers and legal practitioners were invited to participate in a qualitative online survey using SurveyMonkey®.

**Participants**

Nine of the 29 judicial officers and legal practitioners invited to participate in the research provided responses. The research participants were recruited from the ACT Office of the Director of Public Prosecutions (ACT DPP), the ACT Supreme Court, the ACT Bar Association, and various private law firms.

Eight judicial officers from the ACT Supreme Court and ACT Magistrates Court were invited to complete the online survey. Three provided responses. The eight potential participants were identified through the ACT Supreme Court and ACT Magistrates Court websites and also through preliminary talks with a few key individuals. These respondents oversee cases involving sexual assault regularly and so were exceptionally well placed to provide views on the new legislation’s implementation.

Four prosecutors from the ACT DPP were invited to complete the online survey, and one provided a response. A senior prosecutor at the DPP participated in this survey and recommended the four potential respondents. I met with this prosecutor throughout my research process. The DPP prosecutors oversee all of the criminal cases in the ACT. Thus they are in an excellent position to provide an opinion on how the new legislation has been implemented.

Seventeen barristers from the ACT Bar Association and private law firms were invited to complete the online survey and five provided responses. The 17 potential participants were identified either through the ACT Bar Association’s criminal law list website or through personal contacts within the field. I first sent them an email asking them to respond if they had been involved in a sexual assault matter in the past five years. The resulting participants were criminal lawyers who had represented a defendant in a sexual assault matter. They were, therefore, able to provide some good insight into the implementation of the reforms and their impact from the Defence and defendant’s point of view.
Survey design and scope*

Once the potential research participants were identified, they were sent an email with a link to the survey on SurveyMonkey®. The survey instrument first asked some basic background information questions about the participant, to be used to contact the participant for any follow-up queries. Participants were then asked a series of questions about interpretation of the indeterminate sections of the legislation. These questions were designed around each of the new or amended sections of the legislation to determine how each section is working in practice. Finally, several questions sought views on whether the changes are achieving their intended aim of reducing the trauma of a trial for victim–witnesses whilst maintaining the accused’s right to a fair trial. The background research highlighted that the idea of balancing the rights of the accused and the victim is a somewhat problematic one. Given this, these questions were necessary to determine whether this issue had in fact been resolved.

Analysis

The SurveyMonkey® website stores all responses and enables them to be downloaded at any stage as a single PDF file. Once all of the surveys were complete, I downloaded the two PDF files—one with the judicial officers’ responses and one with the legal practitioners’ surveys. However, after I collected the practitioner survey responses, it became obvious that six respondents had not answered some questions. I contacted these participants again by email asking them to clarify or expand on their answers. Of these six, two responded to the follow-up email. The follow-up questions focused on how many relevant trials the practitioners had been involved with and how the pre-trial processes and applications for special provisions were working in practice. This method was ideal for eliminating errors and omissions in the original instrument.

Again, the participant responses were examined qualitatively using an open-coding approach.21 Because only three judicial officers and six legal practitioners provided responses, and the answers were generally short, the process of thematic coding was informal and unstructured. The process of studying each passage of every survey word-by-word and line-by-line led me to identify clear themes that were repeated in the

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21 Miles and Huberman, above n 16, 40–43.
* Please see Appendix B for the full interview schedules.
surveys. This process helped to identify the common themes that arose and to observe and summarise the patterns in the responses.

**Victim support and victim–witness survey/interview**

In addition to determining how the SVOLAA is being interpreted and implemented, this part of my research aimed to determine the impact that the Act has had on the trial experiences of sexual assault victim–witnesses. To determine this, I chose to obtain the views of victim support personnel and victim–witnesses who had given evidence at a committal and/or trial. The legislative changes studied aimed to improve the process for these victims. As such, their voices, and the voices of those who supported them, are able to best illustrate the impact of the changes in this regard.

Access to support workers and victims for the purpose of conducting qualitative research can be quite complex. Support workers often work in under-resourced community organisations and have limited time. Victims have already been traumatised by their experiences and so can be unwilling to come forward. They may also distrust researchers they do not know and be reluctant to tell them the intimate details of their traumatic experiences. To get access to, and gain the trust of the participants, my relationship with the support workers—and the representatives of the organisations who deal with the support centres—was pivotal. The manner of recruitment was also extremely important and this is discussed further below.

The interview/survey of victims of sexual assault involved a strong focus on the procedural ethics process. Given the sensitive nature of this research, I gave careful consideration to identifying and minimising potential risks to these participants. In determining how I would achieve this, I was largely guided by the Human Research Ethics Committee’s (HREC) National Ethics Application Form (NEAF). It helped me to focus on the wellbeing of the victims. I was also guided by research by Campbell et al.

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22 The University of Canberra’s Committee for Ethics in Human Research approved the project on 27 October 2010. Protecting the anonymity of participants and the wellbeing of the victim–witnesses were the main ethical consideration in this project. Before responding to the survey or participating in an interview, participants had to read the participant information form and sign a consent form, both of which stated that all responses would be de-identified. Victim–witnesses were also informed of where they could seek help should the survey or interview cause further trauma.

which observed that researchers need to be knowledgeable about violence against women; understand that survivors show their emotion in different ways; know that recovery is a long journey that takes different paths; respect the difference between learned and personal knowledge and help women feel comfortable.  

I identified a major potential risk for victim–witnesses participating in my research. A consequence of talking about painful or traumatic events, or disclosing sensitive or embarrassing information, was that they might be re-traumatised by the interview or survey. This in turn could cause them to suffer psychological and/or emotional distress during or after participation. It was particularly important that I respected the victims during the interview and survey process so as to not further compound this trauma. In consultation with the HREC guidelines and my supervisor—who has extensive experience in interviewing sexual assault victims—I developed strategies to minimise this risk. Before these participants completed the survey or attended the interview, they were informed that they might ‘be re-traumatised by the interviews and may experience psychological harm as a result of distress, anger or fear related to disclosure of sensitive or embarrassing information’. I did not anticipate a high rate of re-traumatisation because the victim participants were self-selected—this is discussed further below. However, they were all advised before participating that they could end the interview at any time. I also planned to monitor the interviews carefully throughout so that I could identify any risks and end the interview if necessary. I also gave the participants details of free sexual assault counselling services for debriefing.

Participants

Three victim support workers were invited to complete an online survey using SurveyMonkey® and two victim–witnesses were invited to complete an online survey or participate in a face-to-face interview.

24 Campbell et al, above n 5.
26 This statement was included on the participant information form attached to the consent form that was given to each participant before his or her participation.
Two victim support workers employed or formerly employed by the ACT DPP, and one from the AFP, were invited to complete an online survey. All three provided responses. The contact details of the respondent formerly employed by the DPP were gained through meeting at a conference. This respondent later provided me with the email addresses of the other two participants—a form of sampling known as ‘respondent driven sampling’. The victim support participants work directly with victims of sexual assault when they go to trial. Thus, they were able to provide an invaluable insight into how the reforms are working in practice and the effect that they have had on victim–witnesses’ experiences. They have a deep knowledge of the concerns and problems faced by victims of sexual assault and what seems to work and what has failed.

In October 2010 The Canberra Times interviewed me about my doctoral research. They subsequently published an article that provided an overview of my research and also invited any victims of sexual assault who were willing to participate in a survey or interview to contact me. As a result of the publication of this article I had contact with three victims of sexual assault. However, only two were suitable for my research. The third was not able to participate as the defendant in that case pleaded guilty before trial and so she did not experience a committal hearing or actual trial. The two victims who participated in the research gave evidence at the committal hearing before the reforms were enacted and at the trial after the reforms. My research aims to determine whether the ACT legislative amendments have made victims feel safer and to critique the processes that fail and work for victims. Because of this it was pivotal for me to listen to the criminal justice process stories of these victims and hear about how they believe it might be improved. As Renzetti observes, this type of research helps to ‘give voice to and improve the lives of marginalised people and it transforms social scientific enquiry from an academic exercise into an instrument of meaningful social change’.  

**Survey/Interview design and scope**

After I identified the potential victim support research participants, I sent them a link to the survey on SurveyMonkey®. The victim support person survey was a combination of the questions asked of the practitioners and those asked of the victims. This is discussed

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28 Claire M Renzetti, ‘Confessions of a reformed positivist: feminist participatory research as good social science’ in Martin D Schwartz (ed.), *Researching sexual violence against women* (Sage Publications, 1997) 143.

* Please see Appendix C for the full interview schedules.
in more detail below. The instrument first gathered some basic background information about the participant; again to be used in case of a need to follow up on any of the responses. Participants were then asked a series of questions about the impact that a trial has on sexual assault victim–witnesses’ wellbeing. Following this, several questions sought respondents’ views on how the new provisions are being implemented and the effect, if any, that they have had on the experiences of victim–witnesses.

Of the two victim participants, one completed an online survey using SurveyMonkey®, and the other chose to participate in a face-to-face interview using the same instrument. That interview was recorded and later transcribed. I chose to give the victims a choice of how to participate in the research. I hoped that providing an option to complete an online survey would encourage participants who did not feel comfortable talking about their experiences face-to-face. The victim–witness research instrument firstly asked the victims to discuss their experiences of committal hearings, pre-trial hearings and trials, and how the processes impacted on their wellbeing. Questions were then asked about their specific experiences in relation to the reforms. That is, their view of the accused, testifying in an open/closed court, and having a support person present.

**Analysis**

The SurveyMonkey® website stores all responses and enables them to be downloaded at any stage as a single PDF file. Once all of the surveys were complete, I downloaded the two PDF files—one with the victim support personnel responses and one with the single victim response. The interview with the victim–witness participant was recorded and later transcribed into the same survey instrument response format as that used for the online survey. However, as with the legal practitioner responses, after I analysed the victim support surveys it became apparent that there were some further questions or clarifications needed about how the amendments are working in practice. I sent an email to two of the three support worker participants asking them to answer some further questions. One participant could not answer these questions as he/she is no longer involved in the ACT system. Only one of the two victim support personnel contacted with further questions provided answers. The questions focused on how and when victims are made aware of the special provisions that are available and the success rate of the applications that are made. Again, this enabled me to gain responses to questions that were omitted from the original instrument.
The participant responses were examined qualitatively using an open-coding approach. Only three victim support workers and two victim–witnesses participated in the study and their answers were generally short. This meant that the open-coding process was informal and unstructured. I then studied every passage of the surveys and interview transcript to determine exactly what was said and labelled each passage with an appropriate code or label. This process helped to identify the common themes that arose and enabled me to observe and summarise the patterns in the responses.

**Limitations on the findings**

The qualitative research findings cannot be generalised due to the small size of the various samples.

When investigating the history of the legislation, I made every effort to recruit participants from all areas and with varying perspectives. However, it is possible that there was insufficient input from the detractors of the legislation. Those involved in drafting the legislation and those from the ACT Department of Justice and Community Safety (JACS), which was heavily involved in the reforms, did not respond. Therefore, the findings in this study are not representative of everyone’s views. Rather they tell the story of legislative change from the perspective of a few of the most involved individuals.

The implementation findings cannot represent the views of all judges, lawyers, support workers and victims: it cannot be said that these few are representative of the whole. Further, the findings cannot illustrate the effect of the legislative reforms as a whole. However, they can be used to demonstrate how they are being, or might be, implemented and how they could affect victim–witnesses’ wellbeing. The findings provide viewpoints from a range of perspectives on the purported success, or otherwise, of the legislation and how it is being implemented.

The findings in my thesis have also been affected by my values and beliefs – my particular selection, interpretation and presentation of the data. As stated by Easteal, ‘since the dominocentric academic ethos, like law, lays claims to an objective knowledge,

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29 Miles and Huberman, above n 16, 40–43.
this acknowledgment of my own assumptions makes the author vulnerable to allegations of subjectivity and bias’.  

**Summary**

The methods employed in this research focus on the voices and experiences of those closest to the introduction and implementation of the SVOLAA. The triangulation of the methods—including background research, case and legislation analysis, interviews and surveys—enabled me to provide a clear and concise picture of the history and impact of the changes. My findings illustrate the impact and effectiveness of sexual assault victim protection law reform on non-disabled, adult victims of sexual assault by:

- determining the extent and legal context of victim trauma in the courtroom and the impact of previous legislative changes aimed at improving victims’ safe speaking
- discovering the reasons and process behind the enactment of the SVOLAA
- analysing the implementation of the legislation and determining the impact the changes have had on the experiences of victims of sexual assault.

The following chapter introduces the principle of a fair trial in Australia and illustrates its vague nature and the way in which it exists within Australia’s legislative framework. I then examine, in the context of the application of this principle in Australia, the most controversial changes made by the *Sexual and Violent Offences Legislation Amendment Act*.

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Chapter Three

The principle of a fair trial in Australia and the Sexual and Violent Offences Legislation Amendment Act 2008

The Sexual and Violent Offences Legislation Amendment Act (SVOLAA) was not introduced without demur. With its introduction came concern from many people and organisations that the Act, whilst protecting the complainant’s rights, would breach the accused’s right to a fair trial.¹ This chapter seeks to illustrate the amorphous nature of Australia’s right to a fair trial and how it exists within and beside ACT human rights statutes and international treaties. It also examines the most controversial changes made by the Act and discusses whether these changes balance or infringe upon victim and defendant rights within the ACT human rights framework.

There are many jurisdictions in which the ‘right’ to a fair trial is preserved—either through a Constitution or a statute of general application.² However, this is not the case in Australia. When our Constitution was framed, the founders decided to exclude an express guarantee of ‘due process of law’. Their rationale for this was that ‘Australia’s legal and political traditions already respected the right to a fair trial and thus constitutional protection for “due process of law” was unnecessary’.³ In the absence of any legislation providing for the right to a fair trial in Australia, the courts have identified some implied rights under the Constitution and developed common law doctrines of due process.⁴

The constitutional status of the right to a fair trial in Australia is implicit at best. Instead, the right is based on the ‘inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes’.⁵ As a result, the term ‘principle’ rather than ‘right’ is often used in Australia. This term recognises that

¹ See: Letter from Dr Helen Watchirs and Linda Crebbin to Simon Corbell, 21 July 2008; Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 21 August 2008, 3510–3513 (Dr Foskey); Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 21 August 2008, 3513–3515 (Mr Mulcahy).
² See, for example: the Fifth and Fourteenth Amendments to the United States Constitution; and section 7 of the Canadian Charter of Rights and Freedoms.
the weight given to fair trial considerations in our legal system may vary depending on the circumstances of the case. The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.

What is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values... And, just as what might be fair at one time may, quite properly, be adjudged unfair at another.

However, there are two international human rights treaties that Australia has ratified that are often referred to in human rights debates: the **International Covenant on Civil and Political Rights** and the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Furthermore, the ACT and Victoria now have human rights legislation that codifies, to some extent, the rights contained in these treaties. I discuss the influence of these legal instruments further on in the chapter.

**Constitutional significance**

The only express fair trial protection in the *Australian Constitution* is a narrow guarantee of a jury trial under section 80. However, many argue that Chapter III of the *Australian Constitution* implies some form of protection of procedural rights. Recently there have been many debates in the High Court as to whether or not this is the case. It

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7 *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23, 57 (Deane J).
8 *Dietrich v The Queen* (1992) 177 CLR 292 (Gaudron J).
9 See, for example, *New South Wales Law Reform Commission, 'Questioning of complainants by unrepresented accused in sexual offence trials'* (101, 2003).
13 *Commonwealth of Australia Constitution Act 1900* (Cth).
14 Hon J J Spigelman AC, above n 5, 32.
seems quite likely that Chapter III does imply some protection to certain aspects of the principle of a fair trial. However, there has been no clear majority decision to that effect.\(^\text{15}\)

In *Dietrich v The Queen*\(^\text{16}\) the High Court considered the origin of the principle of a fair trial. The majority of the Court held that the right existed at common law. However, Deane and Gaudron JJ elaborated on this conclusion stating that the right to a fair trial, at least in relation to federal offences, is entrenched in the *Australian Constitution*.\(^\text{17}\) The main argument in favour of a constitutional right to a fair trial is that the right is implied from the separation of judicial power under the *Constitution*.\(^\text{18}\)

**Right to a fair trial by implication from the separation of judicial power**

The separation of the judicature under Chapter III of the *Australian Constitution* helps to protect the right to a fair trial by giving Commonwealth judicial power to the courts. This ensures that judicial power is exercised independently of the government and that it is exercised in accordance with established judicial procedures.\(^\text{19}\) However, in *Dietrich*,\(^\text{20}\) Deane and Gaudron JJ furthered this notion. They suggested that the strict separation of Commonwealth judicial power could be the basis of an implied right to a fair trial in the *Australian Constitution*:

> The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution’s requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the Constitution designates.\(^\text{21}\)

> The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch III’s implicit requirement that judicial power be exercised in accordance with the judicial process.\(^\text{22}\)

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15 Hon. J J Spigelman AC, above n 5, 32.
16 *Dietrich v The Queen* (1992) 177 CLR 292.
17 Ibid.
19 Ibid.
20 *Dietrich v The Queen* (1992) 177 CLR 292.
21 Ibid., 326 (Deane J).
22 Ibid., 362 (Gaudron J).
Other members of the High Court have also expressed support for this view. In *Nationwide News Pty Ltd v Wills* Deane and Toohey JJ stated that:

...it is a fundamental implication of the Constitution’s doctrine of the separation of powers that...no part of the judicial power of the Commonwealth can be exercised...in a manner which is inconsistent with our traditional judicial processes.

Mason CJ, Dawson and McHugh JJ also agreed with this view in *Leeth v Commonwealth*, holding:

...that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power...a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.

Brennan, Deane and Dawson JJ again reiterated these views in their joint judgment in *Chu Kheng Lim v Minister for Immigration*.

However, there is a further difficulty with the argument of a right to a fair trial by implication from the separation of judicial power. That is, its application to the States. The Constitution refers to Commonwealth judicial power; yet most criminal offences are legislated and enforced by the States. It could be demonstrated that the State constitutions also contain express or implied guarantees of judicial independence. However, Hope argues that nothing can be implied from these guarantees because State constitutions are Acts of Parliament subject to amendment at any time. Furthermore, research does not appear to support the existence of a doctrine of separation of powers at a State level.

There are, however, other arguments in favour of the constitutionally implied right to a fair trial applying to the States. One of those arguments relies on either

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23 Hope, above n 18, 182.
25 Ibid., 69–70.
27 Ibid., 470.
29 Hope, above n 18, 183.
section 106 or 109 of the *Commonwealth Constitution*. The argument claims that although State constitutions may not contain a separation of powers doctrine, they are required to observe the doctrine because it exists at a Commonwealth level. Another argument is that because of Australia’s integrated court system, ‘any interference with the conduct of criminal trials at State level would inevitably constitute an interference with the Commonwealth judicial process’.

From this it is clear that there is no concise answer as to whether there is an implied right to a fair trial in Australia’s *Constitution*. Irrespective of a constitutionally implied right to a fair trial, an accused’s right to receive a fair trial according to law is a fundamental element of Australia’s criminal justice system. Notwithstanding this, the High Court has made it clear that the fairness requirement must depend upon the facts of the particular case.

**International Covenant on Civil and Political Rights**

In addition to the potential Constitutional right to a fair trial, Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*. This treaty is often referred to in human rights debates. Australian judges may look to the *ICCPR* ‘as an aid to the explication and development of the common law’. However, without clear expression in Australian legislation, these rights have no legal force. The section of the *ICCPR* that outlines the principle of a fair trial is Article 14, which states:

1. All persons shall be equal before the courts and tribunals...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial...but any judgement rendered in a criminal case...shall be made public...
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

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31 Hope, above n 18, 183.
32 Ibid, 184.
33 See: *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23;
*Dietrich v The Queen* (1992) 177 CLR 292...
35 See, for example: New South Wales Law Reform Commission, above n 9.
a. To be informed promptly and in detail...of the nature and cause of the charge against him;
b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
c. To be tried without undue delay;
d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
g. Not to be compelled to testify against himself or to confess guilt.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.37

Again, however, although the courts may use the ICCPR as a guide to developing the common law, these international standards are not legally enforceable until they are clearly adopted in Australian legislation.

**Human Rights Act 2004 (ACT)**

On the 1st of July 2004, the Australian Capital Territory enacted the first human rights statute in Australia. This Act is primarily based on the statements of rights found in the ICCPR. Section 21 of the Human Rights Act38 (HRA) provides for the right to a fair trial, and states:

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38 *Human Rights Act 2004 (ACT)*.
a. Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

b. However, the press and public may be excluded from all or part of a trial—
   1. to protect morals, public order or national security in a democratic society; or
   2. if the interest of the private lives of the parties require the exclusion; or
   3. if...publicity would otherwise prejudice the interests of justice.

c. But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

Section 22 of the HRA refers to other 'rights in criminal proceedings':

1. Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
2. Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
   a. to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;
   b. to have adequate time and facilities to prepare his or her defence and to communicate with lawyers...
   c. to be tried without unreasonable delay;
   d. to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
   e. to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;
   f. to have legal assistance provided to him or her, if the interests of justice require...and he or she cannot afford to pay for the assistance;
   g. to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
   h. to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
   i. not to be compelled to testify against himself or herself or to confess guilt.

However, section 28 of the HRA states that 'human rights may be subject...to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic

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39 Human Rights Act 2004 (ACT) s 22.
society’. This means that the rights provided for by the HRA may be limited or overridden by other legislation; provided that it is ‘reasonable’. In determining whether a restriction is reasonable, the court must consider all relevant factors. These include whether any less restrictive means are reasonably available to achieve the purpose of the limitation and the:

- nature of the right affected
- importance, nature and extent of the limitation
- relationship between the limitation and its purpose.

Furthermore, the HRA does not confer legally enforceable rights on individuals as such. Rather, it requires the courts to interpret other ACT legislation in a way that is compatible with the HRA. If the Supreme Court finds that another statute is not consistent with the HRA, it may issue a ‘declaration of incompatibility’. However, this declaration does not affect ‘the validity, operation or enforcement of the law’.

The HRA is now the legal instrument to turn to in human rights debates in the ACT. However, section seven states that ‘this Act is not exhaustive of the rights an individual may have under domestic or international law’. Other rights that are not contained within this statute may still be referred to. This means that the HRA will apply in the principle of a fair trial in the ACT. However, international and constitutionally implied rights such as those discussed above could also still be referred to.

**The principle of a fair trial in sexual assault cases: the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)**

Although the original nature of the principle of a fair trial in Australia is uncertain it is a fundamental element of our criminal justice system; and has now been codified by the HRA in the ACT. However, although legislation does not expressly provide for it, judicial officers have noted that the accused’s right to a fair trial must be balanced with the needs and the interests of the other parties involved. These include the interests of

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40 Human Rights Act 2004 (ACT), s 28(1).
41 Ibid., s 28(2).
42 Ibid., s 30.
43 Ibid., s 32(2).
44 Ibid., s 32(3)(a).
the victim–witness not to be re-traumatised. As one United Kingdom judge has explained:

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.45

In applying section 21 of the HRA in the ACT, one judge clarified that the rights of both the accused and the complainant should not be seen to be in competition; that the section does not provide for ‘a zero-sum game’:

...it is not the position whereby fairness to the complainant reduces fairness to the accused—both can sit comfortably together.46

It has been argued by some members of the legal community that changes to sexual offence trial procedure could restrict the accused’s right to be tried fairly.47 In the remainder of this chapter I examine—in the context of the above discussion about the right to a fair trial in Australia—the changes made by the Act that affect sexual assault victims. I then discuss if these amendments could possibly be infringing the principle of a fair trial for the accused in the ACT.

**Paper-based committal proceedings**

A person charged with an indictable offence in the ACT may be summoned to attend a committal proceeding before the Magistrate’s Court ‘to answer to the information and to be further dealt with according to law’.48 Committal hearings are a preliminary examination conducted by a magistrate to determine whether a case has sufficient evidence to justify a trial. If the magistrate finds that this is the case, the defendant is committed to trial in a higher court: for sexual offences in the ACT this is the Supreme Court.

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48 *Magistrates Court Act 1930* (ACT) s 38.
The SVOLAA inserted a section into the *Magistrates Court Act 1930 (ACT)*, which prohibits absolutely the calling and cross-examination of victims of sexual assault at the committal hearing. The amendment states that ‘a person must not be required to attend and give evidence at a preliminary examination in relation to a sexual offence...if the person is a complainant’. Written statements or transcripts of police interviews are instead admitted to the court for assessment—the ‘paper committal’. This means that sexual assault complainants can no longer be cross-examined at the committal hearing; a restriction that may appear to threaten the accused’s right to be tried fairly.

The amendments to the committal process do not appear to expressly conflict with any provisions of the *HRA* or *ICCPR*, which means that they are legally sound. However, this raises a question: do they conflict with the common law principle of a fair trial?

Committal proceedings have been said to be an important part of the criminal justice process; but there are differing views about the structure and necessity of committal proceedings for a fair trial. For some, ‘the loss of the opportunity to cross-examine Crown witnesses before the trial will be irremediable’. The majority of the High Court in *Barton v The Queen* held that:

...to deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial.

However, it has also been argued that the ‘traditional method of conducting a committal by viva voce evidence is [not] essential to safeguard the fairness of any subsequent trial’. The purpose of a committal hearing is to ensure that no one stands trial unless a prima facie case has been made out. Although it will ordinarily do so, the committal hearing is not designed to assist the accused in preparation of his Defence:

It cannot be simply that the loss of some advantage which may ordinarily be enjoyed,

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49 Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) s 34, now s 90AA(9) of the Magistrates Court Act 1930 (ACT).
50 Barton v The Queen (1980) 147 CLR 75, 106 (Stephen J).
51 Barton v The Queen (1980) 147 CLR 75
52 [Ibid., 101 (Gibbs and Mason J)].
54 Moss v Brown (1979) 1 NSWLR 114.
whether or not fortuitously, by other persons accused of crime, amounts to such an abuse. That loss of advantage may be felt keenly by an accused person, but this is a very different thing from saying that he has lost the opportunity of a fair trial.\(^{55}\) This means that the loss of an advantage normally held by the accused will not necessarily result in an unfair trial.

With paper committals, such as those provided for by the SVOLAA, Higgins contends that they do no injustice to the accused.\(^{56}\) This contention is qualified. Paper committals do not treat an accused unjustly provided that the statement is limited to admissible evidence and the witness is available to be cross-examined by the accused at some stage.\(^{57}\) However, Defence lawyers have argued that the accused does not have the same opportunity to test the Crown witnesses and investigate matters of detail before trial; fairness requires that the Defence be given this opportunity.\(^{58}\) The High Court held that without committal proceedings, ‘the accused is denied knowledge of what the Crown witnesses say on oath; the opportunity of cross-examining them; [and] the opportunity of calling evidence in rebuttal’.\(^{59}\)

From this it is evident that paper-based committals can result in some loss of advantage to the accused. However, as Wilson J stated above, this does not necessarily interfere with the fairness of the trial. There are multiple arguments both for and against paper-based committals and perhaps there is no way to determine whether such a change derogates from the common law principle of a fair trial. However, in the context of the ACT legislation, the amendments to the committal process appear to be compatible with the accused’s (statutory) right to be tried fairly.

**Pre-trial hearings**

For non-disabled, adult victims of sexual assault who are likely to suffer severe emotional trauma\(^{60}\) or be intimidated or distressed,\(^{61}\) the SVOLAA allows them to give

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\(^{55}\) *Barton v The Queen* (1980) 147 CLR 75, 114 (Wilson J).

See also: *Varley v The Queen* (1976) 51 ALJR 242.

\(^{56}\) Higgins, above n 53, 86–87.

\(^{57}\) Ibid. This is the case under the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT).


\(^{59}\) Blow, above n 57, 99 (Gibbs and Mason JJ).


\(^{61}\) Ibid., s 40P(1)(c)(ii).
their evidence at a pre-trial hearing by audiovisual link. This evidence—including cross-examination and re-examination—must be recorded, then played and admitted as the witness’s evidence at the hearing of the sexual offence proceeding. However, the accused may apply to the court for an order that the witness attend the hearing to give further evidence; and the court can make this order if it is in the interests of justice to do so. These restrictions may appear to potentially conflict with section 22(2)(g) of the HRA: the right to have prosecution witnesses examined under the same conditions as witnesses on the accused’s behalf.

There have been no cases in Australia that discuss the concept of a pre-trial hearing and its impact on the accused’s right to a fair trial. So it is necessary to use similar overseas legislation and international treaties to help define the issues.

The United Kingdom *Youth Justice and Criminal Evidence Act 1999* enacted many special measure provisions for vulnerable witnesses similar to those in the *SVOLAA*. Section 28 of the United Kingdom Act provides for video recorded cross-examination or re-examination similar to the pre-trial concept in the *SVOLAA* mentioned above. An evaluation was conducted in the United Kingdom to determine the Act’s compatibility with fair trial guarantees—specifically Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*. It found that pre-trial cross-examination should not, in principle, offend Article 6 as the judge has control over the proceedings and the Defence is able to participate in full. Furthermore, Strasbourg jurisprudence has continually held that Article 6 does not provide the accused with an unlimited right to secure witnesses in court. It is for the domestic courts to decide whether a witness should be called at all; or be recalled to give further testimony.

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62 *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 40Q(1) and (2).
63 Ibid., s 40S(1).
64 Ibid., s 40S(3)(a).
65 Ibid., s 40S(3)(b).
66 Ibid., s 40T(2).
67 Ibid., s 40T(3)(b).
68 *Youth Justice and Criminal Evidence Act 1999 (UK)* c23.
70 *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, opened for signature 4 November 1950, 213 UNTS 222, art 8 (entered into force 3 September 1953). The ECHR contains fair trial provisions similar to those in the *ICCPR*.
71 Hoyano, above n 68, 961.
Article 6 of the \textit{ECHR} is very similar to sections 21 and 22 of the \textit{HRA}. Therefore, the findings of the Strasbourg Court could be used as an example to follow in determining the compatibility of the \textit{SVOLAA} with fair trial guarantees. If this precedent was followed, it is likely that the restrictions imposed on the accused by pre-trial hearings would be found to be compatible with the accused’s right to a fair trial.

\textbf{Prohibition on cross-examination by a self-represented accused}

The \textit{SVOLAA} creates a new section, 38D, in the \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT)}. It states that in sexual offence proceedings, ‘a self-represented accused person \textit{must} not personally cross-examine a witness’.\textsuperscript{74} If a self-represented accused intends to cross-examine the victim in these circumstances, the court must order that the accused obtain legal representation.\textsuperscript{75} If representation is refused the court must inform the person that they may not cross-examine the victim.\textsuperscript{76}

This amendment is perhaps the most controversial of all the amendments in terms of the right to a fair trial.

At first glance, any restriction on cross-examination would appear to potentially infringe a defendant’s right to be tried fairly. The New South Wales Law Reform Commission (NSWLRC) has outlined two possible reasons why restricting cross-examination by a self-represented accused could be viewed as interfering with the ‘right’ to a fair trial. The first of these is that the accused is denied the ability to present his or her case personally. Secondly, even if alternative arrangements are made, the accused is denied the ability to test the complainant’s evidence in the normal way.\textsuperscript{77}

Lawyers’ groups and some judges have argued against the introduction of a prohibition on cross-examination by a self-represented accused in sexual assault trials. They argue that it threatens the fairness of the trial:\textsuperscript{78}

\textsuperscript{74} \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT)} s 38D(3) (emphasis added).
\textsuperscript{75} \textit{Ibid.}, s 38D(4)(e)(i).
\textsuperscript{76} \textit{Ibid.}, s 38D(5)(a).
\textsuperscript{77} New South Wales Law Reform Commission, above n 9, 31–32.
\textsuperscript{78} See: Victorian Law Reform Commission, above n 46; NSW Public Defenders (P Zahra and C Loukas), \textit{Submission} at 2, in New South Wales Law Reform Commission, above n 9, 37.
...to deny an accused the right to appear in person and conduct his own defence according to law, is to strike at the very heart of the criminal justice system and indeed the liberty of the subject.79

Proponents of this view believe that it is dangerous to convict a defendant who has not been given the full opportunity to test the prosecution evidence by questioning witnesses. Although the experience may be unpleasant for witnesses, the whole purpose of cross-examination is to challenge the credibility and consistency of their evidence.80

Further it has been argued that the right to self-representation is inviolable; that it is inappropriate to enforce legal representation on a defendant who chooses to represent himself or herself.81

In the context of the ACT HRA, this prohibition could appear to contradict the accused’s right to ‘defend himself or herself personally’.82 As the law currently stands in Australia, and in the ACT, defendants do have the right to represent themselves in court.83 Furthermore, it is possible that persons charged with a criminal offence have the right not to have counsel forced upon them against their will.84 However, according to the HRA, the right to self-representation in the ACT is not absolute.85 Further, the European Court of Human Rights has held that a State law requiring a court to appoint representation for an accused—even against his or her will—does not offend the provisions of Article 6 of the ECHR. These provisions contain rights similar to those in the ACT HRA.

Under the HRA, an accused in a criminal proceeding also has a right to test the evidence against him or her—including cross-examining prosecution witnesses.86 However, the HRA allows for this right to ‘be subject...to reasonable limits set by Territory laws

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80 Judges Neesham, Kelly and Hart, above n 74.
81 NSW Public Defenders (P Zahra and C Loukas, Submission, at 3, in New South Wales Law Reform Commission, above n 47, 37
82 Human Rights Act 2004 (ACT) s 22(2)(d). This right is supported by Article 14(3)(d) of the ICCPR and Article 6(3)(c) of the ECHR.
83 See: Judiciary Act 1903 (Cth) s 78; Human Rights Act 2004 (ACT) s 22(2)(d); and Varley v The Queen (1976) 51 ALJR 243. Various court rules (for example, O 4, r 14 of the Federal Court Rules (Cth)) confirm the right of a person to appear in court in person or with a lawyer.
84 See: R v Woodward [1944] 1 KB 118; and Burwood MC v Hervey (1995) 86 LGERA 389 (Kirby P).
85 See section 28 of the Human Rights Act 2004 (ACT). This view is also supported by the European Court of Human Rights.
86 Human Rights Act 2004 (ACT) s 22(2)(g). See also: Whitehorn v The Queen (1983) 152 CLR 657, 661 (Murphy J); Kant v DPP (1994) 73 A Crim R 481; Astill v The Queen (1992) 63 A Crim R 157
that can be demonstrably justified in a free and democratic society": 87

...justification under section 28...requires a showing by the proponent of the law that the limitation or restriction on the right pursues a legitimate objective, and that there is a reasonable relationship of proportionality between the means employed and the objective sought to be realised.88

The NSW Court of Appeal has stated that the rights of the accused must be balanced with the need to reduce the trauma of testifying for victims of crime. 89 Thus, Parliament’s restriction of cross-examination processes in an attempt to achieve this balance could be seen as a reasonable limit under section 28 of the HRA. At an international level:

...a prohibition on cross-examination in person by an unrepresented accused would not breach the express words of [the ICCPR or ECHR], provided that the accused retained the opportunity to have the witness against him or her effectively examined by someone else’.90

The SVOLAA aims to

...achieve the dual objectives of treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused.91

The prohibition on cross-examination by a self-represented accused was introduced following research demonstrating that victims in these situations were often subject to lengthy and traumatic cross-examination by the accused leaving them feeling demeaned and humiliated.92 The High Court supports this prohibition and conforms to the ICCPR as defendants maintain the right to examine witnesses through a legal practitioner. If the amendment is ‘demonstrably justifiable in a free and democratic society’, it will also be compatible with the HRA and the accused’s right to be tried fairly.

The drafters of the legislation argue that the ‘process for establishing whether a

87 Human Rights Act 2004 (ACT) s 28(1).
89 Kant v DPP (1994) 73 A Crim R 481, 488 (Gleeson CJ).
90 New South Wales Law Reform Commission, above n 9, 34.
91 Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
limitation on a human right is justifiable is now well established’.\(^{93}\) To satisfy the test—as set out in section 28 of the \textit{HRA}—of:

...reasonable limits...that can be demonstrably justified in a free and democratic society\(^ {94}\)
...the limitation must fulfill a pressing and substantial social need, pursue a legitimate aim and be proportionate to the aims being pursued.\(^ {95}\)

The drafters of the legislation argue that the restriction on cross-examination by a self-represented accused is aimed at overcoming a problem that is pressing and substantial;\(^ {96}\) that the problem is ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’.\(^ {97}\)

The proportionality element requires that the restriction be:

...necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person(s) to whom it applies.\(^ {98}\)

The drafters of the legislation also argue that the restriction on cross-examination adheres to the proportionality criterion; and hence the amendment meets the test of a reasonable limit as detailed in the \textit{HRA}.\(^ {99}\)

After assessing both the Australian and international arguments, it would appear that the restriction on cross-examination by a self-represented accused does not impact on the accused’s right to be tried fairly. The trauma to the victim—which will be discussed in more detail in the following chapter—far outweighs the loss of the right to self-representation for the accused.

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\(^{93}\) Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 7.

\(^{94}\) \textit{Human Rights Act 2004 (ACT)} s 28.

\(^{95}\) Ibid.

\(^{96}\) Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 7.


\(^{98}\) Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 9.

\(^{99}\) Ibid., 9–11.
Closed courts

Under the new ACT legislation, the court may order that the court be closed to the public while witnesses in sexual offence proceedings give all or part of their evidence.\textsuperscript{100} In deciding whether the court should be closed to the public, the court must consider:

\begin{itemize}
  \item the wishes of the witness\textsuperscript{101}
  \item whether it may be in the interests of justice for the witness to give evidence in an open court.\textsuperscript{102}
\end{itemize}

It is a fundamental principle of the common law that justice be administered in open court. That is, that the public, including the press, may attend all stages of a trial.\textsuperscript{103} In the ACT, under section 21(1) of the HRA, the accused has a right to a fair and public hearing. The new closed court provision in the SVOLAA may appear to conflict with these principles. However, subsection 21(2) of the HRA enables exclusion of the press and public in certain circumstances—including situations where the interests of the private lives of the parties require exclusion.\textsuperscript{104} Thus, if the court makes an order under section 39, with all variables considered, the order will conform to the HRA and will not breach the accused’s right to be tried fairly in the ACT.

Use of screens to block the victim’s view of the accused

Section 38C of the \textit{Evidence (Miscellaneous Provisions) Act} is a new section inserted by Section 8 of the SVOLAA. This section enables the court to order that the courtroom be arranged in such a way that complainants in sexual offence proceedings cannot see the accused—or any other relevant person—while they are giving their evidence.\textsuperscript{105} However, the witness must be visible to the judicial officer, the jury, the accused person, the accused person’s lawyer, and anyone else who has been screened from the victim.\textsuperscript{106}

This provision does not appear to expressly conflict with the accused’s right to be tried fairly in the Australian context. The Human Rights Commission has approved—in the

\textsuperscript{100} Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) s 9, now s 39(2) of the Evidence (Miscellaneous Provisions) Act 1991 (ACT).


\textsuperscript{102} Ibid., s 39(3)(b).

\textsuperscript{103} See: Scott v Scott (1913) AC 417, p 441; McPherson v McPherson [1936] AC 177,199–203; Russell v Russell (1976) 134 CLR 495, 520 (Gibbs J).

\textsuperscript{104} Human Rights Act 2004 (ACT) s 21(2)(b). This exception is also supported by the common law, see: R v Governor of Lewes Prison; Ex parte Doyle [1917] 2 KB 254; Scott v Scott [1913] AC 417, 436.

\textsuperscript{105} Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38C(2).

\textsuperscript{106} Ibid., s 38C(3).
Northern Ireland context—the use of screens to shield intimidated witnesses from the accused, the public and the media.107

Support persons

Previously in the ACT, witnesses in sexual offence proceedings were allowed to have a support person with them while they gave evidence from another location via Closed Circuit Television (CCTV). However, following the implementation of the SVOLAA, witnesses are now also allowed to have a support person with them in the courtroom—or remote witness CCTV room—while they give their evidence.108 When a party applies to call a witness, the court must now order that the witness have a support person in the court, 'close to, and within the witness’s sight'.109

The support person in these circumstances must not speak for the witness during, or otherwise interfere in, the proceeding.110 In addition, they must not be, or be likely to be, a witness or party in the proceeding.111 Therefore, this amendment does not appear to directly infringe the defendant’s right to be tried fairly.

Summary

The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system in Australia. However, the High Court has made it clear that the fairness requirement must depend upon the facts of the particular case and that the interests of victims need also be considered.112

Despite this, ‘the question for feminism is whether the concept of the fair trial is sufficiently flexible to give adequate protection to both the rights of the accused and the rights of the complainant’.113

As we have seen, the Revised Explanatory Statement that accompanied the Sexual and Violent Offences Legislation Amendment Bill stated that all of the new provisions ensure a fair trial for the accused. In Chapter Ten I discuss whether, in the eyes of those interacting with the legislation every day, this right has been maintained in practice.

107 X v United Kingdom (1992) 15 EHRR CD (Ser A) 113; in Hoyano, above n 68, 967.
108 Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38E.
109 Ibid., s 38E(2).
110 Ibid., s 38E(4).
111 Ibid., s 38E(5)
113 Terese Henning and Simon Bronitt, 'Rape victims on trial: regulating the use and abuse of sexual history evidence' in Patricia Eastal (ed.), Balancing the scales: rape, law reform and Australian culture (1998) 93.
The following chapter illustrates the reasons behind the primary aim of the legislation: the trauma that sexual assault victims are subject to following the assault and throughout the criminal justice process.
Chapter Four

Why was reform needed? Trauma and re-trauma

For many witnesses, and especially victims of sexual assault, giving evidence in court is a particularly distressing experience. Following a sexual assault, victims often feel scared, anxious, sad, angry, shameful, responsible and unconfident. They may also experience Rape Trauma Syndrome (RTS)1 or Post-Traumatic Stress Disorder (PTSD) with rape as the stressor.2 Given their psychological fragility, there is enormous potential for re-traumatisation of sexual assault victims through their involvement with the criminal justice system and its processes. Of particular concern is when victims testify and are cross-examined.

The ‘primacy of the oral tradition’, within a culture of adversarialism, has produced entrenched patterns of testing oral evidence through leading questions that utilise complex vocabulary, sentence construction and syntax. Such techniques have been described as ‘legitimated bullying’.3

For victims of sexual assault, the traumatic effects of the trial can trigger similar feelings of powerlessness to those experienced as a result of the original abuse:4

...there is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happens in front of a crowd’.5

The Heroines of Fortitude study found that 65 per cent of the trials studied had two or more interruptions to evidence because of the distress of the victim.6

In this chapter I firstly outline the impact of sexual assault on the mental health of sexual

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assault victims. I then discuss the treatment of victim–witnesses throughout the criminal justice process and demonstrate how the system can re-victimise victims.

**Rape Trauma Syndrome (RTS)/ Post-Traumatic Stress Disorder (PTSD) with rape as the stressor**

Burgess and Holmstrom, a nurse and a sociologist respectively, first observed Rape Trauma Syndrome (RTS) in the emergency department of a Boston hospital while working with victims of sexual assault. In their clinical observations, they identified a group of psychological symptoms that appeared to occur in most rape victims and coined the term *Rape Trauma Syndrome.* This syndrome is defined as:

> ...a stress response pattern of the victim following forced, non-consenting sexual activity. It consists of somatic, cognitive, psychological and behavioural symptoms resulting from an active stress reaction to a life-threatening situation.

Rape Trauma Syndrome is now recognised in the medical and legal worlds as Post-Traumatic Stress Disorder (PTSD) where the stressor is rape. Sexual assault victims comprise the largest group of PTSD sufferers and tend to have more severe symptoms than those whose PTSD is a result of other stressors.

Sexual assault involves not only a physical deprivation of a victim’s right to the sanctity of her body, but a serious psychological deprivation as well. Studies indicate that more than 50 per cent of rape victims experience long-term effects of RTS, with as many as 94 per cent experiencing RTS at some stage after the assault. Generally, the effects of RTS occur in two main phases:

- the acute, disorganisation or disruptive phase, which can last up to a few weeks and is characterised by general stress response symptoms; and

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7 Cling, above n 2, 19.
10 Biggers and Yim, above n 9, 64.
11 Cling, above n 2, 22.
12 Biggers and Yim, above n 9, 69.
the long-term reorganisation phase, which is characterised by rape-related symptoms and can last a lifetime.\textsuperscript{15}

During the acute phase, victims may experience headaches, sleep disturbances, startle reactions, fear, anger, guilt and self-blame.\textsuperscript{16} These symptoms often continue into the reorganisation phase. However, in addition victims often change their surroundings, lifestyle and sexual activity, experience nightmares and fear being alone or in places similar to that in which the assault occurred.\textsuperscript{17} In addition to RTS, victims of sexual assault may also suffer from other disorders—such as major depressive disorder, panic disorder and anxiety disorders as well as substance abuse or dependence.\textsuperscript{18}

**What trauma were/are victims subject to during the criminal justice process?**

In sexual assault cases, the victims are not a party to the proceedings. Rather, they are the primary witness to the crime. This means that, for the trial to be plausible, they are required to give evidence and be cross-examined. Cross-examination is a difficult process for most witnesses in criminal trials but can be especially daunting for victims of sexual assault. Often years have passed since the commission of the crime—especially in cases of childhood sexual assault. There are cases in which the victims might not remember every detail clearly. However, despite this, they are required to give accurate, factual evidence, and are often accused by the Defence of lying, provoking the assault, or wanting financial compensation.\textsuperscript{19}

Some of the specific factors that compound the trauma of a trial for sexual assault victim–witnesses—and which have resulted in much law reform—including:

- being able to see the accused in the courtroom
- being cross-examined by a self-represented accused
- the use of traumatising questions by the Defence
- having to give evidence multiple times
- giving evidence in a court open to the public

\textsuperscript{15} See: Patricia Frazier and Eugene Borgida, ‘Rape trauma syndrome evidence in court’ (1985) 40(9) *American Psychologist* 984, 984; Ann Wolbert Burgess, ‘Rape Trauma Syndrome’ (1983) 1(3) *Behavioral Sciences & the Law* 97, 100
\textsuperscript{16} Frazier and Borgida, above n 15, 984.
\textsuperscript{17} Ibid.
\textsuperscript{18} Bisson, above n 13, 400.
\textsuperscript{19} Department for Women, above n 6, 18.
the length of the process.

Seeing the accused

Before the introduction of closed circuit television (CCTV) and the use of one-way screens in court, sexual assault victims had to give evidence in the courtroom, in front of the perpetrator. Victims had to discuss the intimate details of the assault in front of the accused. This escalated their feelings of angst and trauma. Many organisations—including the Youth Affairs Council of Victoria—argued that ‘exposure to the alleged perpetrator can often re-victimise and re-traumatisethe complainant’.

There are now provisions in all Australian jurisdictions that give the court the power to allow some or all complainants in sexual offence proceedings to give evidence via CCTV. In the ACT, ‘the evidence of the complainant…must be given by audiovisual link from the other place unless the court otherwise orders’. The court may only make an order under this section if the witness prefers to give evidence in the courtroom or if the trial would otherwise be delayed or conducted unfairly. This means that the majority of victims of sexual assault now give evidence via CCTV. If the court orders that the victim give evidence in the courtroom—or if the victim chooses to give their evidence in the courtroom—there are also provisions which allow the accused to be screened from the victim.

However, the Victorian Law Reform Commission found that prosecutors often express the view that jurors are more likely to convict when evidence is given in an open court. It encouraged victims to do so even though they may have preferred to give evidence by other means. Furthermore, all reforms aside, there remains a chance in all jurisdictions that the victim might see the accused in the precincts of the Court.

22 See: Evidence Act 1977 (QLD) s 21A; Criminal Procedure Act 1986 (NSW) part 5; Criminal Procedure Act 2009 (Vic) s 363; Evidence Act (NT) s 21A; Evidence Act 1929 (SA) s 13A; Evidence Act 1906 (WA) s 106R; Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8.
24 Ibid., s 38C. See also: Criminal Procedure Act 1986 (NSW) s 294B; Evidence Act 1977 (QLD) s 21A; Criminal Procedure Act 2009 (Vic) s 360; Evidence Act (NT) s 21A; Evidence Act 1929 (SA) s 13A; Evidence Act 1906 (WA) s 106R.
25 Victorian Law Reform Commission, above n 21, [4.12].
...we went off to lunch and, when we got back, you are all coming through the one entrance and I hadn’t actually seen him since the assault and I happened to see him, which really hit me for six a couple of minutes before I had to go back in. That was really hard. If there was some way that that could be avoided that would be brilliant. Because they keep you in a whole different section of the Court, and I guess he’s on one side and I’m all the way on the other, but we are all coming [back] through the same door...it’s a very big shock right before you are about to go back in. I had pulled myself together and everything and I was feeling confident about going back in. I was fine about going back in, and then all of a sudden I saw him and it just, you know, took me apart all over again. So if there was a way that you could keep people apart that would be brilliant.26

**Traumatising questions in cross-examination**

...I felt like I was on a cross. I just felt like someone was throwing stones at me.27

Cross-examination is often the most traumatic part of the trial for sexual assault victim–witnesses. Victims are asked about the intimate details of the assault including questions about their sexual organs and the accused’s sexual organs. These questions are embarrassing and humiliating. The following trial extract demonstrates how the statement that the trial is a second violation28 is more than a metaphor:

Now when you were having oral sex, towards the end something came out of his penis, that is right, is it not?—(Yes.) It is a liquid, right?—(Yes.) Did you have your mouth over his penis when that liquid came out?—(Yes.) Do you mean by that you had his penis inside your mouth?—(Yes.) It was not a situation where your mouth was above his penis, and the liquid hit your lips?—(In my mouth.) That’s different to what you told the police, isn’t it? (I was confused.) Are you sure now?—(Yes.) Well, how are we to know whether to believe you, if you told the police something different?—(I don’t know.)29

The Victorian Rape Law Reform Evaluation Project also found that

...complainants frequently were subjected to lengthy cross-examination about matters such as the clothing they were wearing at the time of the alleged rape and the amount of alcohol they had consumed, in order to...attempt to show that they are the kind of person

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26 Victim participant in Success Works, 'Sexual assault reform strategy: final evaluation report' (Department of Justice, 2011) 89–90.
27 Ibid. 117.
28 Donna Stuart, above n 5.
29 Case 3, in David Brereton, 'How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials' (1997) 37(2) British Journal of Criminology 242, 256.
who was likely to agree to sexual penetration’.\textsuperscript{30}

As one victim said, she was ‘made to feel like a moron by the defense in court. The defense (counsel) in court was awful to me—it was quite upsetting and scary’.\textsuperscript{31}

Defence counsel continue to use all kinds of tactics in the trial to undermine the victim’s evidence and upset or confuse her. These tactics would be unacceptable if they were used in a serious, non-sexual assault.\textsuperscript{32} In particular, victims are questioned about their credibility, sexual reputation and sexual history; and their culpability for the crime.

**Credibility**

Cross-examination of complainants in sexual assault trials often involves an extremely arduous test of their credibility. The *Evidence Act 1995* (Cth) defines credibility as including ‘the witness’s ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence’.\textsuperscript{33} However, it appears that these are not the only factors that are considered when assessing a victim’s credibility. Victims of sexual assault continue to be regarded as belonging to an unreliable class of witness.\textsuperscript{34} Hence the complainant’s dress, lifestyle, actions, and perceived reaction to the crime are often deemed relevant in determining credibility.\textsuperscript{35}

The *Heroines of Fortitude* study found that Defence counsel were often permitted to ask questions during cross-examination that attacked the complainant’s credibility and appeared substantially irrelevant to the facts in issue at the trial. Victims were routinely implied to be liars, seeking compensation, or vengeful. They were often described as the type of woman who could be expected to consent to sexual advances, or as an inexperienced person who consented and then later regretted her actions.\textsuperscript{36}

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\textsuperscript{30} Victorian Law Reform Commission, ‘Sexual offences: law and procedure’ (2001) [5.21].

\textsuperscript{31} Participant 5, in Australian Capital Territory Office of the Victims of Crime Coordinator, above n 21, 23.


\textsuperscript{33} *Evidence Act 1995* (Cth) Schedule: Dictionary.


\textsuperscript{35} Department for Women, above n 6, 149.

\textsuperscript{36} Department for Women, above n 6, 176. See also: Aviva Orenstein, ‘Special issues raised by rape trials’ (2007) *76 Fordham Law Review* 1585
Defence Counsel: You see this is a tissue of lies by you isn't it?
Complainant: It is not (crying) a lie—why would I go to the police station and make a 20-page statement and be there for 8 hours and go through hell for this! (screaming)\(^\text{37}\)

Disturbingly, ethnicity—in particular, Aboriginality—as well as the presence of a disability, were also found to be used to undermine complainant credibility during cross-examination. This perpetuates the myth that victim characteristics are relevant in determining the guilt of an offender.\(^\text{38}\)

Another common tactic that was, and sometimes still is, used by Defence lawyers is to demonstrate the victim’s lack of resistance, or lack of injuries as a result of resistance, and that she missed opportunities to escape. This implies that she is lying, or that she was not so upset as to try to escape.

<table>
<thead>
<tr>
<th>Defence Counsel:</th>
<th>You didn’t scream or anything then? You didn’t yell out for help?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant:</td>
<td>I was panicked. I didn’t know what to do. I couldn’t get out of the situation. What was I supposed to do?</td>
</tr>
<tr>
<td>Defence Counsel:</td>
<td>How were you trying to stop him? Were you kicking?</td>
</tr>
<tr>
<td>Complainant:</td>
<td>No.</td>
</tr>
<tr>
<td>Defence Counsel:</td>
<td>Why not?</td>
</tr>
<tr>
<td>Complainant:</td>
<td>I was frozen, I didn’t know what to do...I was scared shitless OK!(^\text{39})</td>
</tr>
</tbody>
</table>

These types of questions are especially traumatic for victims of sexual assault who have decided to give evidence at the trial. This is because they have often already questioned themselves, their response to the crime and the legitimacy of their claim.\(^\text{40}\)

**Sexual reputation and sexual history**

In the 1970s and 1980s, all Australian jurisdictions reformed the legislation applying to evidence of victim–complainant sexual reputation and sexual experience/history. Evidence of sexual reputation is not permitted in any jurisdiction except the Northern Territory where it is allowed only with the permission of the court. Sexual history

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\(^{37}\) Department for Women, above n 6, 170.
\(^{38}\) Ibid., 177
\(^{39}\) Department for Women, above n 6, 171
\(^{40}\) See: Easteal and McOrmond–Plummer, above n 2.
evidence is only admissible in some circumstances. These reforms ‘sought to eliminate the impression that a woman’s sexual history could render her responsible for sexual assault and unworthy of the law’s protection’. They also aimed to mitigate victims’ trauma and reluctance to report sexual assault or to give evidence at committal or trial.

The Victorian Law Reform Commission’s research demonstrates that this evidence is humiliating and irrelevant to the conduct of the trial. It also causes extra, unnecessary trauma for the victim. Because of the lack of efficacy of the reforms, Amnesty International now advocates a blanket ban on the admission of evidence of sexual history.

**Victim culpability**

Often in cross-examination, victims are accused of precipitating the crime or in some way contributing to its occurrence. In the *Heroines of Fortitude* study, more than half of the victims were asked if they had flirted or acted in a ‘sexually provocative’ way towards, or in the presence of, the accused. Just under half of the victims were asked detailed questions about the type of clothing that they were wearing at the time of the offence.

| Defence Counsel: | (Your swimmers) gripped your skin? |
| Complainant: | It was just a normal pair of swimmers. |
| Defence Counsel: | Yes well, it gripped your skin? |
| Complainant: | It was yeah, just the normal kind of swimmers. |
| Defence Counsel: | And did you wear your swimmers round at X’s place? |
| Complainant: | Yes. |

Furthermore, 32 per cent of victims were asked questions which suggested that they were responsible for, or somehow contributed to, the offence.

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41 Mary Heath, ‘The law and sexual offences against adults in Australia’ (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1, 7.


43 Victorian Law Reform Commission, above n 21, [4.37].

44 See: Aviva Orenstein, above n 36.

45 Amnesty International Australia, ‘Setting the standard: international good practice to Inform an Australian national plan of action to eliminate violence against women’ (2008) 52.

46 Department for Women, above n 6, 160.

47 Ibid., 162.

48 Department for Women, above n 6, 162.

49 Ibid., 165.
Defence Counsel: You didn’t think the fact that there were four or five young girls in this pool might interest the boys who were there?

Complainant: No.

Defence Counsel: Anyway you didn’t see any problem about 12:30 at night going into the swimming pool with a group of drunken boys nearby did you?

Complainant: No.\(^{50}\)

Again, these questions are particularly traumatic for victims of sexual assault. They have often questioned whether they had done something to cause the assault\(^{51}\) when the victim’s actions should be irrelevant.

**Being cross-examined by a self-represented accused**

Accused persons have a fundamental right to test the evidence that is given against them in court. They also have a right to represent themselves instead of using a lawyer. Therefore, before the introduction of several reforms in Australia—including the ACT SVOLAA—persons accused of sexual assault were able to personally cross-examine the victim.

The experience of cross-examination is traumatic enough when conducted by counsel. But being cross-examined by the person who committed these crimes is horrifying. Victims in these situations are often subject to lengthy and traumatic cross-examination by the accused leaving them feeling demeaned and humiliated.\(^{52}\) ‘Being cross-examined by [the accused] raises the issue of being threatened again and they then become the “victim” again to this person within the Court setting’.\(^{53}\) This trauma is evidenced by the case of *R v Ralston Edwards*. The accused personally cross-examined the victim for six days wearing the same clothes that he wore when he committed the offence. This resulted in the victim having to leave the witness stand to be physically sick.\(^{54}\)

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\(^{50}\) Ibid., 165–166.

\(^{51}\) See: Easteal and McOrmond–Plummer, above n 2.


\(^{53}\) Submission 28, Victorian Law Reform Commission, above n 21, [4.134].

\(^{54}\) *R v Ralston Edwards* [1997] EWCA Crim 1679.
All Australian jurisdictions, with the exception of Tasmania, have now enacted provisions that place limitations on the cross-examination of sexual assault victims by self-represented defendants.\textsuperscript{55}

**Giving evidence multiple times**

Again, before this most recent round of reforms,\textsuperscript{56} as primary witnesses to the crime, victims were potentially required to testify several times. Firstly, they had to testify at the committal or preliminary hearing; then at the trial and any subsequent appeals or retrials. Because there is no jury present at a committal hearing, Defence practitioners are not concerned with appearing aggressive. This meant that cross-examination was often unduly harsh and intimidating. In some cases 'the cross-examiner [endeavoured] to make the exercise so distressing that the complainant would be reluctant to give evidence at the trial'.\textsuperscript{57} The experience of the committal often resulted in the victim seeking to have the proceedings discontinued,\textsuperscript{58} however, if they did choose to proceed, they had to again give evidence at the trial. As one victim said to the magistrate:

Do you know what it's like to go through humiliation over and over all the time? It’s not easy. I’m sorry your worship, but it’s not. Reliving this over and over. It’s not nice. You can’t sleep at night because you’re thinking about it all the time.\textsuperscript{59}

**Open courts**

In all jurisdictions in Australia, the judge has the discretion to allow closure of the court after an application from the prosecution. This means that the court is not open to the public so that the victim can feel less stressed when giving evidence. Reliving the event in public can be one of the most distressing parts of the trial for a victim of sexual assault.\textsuperscript{60} The Australian Law Reform Commission has noted that 'when a woman has to give details of a sexually intimate nature as a witness it can be profoundly embarrassing to face a male audience...'.\textsuperscript{61}

\textsuperscript{55} See following chapter for further discussion.
\textsuperscript{56} As discussed in previous chapters.
\textsuperscript{59} Department for Women, above n 6, 84.
\textsuperscript{60} Department for Women, above n 6, 116.
\textsuperscript{61} Australian Law Reform Commission, 'Equality before the law: justice for women, Part I (69, 1994) [2.23].
Length of process

The length of time that it takes a sexual assault case to proceed from investigation to committal to trial, and sometimes appeal, is often years. The majority of victims in a recent ACT survey reported that the time between the incident, reporting and getting to court was extremely difficult.62 One victim stated:

[The defence] kept on postponing the court date. It was a rollercoaster ride getting stressed and anxious. Then they would call up and say it was being postponed. At the start of this year I said if it isn't going ahead I am going to withdraw because I can't handle it. It was too long.63

Once the time has finally come to go to trial, the trial itself can often last weeks or months.64 Within the trial, cross-examination of the victim can take hours or days. The Heroines of Fortitude study found that the average time taken for a victim to be cross-examined was just over two hours. But the longest was eight hours and six minutes and occurred over two days.65

Then there is the appeal process. This almost always follows the successful conviction of perpetrators and prolongs the process further—often by years.66 In Dr Caroline Taylor’s experience, the retrial lasted ‘with several lengthy hiatus of between several days and several weeks, for seven months’.67 Over several trials, she spent '32 days in the witness box being shouted at, laughed at, called a liar, mocked, ridiculed, humiliated'.68

One participant in the 2009 ACT study withdrew from the process when it went to the third court hearing about two years after the offence was committed:

[It was] too much heartache and effort to go through it again knowing there wasn’t going to be much chance again. I was due to go back to court. One of the head DPP people gave me the option to NOT go through given not high chance of conviction. I wanted to start getting over it...having to go over it and over it again and again was the worst thing.69

65 Department for Women, above n 6, 126.
66 See: Shannon Taylor, above n 63, 65.
67 Ibid., 66.
68 Ibid., 64.
69 Australian Capital Territory Office of the Victims of Crime Coordinator, above n 21, 27.
Dr Caroline Taylor’s criminal justice process experience—from committal hearing to the final retrial—lasted over four years. This is the précis of her experience:

The legal trial process is daunting and horrendous. It can leave scars that can compete with those already left by the perpetrator/s. But the appeal process is another shade of darkness that stands as the sentinel of patriarchy, in the wings of the theatre of the absurd. It demonstrates that the complainant cannot rely on the verdict of the jury should they be lucky enough to have their credibility, their experience, reach a legally successful outcome.

Summary

In this research I demonstrate that victims of sexual assault are not only victimised by the perpetrator, but also by the legal system; and often more than once. Rape is an extremely personal crime and has been described as an ‘ultimate violation of the self, short of homicide, with the invasion of one’s inner and most private space, as well as loss of autonomy and control’. Sexual assault ‘heightens a woman’s sense of helplessness, intensifies conflicts about dependence and independence, [and] generates self-criticism and guilt that devalue her as an individual’. Victims of sexual assault are likely to suffer from RTS and to experience symptoms that are very severe compared to other forms of PTSD.

Following this violation and trauma, victims of sexual assault are often then subject to a long and distressing experience with the criminal justice system. The trial process is harrowing for all victims. But for victims of sexual assault, it can awaken the feelings of helplessness associated with the crime and increase their angst.

The trial is an extremely traumatic experience for victims. It violates their right to be treated with the courtesy, compassion and respect afforded to them by the legislation and international doctrines mentioned in the previous chapter. Changes to legislation in Australia have attempted to ameliorate this re-victimisation over many years. In the

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70 Shannon Taylor, above n 63.
71 Shannon Taylor, above n 63.
72 Easteal and McOrmond-Plummer, above n 2; E Hilberman, The rape victim (1979) in Ann Wolbert Burgess, above n 15, 101.
following chapter I discuss the general changes made for sexual assault victims over the past few decades in Australia; and the effect that they have had on victim–witnesses’ experiences.
Chapter Five

Legislative reform to ameliorate plight: implementation and judicial interpretation of cross-examination substance

In the next two chapters I discuss legislative changes and practices that have been implemented around Australia to help to ameliorate the plight of victims of sexual assault. As discussed in the previous chapter, extensive research demonstrating the re-victimisation of sexual assault victim–witnesses by the criminal justice system has resulted in many changes to the law. Understanding how these laws have been interpreted and applied is crucial to the impact that these changes can have. The legislation has changed; but what about the reality?

In this chapter I examine the reforms that have aimed to change the kinds of questions victims can be asked whilst giving evidence—specifically the admission of sexual history evidence and the use of improper questions. The focus of this thesis is not on this area of reform. However, a review of these changes provides an important background to the implementation of law reform aimed at ameliorating the plight of victim–witnesses. The aim of this dissertation is to examine the application and interpretation of one recent piece of ACT legislation that is intended to reduce the trauma of trial for victim–witnesses. In this context, it is both relevant and necessary to look at the application and interpretation of other reforms with the same intention, as these will form a basis for comparing the limits of efficacy. Changes to the law about improper questions in the ACT were made around the same time as the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) (SVOLAA). Thus, they could be a contributing factor to the change, if any, in victim–witness experience.

Sexual history law reform

In the 1970s and 1980s, all Australian jurisdictions reformed the legislation applying to evidence of victim–complainant sexual reputation and sexual experience/history. It was widely recognised that evidence of the victim’s sexual reputation or history could be used unjustly and result in further trauma to the victim. This, in turn, could imply that
some victims of sexual assault were unworthy of protection from the law or in some way partially responsible for the crime committed against them.¹

These ‘rape shield laws’ were designed to prohibit evidence of the victim’s sexual reputation being admitted. They were also intended to prevent sexual experience evidence being used as an indicator of the victim’s credibility or to imply that the victim is someone who is more likely to consent to sexual activity. The changes were made to ‘improve the chances of a fair trial on legally relevant issues and reduce the risk of unjust acquittals’.² The justification for the absolute prohibition on evidence about sexual reputation is that:

...evidence of reputation, even if relevant and therefore admissible, is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances.³

The reforms aimed to reduce the trauma and humiliation experienced by victims of sexual assault facing cross-examination by Defence lawyers in court. As the then Premier of New South Wales stated:

That humiliation involves their being forced to recount...in minute detail the most humiliating and degrading experiences they have ever gone through and then to suffer under cross-examination the imputation and insinuation about the victim’s own responsibility for the offence and against the victim’s character and morals.⁴

Evidence of sexual reputation is no longer permitted in any jurisdiction except the Northern Territory where it is allowed only with the permission of the court.⁵ Even so, sexual history evidence is only admissible in some circumstances.⁶

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² Mary Heath, 'Women and criminal law: rape' in Patricia Easteal (ed.), Women and the law in Australia (2010) 88, 100. See also: Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward' (Attorney General’s Department NSW, December 2005); Henning and Bronitt, above n 1.
⁴ New South Wales, Parliamentary Debates, Legislative Assembly, 1981, 4763, in, Criminal Justice Sexual Offences Taskforce, above n 2, 53
⁵ See: Criminal Procedure Act 1986 (NSW) s 293(2); Evidence Act 2001 (Tas) s 194M(1)(a); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 50; Criminal Procedure Act 2009 (Vic) s 341; Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(1); Evidence Act 1929 (SA) s 34L(1)(a);
Evidence Act 1906 (WA) s 36B; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1)(a).
⁶ See: Criminal Procedure Act 1986 (NSW) s 293(3) and (4); Evidence Act 2001 (Tas) s 194M(1)(b); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 51; Criminal Procedure Act 2009 (Vic) ss 342, 343 and 352; Criminal Law (Sexual Offences)
New South Wales (NSW)

In the early 1980s section 409B of the NSW Crimes Act 1900 was enacted. This Act imposed the first restrictions on evidence of sexual reputation and sexual experience/history in sexual assault trials in NSW. The New South Wales Law Reform Commission (NSWLRC) later took submissions on the effectiveness of these provisions and stated that interested persons and groups called for a range of changes to section 409B. Ultimately, the NSWLRC recommended that the section be retained, but substantially amended.

Later, the current provision, section 293 of the Criminal Procedure Act 1986 (NSW) was enacted. This section states that evidence about the sexual reputation of the complainant is inadmissible. There are no exceptions to this rule. This section also states that evidence that discloses or implies sexual experience—or the complainant’s involvement in any sexual activity—is inadmissible.

However, this restriction on sexual experience is subject to six exceptions. Evidence of this nature is admissible if:

• the evidence relates to activities that occurred at or about the time of the commission of the alleged offence, and the events are connected to the circumstances of the alleged offence;

• the evidence relates to an existing or recent relationship between the accused and the complainant;

• the accused denies having had sexual intercourse with the complainant, and the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the alleged sexual intercourse;

• the evidence relates to a disease that was present in either the accused or the complainant at the time of the offence, and that was absent in the other party;

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Act 1978 (Qld) s 4(2); Evidence Act 1929 (SA) s 34L(1)(b); Evidence Act 1906 (WA) s 36BC; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1)(b).
8 Ibid., List of Recommendations.
9 Criminal Procedure Act 1986 (NSW) s 293(2).
10 Criminal Procedure Act 1986 (NSW) s 293(3).
11 Ibid., s 293(4)(a)(i).
12 Ibid., s 293(4)(a)(ii)
13 Ibid., s 293(4)(b).
14 Ibid., s 293(4)(c).
15 Ibid., s 293(4)(d).
• the evidence is relevant to whether the allegation was made by the complainant following the realisation of pregnancy or disease;\textsuperscript{16} or,
• the evidence has been given by the complainant in cross-examination by or on behalf of the accused person.\textsuperscript{17}

These exceptions apply where the ‘probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant might suffer’.\textsuperscript{18}

In NSW, if the court allows evidence about the complainant’s sexual history to be admitted, there are processes to be followed before such evidence is given. The court must provide, in writing, the nature and scope of the evidence that is to be admitted and reasons for that decision.\textsuperscript{19}

**Victoria**

Before the introduction of the *Criminal Procedure Act 2009* (Vic), the admissibility of evidence of sexual reputation and sexual history was governed by Section 37A of the *Evidence Act 1958* (Vic). The initial section was substantially less restrictive than the section that exists now; and as a result was subject to analysis by the Victorian Law Reform Commission (VLRC) from 2002.\textsuperscript{20} In this assessment, the VLRC made several recommendations. They included changing the section to make it clear that it applies to both consensual and non-consensual sexual activities.\textsuperscript{21} The VLRC also recommended that leave for the complainant to be cross-examined on these topics should not be granted unless the court is satisfied that the evidence is substantially relevant and it is in the interests of justice to do so.\textsuperscript{22} It also recommended that when deciding whether admission of this type of evidence is in the interests of justice, the judge must consider several factors including:

• whether the probative value outweighs the distress, humiliation and embarrassment that the complainant may suffer

• ‘the risk that the evidence may arouse discriminatory belief or bias, prejudice,

\textsuperscript{16} *Criminal Procedure Act 1986* (NSW) s 293(4)(e).
\textsuperscript{17} Ibid., s 293(4)(f).
\textsuperscript{18} Ibid., s 293(4).
\textsuperscript{19} Ibid., s 293(B).
\textsuperscript{21} Victorian Law Reform Commission, 'Sexual offences: final report' (July 2004), Recommendation 68.
\textsuperscript{22} Ibid., Recommendation 69.
sympathy or hostility in the jury’

• the need to respect the complainant’s dignity and privacy
• the right of the accused to make a full defence to the charge.23

Minor amendments were made to section 37A in 2006.24

As a result of further changes made by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic), the *Criminal Procedure Act 2009* now regulates the admission of evidence of the complainant’s sexual reputation and sexual experience/history. Section 341 of this Act places an absolute prohibition on any questions about, or evidence of, the general reputation of the complainant and their chastity.25

There are three sections in the Victorian Act that deal with sexual experience or sexual history. The first of these, section 342, states that the complainant must not be cross-examined, and that the court must not admit any evidence, about the complainant’s sexual activities without the leave of the court.26 Section 343 then states that sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.27 Finally, section 352 provides a limitation on the use of sexual history evidence. It states that sexual history evidence is not to be regarded as having substantial relevance to the facts by virtue of any inferences it may raise as to general disposition; or, as being proper matter for cross-examination as to credit unless it would be likely to impair confidence in the reliability of the evidence of the complainant.28

In Victoria, an application for the admission of sexual history evidence must be made at least 14 days before the proceeding. The application must set out the questions that the applicant wants to ask and justify the substantial relevance of the questions to the facts of the case or the reliability of the witness.29 The court must provide written reasons for its decision if it allows evidence about the complainant’s sexual history to be admitted.30

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23 Victorian Law Reform Commission, Recommendation 70.
24 *Crimes (Sexual Offences) Act 2006* (Vic) s 37A.
25 *Criminal Procedure Act 2009* (Vic) s 341.
26 Ibid., s 342.
27 Ibid., s 343.
28 Ibid., s 352.
29 *Criminal Procedure Act 2009* (Vic) s 344 and s 346.
30 Ibid., s 351.
South Australia

The South Australian *Evidence Act 1929* provides for an absolute prohibition on questions or evidence about the victim’s sexual reputation.\(^{31}\) Section 34L(1)(b) of this Act also prohibits questions or evidence about the victim’s sexual activities being admitted without leave of the court. However, this restriction does not apply to recent sexual activities with the accused.\(^{32}\) In deciding whether evidence should be allowed under subsection (b), the judge must give effect to the principle that victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment. He or she must also be satisfied that the evidence is of substantial probative value; or would be likely to materially impair confidence in the reliability of the victim’s evidence.\(^{33}\)

Western Australia

In Western Australia, the *Evidence Act 1906* (WA) places an absolute prohibition on the admission of evidence about the complainant’s sexual reputation\(^ {34}\) or sexual disposition.\(^ {35}\) Section 36BC of this Act relates to evidence of the complainant’s sexual experience. It states that evidence about sexual experiences of any kind must not be admitted without leave of the court.\(^ {36}\) The court must not grant leave under this section unless it is satisfied that the evidence has substantial relevance to the facts of the case. Similarly, the court must be clear that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant may suffer as a result of its admission.\(^ {37}\)

Tasmania

Section 194M of the Tasmanian *Evidence Act 2001* covers the issues of admissibility of evidence about sexual reputation and sexual experience in sexual offence proceedings. This section states that any evidence that discloses or implies the sexual reputation of the victim must not be adduced or elicited;\(^ {38}\) and any sexual experience evidence—other than that to which the charges relate—must not be raised without leave of the court.\(^ {39}\)

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\(^{31}\) *Evidence Act 1929* (SA) s 34L(1)(a).

\(^{32}\) Ibid, s 34L(1)(b).

\(^{33}\) Ibid, s 34L(2).

\(^{34}\) *Evidence Act 1906* (WA) s 36B.

\(^{35}\) Ibid, s 36BA.

\(^{36}\) Ibid, s 36BC(1).

\(^{37}\) Ibid, s 36BC(2).

\(^{38}\) *Evidence Act 2001* (Tas) s 194M(1)(a).

\(^{39}\) Ibid, s 194M(1)(b).
Similar to the requirements in Western Australia, the court must not grant leave under this section unless it is satisfied that the evidence has substantial relevance to the facts of the case. The judge or magistrate must also be satisfied that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant may suffer as a result of its admission.\textsuperscript{40} The section goes on to say, however, that sexual experience evidence will not be deemed as relevant to the case if it is relevant only to the victim’s credibility.\textsuperscript{41} In determining the amount of distress, humiliation or embarrassment that the victim may be subject to,\textsuperscript{42} the judge must consider the victim’s age as well as the number and the nature of the questions that may be put to them. In Tasmania, the judge must also provide specific reasons addressing each of the requirements for admissibility, if he/she chooses to admit evidence of the victim’s sexual experience.\textsuperscript{43}

**Queensland**

The *Criminal Law (Sexual Offences) Act 1978 (Qld)* regulates the admission of certain evidence in proceedings about sexual offences. Section 4 of this Act contains special rules limiting particular evidence about sexual offences. It also provides an absolute prohibition on any evidence about the general reputation of the complainant with respect to chastity.\textsuperscript{44} The section also states that evidence about the complainant’s sexual activities shall not be admitted without leave of the court.\textsuperscript{45} Under this section, the court may not grant leave unless it is satisfied that the evidence has substantial relevance to the facts in issue or is proper matter for cross-examination as to credit.\textsuperscript{46}

Section 4 provides that evidence that relates only to the general disposition of the victim must not be regarded as having substantial relevance to the facts. However, evidence of an act or event that occurred around the same time as the offence—that explains the circumstances in which such an offence was committed—shall be regarded as having substantial relevance to the facts in issue.\textsuperscript{47}

**Northern Territory**

The Northern Territory is the only jurisdiction that treats evidence of sexual reputation...
and sexual experience/history equally. Section 4 of the Sexual Offences (Evidence and Procedure) Act 1983 states that evidence of the complainant’s general reputation as to chastity or sexual activities with any other person shall not be elicited or led except with the leave of the court. It also states that the leave of the court shall not be granted unless the court is satisfied that the evidence has substantial relevance to the facts in issue.48

In 1999 the Northern Territory Law Reform Committee considered adopting an approach similar to that of NSW. However, it ultimately recommended that ‘there be no change in the wording of the Northern Territory Sexual Offences (Evidence and Procedure) Act’.49

**How have these changes worked in practice?**

Changes have been made to the laws in all jurisdictions surrounding the admissibility of sexual experience evidence to protect victims of sexual assault. However, these changes have not always had the desired impact or level of impact.

Studies indicate that, despite the multitude of reforms surrounding the admission of sexual history evidence, this class of evidence is still being admitted—often without reference to the relevant legislation.50 These studies also suggest that its use may be increasing.51 In a NSW study, evidence of sexual reputation was admitted in 12 per cent of trials. This occurred despite the fact that its admission is completely prohibited by legislation. Evidence of sexual history was raised in 76 per cent of trials; the prosecution objected to only 35 per cent of these.52

Other studies across Victoria, NSW and Tasmania show sexual history evidence being admitted in between 52 and 76 per cent of cases. In Tasmania and NSW, evidence of this nature was admitted—without the use of proper legal procedure—in 38 and 35 per cent of cases respectively.53 The Heroines of Fortitude study found that evidence about the

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50 See: New South Wales Department for Women, ‘Heroines of fortitude’ (Office for Women: NSW Department of Premier and Cabinet, October 1996); Mary Heath, ‘The law and sexual offences against adults in Australia’ (2005) 4 Australian Centre for the Study of Sexual Assault Issues 1.
51 Ibid.
52 New South Wales Department for Women, above n 50, 230.
53 Heath, above n 50, 10. See also: Dr S Caroline Taylor, ‘Intrafamilial rape and the law in Australia: upholding the lore of the father’ (Paper presented at the Townsville International Women’s Conference, James Cook University, 3–7 July 2002) 14.
victim’s general promiscuity, lesbianism and virginity was raised. The same study found that in some trials there were multiple instances of material concerning the sexual experience of the victim being raised.54

Legislative reform in Victoria, as discussed earlier, aimed to improve the effectiveness of the earlier provisions. However, despite this, subsequent evaluation revealed that cross-examination on sexual history was still taking place without a written application in about half of all cases.55 It was found that it was more likely for sexual history evidence to be raised when there was a close relationship between the complainant and the accused.56 Sexual history evidence is most likely to be admitted in allegations of rape by a partner or former partner57 and continues to be a significant issue:

Some defence lawyers commented that there was some inconsistency between judges in relation to this provision. The concerns about inconsistency generally arose in cases where the prior sexual history about which the defence sought leave to cross examine related to prior sexual relations between the complainant and the accused, including cases where they were wife and husband.58

One of the potential explanations for the inefficacy of these reforms is that the legislation and case law do not clearly distinguish between the terms ‘sexual reputation’ and ‘sexual experience/history’. Evidence about sexual reputation is inadmissible in all jurisdictions except the Northern Territory, while evidence about sexual experience/history is admissible in certain circumstances. In addition, some jurisdictions have yet to clarify whether evidence of non-consensual prior sexual activity falls within the scope of the restrictions. This means that evidence of this nature is often admitted through the use of arguments that the complainant’s evidence may be unreliable because of prior sexual assaults.59

Others have argued that the meaning of ‘substantial relevance’ in some jurisdictions is unclear.60 That is, that the interpretation of the restrictions is often ‘purely formal and technical’ and fails to provide a ‘genuine scrutiny of the evidence in the prescribed

54 New South Wales Department for Women, above n 50, 10.
55 Victorian Law Reform Commission, above n 21, 203.
56 Heath, above n 50, 11; and New South Wales Department for Women, above n 50, 234.
57 Ibid.
59 Heath, above n 50, 102.
60 Heenan, above n 1.
terms’. This is a result of the lack of legislative guidance. Judicial officers have a wide discretion when interpreting the legislation and this results in the reintroduction and application of the myths and stereotypes that the legislation specifically aimed to dispel. Many commentators have highlighted judicial discretion as ‘the core of the problem’ of rape shield legislation and demand that as far as possible discretion be eliminated.

Studies have found that in most cases, in many jurisdictions, the only true consideration is whether the exclusion of sexual history evidence will impair the accused’s right to a fair trial; not whether it will affect the wellbeing of the victim. So far, only NSW, Western Australia, South Australia and Tasmania have attempted to address this lack of respect for the welfare of the complainant. These states have mandated that the potential harm to the victim must be considered when deciding on the admissibility of sexual history evidence. However, only Tasmania provides guidance on how the courts should approach this balancing task.

The NSW legislation appears to have gone a bit further than the other jurisdictions by establishing a presumption that evidence about sexual history is not admissible; and then providing a list of exceptions. This rules-based/non-discretionary regime was modelled on the Michigan rape shield laws in the United States. Those laws provide a general prohibition on the introduction of prior sexual history evidence with just two exceptions. Like NSW, if the evidence falls within either of the exceptions the ‘judge must also find that the evidence is material to a fact at issue and that its inflammatory or prejudicial nature does not outweigh its probative value’.

The Law Reform Commission of NSW intended the new section 293 to remove judicial discretion as the only means by which evidence of this nature could be excluded. However, judicial officers have criticised its rigidness. For example, in R v M Allen J, with whom Gleeson CJ and Meagher JA agreed, stated:

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61 Henning and Bronitt, above n 1, 90. See also: New South Wales Department for Women, above n 50; Jennifer Temkin, Rape and the legal process (Oxford University Press, 2nd ed., 2002).
64 Criminal Procedure Act 1986 (NSW) s 293.
65 Kibble, above n 60, 3.
66 Ibid, 3.
The legislature has endeavoured to foresee all the exceptions which justice requires and to provide specifically for them. It has excluded all others. It has taken the risk that experience will throw up circumstances, which it has failed to foresee and expressly provide for, in which denial of evidence disclosing or implying that the complainant has or may have had sexual experience or lack of sexual experience, or has or may have taken part or not taken part in any sexual activity, results in injustice to an accused at his trial. The wisdom of so Draconic a restriction upon judicial discretion and of so bold an assumption of perfect prescience may be questioned. 68

As a result, in practice, the legislative attempt at limiting judicial discretion has instead resulted in a wide interpretation of the listed exceptions. 69 In addition, the NSW provisions do not include a ‘substantial relevance’ requirement. This requirement is not always interpreted as narrowly as was intended. As noted above, the absence of this requirement in NSW means that provided evidence of sexual history falls within one of the broad exceptions, it may be admitted—even if it is of limited relevance.

As Henning and Bronitt found in their study, provisions that aimed to reduce the admission of prior sexual history evidence:

...have not significantly improved the treatment of women during cross-examination...In some instances, trial judges admitted evidence of sexual reputation and previous sexual history with scant regard to the statutory restriction or the ‘relevance’ of the evidence to the issues in dispute in the case. In other cases, the trial judge, mindful of the overriding duty to ensure a ‘fair trial’, has given the provision a more restrictive interpretation than the drafters intended...[T]he failure of the rape shield laws is a combination of deficient legislation and non-compliance and resistance within the legal profession. 70

This plethora of sexual history evidence admissibility maintains the myths that female sexuality is incapable of change over time and that consent to sexual intercourse on previous occasions implies consent on all occasions. Evidently, legislative reform is not efficacious: ‘the deeply entrenched historical legal understanding of the pertinence of sexual history evidence which fuels the continued acceptance of its admission in rape trials today’ 71 needs to be challenged.

69 Henning and Bronitt, above n 1, 84.
70 Ibid.
71 Heenan, above n 1, 8.
Improper questions during cross-examination

As a result of the court’s inherent power to control the conduct of proceedings, there are well-established evidentiary rules to restrict the cross-examiner at common law.72 As Heydon J explained in Libke v The Queen, the common law has laid down rules to prevent ‘offensive questioning’; questions taking the form of ‘comments’; ‘compound questions’; ‘cutting off answers before they [are] completed’; ‘questions resting on controversial assumptions’; and ‘argumentative questions’.73 Further, judicial officers have power under common law to control irrelevant, unnecessary or repetitive questions;74 to limit lengthy questioning where it serves no forensic purpose;75 and to restrict questions to protect witnesses from suggestibility.76 However, dissatisfaction with the way that these powers were being used led to legislative intervention.

Following the release of the ALRC’s Final Report, Evidence, in 1987,77 which contained draft evidence legislation, the Commonwealth and New South Wales introduced nearly identical Evidence Bills in 1993. In 1995 the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW) were passed. These two Acts are described as the uniform Evidence Acts and they include provisions regulating the use of improper questions during cross-examination in these jurisdictions. In addition to the Commonwealth and New South Wales, Victoria and Tasmania are also now members of the uniform Evidence Act scheme. Improper questions during cross-examination are regulated by section 41 of the Evidence Act78 in each of these jurisdictions. In the remainder of the jurisdictions, a combination of the common law and jurisdiction-specific legislation are used instead.

New South Wales

As a result of a report on the law of evidence produced by the Australian Law Reform Commission (ALRC) in 1985, the Uniform Evidence Acts were introduced in 1995. The primary legislative control over improper questioning (section 41) was introduced following an inquiry by the ALRC into the law of evidence. This inquiry aimed to bring together and clarify the common law and legislative provisions that set limits on cross-
examination.\textsuperscript{79} When it was introduced, section 41 stated that ‘the court may disallow a question put to a witness in cross-examination…if the question is: misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’.\textsuperscript{80} This section was purely discretionary; and judicial officers were under no obligation to intervene, even if questioning appeared to be blatantly abusive.

Concerns over the application of this section first arose just two years after its enactment when the Wood Royal Commission concluded that the legislation did not encourage judicial officers to intervene enough.\textsuperscript{81} Five years later, Justice James Wood of the NSW Supreme Court stated that section 41 was ‘a power which is seldom invoked’.\textsuperscript{82} In 2004, the Victorian Law Reform Commission (VLRC) concluded that section 41 was insufficient to ensure that witnesses are protected against inappropriate questions.\textsuperscript{83} The NSW Adult Sexual Assault Interagency Committee agreed. It recommended that the section be amended to include greater restrictions and to include consideration of the witness’ cultural background and level of understanding as well.\textsuperscript{84} Many argued that, in practice, these provisions failed to provide adequate protection for vulnerable witnesses.\textsuperscript{85}

Following these criticisms, on 12 August 2005, section 275A was inserted into the \textit{Criminal Procedure Act 1986 (NSW)} to specifically control cross-examination in criminal proceedings in NSW. Section 275A imposed a duty on judicial officers to intervene, as opposed to the discretionary section 41. It set out a more comprehensive and detailed list of questions that are inappropriate and provided a list of other factors that may be considered. Around the same time, the ALRC—together with the New South Wales Law Reform Commission (NSWLRC) and the VLRC—conducted an investigation into the uniform Evidence Act. This investigation aimed to identify and address any problems with the legislation as well as further the harmonisation of the laws across all Australian

\begin{footnotesize}
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\item Lloyd Babb, 'What does s 275A of the Criminal Procedure Act mean to you as a judicial officer?' (Paper presented at the Judicial Commission of NSW, Twilight Seminar: Child Sexual Assault, Sydney, 28 September 2005) 7.
\item See: \textit{Evidence Act 1995 (Cth)} s 41; \textit{Evidence Act 1995 (NSW)} s 41; \textit{Evidence Act 2001 (Tas)} s 41.
\item Victorian Law Reform Commission, above n 21.
\item See, for example: Talina Drabsch, ‘Cross-examination and sexual offence complainants’ (18/03, NSW Parliamentary Library Research Service, 2003) 8; New South Wales Department for Women, above n 50.
\end{itemize}
\end{footnotesize}
The Uniform Evidence Law report, which was released in 2006, found that there were no major problems with the Uniform Evidence legislation. However, the ALRC and NSWLRC recommended that section 41 of the uniform Evidence Acts be amended to adopt the terms of section 275A of the NSW Act. This recommendation was based on the commissions’ view that ‘the approach in s 41 [was] too limited to provide sufficient protection to vulnerable witnesses’.

Ultimately, on 1 January 2009, a new section 41 came into force in the NSW Evidence Act, the content of which largely reflects that of section 275A. Section 275A was repealed at the same time.

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a “disallowable question”):

a) is misleading or confusing, or
b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

(c) the context in which the question is put, including:

i) the nature of the proceeding, and

ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and

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87 Ibid.
88 Ibid., Recommendation 5–2.
89 Ibid., [5.91].
90 *Evidence Amendment Act 2007* (NSW) Sch 2.3[1].
(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:
   (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
   (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.91

The main difference between the new section 41 and the old is the imposition of a duty on judicial officers to disallow improper questions—the replacement of the word ‘may’ with the word ‘must’.92 This was intended to eliminate the judicial officer’s power of discretion by requiring them to intervene if a question is ‘improper’—regardless of whether any objection is raised. The new section also provides for more types of questions that are disallowable,93 and expands the range of matters that the court must consider when determining whether a question is improper.94

However, although the section now appears to be mandatory, it still relies on the judicial officer perceiving a question to be ‘misleading or confusing...belittling, insulting or otherwise inappropriate’.95 The judicial officer’s interpretation of the definition of ‘improper’ is likely to be very different to that of the victim–witness. So questions that may be insulting to the victim will still be allowed so long as the judicial officer does not perceive them to be insulting.96 Furthermore, questions that are ‘annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive’ are allowed so long as they are not ‘unduly’ so. This again, relies on judicial discretion to determine what is ‘unduly’.

91 Evidence Act 1995 (NSW) s 41.
92 Ibid., s 41(1).
93 Ibid., s 41(1)(c)–(d).
94 Ibid., s 41(2).
95 Evidence Act 1995 (NSW) s 41(1)(a)–(c).
Victoria

During the course of the combined ALRC, NSWLRC and VLRC inquiry into the uniform Evidence Act, Victoria signalled its intention to enter into the uniform Evidence Act scheme. However, the VLRC did not agree with the ALRC and the NSWLRC’s recommendation that section 41 should be replaced with a provision that reflects section 275A of the NSW Criminal Procedure Act. The VLRC held the view that the amended provision should provide specific protection for vulnerable witnesses. On 15 September 2008, the Evidence Act 2008 (Vic) received assent, and the Act commenced on 1 January 2010. However, despite being a part of the uniform Evidence Act scheme, section 41 of the Victorian Act is different to that in NSW as it reflects the recommendations made by the VLRC.

The most obvious difference between the NSW and Victorian provisions is that the Victorian general provision is still discretionary: ‘the court may disallow an improper question’. However, the Victorian provision provides specifically for the improper questioning of a ‘vulnerable witness’. It states that the ‘court must disallow an improper question...put to a vulnerable witness in cross-examination...unless the court is satisfied that...it is necessary for the question to be put’. Vulnerable witnesses are defined under this section as:

- children under the age of 18 years
- people with a cognitive impairment or intellectual disability
- any witness the court considers to be vulnerable having regard to the witness’ age, education, ethnic and cultural background, gender, language background and skills, level of maturity, understanding and personality
- any witness with a mental or physical disability.

Weight is also given to the context in which the question is put—including the nature of the proceeding; the nature of the offence, and the relationship between the witness and any other party to the proceeding.

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97 Australian Law Reform Commission, above n 84.
98 Ibid.
99 Ibid. [2.36].
100 Ibid. [2.36].
101 Evidence Act 2008 (Vic) s 41(1).
102 Ibid., s 41(2).
103 Ibid., s 41(4)(a).
104 Ibid., s 41(4)(b).
105 Ibid., s 41(4)(c).
106 Ibid., s 41(4)(c)(i).
107 Ibid., s 41(4)(c)(ii).
108 Ibid., s 41(4)(c)(iii).
Furthermore, while the NSW provision addresses only ‘improper questions’, the Victorian legislation also deals with ‘improper questioning’. This is defined in subsection 3 as ‘a sequence of questions’. The final difference between the NSW and Victorian provisions is found where the NSW provision states that a question must be disallowed ‘if the court is of the opinion’ that the question is improper. It sets out the matters that the court must consider when forming this opinion. In contrast, section 41 of the Victorian Act defines ‘an improper question’ or ‘improper questioning’ simply in terms of the categories mentioned. That is, those that are ‘misleading or confusing…unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive…or is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate…has no basis other than a stereotype’. When compared to the NSW provision, the Victorian section 41 appears to be less restrictive for all witnesses. The sections that apply to vulnerable witnesses appear to further reduce the reliance on judicial discretion and provide a broader scope of what is improper. The Victorian section requires the judicial officer to be ‘on guard’ when faced with vulnerable witnesses rather than simply applying the section across the board. However, it must be remembered that its application still depends on the judicial officer determining that the question or questioning is improper.

**Tasmania**

Tasmania became a part of the uniform Evidence Act scheme in 2001: the *Evidence Act 2001 (Tas)* commenced on 17 December 2001. At the time of its enactment, section 41 of the Tasmanian *Evidence Act* was similar to the old NSW section. The initial Tasmanian section was discretionary, and stated that the ‘court may disallow a question put to a witness in cross-examination…if the question is …misleading; or…unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’. Under this section, when determining whether a question is improper, the court must consider ‘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’.

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109 Evidence Act 2008 (Vic) s 41(3).
110 Evidence Act 1995 (NSW) s 41(1).
111 Evidence Act 2008 (Vic) s 41(3).
112 Evidence Act 2001 (Tas) s 41(1) (at November 2010).
113 Ibid., s 41(2) (at November 2010).
However, following the passing of the *Evidence Amendment Act 2010* (Tas) in December 2010, section 41 of the Act is now mandatory and contains the same wording as that in the current NSW *Evidence Act*. That is, a mandatory provision containing six subsections that requires that the court disallow improper questions. It describes the types of questions that must be disallowed. Further considerations that the court must take into account are included in subsection (2) and the new subsection (3). These clarify that a question is not disallowable merely because it challenges the truthfulness of the witness, the consistency or accuracy of any statements made by the witness, or is considered by the witness to be distasteful or private.

**South Australia**

During the ALRC uniform evidence law inquiry, South Australia announced that it planned to adopt the uniform Evidence Act. However, as of 2010, South Australia has yet to introduce any legislation in accordance with the uniform Evidence Act scheme. This means that South Australia continues to use a combination of common law and jurisdiction-specific legislation to regulate improper questions during cross-examination.

Section 25 of the *Evidence Act 1929* (SA) is the provision that regulates improper questions during cross-examination in South Australia. Before the changes made by the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA), section 25 provided for the disallowance of ‘scandalous and insulting questions’. This section provided the court with the discretion to disallow questions that it regarded as ‘indecent or scandalous’, or that ‘intended to insult or annoy, or [were] needlessly offensive in form’. Following the 2008 amendments, section 25 took on an almost identical form to the uniform Evidence Acts provision. The section now refers to ‘improper questions’ and imposes a requirement on judicial officers to intervene if a question is improper. It also includes a list of factors the court may consider when determining this.

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114 *Evidence Act 2001* (Tas) s 41.
115 ibid., s 41(2)–(3).
116 Australian Law Reform Commission, above n 84.
117 ibid.
118 *Evidence Act 1929* (SA) s 25, amended by the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA).
119 ibid., s 25(a), amended by the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA).
120 ibid., s 25(b), amended by the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA).
121 *Evidence Act 1929* (SA) s 25.
122 ibid., s 25(3).
123 ibid., s 25(4).
Western Australia

In 1999, the Law Reform Commission of Western Australia (LRCWA) recommended that the *Evidence Act 1906* (WA) and related legislation be rewritten to encompass the provisions of the uniform Evidence Acts. The commission wanted the rewrite to retain the specific advantages of Western Australian legislation. These include the provisions concerning the evidence of children and special witnesses and the protection afforded complainants in sexual assault matters. Following this, at the time that the combined ALRC, NSWLRC and VLRC report was being compiled, Western Australia also signalled its intention to join the uniform Evidence Act scheme. However, Western Australia has yet to introduce any legislation in accordance with the uniform Evidence Acts; so a combination of common law and jurisdiction-specific legislation is used.

From the time the Western Australian *Evidence Act* was enacted in 1906, section 26 has contained restrictions on improper questions during cross-examination. The original section, which did not change from 1906 to 2004, contained reference to ‘indecent or scandalous questions’. It placed a discretionary right on the court to forbid any questions that it regarded as ‘indecent or scandalous...intended to insult or annoy, or needlessly offensive in form’. This section was finally replaced by section 11 of the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004*. It retained the judicial discretion in section 26. However, it also introduced the concept of ‘improper questions’, provided a broader list of disallowable questions, and listed factors that the court must consider when determining whether a question is improper. The current section 26 states that the:

...court may disallow a question put to a witness in cross-examination...if the question [or the way the question is put] is misleading; or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive'.

Under this section, the court may consider any relevant factors but it must consider:

...any relevant condition or characteristic of the witness, including age, language, personality and education; and any mental, intellectual or physical disability to which the witness is or appears to be subject.

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125 Australian Law Reform Commission, above n 84.
126 *Evidence Act 1906* (WA) s 26, amended by the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* (WA) s 11.
127 Ibid., s 26(1) and (2).
128 Ibid., s 26(3).
Northern Territory

Following the ALRC, NSWLRC and VLRC reports on uniform evidence law in 2006, the Northern Territory Law Reform Committee (NTLRC) produced its own Report on the Uniform Evidence Act. In this report, the commission recommended that the uniform Evidence Acts be adopted in the Northern Territory. It specified, however, that some of the necessary elements that currently exist in the Northern Territory Evidence Act—and that would not be included under the uniform Evidence Act scheme—be reproduced in separate statutes. However, any legislation to this effect has yet to be introduced. So a combination of common law and jurisdiction-specific legislation is still used to regulate improper questions during cross-examination.

Improper questions are regulated by two sections of the current Northern Territory Evidence Act. Section 13 of this Act, which has not been amended since 1990, refers to ‘vexatious and irrelevant questions’ and imposes a discretionary right on the court to disallow any questions of this nature. Section 16 also applies to disallowance of certain questions. Up until 2004, it referred to ‘scandalous and insulting questions’. These questions were disallowable by the court. Following the substitution of section 16 in 2004, the Court now has the discretion to disallow questions that it considers to be ‘misleading, confusing, annoying, harassing, intimidating, offensive, repetitive or phrased in inappropriate language’. When determining whether a question is to be disallowed under this section, the court must consider:

...any relevant condition, attribute or characteristic of the witness, including: the age, maturity and cultural background of the witness; and any mental, intellectual or physical characteristic of the witness.

Queensland

Queensland is the only jurisdiction that has yet to indicate any intention of joining the uniform Evidence Act scheme. In its review of the uniform Evidence Acts, the Queensland Law Reform Commission (QLRC) concluded:

It may be that following such a review, it is considered generally desirable to adopt the uniform Evidence Acts, but that the Queensland position is preferred in respect of certain

130 Ibid., Recommendations 1 and 2.
131 Evidence Amendment Act 1990 (NT) s 22.
132 Evidence Act (NT) s 13.
133 Evidence Act (NT) s 16, amended by the Evidence Reform (Children and Sexual Offences) Act 2004 (NT) s 4.
134 Ibid., s 16(1).
135 Ibid., s 16(2)(a).
specific provisions. In that case, consideration should be given to adopting the uniform Evidence Acts with the exception of the specific provisions.\textsuperscript{136}

In discussing the regulation of improper questions, the QLRC expressly stated that it commends the specific provisions of the \textit{Evidence Act 1977 (Qld)} that deal with these issues—namely sections 21 and 21A.

As Queensland has yet to become a part of the uniform Evidence Act scheme, the \textit{Evidence Act 1977} continues to regulate improper questioning during cross-examination. Before 2000, similar to many other jurisdictions, section 21 referred to ‘scandalous and insulting questions’. It permitted the court to disallow questions that were deemed ‘indecent or scandalous’\textsuperscript{137} or ‘intended only to insult or annoy or is needlessly offensive in form’.\textsuperscript{138} The \textit{Criminal Law Amendment Act 2000 (Qld)} inserted a new section 21 into the \textit{Evidence Act}. It introduced the term ‘improper questions’ and defined these as questions that use ‘inappropriate language or [are] misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive’.\textsuperscript{139} Under this section, the court may disallow questions that it considers improper.\textsuperscript{140} However, when deciding this, it must consider:

...any mental, intellectual or physical impairment the witness has...and any other matter about the witness the court considers relevant, including...age, education, level of understanding, cultural background or relationship to any party to the proceeding.\textsuperscript{141}

\textbf{How have these changes worked in practice?}

Again, despite changes made to the laws in all Australian jurisdictions about the admissibility of improper questions, the indeterminacy of the sections means that questions of this nature may still be admitted.

Research on the application of the old section 41 of the uniform Evidence Acts, could also be relevant or germane to the jurisdictions that still have a discretionary power to disallow improper questions. It suggests that the restrictions were rarely applied and

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\textsuperscript{137} \emph{Evidence Act 1977 (Qld)} s 21(1), amended by the \textit{Criminal Law Amendment Act 2000 (Qld)} s 45.
\textsuperscript{138} \textit{Ibid.}, s 21(2), amended by the \textit{Criminal Law Amendment Act 2000 (Qld)} s 45.
\textsuperscript{139} \textit{Evidence Act 1977 (Qld)} s 21(4).
\textsuperscript{140} \textit{Ibid.}, s 21(1).
\textsuperscript{141} \textit{Ibid.}, s 21(2).
\end{flushleft}
failed to protect vulnerable witnesses.142

There has been little research on the application of the new section 41 of the uniform Evidence Acts. Section 275A of the Criminal Procedure Act (NSW) is largely identical to the new section 41. A small study on its implementation indicates that ‘drawing the line between acceptable and unacceptable cross-examination is not simply a matter of legislative definition or mandated powers of intervention…it is a question of perspective’.143 This study found that following the amendments there was no increase in the number of times the section was invoked. The responses of the prosecution and Defence barristers indicated that this was because improper questions, in their view, were not generally being asked before the enactment of the new section.144 The practitioners’ responses also indicated that the section had not resulted in a change in questioning approach for the same reason: ‘improper questions were not and are not generally being asked’.145

This is where the section becomes problematic. Although intervention under section 41 is now mandatory, the court must still deem a question to be improper to disallow it. A question asked in cross-examination may appear improper from the perspective of the victim, or a person who works with sexual assault victims. But the same question may be viewed as entirely proper by a legal practitioner or judicial officer who is looking at it solely from a legal perspective with the accused’s right to a fair trial in mind.146 Although this study provides some fascinating insight, its scope is too limited to enable any broad conclusions to be drawn from it. Further research across the ‘mandatory intervention’ jurisdictions is necessary to see whether they have in fact brought about any change.

**Summary**

In this chapter I discussed the legislative changes enacted in all Australian jurisdictions to help protect victims of sexual assault from being re-traumatised by questions asked whilst giving evidence. Evidence about a victim’s sexual reputation and experience is often irrelevant to a trial and can cause victims extra, unnecessary distress. When this research became widely known in law enforcement and the judicature, all Australian

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142 See: Royal Commission into the New South Wales Police Service, above n 79; Justice James Wood AO, above n 80, 30–31; Victorian Law Reform Commission, above n 21; NSW Adult Sexual Assault Interagency Committee, above n 82, 37; Drabsch, above n 83, 8; and, New South Wales Department for Women, above n 50.
143 Boyd and Hopkins, above n 94, 150.
144 Ibid., 162.
145 Ibid., 163.
146 Ibid.
jurisdictions reformed their legislation in this area. For the most part, the legislation does not expressly exclude evidence of this nature per se. It relies on judicial discretion and interpretation to determine when this evidence is admissible. Myths about sexual assault and male and female sexuality continue to permeate our society. Thus, discretionary legislation—that enables common beliefs and misconceptions to dictate its application—is of limited use.

The same applies to the recent limitations applied to cross-examination in many jurisdictions. All jurisdictions now have some restriction on the use of improper questions during cross-examination. Some of these give a judge the option to intervene and some mandate intervention. However, it does not much matter whether the legislation imposes a duty on the judge to intervene or not. If a judge does not perceive a question to be improper, then it will not be disallowed. As discussed earlier, a question that may be improper from the victim’s perspective may not be deemed as improper by a judge who has been indoctrinated by a male-dominant, often misogynistic, reality.

In this chapter I have discussed the changes made to legislation around Australia limiting the admissibility of evidence and questions that could reduce the trauma of a trial for victim–witnesses. The next chapter discusses the changes made to cross-examination procedure in all Australian jurisdictions—excluding the ACT. The changes discussed are similar to the changes made by the 2008 ACT legislation. Thus, they can be used for comparison and as a potential indicator of their efficacy.
Chapter Six

Other jurisdictions—legislative reform to ameliorate plight: implementation and judicial interpretation of Cross-Examination (Procedure) Law Reform

In this chapter I focus on procedural changes made in jurisdictions other than the ACT that are similar to the ones made by the Sexual and Violent Offences Legislation Amendment Act (SVOLAA) that this thesis is investigating. These reforms cover the laws governing cross-examination by a self-represented accused and trial procedure for sexual offence cases. These include changes to the committal hearing process, the use of closed circuit television (CCTV) and pre-recorded evidence, and closing courts to the public. This chapter provides an overview of the legislation enacted in each jurisdiction. Where it is available, I discuss the research on the efficacy of these provisions. Employing a similar format to the previous chapter, this overview demonstrates how changes analogous to those being investigated in this thesis have been implemented in other jurisdictions. This provides a comparison to the ACT legislation and enables a discussion of the impact of mythology on these reforms and, hence, their efficacy. This will help to predict how mythology might affect the implementation of the new reforms.

Cross-examination by an unrepresented accused

Over the last decade, all Australian jurisdictions, with the exception of Tasmania, enacted legislation that restricts the right of a self-represented accused to personally cross-examine adult victim–witnesses in sexual assault trials. One of the main arguments behind the initiation of these reforms was that victim–witnesses are likely to be extremely distressed while being cross-examined by a self-represented accused. In this context the:

...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'.

Therefore, those in favour of reforming the legislation argued that preventing an unrepresented accused from personally cross-examining the victim actually facilitates the accuracy of the evidence obtained. Other arguments in favour of reform included:

- affording witnesses some protection by restricting the manner in which cross-examination is conducted does not necessarily void the accused’s right to a fair trial because the ‘probative value of all of the available admissible evidence can [still] be fairly, thoroughly and effectively tested’\(^2\)
- to ensure fairness of proceedings, the definition of the right to a fair trial should be extended to cover victim–witnesses as well\(^3\)
- a mandatory prohibition on cross-examination by a self-represented accused may lessen the victim’s fear of being personally confronted by the accused and hence increase reporting rates.\(^4\)

In Queensland, following a recommendation in the report of the Taskforce on Women and the Criminal Code in 2000,\(^5\) provisions were introduced to prevent an accused from personally cross-examining victim–witnesses is sexual offence trials.\(^6\) Now, if a self-represented accused wishes to cross-examine the victim–witness, they must arrange for private legal representation. Alternatively they are provided with a Legal Aid lawyer.\(^7\) These provisions are almost identical to those in the new *Criminal Procedure Act 2009* (Vic) in Victoria. It states that a protected witness must not be cross-examined by the accused in person.\(^8\) If the accused person fails to obtain legal representation, the court must order Victorian Legal Aid to provide legal representation to the accused for the purposes of cross-examination.\(^9\) The Victorian provisions apply to ‘protected witnesses’ in sexual offence trials,\(^10\) the definition of which includes

\(^4\) Ibid., 26.
\(^6\) *Evidence Act 1977* (Qld) s 21N.
\(^7\) Ibid., s 21O(2).
\(^8\) *Criminal Procedure Act 2009* (Vic) s 356.
\(^9\) *Criminal Procedure Act 2009* (Vic) s 357(2).
\(^10\) Ibid., s 353(2).
complainants.\(^{11}\) South Australian legislation also requires that counsel conduct cross-examination of victim–witnesses in trials of serious offences against the person—which include sexual offences.\(^{12}\) These provisions state that the accused must be given reasonable time to obtain legal representation for the purposes of cross-examination.\(^{13}\) However, there are no requirements for the court to appoint legal representation if it is not obtained by the accused. It is unclear what would occur in these circumstances; presumably cross-examination would not be conducted at all.

New South Wales (NSW), Western Australia and the Northern Territory have slightly different provisions for cross-examination by a self-represented accused. In these jurisdictions legal representation is not necessarily required. The *Criminal Procedure Act 1986* (NSW) states that complainants in sexual offence trials cannot be examined in chief, cross-examined or re-examined by an unrepresented accused: they must instead be examined by a person appointed by the court.\(^ {14}\) The person appointed by the court in these circumstances may only ask the complainant the questions that the accused requests them to ask\(^ {15}\) and must not provide the accused with any legal advice.\(^ {16}\) Similarly, in the Northern Territory and Western Australia, legislation requires that an unrepresented accused must put questions to the witness by stating the question to the Judge or another person approved by the Court. That person must then repeat the question to the witness.\(^ {17}\) The provisions in the Northern Territory legislation prohibit cross-examination of the complainant by an unrepresented defendant in all sexual offence trials.\(^ {18}\) However, in Western Australia, the restrictions apply only to protected witnesses.\(^ {19}\) In Western Australia a protected witness is defined as a complainant in a ‘serious sexual offence’ proceeding.\(^ {20}\) This is defined as a proceeding for an offence for

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\(^{11}\) Ibid., s 354.
\(^{12}\) See: *Evidence Act 1929* (SA) ss 4 and 13B(1)(a).
\(^{13}\) Ibid., s 13B(3)(c).
\(^{14}\) *Criminal Procedure Act 1986* (NSW) s 294A(2). The appointed person could include, but is not limited to, the local registrar or counsel to whom the appellant has spoken about the matter: *Clark v R* [2008] NSWCCA 122. There is no requirement in s 294A that the appointed person be a qualified legal practitioner.
\(^{15}\) *Criminal Procedure Act 1986* (NSW) s 294A(3).
\(^{16}\) Ibid., s 294A(4).
\(^{17}\) *Evidence Act 1906* (WA) s 106G(1); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b). NT legislation has yet to be employed in practice.
\(^{18}\) *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.
\(^{19}\) *Evidence Act 1906* (WA) s 106G(1).
\(^{20}\) Ibid., s 106G(3)(b).
which the maximum penalty that may be imposed is seven years or more and includes most, but not all, sexual offences.\textsuperscript{21}

\textbf{Other procedural law reform}

Over the past couple of decades, all jurisdictions in Australia introduced legislation to change the way in which sexual assault trials are conducted for vulnerable witnesses. Initially, many of the changes applied only to children and complainants with a cognitive impairment. However, in many jurisdictions, further changes have been made recently to include adult victims of sexual assault as well. In this part of the chapter I discuss the changes that have been made to trial procedure for adult victims of sexual assault.

\textbf{Committal hearings}

Currently, all jurisdictions except for Queensland have ‘paper-based’ committal proceedings for adult victims of sexual assault. This means that these witnesses are not generally required to attend to give evidence and be cross-examined. However, although committal proceedings are generally paper-based in most jurisdictions, the court may still require victims to attend to give evidence and be cross-examined in New South Wales, South Australia, Tasmania and Victoria.

Victoria has the longest-standing provisions in this area, with the hand-up or ‘paper committal’ procedure being made mandatory for committal hearings in sexual assault cases in 1976.\textsuperscript{22} Today, the Defence must make an application in writing for leave to be granted to have a prosecution witness attend the committal hearing.\textsuperscript{23} The Court may only grant leave under this section if it is satisfied that the accused has identified an issue and justified why cross-examination on that issue is needed.\textsuperscript{24} In determining whether cross-examination at the committal is justified, the Court must have regard to the need to ensure several things. These include that trivial, vexatious or oppressive cross-examination is not permitted; and that the interests of justice are otherwise served.\textsuperscript{25}

\footnotesize
\textsuperscript{21} See: \textit{Evidence Act 1906 (WA) s 106A; Criminal Code Act 1913 (WA) Ch XXXI.}
\textsuperscript{22} \textit{Rape Offences (Proceedings) Act 1976 (Vic) s 2.}
\textsuperscript{23} \textit{Criminal Procedure Act 2009 (Vic) s 124.}
\textsuperscript{24} \textit{Ibid., s 124(3).}
\textsuperscript{25} \textit{Criminal Procedure Act 2009 (Vic) s 124(4)(g)–(h).}
The provisions in New South Wales and South Australia are very similar to those in Victoria. The legislation in New South Wales has provided for ‘paper committals’ in all circumstances since 2001. Witnesses can be directed to attend as a result of an application by the prosecutor or the accused or on the Magistrate’s own motion. However, victim–witnesses in offences involving violence, including prescribed sexual offences, may not be directed to attend a committal hearing unless the Magistrate is satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence. Similarly, in South Australia, prosecution witnesses may only be called when the Defence has made an application and the court grants permission. For complainants in sexual offence cases, leave must not be granted unless the court is ‘satisfied that the interests of justice cannot be adequately served except by doing so’.

Western Australia, Tasmania and the Northern Territory have effectively abolished committal hearings and committal to the higher court takes place administratively. However, in Tasmania, the accused or a Crown law officer can request an order to conduct a preliminary proceeding. This type of order can be made where the Court is satisfied that exceptional circumstances require the ‘affected person’ to attend. If a preliminary hearing is ordered, the evidence of an ‘affected person’—which includes rape victims—is given to the justices as a recording of the statement of the witness. These victims may only be examined, cross-examined and re-examined on the matters specified in the order except in ‘exceptional circumstances’ where it is in the interests of justice to do so. The legislation does not provide any guidance about the meanings of

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26 Criminal Procedure Act 1986 (NSW) s 74, inserted by the Criminal Procedure Amendment (Justices and Local Courts) Act 2001 (NSW) sched 1[43].
27 Ibid., s 91.
28 Ibid., s 93.
29 Summary Procedure Act 1921 (SA) s 106(1)(b).
30 Ibid., s 106(3). There have yet to be any cases in South Australia that consider the application of this section for victims of sexual assault.
31 See: Justices Amendment Act 2007 (Tas); Criminal Law (Procedure) Amendment Act 2002 (WA); Justice Legislation Amendment (Committal Reform) Act 2010 (NT).
32 Criminal Code 1924 (Tas) sched 1, s 331B.
33 Justices Act 1959 (Tas) s 3.
34 Ibid., s 61(4)(b).
35 Ibid., s 61(5).
'exceptional circumstances’ or ‘interests of justice’; so these sections are largely subject to judicial discretion.

The current legislation in Western Australia and the Northern Territory appears to provide the most protection for adult victims of sexual assault during the committal process. In Western Australia, the *Criminal Law (Procedure) Amendment Act 2002* (WA) abolished preliminary or committal hearings and established a ‘committal mention’ in its place. Now, all committal mentions are paper-based and referred to as a ‘hand-up brief’.36 No prosecution witnesses are required to attend for examination or cross-examination at committal. As a result of the *Justice Legislation Amendment (Committal Reform) Act 2010* (NT), the same now applies in the Northern Territory. There, protected witnesses—including victims of sexual assault—are no longer ‘required to attend a preliminary examination; and...cannot be examined or cross-examined at a preliminary examination’.37

Queensland is the only jurisdiction yet to have extended their committal reforms to adult victims of sexual assault. Before January 2004 there were no limitations on committal proceedings and all witnesses could be called to give evidence. Following the *Evidence (Protection of Children) Amendment Act 2003* (Qld), child victims of sexual assault are no longer required to give evidence at committal hearings and may only be cross-examined if required by the magistrate.38 However, no changes have yet been made for other vulnerable witnesses or for adult victims of sexual assault.

**Pre-trial or ‘special’ hearings**

All jurisdictions, with the exception of New South Wales and Tasmania, now have provisions in place for recording witnesses’ evidence at a special hearing held before the actual trial. However, these hearings are usually only available to specific categories of witnesses and often have preconditions that need to be fulfilled before they are ordered.

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37 *Justices Act* (NT) s 105L.
38 *Evidence Act 1977* (Qld) s 21AG.
In Queensland, special hearings are only available for children; and in Victoria for children and cognitively impaired witnesses. In Queensland, provisions were introduced in 2003\(^{39}\) enabling children to attend a pre-trial hearing at which cross-examination and re-examination is conducted, recorded, and later played at the actual trial. This special hearing is available to victims of sexual assault who are under 18 years of age or who have a cognitive impairment in Victoria.\(^{40}\) These procedures have yet to be extended to apply to adult, non-disabled, victims of sexual assault in either jurisdiction.

Western Australia, the Northern Territory and South Australia are the only jurisdictions to have provisions for a pre-trial hearing for adult victims of sexual assault as well as children and cognitively impaired witnesses. In South Australia, the court must make special orders for the giving of evidence by vulnerable witnesses, which includes victims of sexual assault.\(^{41}\) However, it must be practical or desirable to do so and not cast prejudice on any party to the proceedings.\(^{42}\) On application by the prosecution in these circumstances, the court may order that ‘the evidence be taken outside the trial court, and that an audiovisual record of the evidence be made and replayed in the trial court’.\(^{43}\) However, where the witness is an adult, the court may dispense with the use of this special arrangement if the facilities are not available and it is not reasonably practicable.\(^{44}\)

Legislation in Western Australia and the Northern Territory appears to provide the most protection for adult, non-disabled victims of sexual assault. The provisions in both jurisdictions provide a similar amount of protection although there are slight differences in wording and application. In Western Australia, if a witness has been declared a ‘special witness’ under section 106R of the \textit{Evidence Act 1906}, a judge may order that all of the special witness’s evidence—including any cross-examination and re-

\(^{39}\) \textit{Evidence Act 1977} (Qld) s 21AK, 21AL, 21AM. Changes introduced by the \textit{Evidence (Protection of Children) Amendment Act 2003} (Qld).

\(^{40}\) \textit{Criminal Procedure Act 2009} (Vic) s 370.

\(^{41}\) \textit{Evidence Act 1929} (SA) s 4.

\(^{42}\) Ibid., s 13A(1).

\(^{43}\) Ibid., s 3A(2)(b).

\(^{44}\) \textit{Evidence Act 1929} (SA) s 13A(11).
examination—be taken at a special hearing and recorded.\textsuperscript{45} An order may be made under this section on application by the prosecution or by the court’s own motion.\textsuperscript{46} This section defines a ‘special witness’ as a witness who, without special measures, is likely to suffer severe emotional trauma,\textsuperscript{47} or to be so intimidated or distressed as to be unable to give evidence satisfactorily.\textsuperscript{48} When making this determination, the court must consider the witness’ ‘age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant’.\textsuperscript{49} All sexual offences listed in section XXXI of \textit{The Criminal Code} are serious sexual offences. For victims in those proceedings, the court must make an order that they are a special witness unless satisfied that:

- the definition of a special witness does not apply to them; or
- the victim does not wish to be treated as a special witness.\textsuperscript{50}

For vulnerable witnesses in the Northern Territory—which includes all victims of sexual assault\textsuperscript{51}—the court may arrange for a ‘special sitting’. In that sitting, the examination of the witness is recorded and later played at the actual trial.\textsuperscript{52} On application by the prosecution, the court must make an order under this section unless there is good reason for not doing so.\textsuperscript{53}

\textbf{Use of statement or interview as evidence-in-chief}

Currently, South Australia is the only Australian jurisdiction without legislation providing for the use of a recorded statement or interview as witnesses’ evidence-in-chief. The other jurisdictions have different provisions about the admission of a statement or interview of this nature.

\textsuperscript{45} \textit{Evidence Act} 1906 (WA) s 106RA(1).
\textsuperscript{46} Ibid., s 106RA(3).
\textsuperscript{47} Ibid., s 106RA(3)(b)(i).
\textsuperscript{48} Ibid., s 106RA(3)(b)(ii).
\textsuperscript{49} Ibid., s 106RA(3)(b).
\textsuperscript{50} Ibid., s 106RA(3a). This application of this provision has yet to be considered in any case law in Western Australia.
\textsuperscript{51} \textit{Evidence Act} (NT) s 21A.
\textsuperscript{52} Ibid., s 21B(2).
\textsuperscript{53} Ibid., s 21B(3).
In Queensland and Tasmania the provisions apply to children only. Since 2003, the Queensland legislation has allowed the use of a recording of the police interview as children’s evidence-in-chief. The same provision has applied to children in Tasmania since 2001 but only to those who are deemed an ‘affected child’. In those circumstances the Defence must still be given an opportunity to cross-examine the child. These arrangements are not currently available to adult victims of sexual assault in either jurisdiction.

Legislation permitting a recorded interview to be used as evidence-in-chief in Victoria, New South Wales and Western Australia applies only to children and witnesses with a cognitive impairment. In New South Wales, witnesses in these categories are referred to as ‘vulnerable persons’ and are able to use audio or videotaped interviews as their evidence-in-chief. Victorian legislation specifically provides for children and cognitively impaired witnesses in sexual offence trials to give evidence-in-chief in an audio or audiovisual recording. In these cases the witness answers questions put to him or her by a prescribed person. In Western Australia, in any proceeding for an offence, a witness who is a child or who has an intellectual impairment, may give their evidence-in-chief as a visually recorded interview, which is then admitted as their evidence in chief at the proceeding. There are no similar provisions in any of these jurisdictions for other vulnerable witnesses or adult victims of sexual assault.

Northern Territory legislation is perhaps the widest in scope. It is currently the only jurisdiction that allows a recorded statement to be admitted as evidence-in-chief for adult victims of sexual assault as well as children and those with an intellectual disability. Since 2007, for victims of sexual assault, the court has been able to admit a recorded statement into evidence as the sexual assault victim–witness’ evidence-in-chief. On application by the prosecution, the court must make an order under this

54 Evidence (Protection of Children) Amendment Act 2003 (Qld).
55 Evidence Act 1977 (Qld) s 21AK, 21AL, 21AM.
56 Evidence (Children and Special Witnesses) Act 2001 (Tas) s 5.
57 Ibid., s 5(1).
58 Criminal Procedure Act 1986 (NSW) s 306M(1).
59 Criminal Procedure Act 2009 (Vic) s 367.
60 Evidence Act 1906 (WA) s 106HB.
61 Evidence Act (NT) s 21B(2).
section unless there is good reason for not doing so. However, in *R v Brown*, the length and substance of the interviews led to there being a ‘good reason’ to exclude the recorded evidence. Olsson AJ held:

I am driven to the conclusion that such are the unsatisfactory features of the conduct and content of the child forensic interviews as to the matters relied upon to establish the guilt of the accused that it would be grossly unfair and unjust to permit them to be adduced in evidence. I therefore hold that there is, in any event, good reason not to admit them.

**Use of recorded evidence in subsequent hearings**

All Australian jurisdictions, except for Tasmania, now have provisions allowing for the re-use of victim–witness evidence at subsequent hearings. To which witnesses and trials the provisions apply, however, differs from jurisdiction to jurisdiction.

New South Wales, the Northern Territory, South Australia, Victoria and Western Australia all have legislation allowing for the re-use of recorded evidence of adult sexual assault victim–witnesses at subsequent hearings. In New South Wales, this recording can only be used in appeals against conviction; but in the remainder of the jurisdictions it can be used in any other related hearing. In 2005, the NSW *Criminal Procedure Act* was amended, The Act now provides that where a successful appeal against conviction is made, and a new trial ordered, the prosecutor may tender as evidence in the new trial a record of the victim’s original evidence. ‘Original evidence’ under this section includes the record of the complainant in examination-in-chief, cross-examination and re-examination. The court does not have the power to decline to admit the record in these circumstances where the prosecution has given proper notice. Where the record is admitted in the subsequent hearing, victims of sexual assault cannot be compelled to provide any further evidence but may elect to do so if they wish.

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62 Evidence Act (NT) s 21B(3).
64 Ibid., [64].
65 The *Criminal Procedure (Evidence) Act 2005* (NSW) inserted a new Division 3 to Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW), entitled ‘Special provisions about retrials of sexual offence proceedings’.
66 *Criminal Procedure Act 1986* (NSW) s 306B(1).
67 Ibid., s 306B(2).
68 Ibid., s 306B(5).
69 Ibid., s 306C.
The Northern Territory’s legislation is not as precise. It provides that if evidence is given in court, vulnerable witnesses—including victims of sexual assault—may have their evidence recorded for use as their evidence in later proceedings.\(^{70}\) Similarly, in South Australia, courts have the power to order that the evidence given at trial of a vulnerable witness—which includes a victim of a sexual offence—\(^{71}\) be recorded for use in subsequent hearings if the facilities are available and it is reasonably practicable.\(^{72}\) This recorded evidence may be used in any other relevant trials and may ‘relieve the witness, wholly or in part, from an obligation to give evidence in the later proceedings’.\(^{73}\) For adult sexual assault victim–witnesses in Victoria, a recording of their evidence given at trial, including cross-examination and re-examination, can be played as their testimony in any new trial, appeal or other proceeding.\(^{74}\) And in Western Australia, a special victim’s recorded evidence is admissible in any related hearing to the same extent as if it were given orally in the hearing.\(^ {75}\) However, the judge at the related hearing may order that the witness attend the court for the purposes of giving further evidence to clarify the evidence on the visual recording.\(^ {76}\) This provision will generally apply to adult victims of sexual assault. The court must make an order that a sexual assault victim is a special witness unless the court is satisfied that they do not wish to be declared such.\(^ {77}\)

Queensland legislation is perhaps the most restrictive in its application to adult victims of sexual assault as the provisions only apply to ‘special witnesses’. Queensland courts may order that the evidence of a ‘special witness’ be recorded\(^ {78}\) and the recording is then admissible as the witness’s in any retrial, appeal or other related proceeding.\(^ {79}\) However, ‘special witness’ is defined as a person who, in the court’s opinion, ‘would be likely to suffer severe emotional trauma, or would be likely to be so intimidated as to be

\(^{70}\) Evidence Act (NT) s 21E.
\(^{71}\) Evidence Act 1929 (SA) s 4.
\(^{72}\) Ibid., s 13C(1)(b).
\(^{73}\) Ibid., s 13D.
\(^{74}\) Criminal Procedure Act 2009 (Vic) s 379.
\(^{75}\) Evidence Act 1906 (WA) s 106T(2a).
\(^{76}\) Ibid., s 106T(3).
\(^{77}\) Ibid., s 106T(3a).
\(^{78}\) Evidence Act 1977 (Qld) s 21A(2)(e).
\(^{79}\) Ibid., s 21A(6).
disadvantaged as a witness’.\textsuperscript{80} This means that the provision would have to be argued by the prosecution, and so these benefits do not automatically apply to adult victims of sexual assault. The prosecution must first apply for the special consideration and then be able to demonstrate that the witness is likely to be disadvantaged if not deemed a ‘special witness’.

\textbf{Audiovisual links/screens}

All Australian jurisdictions now have provisions in place that allow the use of audiovisual links or CCTV and screening arrangements for vulnerable witnesses. The regulations in each jurisdiction are different though and some of the sections appear to be quite indeterminate.

In Queensland and Tasmania, only special witnesses are eligible for the special provisions. They are defined as those who are likely to suffer severe emotional trauma or be so intimidated as to be unable to give evidence satisfactorily.\textsuperscript{81} This means that adult victims of sexual assault must apply to be considered a special witness and demonstrate that they fit within the definition to benefit from the special provisions. If the prosecution is able to successfully demonstrate this, the court in Queensland may order that the accused be excluded from the courtroom or be obscured from the view of the witness while they give evidence.\textsuperscript{82} Alternatively, the court might order that the special witness give evidence in a room outside the courtroom.\textsuperscript{83} The situation is similar in Tasmania. The legislation there provides for the mandatory use of audiovisual links by child complainants giving evidence in sexual assault cases.\textsuperscript{84} Adult victims of sexual assault, however, have to be deemed a ‘special witness’ for the judge to be able to make an order that they give evidence via audiovisual link.\textsuperscript{85}

New South Wales, the Northern Territory, South Australia, Victoria and Western Australia all have legislation providing for the use of CCTV and screens by adult victims

\textsuperscript{80} Evidence Act 1977 (Qld) s 21A(1).
\textsuperscript{81} See: Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8(1); Evidence Act 1977 (Qld) s 21A(1).
\textsuperscript{82} Evidence Act 1977 (Qld) s 21A(2)(a).
\textsuperscript{83} Ibid., s 21A(2)(c).
\textsuperscript{84} Evidence (Children and Special Witnesses) Act 2001 (Tas) s 6.
\textsuperscript{85} Ibid., s 8(2)(b)(ii).
of sexual assault. However, in the Northern Territory, South Australia and Western Australia, these provisions only apply where the facilities are available and it is reasonably practicable to do so.

Since 2004, complainants in sexual offence proceedings in New South Wales have been entitled to give their evidence from a place other than the courtroom. They can do this by means of CCTV ‘or other technology that enables communication between that place and the courtroom’. This other technology could include videoconferencing, or even technology that allows audio with no visual; for example, a telephone. Victims are also able to choose to use screens or seating arrangements to restrict their view of the accused or any other person if they choose to give evidence in court.

Where the facilities are available, victims of sexual assault in the Northern Territory are entitled to choose to give evidence from outside the courtroom via CCTV. If evidence is to be given in the courtroom, the victim is entitled to have their view of the party to whom the evidence relates obscured. This can be done by the use of a screen, partition, or one-way glass positioned in the courtroom. However, in addition to the requirement that facilities be available, the court may, in some circumstances, order that the witness is not to give evidence using these arrangements. The court can order this if it is satisfied that it is not in the interests of justice to do so, or the urgency of the proceeding makes it inappropriate to do so.

A South Australian court can make an order for the use of many special arrangements for vulnerable witnesses to give evidence from outside the courtroom. These include the use of CCTV, or screens or partitions to obscure the victim’s view of the person of concern. The restrictions on this power are the same as those that apply to the pre-
recording or re-use of the complainant's evidence as discussed above. They apply only where the facilities are available and it is reasonably practicable to do so.

Victoria and Western Australia appear to be the furthest ahead in law reform governing the use of CCTV and screens. They are the only jurisdictions to have made the use of CCTV and screens the default action for adult victims of sexual assault. These facilities must be used unless the victim wishes to give evidence in court.

If the facilities are available, judges in Western Australia must make an order for special witnesses and victims of sexual assault to give evidence via video link from a room outside the courtroom.93 Where this is not possible or practicable, while the victim is giving evidence in the courtroom, the evidence must be transmitted via video link to the accused in a separate room.94 Video link is defined as:

...facilities (including closed circuit television) that enable, at the same time, a court at one place to see and hear a person giving evidence or making a submission at another place and vice versa.95

In circumstances where these facilities are not available, a screen or one-way glass is to be situated in the courtroom. It must be placed so that the witness cannot see the accused; but the judge, jury, the accused, and his or her counsel can see the witness.96 These arrangements will apply automatically unless the prosecution makes an application for the witness to give evidence in court. In these circumstances the judge must be satisfied that the witness 'is able and wishes to give evidence in the presence of the accused in the courtroom'.97

Similarly, in sexual offence proceedings in Victoria, the court must direct that the complainant give evidence via CCTV ‘or other facilities that enable communication between that place and the courtroom’. This provision applies unless the prosecution makes an application for the complainant to give evidence in the courtroom. In that event, the court must be satisfied that the complainant is aware of the options and is

93 Evidence Act 1906 (WA) s 106N(2)(a).
94 Ibid., s 106N(2)(b).
95 Ibid., s 120.
96 Evidence Act 1906 (WA) s 106N(4).
97 Ibid., s 1060.
happy and able to give evidence in the courtroom.98 The same rules apply for the use of screens to remove the accused from the victim’s direct line of vision. The court must make an order directing the use of screens in the courtroom unless the court is satisfied that the complainant is aware of the right to use screens and does not wish screens to be used.99

**Open/closed court**

All Australian jurisdictions now have legislation that empowers the court to close the proceedings to the public in certain circumstances. The power to make this order in Queensland, South Australia, Tasmania, Victoria and Western Australia is discretionary. This means that the court may make an order to close the court to the public if, for example, it is satisfied that it is necessary to prevent the witness experiencing further trauma. Furthermore, this discretionary power in Queensland and Tasmania only applies to special witnesses; that is, those who are likely to suffer severe emotional trauma or be so intimidated as to be unable to give evidence.

A Queensland court may order that while special witnesses are giving evidence everyone—other than those specified by the court—be excluded from the courtroom.100 The legislation in Tasmania has a similar effect stating that the court in a preliminary hearing is, by default, an open court. However, the justices may order that the court be closed to certain persons if it is in the interests of justice to do so.101 In proceedings where the witness is a special witness, as discussed above, a judge may also make an order that while the special witness is giving evidence, everyone except those specified, be excluded from the courtroom.102

The South Australian *Evidence Act 1929* allows for the court to order that specified persons, or all persons except those specified, be absent from the court for the whole or part of the proceeding. This order may be made where the court considers it desirable in the interests of the administration of justice or to prevent hardship or embarrassment to

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98 Criminal Procedure Act 2009 (Vic) s 363.
99 Ibid, s 364.
100 Evidence Act 197 (Qld) s 21A(2)(b).
101 Justices Act 1959 (Tas) s 61(7).
102 Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8(2)(b)(iii).
any person. This section applies to all trials and not just those involving sexual offences or evidence given by vulnerable witnesses. Victorian legislation also refers to the potential distress of the witness but focuses on complainants. In sexual offence trials in both the Magistrates’ and Supreme Courts in Victoria, the court may order that any part, or the whole, of the proceeding be heard in a closed court. This discretion is available if the court is of the opinion that it is necessary to avoid causing undue distress or embarrassment to the complainant.

By comparison, legislation in Western Australia applies more generically. Under the Evidence Act 1906 (WA), the court may order that all or part of the evidence be heard ‘in camera’; that is, in a court closed to the public. The court may also order that any or all persons be excluded from the courtroom for a part or the whole of the proceedings. This discretion can be used on application by one of the parties or by the court’s initiative if it is satisfied that it is in the interests of justice to do so.

New South Wales and the Northern Territory are the only jurisdictions that mandate closure of the court to the public in sexual offence hearings. In NSW the legislation provides for all prescribed sexual offence proceedings to be held in camera (closed court) unless the court otherwise directs. The court may direct that the complainant give evidence in an open court only at the request of one of the parties to the proceeding. The court can only do this if it is satisfied that special reasons in the interests of justice require the evidence to be given in an open court; or with the complainant’s consent. The provisions in the Northern Territory, however, are the most determinate. They make it mandatory, without exception, that the court be closed to the public whilst victims of sexual assault are giving their evidence. The court must be closed while they are giving their evidence or while the recording of their evidence is being replayed to the court; and ‘a person must not remain in the courtroom, or a place from which the

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103 Evidence Act 1929 (SA) s 69(1).
104 See: Magistrates’ Court Act 1989 (Vic) s 126(2)(a); and, Supreme Court Act 1986 (Vic) s 18(1)(a).
105 See: Magistrates’ Court Act 1989 (Vic) s 126(1)(d); and, Supreme Court Act 1986 (Vic) s 19(e).
106 Evidence Act 1906 (WA) s 19(1(a).
108 Criminal Procedure Act 1986 (NSW) s 291(1).
109 Ibid., s 291(3).
person can overhear the proceedings in the courtroom, without the Court’s permission’.\footnote{Evidence Act (NT) s 21F.}

**How have these changes worked in practice?**

There has yet to be any research conducted to assesses the impact of the prohibition of cross-examination by an unrepresented accused. However, research and cases have demonstrated the impact that cross-examination by a self-represented accused can have on the victim.\footnote{See: Heydon, above n 1; Hoyano, above n 2; Drabsch, above n 3; New South Wales Law Reform Commission, ‘Questioning of complainants by unrepresented accused in sexual offence Trials’ (101, 2003); Victorian Law Reform Commission, ‘Sexual offences: final report ’ (July 2004);  R v Ralston Edwards [1997] EWCA Crim 1679, 3 July 1997.} So it can be assumed that the trauma in these circumstances has been eradicated.

Turning to the other areas of procedural reform, many of the changes to trial procedure for adult sexual assault victims recently made in Australia were already in place for children and witnesses with a cognitive impairment. Although there has yet to be much research conducted on the efficacy of these most recent reforms, the research on the changes made for child witnesses give us an idea of the impact they will have.

**Committal hearings**

In 2003, the Victorian Law Reform Commission undertook a study of committal hearings in sexual offence trials to determine whether complainants were routinely cross-examined at committal.\footnote{Victorian Law Reform Commission, above n 112.} Complainants in sexual offence trials cannot be cross-examined at committal without leave of the court. However, the study found that, in 39 of the 40 matters identified, the Defence made an application to cross-examine the complainant, and leave was granted in all but one of these matters.\footnote{Ibid., 155–156.} As a result, the Commission recommended a prohibition on cross-examination of children and witnesses with a cognitive impairment at the committal hearing.\footnote{Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward' (Attorney General’s Department NSW, December 2005) 65.} However, it did not extend this recommendation to include other vulnerable witnesses such as victims of sexual assault.

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\footnote{Evidence Act (NT) s 21F.}
\footnote{See: Heydon, above n 1; Hoyano, above n 2; Drabsch, above n 3; New South Wales Law Reform Commission, ‘Questioning of complainants by unrepresented accused in sexual offence Trials’ (101, 2003); Victorian Law Reform Commission, ‘Sexual offences: final report ’ (July 2004);  R v Ralston Edwards [1997] EWCA Crim 1679, 3 July 1997.}
\footnote{Victorian Law Reform Commission, above n 112.}
\footnote{Ibid., 155–156.}
\footnote{Criminal Justice Sexual Offences Taskforce, 'Responding to sexual assault: the way forward' (Attorney General’s Department NSW, December 2005) 65.}
Pre-trial hearings and use of recorded evidence

The success of the changes to the legislation allowing child complainants in sexual assault matters in New South Wales to use a recorded interview as their evidence-in-chief was said to be:

...largely dependent upon the quality and standard of the interviews conducted; the technical quality of the recording; the availability of equipment, and an acceptance by lawyers and members of the judiciary to evidence given by way of recorded videotape.\textsuperscript{115}

Other research in New South Wales found that some prosecutors preferred not to submit an electronic recording as the child’s evidence-in-chief because the interviews were often long and confusing and contained inadmissible material.\textsuperscript{116} Furthermore, some prosecutors maintained the belief that giving evidence in court would have a greater (positive) impact on the outcome of the trial.\textsuperscript{117}

Where pre-recorded evidence is used, studies indicate that it is well supported by children and parents.\textsuperscript{118} A Victorian study though found that between 1999 and 2003, the use of pre-recorded evidence had been the grounds of appeal against conviction in several cases.\textsuperscript{119} In each of these appeal decisions, the trial was declared to be unfair because the jury had access to the recording during their deliberations. The conviction was quashed and a new trial ordered in five out of six of the cases studied.\textsuperscript{120} More recently, however, the High Court dismissed an appellant’s claim that the trial judge’s decision to allow the jurors to replay the recorded evidence whilst deliberating constituted a miscarriage of justice.\textsuperscript{121}

Audiovisual links/screens

There has been much positive evaluation of the use of audiovisual links. However, in 2002 the New South Wales Legislative Council Standing Committee on Law and Justice reported that the justice system was failing to embrace the new technology,

\textsuperscript{115}Criminal Justice Sexual Offences Taskforce, above n 114, 106.
\textsuperscript{116}Ibid., 106.
\textsuperscript{117}Ibid., 106.
\textsuperscript{120}Corns, above n 120, 44.
\textsuperscript{121}Gately v The Queen [2007] HCA 55.
which was seriously affecting its potential benefits. The same result was found more recently in Queensland. In addition very few courts in Queensland have the necessary technology for CCTV; and where they do, it is often not in working order. Another more recent evaluation of the changes in New South Wales found that technical difficulties and lack of technical knowledge and experience within the court staff also limited the use of this technology.

The introduction of CCTV in Victoria has not been overwhelmingly successful as intended either. A study conducted by the Victorian Law Reform Commission found that child victims in sexual offence matters were often required to give evidence in court. There is also still a strong preference for having witnesses physically present in the courtroom while they give evidence. A 2003 study conducted in several jurisdictions found that CCTV was refused in 43 per cent of the child sexual assault cases that went to trial. With the advancement of technology and resources, it is likely that CCTV is used more commonly in most jurisdictions today. However, the belief that a witness in the courtroom appears stronger than a witness on a television screen continues to exist.

This is despite research that suggests that whether or not the witness is present appears to have no effect on conviction rates.

Research suggests that screens and other physical arrangements—which have been used for much longer than CCTV—are also rarely used. One reason for this may be that a screen is not sufficient to reduce a victim’s distress. Research in New South Wales and Western Australia suggests that most witnesses and judges, and many counsel, prefer CCTV over the use of screens because screens do not adequately protect the

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124 Cashmore and Trimboli, above n 119.
128 Cashmore and Trimboli, above n 119.
129 New South Wales Law Reform Commission, above n 112, [6.15].
witness. In addition, they are more likely to be interpreted as prejudicial to the accused because they give a strong impression of guilt. However, the increasing use of CCTV has no doubt contributed to the lack of use of screening arrangements in recent times. In addition, the inclusion of judicial discretion in many of the provisions governing the use of screens, means that often the special measures are not invoked. A Queensland study found that, as a result of judicial discretion, ‘one Brisbane judge would not allow a screen to be placed between the child witness and the accused under any circumstances’.

**Open/closed court**

The *Heroines of Fortitude* study found that—although an order could be made to close the court in certain circumstances—the court was not closed to the public at any stage of the trial in 56 per cent of the cases. Seventeen per cent were closed for the examination and cross-examination of the victim; and only 10 per cent were closed for the entire proceedings. In several of the trials in this study, closure of the court was discussed in the courtroom and subsequently refused by the judge:

...there has to be some compelling reason for the court to be closed. I believe that unless there is some other reason that you can advance Mr Crown in support of the application—that the only order I would be prepared to make is a non-publication order. You see there is a public interest in having trials open to and heard by the public which is possibly just as important, probably more important than the interests of the complainant—I refuse the application.

**Summary**

In this chapter I discussed many of the legislative changes made to trial procedure in all Australian jurisdictions to help protect victims of sexual assault from being re-traumatised by the criminal justice system. Research indicates, however, that although

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131 Oliver, above n 124.

132 New South Wales Department for Women, ‘*Heroines of fortitude*’ (Office for Women: NSW Department of Premier and Cabinet, October 1996) 122.

133 Ibid., 123.
many modifications have been made, the changes on paper do not always translate into practice.

Many of the changes to procedure have been in practice for a while now for child witnesses. Thus, I would hope that familiarity with the different procedures will benefit adult victims of sexual assault. The abolition of the traditional committal hearing process in many jurisdictions aims to decrease the number of times a victim has to give evidence in a courtroom. However, for victims not to be regularly ordered to appear, judicial officers need to be aware of, and understand, how traumatic giving evidence can be for victims of sexual assault. This also applies to decisions to close the court to the public or certain persons. Where judicial discretion is required, the court is unlikely to be closed in many circumstances where the decision is made without an adequate understanding of the realities of sexual assault and the impact of discussing such personal things in a public forum.¹³⁴

The pre-recording and re-use of evidence is likely to help ameliorate the plight of sexual assault victim–witnesses by enabling them to give their evidence sooner and not having to repeat it at subsequent trials. Society continues to perceive ‘remote’ witnesses differently to witnesses who give evidence live in court and to believe that recorded evidence can be prejudicial to the accused. Until this perception changes, these legislative changes are not going to have the intended impact. These beliefs also apply to the use of CCTV. Although CCTV has been in use for a while in many jurisdictions, it still poses problems where decisions about its use are influenced by the way evidence is perceived by jurors. Furthermore, the remoteness of many Australian courts—and the lack of technology and technological knowledge within the courts—can contribute to the ineffectiveness of this advancement.

¹³⁴ Benchbooks have now been published in some jurisdictions, directing judicial officers to the research on the effects of sexual assault and the difficulties in presenting evidence about sexual assault in our adversarial system, however, these are merely guides and do not have to be read or followed by judicial officers. See: Department of the Attorney General, Equality before the law: bench book (Department of the Attorney General WA, 2009); Judicial Commission of New South Wales, Equality before the Law Bench Book (Judicial Commission of New South Wales, 2006); Supreme Court of Queensland, Equal treatment benchbook (Supreme Court of Queensland Library, 2005).
In the context of earlier chapters, in this chapter I demonstrated the impact that the indoctrination of sexual assault mythology can have on the interpretation and application of law reform. Legislative changes around Australia have been extensive but different. The language of many of the reforms is indeterminate and requires much judicial discretion. This, in turn, reduces the efficacy of the amendments. Changes on paper are not enough: judicial and societal awareness and understanding of the reality of sexual assault needs to be amplified. In the following chapter I discuss legislative changes made to trial procedure in the Australian Capital Territory before 2008. I then discuss the impact that the reforms have had in practice, setting the stage for the review, in Chapter Eight, of the most recent changes in the ACT.
Chapter Seven

The history and politics of cross-examination (procedure) law reform in the ACT

In this chapter I seek to provide a background to the Sexual and Violent Offences Legislation Amendment Act 2008 (SVOLAA)—the legislation that is the primary focus of this dissertation. I first outline procedural law reform in the ACT before 2008 for victims of sexual assault. This illustrates past legislation and how it has changed, and demonstrates why law reform was needed in this area. Following this, I outline the historical antecedents and political processes behind the SVOLAA. To do this I use the reports that led to its enactment, as well as the voices of the people who played a role in initiating the research, drafting the legislation and enacting the reforms. This part of the chapter illustrates further where the need for law reform came from and how it was achieved.

In this chapter I provide the necessary context surrounding the introduction of the Act. To successfully assess the legislation’s impact and to discuss the reasons behind its success, or lack thereof, it is important to understand why the reform was needed and the original intentions of the legislation.

Procedural law reform in the ACT before 2008

Closed circuit television (CCTV) provisions

In the ACT, child witnesses have been able to give evidence via closed circuit television (CCTV) since July 1989.¹ The Evidence (Closed-Circuit Television) Act 1991 (now the Evidence (Miscellaneous Provisions) Act 1991) originally stated that the court may order that a child give all or part of their evidence from a place other than the courtroom.² However, specific criteria needed to be satisfied for these orders to be made.

¹ The Community Law Reform Committee of the Australian Capital Territory, ‘Sexual assault’ (Discussion Paper No. 4, 1997) [368].
These were that the required facilities were available,³ that the court be satisfied that the child would otherwise suffer mental or emotional harm, or that the facts would be better ascertained if the child’s evidence was given in this manner.⁴ Furthermore, a court could not make an order under this section if it was of the belief that to do so would be unfair to a party to the proceedings.⁵

In 1994, these provisions were repealed and replaced by the Evidence (Closed-Circuit Television) (Amendment) Act which inserted a new section 4A into the Evidence (Closed-Circuit Television) Act. This new section provided that, where the facilities were available, children were to give evidence from outside the courtroom unless otherwise ordered by the court.⁶ The court was restricted from making an order under this section unless two criteria were satisfied:

• the child preferred to give evidence in the courtroom; and
• the court was satisfied that the child would otherwise suffer mental or emotional harm, or the facts would be better ascertained if the child’s evidence was given in this manner.⁷

Later that year, these CCTV provisions were extended to adult victims of sexual assault for a trial period ending on 15 June 1998.⁸ This was done by replacing the word ‘child’ with ‘prescribed witness’;⁹ the definition of which included complainants in sexual offence trials.¹⁰ It can be assumed that the extension of these provisions to adult witnesses was successful because they continued to apply until 2003 when a new Part 4 was inserted into the Evidence (Miscellaneous Provisions) Act 1991.¹¹ The new Division 4.3, entitled ‘Sexual offence proceedings—giving evidence from places other than courtrooms’, contained a new section 43. It used the same wording as the previous

⁴ Ibid., s 6(2) (effective from 21 August 1991).
⁵ Ibid., s 6(3) (effective from 21 August 1991).
⁷ Ibid., s 4A(2), as amended by the Evidence (Closed-Circuit Television) (Amendment) Act 1994 (ACT) s 6.
⁸ The Community Law Reform Committee of the Australian Capital Territory, above n 1, [376].
⁹ Evidence (Closed-Circuit Television) (Amendment Act (No. 2) 1994 (ACT) s 6.
¹⁰ Ibid., s 5.
provisions to provide for the compulsory use of CCTV facilities for victims of sexual assault where the facilities were available.\textsuperscript{12}

This section 43 applied to the use of CCTV by adult victims of sexual offences until 2009, when the changes made by the \textit{SVOLAA} were implemented.

\textbf{Open/closed court provisions}

It is a fundamental principle of Australian common law that justice be administered in open court; that is, that the public, including the press, may attend all stages of a trial.\textsuperscript{13} This principle has legislative force in the ACT.\textsuperscript{14} However, since 1985, there has been an exception to the open court rule in the ACT for sexual offence proceedings. In 1985, the \textit{Evidence (Amendment) Ordinance (No. 2)} inserted a new section 76D into the then \textit{Evidence Ordinance 1971}.\textsuperscript{15} This new section stated that any evidence given by complainants in sexual offence proceedings should, if directed by the court, be given ‘in camera’; that is, in a courtroom closed to the public.\textsuperscript{16}

Section 76D of the \textit{Evidence Act 1971} applied until 2003, when it was overridden by the new Part 4 of the \textit{Evidence (Miscellaneous Provisions) Act 1991}.\textsuperscript{17} Despite all of these changes, the principle remained the same. Part 4 created new provisions for the closure of the court in sexual offence proceedings. Section 39 of these provisions states that a judge or magistrate may order that the court be closed to the public while complainants in sexual offence proceedings give evidence.\textsuperscript{18} This section continued to apply until the \textit{SVOLAA} came into force in 2009.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{12} \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT)} s 43 (effective from 22 March 2004).
  \item \textsuperscript{13} See: The Community Law Reform Committee of the Australian Capital Territory, above n 1, [438]; \textit{Scott v Scott} (1913) AC 417, 441; \textit{McPherson v McPherson} [1936] AC 177, 199-203; \textit{Russell v Russell} (1976) 134 CLR 495, 520 (Gibbs J).
  \item \textsuperscript{14} See: \textit{Magistrates Court Act 1930 (ACT)} s 310.
  \item \textsuperscript{15} The Australian Capital Territory (Self-Government) Act 1988 (Cth) s 34 (4) converted most former Commonwealth ordinances in force in the ACT into ACT enactments. As with most ordinances in force in the ACT, the name of this Ordinance was changed from \textit{Ordinance to Act} by the \textit{Self-Government (Citation of Laws) Act 1989 No 21}, s 5 on its conversion to an ACT enactment on 1 July 1992.
  \item \textsuperscript{16} \textit{Evidence Ordinance 1971 (ACT)} s 76D(1), as amended by the \textit{Evidence (Amendment) Ordinance (No. 2) 1985 (ACT)} s 4.
  \item \textsuperscript{17} Inserted by the \textit{Evidence (Miscellaneous Provisions) Amendment Act 2003 (ACT)} s 6.
  \item \textsuperscript{18} \textit{Evidence (Miscellaneous Provisions) Act 1991 (ACT)} s 39, as amended by the \textit{Evidence (Miscellaneous Provisions) Amendment Act 2003 (ACT)} s 6.
\end{itemize}
\end{footnotesize}
Provisions governing the admission of written statements

Since 1974, the *Magistrates Court Act 1930* has allowed evidence to be adduced by written statements.\(^\text{19}\) Despite this, in the ACT before the 2008 amendments, the practice was for victims of sexual assault to give oral evidence at both the committal hearing and the trial.\(^\text{20}\)

In 1997, in its report, the Community Law Reform Committee of the ACT raised the issue of victims having to give evidence at the committal hearing and at the trial. In this context, its report discussed the possibility of paper-based committal proceedings.\(^\text{21}\) The committee questioned whether the current rules requiring victims of sexual assault to give oral evidence at committal proceedings should be changed.\(^\text{22}\)

In 2001, the ACT Law Reform Commission explored this issue further and concluded that a purely paper-based committal would not be adequate for many cases.\(^\text{23}\) The commission recommended that the prosecution be required to serve copies of any statements it wished to have admitted before the committal hearing. The Defence would then be required to provide written notification of any witnesses it wished to cross-examine.\(^\text{24}\) These recommendations were consistent with the legislation at the time and so did not result in any substantial law reform.

In fact, the legislation in this area was not substantially amended at all before 2008. At that time the legislation stated that the court could admit a written statement as evidence in preliminary examinations. However, the court, and the victim’s lawyer, had the power to require the person who made the statement to attend court to give evidence and be cross-examined.\(^\text{25}\)

\(^{19}\) *Magistrates Court Act 1930* (ACT) s 90AA, inserted by the *Court of Petty Sessions Act 1974* (ACT) s 10.

\(^{20}\) See: The Community Law Reform Committee of the Australian Capital Territory, above n 1, [384]; Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, ‘Responding to sexual assault: the challenge of change’ [March 2005].

\(^{21}\) The Community Law Reform Committee of the Australian Capital Territory, above n 1, [384–402].

\(^{22}\) Ibid, Issue 50.

\(^{23}\) Ibid, Recommendation 19.

\(^{24}\) Ibid, Recommendation 19.

\(^{25}\) *Magistrates Court Act 1930* (ACT) s 90AA (effective to 29 May 2009).
Provisions governing the cross-examination of victim-witnesses by self-represented defendants

Since its enactment, the *Magistrates Court Act* has given defendants the right to personally ‘examine and cross-examine the witnesses giving evidence...against her or him’. In 1997, The Community Law Reform Committee of the ACT raised the idea of prohibiting an accused from personally cross-examining victims in sexual offence trials. However, the discussion did not progress any further than this. Minor changes were made to the section in 2005 but these did not result in any changes to the effect of the provision. As a result, before the changes made by the *SVOLAA*, defendants were still able to personally cross-examine victims in sexual offence trials.

As I have illustrated in the discussion above, before the 2008 amendments, victims of sexual assault were still vulnerable to secondary victimisation by the criminal justice system. Victims had to give evidence in an open court unless the judge made an order to close the court; they were subject to cross-examination at both the committal and the trial; and accused persons were still permitted to cross-examine victims in person. It is in this context that the idea for reform to sexual assault trial procedure in the ACT arose.

How did the amendments come about? In the following section, I outline the history of the *SVOLAA*. To do this I use the reports that led to its enactment, as well as the voices of the people who played a role in initiating the research, drafting the legislation and enacting the reforms.

**How did the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) come about?**

Ultimately, the 2008 legislative reforms resulted from a report, *Responding to Sexual Assault: The Challenge of Change*, published in 2005 by the ACT Office of the Director of Public Prosecutions and the Australian Federal Police (AFP). However, there was a

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26 *Magistrates Court Act 1930 (ACT)* s 53(2) (effective from 3 August 1992).
27 The Community Law Reform Committee of the Australian Capital Territory, above n 1, [460].
28 *Statute Law Amendment Act 2005 (ACT)* [3.222].
29 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20.
sequence of research and events prior to this that contributed to the initiation of the research and the introduction of the Bill.

1999

A crucial player in the ACT criminal justice system first became interested in the area of sexual assault in 1999 when he saw the "Four Corners" program 'Double Jeopardy'. This program revealed the abusive cross-examination that a young boy, aged eight years, had undergone whilst giving evidence in a child sexual assault trial in Queensland. This program played a tape of the cross-examination in which the boy cried whilst being shouted at by Defence counsel.

Following that, in 1999, Dr Annie Cossins founded the National Child Sexual Assault Reform Committee (NCSARC). This committee was made up of some of the nation’s leading lawyers, judges and academics—including the ACT Director of Public Prosecutions (DPP). This inspired the DPP and some of its staff to start looking at the reforms for child victims of sexual assault in Western Australia and New South Wales. At that time, one respondent came to the conclusion that the ACT needed to develop its laws further. He felt that Canberra was ‘leading edge’ in the use of CCTV for children but was still behind Western Australia.

2001

In 2001, Morgan Disney & Associates conducted a review of the sexual assault services for children and young people in the ACT for the Department of Education and Community Services. The resulting report identified the need for a ‘comprehensive inter-agency model’ and ‘strongly recommended that a collaborative inter-agency approach be developed for children and young people who have been victims of sexual abuse’.

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30 Interview with participant no. 8, judicial officer (Canberra, 2010).
32 Interview with participant no. 8, judicial officer (Canberra, 2010).
34 See: Interview with participant no. 5, police officer (Canberra, 2010): 20, 71.
2002

In 2002, Theresa Davis, a prosecutor from the ACT Office of the Director of Public Prosecutions, received a Churchill Fellowship to conduct an international study on the ‘innovative practices in the investigation and prosecution of sexual assault offences on adults and children’. Her study included, amongst other things, an investigation into the use of videotaped interviews as victims’ evidence-in-chief. She recommended that the ACT enact provisions enabling the use of pre-recorded evidence in proceedings involving child victims of sexual assault.

Davis also recommended that the ACT implement a one-stop shop for victims of sexual assault to facilitate the coordination of the police, prosecution, child protection services, rape crisis counsellors and medical practitioners. However, one survey participant from the AFP indicated that:

...despite the experiences and observations of Ms Davis while travelling in England and the United States, the ACT continued to operate disjointedly, with little interaction between key agencies.

2003

In 2003, Eastwood published a comparative report on the experiences of child complainants of sexual abuse in the criminal justice system in Western Australia, New South Wales and Queensland. It also came to the attention of the ACT Department of Public Prosecutions. Eastwood’s study examined the experiences of child complainants in the criminal justice system as well as the consequences of their involvement in the process.

35 Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, 8.
36 Interview with participant no. 5, police officer (Canberra, 2010); and, Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, 8.
37 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, 8.
38 Ibid.
39 Interview with participant no. 5, police officer (Canberra, 2010).
The same year, the ACT DPP, together with the AFP, submitted a budget proposal to develop a Sexual Offences Response Program. This program would be aligned with the Strategic Plan for Criminal Justice 2002–2005 that Cabinet had recently approved. The program proposed to:

- initiate legislative reforms that supported ‘fair investigative practices’
- employ advances in technology to support the ‘detection and investigation of crime’
- provide ‘advocacy services for persons with specific needs’
- quickly and fairly manage cases through the courts
- implement ‘victim-inclusive practices and policies’
- review and reform criminal legislation and processes to meet current needs—in particular the needs of victims of sexual assault.

The program aligned with the values outlined in ACT Labor's Plan for Justice and Community Safety (2001), including:

- access to information
- development of case management processes within the court system to reduce delays
- improved recording of criminal statistics
- provision of better facilities for women and children victims and witnesses in the court system.

Significant amendments to sexual assault legislation were being enacted all over Australia and in the United Kingdom. In this context there was a ‘general acceptance by criminal justice agencies (namely ACT Police and the DPP) that reform was required’ because ‘the system wasn’t working’. Victoria already had their response out and the

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41 Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
42 Interview with participant no. 5, police officer (Canberra, 2010).
43 Ibid.
44 Interview with participant no. 6, victim support worker (Canberra, 2010).
45 Interview with participant no. 1, police officer (Canberra, 2010).
46 Interview with participant no. 9, victim support worker (Canberra, 2011).
ACT had to be seen to be doing something’. In addition, there was an ‘increasing awareness from empirical research that victim–witnesses were having a very difficult time in the Courts’. As one participant from the AFP stated:

> It was my understanding that victims of sexual and violent offences were not being protected adequately during their processing. That is, they were being forced to relive their trauma a number of times during the investigation and Court process.49

### 2004–2005

The ACT Government consequently provided funding to the AFP and the ACT DPP to conduct some research that would follow up on the study conducted by Davis in 2002.50 The funding was used to fund the formation of the Sexual Assault Response Program (SARP). Its founding members were Margaret Jones, a senior prosecutor from the DPP; and Sergeant Anthony Crocker, a member of the ACT Police Sexual Assault and Child Abuse Team (SACAT). The SARP team conducted research which looked ‘into best practice models in Australia and overseas around sexual assault investigations’.51

In their study people from many organisations both within the ACT and elsewhere were consulted. In the ACT, these organisations included Family Services—now the Office for Children, Youth and Family Support; and the:

- Service Assisting Male Survivors of Sexual Assault
- Forensic and Medical Sexual Assault Clinic
- Canberra Rape Crisis Centre
- Victims of Crime Assistance League
- Office of the Director of the Public Prosecutions
- ACT Magistrates Court
- Department of Justice and Community Safety
- Office of the Victims of Crime Coordinator

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47 Interview with participant no. 1, police officer (Canberra, 2010).
48 Interview with participant no. 4, academic/researcher (Canberra, 2010).
49 Interview with participant no. 2, police officer (Canberra, 2010).
50 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, 8.
51 Interview with participant no. 5, police officer (Canberra, 2010).
• Child at Risk Assessment Unit
• Chief Minister’s Department
• Australian Institute of Criminology
• School of Law, University of Canberra
• Faculty of Law, Australian National University.  

The remainder of the organisations consulted were from other parts of Australia and New Zealand and included the:

• Faculty of Law, University of Sydney
• Faculty of Law, University of New South Wales
• Sexual Assault Resource Centre, Perth
• Centre Against Sexual Assault, Carlton, Victoria
• Central Sydney Sexual Assault Centre
• Victorian Institute of Forensic Medicine
• Sydney Rape Crisis Centre
• New Zealand Ministry of Justice
• Gatehouse Centre, Royal Children’s Hospital, Melbourne
• Child Protection Unit, Royal Children’s Hospital, Randwick
• New South Wales Child Protection Unit
• Princess Margaret Hospital for Children, Western Australia
• Department of Children and Youth and Family Services, Auckland, New Zealand
• Western Australian Department of Justice
• Department of Health, Auckland, New Zealand
• Department of Children and Youth and Family Services, Hamilton, New Zealand
• New South Wales Attorney-General’s Department
• Office of the Western Australian Director of Public Prosecutions
• Office of Public Prosecutions, Victoria
• New Zealand Crown Law Office

52 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, iii-iv.
The SARP study examined police, prosecution, medical and counselling services for victims of sexual assault in the ACT and compared them to other service models in the rest of Australia and New Zealand. This research ultimately resulted in the publication of the *Challenge of Change* report in March 2005.\(^{54}\)

The *Challenge of change* report made 105 recommendations to improve the criminal justice response to sexual assault in the ACT. The ones that are pertinent to this research are:

1. The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.\(^{55}\)

2. The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim as the victim’s evidence-in-
chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.56

(3) Child witnesses should be permitted to give their evidence at a special pre-trial hearing, and the recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.57

(4) The ACT’s Evidence (Miscellaneous Provisions) Act 1991 should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.58

(5) The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.59

(6) An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.60

(7) Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.61

(8) Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.62

56 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.2.
57 Ibid, Recommendation 6.5.
58 Ibid, Recommendation 6.7.
60 Ibid, Recommendation 6.11.
A ‘one-stop shop’ for adult victims of sexual assault: facilities should be available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.\(^63\)

However, when the *Challenge of Change* report was first presented to the legislative assembly in 2005, respondents perceived the Chief Minister at the time as very unimpressed—he ‘mumbled a few words and left the room’;\(^64\) and so no reforms were initiated. In fact, the report was then shelved; purportedly because the Government was not happy with it: there was ‘nothing good in it for the Government’.\(^65\) As one respondent explained:

> The human rights discourse in the ACT at the time was dominated by civil liberties perspectives (including inside the government) that only saw the accused person’s interests for fair trial, privacy and protection of dignity.\(^66\)

**2006–2007**

It was not until 2006 that the ideas for reform were taken off the shelf. Victim support agencies and others with a vested interest in sexual assault law reform had continued to actively drive the process.\(^67\) They included:

- Richard Refshauge from the ACT Department of Public Prosecutions
- Robyn Holder from the office of the Victims of Crime Coordinator
- Renee Leon—the CEO of the ACT Department of Justice and Community Services (JACS).

The new ACT Attorney General, Simon Corbell, also had a strong interest in the area of sexual assault and victim rights. When Robyn Holder and the ACT Public Advocate, Anita Phillips, wrote to the Attorney about the *Challenge of Change* and the lack of action, the new minister resurrected the initiative and asked JACS what was happening.\(^68\)

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\(^{63}\) Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 3.33.

\(^{64}\) Interview with participant no. 8, judicial officer (Canberra, 2010).

\(^{65}\) Interview with participant no. 5, police officer (Canberra, 2010).

\(^{66}\) Interview with participant no. 9, victim support worker (Canberra, 2011).

\(^{67}\) Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).

\(^{68}\) Interview with participant no. 9, victim support worker (Canberra, 2011).
This resulted in a working group, known as the SARP Reference Group, being established. Its function was to use the Challenge of Change report to provide input to the legislative reforms and to oversee the implementation of any resulting reforms.\textsuperscript{69} Policy making and law reform processes are of course 'dynamic and multi-sourced'.\textsuperscript{70} In this chapter I focus on the SARP Reference Group as it had the most stakeholders as participants and it was the most public. There were, however, other groups and submissions contributing to the drafting process: ‘there were meetings happening all over the place’.\textsuperscript{71}

The SARP Reference Group meetings were convened by JACS\textsuperscript{72} ‘and [were] vaguely modelled on the approach by the Family Violence Intervention Program in that it focused on being broadly inclusive’.\textsuperscript{73}

It is very usual for reports of various kinds to have recommendations circulated internally for agency viewpoints, then the relevant department (in this instance JACS) to advise the Minister either by way of a briefing note or Cabinet submission or both. Certainly the [Challenge of Change] recommendations were subject to this process.\textsuperscript{74}

The participants in the SARP Reference Group were spokespeople from:

- the Canberra Rape Crisis Centre (CRCC)
- Victim Support ACT
- the Office of the Victims of Crime Coordinator (VoCC)
- ACT Policing (ACTP)
- the Office of the ACT Director of Public Prosecutions (ACTDPP)
- Forensic and Medical Sexual Assault Care (FAMSAC)
- the Child at Risk Assessment Unit
- the Victims Services Scheme (VSS)

\textsuperscript{69} Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010).

\textsuperscript{70} Interview with participant no. 9, victim support worker (Canberra, 2011).

\textsuperscript{71} Ibid.

\textsuperscript{72} Interview with participant no. 3, medical practitioner (Canberra, 2010).

\textsuperscript{73} Interview with participant no. 9, victim support worker (Canberra, 2011).

\textsuperscript{74} Ibid.
• the Victims of Crime Assistance League (VOCAL)
• Legal Aid ACT; and
• the ACT Bar Association.\textsuperscript{75}

The reference group examined the recommendations made in the \textit{Challenge of Change} report. This involved dividing the recommendations into six key areas:

• victim support; training and development
• court upgrades to technology and facilities
• best evidence
• law reform, and
• interagency governance.\textsuperscript{76}

It must be noted, therefore, that victim support advocates did have input into this process. One participant from a victim support organisation explained that they were:

...actively involved in the reference group and other bilateral meetings, developing the wraparound approach [one-stop shop] for victims and protocols with key agencies such as the AFP [and] SACAT Unit.\textsuperscript{77}

The group aimed for reform to ‘implement a “best practice” model’\textsuperscript{78} to:

• address the imbalances in the treatment of victims, through the legal process\textsuperscript{79}
• provide victims with the support they need, provide protection during the investigation and Court process, and [increase] the conviction rate\textsuperscript{80}
• increase the number of cases that go to trial...and hopefully help the plight of victim–witness\textsuperscript{81}
• make the system easier and less traumatic for victims to navigate,\textsuperscript{82} and
• maintain a ‘fair system for victims without compromising the fair trial’.\textsuperscript{83}

\textsuperscript{75} Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 2, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
\textsuperscript{76} Interview with participant no. 3, medical practitioner (Canberra, 2010).
\textsuperscript{77} Interview with participant no. 6, victim support worker (Canberra, 2010).
\textsuperscript{78} Interview with participant no. 1, police officer (Canberra, 2010).
\textsuperscript{79} Interview with participant no. 3, medical practitioner (Canberra, 2010).
\textsuperscript{80} Interview with participant no. 2, police officer (Canberra, 2010).
\textsuperscript{81} Interview with participant no. 4, academic/researcher (Canberra, 2010).
\textsuperscript{82} Interview with participant no. 6, victim support worker (Canberra, 2010).
\textsuperscript{83} Interview with participant no. 6, victim support worker (Canberra, 2010).
All of the agencies, with the exception of Legal Aid, were lobbying for law reform. Although some members of the group were opposed to some aspects of the reforms, there was no overt opposition to the idea of law reform as a whole because it was widely recognised that reform was inevitable.\textsuperscript{84} As one respondent stated:

\begin{quote}
(LegalAid representative) didn’t want there to be any changes—he liked the law the way it was—but he realised that the reforms were going to happen regardless, and so made some compromises with the DPP.\textsuperscript{85}
\end{quote}

This meant that the reference group discussions were centred on how the law would change.\textsuperscript{86} Despite this, as a result of ‘having so many different organisations involved and fighting for things they wanted’, the discussion and negotiation process was reported to be very lengthy.\textsuperscript{87} As one respondent said: ‘there was a lot of stop starting with the process [and] there was a lot of wasted time with unnecessary or unproductive meetings’.\textsuperscript{88}

As a result of ‘the new minister’s personal and political commitment’,\textsuperscript{89} the application for law reform from the DPP and the AFP was accepted, and policy instructions were made.\textsuperscript{90} This meant that the government accepted the proposal for reforming the legislation for sexual assault offences and JACS was instructed to begin drafting the legislation.

From here, one participant from a victim support agency described the process as ‘a little problematic’.\textsuperscript{91} Because some of the agencies in the SARP Reference Group were non-government organisations, they were ‘left out of cabinet-in-confidence processes, which were essentially the drafting of the legislation’.\textsuperscript{92} This was in spite of the fact that

\textsuperscript{83} Interview with participant no. 3, medical practitioner (Canberra, 2010).
\textsuperscript{84} Interview with participant no. 8, judicial officer (Canberra, 2010).
\textsuperscript{85} Interview with participant no. 5, police officer (Canberra, 2010).
\textsuperscript{86} Ibid.
\textsuperscript{87} Interview with participant no. 2, police officer (Canberra, 2010).
\textsuperscript{88} Ibid.
\textsuperscript{89} Interview with participant no. 9, victim support worker (Canberra, 2011).
\textsuperscript{90} Interview with participant no. 8, judicial officer (Canberra, 2010).
\textsuperscript{91} Interview with participant no. 6, victim support worker (Canberra, 2010).
\textsuperscript{92} Ibid.
[they] had been assured personally by the Attorney General that [they] would be included’. There is no direct evidence that the non-government organisations’ lack of involvement had any effect on the resulting legislation. However, legal researchers could speculate that it may have contributed to the indeterminacy of the provisions which is highlighted below. ‘That said, [the NGOs] were happy with the final outcomes’. But this does not imply that everyone felt that the ‘the [SARP] recommendations [were] uniformly accepted [and] covered all the salient issues’.

2008

The Sexual and Violent Offences Legislation Amendment Bill, as introduced, contained sections that reflected all but one of the recommendations for adult victims of sexual assault contained in *The Challenge of Change* report. However, as I demonstrate below, the translation from recommendation to Bill was not always exact and, in at least a couple of instances, the provision was a diluted version of the recommendation. Following are recommendations from *The Challenge of Change* report with a summary of how they were worded in the Bill.

**Recommendation 6.1**

*The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.*

Section 33 of the Bill stated that complainants in sexual offence proceedings must not be required to attend and give evidence at a preliminary hearing. This section was derived from the recommendation above, and contained almost identical wording.

**Recommendation 6.2**

*The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim as the victim’s evidence-in-chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or*

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93 Interview with participant no. 6, victim support worker (Canberra, 2010).
94 Ibid.
95 Interview with participant no. 9, victim support worker (Canberra, 2011).
96 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.1.
97 Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 33.
physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.\textsuperscript{98}

This recommendation was reflected in section 11 of the Bill. It stated that intellectually impaired complainants in sexual offence trials may have a recording of their police interview admitted as their evidence-in-chief; and that they must not be visible to anyone in the courtroom when the audiovisual recording is played.\textsuperscript{99} Again, this section is taken almost word for word from the recommendation. However, the section also includes a subsection providing that ‘the court may refuse to admit all or any part of the audiovisual recording’.\textsuperscript{100} The report did not recommend this. It is an example of how the legislation weakened the SARP recommendations by enabling more judicial discretion in its application.

\textbf{Recommendation 6.7}

\textit{The ACT’s Evidence (Miscellaneous Provisions) Act 1991 should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.}\textsuperscript{101}

Section 17 of the Bill integrated this recommendation and developed it further. The provision stated that the ‘witness must not be able to see or hear the accused person’ whilst giving evidence via audiovisual link.\textsuperscript{102}

\textbf{Recommendation 6.9}

\textit{The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.}\textsuperscript{103}

This recommendation was incorporated into the Bill. However, the provisions enable judicial discretion to be included in deciding their application. This contradicts, in part, the recommendation to ‘permit witnesses’ to have a screen. The Bill stated that the

\textsuperscript{98} Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.2.
\textsuperscript{99} Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 11.
\textsuperscript{100} Ibid.
\textsuperscript{101} Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.7.
\textsuperscript{102} Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 17.
\textsuperscript{103} Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.9.
judge may order that the courtroom be arranged so that the witness cannot see the accused whilst giving evidence. It also expanded this recommendation to include ‘anyone else the court considers should be screened from the witness’.104

**Recommendation 6.11**

*An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.*105

This recommendation was integrated into the Bill with only technical changes. The Bill provided that a ‘self-represented accused person must not personally cross-examine a witness’.106 ‘Witness’ is defined to include complainants and children—who may or may not be complainants—in sexual offence proceedings.107

**Recommendation 6.12**

*Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.*108

The Bill also incorporated this recommendation even using some of the wording. The provisions in the Bill permitted some witnesses to give evidence at a special pre-trial hearing.109 These witnesses included intellectually impaired victims—which was not specifically recommended; and victims who were likely to ‘suffer severe emotional trauma’ or ‘be intimidated or distressed’. It also stated that the recording of this evidence would be admissible at any related proceeding.110

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104 Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 8.
105 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.11.
106 Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 8.
107 Ibid.
108 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 6.12.
109 Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 11.
110 Ibid.
This provision was drafted despite direct opposition from victim support organisations. One victim support worker:

...argued strongly against [this] provision requiring victim/witnesses to prove severe emotional trauma or distress and intimidation...on the basis that this created an unnecessary and humiliating barrier and hurdle.¹¹¹

**Recommendation 9.4**

*Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.*¹¹²

This recommendation was included in the Bill. However, the provisions applied only to complainants in sexual offence trials and excluded other child witnesses as recommended. The Bill provided that the court must order that a complainant have a support person ‘in the court close to, and within [their] sight’ whilst they give evidence.¹¹³

**Recommendation 3.33**

*A 'one-stop shop' for adult victims of sexual assault: facilities should be available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.*¹¹⁴

This recommendation was the only one relevant to this thesis that was not included in the Sexual and Violent Offences Legislation Amendment Bill. The SARP team modelled a one-stop shop on the Victorian system. This recommendation provided a way in which this could be incorporated into the ACT system. It is not clear why the suggestion was completely excluded from the Bill. However, one respondent suggested that it ‘was probably an unrealistic expectation for a jurisdiction of this size’.¹¹⁵ Further, as the one-

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¹¹¹ Interview with participant no. 9, victim support worker (Canberra, 2011).
¹¹² Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 9.4.
¹¹³ Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) s 8.
¹¹⁴ Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 20, Recommendation 3.33.
¹¹⁵ Interview with participant no. 8, judicial officer (Canberra, 2010).
stop-shop was not legislated for in Victoria, it might have been seen by the ACT Government as an ‘administrative rather than a legislative’ issue.\textsuperscript{116}

As can be seen from the discussion above, most of the recommendations for adult victims of sexual assault made by the SARP report were integrated into the Bill.

\textit{The Legislative Assembly debate}

The Attorney-General at the time, Simon Corbell, first presented the Sexual and Violent Offences Legislation Amendment Bill to the ACT Legislative Assembly on 3 July 200\textsuperscript{117} The discussion resumed on 21 August 2008 when ACT Liberal MLA, Mr Stefaniak, began by stating that the Opposition would be supporting the Bill\textsuperscript{118} Dr Foskey, from the ACT Greens party, followed in the discussion by commending the aim of the legislation. However, she highlighted some ‘very alarmed responses’ from various parties, including the Human Rights Commission,\textsuperscript{119} Civil Liberties Australia and some prominent ACT legal practitioners\textsuperscript{120} She stated that she was arguing for the ‘right to a fair trial for both the complainant and the accused’. However, she argued that there were aspects of the Bill that undermined ‘basic civil liberties’ and many aspects of the court process.\textsuperscript{121} She asked the government to reconsider pushing the bill through; and to postpone its passage until the ‘community has been given adequate time to fully consider the impact of the actual proposed changes in this bill’.\textsuperscript{122}

Mr Corbell responded to Dr Foskey by explaining that, before the Bill was drafted, there was a comprehensive consultation process with stakeholders. It included, at the earliest stage, the Human Rights Commission, Legal Aid ACT, the courts and the Australian

\textsuperscript{116} Interview with participant no. 8, judicial officer (Canberra, 2010).
\textsuperscript{117} Australian Capital Territory, \textit{Parliamentary Debates, Legislative Assembly}, 3 July 2008, 2667–2671 (Mr Corbell).
\textsuperscript{118} Australian Capital Territory, \textit{Parliamentary Debates, Legislative Assembly}, 21 August 2008, 3506–3510 (Mr Stefaniak).
\textsuperscript{119} The Human Rights Commission made submissions about the draft Bill, noting the requirement to have regard to the rights in the Human Rights Act 2004 in the development of ACT legislation, drawing attention to relevant provisions in the Human Rights Act 2004, for example, section 22 (Right to a Fair Trial) and drawing attention to the criteria in section 28 about the ‘reasonableness’ test to limitations on human rights: email from Nadiah Tarbet to Jessica Kennedy, 25 March 2011.
\textsuperscript{120} Australian Capital Territory, \textit{Parliamentary Debates, Legislative Assembly}, 21 August 2008, 3510–3511 (Dr Foskey).
\textsuperscript{121} Ibid., 3511 (Dr Foskey).
\textsuperscript{122} Ibid.
Federal Police. He continued by acknowledging the importance of safeguarding the minimum guarantees to which everyone charged with a criminal offence is entitled. But he also stated that protecting the rights of alleged offenders is not the sole purpose of the criminal justice system.

Dr Foskey also proposed several amendments to the Bill that focused on maintaining the court’s discretion to determine witnesses’ rights. For example, she proposed that the court have the discretion to order that a complainant not be required to attend and give evidence at a committal proceeding for a sexual offence. Dr Foskey also recommended that rather than a mandatory prohibition, the court have the discretion to prohibit the cross-examination of the victim by a self-represented accused.

Mr Corbell provided a range of reasons as to why these propositions were not acceptable and stated that the government would not support the amendments. Mr Stefaniak agreed with the Attorney-General and stated that the Opposition would also oppose the amendments. The amendments were not passed.

Mr Mulcahy from the Canberra Party also had some concerns of his own for the Attorney-General. He referred to a letter from Ken Archer—the former Director of the ACT DPP—to the Attorney-General dated 14 August 2008. Mr Archer claimed that the evidentiary provisions of the Bill would lead to an inadmissibility of evidence under the Commonwealth Evidence Act 1995, which cannot be altered by the ACT Assembly. The effect of this inadmissibility, he said, would be that crucial evidence might become inadmissible. This could potentially result in a guilty offender escaping conviction on the basis of an unintended evidentiary error.
Mr Corbell responded to Mr Mulcahy’s claims by stating that the Commonwealth Evidence Act allows other ACT legislation to continue unaffected; and that, therefore, the current Bill would operate unaffected. He stated that the claim made by Ken Archer was wrong in this regard. Mr Corbell concluded by saying that he was:

...confident that the bill [achieved] the necessary balance between reducing the trauma experienced by victims and other vulnerable witnesses in sexual and violent offence court proceedings and at the same time protecting the human rights of the accused to a presumption of innocence and a fair trial.

The question was resolved in the affirmative.

The Sexual and Violent Offences Legislation Amendment Bill was agreed to in principle and passed without change on 21 August 2008. It was notified on 8 September 2008. However, it did not take effect until 1 June 2009.

**Summary**

In this chapter I illustrated the history of legislative reform in the ACT and the process and politics behind the enactment of the SVOLAA. The history of law reform in the ACT provided a necessary context in which the initiation of the reforms could be explored. This exploration demonstrated that the reforms resulted from several years of lobbying, research and consultation with relevant agencies. This hard work resulted in several recommendations aimed at reducing the trauma of a trial for sexual assault victim-witnesses. The recommendations for reform were described as not ‘very controversial, for the relevant players—Law Society, Legal Aid, and Bar Association—had all been represented on the implementation committee and so there was no strong external opposition’. In the end, however, what was necessary for the legislation’s success was an influential person, or a group of influential people, with a vested interest in sexual assault law reform. This personal commitment by prominent players in the criminal justice system enabled the DPP and the AFP to produce the report *The Challenge of*
Change. This in turn resulted in the SARP Reference Group harnessing the energies of government and community groups. The group was a major driving force behind the introduction of the SVOLAA.

In this chapter I discussed the conception, drafting and enactment of the SVOLAA. In Chapter Eight I focus on the implementation and deconstruct and scrutinise the various provisions in the Act to outline the discretionary sections of the legislation. This will enable me to discuss the impact and efficacy of the amendments. I also look at how the new provisions might improve victims’ safe speaking and how they might be affected by sexual assault mythology—that is, how judicial officers might interpret them.
Chapter Eight

Deconstruction of the *Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)*

In this chapter I outline, in order, the relevant sections of the *Sexual and Violent Offences Legislation Amendment Act (SVOLAA)* and discuss whether judicial interpretation is required in their application. I go on to discuss how judicial officers might interpret the discretionary sections; and seek to answer two questions:

- how might the new reforms improve victims’ safe speaking?
- How might rape mythology affect their implementation?

Changes to the *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*

**New section 38C—Accused may be screened from witness in court**

(1) This section applies to the complainant...giving evidence in—
(  \( a \) ) a sexual offence proceeding...

(2) The court *may* order that the courtroom be arranged in a way that, while the witness is giving evidence, the witness cannot see—
(  \( a \) ) the accused person; or
(  \( b \) ) anyone else the court considers should be screened from the witness.\(^1\)

This section applies when closed circuit television (CCTV) is unavailable or when the court has made an order under section 43. That is, the victim has chosen to give evidence in the courtroom; or an order has been made that the victim must give evidence in the courtroom to avoid unreasonable delay or to ensure fairness. This provision aims to protect victim–witnesses from the further trauma of having to see the accused, or anyone else, who could cause them further trauma whilst giving evidence in court.

However, the section requires judicial discretion in its application as the court is not

\(^1\) *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 38C (emphasis added).
required to make an order: the court may order that the accused be screened from the witness. Furthermore, there are no guidelines in the legislation that indicate when this order may, or should, be made; or what the court should consider when making the order. This means that judicial officers may only make an order under this section if they believe that it is necessary for the victim. Furthermore, unless the prosecution requests an order under this section, although judicial officers still have the power to make an order, they may never even consider it.

As the power to make an order under this section is discretionary, judicial officers may only use it for victims of sexual assault whom, they believe, require the protection. This is where sexual assault mythology—discussed in the introduction—could affect the amendment’s implementation. Society’s idea of the more traumatic, or ‘real’, sexual assault does not reflect the reality and judicial officers are not immune to these beliefs. If orders under this section are only made to protect those who are perceived to be victims of ‘real’ rape, the majority of victims will be left unprotected, as it is these victims who reflect the reality.

**New section 38D—Examination of witness by self-represented accused person—procedure**

(1) This section applies to the complainant...giving evidence in—

(a) a sexual offence proceeding...

(3) The witness must not be examined personally by the accused person but may be examined instead by—

(a) the accused person’s legal representative; or

(b) if the accused person does not have a legal representative—a person appointed by the court.3

This section aims to spare victims the ordeal of being asked intimate and humiliating questions by the person who committed the crime against them. Aside from ensuring that victims are treated with the ‘respect and dignity they deserve’, this section could

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2 There are examples contained in this section to aid judicial officers in applying s 38C(1)(c)(ii). However, this subsection applies only to violent offences, not sexual offences, and hence is not relevant to this dissertation.

3 *Evidence (Miscellaneous Provisions)* Act 1991 (ACT) s 38D. Following the introduction of the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) this section stated that a ‘self-represented accused person must not personally cross-examine a witness’. The wording was changed slightly by the *Crimes Legislation Amendment Act 2009* (ACT).
also potentially increase the quality of evidence given. This is because victims will not be subject to the same fear and distress in cross-examination that they would experience at the hands of the offender.4

This section states that in all sexual offence proceedings, regardless of the circumstances, an accused must never personally cross-examine the victim-witness. Because this provision is mandatory, no judicial discretion is required in its application. Thus, the provision is not vulnerable to influence by sexual assault mythology.

**New section 38E—Witness may have support person in court**

(1) This section applies to the complainant...giving evidence in—
   (a) a sexual offence proceeding...

(2) The court **must, on application by a party who intends to call a witness**, order that the witness have a person (a **support person**) in the court close to, and within the witness's sight, while the witness gives evidence.5

This section aims to reduce the trauma of the trial for victims by ensuring that they have emotional support. The legislature hopes that this will be achieved by allowing a support person to be present whilst the victim gives evidence. However, the way that this section is worded means that victims are not provided with an *absolute* right to this support.

Although the section does not provide judicial officers with discretion as such, it relies on the fulfilment of another, separate requirement before the order can be made. For sexual assault victim-witnesses, under this section, a court must order that they have a support person with them while they give evidence. However, judicial officers can only make this order following an application from the prosecution. As mentioned above, requirements such as these can be problematic. Prosecutors may not be required to make such applications and may only do so if they believe it necessary. This again allows the decision to be influenced by sexual assault mythology.

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Revised section 39—Sexual and violent offence proceeding—evidence to be given in closed court

(1) This section applies to the complainant...giving evidence in—
(a) a sexual offence proceeding...

(2) The court may order that the court be closed to the public while all or part of the witness's evidence (including evidence given under cross-examination) is given.

(3) In deciding whether to order that the court be closed to the public, the court must consider whether—
(a) the witness wants to give evidence in open court; and
(b) it is in the interests of justice that the witness give evidence in open court.⁶

This section aims to reduce the embarrassment and humiliation that victims might experience by having to provide evidence of highly personal information in sexual offence proceedings. Victims of sexual assault are required to provide intimate details of their assault. This is embarrassing and humiliating. The embarrassment and humiliation are exacerbated by having to give this evidence in front of a court ‘full of strangers, full of the accused’s family and friends, or full of children on school excursions’.⁷ Closing the court in sexual offence proceedings not only reduces victim trauma, but can also help protect the private lives of the parties to the proceeding.

Before this section was revised, the court already had the power to close the court whilst complainants in sexual offence proceedings gave evidence. The changes to this section extended the scope of this protection to include complainants and witnesses in other proceedings. However, the judicial discretion that was present remained.

Although the provision makes it possible for the court to be closed to the public whilst victim–witnesses give evidence, an order to this effect must first be made by the court. The decision to close the court is entirely up to the judicial officer on the day. Although required to consider the witness’ opinion, that person can conclude that it is in the interests of justice that the evidence be given in an open court.

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This is where the right to a fair trial, as discussed in Chapter Two, again becomes relevant. The principle of a fair trial in Australia continues to be viewed as the accused’s ‘right’ to a fair trial. This is what is considered when determining whether something is in the interests of justice. In determining whether making an order under this section would be contrary to the interests of justice, there is one main question. That is, would the accused’s right to a fair trial be breached if an order was made to close the court? And although this must be weighed against the victim’s wishes, often it is the accused’s rights that dominate these decisions.

New section 40P—Meaning of witness—Division 4.2B

(1) For this division, a witness is a prosecution witness in a sexual offence proceeding who—

(a) is a child; or

(b) is intellectually impaired; or

(c) is a complainant who the court considers must give evidence as soon as practicable because the complainant is likely to—

(i) suffer severe emotional trauma; or

(ii) be intimidated or distressed.  

This definition of witness applies to the whole of the new Division 4.2B of the Evidence (Miscellaneous Provisions) Act. It deals with pre-trial hearings in sexual offence proceedings and includes sections 40Q, 40S and 40T below. The problem with this definition is the differing interpretations of who would experience trauma or distress. Not all judicial officers are educated about the experiences of, and how those experiences affect, sexual assault victims. So they may not have a true understanding of the reality they are facing. This means that a judicial officer’s assessment of who is likely to suffer further trauma, or be distressed, may differ significantly from that of the victim or even the victim support worker. This can result in victims not receiving the protection they need.


See: Heath, above n 6; Bronitt, above n 6.

New section 40Q—Witness may\textsuperscript{11} give evidence at pre-trial hearing

(1) A witness may give evidence at a pre-trial hearing.

(2) The evidence must be given by audiovisual link from a place that—
   
   (a) is not the courtroom in which the pre-trial hearing is held;
   
   (b) but is linked to the courtroom by an audiovisual link.\textsuperscript{12}

This section introduces the idea of a pre-trial hearing for certain witnesses as defined by section 40P discussed above. A pre-trial hearing is a special hearing held before the actual trial at which the witness’ evidence is presented and they are cross-examined. This hearing is recorded and later played at the actual trial as a substitute for the witness’s oral testimony. The aim of this section is to eliminate the need for the witness to attend the trial to give evidence.\textsuperscript{13}

In addition to avoiding the need for victims to give evidence more than once, the pre-recording of witnesses’ evidence aims to redress a fundamental problem of the criminal justice system: delay. Although inevitable, delay in the court process works against the evidence of all victims. The ability to give accurate, factual evidence months or years after the event is virtually impossible. This is despite the fact that coherent evidence was given at the time of the events in question.\textsuperscript{14}

When this section was first enacted, the wording made it non-discretionary although its application was still subject to the definition of witness contained in section 40P. However, as a result of the 2009 amendments, the section is now discretionary. This means that even if a witness satisfies the definition in 40P, they may still not be able to give evidence at a pre-trial hearing.

The explanatory statement that accompanied the Bill stated that:

\begin{quote}
...it may be necessary for an adult complainant in a sexual offence proceeding to give
\end{quote}

\textsuperscript{11} The Crimes Legislation Amendment Act 2009 (ACT) replaced the word ‘must’ with ‘may’.

\textsuperscript{12} Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40Q.


their evidence at a pre-trial hearing, because of a special vulnerability where they might suffer further severe emotional trauma as to be prevented from giving satisfactory evidence at a later time at trial. Amendments will ensure that the court has the discretion to order pre-recording for such witnesses, where the court is satisfied that it is necessary.15

The legislation does not provide any guidance on the process preceding the making of an order under this section. However, one interview participant stated that the DPP must make an application to the court for an order to be made under this section. This means that for, non-disabled, adult victims, only those who can demonstrate to the court that they are likely to suffer further trauma may be eligible to give their evidence at a pre-trial hearing. In addition, this section requires a demonstration of vulnerability in addition to judicial discretion in its application. This again allows the decision to be influenced by sexual assault mythology.

New section 40R—Who may be present at pre-trial hearing

(1) Only the following people may be present in the courtroom at the pre-trial hearing:
   (a) the presiding judicial officer;
   (b) the prosecutor;
   (c) the accused person;
   (d) the accused person’s lawyer;
   (e) anyone else the court considers appropriate.

(2) While the witness is at a place to give evidence, only the following people may be present at the place:
   (a) a support person under section 38E (2) or section 81C;
   (b) anyone else the court considers appropriate.16

This section aims to reduce the level of trauma for victims by reducing the number of people present at the pre-trial hearing. Again, however, this section requires judicial discretion in determining who is an ‘appropriate’ person to be present at the pre-trial hearing or with the victim while he/she gives evidence. The judicial officer’s perception

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of who is appropriate may differ greatly between victims and other judicial officers. This could result in the provision not having its intended effect of protecting victims from further trauma.

In *R v SH*\(^{17}\) the presiding judge, Refshauge J, stated that while he did not:

> ...regard the paragraph as enabling a wide range of persons to be present, and almost certainly not parents of mature accused persons...such persons as the spouse of an accused person or the parents of a younger accused person...\(^{18}\)

were deemed to be appropriate persons. This case is the only one so far to have considered the operation of this provision. The persons in addition to those listed in section 40R(1) who were allowed to be present during the pre-trial hearing were the Judge’s ‘Associate, the Sheriff’s Officer...any ACT Corrective Services officers assigned to the trial...and... the parents of the accused’.\(^{19}\)

**New section 40S—Evidence of witness at pre-trial hearing to be evidence at hearing**

(1) The evidence of a witness (including cross-examination and re-examination) given under this division must be recorded as an audiovisual recording.

(2) The audiovisual recording of the witness’s evidence must—

(a) be played at the hearing of the sexual offence proceeding for which the pre-trial hearing was held; and

(b) be admitted in evidence as the witness’s evidence at the hearing as if the witness gave the evidence at the hearing in person.\(^{20}\)

The application of this section is mandatory as it states that all evidence recorded at a pre-trial hearing *must* be admitted into evidence and played as the victim’s evidence at the actual hearing. However, although mandatory, this section does not apply unless the DPP applies for an order for a pre-trial under the sections discussed above. The presiding judge or magistrate must then apply their discretion to deem the victim as being at risk of further trauma or distress or as likely to be intimidated or distressed.

\(^{17}\) *R v SH; R v Vaughan; R v Chifuntwe (No. 1) [2010] ACTSC 157.*

\(^{18}\) Ibid., 9 (Refshauge J).

\(^{19}\) Ibid., 10 (Refshauge J).

New section 40T—Witness may be required to attend hearing

(1) This section applies if an audiovisual recording of a witness’s evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.

(2) The accused person may apply to the court for an order that the witness attend the hearing of the sexual offence proceeding to give further evidence.

(3) The court must not make the order unless satisfied that—

(a) if the witness had given evidence in person at the hearing of the sexual offence proceeding, the witness could be recalled; and

(b) it is in the interests of justice to make the order.\(^{21}\)

This section does not aim to further protect victim–witnesses’ safe speaking. Rather, it provides a protection to the accused and his/her right to a fair trial which is one of the intended aims of the legislation. However, this provision could potentially undermine the purpose of having a pre-trial hearing in the first place. Where there has been a pre-trial hearing, the accused may apply to the court for an order that the witness attend the hearing as well to give further evidence. Although there is an assumption that the court will not make this order unless satisfied that 'it is in the interests of justice', the decision is still subject to judicial discretion. Again, the issue of the accused’s right to a fair trial becomes relevant. The court must consider if the principle of a fair trial will be maintained if an order is not made under this section. This decision is subject to society’s pre-existing beliefs about the right to a fair trial in Australia and how it may apply differently in sexual assault proceedings. This could result in victims suffering further trauma and contravening the overall intentions of the Act.

New section 40U—Evidence of witness at pre-trial hearing—jury trial

(1) This section applies if—

(a) a sexual offence proceeding is a trial by jury; and

(b) an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of the proceeding.

(2) The court must tell the jury that—

(a) the witness gave the evidence by audiovisual link at a pre-trial hearing; and

(b) admission of the audiovisual recording is a usual practice; and

\(^{21}\) Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2 (emphasis added).
(c) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence was given in that way.22

This section also provides a protection for the accused. It imposes a requirement on the court if an order has been made under this Division for a pre-trial hearing to be held. The section states that at the trial, if there is a jury, the court must direct the jury that the victim gave evidence at a pre-trial hearing and that this is usual practice in these cases. This section is mandatory and so requires no judicial discretion in its interpretation and application.

New section 40V—Recording of witness's evidence at pre-trial hearing admissible in related hearing23

(1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.

(2) The recording is admissible as the witness's evidence in a related proceeding unless the court in the related proceeding otherwise orders.

(3) However, the court in the related proceeding may—
   (a) refuse to admit all or any part of the audiovisual recording in evidence; and
   (b) if the court refuses to admit part of the recording in evidence—order that the part that is not admitted be deleted from the recording.

(4) A party in the related proceeding may apply to the court for an order that the witness attend the hearing to give further evidence.

(5) The court must not make the order unless satisfied that—
   (a) the applicant has become aware of something that the applicant did not know or could not reasonably have known when the audiovisual recording was recorded; and
   (b) if the witness had given evidence in person at the hearing, the witness could be recalled; and
   (c) it is in the interests of justice to make the order.24

22 Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40U.
23 For the purposes of this section, a related proceeding is defined as: a re-hearing or re-trial of, or appeal from, the hearing of the proceeding; or another proceeding in the same court as the proceeding for the offence, or another offence arising from the same, or the same set of, circumstances; or a civil proceeding arising from the offence: Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40V(6) [emphasis added].
24 Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40V.
This section aims to protect victims from the trauma of having to give evidence multiple times. It allows the recorded evidence given at a pre-trial hearing to be admissible:

...in later proceedings, such as a rehearing or appeal, or in another proceeding arising as a result of the original proceeding, for example, in Family Court proceedings.\(^{25}\)

However, the admissibility of this evidence is subject to acceptance by the court in the related proceeding. The court may refuse to admit the evidence or order that the victim attend the hearing to give further evidence.

There are several considerations that must be made by the court when determining whether the victim should be recalled to give further evidence—including again, whether it is in the interests of justice. However, there are no considerations, aside from those under the general law of evidence,\(^ {26}\) to be made when deciding to refuse to admit all or part of the victim’s recorded evidence, a refusal of which would result in the victim having to attend the trial anyway.

**Revised section 43—Giving evidence from place other than courtroom**

(1) This section applies if the courtroom where a sexual or violent offence proceeding is heard and another place are linked by an audiovisual link.

(2) The evidence of the complainant and each similar act witness must be given by audiovisual link from the other place **unless the court otherwise orders**.

(3) The court may make an order under subsection (2) only if satisfied—

(a) that—

(i) for the complainant—the complainant prefers to give evidence in the courtroom;...or

(b) if the order is not made—

(i) the sexual or violent offence proceeding may be unreasonably delayed; or

(ii) there is a substantial risk that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly.\(^ {27}\)

The use of CCTV aims to reduce the trauma of a trial for victim–witnesses. Victims do not have to testify in the courtroom and are unable to see the accused through their monitor.

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\(^{26}\) For example, the evidence must be relevant, must not invite propensity reasoning, must not contain hearsay, must not be prejudicial and must have a probative value, etc. See: *Evidence Act 1971 (ACT); Evidence Act 1995 (Cth)***.

\(^{27}\) *Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 43* (emphasis added).
This section provides for the use of CCTV for all victims of sexual assault whilst giving their evidence at a pre-trial hearing or at the actual trial. There is an assumption that victims will give evidence via CCTV unless they otherwise wish. However, the court still has the power to order that the evidence not be given in this manner in certain circumstances. For example, if the proceeding would be unreasonably delayed or there is a substantial risk that the proceeding would be conducted unfairly. Both ‘unreasonably’ and ‘substantial’ are vague concepts and susceptible to interpretation.

Yet again, the contentious issue of what is a fair trial in these cases could play a part in whether or not this special measure is available to victim–witnesses. As long as the accused’s right to a fair trial is seen to outweigh the victim’s rights, indeterminacies such as these will serve to disadvantage victim–witnesses, despite legislation aiming for the opposite.

**Changes to the Magistrates Court Act 1930 (ACT)**

**New subsection 90AA(11)—Written statements may be admitted in evidence**

(11) However –

(a) a person must not be required to attend and give evidence at a preliminary examination in relation to a sexual offence (whether or not the examination relates also to another offence) if the person is a complainant in relation to the sexual offence; and

(b) subsections (4), (7), (8) and (10) do not apply to a written statement made by the person.28

However, due to several other Acts that came into effect at the same time, subsection (11) was never actually included in the *Magistrates Court Act*. All of section 90AA was rewritten to incorporate all of the different amendments. Subsection (8) of the rewrite reflected the original subsection (11):

(8) However, a person must not be required to attend and give evidence at a committal hearing in relation to a sexual offence (whether or not the hearing also relates to another sexual offence) if the person is a complainant in relation to the sexual offence.29

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28 *Sexual and Violent Offences Legislation Amendment Act 2008 (ACT)* s 34.

29 *Magistrates Court Act 1930 (ACT)* s 90AA(8).
This section introduces the idea of a paper committal for all sexual offence proceedings which means that victims are no longer required to attend and give evidence in person at the committal hearing. This provision aims to reduce the number of times victims have to give evidence, thus reducing the trauma of the trial for them. The section is mandatory for all sexual assault offences in the ACT. There are no exclusions or exceptions to this rule. This means that no judicial discretion is required and all victims, in all circumstances, benefit from this provision.

Summary

In this chapter I demonstrate that although all but one of The Challenge of Change report recommendations were enacted, as discussed in the previous chapter, the amendments contain ample grey areas. These include discretion in:

- defining who is a vulnerable witness
- deciding when the accused may be screened from the witness
- deciding when it is in the interests of justice for the witness to give evidence in an open court
- deciding when the witness may be recalled to give further evidence, and
- admitting audiovisual recording evidence in later proceedings.

This judicial discretion was included despite victim support agencies arguing for none.\(^30\)

The indeterminacy of the recommendations in the Challenge of Change report was minimal. It is not clear how much of the legislation’s indeterminacy resulted from the input of the SARP Reference Group or the drafters of the legislation. However, it is evident that the resulting legislation contains much more judicial discretion than was initially recommended.

Also indeterminate is the lack of direction in the process. The legislation does not provide any direction about how application for the special requirements should be made or by whom. One participant informed me that:

\(^{30}\) Interview with victim support worker (Canberra, 2011).
...certain special measures under the Evidence (Miscellaneous Provisions) Act are available on application by the prosecutor. There are [however] no formal guidelines governing when these special measures will be sought.\(^{31}\)

The guidelines for prosecutors state only that:

In prosecuting charges of assault, especially sexual assault, there should be particular concern for the position of the victim. Many such people have suffered severe emotional and physical distress as a result of the offence and may be confused and apprehensive at the prospect of having to give evidence. Prosecutors should carefully explain to victims of such offences the role which they play in the prosecution process and, if appropriate, the steps that can be taken to ensure their protection.\(^{32}\)

This is the extent of the guidelines. There is no mention of when or how prosecutors should take the steps to ensure the victim’s protection.

Despite this, one of the purposes of establishing a specialist sexual offences unit at the DPP in 2009 was to ‘ensure maximum use is made of the special measures provided for as part of the recent legislative reforms’.\(^{33}\)

The introduction of the sexual offences unit means that all sexual offence prosecutions are allocated to one of three specialist sexual offence prosecutors in the Sexual Offences Unit. These prosecutors deal with the special measures contained in the legislation on a regular basis and will make application for discretionary special measures in appropriate matters after consultation with complainants.\(^{34}\)

For example, one participant stated that through ‘early, sustained and appropriate contact with complainants’, and with the ‘involvement of the Witness Assistant Support officers of the DPP, prosecutors are able to ascertain when it may be appropriate for a witness to give evidence at pre-trial hearing’.\(^{35}\)

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\(^{31}\) Interview with ACT prosecutor (Canberra, 2011).


\(^{34}\) Interview with ACT prosecutor (Canberra, 2011).

\(^{35}\) Ibid.
However, one prosecutor suggested that, due to the absence of strict guidelines or mandating legislation, these applications for special provisions are not always made.\textsuperscript{36} If this is in fact the case, the enactment of the provisions will not have their intended effect, as many victims who could have been further protected will not be.

\ldots the principle should have been that any member of the public performing a public service in serving the administration of justice should be facilitated and enabled to do so, and not jump through hoops (i.e. prove vulnerabilities and only for this one and not for that one). Initiation is just another way of talking about access to rights and entitlements and, like any right or entitlement, victims need to be informed and facilitated. This process requires independent advocacy. In my view this is a specific area of responsibility for the statutory advocate. While the police and prosecution can do aspects of this they remain constitutionally focused on their role in relation to the public interest.\textsuperscript{37}

Research has shown that statutory grey areas, such as exceptions or lack of clarity, lead to a very broad and diverse interpretation of the statutes. So, despite many changes to consent laws and to the types of questions permissible in cross-examining a victim–witness, cross-examinations continue to be focused on the complainant’s actions, rather than those of the accused.\textsuperscript{38} Evidence of sexual reputation is still being admitted, often without reference to the relevant legislation,\textsuperscript{39} and applications for its admission are routinely approved.\textsuperscript{40}

The substantive indeterminacy of these reforms provides opportunities for the exercise of prosecutorial and judicial discretion. Given this, I predict that the Act’s legislative aims might not be fully realised. These aims include sparing victim–witnesses from:

- the humiliation of open court
- the trauma of having to be in the same room as the accused; and

\textsuperscript{36} Interview with ACT prosecutor (Canberra, 2011).
\textsuperscript{37} Interview with victim support worker (Canberra, 2011).
\textsuperscript{39} See: New South Wales Department for Women, above n 10; Mary Heath, ‘The law and sexual offences against adults in Australia’ (2005) \textit{4 Australian Centre for the Study of Sexual Assault Issues} 1, 13.
\textsuperscript{40} Mary Heath, above n 27. See also: Melanie Heenan, ‘Reconstituting the “relevance” of women’s sexual histories in rape trials’ (2002) \textit{13 Women Against Violence} 4.
• having to give evidence multiple times or being unsupported.

Judicial officers and prosecutors may only use these protections for victims of sexual assault whom, they believe, require the protection.

Aren't all victims of sexual assault likely to suffer additional trauma or be intimidated or distressed during the trial process? How does the court determine which victims are more likely than others to suffer severe emotional trauma or be intimidated or distressed?

Given the vagueness in many of these special provisions, the question remains: was the enactment actually a healthy progression or was it perhaps marked by indeterminacy? Further research, which I will discuss in the following chapter, was necessary to determine whether these provisions were being implemented in the spirit of the SARP recommendations and whether the legislation has in fact improved victims' safe speaking.
Chapter Nine

Legal practitioners, judicial officers and victims’ (‘players’) views of the changes

Previous chapters discussed the examples of substantive indeterminacy and the opportunity they presented for the exercise of prosecutorial and judicial discretion. The changes in Australia and the ACT aimed to ensure that victim–witnesses had a gentler experience in court than they would have had in the past. Thus, they aimed to spare victim–witnesses from the humiliation of open court; from the trauma of having to be in the same room as the accused; from having to give evidence multiple times; and from being unsupported. In this chapter I discuss whether these aims appear to have been fully actualised.

In the course of my research I interviewed and surveyed judicial officers, legal practitioners, victim support personnel and victim–witnesses. In this chapter I discuss their views about the implementation of the changes made by the *Sexual and Violent Offences Legislation Amendment Act 2008 (SVOLAA)* to the *Magistrates Court Act* and *Evidence (Miscellaneous Provisions) Act*. I then discuss my findings in the context of the previous chapters.

**How are the new indeterminate sections of the Evidence (Miscellaneous Provisions) Act 1991 (ACT) working in practice?**

**New section 38C—Accused may be screened from witness in court**

(1) This section applies to the complainant or a similar act witness (the witness) giving evidence in—

(a) a sexual offence proceeding...

(2) The court may order that the courtroom be arranged in a way that, while the witness is giving evidence, the witness cannot see—

(a) the accused person; or
(b) anyone else the court considers should be screened from the witness.¹

As discussed in the previous chapter, this section was introduced to protect victims who choose to give evidence in the courtroom or whom the court compels to give evidence in the courtroom. Theoretically, if ‘the complainant wishes to be in court to give evidence’,² or the court makes an order to this effect, this section enables screens to be placed between the victim and the accused. This means that the victim cannot see the accused but the accused and other people involved in the trial can see the victim.

The wording of the new ACT section is not as determinate as that in New South Wales where complainants are ‘entitled (but may choose not)’ to use screens;³ or Victoria where ‘the court must direct’ that screens be used.⁴ In these two states it is a discretionary power of the court similar to the provisions in Queensland and Tasmania. However, the new ACT section does apply more broadly than the discretionary sections in Queensland and Tasmania where these provisions apply to special witnesses only.⁵

As discussed in Chapter Six, research in other jurisdictions suggests that screens are rarely used in practice because of the preference for using closed circuit television (CCTV).⁶ When screens are required, the discretionary power is often not invoked.⁷ My findings corroborate this.

Judicial officer and practitioner responses

One judicial officer stated:

I interpret this section as giving the court a discretion to screen a witness from the accused in the relevant proceeding. I find it difficult to see who else should be out of sight of the witness. I would generally make an order when requested. It would really be up to the accused to justify why the measures should not be implemented.⁸

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¹ Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38C.
² Survey of participant no. 4, legal practitioner (18 July 2011).
³ Criminal Procedure Act 1986 (NSW) s 294B(3).
⁴ Criminal Procedure Act 2009 (Vic) s 364.
⁵ See: Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8(1); Evidence Act 1977 (Qld) s 21A(1).
⁸ Survey of participant no. 3, judicial officer (7 April 2011).
The majority of the legal professionals surveyed reported that this section is rarely, if at all, used in practice, as all victims of sexual assault are eligible to give evidence via CCTV:

[This section is] not encountered in practice because of s 41 Test...\(^9\)

I have never been asked to make orders under 38C—the standard practice seems to be to rely on Divisions 4.2B and 4.3 and have the evidence given by audio-visual link from a remote witness room.\(^{10}\)

In practice all complainants give evidence remotely via video link and the accused is positioned so that the witness cannot see the accused.\(^{11}\)

[Screens are] rarely required. In most cases where this would apply, the complainant/witness is giving evidence via CCTV and will not see the accused in any case.\(^{12}\)

[Screens are] rarely [used] in my experience.\(^{13}\)

Because of the provisions almost mandating evidence by video link [section] 38C in my experience has never specifically arisen.\(^{14}\)

[I have] not yet seen such an arrangement sought.\(^{15}\)

I have not seen an order made under this section.\(^{16}\)

As a result of the heavy reliance on CCTV, none of the participants had made or seen an order made for the use of screens. However, one judicial officer said that he ‘would rely

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\(^9\) Survey of participant no. 1, judicial officer (1 June 2011).
\(^{10}\) Survey of participant no. 2, judicial officer (27 April 2011).
\(^{11}\) Survey of participant no. 5, legal practitioner (4 June 2011).
\(^{12}\) Survey of participant no. 6, legal practitioner (11 May 2011).
\(^{13}\) Survey of participant no. 7, legal practitioner (27 April 2011).
\(^{14}\) Survey of participant no. 5, legal practitioner (4 June 2011).
\(^{15}\) Survey of participant no. 8, legal practitioner (26 April 2011).
\(^{16}\) Survey of participant no. 7, legal practitioner (27 April 2011).
particularly on any submissions from the accused or his/her counsel' when deciding whether to make an order under this section.

When asked to hypothesise when an order under this section would not be made, judicial officers stated that it ‘is impossible to imagine the range of circumstances in which an order under s 38C would be sought, and accordingly impossible to identify any particular cases in which’ such an order would be refused. ‘I find it difficult to imagine the circumstances. I suppose it is possible that there would be some circumstance, but I find it difficult to see it.’ However, other judicial officers and legal practitioners hypothesised that ‘...in the unusual situation where a witness is giving evidence in court rather than via CCTV’, an order to use screens would not be made if the ‘test [is] not satisfied’ or the criteria not met. That is, ‘if [it is] not in the interests of justice’.

Victim support personnel and victim—witness responses

Although the victim support personnel surveyed had not observed the use of screens in court, they were asked to hypothesise about their potential burdens and benefits. Three victim support workers reported that:

...people who want to sit in court usually do so because they want to see the defendant: most of the people I support are entitled to use CCTV so if they are in the courtroom it is because they have chosen to be and [chosen] to be able to see the accused.

One support person reported an application for the use of a screen in a case where the witness was not the complainant in those proceedings:

There was a witness whom was also a sexual assault victim of the same defendant—an application was going to be made for her to use a screen when giving evidence in the matter where she was a witness but not a victim.

17 Survey of participant no. 3, judicial officer (7 April 2011).
18 Survey of participant no. 2, judicial officer (27 April 2011).
19 Survey of participant no. 3, judicial officer (7 April 2011).
20 Survey of participant no. 6, legal practitioner (11 May 2011).
21 Survey of participant no. 1, judicial officer (1 June, 2011).
22 Survey of participant no. 9, legal practitioner (10 April 2011).
23 Survey of participant no. 4, legal practitioner (18 July 2011).
24 Survey of participant no. 10, victim support (7 June 2011).
25 Survey of participant no. 12, victim support (31 May 2011).
Interestingly, the victim–witness who chose to give evidence in the courtroom was not offered screens for her protection. This victim stated that she ‘did not want to testify via CCTV because she felt that she had greater control and a greater presence in the courtroom’. However, she did want to be screened from the accused in the courtroom.26 She asked about the use of screens, and was told that ‘they didn’t do that here—it wasn’t an option’.27 It must be noted that this trial was held approximately three months after the introduction of the new legislation. Because screens were not used in this case, the victim felt ‘scared’ because she ‘had to walk right past him’, ‘anxious’ while giving evidence, and she ‘had trouble breathing’.28 She stated that the accused and his family were ‘unnerving and distracting’ and that the accused was ‘glaring at her the whole time and trying to put her off’.29 One victim support officer supported this finding, stating that if victims were unable to see the accused, they would be ‘able to speak with more confidence and certainty knowing they [cannot] see the accused but [knowing that the accused can] hear them tell their story’.30

**New section 38E—Witness may have support person in court**

(2) The court must, on application by a party who intends to call a witness, order that the witness have a person (a *support person*) in the court close to, and within the witness's sight, while the witness gives evidence.31

As discussed in the previous chapter, this section was introduced to ensure that victims have emotional support whilst they give evidence and to reduce the trauma of the trial for them.

An application for a support person to be present is commonly made in relation to people who are to give evidence by audiovisual link from a remote witness room.32 Judicial officers surveyed indicated that the section ‘requires that where the prosecution...requests a support person to be with the witness, the court must comply

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26 Interview with participant no. 13, victim witness (28 October 2010).
27 Ibid.
28 Interview with participant no. 13, victim witness (28 October 2010).
29 Ibid.
30 Survey of participant no. 12, victim support (31 May 2011).
32 Survey of participant no. 2, judicial officer (27 April 2011).
with that request': 33 'I have never had such an application opposed by the other party, and have never declined to make such an order when sought'. 34

The legal practitioners surveyed confirmed this view. One stated that as the section is interpreted and applied ‘...strictly, it is very seldomly opposed by defence’.

In practice virtually all complainants give evidence remotely by video link and in the room with them is a sheriff’s officer who hands exhibits etc. AND ensures that the support person—who is also in the room but not on camera—is not gesturing to the witness. 36

Usually a D.P.P. staff member sits near the witness in the room from which the witness is testifying and is out of the sight of those watching the testimony in Court. 37

Routinely when evidence is given via CCTV, the court is advised that a support person is present in the remote room. Usually that person is the witness support officer from the DPP. 38

Legal practitioners and victim support personnel reported that

...[w]itnesses who wish to have a support person almost inevitably have one. An order is sought and made on Prosecution application. 39

Each person entitled to a support person is asked if they would like one and if so they chose whom they would like. This can be anyone except for another witness in the matter. The majority of people have a support person. 40

Victims always gave evidence from a remote location via CCTV. The support person was viewed by the court in the opening of the victim’s evidence via wide-view lens, then the camera zoomed in on the victim. A court officer was also in the room to ensure that the support person did not act inappropriately. The Judge had a view of the whole room at all times. 41

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33 Survey of participant no. 3, judicial officer (7 April 2011).
34 Survey of participant no. 2, judicial officer (27 April 2011).
35 Survey of participant no. 4, legal practitioner (18 July 2011).
36 Survey of participant no. 5, legal practitioner (4 June 2011).
37 Survey of participant no. 7, legal practitioner (27 April 2011).
38 Survey of participant no. 8, legal practitioner (26 April 2011).
39 Survey of participant no. 6, legal practitioner (11 May 2011).
40 Survey of participant no. 10, victim support (7 June 2011).
41 Survey of participant no. 12, victim support (31 May 2011).
Both victim–witness participants had support people from the ACT Director of Public Prosecutions and/or the Canberra Rape Crisis Centre (CRCC) within their sight whilst giving evidence. The support people were described as ‘very helpful, friendly [and] approachable’.42 Both victims felt that the support people improved their experience, and neither of them would have preferred to testify alone:

[She] made me feel more comfortable. Improved the experience. Definitely no to testifying alone. Support is much better.43

I felt that I always had support with me and someone to talk to—even when I was walking to and from the court.44

The only problem reported to arise in relation to the application of this section is where ‘there is some issue as to the person who is the support person being an appropriate person’.45 One victim–witness was faced with the question of who could be present whilst she gave evidence at the committal. At the hearing she had a witness support person from the DPP and a counsellor from the CRCC with her in the remote witness room. However, the counsellor was asked to leave before the witness gave her evidence. The Defence counsel had objected to the fact that the counsellor was present when the victim gave her initial statement, and was worried that the counsellor was going to ‘coach her’.46

Revised section 39—Sexual and violent offence proceeding—evidence to be given in closed court

(2) The court may order that the court be closed to the public while all or part of the witness’s evidence (including evidence given under cross-examination) is given.

(3) In deciding whether to order that the court be closed to the public, the court must consider whether—

(a) the witness wants to give evidence in open court; and

(b) it is in the interests of justice that the witness give evidence in open court.47

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43 Ibid.
44 Interview with participant no. 13, victim–witness (28 October 2010).
45 Survey of participant no. 6, legal practitioner (11 May 2011).
46 Interview with participant no. 13, victim–witness (28 October 2010).
As discussed in Chapter Eight, this provision aims to reduce the embarrassment and humiliation that victims might experience as a result of having to provide evidence of highly personal information in sexual offence proceedings. However, an order under this section is subject to the judicial officer on the day deciding whether it is in the interests of justice to make the order.

Unlike Queensland and Tasmania, this section applies to all complainants in sexual offence proceedings—not just special witnesses. The section does not, however, go as far as legislation in New South Wales and the Northern Territory. In those jurisdictions there is a presumption that the court will be closed in sexual offence proceedings. Nor does the ACT section enforce consideration of the potential distress of the witness as happens in South Australia and Victoria. For example, in Victoria, the Court may make an order to close the Court if it is of the opinion that it is ‘necessary to avoid causing undue distress or embarrassment to the complainant’.48 The ACT legislation is probably most similar to the Western Australian legislation. In both of these jurisdictions the focus is on the interests of justice when determining whether or not to close the court.

The Heroines of Fortitude study was conducted in 1996. At that time, the New South Wales legislation required the court to consider not only the interests of justice, but also the victim’s need when deciding whether or not to close the court. This wording appears to be somewhat more favourable to victims than the new ACT section. Despite this, as discussed in Chapter Six, the Heroines study found that the court was not closed to the public at any stage of the trial in 56 per cent of the cases. Seventeen per cent were closed for the examination and cross-examination of the victim; and only 10 per cent were closed for the entire proceedings.49 Although I did not find similar percentages in my research, the qualitative findings below suggest that these percentages could be very similar to those in New South Wales in 1996.

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48 See: Magistrates’ Court Act 1989 (Vic) s 126(1)(d); Supreme Court Act 1986 (Vic) s 19(e).
49 New South Wales Department for Women, ‘Heroines of foritute’ (Office for Women: NSW Department of Premier and Cabinet, October 1996) 122.
Judicial officer and practitioner responses

There is a key consideration for judicial officers when deciding whether to make an order to close the court while victims give evidence. It is whether ‘it is in the interests of justice that the witness give evidence in open court’. Judges provided mixed responses about how they interpreted the meaning of this section. One stated that (s)he would allow the court to be closed ‘[i]f the vulnerability test is satisfied and it is otherwise fair to allow the evidence to be given’. Another judicial officer had a slightly different viewpoint on the meaning of the ‘interests of justice’:

The interest is the need for complainants especially not being deterred from making complaints by the fear that some very personal details of their interaction with the accused will become public property because of the evidence that they give.

When asked what (s)he would do if there was a conflict between the victim’s wishes and the interests of justice, this same judge stated that (s)he ‘would mostly accept the wishes of the witness;…[(s)he could] see little justice in not doing so’. However, the other two judicial officers did not agree. One said that (s)he could not give either consideration more weight overall; that the ‘decision would depend on the details of each competing consideration’. This judge also stated:

I would need to consider why the witness was so keen to give evidence in open court, and the nature and degree of the impact of that on the interests of justice.

The lawyer respondents reported that orders to close the court are ‘rarely sought and rarely made’, ‘as it should be’, but that an order might be ‘requested if a complainant particularly wants the court to be closed during their evidence’. One practitioner stated that ‘so far there has been little occasion for recourse to this section’. Another reported that the ‘public interest points in the direction of evidence being given in open Court’. Both of these statements beg the question, why? The victim support personnel respond

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51 Survey of participant no. 1, judicial officer (1 June 2011).
52 Survey of participant no. 3, judicial officer (7 April 2011).
53 Survey of participant no. 3, judicial officer (7 April 2011).
54 Survey of participant no. 2, judicial officer (27 April 2011).
55 Ibid.
56 Survey of participant no. 7, legal practitioner (27 April 2011).
57 Survey of participant no. 6, legal practitioner (11 May 2011).
58 Survey of participant no. 8, legal practitioner (26 April 2011).
59 Survey of participant no. 7, legal practitioner (27 April 2011).
to this question next.

**Victim support personnel and victim–witness responses**

Victim support workers reported that, in practice:

...an order may be made for a court to be closed if it is going to enhance the person’s evidence. When this happens application can be made up until the morning the person is supposed to give evidence.60

However, despite the apparently equal weighting of the factors by judicial officers discussed above, one victim support worker believes that the:

...[p]ublic interest always trumps a victim’s wishes or concerns. The victim is often treated as an afterthought or like an annoyance, despite the rhetoric that is heard in court’.61

This support person also confirmed the view that the judicial officer’s power to close the court to the public is rarely invoked: ‘all victims have asked to have a closed court, but rarely is it granted or applied for.’62

When asked about the victims’ wishes, one victim support person stated that:

Most people are fine for the court to be open as not many people sit in anyway. Some do not want the defendant’s family in there, and some do not want their own family in there, so in these cases a closed court application may be made.63

However, all victim support personnel reported that most victims would prefer the court to be closed to the public; and that a closed court improved their experience:

They do not like that others can hear their evidence and are particularly concerned about the defendant’s supporters being able to hear the evidence. They find the open court very intimidating.64

...knowing that their personal life is not being portrayed to those who may not know them is definitely a confidence booster.65

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60 Survey of participant no. 10, victim support (7 June 2011).
61 Survey of participant no. 12, victim support (31 May 2011).
62 Ibid.
63 Survey of participant no. 10, victim support (7 June, 2011).
64 Survey of participant no. 12, victim support (31 May, 2011).
65 Survey of participant no. 11, victim support (31 May, 2011).
They are happy that there is not just anyone sitting in the courtroom listening to their evidence.\textsuperscript{66}

The victim–witnesses supported this view. Although both victims gave their evidence in an open court, each stated that she would have preferred the court to be closed to the public. In one of the victim participant’s cases, the prosecutor said that it was not in the interests of justice for the court to be closed, so they did not even apply for an order. As a result, the victim reported feeling distracted and abused.\textsuperscript{67} She felt that it was her story, not a story for the public. She felt that because she was talking about such personal things (including her own body), she would rather not have talked about them in public.\textsuperscript{68} She would also have preferred only chosen people to be in the courtroom; that is, no students. Finally, she would have liked it if people didn’t keep coming and going.\textsuperscript{69}

The other victim–witness participant reported that she was concerned about the publicity of the trial and would have preferred it if this could have been avoided:

I was nervous about it being printed in the paper as Canberra is small and my story was read by many people and confidentiality is difficult to maintain. People who know people, know people and two and two are put together very easily. Although trying to be positive, people read my story creating awareness, education and my story being heard and helping victims and criminals and the whole process. Having the choice and control over public access may have been nice.\textsuperscript{70}

New section 40P—Meaning of witness—Division 4.2B

(1) For this division, a witness is a prosecution witness in a sexual offence proceeding who—

(a) is a child; or

(b) is intellectually impaired; or

(c) is a complainant who the court considers must give evidence as soon as practicable because the complainant is likely to—

(i) suffer severe emotional trauma; or

\textsuperscript{66} Survey of participant no. 10, victim support (7 June, 2011).
\textsuperscript{67} Interview with participant no. 13, victim–witness (28 October, 2010).
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} Survey of participant no. 14, victim–witness (26 July, 2011).
Once this definition of witness is satisfied, ‘a witness may give evidence at a pre-trial hearing [and] the evidence must be given by audiovisual link’. This recording then ‘must...be played at the hearing of the sexual offence proceeding’.

As discussed in Chapter Eight, if victims do not fit into categories of (a) and (b) above, they must satisfy one of two criteria to be eligible to have their evidence recorded at a pre-trial hearing. They must demonstrate that they are likely to ‘suffer severe emotional trauma’ or ‘be intimidated or distressed’ by giving evidence in court.

When compared to the other jurisdictions in Australia, discussed in Chapter Six, this section purportedly caters to more victims than the equivalent legislation in Queensland and Victoria. This section enables non-disabled adult victims who can prove a special vulnerability to apply to give their evidence at a pre-trial hearing. The section is not as inclusive as those in Western Australia or the Northern Territory, however, where all victims of sexual assault are eligible for this protection. Western Australian legislation provides a similar definition of witness. But it then goes on to state that the court must make an order that victims in serious sexual offence proceedings are special witnesses, thereby including all victims in the definition. Because there is no similar section in Australia it was difficult to hypothesise about the effect that this provision will have. However, as I discussed in Chapter Six, research on the use of pre-recorded evidence for children suggests that it is well supported by children and parents.

In my research, when asked how they would determine which witnesses fit within this definition, judicial officers surveyed stated that ‘...it is not a comparative exercise’; rather ‘...it is an assessment of the particular witness’.

There is no question of determining which witnesses are more likely to suffer trauma etc.
than others (it’s not a choice or a competition). The determination is whether, for the reasons specified, a witness must give evidence as soon as practicable.\footnote{Survey of participant no. 2, judicial officer (27 April, 2011).}

Legal practitioners supported the view that ‘...it’s done on a case by case basis’ and stated that ‘...child witnesses [are] more vulnerable generally’.\footnote{Survey of participant no. 4, legal practitioner (18 July, 2011).} However, although one practitioner stated that ‘...in practice ALL complainants in sexual matters are effectively ‘deemed’ to be likely to suffer intimidation or distress’,\footnote{Survey of participant no. 5, legal practitioner (4 June, 2011).} it does not seem that this view is translating into the application of the section, as shown below.

When asked how they would come to a decision under this section, judicial officers reported that it would ‘involve looking at what kind of evidence the prosecution raises’. This might include an ‘...expert report, from a medical practitioner or psychologist to support the claim’;\footnote{Survey of participant no. 3, judicial officer (7 April, 2011).} and ‘...whether the defence opposes a determination that the witness give evidence in a pre-trial hearing’.\footnote{Survey of participant no. 2, judicial officer (27 April, 2011).}

Legal practitioners and victim support personnel confirmed this, albeit with the caveat that ‘...these provisions have not been in operation for long in a small jurisdiction, [so] many of these questions cannot be answered conclusively yet’:\footnote{Survey of participant no. 7, legal practitioner (27 April, 2011).}

I would expect that expert medical evidence would be required on this issue.\footnote{Ibid.}

I have not yet seen this done. Presumably this would be done by affidavit, probably authored by a staff member from the DPP, annexing relevant reports. There may or may not be a need for cross-examination.\footnote{Survey of participant no. 8, legal practitioner (26 April, 2011).}

We seek supporting documentation from psychologists etc. This section had not been used more than twice when I was employed at ODPP.\footnote{Survey of participant no. 12, victim support (31 May, 2011).}

One victim support worker stated that:

\footnote{Survey of participant no. 2, judicial officer (27 April, 2011).}
...often defence will agree and a date for a pre-trial hearing is set, [but at] other times we have had to get a letter from a psychologist outlining the issues.86

Legal practitioners and victim support personnel also described the process before the decision by the judge:

Through prior discussions with witnesses, the Prosecution usually is made aware when a person is likely to suffer trauma or be intimidated or distressed as a result of delay, and an application is made accordingly.87

This [issue] is usually brought up by the witness who verbalises that they need to give evidence ASAP as they are not coping well. [The provision] has also been used where trials are being set a long time in advance. That causes people further distress.88

[One victim] stated that they needed to give evidence as soon as possible so the prosecutor made an application in court.89

[The need for this provision is usually determined] by the way in which the victim presents. The DPP will determine whether they are a suitable candidate... 90

It would usually only be once a person mentions that they are not coping or have some mental health conditions that we (the prosecutor or [victim support]) will bring up the possibility of a [pre-trial evidence] with them. Otherwise we would not inform them if they seem able to cope with the time.91

Two victim support workers stated that ‘...both the AFP and the DPP explained this new legislation to each victim whose matter ends up proceeding’.92 However, one clarified that the victims are only actually made aware of the processes that are automatically available to them:

86 Survey of participant no. 10, victim support (7 June, 2011).
87 Survey of participant no. 6, legal practitioner (11 May, 2011).
88 Survey of participant no. 10, victim support (7 June, 2011).
89 Ibid.
90 Survey of participant no. 11, victim support (31 May, 2011).
91 Survey of participant no. 10, victim support (7 June, 2011).
92 Survey of participant no. 11, victim support (31 May, 2011). See also: Survey of participant no. 10, victim support (7 June, 2011).
All victims are advised about what is automatic for them, such as CCTV etc. For those provisions that are not automatic and need an application, they are only advised if the prosecutor (or [victim support worker]) thinks that they would be successful in the application and that it would assist them in giving evidence.93

This means that if the prosecutor or victim support worker does not inform the victim of the new provisions—and the prosecutor does not subsequently make an application on the victim’s behalf—the judicial officer will not have to consider it. So in practice, it is initially up to the prosecutor or support worker to determine whether the victim is likely to suffer further trauma. This assessment will determine whether the victim is informed of their right to give evidence at a pre-trial hearing.

Neither of the victims in the study gave evidence at a pre-trial hearing. One victim was not made aware of the process at all and stated that she didn’t ‘think it was available’.94 This was despite her trial being held almost four months after the introduction of the reforms. In the other case, the prosecutor offered to pre-record the victim’s evidence, but the victim declined because she had her ‘mind set on giving evidence in court’.95 This was because the police officer with whom she spoke told her that she would appear to be a strong witness if she gave evidence in the courtroom. And despite the fact that the victim support worker had told her that she shouldn’t give evidence in court. So although this victim was aware of the reforms, and that her evidence could be pre-recorded, an application was not made.96

Interestingly, one judicial officer in the study also referred to the view that witnesses appear stronger in the courtroom, despite research to the contrary as discussed in Chapter Six:

There is still a strong feeling that the evidence by CCTV is not as striking and effective as evidence in the courtroom. I have not seen research on this, but have a feeling that there may be some case to justify this.97

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93 Survey of participant no. 10, victim support (7 June, 2011).
95 Interview with participant no. 13, victim–witness (28 October, 2010).
96 Ibid.
97 Survey of participant no. 3, judicial officer (7 April, 2011).
This misconception resulted in the victim discussed earlier being further traumatised as a result of having to see the accused and testify in front of so many people. It could have been avoided if this belief did not continue to persist in the legal community.

As neither victim in my study was involved in a pre-trial hearing, I am not able to discuss its benefits from their perspective. However, victim support personnel were able to report on the benefits for victims. Victim support workers described the pre-trial hearing process as ‘stressful, [but] manageable’ and ‘streamlined and calmer’. It is reported to be very ‘organised’. ‘Both parties know what to expect’, and it provides victims and their supporters with ‘knowledge’ and ‘empowerment’ because they know ‘what is ahead’ and can feel some control over the process. ‘Victims finally feel they are not the ones on trial’. Having procedures in place for those more vulnerable was viewed as being ‘supportive’ of victims. One victim support worker reported that knowing that reforms have been put into place for them provides victims with ‘confidence in the criminal justice system’.

Victims who had been involved in a pre-trial hearing were reported to have been ‘very happy’ with the fact that they did not have to give evidence again at the actual trial: ‘they were glad that things were over and done with’. Victim support personnel also reported that victims were ‘more willing to become involved with the criminal justice system’. Furthermore, one victim support worker reported that (s)he had not seen any victims who gave evidence at a pre-trial hearing be recalled to give further evidence at the trial.

The question that arises at this point is how many, or what percentage of, victim-witnesses had an application for a pre-trial hearing made for them? One legal
practitioner reported that they have been involved in approximately 15 sexual assault trials involving adult complainants. Of these matters, two applications for pre-trial hearings were made, and both were made by consent. That is, the Defence did not object to the victim’s evidence being taken at a pre-trial hearing and so it was not necessary to argue in court why the pre-trial evidence should be given.108 Another victim support worker estimated that the prosecution ‘...don’t apply for the pre-trial hearing...in about 80 per cent’ of cases because ‘...there is no severe emotional trauma or they are not particularly intimidated or distressed’.109 At the prosecutorial stage, the prosecutor or victim support worker assess the victim’s eligibility for a pre-trial. This finding suggests that the filter is acting as more of a barrier to the special provisions than objections by the Defence or non-granting of the application by the judicial officer.

These findings suggest that the pre-trial hearing process provides many benefits for victims of sexual assault. However, there appear to be some issues with the process before this. These issues are resulting in the section not being utilised as often as it could be. Both victim–witnesses in my research were unable to experience the benefits of a pre-trial hearing. This was because they were either not informed that it was an option, or were convinced that giving evidence in court would be better for ‘their case’. Perhaps these issues are just teething problems and will be overcome with time. However, there is evidence in these findings that societal views about vulnerability, and the manner in which evidence is given, are affecting the implementation of this section.

**New section 40R—Who may be present at pre-trial hearing**

(1) Only the following people may be present in the courtroom at the pre-trial hearing:

(a) the presiding judicial officer;
(b) the prosecutor;
(c) the accused person;
(d) the accused person’s lawyer;
(e) anyone else the court considers appropriate.110

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108 Survey of participant no. 6, legal practitioner (11 May, 2011).
109 Survey of participant no. 10, victim support (7 June, 2011).
As discussed in the previous chapter, this section aims to reduce the number of people present at the pre-trial hearing and the level of trauma for victims. In only one reported matter did a judge discuss the application of this provision as it applied to non-disabled adult victims of sexual assault. Refshauge J, in *R v SH*, discussed the interpretation of section 40R which regulates who may be present at a pre-trial hearing. He stated that he did not ‘...regard the paragraph as enabling a wide range of persons to be present, and almost certainly not parents of mature accused persons...’ Refshauge J held that in addition to those listed in section 40R(1), those that were allowed to be present during the pre-trial hearing were the Judge’s ‘Associate, the Sheriff’s Officer...any ACT Corrective Services officers assigned to the trial...and the spouse of an accused person or the parents of a younger accused person’.

**New section 40T—Witness may be required to attend hearing**

(1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.

(2) The accused person may apply to the court for an order that the witness attend the hearing of the sexual offence proceeding to give further evidence.

(3) The court must not make the order unless satisfied that—
   
   (a) if the witness had given evidence in person at the hearing of the sexual offence proceeding, the witness could be recalled; and
   
   (b) it is in the interests of justice to make the order.113

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111 *R v SH; R v Vaughan; R v Chifuntwe (No. 1) [2010] ACTSC 157.*
112 Ibid, 9 (Refshauge J).
113 *Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40T.*
As discussed in Chapter Eight, this section provides a protection to the accused and his/her right to a fair trial. Again, although judicial officers and legal practitioners reported not having seen this section applied in practice, they were able to hypothesise about how it might be interpreted. One judicial officer outlined the importance of this section, as ‘...there may be a chance that the trial would be decided one way or another because of the absence of that additional evidence’.114

When asked how (s)he would interpret the meaning of ‘interests of justice’, one judicial officer stated that:

[Section] 46 of the *Evidence Act 1995* (Cth) provides for the recall of witnesses, and there is a view that the rule in *Browne v Dunn* may permit recall of witnesses in some other cases as well. I have never been asked to make an order under this section, but I suspect that if recall of the witness was available under the *Evidence Act/Browne v Dunn* tests, then it would usually be in the interests of justice to do so.115

Legal practitioners provided differing interpretations:

It would be seen as being in the interest of justice if it was necessary for the accused to obtain a fair trial.116

[It would have to be] something of relevance that would justify recalling the witness and [which] could prejudice a fair trial not to have the matter followed up with the witness—as the legislation states.117

At face value the provision is wide in the sense that the circumstances where someone may be recalled are broad, and the interests of justice are similarly broad. It would be expected however that the provision would be interpreted restrictively to limit the occasions where a person might be recalled.118

These responses highlight the indeterminacy of the section’s wording and illustrate how different people can interpret the one provision differently; thus resulting in an uneven application of the section.

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114 Survey of participant no. 3, judicial officer (7 April, 2011).
115 Survey of participant no. 2, judicial officer (27 April, 2011).
117 Survey of participant no. 5, legal practitioner (4 June, 2011).
118 Survey of participant no. 8, legal practitioner (26 April 2011).
When asked to hypothesise about when the section might actually be invoked in practice, legal practitioners essentially shared the same view. That is, that a victim would be recalled where new evidence became apparent after the witness had given evidence:

[A witness would be recalled] in circumstances when new evidence comes to light after the witness gives his/her evidence—generally that is the only time.\textsuperscript{119}

It is likely they would be recalled only if a new issue not raised in their evidence was raised by another witness.\textsuperscript{120}

**New section 40V—Recording of witness’s evidence at pre-trial hearing admissible in related hearing**

(1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.

(2) The recording is admissible as the witness's evidence in a related proceeding unless the court in the related proceeding otherwise orders.

(3) However, the court in the related proceeding may—

(a) refuse to admit all or any part of the audiovisual recording in evidence; and

(b) if the court refuses to admit part of the recording in evidence—order that the part that is not admitted be deleted from the recording.\textsuperscript{121}

As discussed in the previous chapter, this section aims to protect victims from the trauma of having to give evidence multiple times. However, the admissibility of this evidence is subject to acceptance by the court in the related proceeding. The wording of the section is similar to the equivalent section in Western Australia. It states that the judge at the related hearing may order that the witness attend the court for the purpose of giving further evidence to clarify the evidence on the visual recording.\textsuperscript{122}

One judicial officer stated the admissibility, or non-acceptance, of evidence under this section would be subject to the same test as under section 40T—the Evidence Act and

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\textsuperscript{119} Survey of participant no. 4, legal practitioner (18 July, 2011).
\textsuperscript{120} Survey of participant no. 6, legal practitioner (11 May, 2011).
\textsuperscript{121} Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40V.
\textsuperscript{122} Evidence Act 1906 (WA) s 106T(3).
Browne v Dunn tests. Other judicial officers and legal practitioners hypothesised that, in practice, the evidence could be rejected for several reasons:

Where there is a clear indication that the witness had been asked blatant leading questions or a suggestion of prompting by the questioners.

In circumstances when it is necessary to ensure the accused gets a fair trial and is able to canvass all issues with the witness.

If there is something unfair to the accused in the questioning of the witness (i.e. cross examination of witness, suggesting answer in question) then that part of the interview can be excluded. The prosecution would then need to lead evidence on the excluded area in the usual way.

Presumably it would be in the interests of justice to refuse where the factual paradigms differ between the 2 cases despite the relatedness (eg occurrence the issue in one case, and consent in the second).

If it prejudices the case in some way.

These findings demonstrate that if evidence is pre-recorded at a pre-trial hearing, there are still several opportunities for it to be challenged and reasons for it to be inadmissible in a related hearing. This reduces the intended effect of the section.

Revised section 43—Giving evidence from place other than courtroom

(1) This section applies if the courtroom where a sexual or violent offence proceeding is heard and another place are linked by an audiovisual link.

(2) The evidence of the complainant and each similar act witness must be given by audiovisual link from the other place unless the court otherwise orders.

(3) The court may make an order under subsection (2) only if satisfied—

(a) that—

(i) for the complainant—the complainant prefers to give evidence in the courtroom;...or

(b) if the order is not made—
(i) the sexual or violent offence proceeding may be unreasonably delayed; or
(ii) there is a substantial risk that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly.\textsuperscript{129}

As discussed in the previous chapter, the use of CCTV aims to reduce the trauma of a trial for victim–witnesses. Victims do not have to testify in the courtroom and are unable to see the accused through their monitor. However, under this section, the court retains the power to make an order that the victim give evidence in person.

The section applies to all victims of sexual assault, including adults, and so is more inclusive than the equivalent provisions in Queensland and Tasmania. However, the ACT has not come quite as far as Victoria and Western Australia. Those jurisdictions provide for an unrestricted right to CCTV unless otherwise requested by the victim. The Victorian legislation appears to be the most determinate. As I discussed in Chapter Six, however, research suggests that it has not been entirely successful. Child victims in sexual offence matters are often still required to give evidence in court.\textsuperscript{130}

This does not appear to be the case in the ACT. Participants in my study reported that CCTV is routinely used; and most of them had not seen an order made under this section for the victim to appear in court. Judicial officers and legal practitioners indicated that the only time the use of CCTV might be challenged is ‘...when there is some particular characteristic of the witness (such as size) which cannot be adequately assessed from the audiovisual transmission’.\textsuperscript{131} Alternatively, the use of CCTV could be challenged where ‘it could be said the jury or judge could not assess the witness unless they see his/her body language etc.’\textsuperscript{132}

Only one judicial officer reported that (s)he had made an order under this section, and it was for this exact reason:

\textsuperscript{129} Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 43.
\textsuperscript{130} Nicky Friedman and Margaret Jones, ‘Children giving evidence of sexual offences in criminal proceedings: special measures in Australian States and Territories ’ (2005) 14 Journal of Judicial Administration 157.
\textsuperscript{131} Survey of participant no. 3, judicial officer (7 April, 2011).
\textsuperscript{132} Survey of participant no. 4, legal practitioner (18 July, 2011).
I have made an order under [section] 43 once, in a violent offence proceeding. The order was sought by the Defence, who were planning to raise self-defence and wanted the jury to be able to see the respective sizes of the relatively slight accused and the rather bigger complainant. I was inclined to the view that this did raise an issue of fairness that might justify making the order, but in the event the complainant was willing to give evidence in person so the order was made, in effect, by consent. This meant that I didn't hear the accused's fairness arguments in favour of the order or any opposing arguments from the complainant, and didn't have to reach a conclusion on the fairness point.¹³³

Victim support personnel reported that victims who gave evidence via CCTV were ‘...able to speak with more confidence and certainty knowing they couldn’t see the accused but [knowing] they could hear them tell their story’.¹³⁴ The victim–witness in my study who used CCTV supported this view:

I chose not to see the accused and this was definitely the best option. Unfortunately when the trial finished we went out at the same time as the accused and I saw the accused and started crying at having to see him. Absolutely best avoided. Best avoided due to horrible feelings towards accused. Too confronting seeing accused.¹³⁵

This victim highlights the benefits of CCTV and the importance of protecting the victim from seeing the accused. It also demonstrates that perhaps more internal policies need to be in place to prevent victims from seeing the accused outside of the courtroom.

How are the new indeterminate sections of the *Magistrates Court Act 1930* (ACT) working in practice?

New subsection 90AA(8)—Written statements may be admitted in evidence

...a person must not be required to attend and give evidence at a committal hearing in relation to a sexual offence (whether or not the hearing also relates to another offence) if the person is a complainant in relation to the sexual offence.¹³⁶

As mentioned previously, this provision introduced the idea of a ‘paper committal’ for sexual offence prosecutions, aiming to reduce the number of times victim–witnesses

¹³³ Survey of participant no. 2, judicial officer (27 April, 2011).
¹³⁴ Survey of participant no. 11, victim support (31 May, 2011).
¹³⁶ *Magistrates Court Act 1930* (ACT) s 90AA(8).
have to give evidence.

This section is one of the few mandatory sections introduced. It prohibits absolutely the attendance of victims of sexual assault at the committal hearing. The wording of this provision is most similar to that in the Northern Territory and Western Australia—the jurisdictions that currently provide the most protection in terms of committal processes to adult victims of sexual assault in Australia. The exclusion of judicial discretion from this provision means that victims can never be cross-examined at the committal hearing and prevents the abuse of process that has been identified in Victoria. There, although complainants in sexual offence trials could not be cross-examined at committal without leave of the court, applications are routinely made, and leave routinely granted.\footnote{137}{Victorian Law Reform Commission, 'Sexual offences: final report ' (July 2004) 155–156.}

To illustrate the advantages of this provision, I asked the victim–witness and victim support personnel participants about their committal hearing experiences and the experiences of those they had worked with.

Both victim–witnesses were required to give evidence at a committal hearing before the reforms were implemented. They described the committal hearing process as:

Horrible—definitely not worth experiencing. Would never want to go through it again.\footnote{138}{Survey of participant no. 14, victim–witness (26 July, 2011).}

Revisiting [the experience]—bringing up bad experience and memories.\footnote{139}{Ibid.}

Lonely [and] unsupported, not able to talk openly to people about it.\footnote{140}{Ibid.}

Long and unnecessary—the questions were unnecessary. They were questioning my memory here and now when it was already written in my statement. My statement was much more accurate. They were just questioning my memory.\footnote{141}{Interview with participant no. 13, victim–witness (28 October, 2010).}

They were frustrated with the style of the committal hearing process and their lack of ability to tell their story:
Obviously you can only answer the questions you have been asked. I liked talking about my feelings surrounding the incident and how it affected me personally. This is because my feelings surrounding the incident were the worse part of what happened. The court is obviously not so caring about how I feel but instead how my situation fits into their framework that they have come up with. Obviously the court’s framework is not fool proof or otherwise guilty people would be charged and dealt with appropriately.

I did not get to tell my story wholly, no. At the committal I tried to tell my story by going off on a tangent when the Defence lawyer asked me a question, and this resulted in more questions as to inconsistencies and credibility. I hadn’t learned to just answer the Defence questions succinctly. I felt that the Defence were controlling my story and they were going to take it where they wanted to take it. Some of the Prosecution’s questions allowed me to tell parts of my story, but I never felt that the whole of my story got across.

Victim support personnel explained the reasons behind these feelings of frustration felt by the victims:

[At the committal hearing] they were guided as to what they can and can’t say and often felt that they were not able to explain things properly.

...this is usually because [the] Prosecution usually walks them through their statement whilst the Defence Lawyers try to discredit the victim and refute the statement of facts, usually through cross examination.

 Victims often felt that they did not get to tell their story to the court as they were restricted by the rules of evidence such as relevance, not being able to mention uncharged acts etc.

Victim support workers described the process from the eyes of a victim, and reported that it was often scary, repetitive, unnecessary, stressful, overwhelming, prolonged,

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143 Interview with participant no. 13, victim-witness (28 October, 2010).
144 Survey of participant no. 10, victim support (7 June, 2011).
145 Survey of participant no. 11, victim support (31 May, 2011).
146 Survey of participant no. 12, victim support (31 May, 2011).
frustrating, traumatic, discouraging and unfair:147

...people were very fearful of giving evidence...they had to repeat themselves over and over...they had already given a statement and had to give evidence at trial as well...people often had sleepless nights...it was a very new experience for them.148

[The] Criminal Justice System takes too long...[it is stressful] not knowing what is ahead...[there are] recurrent adjournments...[the] prospect of having to give evidence [and] having to come into contact with family and friends of those that have harmed you [is frightening and scary].149

...the process of giving evidence, reliving the incident and having to face the offender’s legal counsel was traumatic. [The committal was] like an exam—victims were asked to retell their story in exacting detail and then they were aware that if they differed from their statement it would be used against them to discredit their story, no matter how minute the difference could be. The committal often was the undoing of a victim as they would decide that they would not face going through the same process again at trial and so would withdraw from the matter after committal. Victims often expressed that it was not fair that they had to make a statement, then give evidence at committal and all the while the defendant did not have to say anything or be subjected to any questioning if they did not want to be. They thought this was very unfair.150

Victim–witnesses also reported feeling ‘anxious [and] nervous’ about the whole experience and process and ‘unprepared, [not] knowing what to expect’ before the committal hearing.151 One victim reported that the process was ‘emotionally draining [and] difficult to deal with as you can’t talk to many people about it to cope’. This victim highlighted the fact that, for many victims, these feelings are usually felt on top of the original feelings resulting from the assault.152 This victim was ‘...dealing with PTSD [which] required counselling/psychologist and antidepressants and dealing with every

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147 Survey of participant no. 10, victim support (7 June, 2011); Survey of participant no. 11, victim support (31 May, 2011); Survey of participant no. 12, victim support (31 May, 2011).
148 Survey of participant no. 10, victim support (7 June, 2011).
149 Survey of participant no. 11, victim support (31 May, 2011).
150 Survey of participant no. 12, victim support (31 May, 2011).
151 Interview with participant no. 13, victim–witness (28 October, 2010); Survey of participant no. 14, victim–witness (26 July, 2011).
day life on top of [the] court process'. One victim reported that, following the committal hearing, she wasn’t sleeping, was drinking excessively, was angry, had depression and nightmares, and didn’t feel safe to go out at night.

Victim support personnel reported that the committal hearing process ‘brought all of the negative thoughts up and was not good for their wellbeing’. They reported that, generally speaking, the process was detrimental to the victim–witness’s wellbeing:

In some cases the psychological wellbeing [of the victim] was compromised in ways such as relationship issues, not being able to function properly at school or work, victims become reclusive and in some extreme cases internal relationships collapse.

Victims often found that the committal impacted on their wellbeing so negatively that any progress made in their healing after the sexual assault was totally undone. Victims often reported experiencing flashbacks, panic attacks, sleeplessness, loss of appetite before and after the committal.

Most people did not find the process positive as they knew they had to give evidence again at trial.

The victim–witness participants also highlighted their dread of the trial process following their experience at the committal: ‘[I just wanted] it to be over. The whole process is way too drawn out [and] invasive by the lawyer of the committed’.

The victim support personnel confirmed that most victims have these feelings and that they often result in the trial being discontinued because victims do not want to go through the process again:

Most people would much prefer to not give evidence at all let alone twice.

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154 Interview with participant no. 13, victim–witness (28 October, 2010).
155 Survey of participant no. 10, victim support (7 June, 2011).
156 Survey of participant no. 11, victim support (31 May, 2011).
157 Survey of participant no. 12, victim support (31 May, 2011).
158 Survey of participant no. 10, victim support (7 June, 2011).
160 Survey of participant no. 10, victim support (7 June, 2011).
This was a major factor in victims withdrawing from the Criminal Justice System. They felt they were on trial—not the alleged offender.161

Oftentimes victims would say that they were not prepared to give evidence again as they knew their evidence from committal would be used against them to poke holes in their story. Victims who were going to trial after the new reforms who had participated in committals prior often said that they wished they had not had to give evidence at committal. A small number did say that the committal assisted them to know what to expect at trial, but often times this was not a positive.162

The process was taking too long for them and they just wanted to move on with their lives. Others found giving evidence at committal so hard that they did not want to go through it again.163

...in most cases victims step away from the Justice System because of the length it takes from beginning to end along with having to give evidence on more than one occasion.164

Reasons included being scared, not wanting to relive the assault, not wanting to be questioned. Cross-examination was always a major concern for victims, particularly when they had experienced it at committal and felt that they had been attacked. I often had victims call me on the day they were expected to be at court to give evidence to say that they could not go through with it as they were too scared. Victims were often concerned that it has taken too long to get to trial and they wanted the matter over and done with so that they would cease focusing on the matter and be able to try to move on with their lives.165

When asked if they ever considered having the trial discontinued, both victims in my study answered in the affirmative. One victim stated that she was frustrated by the committal hearing process because she ‘wanted answers’ and it didn’t give her ‘any answers’.166 She also reported that the Defence counsel scared her and that she was ‘afraid of going through it again’; ‘the stress and strain of the whole process made me

161 Survey of participant no. 11, victim support (31 May, 2011).
162 Survey of participant no. 12, victim support (31 May, 2011).
163 Survey of participant no. 10, victim support (7 June, 2011).
164 Survey of participant no. 11, victim support (31 May, 2011).
165 Survey of participant no. 12, victim support 31 May, 2011).
166 Interview with participant no. 13, victim–witness (28 October, 2010).
feel like not going through with it’.

The second victim–witness participant highlighted the same issues:

The thought popped into my head because it is a long and lengthy process requiring strength and persistence. Also very little chance of going through the court unfortunately. However I wanted to be strong and follow through with my instincts and what I felt was right. The process was my way of having a say and me standing up for what is right. In some ways more anxiety was created going through the process as opposed to not going through it. However I think I have also overcome a lot of anxiety and issues surrounding my experience from going through the court process.

The new section 90AA(8) of the Magistrates Court Act attempts to deal with these issues by removing the concept of a committal hearing for all victims of sexual assault. In doing so, victims will no longer be exposed to most of the above feelings at the committal hearing stage. It is likely, however, that most of these feelings will still be experienced at the time of the trial. So, although the new provision does not eliminate the risk of victims’ negative experiences, it does reduce the number of times that they have to experience them. The legislature hopes that this, in turn, will decrease the number of victim-initiated discontinuances.

**Have the changes made to Section 41 of the Evidence Act 1995 (Cth) resulted in more questions being disallowed?**

As I discussed in Chapters One and Five, the Evidence Amendment Act 2008 (Cth) came into force at around the same time as the Sexual and Violent Offences Legislation Amendment Act 2008 and amended the Commonwealth Evidence Act. This Act also aimed to reduce the trauma of a trial for victim–witnesses by amending the Evidence Act 1995 (Cth), most importantly section 41. This now makes it mandatory for judicial officers to intervene where they are of the opinion that a question put to the victim–witness is ‘improper’. The amending Act also broadened the definition of improper questions, and now includes questions that are ‘misleading or confusing…unduly annoying, harassing, intimidating, offensive, humiliating or

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167 Interview with participant no. 13, victim–witness (28 October, 2010).
169 Evidence Act 1995 (Cth) s 41(1).
repetitive...belittling, insulting or otherwise inappropriate’.\textsuperscript{170} 

Because the two pieces of legislation have similar aims, it was important to this research to discover what effect, if any, these Commonwealth changes had on sexual assault trials. This effect needed to be investigated as the results may have meant that the overall reduction, or not, of trauma for victims of sexual assault could also be partially attributed to these changes.

All judicial officers surveyed stated that the changes to the wording of section 41 have not resulted in them disallowing more questions. One judicial officer provided an interesting explanation about his belief for the lack of change: ‘I am always a little conscious that the Appeal Court is not necessarily composed of judges who understand the need to protect witnesses’.\textsuperscript{171}

One legal practitioner stated: ‘...section 41 does provide a useful mechanism to challenge inappropriate questions, and I do rely upon it when necessary’.\textsuperscript{172} However, all legal practitioners surveyed confirmed the view that the changes have not resulted in more questions being disallowed. The legal practitioners provided various explanations for the inefficacy of the new provisions:

Any counsel properly applying the Bar Rules would have no need of the legislation ...most counsel are competent and would not be so inept as to handle a witness so as to offend the rule. \textsuperscript{173}

We have to explore everything and judges understand many of the accused rights have been eroded by the new legislation. Generally defence has good rein to ask many questions and explore all issues.\textsuperscript{174}

Practitioners do need to be aware of the provision in order for it to be of use.\textsuperscript{175}

Questioning needs to be relevant to an issue in the proceedings.\textsuperscript{176}

\textsuperscript{170} Evidence Act 1995 (Cth) s 41.
\textsuperscript{171} Survey of participant no. 3, judicial officer (7 April, 2011).
\textsuperscript{172} Survey of participant no. 6, legal practitioner (11 May, 2011).
\textsuperscript{173} Survey of participant no. 9, legal practitioner (10 April, 2011).
\textsuperscript{174} Survey of participant no. 4, legal practitioner (18 July, 2011).
\textsuperscript{175} Survey of participant no. 6, legal practitioner (11 May, 2011).
\textsuperscript{176} Survey of participant no. 7, legal practitioner (27 April 2011).
What is disallowed under s 41 are the sorts of cross examination unlikely to be effective in any event.177

Although these responses were received from a small portion of the legal community, all participants agreed that the changes made to section 41 of the Evidence Act have had no effect. This accords with the research discussed in Chapter Five, which indicates that the restrictions are rarely applied and fail to protect vulnerable witnesses.178 The findings in this study also accord with those of Boyd and Hopkins’ NSW study in 2010. It found that following the amendments there was no increase in the number of times the section was invoked. The responses of the prosecution and Defence barristers indicated that this was because improper questions, in their view, were not generally being asked before the enactment of the new section.179 The practitioners’ responses in their study also indicated that the section had not resulted in a change in questioning approach for the same reason: ‘...improper questions were not and are not generally being asked’.180 Interestingly, this contradicts victim reports and research, which illustrate that victims are often subjected to humiliating and distressing questioning on the stand.181

The findings in this research about the effect of the changes made to section 41 suggest that they have played no part in reducing victim–witness trauma. It is fair to assume that any reduction in trauma for victims of sexual assault in the ACT can be attributed to the changes made by the Sexual and Violent Offences Legislation Amendment Act.

177 Survey of participant no. 8, legal practitioner (26 April 2011).
180 Ibid., 163.
Summary

My findings in this study show that some of the provisions for non-disabled, adult victims of sexual assault—such as CCTV and support people—are strictly applied and working well. However, several provisions are very indeterminate and are being interpreted differently by different judicial officers and prosecutorial personnel. Further, these victims are required to demonstrate vulnerability or distress to be eligible for some of the protections. The prosecutor or victim support worker must perceive the victim as vulnerable before informing them and making an application. They are then required to overcome further hurdles—such as obtaining expert reports for the trial—in order to convince the judicial officer.

Judicial officers said that they would make an equal assessment of victim and offender rights when determining whether to close the court. However, lawyers reported that these orders are rarely sought and rarely made. This was despite my findings that victim–witnesses would nearly always prefer it. The provisions providing for the use of screens in court are also reportedly rarely used in practice—despite the reported benefit to victims. In one case, screens were not available even though the victim asked specifically for them. It is unclear from my study why these provisions are not being used. But as a result, they are not having their intended effect of protecting victims from further trauma.
Chapter 10

Conclusion

In this study I focused on the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) (SVOLAA). The findings were based on interviews and surveys of those closest to the reforms and those working within the system on which the reforms have had an impact. It involved contact with members of the Australian Federal Police, the ACT Office of the Director of Public Prosecutions, the ACT Supreme Court, the Office of the Victims of Crime Coordinator, the University of Canberra, the Canberra Rape Crisis Centre, ACT Forensic and Medical Sexual Assault Care, as well as judicial officers, legal practitioners, victim support personnel and victim–witnesses. The study provides an in-depth analysis of the impact of legislative reform on sexual assault trial practice and procedure. It demonstrates that the effects of sexual assault law reform are complex and dependent upon a range of sociological, legal and procedural considerations.

Research from other jurisdictions suggested that changes to trial procedure such as the ones examined in this study had little impact in practice and that victims continued to be unprotected by the criminal justice system. This study offered an important opportunity to explore the background to similar changes made in the ACT and gather a preliminary view of how they are working in practice.

Sexual assault mythology

As discussed in Chapter One, prevailing notions of sexuality and sexual behaviour come from a stereotypical definition of ‘real’ or ‘legitimate’ rape and stereotypical constructions of the ‘good’ victim and ‘reasonable’ responses. Sexual assault myths continue to permeate society and judicial officers and legal practitioners, as members of society, continue to be influenced by them. As a result, indeterminate or ‘grey’ legislation

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that requires judicial and/or prosecutorial discretion in its application continues to be interpreted and implemented in this context. This means that victims who do not conform to the societal view of normal or ‘real’ rape may slip through the gaps and be left unprotected by the legislation.

**Legal indeterminacy**

Chapter One also provided an overview of legal indeterminacy and its purpose in Australian law. A variety of legal theorists agree that at some stage, to some extent, indeterminacy in the law must exist and a court must make a decision that is not dictated in writing. However, although judicial discretion is never absolute, it is exercised within a broader legal and social context. This context is susceptible to influence by sexual assault myths and permeated with gender biases.

**The principle of a fair trial**

Chapter Three illustrated the amorphous nature of Australia’s right to a fair trial and how it exists within and beside ACT human rights statutes and international treaties. In this chapter I demonstrated that—in the absence of any legislation providing for the right to a fair trial in Australia—the constitutional status of the right to a fair trial in Australia is implicit at best. However, I argue in this study that the right of an accused to receive a fair trial is a fundamental element of the criminal justice system in Australia; and it applies whether or not there is a constitutionally implied right to a fair trial.

Furthermore, Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*; and the ACT now has its own *Human Rights Act* (HRA). Both of these provide for the right to a fair trial. It must be noted, however, that the *ICCPR* is not legally enforceable, and that the *HRA* does not confer legally enforceable rights on individuals as such. Rather, it requires the courts to interpret other ACT legislation in a way that is compatible with the *HRA*.

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4 Ibid., s 30.
Trauma and re-trauma

In Chapter Four I explored how victims of sexual assault are more likely than not to suffer from Rape Trauma Syndrome; and to experience symptoms that are very severe compared to other forms of Post Traumatic Stress Disorder. Further, victims of sexual assault are not only victimised by the perpetrator, but also by the legal system, and often more than once. The trial may be an extremely traumatic experience for victims. It often violates their rights to be treated with courtesy, compassion and respect, as afforded to them by the legislation and international doctrines discussed in Chapter Three.

Legislative reforms to cross-examination substance

In Chapter Five I discussed the legislative changes enacted in all Australian jurisdictions to help protect victims of sexual assault from being re-traumatised by the questions asked whilst giving evidence. I discussed the legislative reforms surrounding evidence of victims’ sexual reputation and experience and highlighted the discretionary wording of the reforms. This illustrated that while the myths surrounding sexual assault and male and female sexuality continue to permeate our society, having legislation that is discretionary allows common beliefs and misconceptions to influence its application. The effect of societal views was also highlighted in terms of the restriction on the use of improper questions during cross-examination. It appears that it does not much matter whether the legislation imposes a duty on the judge to intervene or not. If the judge does not perceive a question to be improper, it will not be disallowed.

Legislative reforms to cross-examination procedure

In Chapter Six I outlined and discussed changes to the trial process in other jurisdictions that were similar to those made by the SVOLAA. The research indicated that although plenty of modifications have been made to the legislation governing the cross-examination process, the changes on paper do not always translate into practice. Legislative changes around Australia have been very extensive, but different, and the language of many of the reforms is indeterminate. This requires much judicial discretion which, in turn, reduces the efficacy of the amendments.
The history of cross-examination procedure law reform in the ACT

In Chapter Seven I provided a history of legislative reform in the ACT and the process and politics behind the enactment of the SVOLAA. The survey findings in this chapter demonstrated that the reforms resulted from several years of lobbying, research and consultation with relevant agencies. For the legislation to succeed an influential person, or a group of influential people—with a vested interest in sexual assault law reform—needed to advocate publicly for the legislation. Despite the support of those with a vested interest, though, the legislation was drafted so that it is very indeterminate in sections. This was not recommended in the by the SARP Reference Group or in The Challenge of Change report.

A new legislative framework for the Australian Capital Territory (ACT)

In Chapter Eight I focused on the most recent and substantial reforms introduced in the ACT by the SVOLAA. This piece of legislation introduced fundamental changes to sexual assault trial procedure for victims of sexual assault. In part, these reforms extended those facilities already available to children and intellectually impaired victims. However, they also introduced a few brand new concepts that were intended to apply more broadly. These included changes to the committal hearing process, the introduction of a pre-trial hearing for certain classes of victims and a prohibition on cross-examination by a self-represented accused. The reforms aimed to:

...achieve the dual objectives of treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused.5

They were ‘...designed to extract the “best” evidence possible from witnesses who may otherwise suffer a disadvantage’.6 The changes aimed to address many of the concerns raised by those advocating for a less traumatic criminal justice experience for sexual assault victim–witnesses.

The most notable changes made by this piece of legislation included:

5 Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
6 Ibid.
• permitting victims who give evidence in court to be screened from the accused
• prohibiting cross-examination by an unrepresented accused
• providing for victims to have a support person present whilst they give evidence
• giving the court the power to close the court while the victim gives evidence in certain circumstances
• the introduction of a special pre-trial hearing for certain witnesses; and
• changing the committal hearing to a paper-based hearing.

Chapter Eight also demonstrated that although the Act contains all but one of the recommendations, the amendments contain ample grey areas, despite victim support agencies arguing for none. There is also a lack of direction in the process. The majority of the provisions of the amending Act were drafted indeterminately using grey wording or concepts such as ‘may’, ‘in the interests of justice’ and ‘the court considers’. Research participants indicated that due to the absence of strict guidelines or mandating legislation, applications for special provisions are not always made and that many victims who could have been further protected are not.

**Vulnerable witnesses?: The impact of the reforms**

In Chapter Nine I outlined legal practitioners’, judicial officers’ and victims’ views of the implementation of the **SVOLAA**. This chapter demonstrated that some of the provisions are strictly applied and working well. However, several of the provisions—as applied to adult victims of sexual assault who are not intellectually impaired—are very indeterminate. Different judicial officers and prosecutorial personnel are interpreting these provisions differently. Further, victims who fall into the category of non-disabled, adult victims are required to demonstrate vulnerability or distress to be eligible for some of the protections. The wording of the new provisions means that there is an extra hurdle for this category of victim and that their further protection is subject to the interpretation and influence of prosecutorial and judicial views.

This leads to the underlying questions of whether the aims of the legislation have been actualised. I look at this next.
Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) significantly altered the trial process for victims of sexual assault?

The responses to this question varied greatly between and within those provided by the different respondent groups. Two judicial officers surveyed stated that they were unable to provide a response. The third indicated that the trial process for victims has not been significantly altered at all.

Legal practitioners’ responses were mixed, although they generally agreed that the process has been altered to some extent:

[The process] takes longer and there are more problems with it.

The changes have not been in place long enough to make full comment in relation to this. There have been improvements, but it is difficult to say whether they have 'significantly altered' the trial process. The limitation on the number of times complainants have to give evidence (via the changes to paper committal and use of pre-recorded evidence) is of significance.

In practice the trial is [now] divided in two. It seems to me that the defence is likely to be disadvantaged when significant delay occurs between interview and opportunity to question. More consideration needs to be given to regulating the questioning of complainants.

The major feature is the continuance of the remote giving of evidence. This was present before the enactment.

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7 Survey of participant no. 1, judicial officer (1 June, 2011); Survey of participant no. 2, judicial officer (27 April, 2011).
8 Survey of participant no. 3, judicial officer (7 April, 2011).
9 Survey of participant no. 4, legal practitioner (18 July, 2011).
10 Survey of participant no. 6, legal practitioner (11 May, 2011).
11 Survey of participant no. 7, legal practitioner (27 April 2011).
12 Survey of participant no. 8, legal practitioner (26 April 2011).
The victim support personnel surveyed indicated that, from their perspective, the process has only changed ‘in relation to people being able to give evidence earlier’;\textsuperscript{13} and victims being ‘more willing to participate in the process’.\textsuperscript{14} One support worker noted, however, that the changes have ‘sped up the process’.\textsuperscript{15}

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) alleviated the trauma of a trial for sexual assault victim–witnesses?**

The main aim of these reforms was to alleviate the trauma of a trial for all victims of sexual assault. The victim–witnesses in this study described the trial process as scary, overwhelming, intense,\textsuperscript{16} hopeless, angering, long, enduring, complex and confusing.\textsuperscript{17} One victim described the feelings of hopelessness while being cross-examined:

> The process was hopeless. I felt that it was a joke because it felt like it wasn’t going anywhere and wasn’t achieving what I had hoped it would achieve. They continued to go over the same questions and I felt that it didn’t matter what they said, it wasn’t going to change what happened—I knew the truth (and so did he). They were going to make what they wanted of it.\textsuperscript{18}

The victims also illustrated the impact that the trial itself had on their wellbeing:

> [The trial] made every day life more difficult and challenging. Harder to concentrate. Not able to talk to people openly. Difficult to go to work and get on with it at times. Impacted on my relationship with my boyfriend by adding stress to the relationship. At times I withdrew from people, so I could deal with my own feelings and cope without the added stress of their opinions.\textsuperscript{19}

> [As a result of the trial I] was not sleeping, lost a lot of friends, I had nightmares, depression, lots of anger, and moodiness. [However] the process of talking to people about

\textsuperscript{13} Survey of participant no. 12, victim support (31 May, 2011).
\textsuperscript{14} Survey of participant no. 12, victim support (31 May, 2011).
\textsuperscript{15} Survey of participant no. 12, victim support (31 May, 2011).
\textsuperscript{17} Interview with participant no. 13, victim–witness (28 October, 2010).
\textsuperscript{18} Ibid.
\textsuperscript{19} Survey of participant no. 14, victim–witness (26 July, 2011).
it and being heard was very validating because I got to tell my story and people—the police and DPP—understood and believed me.\textsuperscript{20}

The victim support personnel surveyed confirmed that these are the experiences of most victims. They described the trial process as scary, unnecessary, overwhelming,\textsuperscript{21} frightening, stressful, long, confusing, painful,\textsuperscript{22} traumatic, discouraging, debilitating and abusive.\textsuperscript{23} One support person stated that:

\begin{quote}
...people are very fearful of giving evidence...they have to repeat themselves over and over...they have already given a statement and have to give evidence at trial as well...people often have sleepless nights...it is a very new experience for them'.\textsuperscript{24}
\end{quote}

Another highlighted how confusing and painful it is for victims: ‘[it is] confusing ...with both sides arguing on points of law and requesting adjournments [and] painful...[the] bringing up of painful memories’.\textsuperscript{25}

One victim support worker stated that victims ‘often spoke of feeling like they had been re-assaulted or that the trial process was worse than the assault. A ‘not guilty’ verdict always put a victim’s recovery back and not once did a victim say that it was worth going to trial when the defendant was found not guilty.’\textsuperscript{26}

So did the legislative changes alleviate the traumatic experience and effect of the trial for victims? There were mixed responses from participants as to whether this legislative aim has been fulfilled; although many noted that the changes have not been in place long enough to make an absolute response.

Judicial officers were reluctant to give a definitive answer to this question:

\begin{quote}
Not able to say—some witnesses appear more comfortable but that is a very subjective impression.\textsuperscript{27}
\end{quote}

I had conducted two sexual assault trials before 1/6/09. In both cases the complainants

\begin{itemize}
\item \textsuperscript{20} Interview with participant no. 13, victim–witness (28 October, 2010).
\item \textsuperscript{21} Survey of participant no. 10, victim support (7 June, 2011).
\item \textsuperscript{22} Survey of participant no. 11, victim support (31 May, 2011).
\item \textsuperscript{23} Survey of participant no. 12, victim support (31 May, 2011).
\item \textsuperscript{24} Survey of participant no. 10, victim support (7 June, 2011).
\item \textsuperscript{25} Survey of participant no. 11, victim support (31 May, 2011).
\item \textsuperscript{26} Survey of participant no. 12, victim support (31 May, 2011).
\item \textsuperscript{27} Survey of participant no. 1, judicial officer (1 June, 2011).
\end{itemize}
gave evidence by audiovisual link from a remote witness room. I have not yet presided over a trial under the new provisions in which either pre-trial evidence or a police interview was admitted instead of evidence given during the trial, so I’m not in a position to assess trauma levels under new and old schemes, but in my limited experience every complainant reacts differently and it would require one to hear a lot of such cases before generalisations could be made, which would be in the nature of whether people seem more or less distressed at [for example] a police interview than they used to at the time of the trial.28

Many of the practitioners surveyed were also unable to be conclusive in their answers because of the limited time the provisions have been in practice:

The changes have not been in place long enough to make full comment in relation to this.29

I have not prosecuted such a case since these provisions have been in place.30

It is probably easier not having to face the alleged offender. However, the provisions do assume the defendant is guilty of the offence.31

The primary theme that arose from the question about the effect of the legislation was that the reforms have the potential to be effective. When asked whether the reforms appear to alleviate the trauma of a trial for sexual assault victim–witnesses, research participants were generally in agreement that there has been some improvement:

I think that witnesses often have a real fear of being in the same room as the accused. This has now improved. They appear to feel safer in giving the evidence from a distance.32

...the change to paper committal proceedings removes the need for complainants to give evidence both at committal and trial, which is a significant improvement. The ability for sexual assault witnesses to give pre-recorded evidence also helps to alleviate the trauma

28 Survey of participant no. 2, judicial officer (27 April, 2011).
29 Survey of participant no. 6, legal practitioner (11 May, 2011).
30 Survey of participant no. 7, legal practitioner (27 April 2011).
31 Survey of participant no. 9, legal practitioner (10 April 2011).
32 Survey of participant no. 3, judicial officer (7 April, 2011).
associated with lengthy delays, although the need to establish trauma or distress as a criterion places a limitation on the utility of this provision.  

Many more people are entitled to pre-trial hearings which make people much more comfortable about giving evidence. Some people have stated they would not have given evidence if they didn’t have CCTV.

Victims are more willing to engage in the Criminal Justice System knowing that special provisions are now made for them.

Pre-recording is a real positive, if only it could be utilised more often. The fact that victims do not have to give evidence at committals is a real positive. Pre-recorded children’s evidence and cross is fantastic.

However, as I discussed earlier, prosecutorial and judicial discretion may mean that the new provisions are not actually used as often as they could be for non-disabled, adult victims. This means that more victims might feel encouraged to engage with the system and are no longer discouraged by their committal experiences. However, about 80 per cent of the time, non-disabled adult victims are not experiencing the significant benefits of a pre-trial hearing.

Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) maintained the accused’s right to be tried fairly?

It must be noted again that the amending legislation aimed to reduce the trauma of a trial for victims of sexual assault. However, as I discussed in Chapter Two, it aimed to do this without prejudicing the accused’s ‘right’ to a fair trial. The judicial officers surveyed were confident that this right had been maintained despite the changes, although, again, they were careful to explain that there have not been many trials to test it:

An accused has a right to a fair trial. The changes have not derogated from that right.

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33 Survey of participant no. 6, legal practitioner (11 May, 2011).
34 Survey of participant no. 10, victim support (7 June, 2011).
35 Survey of participant no. 11, victim support (31 May, 2011).
36 Survey of participant no. 12, victim support (31 May, 2011).
37 Survey of participant no. 1, judicial officer (1 June, 2011).
I haven't observed any threat to this right, but as indicated have only conducted a handful of relevant trials.\(^{38}\)

The legal practitioners were less confident. Not surprisingly, all Defence practitioners surveyed indicated that the accused’s right to a fair trial has been diminished to some extent:

I think it has eroded some aspects of the fair trial. A jury should be able to see the witness completely and not via TV. Most cases are word on word and body language is so important to assess credibility.\(^{39}\)

It’s early days, but I am concerned that the testing of a young complainant’s testimony has been compromised when (as is in practice usual) there is a long delay between police interview and defence counsel’s opportunity to cross-examine.\(^{40}\)

There is a distinct disadvantage to the accused in the complainant giving evidence other than before the court. Cross-examination is less effective and, regardless of any warnings, the message is communicated clearly that the complainant is a genuine victim. This inherently undermines the presumption of innocence.\(^{41}\)

There is a significant danger that treating the evidence of the accuser in this way will be unfair as there is a danger of a perception arising that the accused is guilty—it flies in the face of the presumption of innocence.\(^{42}\)

The opinion of the one legal practitioner who worked for the DPP was in line with those of the judicial officers surveyed: that the accused’s rights were maintained despite the changes.

**Have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) contributed to improving the quality of sexual assault victim–witness evidence?**

Yet another aim of the legislation was to ‘...extract the “best” evidence possible from witnesses who may otherwise suffer a disadvantage’.\(^{43}\) Overall, judicial officers and legal practitioners responded that this aim has not been fulfilled:

\(^{38}\) Survey of participant no. 2, judicial officer (27 April, 2011).
\(^{39}\) Survey of participant no. 4, legal practitioner (18 July, 2011).
\(^{40}\) Survey of participant no. 5, legal practitioner (4 June, 2011).
\(^{41}\) Survey of participant no. 8, legal practitioner (26 April, 2011).
\(^{42}\) Survey of participant no. 9, legal practitioner (10 April, 2011).
No—[it is the] same evidence—just taken differently.\textsuperscript{44}

It's too early to say. However I doubt it.\textsuperscript{45}

No. The changes allow less effective challenge to a complainant and thereby degrade the overall quality of the evidence before the court. Diminishing the testing of evidence diminishes its quality.\textsuperscript{46}

No—it is much harder to appear "real" on a tv.\textsuperscript{47}

However, again the legal practitioners’ responses differed between those who worked as Defence counsel and those who worked for the DPP. The one participant from the DPP stated:

The changes have not been in place long enough to make full comment in relation to this. Certainly, the ability for witnesses to give evidence early is likely to improve the quality of evidence as it is given closer in time to the offence than might otherwise be the case. The use of audiovisual interviews for child complainants is an important improvement in this regard (though I do not understand this to be a focus of the study).\textsuperscript{48}

The victim support personnel surveyed all agreed that the changes made to the legislation did improve the quality of the victims’ evidence. Victims are potentially able to give evidence sooner and are less fearful when they do have to give evidence:

[The evidence is improved] in relation to people recalling their evidence so far after the event.\textsuperscript{49}

...giving evidence away from the courts means victims have the privacy of coming and going without being seen by the accused's family. This bolsters confidence when giving evidence as the fear of retribution is alleviated.\textsuperscript{50}

...the addition of the off-site room means victims are less fearful prior to giving evidence as they no longer have the fear of facing the offender or his supporters in the court precinct.\textsuperscript{51}

\textsuperscript{43} Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
\textsuperscript{44} Survey of participant no. 4, legal practitioner (19 July, 2011).
\textsuperscript{45} Survey of participant no. 7, legal practitioner (27 April, 2011).
\textsuperscript{46} Survey of participant no. 8, legal practitioner (26 April, 2011).
\textsuperscript{47} Survey of participant no. 9, legal practitioner (10 April, 2011).
\textsuperscript{48} Survey of participant no. 6, legal practitioner (11 May, 2011).
\textsuperscript{49} Survey of participant no. 10, victim support (7 June, 2011).
\textsuperscript{50} Survey of participant no. 11, victim support (31 May, 2011).
One judicial officer raised the issue of whether evidence given via CCTV is as effective as that given in a courtroom:

There is still a strong feeling that the evidence by CCTV is not as striking and effective as evidence in the courtroom. I have not seen research on this, but have a feeling that there may be some case to justify this.\textsuperscript{52}

This view confirms the discussion in Chapter Six; that the belief that a witness in the courtroom appears stronger than a witness on a television screen continues to exist.\textsuperscript{53} This is despite research that suggests that the presence (or not) of the witness appears to have no affect on conviction rates.\textsuperscript{54}

**Summary**

In this thesis I establish the existing context through a comprehensive review of the research on victim–witness’ criminal justice system experiences before the recent changes. My discussion highlights the impact of previous legislative changes in victim–witness protection and goes on to discuss the benefits and limitations of these changes.

This study also illustrates the process behind legislative change in the ACT and investigates the impact of the changes made by the *SVOLAA*. In my research I also investigated the perceptions of those who work with the legislation to extend and confirm the theory behind the relationship between legal indeterminacy, judicial discretion and sexual assault mythology.

The findings support the research on the effects of legal indeterminacy discussed in Chapter One. The lack of guidelines and mandatory provisions in the amending legislation has resulted in applications for the special provisions not being made as often as they could be. This has meant that many victims who could have been protected were not. Further, several of the provisions for non-disabled, adult victims of sexual assault are very indeterminate and are being interpreted differently by different judicial officers

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\textsuperscript{51} Survey of participant no. 12, victim support (31 May, 2011).
\textsuperscript{52} Survey of participant no. 3, judicial officer (7 April, 2011).
and prosecutorial personnel. This, in turn, has meant that victims who fall into this category are required to demonstrate vulnerability or distress to be eligible for some of the protections.

As discussed above, the legislation’s aims to treat ‘...complainants in sexual and violent offence proceedings...with respect and dignity during the prosecution process’, to ensure ‘...a fair trial for an accused’,\textsuperscript{55} and to ‘...extract the “best” evidence possible from witnesses who may otherwise suffer a disadvantage’,\textsuperscript{56} have been achieved to varying degrees. Opinions vary about the impact and effect of the changes.

\textbf{Thinking ahead: some ideas for the future}

At this point, it must be noted that there are already some proposals for further changes to ACT victim protection law reform. The Crimes Legislation Amendment Bill 2012, which was recently introduced to Parliament, proposes a new section 43A of the \textit{Evidence (Miscellaneous Provisions) Act 1991}. This section ‘...will facilitate the recording of evidence given by specific witnesses in sexual offence proceedings, and then the admission of this evidence in a related proceeding’.\textsuperscript{57} The amendment ensures that victims’ evidence given via CCTV is recorded, and the recording is admissible in related hearings unless otherwise ordered by the court.\textsuperscript{58} However, as with many of the provisions introduced by the \textit{SVOLAA}, the court may refuse to admit any part of the recording in evidence.\textsuperscript{59}

Orders under the new provisions of the \textit{Evidence (Miscellaneous Provisions) Act 1991} (ACT) are made to protect those who are perceived to be victims of ‘real’ rape, vulnerable and requiring protection. Arguably, perceptual differences of the prosecutor and/or the judge could result in the provisions, in practice, not protecting victims from further trauma. Further, if the accused’s right to a fair trial is seen to outweigh the rights of the victim, grey language in the law could disadvantage victim–witnesses by denying them access to special measures such as CCTV and support people.

\textsuperscript{55} Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
\textsuperscript{56} Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.
\textsuperscript{57} Explanatory Statement, Crimes Legislation Amendment Bill 2012 (ACT) 26.
\textsuperscript{58} Crimes Legislation Amendment Bill 2012 (ACT) s 36.
\textsuperscript{59} Ibid.
These perceptions of vulnerability, and the view that the special measures could affect the accused’s right to a fair trial, may be part of an unconscious judicial/prosecutorial cognitive filter. This filter could be operating despite there being no words in these sections to suggest that fairness to the accused should be considered. Thus, there is a dilemma with sexual assault law reform. It lies in the reality that the substantive indeterminacy of its provisions translates into discretion that is susceptible to interpretation in an unconsciously biased way. Such judicial discretion is evidently an essential part of our legal system to some extent. However, its use ‘dilutes the advantages of rules and creates the risk that discretion may be abused’.60

In the context of sexual assault law reform, there is no value void or vacuum. Judicial discretion is open to abuse and decisions made using discretion may differ depending on the individual beliefs of the judge. However, despite this, Lord Guest and others have argued that this is ‘...a lesser risk than attempting to shackle the judge’s power within a straitjacket’;61 that ‘...discretion is the lesser evil’.62 Therefore, for a legal system to achieve justice, there needs to be an appropriate balance between the rules of law and the use of judicial discretion. Rules must be comprehensive and judicial discretion limited or better guided.

However, as Mary Heath writes:

...changing the words on statutory pages alone will never be sufficient to overcome the competing, powerful, though unwritten social and legal sub-text which continues to be revealed in struggles over rape law reform.63

Ultimately, ‘...the law’s inability to truly impact upon the structural and ideational gender biases must be addressed’.64 At a minimum, judicial officers and legal practitioners need to ensure that their values and perception of harm are in harmony with those of the victims to better facilitate ‘justice’ in sexual assault proceedings. This

61 Selvey v Director of Public Prosecutions [1968] 2 WLR 1494, 1524G (Lord Guest).
would involve education on the reality of sexual assault and the experiences of victim-witnesses—both after the assault and throughout the criminal justice process. Expert witnesses are one way of providing this kind of education and are able to ‘...assist decision-makers in identifying their own unconscious perceptual biases’. At the macro level, legal practitioners’ and judicial officers’ views could be reconstructed. This could be done through amending law school curriculums to mainstream gender and other intersectionality issues.

In terms of drafting and enacting legislation in the ACT, clearly defined process—throughout which members from both government and non-government organisations are involved—would be of great benefit. Currently, various agencies are consulted to develop ‘community’ recommendations for reform. However, the non-government organisations are excluded from the cabinet-in-confidence processes which include the drafting of the legislation. This means that the recommendations are not always included in the reforms as they were intended. The government is able to draft the legislation without the input of the organisations that pushed for the reforms in the first place. A range of government and non-government organisations—including agencies that worked with victims and defendants—developed the recommendations produced in this study. As such, the recommendations were an accurate reflection of what was required. Because these organisations were not involved in the drafting of the legislation, the reforms that resulted were not an accurate reflection of society’s needs.

So societal education is needed in addition to—and perhaps more importantly than—tighter legislation and limited or guided judicial discretion. As long as the systemic beliefs about sexual assault and the experiences of victim–witnesses continue to permeate society without confrontation, the efficacy of law reform such as this will be limited. The need to recognise the social context within which these laws operate is essential.

For the process of law reform to be successful, whether in actually changing the law or as a means of raising people’s awareness of feminist concerns, it has to be matters relating to the status of women. The implications of engaging with a system which is generally

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antithetical to the values one is promoting must be confronted, the nature of the system that one aims to change must be well understood...\textsuperscript{66}

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Appendix A

History and Politics Questions

1. How were you involved in the introduction of the Sexual and Violent Offences Legislation Amendment Bill?

2. What were the reasons for the initiation of the research that led to the amendments (Responding to Sexual Assault: The Challenge of Change)?

3. What were the reasons or driving forces behind the introduction of the Sexual and Violent Offences Legislation Amendment Bill and its enactment?

4. Who petitioned for the reforms?

5. Who were the “key players” or lobbyists behind the introduction of the Bill?

6. What processes or procedures were followed to introduce the Bill and have it enacted?

7. Were there any political compromises behind the initiation of the Bill and the enactment of the Act?

8. What were the original aims and intentions of these reforms?

9. What was originally drafted?

10. What compromises were made to this draft in the process? How does this draft differ from the final Act?

11. Were there any political compromises behind the initiation of the Bill and the enactment of the Act?

12. Is there any further information about the enactment of this legislation that you would like to add?

13. For those who lobbied:
   a. How were you involved in “lobbying” for or against reforms to the sexual assault legislation in the ACT?
   b. What exactly were you petitioning for or against in terms of law reform for victims of sexual assault?
   c. What methods did you use to petition for these reforms or to try and prevent them?
   d. How did your lobbying relate to the research that led to the recent amendments (Responding to Sexual Assault: The Challenge of Change)?
e. In your opinion, did your lobbying contribute to the introduction of the Sexual and Violent Offences Legislation Amendment Bill?

f. Is there any further information about the lobbying process behind the enactment of this legislation that you would like to add?
Appendix B

Judicial Officer Questions

1. How do, or would, you interpret section 38C of the Evidence (Miscellaneous Provisions) Act? When would you make an order under this section to screen the accused from the witness in court?

2. In what circumstances would you choose not to make an order under section 38C?

3. What do you use to help you to make a decision under section 38C?

4. Section 38E of the Evidence (Miscellaneous Provisions) Act states that 'the court must, on application by a party who intends to call a witness, order that the witness have a person (a support person) in the court close to, and within the witness's sight, while the witness gives evidence'. How do you interpret and apply this section in practice?

5. When, in your opinion, is it in the interests of justice for a witness to give evidence in a closed court under section 39 of the Evidence (Miscellaneous Provisions) Act?

6. What if the witness wants to give evidence in open court but it is not in the interests of justice to do so (and vice versa)? Which consideration would you give more weight?

7. Under section 40P(1)(c) of the Evidence (Miscellaneous Provisions) Act, how do you determine which witnesses are more likely to suffer trauma or be intimidated or distressed than others, in order to make an order under Division 4.2B of the Act?

8. In the context of a pre-trial hearing, if an accused has applied for an order that the witness attend to give further evidence under section 40T of the Evidence (Miscellaneous Provisions) Act, when could the witness be recalled and when, in your opinion, is it in the interests of justice to order that the witness attend to give further evidence?

9. When, in your opinion, is it in the interests of justice to make an order under section 40V of the Evidence (Miscellaneous Provisions) Act that the recording of the witness's evidence is inadmissible in a related hearing?

10. Under section 43 of the Evidence (Miscellaneous Provisions) Act, when do you require witnesses to give evidence in the courtroom because of 'a substantial risk that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly’?

11. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) appeared to alleviate
the trauma of a trial for sexual assault victim witnesses? How? Please provide an example.

12. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) maintained the accused's right not to be tried unfairly? Please discuss.

13. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) contributed to improving the quality of sexual assault victim witness evidence? How? Please provide an example.

14. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) significantly altered the trial process for victims of sexual assault? How? Please provide examples.

15. Have the changes made to section 41 of the Evidence Act 1995 (Cth) resulted in you disallowing more questions?

If yes, why? What sorts of questions do you now disallow? How are these different to the questions you disallowed prior to the amendments?

If no, why?

Legal Practitioner Questions

2. How is it determined which witnesses are more likely to suffer trauma or be intimidated or distressed than others, in order for an order to be made under section 40P(1)(c) of the Evidence (Miscellaneous Provisions) Act 1991 (ACT)?

3. When are orders made under section 38C of the Evidence (Miscellaneous Provisions) Act to screen the accused from the witness in court?
   a. When would an order not be made under this section?

4. When are orders made, in the interests of justice, for a witness to give evidence in an open court under section 39 of the Evidence (Miscellaneous Provisions) Act?
   a. What if the witness wants to give evidence in open court but it is not in the interests of justice to do so (and vice versa)?
   b. Which consideration is given more weight?

5. In the context of a pre-trial hearing, if an accused has applied for an order that the witness attend to give further evidence under section 40T of the Evidence (Miscellaneous Provisions) Act, in what circumstances would the witness be recalled and when is it in the interests of justice to order that the witness attend to give further evidence?

If you have observed adult sexual assault trials both prior to and following 1 June 2009, please answer the following:
6. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT):
   a. Appeared to alleviate the trauma of a trial for sexual assault victim witnesses?
      i. How?
      ii. Please provide an example.
   b. Maintained the accused’s right not to be tried unfairly?
      i. Please discuss.
   c. Contributed to improving the quality of sexual assault victim witness evidence?
      i. How?
      ii. Please provide an example.
   d. Significantly altered the trial process for victims of sexual assault?
      i. How?
      ii. Please provide examples.

If you have observed adult sexual assault trials both prior to and following 1 January 2009:

7. In your opinion, have the changes made to section 41 of the Evidence Act 1995 (Cth) resulted in more questions being disallowed?
   a. If yes, what sorts of questions are now disallowed?
      i. How are these different to the questions that were disallowed prior to the amendments?
   b. If no, why do you think there has not been a change?
Appendix C

Victim-Witness Questions

Introductory questions

1. If you experienced a committal or preliminary hearing in the Magistrate’s Court, was this hearing held before or after 1 June 2009?

2. If you experienced a trial in the Supreme Court, was this trial held before or after 1 June 2009?

Committal experiences

If you gave evidence at a committal proceeding, please answer the following:

3. What five words would you use to describe the committal hearing process?
   a. Please explain your choices

4. How did the process impact on your wellbeing?

5. How did you feel about having to give evidence again at the actual trial?

6. Did you ever consider asking to have the trial discontinued?
   a. If so, what were the reasons behind this?

7. Did you feel that you got to tell your “story” to the court?
   a. Why or why not?

Pre-trial hearing experiences

8. If your trial was held after 1 June 2009, were you deemed to be a vulnerable witness so as to give your evidence at a special “pre-trial hearing”?
   a. If yes, how was this achieved?
   b. If no, why?
      i. Was an application for a pre-trial hearing made?
      ii. Were you aware that such a hearing existed?

If you gave evidence at a pre-trial hearing, please answer the following:

9. What five words would you use to describe the pre-trial process?

10. How did the process impact on your wellbeing?

11. How did it feel to know that you probably wouldn’t have to give evidence again at the actual trial?

12. Were you recalled to give further evidence at the trial?
   a. If yes, did you decide to go ahead with the trial?
      i. How would you describe this experience?
      ii. Did you ever consider asking to have the trial discontinued? Why?
If you gave evidence at a trial, please answer the following:

13. What five words would you use to describe the trial process?

14. How did the process impact on your wellbeing?

View of accused

15. If you could see the accused:
   a. How did this make you feel whilst giving your evidence?
   b. Would you have preferred for the accused to be screened from your view?

16. If you were screened from the accused, do you think this make your testimony easier to give?
   a. Would you have preferred to have a view of the accused?

Support people

17. When giving your testimony, either via CCTV or in person, did you have a support person with you?
   a. If yes, who was your support person?
      i. Would you have preferred someone else?
      ii. Do you think having a support person with you improved or hindered the experience for you?
      iii. Would you have preferred to testify alone?
   b. If no, do you think a support person would have improved or hindered your experience?
      i. Would you have preferred to have a support person with you?

Open/closed court

18. Did you testify in court that was open to the public?
   a. If yes, how did this make you feel?
      i. Would you have preferred the court to be closed to the public?
   b. If you testified in a closed court, do you think this improved your experience?
      i. Would you have preferred to testify in an open court?

Additional comments

19. Are there any additional comments that you would like to make about your experience with the criminal justice system in the ACT?

Victim Support Personnel Questions

Committal hearings (pre 2009)

1. For victims who gave evidence at a committal proceeding prior to the changes in 2009, please answer the following:
   a. What five words would you use to describe the committal hearing process for victims generally? Please explain your choices.
   b. How did the process impact on their wellbeing?
   c. How did they usually feel about having to give evidence again at the actual trial?
d. Did victims ever consider asking to have the trial discontinued? If so, what were generally the reasons behind this?
e. Did victims often feel that they got to tell their “story” to the court? Why or why not?

Pre-trial hearing experiences (post 2009)

If you were a support person at a pre-trial hearing, please answer the following:

1. How is it determined which witnesses are more likely to suffer trauma or be intimidated or distressed than others (under s 40P(1)(c)), in order for an order to be made to conduct a pre-trial hearing under Division 4.2B of the Evidence (Miscellaneous Provisions) Act 1991 (ACT)?

2. For victims who had their trial after 1 June 2009, were any deemed to be a vulnerable witness so as to give their evidence at a special "pre-trial hearing"?
   a. If yes, how was this achieved?
   b. If no, why?
   c. Were applications for a pre-trial hearing made?
   d. Were victims aware that such a hearing existed?

3. What five words would you use to describe the pre-trial process for victims?

4. How did the process impact on their wellbeing?

5. How did the victim(s) respond the fact that they probably wouldn't have to give evidence again at the actual trial?

6. Were any victims recalled to give further evidence at the trial?
   a. If yes, did they decide to go ahead with the trial?
   b. How would you describe this experience for them?
   c. Did any ever consider asking to have the trial discontinued? Why?

Trial experiences (pre and post 2009)

If you were a support person for a victim giving evidence at a trial, please answer the following:

7. What five words would you use to describe the trial process for victims of sexual assault?

8. How did the process impact on their wellbeing?

View of accused

9. If victims you supported could see the accused whilst giving their evidence, how did this make them feel?
   a. Would they have preferred for the accused to be screened from your view?

10. If the victims were screened from the accused, do you think this make their testimony easier to give?
    a. Would they have preferred to have a view of the accused?

11. Post 2009: when are orders made under section 38C of the Evidence (Miscellaneous Provisions) Act to screen the accused from the witness in court?
When would an order not be made under section 38C?

**Support people (post 2009)**

12. Section 38E of the Evidence (Miscellaneous Provisions) Act states that 'the court must, on application by a party who intends to call a witness, order that the witness have a person (a support person) in the court close to, and within the witness’s sight, while the witness gives evidence'. How is this section interpreted and applied in practice?

**Open/closed court**

13. Do most victims, in your experience, testify in a court that is open to the public?
   a. If yes, how does this make them feel?
   b. Would they have preferred the court to be closed to the public?

14. If they testify in a closed court, do you think this improves their experience?
   a. Would they have preferred to testify in an open court?

15. Post 2009: when are orders made, in the interests of justice, for a witness to give evidence in a closed court under section 39 of the Evidence (Miscellaneous Provisions) Act?
   a. What if the witness wants to give evidence in open court but it is not in the interests of justice to do so (and vice versa)?
   b. Which consideration is given more weight?

**General**

16. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) appeared to alleviate the trauma of a trial for sexual assault victim witnesses? How? Please provide an example.

17. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) contributed to improving the quality of sexual assault victim witness evidence? How? Please provide an example.

18. In your opinion, have the changes made by the Sexual and Violent Offences Legislation Amendment Act 2008 (ACT) significantly altered the trial process for victims of sexual assault? How? Please provide examples.

**Additional comments**

19. Are there any additional comments that you would like to make about your experience with the criminal justice system in the ACT?