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**Cross-examination and Sexual
Offence Complainants**

by

Talina Drabsch

Briefing Paper No 18/03

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EXECUTIVE SUMMARY

The cross-examination of complainants of sexual offences is a contentious issue. In one sense, it may be characterised as a conflict between the rights of a person accused of a serious crime with the rights of an alleged victim who may have already survived an extremely traumatic experience. Alternatively, the issue may be viewed as a question of balance, with the needs of both defendants and witnesses to be taken into account, rather than a zero sum game.

This paper considers the debate surrounding the right of a person accused of a sexual offence to cross-examine the complainant. It considers the various rights of the accused and discusses the experience of complainants in court. It contemplates whether the experience of sexual assault complainants is unique and thus if special protection is required. However, whilst this paper does consider the issues surrounding cross-examination in general, particular attention is given to the situation where the defendant is not represented.

The various offences that are encompassed by the term 'sexual offences' are outlined in section 2 (pp 2-4). An overview of cross-examination is provided in section 3 (pp 4-5) followed by consideration of the arguments that have been advanced in support of the idea that the sexual assault complainant's experience of cross-examination is unique (section 4: pp 5-9). The rights of a victim of crime are briefly considered in section 5 (p 9).

Section 6 examines the relevant laws as they currently stand in New South Wales (pp 9-12). An overview of the law in each Australian jurisdiction (section 7: pp 12-16), as well as a sample of the situation outside Australia (section 8: pp 17-19), is provided to aid comparison.

Three case studies are explored in section 9 (pp 19-21). These are intended to facilitate consideration of some of the dangers inherent in a defendant being entitled to cross-examine the complainant of a sexual offence in person.

The arguments for and against an unrepresented defendant being able to directly cross-examine a sexual offence complainant are canvassed in sections 10 (pp 21-23) and 11 (pp 23-26) respectively.

Section 12 outlines six options for how the law in this area could be reformed (pp 26-29). Finally, the proposed *Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003* is discussed in section 13 (pp 30-31). A copy of the proposed Bill is attached as Appendix A.

Some of the recommendations made by the New South Wales Law Reform Commission in their report, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, June 2003, are discussed throughout, with the full text of the recommendations included as Appendix B.

1 INTRODUCTION

The cross-examination of complainants of sexual offences is a contentious issue. In one sense, it may be characterised as a conflict between the rights of a person accused of a serious crime with the rights of an alleged victim who may have already survived an extremely traumatic experience. Alternatively, the issue may be viewed as a question of balance, with the needs of both defendants and witnesses to be taken into account, rather than a zero sum game.

There has recently been considerable debate over the issues surrounding the cross-examination of a complainant of a sexual offence by an unrepresented defendant. In March 2003, Premier Carr promised to bar self-represented defendants from cross-examining the complainant in sexual assault cases.¹ The debate intensified following media reports of a sexual assault trial to commence in September 2003 in which two of the accused no longer have legal representation. This sparked media discussion of whether they should be permitted to cross-examine their alleged victims in person.² The Government has indicated its intention to introduce legislation to prevent an unrepresented accused from directly cross-examining the complainant of a sexual offence following the resumption on parliament on 2 September 2003. Copies of the proposed *Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003* have been forwarded to the Opposition to ensure its speedy passage through parliament.³

On 27 March 2002, the NSW Law Reform Commission was provided with the following reference:

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

The Commission released an issues paper⁴ in August 2002 followed by a report in June 2003.⁵ A number of the recommendations made by the Commission are discussed

¹ 'Grilling of sex assault victims to end: Carr', *Sydney Morning Herald*, 18/3/03, p 12.

² See, for example, 'Brothers are within their rights, but maybe not for much longer', *Sydney Morning Herald*, 15/7/03, p 5; 'Law to stop rape accused quizzing victims', *Sydney Morning Herald*, 15/7/03, p 5; 'Loophole in victims' rights', *Sydney Morning Herald*, 16/7/03, p 10; 'Rush for law to shield rape victims', *Daily Telegraph*, 16/7/03, p 2; 'Swift change to law on quizzing rape victims', *Sydney Morning Herald*, 16/7/03, p 7; 'Carr's promise to rape victims now rings hollow', *Sydney Morning Herald*, 18/7/03, p 11.

³ R Debus MP, Attorney-General, 'Bill released to prevent sexual assault victims cross examined by accused', *Media Release*, 24/8/03.

⁴ New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Assault Trials*, Issues Paper 22, August 2002.

⁵ New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101, June 2003.

throughout this paper. However, the full text of the recommendations is attached as Appendix B. Organisations in other jurisdictions have also considered the issue in recent years, including the Queensland Taskforce on Women and the Criminal Code, the Victorian Law Reform Commission, the New Zealand Law Commission, the UK Home Office and the Scottish Executive.

This paper considers the debate surrounding the right of a person accused of a sexual offence to cross-examine the complainant. It considers the rights of a person accused of a crime and discusses the experience of complainants in court. It examines whether the experience of sexual assault complainants is unique and thus if special protection is required. However, whilst this paper does consider the issues surrounding cross-examination in general, particular attention is given to the situation where the defendant is not represented.

Nevertheless, it should be stressed at the outset that a defendant in a sexual assault trial is usually represented due to the serious nature of the charges. However, in 2000, at least 6.9% of such persons appearing before the District Court were unrepresented.⁶ The impact of cases where the defendant is not represented may be disproportionate to their number. The mere possibility that sexual assault victims may have to confront their attacker in person in court may deter them from reporting the crime. Cases where the accused is not represented can also generate much publicity, as occurred in the United Kingdom in 1997 and 1998 (see section nine). Publicity surrounding the complainants' traumatic experience in these trials served as a catalyst for law reform in the United Kingdom.

2 SEXUAL OFFENCES

The following offences constitute 'prescribed sexual offences' and are listed in section 3 of the *Criminal Procedure Act 1986* (NSW):

- sexual assault – s61I *Crimes Act 1900*;
- aggravated sexual assault – s61J *Crimes Act 1900*;
- aggravated sexual assault in company – s61JA *Crimes Act 1900*;
- assault with intent to have sexual intercourse – s61K *Crimes Act 1900*;
- indecent assault – s61L *Crimes Act 1900*;
- aggravated indecent assault – s61M *Crimes Act 1900*;
- acts of indecency – s61N *Crimes Act 1900*;
- aggravated act of indecency – s61O *Crimes Act 1900*;
- sexual intercourse procured by intimidation, coercion and other non-violent threats – s65A *Crimes Act 1900*;
- sexual intercourse – child under 10 – s66A *Crimes Act 1900*;
- attempting, or assaulting with intent, to have sexual intercourse with child under 10 – section 66B *Crimes Act 1900*;
- sexual intercourse – child between 10 and 16 – section 66C *Crimes Act 1900*;
- attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 – section 66D *Crimes Act 1900*;

⁶ NSW Law Reform Commission, n 4, p 22.

- persistent sexual abuse of a child – section 66EA *Crimes Act 1900*;
- sexual intercourse – intellectual disability –section 66F *Crimes Act 1900*; or
- sexual assault by forced self-manipulation – section 80A *Crimes Act 1900*.

2.1 Sexual Assault

In New South Wales, sexual assault offences are detailed in Division 10 of Part 3 of the *Crimes Act 1900*. The general sexual assault offence is described in section 61I of the *Crimes Act*:

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

Accordingly, the offence involves three elements:

1. Sexual intercourse, defined in section 61H as:
 - (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
 - (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
 - (c) cunnilingus, or
 - (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).
2. Lack of consent.
3. Knowledge or belief that the other person was not consenting, or recklessness as to that possibility.⁷

Therefore, sexual assault involves an activity that but for the absence of consent would be legal. This gives rise to many of the difficulties associated with the trial of sexual assault offences as the presence or absence of consent can be difficult to establish.

2.2 Aggravated sexual assault

Aggravated sexual assault is similarly defined but also involves at least one of the following circumstances of aggravation:⁸

- Infliction of harm;
- Use of weapon;
- Offender is in the company of another;
- The victim is under the age of 16 or is under the authority of the offender; or
- The victim has a serious physical or intellectual disability.

⁷ Section 61R *Crimes Act 1900* (NSW).

⁸ Section 61J(2) *Crimes Act 1900* (NSW).

2.3 Incidence of sexual assault

The first of the following tables compares the number and rate of sexual assault victims in NSW between 1993 and 2002. The second table contrasts the number and rate of sexual assault victims in various Australian jurisdictions for the year 2002.

Sexual Assault Victims – NSW

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Number	3797	4608	4156	5036	4663	4504	4425	5975	6268	6480
Rate*	63.2	76.0	67.8	81.2	74.3	71.1	69.2	92.5	95.3	97.2

* per 100,000 persons

Source: Australian Bureau of Statistics, *Recorded Crime – Victims*, 4510.0, 2002, p 23.

Sexual Assault Victims – 2002

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
Number	6480	2653	4740	1625	1620	240	312	180	17850
Rate*	97.2	54.3	127.8	106.8	84.0	50.7	155.9	55.6	90.6

* per 100,000 persons

Source: Australian Bureau of Statistics, *Recorded Crime – Victims*, 4510.0, 2002, p 10.

The tables indicate that the rate of sexual assault in New South Wales is relatively high and has been increasing over the last decade. However, given the private nature of much sexual assault and the stigma that can still be attached to its victims, ‘estimates of the prevalence of sexual assault in the community are problematic and likely to be imprecise’.⁹ Many sexual assault incidents are not reported to the police and are therefore not reflected in the above figures. There may also be differences between the jurisdictions in terms of definitions used, reporting practices and policing procedures. Therefore, inclusion of the above tables is intended as a *guide* to the level of sexual assault in the Australian community.

3 OVERVIEW OF CROSS-EXAMINATION

It is a fundamental tenet of the Australian legal system that a person accused of a crime is to be presumed innocent until proven guilty. Accordingly, a defendant in a criminal trial is afforded a number of important rights to ensure procedural fairness. A number of these rights are enshrined in Article 14 of the *International Covenant on Civil and Political Rights*, including:

- The right to a fair trial;
- The right to defend oneself in person;
- The right to silence; and
- The right to examine hostile witnesses.

⁹ Stubbs J, ‘Sexual Assault, Criminal Justice and Law and Order’, Presentation for *Practice and Prevention: Contemporary Issue in Adult Sexual Assault in NSW* Conference, 12-14 February 2003. Available from www.lawlink.nsw.gov.au/cpd.nsf/pages/stubbs Accessed 18 August 2003.

One of the principal means of examining opposing witnesses and testing the evidence against the accused is cross-examination - 'the questioning of a witness by a party other than the party who called the witness to give evidence'.¹⁰ It occurs during the trial after the witness has given their evidence-in-chief.¹¹ Section 27 of the *Evidence Act 1995* (NSW) expressly states that parties may examine any witness. However, this right is not unfettered. It is subject to the power of the court to control proceedings and to other requirements regarding the nature of questioning.

Cross-examination has two purposes, as identified in *Cross on Evidence*:¹²

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

A number of techniques are employed in cross-examination to achieve these aims including, 'questioning to expose internal inconsistencies or fabrications in a witness's account of events, showing inconsistencies between that account and other items of evidence, by tendering proof of a witness's prior inconsistent statements, or by proving that he or she has prior convictions'.¹³ The experience of cross-examination is rarely pleasant for any witness, as its main thrust is to discredit the witness and his or her testimony. However, cross-examination is thought to be a particularly traumatic experience for sexual assault complainants.

4 CROSS-EXAMINATION OF SEXUAL ASSAULT COMPLAINANTS

Cross-examination can assume particular importance in sexual assault trials that focus on the issue of consent. In such cases, the parties may agree that sexual intercourse took place but the defendant claims that it occurred with the consent of the complainant. As sexual activity usually occurs in private, the only witnesses to whether consent was provided tend to be limited to the defendant and the complainant. Therefore the right of the accused to cross-examine the complainant is intricately linked with the right of the accused to test the principal evidence against him or her.

Whilst cross-examination is frequently a trying experience for a witness in any trial, it is thought to be especially harrowing for a sexual assault complainant. The distinctive nature of sexual assault trials is thought to arise from a combination of the following factors:

- As the complainant is often the only witness for the prosecution, cross-examination

¹⁰ *Evidence Act 1995* (NSW), Dictionary.

¹¹ Cross-examination may also occur during the committal hearing. However, the complainant is generally not to be cross-examined unless the magistrate believes there are special reasons why a sexual assault complainant should give oral evidence. For further information see: New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101, June 2003, p 24.

¹² Heydon JD, *Cross on Evidence*, Butterworths, Sydney, 2000, p 474.

¹³ Aronson M and Hunter J, *Litigation: Evidence and Procedure*, 6th ed, Butterworths, Sydney, 1998, p 946.

generally centres on his or her credibility. Credibility is particularly important in a sexual assault trial as it is only the absence of consent, as claimed by the witness, which transforms a previously legal activity into an illegal one.¹⁴

- There is frequently a pre-existing relationship between the complainant and the defendant. Studies have found that the parties knew each other in approximately 90% of cases.¹⁵
- The intimate nature of the subject matter of the proceedings, which the complainant is expected to recall in detail.
- The extent of trauma caused by the crime.
- The length of cross-examination to which the complainant is subjected. The *Heroines of Fortitude* study reviewed all sound recorded sexual assault hearings in the NSW District Court between 1 May 1994 and 30 April 1995 involving a female complainant. The study found that the average length of cross-examination of sexual assault complainants was over two hours compared to examination-in-chief which generally lasted a little under an hour.¹⁶ Research by Brereton found that complainants in sexual assault matters were, on average, cross-examined about twice as long as those in assault trials.¹⁷

Eastwood and Patton studied the experience of child complainants of sexual abuse in the criminal justice system, and likened the climate of court to that in which the abuse was originally experienced.¹⁸ They describe the dynamics of the criminal justice system in the following terms:

In sexual abuse, the right of the child to exercise ownership and control of their own bodies is overridden. The child loses control of their sexuality and their identity. In cross-examination, the child is forced to be physically present in the same room as the abuser, and also in the presence of a number of (usually) male adults. The sexually assaulted child has no choice in being present, nor is the child permitted any control over who is in the courtroom. In addition, they are forced to describe intimate intrusions to their body in great detail, usually a number of times. The child has no control over the questions, nor over how they can respond. As a child who has been sexually assaulted they are not permitted to tell their own story in their own words, nor are they permitted to defend themselves against accusations of lying in any way whatsoever. The child must do as they are told. The child must answer

¹⁴ New South Wales Law Reform Commission, n 5, p 12.

¹⁵ NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Department for Women, Sydney, 1996, p 57.

¹⁶ *Ibid*, p 126.

¹⁷ Brereton D, 'How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials', *British Journal of Criminology*, 37(2) Spring 1997, p 257.

¹⁸ Eastwood C and Patton W, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Queensland University of Technology, 2002.

every question. The child has no right to challenge offensive treatment, or try to defend themselves. They are the precise terms in which the initial sexual abuse took place. In other words, the sexually abused child is abused all over again, though this time with the sanction of the State.¹⁹

However, others have suggested that the difference in the experience of sexual assault complainants in court as compared to other witnesses may be exaggerated.²⁰ Brereton studied a number of rape and assault trials in Melbourne County Court between 1989 and 1991. He found that the questioning of sexual assault complainants during the trials was not significantly different to that directed to other types of complainants.²¹ The following table summarises his findings regarding cross-examination on the theme of character.

Rape and assault trials – cross-examination on character/credit themes

Types of issues raised	% of cases in which issue raised	
	Assault (n=46)	Rape trials (n=48)
General drinking/drug taking habits of complainant	26.1	31.3
Complainant's drinking on day of offence	52.2	54.2
Whether complainant had history of mental/emotional instability	8.7	8.3
Criminal history of complainant	39.1	16.7
Possible motives for making false report	54.3	54.2

Source: Brereton D, 'How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials', *British Journal of Criminology*, 37(2) Spring 1997, p 253.

Nevertheless, whilst the complainant may be subjected to a similar line of questioning to others, Brereton does concede that it is 'probable that being a complainant in a rape trial is frequently a more traumatic experience than being a complainant in an assault trial because of the intimate nature of the matters which are canvassed in rape trials, the length of time which the complainant must spend in the witness box, and the degree of trauma associated with the offence itself'.²²

89% of adult respondents to a sexual assault phone-in study believed that they suffered some kind of ongoing harm because of the court process, with many stating that 'they felt degraded, humiliated and violated by the process'.²³ The following table summarises the various reasons given by the respondents to the study as to why they did not proceed with legal action:

¹⁹ Ibid, p 127.

²⁰ Brereton's study of assault and rape trials in Melbourne County Court between 1989 and 1991 challenged the assumption that 'complainants in rape trials are subjected to lines of questioning which are rarely employed, and would not be acceptable, in other trial contexts': Brereton, n 17, pp 242-261.

²¹ Brereton, n 17, p 242.

²² Ibid, p 259.

²³ NSW Sexual Assault Committee, *Sexual Assault Phone-in Report*, Ministry for the Status of Women, Wolloomooloo, 1993, p 37.

Why the victim decided not to go ahead with legal action	Over 16	16 and under	Total	%
After finding out more about the legal process did not want to go through with it.	14	13	27	57
Police said case would be unsuccessful	13	11	24	51
Family and friends said not to proceed	8	7	15	32
Felt police did not believe	7	6	13	28
Just wanted police to know. No intention of taking matter further	6	7	13	28
Police said they did not believe	3	1	4	9
Other	15	5	20	43

Source: NSW Sexual Assault Committee, *Sexual Assault Phone-in Report*, Ministry for the Status of Women, Sydney, 1993, p 34.

Of particular interest is the finding that 57% of victims did not pursue legal redress once they found out more about the process involved.

The underreporting of sexual assault offences is a serious problem. Sexual assault has been found to be the least likely personal criminal offence to be reported to the police, with reporting rates estimated at approximately 25% of all female sexual assault victims over the age of 18.²⁴ 38% of victims claim that based on their experience they would advise other victims to not pursue legal action.²⁵ The reluctance to report sexual offences may also be exacerbated by a belief that legal proceedings are not worthwhile. Only one in ten victims who reported a sexual assault offence to the police in 1996 'succeeded in achieving some kind of punishment or redress for the alleged offender'.²⁶ This begs the question 'whether the victims of sexual assault should be encouraged to use a legal process in which as many as nine out of ten defendants will be acquitted of the charge – inflicting a great deal of additional pain upon the victim in the process'.²⁷

Defence counsel is in a difficult position when cross-examining a sexual assault complainant. There may be tensions in the various duties owed by the barrister to the court and his or her client. Rule 16 of the *NSW Barristers' Rules* provides:

A barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these Rules.

²⁴ Edwards A, *The Criminal Justice Response to Sexual Assault Victims*, New South Wales Bureau of Crime Statistics and Research, Sydney, 1996, p 1.

²⁵ NSW Sexual Assault Committee, n 23, pp 41 and 44.

²⁶ Cook B, David F and Grant A, *Sexual Violence in Australia*, Australian Institute of Criminology, Canberra, 2001, p 43.

²⁷ *Ibid*, p 44.

One of the strategies of defence counsel is to discredit the testimony of the complainant. This can be an extremely distressing process for a victim of a sexual offence as they may feel like they are the ones on trial rather than the accused. However, discrediting a witness' testimony is often a crucial aspect of the defence. Accordingly, Ellison has argued that 'any ethical duty to protect complainants and witnesses from unnecessary distress in court necessarily conflicts with the duty owed by the advocate to his or her client'.²⁸

5 VICTIMS' RIGHTS²⁹

The rights and needs of victims of crime have been increasingly recognised in recent years. This has culminated in the passage of such legislation as the *Victims Rights Act 1996* (NSW) which included a statutory charter of victims' rights. The *Charter of Rights for Victims of Crime* is located in section 6 of the Act, and includes such rights as the right to courtesy, compassion and respect; and the right to protection from unnecessary contact with the accused during the course of court proceedings. Therefore it could be argued that cross-examination of a sexual offence complainant, especially by an unrepresented defendant, may violate these principles. However, whilst the Charter is an important statement of the entitlements of a victim of crime, the specified rights are not legally enforceable. Nonetheless, section 7 of the Act stresses that the Charter is 'as far as practicable and appropriate, to govern the treatment of victims in the administration of the affairs of the State'. Therefore it could be argued that attempts should be made to further accommodate the needs of victims of crime wherever possible. However, the difficulty remains that at the start of a trial it is not certain whether the complainant is in fact a victim and the defendant a criminal, as that is one of the issues to be determined by the trial.

6 THE CURRENT SITUATION IN NEW SOUTH WALES

The main requirements concerning cross-examination in New South Wales can be found in the *Evidence Act 1995* (NSW). It has already been noted that section 27 of the Act enables parties to question witnesses. However, this right is subject to the power of the court in section 11 to control the conduct of proceedings. Section 26 stipulates that the court is to have control over the questioning of witnesses as follows:

The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned, and
- (b) the production and use of documents and things in connection with the questioning of witnesses, and
- (c) the order in which parties may question a witness, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

The *Evidence Act* also specifies other limits to the questioning of witnesses. The court is

²⁸ Ellison L, 'Cross-examination in rape trials', *Criminal Law Review*, 1998, p 613.

²⁹ See further Briefing Paper No 10/02, *Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services*, by Rowena Johns.

empowered by section 41 to disallow any questions that are misleading or ‘unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’. There are rules concerning relevance, hearsay, opinions, credibility and privilege in relation to the admissibility of evidence.³⁰ Section 293 of the *Criminal Procedure Act 1986* disallows evidence of the complainant’s sexual reputation, sexual experience or lack thereof, other than in particular circumstances. It may be argued that these provisions afford sufficient protection to sexual assault complainants.

However, it could also be argued that the effect of these provisions *in practice* is not sufficient to protect complainants from inappropriate and offensive questions. A judge may be wary of intervening too often in the course of cross-examination, especially in cases where the defendant is not represented, for fear of appearing to favour one party over the other and subsequently providing grounds for appeal. The limits of cross-examination are not always clear. It has been noted that, ‘there is a modern tendency, particularly in criminal cases, for cross-examination to assume an unduly lengthy and repetitive character. The court probably has inherent power to control this as part of its overall power to regulate the proceedings, but it is rare for a court to give directions limiting cross-examination, as opposed to hints’.³¹ Examples of cases where the current limitations on cross-examination have perhaps proved insufficient may be found in section nine of this paper.

An unrepresented defendant is currently entitled to cross-examine a sexual assault complainant in person in New South Wales. However, an exception is provided regarding a child witness in any criminal proceedings, or in civil proceedings involving a personal assault offence.³² In such an event, section 28 of the *Evidence (Children) Act 1997* requires any questions to be put by a person appointed by the court for that purpose, unless the court considers that it is not in the interests of justice to do so. The court-appointed person is not to advise the defendant and may only ask the questions specified by the defendant. Therefore limitations on the rights of self-represented defendants are not unprecedented in New South Wales.

However, alternative arrangements may be made to facilitate the giving of evidence by vulnerable witnesses. The court is entitled to control the way in which witnesses are questioned.³³ They can also order that a person give evidence by way of audio-visual link.³⁴ Nonetheless, the NSW Law Reform Commission noted that ‘...it may be argued that these provisions, which are clearly not specifically aimed at the use of alternative arrangements by complainants in sexual offence proceedings, neither facilitate the use of such

³⁰ For a useful summary of the various rules concerning the admissibility of evidence see: Odgers S, *Uniform Evidence Law*, 5th ed, Lawbook Co, Pyrmont, 2002, p 126.

³¹ Heydon, n 12, p 489.

³² Section 28, *Evidence (Children) Act 1997* (NSW).

³³ Section 26 *Evidence Act 1995* (NSW).

³⁴ Section 5B *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

arrangements nor go far enough as far as sexual offence proceedings are concerned'.³⁵

The current debate over the right of a self-represented defendant to personally cross-examine the complainant of a sexual offence is not the first time the need to balance the interests of an accused with those of an alleged victim has arisen. The law in relation to sexual offences has been significantly amended in the last twenty years or so. In doing so, the needs of persons other than the accused have been recognised.

The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) incorporated some significant changes to the law in relation to sexual offences. As a result of the Act:

- the common law of rape was abolished and replaced with a series of graduated offences of sexual assault in the *Crimes Act 1900*;
- the violent rather than sexual nature of sexual assault was emphasised;³⁶
- irrelevant questioning of a complainant's sexual experience was not to be permitted in court;
- a husband's immunity from prosecution was removed;
- a judge was required to warn the jury that there may be good reasons for delay in complaint; and
- the corroboration warning was removed.³⁷

Other changes to have transpired since then include the abolition of the dock statement by the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW).

The reforms introduced by the 1981 Act were designed 'to protect the victims of rape from victimization under the legal process; to encourage rape victims to report offences to the authorities; to facilitate the administration of justice and the conviction of guilty offenders; at the same time to preserve the rights of the accused; and to serve an educative function in further changing community attitudes to sexual assault'.³⁸ Accordingly, the changes sought 'to ease, so far as is possible, the humiliation experienced by sexual assault victims, to remove the stigma attached to the rape victim, to encourage victims to report the offences, and to bring the offender to justice as justice demands'.³⁹ It is noteworthy that many of these same arguments are still advanced in support of implementing a prohibition on unrepresented defendants directly cross-examining the complainant of a sexual offence. It was noted by the then Attorney-General and Minister for Justice, the Hon F Walker MP, that 'what is necessary is a legal and administrative system under which victims of sexual assault – particularly women – feel confident that they can report the offence and know that they will be treated in a civilised fashion, that they will not be unfairly harassed in court,

³⁵ NSW Law Reform Commission, n 5, p 91.

³⁶ Hon N Wran MP, *NSWPD*, 18/3/81, p 4760.

³⁷ The corroboration warning was given by a judge to the jury to warn them that it is dangerous to convict on the uncorroborated evidence of sexual assault complainants.

³⁸ Hon N Wran MP, *NSWPD*, 18/3/81, p 4758.

³⁹ *Ibid*, p 4759.

and that a just penalty will be imposed on any offender'.⁴⁰ Whilst some progress has been made, such a system has yet to be achieved.

7 OTHER AUSTRALIAN JURISDICTIONS

A survey of the relevant legislation in each of the Australian jurisdictions reveals the various attempts that have been made to balance the interests of the defendant with those of the complainant of a sexual offence and other vulnerable witnesses.

7.1 Commonwealth

Section 15YF of the *Crimes Act 1914* (Cth) forbids an unrepresented defendant to cross-examine a child complainant of a sexual offence. Instead, a person appointed by the court is to ask questions on behalf of the defendant. In relation to child witnesses in general, section 15YG provides that an unrepresented defendant may only cross-examine them with leave of the court. Relevant considerations when determining whether to grant leave include whether the child's ability to testify will be adversely affected, and the possibility of trauma being caused, by the defendant's ability to conduct the cross-examination in person.

7.2 Australian Capital Territory

Children are able to give evidence via closed circuit television (CCTV) in the ACT. This entitlement was extended to adult complainants of sexual assault offences in 1994. Section 6 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) enables prescribed witnesses, that is children or complainants of sexual offences, to give evidence via closed-circuit television. However, in the event that the witness prefers to give evidence in the courtroom, the proceedings will be unreasonably delayed, or there is a substantial risk that the proceedings will not be conducted fairly, the court may make an order against the use of CCTV. However, the ACT provisions do not prevent an unrepresented defendant cross-examining the complainant in person.

The Australian Law Reform Commission noted that the use of such technology as CCTV generally reduced the trauma experienced by witnesses when testifying. They commented,

When assessed in terms of the four aspects of its effect upon the participants who used it, the general response to closed-circuit television was favourable, and in some cases, very much so. First, it was seen as achieving both objectives – reducing the stress upon children as they testify, and increasing the likelihood that they would be forthcoming with their evidence. Second, in terms of the way the evidence via closed-circuit television is perceived, there was some concern about a change in impact but generally, closed-circuit television was reported, especially by magistrates, as providing a closer and clearer picture of the child. Third, closed-circuit television was generally seen as being fair. Most respondents denied that it infringed the rights of the accused to confront witnesses because the evidence was

⁴⁰ Hon F Walker MP, *NSWPD*, 18/3/81, p 4769.

still able to be tested.⁴¹

7.3 Northern Territory

Section 5 of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) expressly states that an unrepresented defendant in a sexual offence trial cannot directly cross-examine the complainant. Instead, any questions are to be put to the Justice, Judge or court-appointed person who will then repeat the question to the complainant. However, the Victorian Law Reform Commission has been critical of the approach adopted in the Northern Territory, as such an approach creates ‘a potential or actual conflict between the impartiality of the judicial officer and the judicial officer’s role in putting questions on behalf of an accused, and may create an impression of unfairness’.⁴²

Northern Territory legislation also provides for vulnerable witnesses.⁴³ Vulnerable witnesses include but are not limited to witnesses under the age of 16 or an alleged victim of a sexual offence. In such an event, the vulnerable witness is entitled to give evidence: via closed-circuit television; with the use of a screen between the witness and the defendant; and/or to be accompanied by a relative, friend or other support person. Appropriate considerations when determining whether such arrangements should be permitted include the need to minimise the possible harm caused to the witness by giving evidence and the need to enable the witness to effectively give evidence.

7.4 Queensland

An unrepresented person accused of a sexual offence is unable to directly cross-examine a protected witness in Queensland.⁴⁴ A protected witness includes victims of sexual violence and other serious violent offences, child witnesses and witnesses with an intellectual impairment.⁴⁵ In such a case the defendant will be provided with legal representation for the purposes of cross-examination unless he or she wishes to arrange his or her own representation or does not want the witness to be cross-examined.⁴⁶

The prohibition on an unrepresented defendant cross-examining a protected witness in person is a recent amendment to Queensland law. The *Criminal Law Amendment Act 2000* (Qld) followed the report of the Task Force on Women and the Criminal Code which overwhelmingly favoured ‘an absolute prohibition on the cross-examination of children and

⁴¹ Australian Law Reform Commission, *The Use of Closed-Circuit Television for Child Witnesses in the ACT*, Children’s Evidence Research Paper 1, October 1992, p 143.

⁴² Victorian Law Reform Commission, *Sexual Offences: Interim Report*, 2003, p 232.

⁴³ Section 21A *Evidence Act* (NT).

⁴⁴ Section 21N *Evidence Act 1977* (Qld).

⁴⁵ Section 21M *Evidence Act 1977* (Qld).

⁴⁶ Section 21O *Evidence Act 1977* (Qld).

victims of sexual or violent crime by the accused in person'.⁴⁷ In the Second Reading speech, the Attorney-General, the Hon M J Foley MP, noted:

The Government recognises that the right to a fair trial and the presumption of innocence require that an accused person be allowed to confront his or her accuser and to test the evidence called against him or her through cross-examination. However, the Government also recognises that a witness giving evidence in court is performing a public duty and is entitled to be treated with dignity and respect, and encouraged, not discouraged, from reporting crime. An accused does not have the right to harass, intimidate or traumatise a witness.⁴⁸

Section 21A of the *Evidence Act 1977* (Qld) enables the use of alternative arrangements when a special witness is required to give evidence. A special witness includes, amongst others, one who is likely to suffer severe emotional trauma or 'would be likely to be so intimidated as to be disadvantaged as a witness'. Permissible arrangements include the accused being excluded from the courtroom whilst the special witness gives evidence, the accused being obscured from the view of the witness, closure of the courtroom, the use of an alternative venue, the provision of a support person, and the witness' evidence to be videotaped and subsequently viewed in the courtroom rather than testifying directly provided that it does not unfairly prejudice the accused.

7.5 South Australia

There is currently no specific prohibition on an unrepresented defendant in South Australia cross-examining the complainant of a sexual offence in person. However, some protection is offered to vulnerable witnesses through the provision of alternative arrangements for giving evidence. Vulnerable witnesses include but are not limited to those under the age of 16 or an alleged victim of a sexual offence. Section 13 of the *Evidence Act 1929* (SA) empowers a court to make special arrangements to protect a witness from embarrassment or distress and to prevent them being intimidated by the atmosphere of the courtroom. Such arrangements might include the use of closed-circuit television, the use of a screen, and/or permitting the witness to be accompanied by a relative or friend.

7.6 Tasmania

Like South Australia, a complainant of a sexual assault offence in Tasmania may be cross-examined in person by the accused. However, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) enables a court to make appropriate arrangements for witnesses who because of their relationship to any party in the proceeding or the nature of the subject matter of the evidence is likely to suffer severe emotional trauma or to 'to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily'.⁴⁹ An order

⁴⁷ Queensland, Office for Women, *Report of the Taskforce on Women and the Criminal Code*, 2000, p 327.

⁴⁸ Hon M J Foley, Second Reading Speech, *QPD*, 7/9/00, p 3100.

⁴⁹ Section 8(1).

may include the provision of a support person, the use of an audio-visual link, or a closed courtroom.

7.7 Victoria

Whilst there is currently no prohibition on an unrepresented accused cross-examining a complainant of a sexual assault in person, alternative arrangements may be made for the giving of evidence by a witness in sexual offence proceedings.⁵⁰ Permissible arrangements include the use of closed-circuit television or screens, the presence of support persons, closed courtrooms and the removal of such formalities as legal practitioners wearing robes.

Nevertheless, the law in this regard is under active consideration in Victoria. The Victorian Law Reform Commission recently made a number of recommendations in relation to cross-examination by an unrepresented defendant.⁵¹ Recommendations 44 to 50 are reproduced below:

Recommendation 44: In any criminal proceeding for sexual offences, the accused may not cross-examine the complainant or a protected witness personally.

Recommendation 45: The court must advise the accused that he may not cross-examine the complainant or protected witness personally, and invite the accused to arrange representation if he wishes the complainant or protected witness to be cross-examined.

Recommendation 46: If the accused refuses legal representation, the court must direct Victoria Legal Aid to provide legal assistance for the purpose of cross-examination of the complainant or protected witness. A person appointed by Victoria Legal Aid is appointed as a friend of the court for the purpose of cross-examination only.

Recommendation 47: The person appointed may question the complainant or protected witness only about the general matters the accused requests be put to the complainant or protected witness, subject to the ordinary rules governing cross-examination of complainants or other witnesses.

Recommendation 48: Guidelines for the conduct of lawyers who are appointed as friends of the court should be developed after consultation with the courts, the Victorian Bar, Victoria Legal Aid, the Office of Public Prosecutions and the Law Institute of Victoria.

Recommendation 49: If the accused declines to accept the legal assistance provided for this purpose, or to provide such instructions as are necessary to enable the person appointed to question the complainant or protected witness adequately or at

⁵⁰ Section 37C, *Evidence Act 1958* (Vic).

⁵¹ Victorian Law Reform Commission, n 42.

all, he is to be taken as having foregone his right to cross-examine the complainant or protected witness.

Recommendation 50: The court must inform the jury that the accused is not permitted to cross-examine the complainant or a protected witness personally. If a complainant or protected witness is cross-examined by a person appointed for that purpose, the court must warn the jury that:

- The procedure is a routine practice of the court.
- No adverse inference is to be drawn against the accused as a result of the arrangement; and
- The evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

However, the Commission recognised that other witnesses may also experience distress and humiliation if cross-examined personally by the accused. Accordingly, they proposed that the above protections should also apply to such witnesses as children, persons with a cognitive impairment and witnesses who are complainants in other cases involving the defendant.⁵²

7.8 Western Australia

In Western Australia, an unrepresented defendant cannot directly cross-examine a child under the age of 16 in any criminal proceedings.⁵³ However, section 106G of the *Evidence Act 1906* (WA) enables the defendant to put the question by stating it to the judge or a court-approved person who subsequently repeats it to the child. However, these protections do not extend to adult sexual assault complainants.

Nevertheless, the court may take into account, when considering whether to make an order regarding measures to assist a special witness, whether an adult witness is likely to suffer severe emotional trauma or 'to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily' because of the relationship between the parties or the nature of the subject matter of the proceedings.⁵⁴ In such a case, the court may make an order that the witness is entitled to a support person, and that his or her evidence can be pre-recorded on videotape at a special hearing.

⁵² Ibid, p 231.

⁵³ Section 106G *Evidence Act 1906* (WA).

⁵⁴ Section 106R *Evidence Act 1906* (WA).

8 FOREIGN JURISDICTIONS

8.1 Canada

In Canada, there is a presumption against an accused in a sexual or violent offence trial being allowed to personally cross-examine a witness under the age of 18.⁵⁵ However, the court may grant leave to the defendant if it is of the opinion that ‘the proper administration of justice requires the accused to personally conduct the cross-examination’. The court will appoint counsel for the purpose of cross-examination where the accused is not represented.

8.2 England

In England, the *Youth Justice and Criminal Evidence Act 1999* was passed to prevent an unrepresented defendant from personally cross-examining the complainant in relation to a sexual offence.⁵⁶ The Act implemented reforms recommended by the Home Office in their report - *Speaking Up for Justice*⁵⁷ and followed two high profile sexual assault cases involving unrepresented defendants (see section nine). The defendants in each case were found guilty but only after they had conducted a harrowing cross-examination of their respective victims, one dressed throughout in the clothes he had worn at the time of the offence.

Whilst unrepresented defendants were already prevented from cross-examining child witnesses in person regarding sexual and violent offences, the *Youth Justice and Criminal Evidence Act 1999* extended this protection to adult complainants in sexual cases as well as strengthening the provisions in relation to children. Section 36 provides the court with a discretionary power to prevent the personal cross-examination of witnesses in other cases where the court is satisfied that the circumstances of the particular case warrant the prohibition and it is not contrary to the interests of justice. Should the defendant fail to arrange legal representation, at least for the purposes of cross-examination, the court will consider whether the evidence of the particular witness is necessary in the interests of justice. In the event that the court deems the evidence necessary, a legal representative will be appointed by the court to conduct cross-examination on behalf of the defendant.⁵⁸ However, the person appointed by the court is not to be responsible to the accused.

⁵⁵ Section 486, *Criminal Code* (Canada).

⁵⁶ Section 34 *Youth Justice and Criminal Evidence Act 1999*.

⁵⁷ United Kingdom, Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, 1998.

⁵⁸ Section 38.

8.3 New Zealand

An unrepresented defendant on trial for a sexual offence cannot directly cross-examine a child or a person with a mental handicap in New Zealand.⁵⁹ The questions are to be put by a person appointed by the court. However, the law in New Zealand is currently under review. The New Zealand Law Commission noted in a preliminary paper in 1996 that much of the reasoning behind the current prohibition also applies to adult complainants in sexual cases, custody cases and domestic protection cases.⁶⁰

A report released by the Commission in 1999 recommended that there be ‘an absolute bar on personal cross-examination by unrepresented defendants in the cases of:

- All complainants in sexual cases;
- All complainants in cases of domestic violence (as defined in the *Domestic Violence Act 1995*); or harassment (as defined in the *Harassment Act 1997*); and
- All child witnesses in sexual and domestic violence cases’.⁶¹

The Commission also recommended that such protections should be afforded to all other witnesses who ‘should be able to apply not to be personally cross-examined, or the court should be able to make an order of its own initiative’.⁶²

8.4 Scotland

The *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* requires persons accused of certain sexual offences, including rape, to be represented throughout the trial. Section 288C was inserted into the *Criminal Procedure (Scotland) Act 1995* to prohibit the personal conduct of the defence in certain sexual matters. The memorandum released with the *Sexual Offences (Procedure and Evidence) (Scotland) Bill* noted that,

The aim of the new provisions is to prevent the complainer from being humiliated, embarrassed or otherwise inhibited in giving evidence as a result of abuse by the accused of his or her right to cross-examine, or as a result of having to submit to questioning by the accused personally about highly intimate or degrading matters, whether or not that questioning is abusive.⁶³

Scotland is unusual in requiring legal representation for the duration of the trial. This is partly due to procedural aspects of the Scottish legal system involving less pre-trial

⁵⁹ Section 23F *Evidence Act 1908* (NZ).

⁶⁰ New Zealand, Law Commission, *The Evidence of Children and Other Vulnerable Witnesses; A Discussion Paper*, Preliminary Paper 26, 1996, p 46.

⁶¹ New Zealand, Law Commission, *Evidence*, Report 55, volume 1, 1999, p 110.

⁶² *Ibid*, p 110.

⁶³ Scottish Parliament Information Centre, *Sexual Offences (Procedure and Evidence) (Scotland) Bill*, Research Paper 01/10, 2001, p 15.

disclosure of evidence than is required elsewhere.⁶⁴ As most of the evidence is revealed during the trial it would be difficult for a legal representative appointed solely for the purposes of cross-examination to have a full grasp of the case.

9 CASE STUDIES

The following cases highlight some of the harms that may be inflicted when the accused is able to cross-examine the complainant of a sexual offence in person.

- *R v Cremmen* (unreported, Supreme Court of Victoria, Court of Criminal Appeal, 27 June 1988)

The appellant had been convicted of one count of aggravated burglary, four counts of rape with aggravating circumstances and two counts of attempted rape with aggravating circumstances. The appellant was unrepresented during the trial and personally cross-examined the complainant for four days. Much of the cross-examination was irrelevant and repetitious. The nature of the cross-examination caused such concern that at one stage the foreman of the jury even indicated to the judge that the jury was concerned about the length of the cross-examination and its possible effect upon the complainant. The trial judge had been reluctant to intervene and thus interfere with the right of the defendant to cross-examine. However, the trial judge did note that,

The accused's right to cross-examine is only a right to cross-examine relevantly and not to embark upon a course designed to wear down the morale of the witness or so overbear her will and mind that she will agree with any proposition put to her by the accused in order to escape from her ordeal in the witness box.

- *R v Milton Brown* [1998] EWCA Crim 1486 (6 May 1998)

The defendant in this case in the United Kingdom was convicted on five counts, two of which involved the rape of a woman. The trial judge's comments, as recorded in the judgment of the Court of Appeal, highlight how the right to cross-examine the complainant may be abused by an unrepresented defendant. The trial judge noted:

It is a highly regrettable and extremely sad aspect of this case that despite my repeated efforts during the first two days of your trial you insisted on dispensing with the services of highly competent leading and junior counsel and solicitors, the third set you had been allocated at public expense, thereafter *subjecting your victims to merciless cross-examination clearly designed only to intimidate and humiliate them.*

⁶⁴ *Ibid*, p 8.

The trial judge also commented on the legal restrictions under which judges operate, that prevent them from intervening in such cases:

Although I took what steps I could to minimise that ordeal by repeated efforts to prevent repetitious and irrelevant questioning, nevertheless the *whole experience must for those women have been horrifying* and it is highly regrettable in my view, and a matter of understandable public concern, that the law as it stands permits a situation where an unrepresented defendant in a sexual assault case has a virtually unfettered right personally to question his victim in such needlessly extended and agonising detail for the *obvious purpose of intimidation and humiliation*.

On appeal, Lord Bingham stressed the centrality of the presumption of innocence to the conduct of a trial. Accordingly, a trial should not be conducted on the basis that the defendant is a rapist and the complainant a victim as that remains to be determined. Nevertheless, Lord Bingham did provide some guidance to trial judges in such situations:

The trial judge is, however, 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 can say they have been subject. It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants. Furthermore, *a trial is not fair if a defendant, by choosing to represent himself, gains the advantage he would not have had if represented of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned*.

- *R v Ralston Edwards* [1997] EWCA Crim 1679 (3 July 1997)

This case was the second of two high-profile sexual offence cases where the defendant was not represented in the United Kingdom. The defendant was eventually convicted of two counts of rape. However, during the trial he had cross-examined the complainant for six days wearing the same jeans and jumper he had worn at the time of the attack. At one stage the complainant had fled from the courtroom physically sick. The complainant described the situation as being ‘raped once by Edwards and again by the British justice system’.⁶⁵ She subsequently made a complaint to the European Commission of Human Rights.⁶⁶

The public outcry in relation to the latter two cases was sufficient to spark reform in this area. Whilst such examples of abuse of the right to cross-examine may be infrequent, the

⁶⁵ ‘Rape trial ordeal prompts reform call’, *Guardian Weekly*, 1/9/96, p 9.

⁶⁶ *PD (HL)*, 1 February 1999, Column 1395.

trauma experienced by the victim in each of these cases would have been extreme, and may have served to deter other victims from reporting similar crimes.

10 WHY AN UNREPRESENTED DEFENDANT SHOULD BE ABLE TO PERSONALLY CROSS-EXAMINE THE COMPLAINANT OF A SEXUAL OFFENCE

Some arguments that have been advanced in support of the proposition that an unrepresented defendant should be permitted to directly cross-examine a complainant of a sexual offence include:

- The presumption of innocence is a fundamental principle of the Australian legal system. A trial should not be conducted on the basis that the defendant is guilty of the offence and the complainant is a victim. The purpose of the trial is to determine whether this is the case. A prohibition on an unrepresented accused cross-examining the complainant in person may create the impression that they are guilty of the crime and that the complainant is a victim in need of protection.
- The ability to test hostile witnesses is an important right of the defendant. It is enshrined in such international agreements as the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights* (ICCPR). Article 14 of the ICCPR provides that a defendant has the right ‘to examine, or have examined, the witnesses against him’. A prohibition on an unrepresented defendant personally cross-examining the complainant would unfairly restrict the right of the defendant to confront his or her accusers.
- The defendant has the right to conduct his or her own defence. Article 14 of the ICCPR provides that a defendant has the right ‘to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing’.
- The law already provides sufficient protection to vulnerable witnesses. The ACT Law Reform Commission found the provisions in the *Evidence Act* regarding ‘unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’ questions to be adequate as ‘there is a real risk that unnecessary fetters on cross-examination may prejudice the fair and effective trial of the accused’.⁶⁷
- The adversarial trial model is primarily concerned with the rights of the defendant. As the defendant is at risk of losing their liberty their rights should be of the utmost importance. It is ‘intrinsically incompatible with that model to balance those rights against the interests of other participants in the criminal justice system, and specifically witnesses’.⁶⁸

⁶⁷ ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report 18, 2001, p 111.

⁶⁸ Hoyano L, ‘Striking a balance between the rights of defendants and vulnerable witnesses: will special measures directions contravene guarantees of a fair trial?’, *Criminal Law Review*, 2001, p 949.

- The ordeal of cross-examination is not limited to sexual assault victims. Studies have shown that other victims and witnesses also ‘feel humiliated, degraded, and frustrated by the process of cross-examination’.⁶⁹
- The real problem does not derive from an unrepresented defendant being able to directly cross-examine the complainant. The true source is found in the inadequate restrictions upon cross-examination in general. The poor treatment of complainants is an inescapable part of the adversarial trial process.⁷⁰ Preventing an unrepresented defendant from directly cross-examining the complainant does little to address this issue.
- Preventing an unrepresented defendant from personally cross-examining the complainant may jeopardise the fairness of the trial.⁷¹ Whilst the distress of sexual assault complainants in court is not doubted, the minority of the NSW Law Reform Commission (who did not support the final recommendation that there be a mandatory prohibition on an unrepresented accused personally cross-examining a complainant in a sexual offence proceeding) argued that there is no evidence to support the conclusion that the distress of the complainant is sufficient to question the fairness of the trial. They stressed that, ‘a radical assault on the traditional trial process could only be justified if there was evidence to show that complainants are so distressed by subjection to cross-examination in person by an unrepresented accused that the fairness of the trial is called into question’.⁷²
- Some sexual assault complainants wish to confront the offender in person. A mandatory prohibition would deny them this opportunity. The ability of the defendant to personally cross-examine the complainant is best left to the discretion of the court as they are better placed to account for the interests of the particular witness.
- The distress caused to sexual assault complainants is unavoidable, whether or not the defendant can cross-examine in person. There are limits to the protections that can be offered to victims by the criminal justice system.⁷³ These limitations were explored by the ACT Law Reform Commission:

The rules of evidence and procedure have been progressively changed to provide some limited protection from cross-examination as to prior sexual

⁶⁹ Ellison, n 28, p 608.

⁷⁰ Ibid, p 606.

⁷¹ NSW Law Reform Commission, n 5, p 36.

⁷² Ibid, p 48.

⁷³ Scotland, Scottish Executive, *Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials. A Pre-Legislative Consultation Document*, 2000 para 17.

history and reputation, and to permit evidence via video link, but there are very real limits to what can be done to reduce the ordeal. Complainants need emotional support and specialised counselling facilities not only to help them to come to terms with what has happened to them, but to help them cope with the strain of having to give evidence.⁷⁴

11 WHY AN UNREPRESENTED DEFENDANT SHOULD NOT BE ABLE TO PERSONALLY CROSS-EXAMINE THE COMPLAINANT OF A SEXUAL OFFENCE

Arguments that have been advanced in support of an unrepresented accused being prevented from directly cross-examining the complainant of a sexual offence include:

- One of the principles underlying the current limitations on the acceptable form of cross-examination is ‘that truth will out more readily from the lips of a calm witness, or one who has been calmly induced to assert inconsistent propositions, than from one in a state of justifiable terror or rage, or fatigue’.⁷⁵ The intimate nature of the complainant’s evidence in a trial involving a sexual offence is in itself likely to cause the witness some distress. This distress has the potential to be extreme in the event that an unrepresented accused is permitted to directly cross-examine the complainant.⁷⁶ Therefore it could be argued that preventing an unrepresented defendant from directly cross-examining the complainant facilitates the accuracy of evidence.
- Refusing to allow an unrepresented defendant to cross-examine the complainant in person does not necessarily mean that he or she has lost the ability to test the complainant’s evidence, as it can be tested by other means. In other words, ‘affording some witnesses some protection by mitigating the rigours of the orthodox adversarial trial does not necessarily mean that one is hollowing out the defendant’s rights’.⁷⁷
- Credit needs to be given to the unique experience of sexual assault victims both in and out of the court. Sexual assault complainants are generally cross-examined more severely and for longer periods of time than other witnesses. The exceptional experience of complainants has been recognised by a number of sources including Heenan and McElvie who noted,

almost all the barristers, judges and magistrates interviewed thought that rape complainants have a significantly different experience as witnesses

⁷⁴ ACT Law Reform Commission, n 67, p 125.

⁷⁵ Heydon, n 12, p 493.

⁷⁶ For example, Victorian Law Reform Commission, n 42, p 233.

⁷⁷ Hoyano, n 68, p 969.

than victims of other forms of personal violence. Some attributed this to the nature of the offence and consequently the intimate character of the evidence rape complainants must give in front of strangers. Others thought that rape complainants were attacked on their motives for lying, and were generally treated more ‘savagely’ or ‘thoroughly’ by defence counsel than other witnesses⁷⁸.

Therefore, it is appropriate to restrict the right of an unrepresented defendant to cross-examine a complainant of a sexual offence in person. It does not necessarily follow that the right needs to be fettered in regards to all kinds of offences, as sexual cases constitute ‘those in which an accused who is motivated to derive personal pleasure from another’s distress is most likely to find it’.⁷⁹

- An unrepresented defendant has an inappropriate advantage if permitted to directly cross-examine a sexual offence complainant ‘because of the intense character of direct personal confrontation’.⁸⁰
- Allowing an unrepresented defendant to cross-examine the complainant risks the purpose of cross-examination being abused. The purpose of cross-examination is to ‘test the reliability and credibility of the witness’s evidence, not to humiliate the witness or afford personal satisfaction to the questioner’.⁸¹
- The rights of the accused need to be balanced with the rights of others involved in the proceedings. The notion of a ‘fair trial’ should be more broadly defined to include the interests of persons other than the accused.⁸²
- A witness is performing a public duty. A complainant of a sexual offence is therefore entitled to appropriate support.⁸³ This was recognised by the Scottish Executive who noted that ‘a witness is entitled to security and protection from harassment and intimidation throughout the process’.⁸⁴
- The right to cross-examination is not a fundamental human right. The Queensland Court of Appeal noted that it is rather ‘an incident of the obligation of a court to ensure that there is a fair trial; that is, one which fairly balances the interests of the

⁷⁸ Quoted in Queensland, Office for Women, n 47, p 312.

⁷⁹ Scotland, Scottish Executive, n 73, para 55.

⁸⁰ NSW Law Reform Commission, n 5, p 47.

⁸¹ Scotland, Scottish Executive, n 73, para 25.

⁸² *Ibid*, para 14.

⁸³ Queensland, Office for Women, n 47, p 301.

⁸⁴ Scotland, Scottish Executive, n 73, para 21.

accused with those of the public represented by the prosecution'.⁸⁵

- Numerous studies have revealed that the worst feature of going to court for a sexual assault victim is seeing the defendant and being subjected to cross-examination.⁸⁶ A survey conducted by the Bureau of Crime Statistics and Research found that the three worst features of giving evidence in court, as identified by complainants of sexual offences, were: reliving the event in public (46.2%), seeing the offender in the courtroom (38.5%) and being cross-examined (19.2%).⁸⁷ 65.5% of the respondents thought that the worst aspect of cross-examination was seeing the accused in the courtroom.⁸⁸ Therefore, to allow the defendant to conduct cross-examination in person heightens the already distressing experience of court for the complainant. Such trauma would derive from the actual manner and nature of questioning, compounded by the fact that it is the defendant asking the questions.⁸⁹
- Whilst the law does allow for judicial control of the style and type of questioning permitted in cross-examination, these controls are often inadequate. Judges may hesitate to intervene too often in cases where the defendant is unrepresented for fear of appearing to favour one party and so provide grounds for appeal. This hesitancy is thought to derive from the conflicting duties of the judge:

A conflict exists between the role of the trial judge in criminal proceedings and the trial judge's duty to restrain unnecessary and improper cross-examination. This irreconcilable conflict renders judicial discretion a less significant constraint than is traditionally recognised.⁹⁰

- The rate at which sexual assaults are reported is notoriously low. One reason for the low rate of reporting is a fear of the legal process.⁹¹ The Sexual Assault Phone-in Report found that, based on their own experience, 38% of victims would advise against other victims pursuing legal action.⁹²

The reluctance to report sexual assault to the police is a serious issue. According to

⁸⁵ Davies JA, *R v McLennan* [1999] 2 Qd R 297 at 303.

⁸⁶ 85.2% of sexual offence complainants in a study conducted by BOCSAR believed that seeing the offender was the worst feature of time spent in the courtroom: Edwards, n 24, p 32.

⁸⁷ Edwards, n 24, p 37.

⁸⁸ *Ibid*, p 37.

⁸⁹ United Kingdom, Home Office, n 57, p 64.

⁹⁰ Ellison, n 28, p 609.

⁹¹ Cook et al, n 25, p 21.

⁹² NSW Sexual Assault Committee, n 23, p 44.

Van de Zandt:

There is quite clearly a problem in our legal system when its participants, its managers, its protagonists would, in the event that they are raped, decline to make a complaint of sexual assault for fear that they would become a complainant in the court process. There is a problem in our legal system when criminal defence lawyers would not want their own daughter or spouse to be a complainant in a sexual assault, for fear they may be cross-examined by a defence lawyer like themselves.⁹³

A mandatory prohibition on unrepresented defendants cross-examining sexual assault complainants may encourage victims to report the crime to the police as it could lessen the fear of being personally confronted by the offender in court.

- A prohibition on direct cross-examination has the support of a number of legal organisations. The NSW Law Reform Commission recommended that ‘an unrepresented accused should be prohibited from personally cross-examining a complainant in a sexual offence proceeding’ as ‘the benefit to complainants and to the community in general outweighs any perceived detriment to accused persons’.⁹⁴ The following factors were influential in reaching that conclusion:⁹⁵
 1. The need for a fair trial does not mean that the interests of the accused take priority over all other interests.
 2. The nature of the questions in a sexual assault case mean it is inherently offensive for them to be put personally by the alleged attacker.
 3. An unrepresented defendant gains an unfair advantage if permitted to cross-examine in person.

Therefore, the Law Reform Commission concluded that ‘provided there are other ways in which the complainant’s evidence can effectively be tested... there can be no justifiable reason for subjecting the complainant to cross-examination by the accused’.⁹⁶ The UK Home Office similarly supported a mandatory prohibition.⁹⁷

12 OPTIONS FOR REFORM

There are a number of ways in which the law in relation to an unrepresented defendant can be reformed. The following options represent various attempts to balance the rights and interests of the accused with that of the complainant. The first three options involve a mandatory prohibition on an unrepresented defendant personally cross-examining the

⁹³ Van de Zandt P, ‘Heroines of fortitude’ in Easta P (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, Sydney, 1998, p 124.

⁹⁴ NSW Law Reform Commission, n 5, p 47.

⁹⁵ Ibid, p 45ff.

⁹⁶ Ibid, p 47.

⁹⁷ United Kingdom, Home Office, n 57, recommendation 58, p 12.

complainant of a sexual offence. However, the options differ on the procedure by which cross-examination is subsequently to occur. The final three options allow the court to retain some discretion in determining the best approach in relation to the particular circumstances of each case as it arises.

Mandatory prohibition on an unrepresented defendant directly cross-examining the complainant of a sexual offence

1. *Legal representation is to be appointed solely for the purposes of cross-examination.*

This option minimally restricts the rights of the accused as the prohibition on self-representation is limited to cross-examination. The defendant is able to conduct the remainder of his or her defence. A legal representative also has the necessary skills and knowledge and is therefore in the best position to conduct cross-examination. This was the preferred approach of the UK Interdepartmental Working Group, who recommended that ‘there should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault’ and ‘where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only’.⁹⁸ It is also the option supported by the Victorian Law Reform Commission who proposed that the legal representative be permitted to question the complainant only on matters instructed by the defendant.⁹⁹ However, the Victorian Law Reform Commission advised that the representative be treated as a friend of the court rather than as the legal representative of the accused.¹⁰⁰

This option is also preferred by the NSW Law Reform Commission because it ‘has the benefits of consistency, certainty and simplicity. It is also less prejudicial to accused persons because the procedure is routine’.¹⁰¹ They recommended that the prohibition apply to all sexual offence proceedings. Should the defendant be unwilling to arrange representation, the Legal Aid Commission is to arrange representation for the purposes of cross-examination. However, unlike the recommendations in the UK and Victoria, the NSW Law Reform Commission recommended that the legal representative have ‘the same obligations and authority as if he or she were engaged by the accused’. However ‘where the accused gives no instructions, or where the instructions given are inadequate or perverse, the duty of the legal representative is to act in the best interests of the accused in the same way as if there was a conventional retainer’.¹⁰² The NSW Law Reform Commission also recommended that the complainant in a sexual offence

⁹⁸ Ibid, Recommendations 58 and 60.

⁹⁹ Victorian Law Reform Commission, n 42, p 231.

¹⁰⁰ Ibid, p 232.

¹⁰¹ NSW Law Reform Commission, n 5, p 55.

¹⁰² Ibid, Recommendation 7.

proceeding be entitled to give evidence via CCTV.¹⁰³

2. *The defendant should have legal representation for the duration of the trial.*

This option has the advantage of ensuring that the defence is consistently prepared and presented and that all witnesses are treated similarly. It was the option adopted in Scotland. However, it substantially restricts the rights of the accused to represent him/herself. Caution must also be exercised when considering the Scottish approach due to significant procedural differences between the legal system in Scotland and New South Wales. Nevertheless, Justice McColl (part of the minority division of the NSW Law Reform Commission) would prefer legal representation to be appointed for the entire trial, rather than being limited to cross-examination, should a mandatory prohibition be imposed on an unrepresented defendant.¹⁰⁴ Her Honour stressed that a legal representative would be unable to adequately represent the accused unless he or she was familiar with all of the issues. Therefore, she argued that partial appointment has the potential to jeopardise a fair trial. Nevertheless, the NSW Law Reform Commission noted that appointment for the entire trial would often prove unnecessary as it is thought that when faced with the compulsory appointment of a legal representative, ‘the overwhelming likelihood is that the accused would seek representation for the entire trial’.¹⁰⁵

3. *The judge, or a person appointed by the court, should ask the questions for cross-examination on behalf of the unrepresented defendant.*

Whilst this option reduces the potential for the trial to be disrupted whilst legal representation is arranged, arguments against are that it looks artificial, undermines the independence of the judge and increases the possibility of grounds for appeal.¹⁰⁶ Nevertheless, the New Zealand Law Commission recommended that the judge, or a person appointed by the judge, put the questions to the complainant on behalf of the defendant.¹⁰⁷ The judge can put the question to the witness unaltered, rephrased, or refuse to allow the question. However, the Victorian Law Reform Commission specifically recommended against the implementation of this option because of the creation of ‘a potential or actual conflict between the impartiality of the judicial officer and the judicial officer’s role in putting questions on behalf of an accused’.¹⁰⁸ However, the use of a court-appointed person to ask the questions may avoid these difficulties.

¹⁰³ Ibid, Recommendation 10.

¹⁰⁴ Ibid, p 49.

¹⁰⁵ Ibid, p 75.

¹⁰⁶ Scotland, Scottish Executive, n 73.

¹⁰⁷ New Zealand, Law Commission, n 61, p 111.

¹⁰⁸ Victorian Law Reform Commission, n 42, p 232.

Court to retain some discretion

4. *The court should have the discretion to determine whether in the circumstances it is appropriate for direct cross-examination to occur.*

The benefits of this option include its flexibility and the possibility that it may encourage the defendant to cross-examine the complainant in an appropriate manner or risk losing this entitlement. This option only limits the defendant's rights in those cases where it is truly warranted. However, it does not solve a number of the problems created by self-represented defendants. Sexual assault victims will not be encouraged to report the crime to a greater extent than in the current system, as there is no certainty that the defendant will not be permitted to directly cross-examine him or her.¹⁰⁹ There is also a concern that it may contribute to inconsistencies in decision-making.¹¹⁰

5. *There should be a presumption that an unrepresented defendant is not to personally conduct cross-examination, but with a judicial discretion to allow it in appropriate circumstances.*

This option is very similar to the previous one, except for the imposition of a presumption against allowing direct cross-examination by an unrepresented accused. Accordingly, many of the advantages and disadvantages are similar to those noted above, including the concern that it could result in inconsistent decision-making.¹¹¹

6. *There should be a presumption that a defendant cannot personally cross-examine the complainant of a sexual offence, unless the witness specifically agrees to it.*

One of the benefits of this option is that it gives those complainants who desire to confront their attacker an opportunity to do so. The UK Interdepartmental Working Group nonetheless advised against this option, as it was feared that it would increase the likelihood of the witness being intimidated as the brunt of the decision was placed on him or her.¹¹² The benefit of this alternative may also be exaggerated as relatively few complainants confront their attackers in person in court, irrespective of their personal wishes, as the majority of defendants are represented in any event.

¹⁰⁹ Scotland, Scottish Executive, n 73.

¹¹⁰ UK, Home Office, n 57, p 65.

¹¹¹ Ibid, p 65.

¹¹² Ibid.

13 CRIMINAL PROCEDURE AMENDMENT (SEXUAL OFFENCE EVIDENCE) BILL 2003

The Government has indicated its intention to introduce the *Criminal Procedure Amendment (Sexual Offence) Bill 2003* into NSW Parliament when it resumes on 2 September 2003.¹¹³ A copy of the proposed Bill is attached as Appendix A. The intention of the Bill is to ‘amend the *Criminal Procedure Act 1986* to protect a complainant in certain sexual offence proceedings from being questioned directly by the accused person’. It would insert a new section 294A into the *Criminal Procedure Act 1986* – Arrangements for complainant in sexual offence proceedings giving evidence when accused person is unrepresented.

The Bill, in its current form, implements the NSW Law Reform Commission’s (NSWLRC) recommendation that an accused be prohibited from directly questioning the complainant in sexual offence proceedings. The prohibition is mandatory. However, the Commission recommended that a *legal practitioner* cross-examine the complainant where the accused is unrepresented.¹¹⁴ Section 294A(3) requires a *person appointed by the court* to ask questions on behalf of the accused, and only those questions requested by the accused. Accordingly, section 294A(4) prevents the court-appointed person from independently giving the accused legal or other advice. The Bill essentially extends the current requirements in New South Wales concerning a child witness in any criminal proceedings, or in civil proceedings involving a personal assault offence, to include adult sexual offence complainants. However, the court does not have a discretion to decline to appoint a person to question the complainant.

Sexual offences are defined by the Bill to include prescribed sexual offences (see section 2 of this paper), as recommended by the NSWLRC. However, the Bill goes further by extending the definition of sexual offences to include an offence against section 73 (sexual intercourse with child between 16 and 18 under special care), 78A (Incest), 78B (Incest attempts), 80D (Causing sexual servitude), 91A (Procuring for prostitution), 91B (Procuring person by drugs etc), 91D (Promoting or engaging in acts of child prostitution), 91E (Obtaining benefit from child prostitution), 91F (Premises not to be used for child prostitution) or 91G (Children not to be used for pornographic purposes) of the *Crimes Act 1900*.

The Bill largely implements the ninth recommendation of the NSWLRC as section 294A(7) provides:

If such a person is appointed in proceedings before a jury, the judge must:

- (a) inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant, and
- (b) warn the jury not to draw any inference adverse to the accused person or to give

¹¹³ Hon. R Debus MP, Attorney-General, ‘Bill Released to Prevent Sexual Assault Victims Cross Examined by Accused’, *Media Release*, 24/8/03.

¹¹⁴ Recommendation 4.

the evidence any greater or lesser weight because of the use of that arrangement.

Such a warning attempts to overcome any disadvantage to the accused that may be caused by adverse inferences being drawn from the fact that he or she may not cross-examine the complainant in person. There has been some concern that a prohibition on cross-examination could create an impression that the accused is guilty and the complainant is a victim in need of protection.

The Bill does not create an entitlement to the use of such alternative arrangements as closed-circuit television, as recommended by the NSWLRC. However, the Bill does specify in proposed section 294A(6) that ‘this section applies whether or not closed-circuit television facilities or other similar technology (or alternative arrangements) are used by the complainant to give evidence’. Therefore, the use of alternative arrangements are to be an additional measure to facilitate the giving of evidence, rather than a substitute for the prohibition on the accused.

The Bill, if passed in its current form, is to apply to proceedings instituted before its commencement, including any partly heard proceedings.¹¹⁵

14 CONCLUSION

There are many factors to be considered when determining whether an unrepresented defendant should be entitled to cross-examine the complainant of a sexual offence in person. It raises difficult questions concerning the tension between the rights of the accused and the rights and needs of victims. From one view point, allowing an unrepresented accused to directly cross-examine a sexual offence complainant recognises that the presumption of innocence is a fundamental principle of the Australian legal system. The accused should not be treated as guilty, and the complainant a victim, as that is to be determined by the trial. The defendant has the right to test hostile witnesses and to conduct his or her own defence. Preventing an unrepresented accused from cross-examining a sexual offence complainant will not fully protect the complainant from the ordeal of giving evidence. Others, however, argue that victims of sexual offences need to be encouraged to report the crime and affording them as much protection as possible throughout the court process may encourage them to come forward. The ability to test the complainant’s evidence is not necessarily lost by preventing the accused from cross-examining the complainant, as his or her evidence can be tested by other means. Reducing the ordeal of cross-examination may also enable the complainant to provide more accurate evidence, thus facilitating a fair trial.

¹¹⁵

Proposed section 294A(8).

APPENDIX A:
Proposed *Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003*

First print



New South Wales

Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to protect a complainant in sexual offence proceedings by providing that the accused cannot directly question the complainant and by providing instead for questions asked by an unrepresented accused to be put to the complainant by a person appointed by the court for that purpose. At present, that arrangement applies only to child witnesses under 16 years of age in any criminal proceedings and in certain civil proceedings.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Criminal Procedure Act 1986* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] inserts proposed section 294A in the *Criminal Procedure Act 1986*.

The proposed section applies to sexual offence proceedings during which the accused person is not represented by counsel.

The proposed section provides that the complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court. The court does not have a discretion to decline to appoint such a person. The person so appointed is to ask the complainant only the questions that the accused person requests the person to put to the complainant and must not independently give the accused person legal or other advice.

The proposed section applies whether or not closed-circuit television facilities or other similar technology (or alternative arrangements) are used by the complainant to give evidence.

The proposed section provides that if such a person is appointed in proceedings before a jury, the judge must:

- (a) inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant, and
- (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of that arrangement.

The proposed section extends to proceedings instituted before the date of assent to the proposed Act, including proceedings that have been partly heard.

For the purposes of the proposed section, *sexual offence* is defined to include all sexual assault offences, sexual offences against children (including child prostitution or pornography offences), sexual servitude offences, and other sexual offences.

Schedule 1 [2] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

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New South Wales

Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003

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New South Wales

Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003

No. , 2003

A Bill for

An Act to amend the *Criminal Procedure Act 1986* to protect a complainant in certain sexual offence proceedings from being questioned directly by the accused person.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003</i> .	3 4
2 Commencement	5
This Act commences on the date of assent.	6
3 Amendment of Criminal Procedure Act 1986 No 209	7
The <i>Criminal Procedure Act 1986</i> is amended as set out in Schedule 1.	8 9

Schedule 1 Amendments

(Section 3)

[1] Section 294A

Insert after section 294:

294A Arrangements for complainant in sexual offence proceedings giving evidence when accused person is unrepresented

- (1) This section applies to sexual offence proceedings during which the accused person is not represented by counsel.
- (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court.
- (3) The person appointed by the court is to ask the complainant only the questions that the accused person requests that person to put to the complainant.
- (4) Any such person, when acting in the course of an appointment under this section, must not independently give the accused person legal or other advice.
- (5) The court does not have a discretion to decline to appoint a person under this section, despite anything to the contrary in section 28 of the *Evidence (Children) Act 1997* or any other Act or law.
- (6) This section applies whether or not closed-circuit television facilities or other similar technology (or alternative arrangements) are used by the complainant to give evidence.
- (7) If such a person is appointed in proceedings before a jury, the judge must:
 - (a) inform the jury that it is standard procedure in such cases to appoint the person to put the questions to the complainant, and
 - (b) warn the jury not to draw any inference adverse to the accused person or to give the evidence any greater or lesser weight because of the use of that arrangement.
- (8) This section extends to proceedings instituted before the commencement of this section, including proceedings that have been partly heard.

-
- (9) In this section: 1
- accused person**, in relation to any proceedings, means the 2
person who stands, or any of the persons who stand, charged 3
in those proceedings with a sexual offence. 4
- complainant**, in relation to any proceedings, means the 5
person, or any of the persons, on whom a sexual offence with 6
which the accused person stands charged in those proceedings 7
is alleged to have been committed, and includes: 8
- (a) in relation to an offence under section 91D, 91E or 91F 9
of the *Crimes Act 1900*, the person under the age of 18 10
years who is alleged to have participated in an act of 11
child prostitution, and 12
- (b) in relation to an offence under section 91G of the 13
Crimes Act 1900, the person under the age of 18 years 14
who is alleged to have been used for pornographic 15
purposes. 16
- sexual offence** means: 17
- (a) a prescribed sexual offence, or 18
- (b) an offence against section 73, 78A, 78B, 80D, 91A, 19
91B, 91D, 91E, 91F or 91G of the *Crimes Act 1900*, or 20
- (c) an offence that includes the commission of, or an 21
intention to commit, an offence referred to in paragraph 22
(a) or (b), or
- (d) an offence of attempting, or of conspiracy or 24
incitement, to commit an offence referred to in 25
paragraph (a), (b) or (c). 26
- sexual offence proceedings** means proceedings in which a 27
person stands charged with a sexual offence, whether the 28
person stands charged with that offence alone or together with 29
any other offence (as an additional or alternative count) and 30
whether or not the person is liable, on the charge, to be found 31
guilty of any other offence. 32

[2] Schedule 2 Savings, transitional and other provisions

1

Insert at the end of clause 1 (1):

2

*Criminal Procedure Amendment (Sexual Offence Evidence)
Act 2003*

3

4

APPENDIX B:

New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report 101, June 2003, Recommendations 1-10.

RECOMMENDATIONS

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

Recommendation 1 | see page 48

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

Recommendation 2 | see page 61

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

Recommendation 3 | see page 62

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

Recommendation 4 | see page 71

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

Recommendation 5 | see page 72

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

Recommendation 6 | see page 76

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

Recommendation 7 | see page 78

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

Recommendation 8 | see page 83

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

Recommendation 9 | see page 84

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

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

Recommendation 10 | see page 99

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