While the structure and adversarial nature of criminal trials are common to all offences, the impact of those processes is quite different for sexual offence victim-complainants. Thus, critical attention on the trial process itself, as well as a focus on elements specific to sexual offence trials, is needed (Brereton 1997a). The Victorian Law Reform Commission (VLRC) (2004: 85) has suggested that the responsibility on defence counsel to "vigorously test the prosecution case" and on the prosecution to "show fairness to the accused" combine to hamper sensitivity toward complainant witnesses.[2]

Victim-complainants recognise the constraints operating upon them within sexual offence trials. A United States study has shown that survivors of sexual assault are far from passive in their witness roles. Rather, witnesses work on their appearance, prepare their role as witnesses and emotionally prepare "to achieve courtroom demeanour . . . consistent with idealised images of witnesses or victims" (Konradi 1996: 415). They often built teams of supportive people around them, increasing their understanding of the court process as well as their confidence and capacity to assist in the prosecution. Many provided documents, evidence and strategic ideas to the prosecution. Their active participation went well beyond the expectations of prosecutors, and at times they resisted it (Konradi 1996). However, almost all of the survivors interviewed found that portraying themselves as "legitimate victims" required presenting themselves in ways that responded to, rather than challenging, cultural stereotypes about rape and rape victims (Konradi 1996: 425).

Alternatives models for justice

Given current low reporting and conviction rates, there are obvious limits on the capacity of "law and legal reform to address effectively certain kinds of interpersonal crime, especially sexual assault" (Daly, Curtis-Fawley, Bouhours, Weber and Scholl 2003). As a result, some people working for change have begun to explore alternative models for justice and healing outside the criminal justice system.

In particular, "restorative justice" approaches are being examined for their applicability to sexual assault and domestic violence. These approaches bring together people who have been affected by criminal activity and aim to achieve a reintegration of the offender into the broader community. Restorative justice processes take a large number of forms with widely varying relationships to usual criminal justice processes (Stubbs 2004). Evaluation of family conferencing of sexual offences committed by young people in South Australia has shown that while a substantial proportion of offenders whose cases go to court are never held responsible for their conduct, family conferencing may produce better outcomes for victim-complainants. In order to enter the family conferencing program, offenders must admit the offence, although at least half of the cases going to trial result in all charges being withdrawn or dismissed. Family conferences produced outcomes far more quickly. They resulted in more apologies to victim-complainants as well as more undertakings to do community service and more undertakings to participate in therapeutic counselling from offenders than court processes. By contrast, the few custodial sentences imposed in court were almost all suspended. (Daly et al. 2003; Daly 2004).

However, some authors and community members have real concerns about the appropriateness of restorative approaches in dealing with sexual offences, and

with domestic and family violence (and with experiences of both which is often the case when the perpetrator is a partner or family member) (Stubbs 2004). In particular, critics question whether restorative justice approaches are able to adequately address power imbalances, deal with crimes in which there may not be community consensus condemning the offender's behaviour, provide safety for victim-complainants and address the complexities of domestic violence (Stubbs 2004). Although the shortcomings of formal legal processes are documented, much less evidence is available about the capacity of restorative justice strategies to achieve safety, justice and future non-offending (Stubbs 2004). While appropriate restorative justice processes may provide a valuable alternative choice within the context of the criminal justice system, the current failures of the criminal law still need to be effectively addressed.

While appropriate restorative justice processes may provide a valuable alternative choice within the context of the criminal justice system, the current failures of the criminal law still need to be effectively addressed.

In Australia, most criminal offences, including sexual offences, are dealt with under state and territory law. This means that the law relating to sexual offences is different in each state and territory, although some jurisdictions have similar legislation. Consequently, each section of the paper deals with the similarities and differences between the states and territories. Information on evaluations of the law is provided where it has been undertaken in each jurisdiction. There is also a detailed Table at the end of this paper (pp. 32-41) outlining the specific laws and provisions that operate in each state and territory.

Evidence about past sexual experiences

A focus on the character of the victim-complainant has been a persistent feature of rape trials, and one which has reflected social attitudes suggesting that women's sexual reputation and chastity are indicators of women's truthfulness and reliability as witnesses (Henning and Bronitt 1998).

In the 1970s and 1980s, all Australian jurisdictions reformed the law applying to this aspect of evidence. It was widely recognised that the unjustified use of sexual history evidence could be humiliating and distressing for victim-complainants, jeopardising a fair trial of the real issues and producing unjust acquittals. Attacks on women's credibility based on past sexual activity also seemed to imply that some victim-complainants were unworthy of legal protection or partially responsible for sexual assaults committed against them (Edwards and Heenan 1994; Henning and Bronitt 1998). Reform sought a better balance between the rights of the accused to a fair trial and the rights of the victim-complainant to access to justice.

The legislation

Evidence about the victim-complainant's sexual reputation[3] is not permitted in any Australian jurisdiction except the Northern Territory (NT), where it is permitted only with the permission of the court. However, despite the blanket rule that evidence of sexual reputation is inadmissible, studies show it is still being admitted (Henning 1996; NSW Department for Women 1996; Taylor 2004). It appears that part of the reason is that legislation and case law offer little guidance on distinguishing between "sexual reputation" (which is generally not admissible) and "sexual experience/history" (which is admissible in some circumstances) (Henning and Bronitt 1998; Law Reform Commission of NSW 1998).