

# The law and sexual offences against adults in Australia

MARY HEATH

This paper outlines those laws of evidence that have had significant impacts upon procedures in sexual offence trials and on victim-complainants' experiences in court. It provides an accessible introduction to the current status of the laws governing penetrative sexual offences in each Australian state and territory jurisdiction to allow sexual assault workers, counsellors and victim-complainants to understand more readily the relevant criminal law in their particular state.

Sexual assault impacts on the lives of many Australians. However, the vast majority of people who are sexually assaulted avoid engagement with the criminal justice system, perceiving it as inappropriate to their needs or fearing the additional trauma of the legal process (Cook et al. 2001; Lievore 2003). According to the Victorian Law Reform Commission, rape has the lowest reporting rate of any crime (VLRC 2004). At least 85 per cent of sexual assaults never reach the criminal justice system at all (Stubbs 2004).

The relationship between reporting and convictions has become a self-perpetuating cycle, one that maintains both at unacceptably low levels. Of the cases that do enter the criminal justice system, very few reach trial, which means that a tiny fraction of all reported sexual offences result in convictions (Lievore 2003). On the other hand, low conviction rates, traumatic experiences in court, and high rates of withdrawal from criminal justice processes contribute to low rates of guilty pleas and low reporting (VLRC 2004). Part of the task for those engaged in trying to change this picture is to break the cycle.

The criminal justice system should be accessible to everyone who is subjected to a serious crime. People who are sexually assaulted deserve to be treated with dignity and respect, no less than victims of other crimes. Their contribution to the public interest in reporting crime and ensuring that it is prosecuted should be recognised. Instead, "current deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence" (VLRC 2004: 81).

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## Aims and structure of the paper

This issues paper aims to provide a plain-language account of the current status of the law relating to key penetrative sexual offences against adults in Australia. It also aims to outline some parts of the law of evidence that have significant impacts upon procedures in sexual offence trials and on the experiences in court of victim-complainants. It seeks to provide an accessible introduction to the current status of the laws governing sexual offences to allow sexual assault workers, counsellors and victim-complainants to understand more readily the relevant criminal law. In doing so, the paper aims to supplement existing guides which provide support and information about going to court as a complainant witness in a sexual offence trial (Cumberland, Heenan and Gwynne 1998; Taylor 2005).

This paper begins with some brief historical context about Australian laws against sexual offences and information about reporting and conviction rates. Although the overall focus is on the current state of the law, it would be misleading to suggest that the criminal law currently addresses sexual violence in a completely effective way. The vast majority of sexual offences never reach the legal system because they are never reported to the police. The majority of sexual offences that are reported to the police do not reach court.

As a result of these well-documented limits on the effectiveness of the criminal justice response to sexual offending, some anti-rape activists are considering whether alternatives to the criminal justice system offer better models for responding to sexual violence. The paper briefly summarises some of the key arguments for and against alternative approaches.

It then moves on to offer a description of the law about the admissibility of evidence about the victim-complainant's past sexual experiences, the admissibility of sexual assault counselling information (such as counselling files and counsellors' notes), and corroboration in sexual offence trials.

Having described the applicable law in each of these areas, the paper presents a summary of key evaluations that were designed to assess how the

The Australian Centre for the Study of Sexual Assault aims to improve access to current information on sexual assault in order to assist policy makers, service providers, and others interested in this area to develop evidence-based strategies to prevent, respond to, and ultimately reduce the incidence of sexual assault.

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## Contents

Aims and structure of the paper	2
Historical context	3
Reporting and conviction rates	3
Alternative models for justice	6
Evidence about past sexual experiences	7
Corroboration	13
Protection of sexual assault counselling communications	15
Outline of the offences	19
Non-consent of the victim-complainant	21
What the accused thought	26
Incest provisions	29
Table of sexual offence laws and procedures in Australia	32-41
Conclusion	31
Endnotes and references	42

## The author

**Dr Mary Heath** lectures in law at Flinders University in South Australia. She is also the Chair of the Management Committee of Yarrow Place Rape and Sexual Assault Service, and a member of "Stop Rape Now" who are currently lobbying for law reform.

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ACSSA Coordinator: *Melanie Heenan*

Australian Institute of Family Studies  
300 Queen Street, Melbourne 3000 Australia  
Phone: (03) 9214 7888 Fax: (03) 9214 7839

Internet: [www.aifs.gov.au/acssa](http://www.aifs.gov.au/acssa)

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law works in practice. It then describes the laws of each state and territory dealing with major sexual offences involving sexual penetration of an adult; provides contextual information about the relationship of these offences to the law dealing with intrafamilial sexual assault (incest); and summarises the findings of key evaluations of each area of the law, where they have been undertaken.

## Historical context

The law of sexual offences applied in Australian courts today has its foundations in the English common law tradition. However, in the last 30 years, there have been major changes to the law concerning sexual offences in every state and territory. Every jurisdiction has created distinct legislation on sexual offences. As a result, Australia offers significant opportunities to consider which laws work most effectively and why. Most Australian jurisdictions have also undertaken evaluation of this legislation (discussed in more detail in the body of this paper). Evaluation is critical because the evidence so far suggests that, while major improvements have taken place, more work is needed (Heenan and McKelvie 1997; Stubbs 2003; VLRC 2004).

The law relating to adult sexual offences has moved a long way from its history in a legal tradition that saw women as the property of their husbands or fathers, and treated rape as a violation of male property rights. The modern law of rape focuses much more strongly on sexual autonomy. However, the past exercises an intense pull on the law in a range of ways. Judge-made law draws on the decisions of judges in order to decide the legal principles of today. The historical shape of the law of rape limits the imaginations of those who lobby for, enact, enforce and interpret laws. Individuals who work within the police, the legal profession and the courts are part of the same culture that produces victim-complainants, perpetrators and juries. Myths about sexual assault remain prevalent within Australian culture (Easteal 1993; Friedman and Golding 1997; Xenos and Smith 2001).

Sexual assault is a complex problem that cannot be addressed solely by legislative change. However, the importance of the criminal justice system and its significant symbolic role should not prevent a clear recognition that the vast majority of sexual assaults are not addressed by the criminal justice system (Stubbs 2004: 2891).



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## Reporting and conviction rates

Australian research suggests that one in five Australian women and one in twenty Australian men over the age of 18 have been “forced or frightened into unwanted sexual activity” across their lifetimes, many of them having experienced coercion when aged under 16 years (de Visser, Smith, Rissel, Richters and Grulich 2003: 200).<sup>1</sup> However, very few of these experiences reach the criminal justice system. National and international research suggests that 15 per cent or less of these offences are reported to the police (McLennan 1996; Cook, David and Grant 2001; de Visser et al. 2003; Lievore 2003).

A high proportion of sexual assaults against women are perpetrated by male intimate partners (Heenan 2004a; VLRC 2003). Indeed research undertaken on behalf of the Victorian Health Promotion Foundation (2004) has found that domestic