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Law Reform Commission of Victoria

Discussion Paper No. 9

RAPE AND ALLIED OFFENCES:

Victims with Impaired Mental Functioning

January 1988

This is a discussion paper, *not* a report. Your comments on the matters raised in the paper would be most welcome. They will be taken into account by the Commission in compiling its report.
Comments should be sent to the Executive Director, Law Reform Commission of Victoria, 7th Floor, 160 Queen Street, Melbourne (Telephone: (03) 602 4566) by 4 March, 1988.

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1. INTRODUCTION

Terms of reference

1 On 21 October 1985, the Attorney-General, the Hon J H Kennan MLC, gave the Commission a reference dealing with the law relating to sexual offences in Victoria. The terms of reference direct the Commission:

(i) to review the law relating to sexual offences in Victoria, in particular the adequacy of the operation in practice of the amendments to the law made by the Crimes (Sexual Offences) Act 1980; and

(ii) to recommend what, if any, reforms should be made.

Background

2 The Commission is dealing with the reference in four parts:

the substantive law relating to sexual offences – the report was released in September 1987;

procedure and evidence in the prosecution of sexual offences – the report has been presented to the Attorney-General;

sexual offences against children – a discussion paper is being prepared; and

sexual offences against victims with impaired mental functioning – the subject of this discussion paper.

3 There is little data available in relation to the number of sexual offences committed against victims with impaired mental functioning. They are not separately identified within the statistics dealing with the general offences and their situation has not been the subject of detailed study. The Public Advocate is conducting a study of the intellectually disabled as victims of crime, examining issues such as incidence, the acceptance of intellectually disabled people as witnesses, and the ease or difficulty experienced by intellectually disabled people in bringing charges.[1]

1. For background to the study see *Finding the Way: The Criminal Justice System and the Person with Intellectual Disability*, Office of the Public Advocate, Melbourne, 1987, 10.

Terminology

4 There are many forms of mental impairment. They fall into four main categories:[2]

- mental or psychiatric illness
- brain injury
- dementia, senility and Alzheimer's Disease
- developmental disablement, more commonly known in Victoria as intellectual disability.

For the purposes of this paper, the term mental illness is used to cover the first three categories of mental impairment. Recent legislative initiatives demonstrate the Government's recognition that mental illness and intellectual disability are quite distinct.[3] Social justice requires that each kind of impairment should be separately considered in relation to identification, recognition, support and management.

5 However, no such distinction is to be found in the criminal law. The principles relevant to the assessment of a person's mental functioning are expressed in general terms. The essential question underlying these principles is whether or not the person has the level of mental functioning necessary to satisfy the tests specified by the criminal law. It is the nature and extent of the impairment, not its cause, which is relevant.

6 Consequently, references in this paper to 'impaired mental functioning' includes all causes of that impairment. Where appropriate, distinctions are made by the use of the terms 'intellectually disabled' and 'mentally ill'. Offensive terms such as 'idiot', 'imbecile', 'lunatic' or 'defective' have been used only where they are the ones used in the relevant laws.

2. B. E. Porter, M. B. Robinson *Protected Persons and their Property in New South Wales* Law Book Co Ltd, Sydney, 1987, 2.
3. Mental Health Act 1986, Intellectually Disabled Person's Services Act 1986.

2. RELEVANT CONSIDERATIONS

7 In its first report on this reference, the Commission identified four major considerations which it believed should underlie general reform of sexual offences. They are also applicable in this context. The first is that the law should offer as much protection as possible to the sexual autonomy and integrity of all members of the community. The second is that the interests and concerns of women must be given special recognition as they constitute the vast majority of adult victims of sexual offences. The third is that the fundamental tenets of the criminal justice system, such as the presumption of innocence, should be maintained unless a paramount case for change is established. The fourth is that the law should be as precise, clear and simple as possible.

8 In the case of persons with impaired mental functioning, there is a further major consideration to be taken into account. In their case, there are specific offences designed to protect them not from violence, but from sexual 'exploitation' by people in positions of power over them, or generally by people without mental impairment seeking only their own sexual gratification. As well as providing protection, such laws may have the effect of depriving people with impaired mental functioning of their right to sexual expression. As the Royal Commission on Human Relationships noted:

> These provisions were no doubt intended to be protective in nature. It is probable also that the undesirability of procreation by women who may not be capable of caring for their offspring was taken into account when the offences were created. The effect of these laws, however, is to deprive a woman within one of these definitions of all sexual freedom. The law contains assumptions which we do not think are warranted, namely that any intercourse with such a woman is likely to be exploitive in nature, and possibly damaging in its effects. These laws do not admit the possibility that the woman may want to enter into a sexual relationship.[1]

The United Nations Declaration on the Rights of Mentally Retarded Persons states that 'the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings'.[2] However,

1. *Final Report*, Vol 5, AGPS, Canberra 1977, 221.
2. Resolutions of the UN General Assembly 2856 (XXVI) of 10 December 1971, Section 3(1).

the right to individual expression of sexuality has received scant attention by signatory nations. Neither the United Nations Declaration on the Rights of Mentally Retarded Persons, nor the European Convention on Human Rights are specific on sexual rights of people with mental impairment.

9 For centuries, western societies have segregated those with impaired mental functioning, or subjected them to a range of controls. Particularly in relation to intellectually disabled people, the emphasis is now upon 'normalisation', the principles of which are defined in the Intellectually Disabled Person's Services Act 1986, and include:

> *(d)* The needs of intellectually disabled persons are best met when the conditions of their everyday life are the same as, or as close as possible to, norms and patterns which are valued in the general community;
> *(e)* Services should promote maximum physical and social integration through the participation of intellectually disabled persons in the life of the community;
> *(n)* When some restriction on the rights or opportunities of an intellectually disabled person is necessary, the means chosen should be the least restrictive of the available alternatives having regard to all the circumstances.[3]

In a related vein, the objects of the Mental Health Act 1986 state that functions, powers and duties provided by the Act should be exercised so that:

> In providing for the care and treatment of persons who are mentally ill and the protection of members of the public any restriction upon the liberty of patients and other persons who are mentally ill and any interference with their rights, dignity and self-respect is kept to the minimum necessary in the circumstances.[4]

If the rights of persons with impaired mental functioning are to be recognized it follows that the right to expression of sexuality must be recognized.

10 The challenge for the law is to balance two potentially competing rights – the right of people with impaired mental functioning to protection from sexual contact which the community regards as exploitive or harmful, and the right to sexual expression. The same issue arises in relation to young people – when and in what circumstances are they to be entitled to express their sexuality? However, the context in which the rights of young people are considered is significantly different: the restrictions on their sexual rights are temporary. Restrictions imposed because of a person's mental illness or intellectual disability may be permanent.

3. s5.
4. s(4)(2)(b).

Sexuality and mental impairment

11 In considering an appropriate balance between the rights of people with impaired mental functioning to protection and to sexual expression, care must be taken to ensure that legislation is based on knowledge, and that it is not the product of prejudice, fear or ignorance.

> As with everything that has to do with sexuality, we must take inventory of our personal feelings. Some people say, 'It hadn't occurred to us before that we have been depriving the retarded of something that can enrich their lives'. In addition, some people who are over-reacting from anxiety need reassurance that their fears are based on myths or that positive action can solve a number of problems. We should accept our own sexuality as a positive part of ourselves and believe that this can be similarly true for the retarded.[5]

12 Little is known about the sexuality of mentally ill people,[6] and clearly the range of illnesses should warn against generalisations. With respect to intellectually disabled people, a recurring theme in studies is that strongly held views which have long guided policies are not well founded.

13 The Bright Committee in South Australia examined four commonly held beliefs of the undesirability of persons with intellectual disabilities participating in sexual relationships:

1. Intellectually handicapped persons, if allowed to have sexual relations and marry, pass on their intellectual handicaps to their children.
2. Persons with intellectual handicaps are incapable of responsible behaviour or informed consent in relation to intimate and sexual relationships and marriage.
3. Persons with intellectual handicaps are incapable of being good parents.
4. Persons with intellectual handicaps are incapable of managing their own sexual hygiene and contraception.[7]

The Committee found little evidence to support any of these views.

14 The present rationale for restricting the sexual relations which people with impaired mental functioning may have is said to be protection from exploitation rather than genetic or procreative concerns. Fears of exploitation are often based on views equating disability with abnormal sexuality. First, there is a widespread view that the intellectually disabled are childlike and sexually ignorant or 'innocent'. This is contradicted by research findings.

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5. W. Kempton, "Sex and the Mentally Retarded" (1982) *British Journal of Sexual Medicine*, 5, 6.
6. e.g. see C.A. Pinderhughes, B. Grace and L.J. Reyna, "Psychiatric Disorders and Sexual Functioning" (1972) 128 (10) *American Journal of Psychiatry* 96-103. M. Wasow "Sexuality and the Institutionalized Mentally Ill" (1980) 3 *Sexuality and Disability* 3, 5.
7. Committee on Rights of Persons with Handicaps *The Law and Persons with Handicaps: 2 Intellectual Handicaps*, SAGP, Adelaide 1981, 110-114.

> Many people view retarded teenagers and adults as perennial children in the pre-Freudian sense, innocent and asexual . . . Retarded children do develop sexually, they become aware of their sexual desires as well as of the role prescriptions and restrictions of their societies.[8]

In a study of 84 intellectually disabled adolescent and adult males Gebhard found only two who lacked any sexual knowledge. Both were teenagers. The study found no suggestion of sexual ignorance amongst the adults, who constituted one half of the sample.[9] The contrary view – that intellectually disabled people have a far greater uninhibited sex drive than other people – has also been expressed. Research does not support it.[10]

15 One analysis of community responses to the sexuality of people with impaired mental functioning is that we prefer them to be ignorant, in part because it enables us to avoid confronting situations that are regarded as difficult or sensitive. It found:

> . . . inhibition and embarassment among the general public as well as among professionals, and especially among staff members who would have to deal personally with their patients about this topic . . . added to this type of discomfort was the fear that these persons are not capable of responsibly handling their sexuality and that any dealings which might recognise their sexuality or educate them about it would only bring about inappropriate behaviour. Their ignorance of sexuality was thought to be safer and better for them, and ignoring the topic around them was thought to assure such ignorance.[11]

8. R. & C. Whalen "Sexual behaviour: Research Perspectives" in F. del la Cruz and G. La Veck *Human sexuality and the Mentally Retarded* Brunner/Mazel Inc, New York, 1973, 221.
9. P. H. Gebhard "Sexual Behaviour of the Mentally Retarded" in Cruz and La Veck, 29.
10. A. Chamberlain, J. Rauh, A. Passer, M. McGrath and R. Burket "Issues in Fertility Control for Mentally Retarded Female Adolescents: Sexual Activity, Sexual Abuse and Contraception" (1984) 73 *Pediatrics* 445.
11. D. Sadow and A. G. Corman, "Teaching a Human Sexuality Course to Psychiatric Patients: The Process, Pitfalls, and Rewards" (1983) 6 *Sexuality and Disability*, 47.

3. THE SUBSTANTIVE LAW

Offences which are not specific to victims with impaired mental functioning

Rape[1]

16 Rape is sexual penetration without consent. It includes the introduction of the penis of a person into the vagina, anus or mouth of another person, or the introduction of an object (not being part of a body) into the vagina or anus of another person.[2] The prosecution must prove beyond reasonable doubt that the victim did not consent, and that the accused intended to penetrate either knowing that the complainant was not consenting, or was aware that consent might not be present but proceeded with the act regardless.

Indecent assault[3]

17 An indecent assault is an assault accompanied by circumstances of indecency.[4] The offence has been described by the English Court of Appeal as 'concerned with the contravention of standards of decent behaviour in regard to sexual modesty or privacy'.[5] An assault is an act by which the offender intentionally or recklessly causes the victim to apprehend or sustain unlawful personal violence.[6] Indecency has not been exhaustively defined by law. It is assessed on the basis of prevailing views of unacceptable sexual behaviour. As with the offence of rape, the prosecution must prove beyond reasonable doubt that the victim did not consent. It must also prove that the accused intended to assault the other

1. In its report, *Rape and Allied Offences – Substantive Aspects*, the Commission has made a number of recommendations regarding the offence of rape. None of the proposed changes have specific relevance to the issues in this discussion paper.
2. s2A Crimes Act.
3. In its report, *Rape and Allied Offences – Substantive Aspects*, the Commission made a number of recommendations regarding the offence of indecent assault. None of the proposed changes have specific relevance to the issues discussed in this paper.
4. *Beal v Kelley* [1951] 2 All ER 763.
5. *R v Court* [1987] 1 All ER 120, 122.
6. *R v Venna* [1975] 3 All ER 788.

person, either knowing that there was no consent or being reckless as to whether the other person was consenting or not.[7]

Other offences

18 The Crimes Act also contains several rarely prosecuted sexual offences. Section 54 makes it an offence to procure acts of sexual penetration by threats or fraud. In its report, *Rape and Allied Offences: Substantive Aspects*, the Commission recommended retention of this offence. It is potentially of considerable relevance to persons with impaired mental functioning because they may be far more vulnerable to deception than other people. Administering drugs with a view to preventing resistance to an act of penetration is an offence under section 55, and section 56 makes it an offence to abduct or detain persons for sexual purposes. In its report, *Rape and Allied Offences: Substantive Aspects*, the Commission recommended the repeal of sections 55 and 56, as they duplicate other general offences. These offences have no specific relevance to persons with impaired mental functioning and their repeal should therefore not cause any disadvantage to them.

Problems in relation to victims with impaired mental functioning

Capacity to consent

19 It is the presence or absence of consent which constitutes the central distinction between lawful and unlawful sexual behaviour. Consent is absent if a person is unable to consent. A person may be unable to consent because of physical circumstances – for example, where the person is unconscious. A person may also be unable to consent because of impaired mental functioning.

20 In *R v Morgan*[8] the Full Court heard an appeal against a conviction of rape involving a victim with impaired mental functioning. The appeal concerned the view taken by the trial judge that in order to be capable of consenting to intercourse a person must have some appreciation of concepts such as virginity, pregnancy and the social significance of penetration. The Full Court rejected this view. It held that where capacity to consent was in issue, the prosecution had to prove either that the victim did not comprehend that what was proposed was the physical fact of penetration of her body or, if this was not proven, that she did not comprehend that the proposed act was one of sexual connection as distinct from an act of a totally different character. Comprehension of the sexuality of the act did not require knowledge of the kinds of concepts suggested by the trial judge.

7. *R v Kimber* [1983] 77 Cr App R 225.
8. [1970] VR 337, 341.

21 The approach in *Morgan* has been followed in Tasmania. In *R v Roden*,[9] Mr Justice Crawford of the Tasmanian Supreme Court stated that the jury could find that the prosecution had proved lack of consent if they were satisfied beyond reasonable doubt either that the victim did not comprehend that the physical act of penetration was proposed, or that she had not understood that the act of penetration was one of a sexual connection as distinct from an act of a totally different character.

> To be able to give her consent on the latter basis, the girl had to have: some understanding that there was sexuality involved and had to be able to appreciate the difference between such an act and an act of a totally different character such as the cleansing of her body by her parents or a medical examination or something of that nature.

What should the test for capacity to consent be?

22 There are two main options as to what the test of capacity to consent[10] could be:

- The present Victorian law: comprehension of a sexual act of penetration.
- A requirement of broader knowledge, such as that posed by the trial judge in *Morgan*: comprehension of the nature and significance of sexual intercourse.

The case for a broader requirement is that under the present law all but people with the most severe levels of impairment are likely to be capable of consenting to sexual relations. It could be argued therefore that the present approach leaves many people with less severe impaired mental functioning vulnerable to exploitation. A broader test might deter more people from engaging in sexual relations with moderately or even mildly impaired people, and thereby reduce the opportunity for exploitation, and consequences such as unwanted pregnancy, infection with sexually transmitted diseases or social discrimination. However, more people with impaired mental functioning would then be denied the right to engage in any lawful sexual relationship. The presumption would be that people with impaired mental functioning are so likely to enter and be harmed by sexual relationships of inequality, that they are better off having no relationships at all. The Commission is aware of no evidence that this is the case. The right to sexual relations should not be denied because the person's ability to exercise it wisely might be limited. The essence of the offences of rape and indecent assault is to protect people against sexual advances which they do not want, not to protect them from misjudgment about such matters. The criminal law should not be used as a means of ensuring that people with impaired mental functioning do not make sexual

9. [1981] 4 A Crim R 166, 170.
10. In order to keep the discussion concise the two options are considered in relation to the offence of rape. There are straightforward equivalents in relation to indecent assault.

decisions unless they are fully informed about the consequences. That is a broader social responsibility. As the Bright Committee pointed out:

> Non-handicapped children and adolescents usually receive some basic education in sexuality and human relationships at school, or through family life or family planning organisations.[11]

The Committee concluded that appropriate education should also be made available to people with disabilities. Programs of this kind are obviously essential to a policy of normalisation.

Proposal

The present test for capacity to consent to sexual relations should be retained.

Does the offender have to be aware of impairment?

23 The mental element of the offences of rape and indecent assault is that the accused must intend to do the acts concerned, either knowing the complainant was not consenting, or being reckless about whether there was consent or not. Consequently, the accused's knowledge of the victim's intellectual or mental condition is critical. If the accused believes the victim is consenting, because he or she does not know that the victim lacks the capacity to consent, then he or she should not be found guilty of committing the offences.

24 The belief need not be based on reasonable grounds, although the question of the reasonableness of the belief may be relevant to the jury's assessment whether the accused actually held that belief. For example, evidence of the appearance of disability is a factor a jury might take into account in assessing the credibility of the accused's evidence.

25 Some commentators have argued that a person should be guilty even if he or she held an honest belief that there was consent, if that belief was based on unreasonable grounds. This issue was dealt with at length in the Commission's report, *Rape and Allied Offences: Substantive Aspects.*[12] The Commission recommended that the present law should be retained. The grounds for this are that the law should treat people on the basis of what they actually thought, and what they actually intended to do, not according to what a 'reasonable' person would have thought or intended in the same circumstances.

26 The issue is relevant in the present context because it might be suggested that a person wanting to have sexual relations with a person with impaired

11. Committee on Rights of Persons with Handicaps, *The Law and Persons with Handicaps: 2 Intellectual Handicaps*, SAGP, Adelaide 1981.
12. Paras 60-1; dissent 102.

mental functioning should be under a special duty to take reasonable care in deciding whether that person has the capacity to consent. The contrary view is that it would be unrealistic and unfair in most cases to expect a person to be aware whether his or her sexual partner has an impairment which is legally significant. Intellectual disability and mental illness vary greatly in the extent to which they are apparent to others (even experts) in the course of social contact. The offender might well also be a person with some degree of mental impairment which would make the imposition of a test of 'reasonableness' according to a community standard particularly harsh. The Commission therefore believes that the mental element of the offences – that the accused knew consent was lacking, or was reckless about it – should not be different for offences committed against persons with impaired mental functioning.

Proposal

The mental element in rape and indecent assault offences committed against victims with impaired mental functioning should be the same as in other cases.

Offences which are specific to victims with impaired mental functioning

27 Section 51 of the Crimes Act makes it an offence for anyone who is employed in a psychiatric or residential institution to take part in an act of sexual penetration with a person who is under care or supervision as a mentally ill or intellectually defective person. It also makes it an offence for any person who has the care or charge of a person who is mentally ill or intellectually defective to take part in an act of sexual penetration with that person. The consent of the parties is no defence unless the accused was married to the other person.[13] Unlike the offence of rape, there can be no conviction solely on the evidence of one witness.[14]

Should there be special offences for victims with impaired mental functioning?

28 The threshold question is whether special offences are necessary at all. One view is that the concept of consent should be sufficient to distinguish between lawful and unlawful sexual activity:

> [Special] statutory provisions are designed to protect the retarded woman, not only from the person "taking advantage of her", but from herself, so that even if she understands the nature of the act and consents, her potential partner will presumably be deterred by the possible criminal prosecution.

13. s51(4).
14. s51(5).

Whilst the intention of such legislation is to benefit and protect vulnerable retarded people, the questions should be asked:

- Is the law as it stands capable of offering those protections anyway?
- Could the protective provisions in fact be used repressively, to deny retarded people the rights enjoyed by other citizens?

. . . [It] would appear that the law already offers adequate protection. Rape, at common law, consists of having sexual intercourse with a woman without her consent and if the woman, by reason of her mental state, is incapable of consenting, and any man has intercourse with her, he commits rape even though she does not offer any resistance. A leading case established that in order to consent, the woman must comprehend that "what is proposed to be done is the physical fact of penetration of her body by the male organ", or some other sexual form of penetration. Surely the protection offered by the common law is broad enough![15]

29 This criticism was directed primarily at the statutory offences which, unlike section 51, apply generally to people with impaired mental functioning. For example, it is an offence in New South Wales for a person to have 'unlawful carnal knowledge' of a woman or girl whom he knows to be 'an idiot or imbecile'.[16] An 'idiot' is a person with 'mental defectiveness' to such a degree that she is unable to guard against common physical dangers, and an 'imbecile' is a person with mental defectiveness so as to be 'incapable of managing herself or her affairs, or if she be a child, she is incapable of being taught to do so'. Consent is no defence. It is also an offence for a male knowing another male to be an idiot or an imbecile to have or attempt to have homosexual intercourse with him.[17] Again, consent is no defence.

30 The New South Wales Government has recently considered a proposal to repeal these provisions. The proposal was based on the grounds that the provisions are 'discriminatory and pejorative', and moreover:

> in some circumstances, it would be in the interests of an intellectually disabled person, notwithstanding their lack of understanding of the nature and quality of sexual intercourse, to be able to consent to sexual activity.[18]

The Government has decided to meet the concerns by restricting the scope of the prohibition to the undesirable behaviour it aims to deter. Two offences are proposed. One prohibits a person having sexual intercourse with a person who has an intellectual disability and over whom he or she has authority in a facility or program providing services to people with

15. R Hayes and S Hayes, *Mental Retardation*, Law Book Company, Sydney, 1982, 411-422.
16. s72A Crimes Act 1900.
17. s78M.
18. NSW Government Violence Against Women and Children Law Reform Task Force, *Consultation Paper*, NSW Government Printer, 1987, 75-79.

intellectual disabilities. The other prohibits a person having sexual intercourse with a person with an intellectual disability 'with the intention of taking advantage of the other person's vulnerability to sexual exploitation'.[19]

31 Offences of the second type undoubtedly make it easier for the criminal law to protect vulnerable people against sexual exploitation. However, they do so by severely restricting the rights of the nominated persons to lawful sexual relations, regardless of how much those people might wish to express their sexuality actively. The Commission's present view is that protective legislation of this type is unnecessarily and unfairly broad.

Proposal

There should not be a general prohibition on people having consensual sexual relations with persons with impaired mental functioning.

Exploitation in specific relationships

32 Section 51 of the Crimes Act reflects a quite different approach – people with impaired mental functioning should be protected against exploitive sexual relations with people who have a care or supervisory responsibility for them.

33 It could be argued that section 51 is inconsistent with the philosophy of the policy of normalisation. There are no criminal sanctions against care-givers having sexual relations with persons in their care who do not have impaired mental functioning, whether in institutions such as hospitals, or in community settings. Other kinds of sanction may be available to deter inappropriate conduct, such as action under employment contracts, or codes of ethical conduct. For example, the Medical Board of Victoria:

> has always taken a serious view of the abuse of a practitioner's professional position in order to further an improper association or to commit adultery with a person with whom the practitioner stands in a professional relationship.[20]

However, non-criminal sanctions may not provide sufficient protection because people with impaired mental functioning are significantly more vulnerable to sexual abuse than other members of the community, particularly when they are in institutions which are not as open to public scrutiny as, for example, are general medical hospitals.[21]

19. Schedule 2(7) Crimes (Personal and Family Violence) Amendment Bill 1987.

20. The Medical Board of Victoria, *A Guide for Medical Practitioners*, Victorian Government Printer, 1985, 14.

21. A commonly held perception is that persons with disabilities are more vulnerable to exploitation by strangers than by those within their immediate environment. This is not borne out by research. A. Chamberlain, J. Rauh, A. Passer, M. McGrath and R. Burket, "Issues in Fertility Control for Mentally Retarded Female Adolescents: Sexual Activity, Sexual Abuse and Contraception". (1984) 73 *Pediatrics* 445.

34 Other jurisdictions share the view that institutional and specified relationships require particular legislative attention. Recently, a New South Wales inquiry concluded that:

> Evidence suggests that men and women with intellectual disabilities are at risk of sexual assault from workers in institutions, sheltered workshops and community care facilities.[22]

As indicated earlier, the New South Wales Government has accepted the inquiry's advice to create an offence similar to Victoria's, prohibiting a person who has authority over an intellectually disabled person from having sexual intercourse with that person.[23] This reinforces the Commission view that there is a need to protect persons with impaired mental functioning from sexual relations with those who are responsible for their care or supervision.

Proposal

The law should continue to prohibit sexual relations between persons with impaired mental functioning and those who are responsible for their care and supervision.

What relationships should be covered?

35 Section 51(1) prohibits sexual penetration between all people employed in certain institutions, and all people under care or treatment as mentally ill or intellectually defective. It therefore includes people who might not have a *direct* relationship for example, a patient and a gardener. This might be seen as too broad a prohibition. On that basis, the prohibition could be limited to sexual relations with an employee who actually occupies a position of authority which might be unfairly exploited. That is the approach which the New South Wales Government has taken. The alternative view is that the present provision is appropriate because there is an inherent power inquality in an institutional setting between *all* staff, who are there voluntarily, and all patients or residents, who are not.[24]

36 Section 51(2) is concerned mainly with relationships in non-institutional situations. There is some uncertainty about the relationships prohibited by the section because the key terms, 'care' and 'charge', are not defined. An exceptionally wide range of persons, professional and others, might be regarded as care-givers. For example, a citizen's advocate, a de facto spouse or a local doctor may be said to have the care of a person with mental

22. NSW Government Violence against Women and Children Law Reform Task Force, 77.
23. para 31.
24. In the legal sense many patients are voluntary in that they may discharge themselves at will, but their illness and need for treatment, which makes them become patients, are involuntary.

impairment at various times. There is no legislative guidance as to the meaning of 'care' and the nature of the care necessary to constitute this element of the offence. There is a common perception that persons with impaired mental functioning are incapable of genuine independence and therefore at all times under some person's care. If that view were taken, the scope of the offence would be exceptionally wide.

37 It would be difficult to define every specific relationship which should come within the terms of section 51(2). On that basis, a general description of the types of relationship may be preferable. However, some specific restrictions on the scope of the provision might be seen as appropriate. For example, the provision could be restricted to people who have a professional or legal reationship, for example, one of guardianship, so as to clearly exclude relationships based on a voluntary, social basis. The New South Wales proposal defines the relationship as one of authority 'in connection with any facility or programme providing services to persons who have intellectual disabilities.'[25] The Commission would welcome comment on the nature of the relationships which should be specified in the legislation.

Issue

Should the relationships in which sexual intercourse is prohibited be left broadly defined, or are more specific definitions appropriate?

Who should be protected by section 51?

38 Section 51 defines the protected population in part as people who are 'mentally ill' or 'intellectually defective', but these terms are not defined by the legislation. Until earlier this year, the terms were defined by the Mental Health Act 1959 as follows:

> 'Mentally ill' means to be suffering from a psychiatric or other illness which substantially impairs mental health.
>
> 'intellectually defective' means to be suffering from an arrested or incomplete development of the mind.[26]

As one commentator pointed out, the definition of mentally ill in the Act was circular, and therefore of no practical use in determining who is or is not mentally ill.[27]

39 The Mental Health Act 1959 has been replaced by the Mental Health Act 1986, which has no definition of 'intellectually defective', and defines

25. Schedule 2(7) Crimes (Personal and Family Violence) Amendment Bill 1987.
26. s3.
27. M. Errington, 'Mental Illness' in Australian Legislation (1987) 61 *Australian Law Journal*, 182, 185.

mental illness only in terms of factors which are *not* to be regarded as symptomatic of it:

> A person is not to be considered to be mentally ill by reason only of any one or more of the following:
> *(a)* that the person expresses or refuses or fails to express a particular political opinion or belief
> *(b)* that the person expresses or refuses or fails to express a particular religious opinion or belief
> *(c)* that the person expresses or refuses or fails to express a particular philosophy
> *(d)* that the person expresses or refuses or fails to express a particular sexual preference or sexual orientation
> *(e)* that the person engages in or refuses or fails to engage in a particular political activity
> *(f)* that the person engages in or refuses or fails to engage in a particular religious activity
> *(g)* that the person engages in sexual promiscuity
> *(h)* that the person engages in immoral conduct
> *(i)* that the person engages in illegal conduct
> *(j)* that the person is intellectually disabled
> *(k)* that the person takes drugs or alcohol
> *(l)* that the person has an anti-social personality
>
> Subsection (2)(j) does not prevent the serious temporary or permanent physiological, bio-chemical or psychological effects of drug or alcohol taking from being regarded as an indication that a person is mentally ill.[28]

40 Because the definition of mentally ill in section 51 was based on the Mental Health Act 1959, an unintended consequence of the repeal of this Act is that section 51 is now no longer confined to people with *substantial* impairment of mental health, (which would exclude 'those who are merely slightly impaired, presumably, for example eccentrics'.[29]) This might seem to be welcome, on the grounds that it is difficult enough to find agreement on a definition of 'mentally ill', let alone on a definition of 'substantial'. The fact that a person requires treatment or supervision because of mental illness might be seen as adequate reason for protection against someone in a care or supervision relationship with him or her, without an inquiry into the severity of the illness. Alternatively, it could be argued that the law should have an element of flexibility so as not to deny sexual rights to a large group of people with perhaps very low levels of impairment and need for protection. A recent estimate is that 'about three million Australians are suffering from some form of mental illness sufficient to interfere with their lives', of whom 240,000 are under intensive treatment and over 900,000 are using mood-affecting drugs.[30]

28. s8(2) and 8(3) Mental Health Act 1986.
29. Errington, 185.
30. Prof. G. Burrows, Chairman, Mental Health Foundation of Australia, reported in *The Sun*, 21 September, 1987.

41 The Intellectually Disabled Persons' Services Act 1986 has abandoned the concept of 'intellectually defective' and replaced it with that of 'intellectual disability'. The latter is defined as:

> In relation to a person over the age of 5 years means a significant sub-average general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the developmental period.[31]

However, this definition cannot be used directly to interpret the term 'intellectually defective' in section 51 of the Crimes Act.

Proposals

Section 51 should be restricted to persons with substantially impaired mental functioning.

The term 'intellectually defective' in section 51 should be replaced by 'intellectual disability', as defined in the Intellectually Disabled Persons' Services Act 1986.

What sexual acts should section 51 forbid?

42 Section 51 forbids acts of sexual penetration,[32] which are defined as the introduction of a penis into the vagina, anus or mouth of another, or the introduction of an object into the vagina or anus of another, other than as part of some generally accepted medical treatment. This is the same as the definition of the physical acts constituting rape. However, rape is committed only if it is the offender who effects penetration. In relation to section 51, the Crimes Act deems both a person effecting penetration and a person who is penetrated to be taking part in an act of sexual penetration.[33]

43 There are two main anomalies. First, only some forms of sexual penetration are included. Digital penetration and penetrative cunnilingus are excluded. The same anomaly exists in relation to rape. In its report *Rape and Allied Offences: Substantive Aspects*, the Commission recommended that rape should include digital penetration and penetrative cunnilingus. For consistency, the definition of sexual penetration in the section 51 offence should be similarly extended.

44 The second anomaly is the exclusion of non-penetrative acts from the offence. There is no complementary offence, by analogy with indecent assault. If the aim is to forbid sexual relations between specified persons in order to protect against exploitation, then all forms of sexual contact should be prohibited.

31. s3, Intellectually Disabled Persons' Services Act 1986.
32. Also attempts, and assaults with intent, to take part in an act of penetration.
33. s2A(3) Crimes Act.

45 This could be done in one of three ways:

(a) amending the prohibited acts to include all forms of simply sexual contact instead of sexual penetration. The disadvantage of this is that it does not distinguish between penetrative and non-penetrative conduct as a criterion of seriousness. In its report *Rape and Allied Offences: Substantive Aspects* the Commission recommended that the law should distinguish between them.[34]

(b) Creating an additional offence of non-penetrative sexual contact. The disadvantage of this is that the present definition of penetration regards penetrative acts done by and to the offender as equally serious. The Commission believes that these should be distinguished, as they are in the offences of rape and indecent assault.

(c) Creating two offences, the more serious being sexual penetration of a person with impaired mental functioning, the other being sexual contact with a person with impaired mental functioning.

Proposal

Section 51 should be extended to cover all sexual contact between the relevant persons. It should distinguish between sexual penetration of people with impaired mental functioning by specified people, and other sexual contact between them.

34. Paras 29-31.

4. PROCEDURAL ISSUES

> When a retarded person is the victim of a crime, there may be little or no attempt to bring the offender to justice, perhaps because the victim cannot call the police, and no one calls them on his/her behalf; or perhaps because police officers decide not to proceed with an investigation or prosecution because the victim will make an unreliable witness.[1]

46 There are no special procedural rules relevant to the investigation and prosecution of crimes against persons with impaired mental functioning. However, the fact that a victim has a mental impairment may require that special procedures be adopted if the criminal justice system is to protect him or her effectively. There are three major issues to be considered. The first is whether a statutory responsibility should be created to report sexual crimes committed against those with impaired mental functioning. The second is whether specialist investigation resources should be made available. The third is whether priority in prosecution should be given to cases involving victims with impaired mental functioning.

Should there be a duty to report crimes against victims with impaired mental functioning?

47 There is no general offence of concealing or failing to report a crime. Medical practitioners who are likely to see people soon after they have been subjected to physical violence, are not subject to any duty to report a suspected crime against a patient, even if that person does not seem able to report it to the police of his or her own initiative. According to the Victorian Branch of the Australian Medical Association, if a doctor had such a patient in his or her care, and suspected the person had been a victim of a crime such as rape:

> Various considerations would apply in the response offered to these circumstances.
>
> – The medical professional is not expected to make judgements about the specific application of the criminal law in respect of patients in his care. The 'suspecting' of commission of a criminal offence would not lead to an

1. S. Hayes, "Criminal Justice?" (1982) 7 *Legal Service Bulletin* 168, 169.

ethical obligation to take direct action unless, e.g. that action was directed as a matter of law, and appropriate indemnity was provided.

- The communication of medical details, without the patient's consent – informed consent – would be ethically suspect and legally precarious, vide Ethical Rule 6.2.1 –

  "It is the practitioner's obligation to observe strictly the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party information which he has learnt in his professional relationship with the patient."

- The assessment of ethical responsibility to take action is an individual one, which it is believed relies on factors which are not susceptible to reasonable codification.[2]

48 In contrast, certain State Government employees have a contractual obligation to report suspected crimes to superior officers, who in turn have a duty to report to the police. According to the Office of Psychiatric Services of the Health Department Victoria:

> [T]here are requirements on persons employed to work with people who are mentally ill to report to their Officer-in-Charge if they suspect a crime has been committed against someone in the care of the agency for which they work; who in turn would report such a matter to the Police.[3]

49 The question whether there should be a statutory duty to report has been extensively considered in relation to child abuse, including sexual abuse. All States except Victoria and Western Australia have some form of mandatory reporting on child abuse. Victoria encourages voluntary reporting of suspected maltreatment of children by offering reporters the following protection:

- the notification cannot be held by any court or tribunal to constitute a breach or a departure from professional ethics or standards
- if acting in good faith a reporter cannot be subject to any legal proceedings including action for damages
- subject to certain safeguards, no person can be compelled to disclose any details of the notification in any legal proceedings.[4]

50 A number of the arguments for and against the mandatory reporting of child abuse are relevant to the issue in relation to people with impaired mental functioning. They can be summarized as follows:[5]

2. Letter to Victorian Law Reform Commission 16/6/1987.
3. Letter to Victorian Law Reform Commission 1/7/1987.
4. s31(4) Community Services Act 1970.
5. This summary of the arguments is based largely on the summary in L. Hewitt *Child Sexual Assault Discussion Paper* Victorian Government Printer, 1986, 165-170.

Against mandatory reporting

- It breaches client-professional ethics of confidentiality.
- It is unenforceable, because it is difficult to prove that the person on whom the duty is imposed knew of the abuse, and the community may be averse to prosecuting professionals who act in good faith.
- It removes the discretion of professionals who know the victim's circumstances, and are therefore in a good position to decide whether a case should be reported.
- It removes the right of the person with impaired mental functioning to decide whether action should be taken.

For mandatory reporting

- Special legal protection is needed because people with impaired mental functioning have fewer means to help themselves than other adults.
- Mandatory reporting increases notification of cases.
- It demonstrates a public commitment to the protection of people with impaired mental functioning.
- It increases the accountability of practitioners for the decisions they make or fail to make in order to protect people with impaired mental functioning.
- It increases knowledge of the problem, which can assist in the planning of services and resource allocation.

51 The question of mandatory reporting of sexual offences against children will be dealt within the discussion paper on sexual offences against children. This paper is concerned with the issue only in relation to offences against those persons who suffer from impaired mental functioning. If there were to be a statutory duty imposed in relation to those offences, two important issues would have to be considered. First, which people should be under a duty to report; second, what sanctions should there be for breaching the duty?

52 A duty to report could be imposed on different groups in the community. The major options are:

(a) *every person.* The difficulty with this option is that there is no simple way of identifying the people with impaired mental functioning in relation to whom the duty to report arises. Relatively few people in the community could be confident that they had such a duty with respect to any particular person, even if they knew in a general sense that the duty existed.

(b) *specified professional and other caregivers, such as medical practitioners and institutional employees.* The duty could be imposed upon only those who are in a position to know that a person has impaired mental functioning. An advantage of this option is that the specified people are relatively easily identifiable, and information about the duty could therefore be directly communicated to them.

Penalties for breach of duty to report

53 One option would be to impose a duty but to provide no legislative sanction. Those breaching the duty would be subject to civil rather than criminal action. If a sanction were felt to be necessary, it might take many forms. Criminal sanctions might be appropriate in some cases but not others. In the case of employees and professionals, other types of sanction might be preferable, including disciplinary action by employers and professional associations.

54 Views on these matters are likely to vary considerably. Instead of making a definite proposal, the Commission has decided to ask the following questions to help it report on the issues.

Issues

Should it be made a criminal offence to fail to report a suspected sexual crime committed against a person suffering from impaired mental functioning?

If so, who should be liable to prosecution for failing to report and what penalty should be available?

If a criminal offence is inappropriate, should there be a statutory duty, with a non-criminal penalty, on persons to report?

If so, what persons should have this duty and what should the penalty be?

Police investigation procedures

55 The investigation and prosecution of offences against people with impaired mental functioning may present greater difficulties for the police than they encounter with other adults. These include:

- below average memory recall – people with impared mental functioning may have effective short-term recall of incidents, but it is likely to be less than in the case of other people. Prompt interviewing is clearly desirable;
- some intellectually disabled people may be easily open to suggestion. Particular care is required in asking questions and in assessing the reliability of answers.

56 In view of these and other difficulties affecting intellectually disabled people in their contact with the police, the Public Advocate has recommended that the Office of Intellectual Disability Services of Community Services Victoria develop resource material for the police. This is to contain basic information concerning intellectual disability and indicators to alert police to its possibility, a description of the functions of

the Office of Intellectual Disability Services and details of crisis contact procedures with the Office.[6] The Public Advocate also recommended that:

> Police Manual guidelines should be drawn up for interviewing individuals with intellectual disability, on the model of British guidelines, and these guidelines should incorporate the presence of an advocate for individuals with intellectual disability.
>
> Within Police training, information should be included distinguishing between intellectual disability and mental illness, and describing the service structure of Health and Community Services in relation to these areas.
>
> An advocacy service for individuals interviewed by police should be instituted which would be monitored and maintained by the Public Advocate's office in conjunction with citizen advocate groups.

57 Subsequently, Community Services Victoria, the Office of the Public Advocate and the Guardianship and Administration Board have liaised with the Victoria Police to draft new Standing Orders for the Police in dealing with intellectually disabled persons and these are presently under consideration by the police. The Commission endorses the recommendations of the Public Advocate and the action on the Standing Orders which has followed.

58 Another possibility which should be considered is the tape or video recording of complainants' interviews to help overcome later memory difficulties. A substantial period frequently elapses between an offence and the trial. This makes it difficult for witnesses, even if they are not mentally impaired, to recall the relevant events in detail. A statement made by a person prior to attending court is generally inadmissible to support the person's evidence at the trial. However, in certain circumstances, such a statement may be used by a witness to 'refresh' his or her memory. A witness may refer to notes at the point where there is a gap in memory.[7] The relevant conditions are as follows:

- The document must have been made substantially at the same time as the events about which the witness is testifying.
- The document must have been made by or under the supervision of the witness.
- The document must be produced to the court or the opposite party on demand.

59 It is highly unlikely that a person with impaired mental functioning will make a contemporaneous record of the events. However, the notes prepared by an investigator could be used to refresh the witness' memory if they are made sufficiently contemporaneously and if they can be regarded

6. Office of the Public Advocate *Finding the Way: The Criminal Justice System and the Person with Intellectual Disability* Victorian Government Printer 1987, xii.
7. *R v Baffigo* (1957) VR 303.

as a document made by or under the supervision of the witness. Certainly, a video or audio tape of the witness' statements is a document within the meaning of the *Evidence Act* 1958[8] and could therefore be used to refresh a witness' memory.

Proposal

Interviews with victims with impaired mental functioning should be recorded to assist them to refresh their memories at trial.

60 This proposal is essentially a matter of changes in police procedures rather than the law, although clarification of what is 'contemporaneous' may be required, because of the delays which may occur before a victim can be interviewed at a location with recording facilities. It does however highlight very major legal issues. One is the admissibility of the document used to refresh memory as evidence itself. The New South Wales Law Reform Commission has questioned the present restrictions on tendering such documents.

> If a document is used to refresh memory without being made evidence, the curious result follows that though it is not evidence it is presumed to be more likely true than false, otherwise it would not refresh the witness' memory correctly. The document is not evidence; the witness' statement, which is not based on anything but the document, is. This may be thought to put matters the wrong way around . . . Where memory is truly refreshed it may be satisfactory to regard the witness' evidence as admissible, where memory is not truly refreshed, it is in substance the inadmissible document which is going in.[9]

61 A broader issue is the general admissibility of evidence about what a complainant said to other persons shortly after an alleged offence. This was examined at length by the Australian Law Reform Commission in its review of the laws of evidence, and it has recommended considerable easing of present restrictions.[10] Consideration of this issue is beyond the scope of the present review.

Should priority be given to cases involving victims with impaired mental functioning?

62 At present, priority in conducting prosecutions is given to cases involving rape, attempted rape and assault with intent to rape. The Magistrates

8. s3.
9. New South Wales Law Reform Commission *Working Papers on the Course of the Trial* 1978, 23.
10. The Law Reform Commission, Report No. 38 *Evidence* AGPS Canberra 1987, Chapter 10.

(Summary Proceedings) Act 1975 provides that in relation to these offences the preliminary examination which is conducted to see if there is sufficient evidence for the accused to stand trial must commence within three months of the accused being charged.[11] This time limit may be extended by the magistrate. The Crimes Act 1958 provides that the trial of an accused person must be commenced within three months of the committal, or within such longer period as a Supreme Court Judge may order.[12]

63 There are two arguments against giving priority to cases involving section 51 offences. The first is that they may be concerned with apparently consensual activity. The victim is unlikely therefore to be experiencing the extreme stress common among rape victims. The second argument is that giving priority to section 51 cases may delay the processing of other, non-sexual, cases, which both victims and accused have a legitimate interest in seeing dealt with as quickly as possible. However, there is a special reason for giving priority to section 51 cases. Victims with impaired mental functioning have greater memory difficulties than other people, and delays in trials therefore substantially prejudice the outcome of prosecutions.

Proposal

Section 51 should be added to the list of sexual offences which have priority.

11. s47A.
12. s359A.

5. EVIDENTIARY ISSUES

When is a person with impaired mental functioning permitted to testify?

64 Generally speaking, all persons are competent or entitled to be witnesses. The two major categories of persons precluded from participating are the young and those with mental impairment:

> No witness is competent who is prevented by reason of lunacy, drunkenness and the like from understanding the nature of an oath and giving rational testimony.[1]

If the suggestion is made that a witness is incompetent, it is for the trial judge to determine whether he or she is capable of giving rational evidence and understands the nature of the oath. However, it is for the jury to decide the value of any evidence which is admitted.[2] It is no longer necessary that a person appreciate the religious significance of an oath. A person may give evidence on an affirmation (a solemn declaration made without an oath) provided he or she understands the duty to tell the truth.[3]

65 Whether a person is competent or not is a question for the judge on the evidence presented. In *R v Hill*, the proposed witness was an inmate of a lunatic asylum who thought he was in communication with spirits. He was held to be competent because he was capable of giving a lucid account of his observations. In *R v Dunning*,[4] evidence of a man who had a history of mental disturbance was admitted after two doctors gave evidence that he knew the nature and the sanction of the oath. Their evidence included a qualification that his evidence might be unreliable because of his disturbance. On appeal it was argued that his evidence ought to have been excluded as the jury would not only have to decide if he was truthful but also if what he said was based on fact. Applying *R v Hill*, the Court of Criminal Appeal ruled that his evidence was properly admitted.

1. *Archbold's Criminal Pleading* 42nd Ed, London, Sweet and Maxwell, 1985, # 4.269, 377.
2. *R v (Samuel) Hill* (1851) 2 Den 254, 169 ER 495.
3. *R v Hayes* (1977) 2 All ER 288.
4. (1965) Crim LR 372.

66 The Australian Law Reform Commission (ALRC) has recently completed a review of the laws of evidence.[5] It was critical of the court's use of witnesses' understanding of the nature and consequences of the oath as an indirect test of psychological competence.

> A person's understanding of moral matters as evidenced by his comprehension of the oath might bear very little relationship to his ability to comprehend questions and formulate rational responses. Further, in some cases of schizophrenia an individual might comprehend the nature and consequences of the oath but might be suffering from delusions or be hearing voices. His grasp on reality will be very poor and he will be unable to differentiate between fact and fantasy. The oath test seems particularly inadequate in such cases.[6]

The ALRC proposed that only a person who is incapable of understanding that he or she is under an obligation to give truthful evidence or incapable of giving a rational reply should be excluded from giving evidence. In determining whether or not a person is competent to testify, the court should be entitled to inform itself as it sees fit.[7] The Commission believes that the ALRC approach is preferable to the uncertainty of the common law principles.

Proposal

> *The test of psychological competence to give evidence proposed by the Australian Law Reform Commission should be adopted. A person who understands that he or she is under an obligation to give truthful answers and who is capable of giving a rational reply should be competent to be a witness. A court should be able to inform itself as it sees fit in determining whether a person is competent to testify.*

Should the jury be present when competence is being assessed?

67 There is Victorian and English authority for the view that the examination of a proposed witness, and any other witnesses testifying as to competence, should be conducted in the presence of the jury.[8] However, in the High Court in *Demirok v R*,[9] Mr Justice Gibbs rejected the English authorities.

5. Interim Report No 26 Vols 1 and 2 *Evidence*, AGPS, Canberra, 1985; Report No 38 *Evidence*, AGPS, Canberra, 1987.
6. Report No 26 Volume 1, para 243.
7. Report No 38 paras 64-65.
8. *R v Dunne* (1929) 21 Cr App R 176; *R v Southern* (1930) 22 Cr App R, 6; and *R v Reynolds* (1950) 1KB 606, 34 Cr App R 60. *R v Lambert* (1919) VLR 205.
9. (1977) 14 ALR 199, 209.

> Evidence which is relevant solely to the question of competence should not be used by the jury for some other purpose, such as determining the credibility of the witness. If the evidence on the *voir dire* happens also to be relevant to a question that the jury has to decide, and is admissible, it may be given again before the jury . . . if evidence which the judge has to consider on the *voir dire* in deciding a question of competence or admissibility is likely to be prejudicial to the accused, it should be received in the absence of the jury.

68 The potential for prejudice arises from the possibility that a proposed witness may be ruled unable to testify but the jury have had an opportunity to see and hear from the alleged victim. This is contrary to the principle that the jury should not have access to inadmissible evidence. There is also a risk that the jury will use the examination of competence for the purpose of assessing other issues, such as whether the victim lacked the capacity to consent to sexual relations.

Proposal

The jury should not be present when the court assesses the competence of a witness suffering from impaired mental functioning.

The victim as evidence

69 Even if a victim with impaired mental functioning is not competent to appear as a witness, he or she may nonetheless be relevant as 'evidence' in relation to two key issues in the offences of rape and indecent assault:

- was he or she able to give consent to sexual relations?
- was the accused aware of lack of capacity to consent?

In cases where the prosecution alleges that the complainant lacked the capacity to consent, evidence as to capacity is generally given by other witnesses, for example a medical practitioner or family member. If the accused challenges that evidence, the jury must resolve the conflict. It might be helped to do so if it could 'examine' the victim.

70 The production of the alleged victim as evidence was approved by the Full Court of the Victorian Supreme Court in *Lambert*:

> The production in Court of either a person or thing identified by sworn testimony is generally allowed where it will assist the jury in arriving at a decision, care being taken in appropriate cases to warn the jury against hastily arriving at a conclusion from it, and in a case like this to warn them that the unaccustomed surroundings of a Court may make some

> difference, even to a person of little mental capacity. Such evidence, which is sometimes called "real evidence", generally involves inspection merely, but I do not think that the direct appeal to the senses of the jurymen is confined to inspection. If such production in Court was not allowed, the jury would have to act on a narration on oath by a witness about something which could be decided much better by such production, and the possibility of the witness's narration being inaccurate would be eliminated to a large extent.[10]

The mere production of a person with impaired mental functioning might not tell the jury very much about his or her disability. It might well be necessary to ask questions of that person. It is not clear whether the 'inspection' allowed by the law would extend to questioning the alleged victim, even if it were restricted to matters not directly related to the issues in the case.

71 The same issues arise in relation to the question of the accused's knowledge. The prosecution must prove not only that the victim did not consent, but that the accused was aware of the fact. If the prosecution alleges that the victim lacked the capacity to consent, it must prove the accused was aware of that. Evidence of how the victim appears and communicates may be relevant in assessing the prosecution's case. Again, there is authority that a jury may 'inspect' the alleged victim. In *R v Colgan*[11], the jury had requested to see the victim 'to gain an impression of her and how she would have appeared to the accused'. The trial judge had refused and, on appeal, the New South Wales Court of Criminal Appeal disagreed. It found that the victim's appearance 'may have had probative value either against or in favour of the accused'.[12]

> We think it proper to add that we recognise that there is a natural reluctance to produce an afflicted person in Court for inspection. In some cases it may be clearly necessary to do so; in other cases it may not be necessary. In cases of doubt, this matter, and the procedure to be adopted, may well be left to the sound discretion of the presiding judge to decide on his own inspection, in the absence of a jury, whether or not the appearance of the woman concerned has probative value.

Again, however, it is unclear whether questions, not themselves related to the facts in issue, may be asked of the victim. In some cases, the victim's response to questions may be more indicative of what the accused must have realised than the victim's mere appearance. Video recording may be an appropriate and more desirable means of presenting such evidence. It would avoid the need to bring the victim to court, and, by being done in more relaxed settings than a courtroom, could yield more accurate information about the victim.

10. [1919] VLR 205, 213-214.
11. [1959] WN (NSW) 41, 44.
12. at 44.

Proposal

A court should have discretion to allow a person who is incompetent to testify to be examined by the jury. The person should be able to be asked questions on matters other than the facts in issue.

Corroboration

72 Successful prosecution of a section 51 offence requires corroboration as a matter of law, because section 51(5) provides that:

> A person shall not be convicted of an offence against this section upon the evidence of one witness only unless the witness is corroborated in a material particular by evidence implicating the accused.
>
> For a long time judges were required to warn juries of the danger of convicting an accused of certain sexual offences unless there was corroboration of the complainant's evidence. This requirement was based on the view that the evidence of complainants in sexual cases was more likely to be false than in other cases. That view has now been rejected.[13]

73 The reason for the requirement in relation to section 51 offences must be the belief that people with impaired mental functioning are particularly prone to making false allegations, either because they imagine the events, or because they want to harm institutional staff who have charge of them. The corroboration requirement is a considerable barrier to the prosecution of false allegations but, being arbitrary, also prevents action on genuine complaints.

74 The criminal justice system already has a number of means of testing the strength of allegations before an accused stands trial with the attendant publicity and other consequences which that involves. First, in relation to the more serious offences (including offences against section 51) a magistrate must be satisfied at the preliminary examination that the evidence is of 'sufficient weight to support a conviction'.[14] A further safeguard has been suggested in relation to a section 51 offence, that the Director of Public Prosecutions should consider every such case before it goes to trial.[15] The New South Wales Government proposes that consent of the Attorney-General will be required for the prosecution of an offence similar to section 51 which it intends to establish.[16]

75 There are additional safeguards for scrutinising the evidence. If the victim is the sole witness to the facts in issue, there are general evidentiary

13. In Victoria the corroboration warning requirement in rape cases was abolished in 1980.
14. Section 56 Magistrates (Summary Proceedings) Act 1975.
15. Suggestion made by I. Heath, Prosecutor for the Queen, honorary consultant to the Commission.
16. Schedule 2(7) Crimes (Personal and Family Violence) Amendment Bill 1987.

processes which can be used to test and assess his or her reliability. Questioning as to credit is normally confined to the cross-examination of a witness. In the case of a witness who may be suffering from mental impairment, the defence may call medical evidence to testify that the disability may affect the reliability of the witness' evidence.[17] Expert witnesses may also give evidence on the facts in issue, though not on what is called 'the ultimate issue' – for example, whether the alleged victim lacked capacity to consent at the time. The role of the expert witness is a matter of controversy, and was examined in the recent report on the laws of evidence by the Australian Law Reform Commission.[18] It raises broad issues which are beyond the scope of the present review.

76 When all the evidence has been presented, it is open to the prosecution, defence and judge to comment on its reliability. The importance of the judge's discretion to comment about relying on the evidence of a person with impaired mental functioning has recently been affirmed by the High Court.

> If it appears that a witness whose evidence is important has some mental disability which may affect his or her capacity to give reliable evidence, common sense clearly dictates that the jury should be given a warning, appropriate to the circumstances of the case, of the possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case.[19]

77 It is true that these safeguards exist in relation to all cases in which a person with impaired mental functioning gives evidence. The requirement of corroboration has been an additional safeguard in relation to section 51 cases. However, the role of corroboration in sexual cases has been much diminished in recent times. The Commission's report, *Rape and Allied Offences – Procedure and Evidence*,[20] would diminish it even further. There is, in the Commission's view, no justification for maintaining the particular requirement in respect of section 51 offences. Indeed, it may operate in a peculiarly prejudicial way in that area.

78 The corroboration requirement of section 51 applies not to the evidence of the victim alone. It applies to the evidence of any sole witness. The evidence of another patient or visitor, or a member of staff, would not of itself be sufficient in a case where an institutionalised victim was unable or incompetent to testify. Similarly, in a community setting, the evidence of one person unconnected with either victim or accused would be

17. *Toohey v Metropolitan Police Commissioner* [1965] AC 595.
18. The Law Reform Commission, Report No 38, *Evidence*, AGPS, 1987.
19. *Karpany and Bromley* (1986) 22 A Crim R 217, 219 per Gibbs CJ.
20. Forthcoming.

inadequate for a successful prosecution. This restriction seems an unreasonable burden on the prosecution. The ordinary rules of testing evidence, and the discretion of judges to comment on the evidence, should be adequate safeguards.

Proposal

The corroboration requirement in section 51 of the Crimes Act should be repealed.

Sexual history

79 Section 40 of the Evidence Act 1958 requires a court to

> forbid or disallow any question which appears to it to be intended to insult or annoy, or which though proper in itself appears to the court needlessly offensive in form.

Additional restrictions apply in relation to cases involving a charge of rape, attempted rape, or assult with intent to rape. Section 37A of the Evidence Act provides that:

- a court must forbid any questions or evidence of the complainant's general reputation as to chastity
- evidence about the sexual history of the complainant with people other than the accused is admissible only with the leave of the court
- the court cannot give permission unless the evidence is substantially relevant to the issues in the case or is proper matter for cross-examination as to credit.

80 In its discussion paper on procedure and evidence in relation to rape and allied offences, the Commission suggested that the restrictions on admissibility of sexual history evidence in section 37A should be extended to all sexual offences. All the submissions on this subject agreed. The Commission sees no reason why the restrictions should not apply to the prosecution of offences against section 51 of the Crimes Act.

Proposal

The restrictions on admissibility of sexual history evidence which apply to cases of rape and allied offences should apply to offences against section 51 of the Crimes Act.

SUMMARY OF TENTATIVE PROPOSALS AND ISSUES

Capacity to consent paras 19-22

Proposal

The present test for capacity to consent to sexual relations should be retained.

The offender's awareness of impairment paras 23-26

Proposal

The mental element in rape and indecent assault offences committed against victims with impaired mental functioning should be the same as in other cases.

Prohibited and permitted relationships paras 28-41

Proposal

There should not be a general prohibition on people having consensual sexual relations with persons with impaired mental functioning.

Proposal

The law should continue to prohibit sexual relations between persons with impaired mental functioning and those who are responsible for their care and supervision.

Issue

Should the relationships in which sexual intercourse is prohibited be left broadly defined, or are more specific definitions appropriate?

Proposals

Section 51 should be restricted to persons with substantially impaired mental functioning.

The term 'intellectually defective' in section 51 should be replaced by 'intellectual disability', as defined in the Intellectually Disabled Persons' Services Act 1986.

Prohibited sexual acts paras 42-45

Proposal

Section 51 should be extended to cover all sexual contact between the relevant persons. It should distinguish between sexual penetration of people with impaired mental functioning by specified people, and other sexual contact between them.

A duty to report crimes? paras 47-54

Issues

Should it be made a criminal offence to fail to report a suspected sexual crime committed against a person suffering from impaired mental functioning?

If so, who should be liable to prosecution for failing to report and what penalty should be available?

If a criminal offence is inappropriate, should there be a statutory duty, with a non-criminal penalty, on persons to report?

If so, what persons should have this duty and what should the penalty be?

Recording interviews paras 58-59

Proposal

Interviews with victims with impaired mental functioning should be recorded to assist them to refresh their memories at trial.

Priority in prosecutions paras 62-63

Proposal

Section 51 should be added to the list of sexual offences which have priority.

Competence to be a witness paras 64-66

Proposal

The test of psychological competence to give evidence proposed by the Australian Law Reform Commission should be adopted. A person who understands that he or she is under an obligation to give truthful answers and who is capable of giving a rational reply should be competent to be a witness. A court should be able to inform itself as it sees fit in determining whether a person is competent to testify.

Assessment of competence paras 67-68

Proposal

The jury should not be present when the court assesses the competence of a witness suffering from impaired mental functioning.

Jury inspection of the victim paras 69-71

Proposal

A court should have discretion to allow a person who is incompetent to testify to be examined by the jury. The person should be able to be asked questions on matters other than the facts in issue.

Corroboration paras 72-78

Proposal

The corroboration requirement in section 51 of the Crimes Act should be repealed.

Sexual history paras 79-80

Proposal

The restrictions on admissibility of sexual history evidence which apply to cases of rape and allied offences should apply to offences against section 51 of the Crimes Act.