SHADES OF GREY: INDETERMINACY AND SEXUAL ASSAULT LAW REFORM

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ABSTRACT

This paper discusses the theory behind legal indeterminacy, its role in Australian law, and how it can affect the implementation of legislative reform. A sample of sexual assault law reform provisions that were enacted to better protect victim witnesses from retraumatisation are deconstructed to demonstrate their statutory indeterminacy. We then examine the ways in which the greyness of these laws has facilitated and/or could affect judicial discretion, which, from a feminist perspective, is exercised within a context replete with beliefs about 'real rape' and a focus on the accused's right to a fair trial.

I INTRODUCTION

> What is determined is decided and fixed; its meaning is *found* rather than created. What is indeterminate is not fixed; its meaning is interpreted in an act of *creation* rather than *location*.[1]

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1 "Indeterminacy" in Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2011).

Views about indeterminacy and law range between those formulated by legal formalists, positivists, realists and critical legal theorists. Legal formalism states that judicial officers find the law rather than make it, whereas legal realism provides that judges do make law and their decisions can be affected by their personal views, but indeterminacy is found in individual cases rather than at the core of legal meaning.[2]

Legal positivist, Hart, concedes that a large proportion of the law is indeterminate, but that this indeterminacy is only a marginal part of our legal system. He states that the indeterminacy of the law is generally a result of the 'open-texture' of natural language; that at some stage for all general terms and phrases it becomes controversial as to whether or not they apply to some particular.[3] Dworkin on the other hand, implies that the inclusion of principles and ideals in the law resolves the problem of indeterminacy. He argues that legal principles take judicial officers 'past the point where it would be accurate to say that any test of pedigree exists'; that legal principles indicate the intended scope of the rules and resolve any conflict by indicating how the rule should apply to the legal problem at hand.[4]

Critical legal studies, including feminist legal theory, argues that law can never reasonably induce determinate results on a case by case basis.[5] Critical legal theory states that indeterminacy is inescapable and fundamentally affects the decisions made by judicial officers: 'the law is infused with irresolvably opposed principles and ideals'.[6]

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2 See John P McCormick, 'Max Weber and the Legal-Historical Ramifications of Social Democracy' (2004) 17 *Canadian Journal of Law and Jurisprudence* 143; Lawrence B Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54(2) *The University of Chicago Law Review* 462.

3 H L A Hart, *The Concept of Law* (Clarendon Press, 1961) 119.

4 Ronald Dworkin, *Taking rights seriously* (Harvard University Press, 1977) 67.

5 Charles M Yablon, 'The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation' (1984-1985) 4 *Cardozo Law Review* 917, 917.

6 Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15(3) *Philosophy and Public Affairs* 205, 217.

All of these theories, although promulgating completely different arguments, are basically in agreement that at some stage, to some extent, a court must make a decision that is not dictated by law; that indeterminacy in the law exists. At its most extreme, the 'indeterminacy of law' thesis provides that as a result of the indeterminate nature of the law, judicial officers are free to arrive at a range of decisions according to their particular values and inclination. [7] The critical legal studies approach towards indeterminacy 'opened up the possibility of the infinite manipulation of legal principle and the consequent collapse of the rule of law'.[8] Thus, Dworkin's theory of incorporating principles and ideals to address these issues would fail from a critical legal theorist's point of view because 'we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future'.[9]

One correlate of laws' substantive indeterminacy then is interpretation by judges. Judicial discretion appears in legislation usually because the existing sections are unclear or ambiguous.[10] However, the ability of judges to exercise discretion is also an aspect of judicial independence under the doctrine of the separation of powers. In the legal sense of the term, judicial discretion is defined as 'the ability of a judge to exercise autonomy in making decisions in the absence of determinate rules, using individual judgement or assessment to arrive at a just and fair result'.[11] More broadly, Pound describes discretion as the power conferred by law to act on the official's own judgement and morality in certain cases.[12] Pound also

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7 See McCormick, above n 2; Solum, above n 2.

8 Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 135, 150.

9 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1685.

10 Nkeonye Otakpor, 'On Indeterminacy in Law ' (1988) 32(1) *Journal of African Law* 112, 174.

11 "judicial discretion": Mann, above n 1.

12 Roscoe Pound, 'Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case' (1960) 35 *New York University Law Review* 925, 926.

introduces the idea that discretion integrates moralities into the law: discretion 'is an idea of morals, belonging to the twilight zone between law and morals'.[13]

As rationalised by Brennan J in *Norbis v Norbis*, 'an unfettered discretion is a versatile means of doing justice in particular cases, but unevenness in its exercise diminishes confidence in the legal process'.[14] This means that discretionary power is usually limited by guidelines or principles, or by reference to other factors that must be considered when coming to a decision.[15] For example as we see below, 'in deciding whether to order that the court be closed to the public, the court must consider whether the witness wants to give evidence in open court; and [whether] it is in the interests of justice that the witness give evidence in open court'.[16] It is argued that the judicial nature of the exercise means that discretion is not a matter of personal conscience or inclination; that 'limitations on discretion are as inevitable and abundant as the sources of discretion … [and] discretionary decisions are rarely as unfettered as they look'.[17] However, although discretionary powers are never absolute, they are exercised within a broader legal and social context, one that is susceptible to influence by common societal and legal beliefs. In the example just given, the relevant beliefs would be those concerning what constitutes the 'interests of justice'.

From a feminist perspective, the broader social context and its values and justice-related priorities are understood as being male dominated and therefore permeated with overt, covert, and even unconscious gender biases. This means that the 'guidelines', 'principles' and legal concept signposts do not exist in a legal vacuum and that judicial discretion in interpreting them could be

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13 Pound, above n 12, 926.

14 *Norbis v Norbis* (1986) 161 CLR 513 (Judge Brennan).

15 Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108, 110.

16 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 81D(3).

17 Carl Schneider, 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 47, 79.

seen as 'shaped by the discriminatory and stereotypical reasoning embedded in the substantive law'.[18] Thus from this vantage point, discretion can be seen as taking place in a legal arena in which these so-called objective standards are in reality 'not neutral and inevitable, but are constructed in cultural images of masculine and feminine'.[19]

To test this approach or viewpoint, we explore legal indeterminacy in one particular area of law - a sample of sexual assault reform provisions enacted to better protect the victim witness from retrauma. We are looking at what Dworkin refers to as 'weak' discretion.[20] Weak or 'concealed'[21] discretion is used to describe rules that leave the judicial officer with a considerable freedom of choice because the provisions 'contain value-qualified precepts which require a personal assessment of the circumstances'.[22] Provisions which contain vague standards such as 'reasonable', 'just', 'necessary', 'fair', or which allow the judge to choose whether to follow a statutory requirement (eg. the court 'may' order that the court be closed to the public) are all examples of weak or concealed discretion.

This paper examines some of the language used in sexual assault law reform that could be conducive to the application of weak discretion; specifically, sexual reputation and history provisions, improper question legislation, and the changes made by the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT).[23] We particularly focus on and deconstruct each of the provisions of the amended *Evidence (Miscellaneous Provisions) Act 1991* (ACT). We

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18 Simon Bronitt, 'No Records. No Time. No Reason' (1996) 8(2) *Current Issues in Criminal Justice* 130, 134.

19 Rosemary Hunter and Kathy Mack, 'Exclusion and Silence' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 192.

20 Ronald Dworkin, 'Judicial Discretion' (1963) 60(21) *The Journal of Philosophy* 624.

21 Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (Oxford University Press, USA, 1990).

22 Ibid 2.

23 A few further minor changes were made to these changes by the *Crimes Legislation Amendment Act 2009* (ACT).

then look at the potential ways in which the greyness of the substantive laws has facilitated and/or could affect judicial discretion in cases involving adult, non-disabled victims of sexual assault.[24] The emphasis is on 'potential' since there has yet to be much judicial consideration (in reported judgements) concerning the operation of the new provisions.[25]

II GREY WORDING: QUESTIONING OF RAPE VICTIM WITNESSES

A *Rape shield*

Some 30 to 40 years ago, all Australian jurisdictions amended legislation applying to evidence of victim-complainant sexual reputation and sexual experience/history. These reforms came about due to the recognition that evidence of this nature could be used unjustly and could result in further trauma to the victim.

> That humiliation involves their being forced to recount... in minute detail the most humiliating and degrading experiences they have ever gone through and then to suffer under cross-examination the imputation and insinuation about the victim's own responsibility for the offence and against the victim's character and morals.[26]

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24 This Act is focused upon as the authors are from the ACT and. this paper is part of a larger study that explores the history and efficacy of these amendments.

25 The cases that reference the new provisions are: *R v Elrick* [2011] ACTSC 66; *R v WR (No 2)* [2009] ACTSC 110; *R v WR* [2010] ACTSC 89; *R v DM* [2010] ACTSC 137; *R v Sharma* [2009] ACTSC 154; *R v Burdon* [2011] ACTSC 90; *R v Ramalingam* [2011] ACTSC 86; *R v Tominac* [2009] ACTSC 75; *R v SH; R v Vaughan; R v Chifuntwe (No. 1)* [2010] ACTSC 157. However, only *R v SH* discusses the application of the provisions as applied to adult, non-disabled victims of sexual assault. This case will be discussed further below.

26 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1981, 4763, in, Criminal Justice Sexual Offences Taskforce, 'Responding to Sexual Assault: The Way Forward' (Attorney General's Department NSW, December 2005) 53.

Allowing questions of this type (with only the limitation of relevance) implied that some victims of sexual assault were unworthy of protection from the law or in some way partially responsible for the crime committed against them.[27]

The intention of 'rape shield laws' is to prohibit the admission in evidence of the victim's sexual reputation and to prevent sexual experience evidence being used as an indicator of the victim's credibility or to imply that the victim is the type of person who is more likely to consent to sexual activity - in order to 'improve the chances of a fair trial on legally relevant issues and reduce the risk of unjust acquittals'.[28] Consequently, evidence of sexual reputation is no longer permitted in any jurisdiction except the Northern Territory, where it is allowed only with the permission of the court;[29] and sexual history evidence is only admissible in some circumstances.[30] The justification for the absolute prohibition is that 'evidence of reputation, even if relevant and therefore admissible, is too far removed from evidence of actual events or circumstances for

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27 See Melanie Heenan, 'Reconstituting the "Relevance" of Women's Sexual Histories in Rape Trials' (2002) 13 *Women Against Violence* 4; Terese Henning and Simon Bronitt, 'Rape Vicitms on Trial: Regulating the Use and Abuse of Sexual History Evidence' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998).

28 Mary Heath, 'Women and Criminal Law: Rape' in Patricia Easteal (ed), *Women and the Law in Australia* (2010) 88, 100. See also, Criminal Justice Sexual Offences Taskforce, above n 26; Henning and Bronitt, above n 27.

29 See *Criminal Procedure Act 1986* (NSW) s 293(2); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50; *Criminal Procedure Act 2009* (Vic) s 341; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 1906* (WA) s 36B; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).

30 See *Criminal Procedure Act 1986* (NSW) s 293(3) and (4); *Evidence Act 2001* (Tas) s 194M(1)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51; *Criminal Procedure Act 2009* (Vic) ss 342, 343 and 352; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2); *Evidence Act 1929* (SA) s 34L(1)(b); *Evidence Act 1906* (WA) s 36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b).

its admission to be justified in any circumstances'.[31] However, the wording of most of the legislation surrounding the admission of sexual reputation and sexual history evidence is extremely indeterminate and allows for a plenitude of judicial discretion (discussed below). For instance, the laws do not clearly distinguish between the terms 'sexual reputation' and 'sexual experience/history'. In addition, some jurisdictions have yet to clarify whether evidence of non-consensual prior sexual activity falls within the scope of the restrictions, and so evidence of this nature is often admitted through the use of arguments that the complainant's evidence may be unreliable because of prior sexual assaults.[32]

An example of the greyness of the language in this genre of legislation comes from the Queensland *Criminal Law (Sexual Offences) Act* 1978. Section 4 of this Act contains special rules limiting particular evidence about sexual offences, and provides an absolute prohibition on any evidence as to the general reputation of the complainant with respect to chastity.[33] The section though also states that evidence as to the sexual activities of the complainant shall not be admitted *'without leave of the court'*,[34] and that the court may not grant leave under this section 'unless it is satisfied that the evidence … has *substantial relevance* to the facts in issue or is *proper matter* for cross-examination as to credit'.[35] What is considered to be *substantially relevant* evidence or a *proper matter* for cross-examination though?[36]

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31 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Model Criminal Code - Chapter 5 Sexual Offences Against the Person' (1999) 219.

32 Heath, above n 28, 102.

33 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1).

34 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2) (emphasis added).

35 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(3).

36 These terms have been defined in the legislation, but still leave ample room for discretion: *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4.

B *Improper Questions During Cross-Examination*

Following the release of the Australian Law Reform Commission's Final Report, *Evidence*, in 1987,[37] which contained draft evidence legislation, the Commonwealth and New South Wales parliaments introduced nearly identical Evidence Bills in 1993. In 1995 the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) were passed. These two Acts have been labelled the uniform *Evidence Acts*, and they regulate the use of improper questions during cross-examination in these jurisdictions. In addition to the Commonwealth and New South Wales, Victoria and Tasmania are also now members of the uniform *Evidence Act* scheme. Improper questions during cross-examination are regulated by section 41 of the *Evidence Act* in each of these jurisdictions.[38] In the remainder of the jurisdictions, a combination of the common law and jurisdiction-specific legislation are used instead.

Although the wording of the provisions surrounding improper questions is similar in all jurisdictions, only the Commonwealth, New South Wales, Tasmania and South Australia have imposed a mandatory requirement on judicial officers to intervene.

> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "disallowable question"):
>
> (a) is misleading or confusing, or
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).[39]

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37 Australian Law Reform Commission, 'Evidence' (38, 1987).

38 See *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas).

39 *Evidence Act 1995* (NSW) s 41(1) (emphasis added).

The word 'must' appears to be determinate. This mandatory requirement is, however, dependent upon the court's 'opinion' that the question is objectionable. And, what may seem misleading to a victim witness or what the witness perceives of as a belittling tone may not be seen in the same way by the judge.

III GREY WORDING: THE *EVIDENCE (MISCELLANEOUS PROVISIONS)* ACT 1991 (ACT)

As a result of extensive research illustrating the re-victimisation of victim witnesses in sexual assault trials, the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) was enacted. This Act amended the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) and the *Magistrates Court Act 1930* (ACT) in relation to sexual and violent offences.[40]

These reforms were intended to 'achieve the dual objectives of treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused'.[41] The special measures for the giving of evidence in court proceedings were 'designed to extract the "best" evidence possible from witnesses who may otherwise suffer a disadvantage'.[42]

The amended section 90AA(11)(a) of the *Magistrates Court Act* introduced the idea of a 'paper committal' for all sexual offence proceedings, which means that victims are no longer required to attend and give evidence in person at the committal hearing. This is

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[40] Further changes (see above n 23) were made to ensure that the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) operated as intended. See Revised Explanatory Statement, Crimes Legislation Amendment Bill 2009 (ACT) 2.

[41] Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.

[42] Ibid.

mandatory for all victims of sexual assault in the ACT. There are no exclusions or exceptions to this rule, which means that no judicial discretion is required and all victims reap the benefits of this provision, in all circumstances.

As we will see next in our deconstruction of the amendments and our identification of language drafted in shades of grey, however, the same cannot be said for almost all of the amended provisions in the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

> New section 38C - Accused *may* be screened from witness in court
> (1) This section applies to the complainant … giving evidence in-
> (a) a sexual offence proceeding…
> (2) The court *may* order that the courtroom be arranged in a way that, while the witness is giving evidence, the witness cannot see-
> (a) the accused person; or
> (b) anyone else the court considers should be screened from the witness.

As the words above indicate, the court is not required to make an order; it *may* order that the accused be screened from the witness. Furthermore, there are no guidelines in the legislation that indicate when this order may, or should, be made, or what should be considered when making the order.[43] This means that judicial officers may only make an order under this section if they believe that it is necessary for the victim. And, unless the prosecution requests an order under this section, although judicial officers can make an order without such a request, they may not even consider it.

> New section 38E – Witness *may* have support person in court
> (1) This section applies to the complainant … giving evidence in —
> (a) a sexual offence proceeding…
> (2) The court *must, on application by a party who intends to call a witness,* order that the witness have a person (a *support person*) in the court close to, and within the witness's sight, while the witness gives evidence.

[43] There are examples contained in this section to aid judicial officers in applying s 38C(1)(c)(ii), however, this subsection applies only to violent offences, not sexual offences, and hence are not relevant to this paper.

The way that this provision is worded means that victims are not provided with an *absolute* right to this support. Although the section does not provide judicial officers with discretion as such, it does rely on the fulfillment of another, separate, requirement before the order can be made. Judicial officers can only make this order following an application from the prosecution.

> Revised section 39 – Sexual and violent offence proceeding—evidence to be given in closed court
>
> (1) This section applies to the complainant … giving evidence in—
>
> (a) a sexual offence proceeding…
>
> (2) The court *may* order that the court be closed to the public while all or part of the witness's evidence (including evidence given under cross-examination) is given.
>
> (3) In deciding whether to order that the court be closed to the public, the court must consider whether—
>
> (b) the witness wants to give evidence in open court; and
>
> (c) it is in the interests of justice that the witness give evidence in open court.

Prior to these amendments, the court had the power to close the court while complainants in sexual offence proceedings gave evidence. The changes to this section extended the scope of this protection to include complainants and witnesses in other proceedings; yet the judicial discretion that was present remained. The provision makes it possible for the court to be closed to the public while victim witnesses give evidence; however, the court must first make an order to this effect. The decision to close the court is entirely up to the judge on the day. Although required to consider the witness' opinion, the judicial officer is able to conclude that it is in the interests of justice that the evidence be given in an open court.

> New section 40P - Meaning of witness—div 4.2B
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> (1) For this division, a witness is a prosecution witness in a sexual offence proceeding who—
>
> (a) is a child; or
>
> (b) is intellectually impaired; or
>
> (c) is a complainant who the *court considers* must give evidence as soon as practicable because the complainant *is likely to*—
>
> (ii) suffer severe emotional trauma; or
>
> (ii) be intimidated or distressed.

This definition of witness applies to the whole of the new Division 4.2B of the *Evidence (Miscellaneous Provisions) Act*, which deals with pre-trial hearings in sexual offence proceedings and includes sections 40Q, 40S and 40T, below. The problem with this definition is the differing interpretations of who *is likely to* experience trauma or distress.

> New section 40Q - Witness *may*[44] give evidence at pre-trial hearing
> (1) A witness *may* give evidence at a pre-trial hearing.
> (2) The evidence must be given by audiovisual link from a place that –
> (a) is not the courtroom in which the pre-trial hearing is held;
> (b) but is linked to the courtroom by an audiovisual link.

This section introduces the idea of a pre-trial hearing for certain witnesses, defined by section 40P (above). A pre-trial hearing is a special hearing held before the actual trial, at which the witness' evidence is presented and they are cross-examined. This hearing is then recorded and later played at the actual trial as a substitute for the witness's oral testimony, aiming to eliminate the need for the witness to attend the trial to give evidence.[45]

In addition to avoiding the need for victims to give evidence more than once, the pre-recording of witnesses' evidence aims to redress a fundamental problem of the criminal justice system: delay. Delay in the court process, although inevitable, works against the evidence of all victims: the ability to give accurate, factual evidence months or years after the event is virtually impossible, despite the fact that coherent evidence was given at the time of the events in question.[46]

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44 The *Crimes Legislation Amendment Act 2009* (ACT) replaced the word 'must' with 'may'.

45 Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill (2008) 5.

46 See Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill (2008) 5; Shelagh Doyle and Claire Barbato, 'Justice Delayed is Justice Denied: the Experiences of Women in Court as Victims of Sexual Assault' in J Breckenridge and L Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (Allen & Unwin, 1999) 47;

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

The explanatory statement that accompanied the Bill stated that:

> … it may be necessary for an adult complainant in a sexual offence proceeding to give their evidence at a pre-trial hearing, because of a special vulnerability where they might suffer further severe emotional trauma as to be prevented from giving satisfactory evidence at a later time at trial. Amendments will ensure that the court has the discretion to order pre-recording for such witnesses, where the court is satisfied that it is necessary.[47]

The legislation does not provide any guidance on the process preceding the making of an order under this section. This means that for adult, non-disabled victims, only those who have had an application made for them by the prosecutor and who can convince the court that they are likely to suffer further trauma *may* be eligible to give their evidence at a pre-trial hearing.

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

(1) Only the following people may be present in the courtroom at the pre-trial hearing:
    (a) the presiding judicial officer;
    (b) the prosecutor;
    (c) the accused person;
    (d) the accused person's lawyer;
    (e) anyone else the *court considers* appropriate.
(2) While the witness is at a place to give evidence, only the following people may be present at the place:
    (a) a support person under section 38E (2) or section 81C;
    (b) anyone else the *court considers* appropriate.

Department for Women, 'Heroines of Fortitude' (Office for Women: NSW Department of Premier and Cabinet, October 1996).

47 Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill (2008) 5.

In this section, judicial discretion is present in determining who is an 'appropriate' person to be present at the pre-trial hearing or with the victim while he/she gives evidence. Again, the way in which the term *appropriate* is defined could differ greatly between victims and (different) judicial officers.

We note that in *R v SH*[48] the presiding judge, Refshauge J, stated that while he did not 'regard the paragraph as enabling a wide range of persons to be present, and almost certainly not parents of mature accused persons … such persons as the spouse of an accused person or the parents of a younger accused person'[49] seemed to be appropriate persons. In this case, which is the only one to have considered the operation of this provision so far, the persons in addition to those listed in s 40R(1) that were allowed to be present during the pre-trial hearing were the Judge's 'Associate, the Sheriff's Officer … any ACT Corrective Services officers assigned to the trial … and … the parents of the accused'.[50]

> New section 40S - Evidence of witness at pre-trial hearing to be evidence at hearing
>
> (1) The evidence of a witness (including cross-examination and re-examination) given under this division *must* be recorded as an audiovisual recording.
>
> (2) The audiovisual recording of the witness's evidence *must*—
>
> (a) be played at the hearing of the sexual offence proceeding for which the pre-trial hearing was held; and
>
> (b) be admitted in evidence as the witness's evidence at the hearing as if the witness gave the evidence at the hearing in person.

This section is mandatory in application as it states that all evidence recorded at a pre-trial hearing *must* be admitted into evidence and played as the victim's evidence at the actual hearing. However, although mandatory, this section does not apply unless an (discretionary) order has been made under the above sections for a

48 *R v SH; R v Vaughan; R v Chifuntwe (No. 1)* [2010] ACTSC 157.
49 Ibid 9 (Refshauge J).
50 Ibid 10 (Refshauge J)

pre-trial hearing to be held (i.e. the DPP needs to apply for an order for a pre-trial hearing to be held, and the victim then needs to be deemed as likely to suffer further trauma or be intimidated or distressed).

> New section 40T - Witness *may be* required to attend hearing
> (1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.
> (2) The accused person may apply to the court for an order that the witness attend the hearing of the sexual offence proceeding to give further evidence.
> (3) The *court must not make the order unless satisfied that*—
> (a) if the witness had given evidence in person at the hearing of the sexual offence proceeding, the witness could be recalled; and
> (b) it is in the *interests of justice* to make the order.

This section does not aim to further protect victim witnesses' safe speaking. Rather, it provides a protection to the accused and his/her right to a fair trial, which is one of the intended aims of the legislation.[51] It is, however, an example of yet another way that the aim of protecting victim witnesses could be undermined.

> New section 40U - Evidence of witness at pre-trial hearing—jury trial
> (1) This section applies if—
> (a) a sexual offence proceeding is a trial by jury; and
> (b) an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of the proceeding.
> (2) The court *must* tell the jury that—
> (a) the witness gave the evidence by audiovisual link at a pre-trial hearing; and
> (b) admission of the audiovisual recording is a usual practice; and
> (c) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence was given in that way.

This provision provides a protection for the accused as well as the victim. If an order has been made under this Division for a pre-trial

[51] Revised Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 2.

hearing to be held, the section states that at the actual trial, if there is a jury, the court *must* direct the jury that the victim gave evidence at a pre-trial hearing and that this is usual practice in these cases. It is a mandatory direction and so there is no potential for judicial discretion in its interpretation and application.

> New section 40V - Recording of witness's evidence at pre-trial hearing admissible in related hearing[52]
>
> (1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.
> (2) The recording is admissible as the witness's evidence in a related proceeding *unless the court* in the related proceeding *otherwise orders.*
> (3) However, the court in the related proceeding *may*—
> (a) refuse to admit all or any part of the audiovisual recording in evidence; and
> (b) if the court refuses to admit part of the recording in evidence— order that the part that is not admitted be deleted from the recording.
> (4) A party in the related proceeding may apply to the court for an order that the witness attend the hearing to give further evidence.
> (5) The court must not make the order *unless satisfied that*—
> (a) the applicant has become aware of something that the applicant did not know or could not reasonably have known when the audiovisual recording was recorded; and
> (b) if the witness had given evidence in person at the hearing, the witness could be recalled; and
> (c) it is in the *interests of justice* to make the order.

The admissibility of evidence recorded at a pre-trial hearing is subject to acceptance by the court in the related proceeding: the court may refuse to admit the evidence or order that the victim attend the hearing to give further evidence.

Although there are considerations that must be made by the court when determining whether the victim should be recalled to

[52] For the purposes of this section, a related proceeding is defined as: a re-hearing or re-trial of, or appeal from, the hearing of the proceeding; or another proceeding in the same court as the proceeding for the offence, or another offence arising from the same, or the same set of, circumstances; or a civil proceeding arising from the offence: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 40V(6).

give further evidence (including again, whether it is in the interests of justice), there are no considerations, aside from those under the general law of evidence,[53] to be made when deciding to refuse to admit all or part of the victim's recorded evidence—a refusal of which would result in the victim having to attend the trial anyway.

> Revised section 43 - Giving evidence from place other than courtroom
>
> (1) This section applies if the courtroom where a sexual or violent offence proceeding is heard and another place are linked by an audiovisual link.
> (2) The evidence of the complainant and each similar act witness *must* be given by audiovisual link from the other place *unless the court otherwise orders.*
> (3) The court may make an order under subsection (2) only *if satisfied—*
> (a) that—
> (i) for the complainant—the complainant prefers to give evidence in the courtroom; … or
> (b) if the order is not made—
> (i) the sexual or violent offence proceeding may be *unreasonably* delayed; or
> (ii) there is a *substantial risk* that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly.

Section 43 provides for the use of CCTV for all victims of sexual assault while giving their evidence at a pre-trial hearing or at the actual trial. Although there is an assumption that victims will give evidence via CCTV unless they otherwise wish, the court still has the power to order that the evidence not be given in this manner in certain circumstances: if the proceeding would be *unreasonably* delayed or there is a *substantial* risk that the proceeding would be conducted unfairly. Both 'unreasonably' and 'substantial' are grey-coloured words and susceptible to interpretation.

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[53] For example, the evidence must be relevant, must not invite propensity reasoning, must not contain hearsay, must not be prejudicial and must have a probative value. See *Evidence Act 1971* (ACT); *Evidence Act 1995* (Cth).

IV JUDICIAL DISCRETION

A *Sexual History Reforms*

Studies indicate that notwithstanding the multitude of reforms surrounding the admission of sexual history evidence, evidence of this class was still being admitted, often without reference to the relevant legislation, and that its use may be increasing.[54] For example, the NSW *Heroines of Fortitude* 1997 project involving the analysis of victim cross examination transcripts found that evidence of sexual reputation was admitted in 12% of New South Wales trials, despite the fact that its admission had been completely prohibited by legislation, and evidence of sexual history was raised in 76% of trials, with only 35% of these questions being objected to by the prosecution.[55] Evidence relating to the victim's general promiscuity, lesbianism and virginity was introduced, and in some trials, there were multiple instances of material concerning the sexual experience of the victim being raised.[56] Other studies show sexual history evidence being admitted in 52-76% of cases, with 38% of cases in Tasmania having evidence of this nature admitted without the use of proper legal procedure.[57]

Why or how is such evidence being allowed? One reason is that the meaning of the term 'substantial relevance' in some jurisdictions is unclear,[58] and the interpretation of the restrictions is often 'purely formal and technical' and fails to provide a 'genuine scrutiny of the evidence in the prescribed terms'.[59] This is a result of the lack of

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54 See, eg, Department for Women, above n 46; Mary Heath, 'The Law and Sexual Offences Against Adults in Australia' (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1.

55 Department for Women, above n 46, 230.

56 Ibid 10.

57 Heath, above n 54, 10. See also, S Caroline Taylor, 'Intrafamilial Rape and the Law in Australia: Upholding the Lore of the Father' (Paper presented at the Townsville International Women's Conference, James Cook University, 3 - 7 July 2002) 14.

58 Heenan, above n 27.

59 Henning and Bronitt, above n 27, 90. See also, Department for Women, above n 46; Jennifer Temkin, *Rape and the legal process* (Oxford University Press, 2nd ed, 2002).

legislative guidance: judicial officers have a wide discretion when interpreting the legislation, which ironically results in the reintroduction of the myths and stereotypes that the legislation specifically aimed to dispel. As one judge in a recent UK case stated: 'I'm not one for being unduly fettered. I've been appointed to do a job on the basis that I have a certain amount of judgment, and to be fettered or shackled by statutory constraints, I don't think helps anybody'.[60]

In most instances, the only true consideration is whether the exclusion of sexual history evidence will impair the accused's right to a fair trial, not whether it will affect the well-being of the victim.[61] The words of the High Court in *Longman v The Queen*[62] are still being referred to today: 'the legislature did not intend to "sterilize the trial judge's ability to secure a fair trial"'.[63] So far, only New South Wales, Tasmania, and Western and South Australia have attempted to address this lack of respect for the welfare of the complainant by mandating consideration of the potential harm to the victim when deciding on the admissibility of sexual history evidence. Tasmania, and to an extent Queensland, provide guidance as to how this balancing task should be approached by the courts.[64]

The New South Wales legislation appears to have gone further than the other jurisdictions by establishing a presumption that evidence relating to sexual history is not admissible, and then providing a list of exceptions.[65] The Law Reform Commission of New South Wales intended this section to remove judicial discretion

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60 Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 149.

61 Sue Lees, 'Unreasonable Doubt: The Outcomes of Rape Trials' in M Hester, L Kelly and J Radford (eds), *Women, Violence and Male Power: Feminist Activism, Research and Practice* (Open University Press, 1996) 107, cited in Heath, above n 54. See also, *R v Maher* [2005] ACTSC 41.

62 *Longman v The Queen* (1989) 168 CLR 79, 86.

63 *Bull v R* (2000) 201 CLR 443, 88 (McHugh, Gummow and Hayne JJ).

64 *Evidence Act 2001* (Tas) s 194M; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.

65 *Criminal Procedure Act 1986* (NSW) s 293.

as the only means by which evidence of this nature could be excluded.[66] However, the statistics mentioned above indicate that such evidence is still being adduced.[67] This could be in part because the courts appear to 'have adopted a particularly broad interpretation of the exceptions which allow evidence to be adduced of an "existing or recent relationship" between the accused and complainant and which permit evidence to be elicited in cross-examination of the complainant to rebut evidence of sexual experience raised by the Crown'.[68] In addition, the New South Wales provisions do not include a 'substantial relevance' requirement, and although this is not always interpreted as narrowly as was intended, as noted above, the absence of such a requirement means that as long as evidence of sexual history falls within one of the broad exceptions, it may be admitted, even if it is of limited relevance. These issues are further compounded by the fact that the New South Wales Bench Book directs judges that 'there is no need for the questions that are to be asked to be specifically identified'.[69]

For all of these reasons, Therese Henning and Simon Bronitt concluded that the many reforms that were intended to reduce the admission of prior sexual history evidence had:

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

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66 New South Wales Law Reform Commission, 'Review of Section 409B of the Crimes Act 1900 (NSW)' (87, 1998).

67 Department for Women, above n 46.

68 Henning and Bronitt, above n 27, 90. See, eg, *R v GAR* [2008] NSWDC 208.

69 Judicial Commission of New South Wales, 'Criminal Trial Courts Bench Book: Sexual intercourse without consent' (2011) [5-1642]. See also, *Taylor v R* [2009] NSWCCA 180, [48].

70 Henning and Bronitt, above n 27.

We do note that various law reform organisations have concluded that a structured discretionary model, as opposed to the exceptions model as in New South Wales, better ensures the defendant's right to a fair trial.[71]

B *Improper Questions Provisions*

The imposition of a duty on judicial officers to disallow improper questions supposedly reduces the indeterminacy by eliminating their discretion and requiring them to intervene if a question is 'improper'. However, although the relevant sections in the Commonwealth, New South Wales, Tasmania and South Australia appear to be mandatory, as mentioned above, they still rely on judicial officers perceiving a question to be 'misleading or confusing… belittling, insulting or otherwise inappropriate'.[72] Their interpretation of 'improper' is likely to be very different to that of a victim witness, and so, as one study discussed below found, questions that may be insulting to victims will still be allowed so long as the judges do not perceive them to be insulting. Furthermore, questions that are 'annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive' are permitted, so long as they are not 'unduly' so. This 'grey' wording again contributes to the need for judicial discretion in determining what is 'unduly'.

The findings of a small study conducted in New South Wales illustrate that 'drawing the line between acceptable and unacceptable cross-examination is not simply a matter of legislative definition or mandated powers of intervention – it is a question of perspective'.[73]

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71 See Australian Law Reform Commission, 'Family Violence - A National Legal Response' (114, 2010); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 31; New South Wales Law Reform Commission, above n 66; Victorian Law Reform Commission, 'Sexual Offences: Final Report ' (July 2004).

72 *Evidence Act 1995* (NSW) s 41(1)(a)-(c).

73 Russell Boyd and Anthony Hopkins, 'Drawing the Line Between Acceptable and Unacceptable Cross-examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 Evidence Act ' (2010) 34 *Criminal Law Journal* 149, 150.

Following the amendments, lawyers reported that there was no increase in the number of times section 41 was invoked because improper questions, in their view, were not usually asked even before the enactment of the new section.[74] The practitioners' responses also indicated that the section had not resulted in a change in questioning approach for the same reason: 'improper questions *were not* and are not generally being asked'.[75] These responses illustrate that questions asked in cross-examination may appear improper from the perspective of the victim, or a person who works with sexual assault victims, but the same questions may be viewed as entirely proper by a legal practitioner or judicial officer who are looking at them from a legal perspective with the accused's right to a fair trial in mind.

In other jurisdictions (Victoria, Western Australia, Northern Territory, and Queensland), this indeterminacy is exacerbated by the fact that judicial officers have discretion to disallow questions that they consider to be 'improper': even if they perceive a question to be improper, they do not have to intervene. For instance, in Western Australia:

> The court *may* disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading; or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.[76]

Therefore, given all of this greyness of language, it is not surprising that research on the application of the previous section 41 of the uniform Evidence Acts, which could also be germane to the jurisdictions that still have a discretionary power to disallow improper questions, suggests that the restrictions were rarely applied and failed to protect vulnerable witnesses.[77]

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74 Boyd and Hopkins, above n 73, 162.

75 Ibid 163.

76 *Evidence Act 1906* (WA) s 26(1) (emphasis added).

77 See Royal Commission into the New South Wales Police Service, 'Final Report' (1997); Justice James Wood AO, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003) 30-31;

C *Interpretation of the Evidence (Miscellaneous Provisions) Act 1991* (ACT)

One of the changes to this Act was drafted in black hues instead of grey. Section 38D states that the 'witness *must* not be examined personally by the accused person'.[78] The provision is mandatory, stating that in all sexual offence proceedings, regardless of the circumstances, an accused must never personally cross-examine the victim witness in sexual offence proceedings. The determinate language does not allow for discretion.

However as we showed earlier, the other provisions were drafted using indeterminate wording or concepts. Given this substantive indeterminacy and thus the opportunity for the exercise of prosecutorial and judicial discretion, we predict that the legislative aims of sparing victim witnesses from the humiliation of open-court, the trauma of having to be in the same room as the accused or from having to give evidence multiple times or being unsupported, may not be actualised fully. Judicial officers and prosecutors may only use these protections for victims of sexual assault whom, they believe, require the protection. And who is the vulnerable witness requiring protection? Community attitudes about what constitutes the more traumatic or 'real' sexual assault do not reflect the reality of many victims.[79] Prevailing notions of sexuality and sexual behaviour come from a stereotypical definition of 'real' or 'legitimate' rape, that is, 'vaginal penetration and physical injury

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Victorian Law Reform Commission, 'Sexual Offences: Final Report ' (July 2004); NSW Adult Sexual Assault Interagency Committee, 'A Fair Chance: Proposals for Sexual Assault Law Reform in NSW' (Violence Against Women Specialist Unit Committee, 2004) 37; Talina Drabsch, 'Cross-examination and Sexual Offence Complainants' (18/03, NSW Parliamentary Library Research Service, 2003) 8; Department for Women, above n 46.

78 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(3). Following the introduction of the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) this section stated that a 'self-represented accused person must not personally cross-examine a witness'. The wording was changed slightly by the *Crimes Legislation Amendment Act 2009* (ACT).

79 Patricia Easteal, 'Australia' in G Gangoli and N Westmarland (eds), *International Approaches to Rape* (Policy Press, 2011).

perpetrated by an armed stranger in a public place'[80] with physical resistance by the victim, followed by a prompt complaint to the police.[81] In addition, societal views continue to question the 'provocative' actions of the complainant and sympathise with men's 'uncontrollable' desire for sex.[82] In one national study, 'nearly all participants (98%) considered myth factors – such as those relating to the victim's dress, behaviour, chastity and alcohol consumption, as well as prior acquaintance and the offender's social status – as relevant in determining the seriousness of any particular offence'.[83]

Although there have been 'important, positive shifts' in community beliefs, 'attitudes that excuse, trivialise and or justify violence against women persist, and some have even worsened'.[84] And these beliefs continue to permeate the judicial arena as well,[85] although members of the judiciary might not recognise that they bring their own biases to the bench. When interviewed, judicial officers in one UK study 'failed to mention that they too, as a group, might be implicated in the problems surrounding rape trials through their own attitudes which affect the way they apply the law'.[86] In fact research has shown the effect of rape myths on judicial

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80 Denise Lievore, 'Intimate Partner Sexual Assault: The Impact of Competing Demands on Victims' Decisions to Seek Criminal Justice Solutions' (Paper presented at the Eighth Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003) 3.

81 See Kathleen Daly, 'Conventional and innovative justice responses to sexual violence' (2011) *ACSSA Issues No. 12* ; Heath, above n 28; Temkin and Krahe, above n 60; Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence: An Australian Feminist Journal* 14; Victorian Law Reform Commission, 'Sexual Offences: Interim Report' (2003) 320-321.

82 See VicHealth, 'National Survey on Community Attitudes to Violence Against Women 2009: Changing cultures, changing attitudes – preventing violence against women' (2010); Natalie Taylor and Jenny Mouzos, 'Community Attitudes to Violence Against Women Survey 2006' (1, Australian Institute of Criminology, 2006).

83 Haley Clark, 'Judging rape: public attitudes and sentencing' (2007) 14 *ACSSA Aware* 17, 22.

84 VicHealth, above n 82, 67.

85 See Temkin and Krahe, above n 60.

86 Ibid 142.

decision-making in many ways.[87] In the trial context, a victim's character and credibility is most closely scrutinised because judicial officers can have 'negative stereotypes of rape victims, holding them responsible for victimisation, unless the assault contexts and elements conform to the "real rape" stereotype (stranger relations, visible physical injury, weapon use)'.[88] Some studies suggest that judges may draw negatively on the victim's supposed character or sexual history[89] and that the nature of the tie between victim and offender affect judicial weighting in sentencing.[90] For example, mitigating variables used in sentencing, although similar for all categories of defendants, have been found to be given more weight where the defendant is related to the victim, which reflects the myth that rape by someone known to the victim is not as bad as rape by a stranger.[91] The high rates of attrition in certain types of cases are further evidence that a 'real rape' template persists amongst at least some in the judiciary. In one study of rape and attrition across five countries, the researchers found that the decrease in conviction rate could be partially explained by a higher number of rapes that do not accord with the real rape construct being reported to the police, and at 'the same time, police, prosecutorial, and court decisions continue to operate with the real rape construct in mind'.[92]

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87 See Kylie Weston-Scheuber, 'A Prosecutorial Perspective on Sexual Assault' (Paper presented at the Australasian Institute of Judicial Administration Conference, Sydney, 7-9 September 2011).

88 Daly, above n 81, 6.

89 S Caroline Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995: A Research Summary' (2001) (10) *Women Against Violence* 57.

90 See Patricia Easteal and Miriam Gani, 'Sexual Assault by Male Partners: A Study of Sentencing Variables' (2005) 9 *Southern Cross University Law Review* 39; Jessica Kennedy, Patricia Easteal and S Caroline Taylor, 'Rape Mythology and the Criminal Justice System: A Pilot Study of Sexual Assault Sentencing in Victoria' (2009) 10 *ACSSA Aware* 13.

91 See Kennedy, Easteal and Taylor, above n 90; Kate Warner, 'Sexual Offending: Victim, Gender and Sentencing Dilemmas' in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 233.

92 Kathleen Daly and Brigitte Bouhours, 'Rape and attrition in the legal process: a comparative analysis of five countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2010) vol 39, 565, 568.

Arguably then if orders under the new provisions of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) are only made to protect those who are perceived to be victims of 'real' rape, the majority of victims may be left unprotected, as it is only a minority of victims who match up with the criteria of the community 'real rape' victim profile. These perceptual differences could result in the provisions, in practice, not protecting victims from further trauma. And, if the accused's right to a fair trial is seen to outweigh that of the victim, indeterminacies in the language of the law could disadvantage victim witnesses by denying them access to special measures such as CCTV and support people.[93] As discussed next in the conclusion, there are no doubt many who do believe that the need for a fair trial for the accused does in fact outweigh every other aspect of the trial including the witnesses' protection from retrauma.

V CONCLUSION: INDETERMINACY AND THE LIMITS OF RAPE LAW REFORM

> It is the gap between the law and the law in action which is an essential component of the justice chasm in sex cases. It seems that law itself, which must ultimately be interpreted and applied by the judges, cannot entirely withstand an attitude problem which, in some cases, is too entrenched to budge.[94]

From our examples of reforms surrounding the questioning and protection of rape victim witnesses, it is evident that where there are statutory 'grey' areas in the form and language of the law, a very broad and diverse interpretation of the statutes may ensue. The

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93 This perception that the special measures may affect the accused's right to a fair trial may be a part of a judicial unconscious, cognitive filter which is operating despite there being nothing in s 40P to suggest that fairness to the accused should enter into the judge's consideration.

94 Temkin and Krahe, above n 60, 158.

ubiquitous judicial discretion discussed earlier is exercised in sexual assault matters within a context replete with beliefs about 'real rape', male sexuality and female sexuality, and with an emphasis on the accused's right to a fair trial. Indeed, in rape trials, the 'balancing approach is structurally skewed in favour of the accused'.[95] Judges must choose 'between conflicting moral imperatives' and the 'central, indeed overriding, importance attached to the fair trial principle' which means that one of the moral imperatives is weighted more heavily.[96]

The dilemma with sexual assault law reform then lies in the reality that the substantive indeterminacy of its provisions translates into discretion that is susceptible to interpretation in an unconsciously biased way. Such judicial discretion is evidently an essential part of our legal system to some extent. However, its use 'dilutes the advantages of rules and creates the risk that discretion may be abused'.[97] Wexler argues that this aversion to discretion derives from a widely shared mistrust of the ability of others to make decisions for us where the result is not predetermined by law:

> If the men who make legal decisions do not make them on the basis of rules then we are afraid that they can only make them, as our fantasy tyrants do, on the basis of evil and dishonest motives, biases, and personal quirks, and sheer perversity. We are not confident that men can exercise intelligent and honest personal discretion…[98]

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95 Simon Bronitt, 'No Records, No Time, No Reason' (1996) 8(2) *Current Issues in Criminal Justice* 130, 130.

96 See Simon H Bronitt, 'Comparative Perspectives on the Fair Trial Principle: A Flawed Balance?' (Paper presented at the National Forum, Peaceful Coexistence: Victims' Rights In A Human Rights Framework, Canberra, 16 November 2005) for a discussion of 'the traditional binary conception of the right to fair trial as being a balance between the state and the individual accused, an approach which tends to marginalize the interests of both victims and wider societal community interests.'

97 Schneider, above n 17, 47.

98 Steve Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120, 123.

It is true that problems involving legal indeterminacy or judicial discretion can only be solved correctly in a socio-cultural void or vacuum. As we have seen in the context of sexual assault law reform, there is of course no such value void or vacuum. However, although judicial discretion is open to abuse, and decisions made using discretion may differ depending on the individual beliefs of the judge, it is argued that this is 'a lesser risk than attempting to shackle the judge's power within a straitjacket';[99] that 'discretion is the lesser evil'.[100] Working out an appropriate balance between the rules of law and the use of judicial discretion so that rules are comprehensive and judicial discretion is limited, is therefore necessary for a legal system to achieve justice. With sexual assault legislation, 'justice' would also be better facilitated if judicial officers' values and measurement of harm are in harmony with those of the victims.[101]

[99] *Selvey v Director of Public Prosecutions* [1968] 2 WLR 1494, 1524G (Lord Guest).

[100] Pattenden, above n 21, 14.

[101] There is a significant lack of research on judicial officers' measurement of harm in these circumstances—an obvious gap that needs to be filled. Jessica Kennedy's PhD research aims to examine this issue further.