BUREAU OF CRIME STATISTICS AND RESEARCH

INTERIM REPORT No 3

CRIMES (SEXUAL ASSAULT) AMENDMENT ACT, 1981 MONITORING AND EVALUATION

COURT PROCEDURES

Attorney-General's Department
New South Wales

CONTENTS

		Page
Report Series, Glossary of Terms and Abbreviations, and Acknowledgements		v
SUMMARY OF RESULTS		1
	Lower Court Proceedings - Committals	1
	Higher Court Proceedings - Trials	2
Chapter		
1.0	THE CRIMES (SEXUAL ASSAULT) AMENDMENT ACT	5
	1.1 The Common Law	6
	1.2 English Legislation	7
	1.3 Australian Legislation	8
	1.4 New South Wales Legislation - s.409B(2) and (3)-(5)	11
	1.5 Sexual Experience or Lack of Experience	14
	1.6 Methodology	18
2.0	COMMITTAL PROCEEDINGS	21
	2.1 Total Questions Put to Complainant	21
	2.2 Sexual Reputation at Committal	24
	2.3 Sexual Experience/Lack of Experience	28
	2.4 Results	30
	2.5 Summary of Committal Results	40
3.0	TRIALS	43
	3.1 Total Questions Put to Complainant	44
	3.2 Sexual Reputation at Trial	46
	3.3 Sexual Experience at Trial	48
	3.4 Results	48
	3.5 Other Aspects of Trial	64
4.0	CONCLUSION	71

CONTENTS (continued)

Page

Appendices

Appendix 1 73
Appendix 2 74
Appendix 3 75
Appendix 4 76
Appendix 5 77
Appendix 6 78
Appendix 7 79
Appendix 8 80
Appendix 9 81

***

REFERENCES 91

REPORT SERIES

This report is one of a series of interim reports produced by the Bureau of Crime Statistics and Research as part of its monitoring of the Crimes (Sexual Assault) Amendment Act, 1981.

Interim Report No. 1 established the characteristics of the complainant, the defendant and the offences which are discussed in Interim Report Nos. 2 and 3.

Interim Report No. 2 analysed acquittals, convictions, sentences and the change in sentence structure after the 1981 amendments to the Crimes Act.

Interim Report No. 3 examines the court process at both committal and trial with particular emphasis on the application of s.409B(3)-(8) of the Crimes (Sexual Assault) Amendment Act.

GLOSSARY OF TERMS AND ABBREVIATIONS

For brevity, the Crimes (Sexual Assault) Amendment Act of 1981 will henceforth be referred to as the Amended Crimes Act. Sections and sub-sections mentioned in this report will, unless otherwise stated, be sections and sub-sections of the Amended Crimes Act.

The Study or post-legislation population refers to cases dealt with under the Amended Crimes Act.

The Control or pre-legislation population refers to cases dealt with under the Crimes Act, 1900, prior to the 1981 amendments.

ACKNOWLEDGEMENTS

The Bureau wishes to express its gratitude to the following offices for their assistance in this study:

The Office of the Solicitor for Public Prosecutions for allowing the researchers to have access to the committal papers which are lodged with them; the Court Reporting Branch of the Attorney-General's Department for the trial and sentence transcripts; various Local Courts in New South Wales who forwarded to us committal transcripts which had lapsed before trial; officers in the Attorney-General's Department who arranged for sound recorded committal proceedings to be re-recorded for this study; and the Criminal Records Office of the New South Wales Police Department.

The principal empirical findings can be summarised briefly as follows:

Lower Court Proceedings - Committals

1. Sexual Reputation - s.409B(2)

In most cases in both the Study group and the Control group the sexual reputation of the complainant was not raised in evidence (Study: 92.4%; Control: 85.3%). However, this means that the total prohibition on raising the sexual reputation of the complainant contained in s.409B(2) was breached in 17 cases or 7.6% of the Study group. However, the absence of definition of what precisely is meant by sexual reputation in s.409B(2) raised problems in classifying the data with absolute certainty.

2. Slightly more than a third of the references to the sexual reputation of the complainant in the Study group related to the prostitution of the complainant. There were no prostitutes in the Control group. Most of the references in both groups concerned the complainant's reputation for promiscuity.

3. Sexual Experience (as opposed to reputation) - s.409B(3)-(6)

Quantitatively, the provisions of s.409B(3) in the Amended Crimes Act which limit the introduction of the complainant's sexual experience in sexual assault cases have had a decided impact on the conduct of such cases. The sexual experience of the complainant was raised in 33.2 per cent of the Study group compared to 65.7 per cent of the Control group. Differences between the two groups are significant at the .05 level.

4. In the Study group, 6.7 per cent of the sexual experience evidence raised at the committal was rejected by the court. Comparisons with the amount of information which was rejected in the Control group are not valid because of the limited powers to reject such information prior to the introduction of the Amended Crimes Act.

5. The quantitative decline in the introduction of sexual experience in the Study group is further reflected in the numbers of sexual experience questions put to the complainant in cases where such experience was raised. Only 16.7 per cent of the complainants were asked 11 or more questions about their prior sexual experience. By comparison, 31.6 per cent of the Control group complainants were asked 11 or more questions about their sexual experience. In approximately one in five Study group cases (21.0%) sexual experience was introduced by means other than questions to the complainant. These other means included medical testimony and the evidence of other witnesses.

6. As well as a quantitative difference between the Study group and the Control group, there was also a qualitative difference in the type of prior sexual experience which was admitted. The experience

of the complainant with a person(s) other than the defendant was raised less often in the Study group than in the Control group (Study: 55.7%; Control: 72.2%). Equally, the issue of whether or not the complainant was a virgin prior to the time of the alleged offence was canvassed less frequently in the Study group than in the Control group (Study: 24.2%; Control: 39.6%).

7. In 33 cases (47.1%) the sexual experience evidence admitted into committal proceedings in the Study group was tendered without prior application to the magistrate, in contravention of s.409B(4) of the Amended Crimes Act. It was not possible to establish any reason why the evidence in this category was permitted.

8. The data indicate that in many instances the provisions of s.409B(3)-(8) of the Amended Crimes Act, which limit the introduction of the complainant's sexual experience or lack of experience, are being ignored by magistrates, prosecutors and defence.

9. The most commonly utilised provisions of s.409B(3)-(8) of the Amended Crimes Act for the introduction of sexual experience were s.409B(3)(c) - sexual intercourse contested (25.7%), and s.409B(3)(b) - existing/recent relationship with the defendant (14.2%).

10. In 7 of the 10 cases in which it was argued that there was an existing or recent relationship between the complainant and the defendant, the most recent sexual contact between them prior to the alleged sexual offence was more than 12 weeks earlier. In 2 cases the recency condition of the provision was satisfied by sexual contact which occurred more than 6 years prior to the alleged sexual offence.

Higher Court Proceedings - Trials

11. Sexual Reputation - s.409B(2)

In most cases in both the Study group and the Control group the sexual reputation of the complainant was not raised in evidence (Study: 91.1%; Control: 93.5%).

12. Most of the sexual reputation references in both groups related to the reputation for promiscuity it was said the complainant possessed. Three of the references in the Study group related to the prostitution of the complainant.

13. Sexual Experience (as opposed to reputation) s.409B(3)

As with committal proceedings, the provisions of s.409B(3) limited the extent to which the sexual experience or lack of experience of the complainant was raised at trials. The sexual experience of the complainant was raised in 40.6 per cent of Study group trials compared to 68.0 per cent of Control group cases. The differences between the two groups were significant at .001 level.

14. In 18.8 per cent of Study group cases the sexual experience raised in evidence was completely rejected by the court. Comparisons with the amount of information rejected in the Control group are not valid because of the limited powers to do so prior to the introduction of the Amended Crimes Act.

15. Qualitatively there are fewer differences between the Study and Control groups in the type of sexual experience raised than at the committal. The experience of the complainant with a person(s) other than the defendant was raised and allowed more frequently in the Study group than in the Control group (Study: 84.6%; Control: 73.0%). The two major differences between the Study and Control groups in terms of the type of information raised was the reduced emphasis placed on the presence (or absence) of virginity prior to the alleged offence (Study: 9.3%; Control: 31.4%), and sexual experience or contact with the defendant (Study: 57.6%, Control: 23.0%).

16. In four of the Study group cases sexual experience evidence was allowed without challenge or explanation (15.3%). No reason could be established from the transcripts of these cases why this information was admitted.

17. As with committals, the most commonly utilised provisions s.409B(3) of the Amended Crimes Act for the introduction of prior sexual experience were s.409B(3)(b) - existing/recent relationship with the defendant (46.1%); and, s.409B(3)(c) - sexual intercourse contested (30.7%).

18. The conditions of a relationship being deemed "recent" were subject to a much shorter time frame at trial than at committal. In only two cases (16.7%) was the most recent sexual contact between the complainant and the defendant more than 12 weeks before the alleged offence. (By comparison, 70.0 per cent of the "recent relationships" at committal fell into this time span.)

Basis of Defence

19. In both the Study group and the Control group the most commonly presented defence to the charge/s was that the complainant had consented to the intercourse or offence alleged (Study: 66.0%, Control: 74.3%).

20. In more than half of the cases in which consent was the defence, consent was inferred by the defendant from the complainant's compliant behaviour rather than stated explicitly by the complainant. Defendants in the Control group were more inclined than Study group defendants to say that consent was explicitly stated by the complainant (Study: 8.1%; Control: 17.2%).

Delay in Complaint - s.405B(2)

21. That the complainant delayed complaining about the alleged offence for some time was raised in 26 cases in the Study group. The mandatory warning contained in s.405B(2) of the Amended Crimes Act

which the trial judge should give to juries in such cases was not given in 3 cases (18.8%). However, in more than a third of the relevant cases (38.4%) the judge's summing up to the jury was unavailable so it could not be established whether the warning was given or not.

Corroboration Warning to Jury - s.405C

22. The trial judge is not obliged by any rule of law or practice to warn the jury that it is unsafe to convict the defendant on the uncorroborated evidence of the complainant. The warning was, however, given by judges in 10 cases in the Study group (28.5%). In 23 cases (39.6%) it could not be established whether the warning was given or not.

1.0 THE CRIMES (SEXUAL ASSAULT) AMENDMENT ACT

Introduction

The Crimes (Sexual Assault) Amendment Act was introduced to Parliament on July 14, 1981. At that time the then Attorney-General, the Hon. Mr. Frank Walker, Q.C., M.P., instructed the Bureau of Crime Statistics and Research to monitor the operations of the legislation for an 18-month period with a view to bringing to light any anomalies in its operation and recommending any amendments requisite to giving fuller effect to its intentions.

The aims of the legislation were to rectify perceived major defects in the law relating to rape and sexual assault. In particular, it was anticipated that the new laws would protect complainants from further victimisation under the legal process; encourage victims to report offences; facilitate the administration of justice and the conviction of guilty offenders, whilst preserving the traditional rights of the accused; and serve an educative function in further changing community attitudes to sexual assault victims (Hansard: 1981).

1.0.1 Major Provisions of the Act

The common law offences of rape and attempted rape were abolished and replaced with three categories of sexual assault of differing seriousness and correspondingly varying sentence structures. (Under the old legislation the only penalty available for rape of all kinds was life imprisonment.)

The Amended Act broadened the definitions of sexual intercourse to include the penetration of the vagina and anus of any person by any part of the body of another person. Foreign objects inserted into the anus and vagina, except where the penetration was carried out for proper medical purposes, would also constitute sexual intercourse within the meaning of the Act, as would the introduction of any part of the penis into another person's mouth.

The immunity from prosecution of husbands, and youths aged less than fourteen years, was removed. Perhaps most importantly, the Act provided for limitations to be imposed on the admission of evidence of the complainant's sexual experience or lack of experience in any court proceedings in connection with prescribed sexual offences. Reference to the complainant's sexual reputation was to be totally prohibited in prescribed sexual offence proceedings.

Unlike English law, which allows a broad judicial discretion on the question of admitting sexual experience in rape cases, the New South Wales legislation clearly specified the conditions which must be satisfied before a judge or magistrate could agree to any such information being admitted. Their reasons for admitting information were to be recorded and counsel making applications to raise such evidence, whether prosecution or defence, were to do so in the absence of the jury.

The major provisions of the Crimes (Sexual Assault) Amendment Act of 1981 are shown in Appendix 2 in Interim Report No. 1.

Characteristics of the Complainant, the Defendant and the Offence

The reader is further referred to that Interim Report for details of the sample descriptions, methodology and data sources used in these reports.

1.1 THE COMMON LAW

Before the enactment of the Crimes (Sexual Assault) Amendment Act of 1981 the introduction of evidence relating to the complainant's sexual history and reputation in New South Wales was governed by common law rules and other general restrictions in the Evidence Act. As Tempkin (1984) notes:

> "At common law, the sexual history of the complainant was regarded as relevant in two respects. It could be relevant to her credit, to suggest in other words that she was not a trustworthy witness, and it could be relevant to the issue of whether she had consented to sexual intercourse with the defendant".

The distinction between evidence which goes to credit and that which goes to issue and that which goes to both credit and issue, is an important one. If the evidence goes to credit alone, no evidence can be brought to rebut the answers given by the complainant, but if to issue, such rebutting evidence can be introduced. (1)

Sexual reputation and sexual experience are not mutually exclusive and sexual reputation presumably derives from the sexual experience attributed to the complainant. However, for the purposes of this segment of the report, three types of information or evidence are singled out as probably coming close to the concept of reputation which will be developed later in this report, and which was allowed at common law.

Prostitution, even remote in time as in Clay's case (2) where evidence was led that the complainant had been a "street-walker" 20 years earlier was ruled to be relevant both to credit and the issue of consent.

The complainant's notorious bad character for want of chastity was also held to be relevant to both credit and the issue of consent. (3) Consequently, the defence was entitled to bring evidence in rebuttal of the complainant's denials of such character.

Promiscuity falling short of prostitution and public notoriety was generally held as going only to credit and not to issue. Hence, the answers given by the complainant were final. That is, while she could be asked questions, the import of which suggested that she was highly promiscuous, no evidence could be brought which could contradict her answers. (4)

---

(1) Fuller discussions than are shown here can be found in any textbook on Evidence. Also see Tempkin. J., Regulating Sexual History Evidence - The Limits of Discretionary Legislation. The International and Comparative Law Quarterly, Vol. 33, 942-978, 1984.
(2) R.V. Clay (1851), 5 Cox C.C., 146.
(3) R.V. Tissington (1843), 1 Cox C.C., 48.
(4) R.V. Cockcroft (1870), 11 Cox C.C., 410.

However, the decision in Krausz's case (5) offers a different view of the status of evidence relating to promiscuity. This decision has been cited in support of "the proposition that evidence tending to show that the complainant is highly promiscuous is relevant to consent and may be led by the defence" (Tempkin:1984).

1.2 ENGLISH LEGISLATION

In England, the Sexual Offences (Amendment) Act of 1976 introduced provisions aimed at limiting the examination of the complainant about her sexual experiences with a person other than the defendant. The Act does not specifically mention sexual reputation but should be read to include it within its limitations.

The relevant section of this Act provides, inter alia:

> Section 2
>
> (1) .....except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than the defendant.

Section 2(2) stipulates the conditions which must pertain before the trial judge will give leave to ask such questions. They are, in summary, that an application be made in the absence of the jury before the questions are asked and that then he would have to be satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

The two most important decisions since the introduction of the Act are Viola (6) and Lawrence. (7) In Lawrence's case the court considered the circumstances in which it could be said that to refuse questions about the complainant's prior experience with third parties would "be unfair to the defendant". It was held that it would be unfair to exclude questions if the questions once allowed might reasonably lead the jury, properly instructed, to take a different view of the complainant's evidence. This type of evidence or questioning, it was held, was proper, but "cross-examination designed to form a basis for the unspoken comment: 'well there you are, members of the jury, that is the sort of girl she is': that was not permissible" (Elliott:1984).

In Viola the ruling in Lawrence's case was approved and it further stated that the only type of questions which should never be allowed would be those which went to credit and nothing more. That is, questions which suggest that merely by dint of specified or general promiscuity, the complainant is less credible as a witness or should not be believed on her oath.

---

(5) R.V. Krausz (1973) 57 Cr. App. R. 466, 474.
(6) (1982) 75 Cr. App. R., 125.
(7) (1977) Crim.L.R., 492.

The decisions in Viola and Lawrence strongly suggest that sexual reputation is also prohibited under English law, although a discretion is vested in the trial judge to allow such evidence if it can be successfully argued that it goes to more than "simply credit" or it is relevant to an issue before the court.

1.3 AUSTRALIAN LEGISLATION

All Australian States have passed legislation to affect the laws of evidence with respect to the questioning of the complainant about her sexual reputation and/or sexual experience. Although generally these rules are restricted to rape cases alone, some of the legislation also covers other types of sexual assaults.

1.3.1 In Western Australia, the Evidence Act 1906 restricts the types of evidence which may be adduced by or on behalf of the defendant. Section 36A (5) defines the matters which are restricted. They are:

(a) the sexual experiences (of any kind and at any time) of a complainant with any person and,
(b) a complainant's disposition in sexual matters and
(c) a complainant's reputation in sexual matters, excluding any matter among the res gestae connected with any offence with which a defendant is charged at trial.

The Western Australian legislation provides different standards of relevance which the evidence must satisfy in order to be admissible. This varies according to whether it is sought to admit the evidence at committal or at trial. At committal, the standard applied is that the matters are:

> "of such relevance to issues arising in the hearing that it would be unfair to the defendant to exclude evidence of those matters" (s.36A(2)).

At trial the standard applied is that the matter has:

> "substantial relevance to the facts in issue or to the credit of the complainant" (s.36B (2)).

The restrictions appear to apply to the defence only and not to cover situations involving lack of sexual experience. It would seem then under this legislation that the prosecution (or the judge) could introduce, say, the virginity of the complainant into proceedings.

1.3.2 In Tasmania, the Evidence Act 1910 - s.102A restricts questions which may be put to the complainant in cross-examination concerning her prior sexual behaviour with persons other than the defendant, unless in the opinion of the magistrate or judge:

> "...the question asked is directly related to, or tends to establish a fact or matter in issue before the magistrate or court".

As with the Western Australian restrictions, the Tasmanian legislation appears to exempt the prosecution from the restrictions on asking the complainant about her prior sexual behaviour.

1.3.3 In Victoria, s.37A of the Evidence Act, 1958 governs admissibility of evidence in rape, attempted rape or assault with intent to rape proceedings and in some respects is broader in its limiting power than either the Western Australian or Tasmanian models. S.37A (1) Rule (1) provides that:

> "The court shall forbid any question as to and shall not receive evidence of the general reputation of the complainant with respect to chastity".

This obviously limits the prosecution as well as the defence and is not restricted to questions put only to the complainant. Under Rule (2) leave of the court must be obtained before the complainant may be cross-examined concerning her sexual activities other than with the accused, and without such leave being granted no evidence may be admitted of her sexual activities with persons other than the accused. It is not clear whether the rule would prevent the introduction for evidence of sexual inexperience prior to the alleged offence.

Rule (3) states the standard of relevance which is required, and it is that the court must be satisfied that:

> "the evidence has substantial relevance to facts in issue or is proper matter for cross-examination as to credit".

Where a plea of guilty has been entered by the accused or in proceedings following conviction, the standard is substantial relevance to the issue of finding an appropriate sentence for the accused.

Rule (4) states that evidence which tends to establish the facts that the complainant normally engaged in sexual activities apart from with the accused shall not be regarded:

"(a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or,

"(b) as being proper matter for cross-examination as to credit in absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant".

1.3.4 In Queensland, the Criminal Law (Sexual Offences) Act, 1978 in s.4 introduces the relevant rules of evidence in sexual offence cases: Rule (1) provides:

> "The court shall not receive evidence of and shall disallow any questions as to the general reputation of the complainant with respect to chastity".

Rule (2) stipulates that:

> "Without leave of the court-
>
> "(a) the complainant shall not be cross-examined as to her sexual activities with any person other than the defendant; and
>
> "(b) evidence shall not be received as to the sexual activities of the complainant with any person other than the defendant."

Rule (3) introduces the standard of relevance required for evidence to be admissible under Rule (2). The standard is that the court must be satisfied that:

> "...the evidence sought to be elicited or led has substantial relevance to the facts in issue or is a proper matter for cross-examination as to credit."

Rule (4) further limits what evidence will be admissible by stating that:

> "Evidence that relates to or tends to establish the fact that the complainant was accustomed to engage in sexual activities with a person or persons other than the defendant shall not be regarded -
>
> "(a) as having substantial relevance to the facts in issue by reason only of an inference it may raise as to general disposition; or
>
> "(b) as being proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.
>
> "Without prejudice to the substantial relevance of other evidence, evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged in an examination of witnesses or a trial or that is part of a sequence of acts or events that explains the circumstances in which such an offence was committed shall be regarded as having substantial relevance to the facts in issue."

1.3.5 In South Australia, the Evidence Act 1929-1984 in s.34 i of that Act restricts the evidence of sexual experience in the following terms:

> "S.34 (2) In proceedings in which a person is accused of a sexual offence, evidence of -
>
> "(a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or
>
> "(b) the sexual morality of the alleged victim of the offence, shall not be adduced (whether by examination in chief, cross-examination, or re-examination) except by leave of the judge."

Section 34i(3) limits the judge's power to grant leave by stating leave to adduce evidence covered or restricted by sub-section (2) shall not be granted except where the judge is satisfied that:

> "(a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and
>
> "(b) the introduction of the evidence is, in all the circumstances of the case, justified."

Section 34i(4) states that the evidence referred to in sub-sections (2) and (3) is to include assertions made in unsworn statements and statements to the police.

In Western Australia, Tasmania and Queensland, the legislation has placed restrictions on evidence of sexual experience of the complainant with persons other than the defendant, but allows that there will be no restrictions on evidence of prior sexual activity with the defendant. While the South Australian legislation draws no distinction between sexual activities with the defendant and other persons, it is not as restrictive as the New South Wales Crimes (Sexual Assault) Amendment Act, in that it grants to the judge a greater level of general discretion to admit evidence of sexual experience.

1.4 NEW SOUTH WALES LEGISLATION - s.409B(2) & (3)-(5)

It is now proposed to examine the relevant sections of the Crimes (Sexual Assault) Amendment Act of 1981. First, the report will look at the total prohibition on raising the sexual reputation of the complainant contained in s.409B(2).

At the completion of the reputation section the report will examine the exceptions to the inadmissibility of sexual experience or lack of sexual experience of the complainant in prescribed sexual offence proceedings stated in s.409B(3).

1.4.1 Sexual Reputation

Section 409B (2) In prescribed sexual assault offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible (Crimes (Sexual Assault) Amendment Act, 1981).

For the purpose of s.409B(2) a "prescribed sexual offence" is an offence under ss.61B, 61C, 61D or 61E or an offence of attempting, or of conspiracy or incitement, to commit an offence under sections 61B, 61C, 61D or 61E (s.405B(1)). The complainant means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed (s.409B(1)). Evidence is "all the legal means, exclusive of

mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation" (Osborn, 1983). (8)

1.4.2 Sexual Reputation Defined

Sexual reputation is a vague term and what distinguishes it from sexual experience is even vaguer. Because of this it is likely that what one court will exclude as material prohibited by section 409B(2) will be allowed by another court under the exceptions stated in s.409B(3) & (5). Much of the criticism which has been levelled at section 2 of the U.K. Sexual Offences (Amendment) Act (Adler:1982;Tempkin:1985) is because that Act fails to lay down adequate rules for which type of sexual information is to be excluded from English rape cases. The New South Wales Act in s.409b(2) can be similarly criticised, for although it stipulates that sexual reputation is totally prohibited, it fails to address the problem of defining a contemporary standard of what precisely this means. Some of the material which will be classified as sexual reputation in this study has only been included to force debate on this issue, and the blurred line between reputation and experience.

The Oxford English Dictionary offers the following definition of reputation: "n. What is generally said or believed about a person's or thing's character; state of being well reported of, credit, distinction, respectability, good report; the credit or discredit of doing or of being". Presumably, then, "sexual reputation" is what is generally said or believed about a person's sexual character.

1.4.3 Problems of Definition

Written guidelines about what is to be construed as sexual reputation for the purposes of the prohibition are hard to find. In his commentary on the provisions of s.409B(2), Woods (1981) states:

> "This is an important provision, excluding irrelevant material about a complainant's supposed sexual behaviour as a proper basis upon which the facts of a particular allegation of sexual assault should be judged".

Apart from commending the section for its importance, Woods has contributed little in terms of definition. But, more importantly, he has added a new element to the section, the notion of relevance. Section 409B(2), of course, says nothing at all about relevance. Even if it were to be shown that the complainant's sexual reputation was relevant to issue, there seems to be no discretion to allow evidence of it. A literal interpretation of s.409B(2) is that sexual reputation, even if it is the lynch-pin of the prosecution or defence case, is simply inadmissible.

---

(8) A full list of the types of evidence which may be put to the court would be too lengthy to list here, but is shown in Osborn at pages 137 and 138. See also confession at page 85 of Osborn and s.409A(1)-(3) Crimes Act, 1900 - New South Wales - depositions.

But what type of sexual reputation? If the common law is a guide, s.409B(2) would only prohibit evidence of sexually infamous reputation, leaving open the possibility that evidence of a sexual reputation for chastity might be admissible. However, s.409B(2) states no distinction between fame and ill-fame so it is concluded that a reputation for chastity is inadmissible. Support for this interpretation is found in s.409B(3) (which will be discussed in the next chapter) which stipulates that evidence of a lack of sexual experience can be as inadmissible as evidence of sexual experience.

Similarly, although s.409B(3) talks about "evidence which discloses or implies" either sexual experience or lack of sexual experience as being generally prohibited, s.409B(2) only says "evidence relating to sexual reputation is inadmissible". This leaves unclear whether sexual reputation could be implied, or has to be explicitly alleged to be inadmissible.

Returning to the question of what sexual reputation means, the proposition John is commonly thought to be a man is a statement of John's sexual reputation. However, most readers would cavil at the idea that this was the type of information which s.409B(2) intended to prohibit. There would probably be greater consensus that Mary is well known for being a slut and a whore is the type of evidence meant for prohibition.

However, other questions remain. How many people have to think that Mary is a slut before that becomes her sexual reputation? What if Mary believes that other people regard her as a slut, but in fact they don't (or in any case the court isn't told whether they do or not). Would Mary, in stating her belief about her reputation, be introducing prohibited material? These questions are not raised as an interesting game of semantics. They are situations which arose and posed difficulties in the classification of the data.

1.4.4 Material To Be Included as Reputation in This Study

Generally, all situations in which the defendant asserts that he heard or knew about the complainant's sexual proclivities from other people will be regarded as infringing the sexual reputation prohibition. For the purposes of these analyses assertions about the common knowledge of the complainant's promiscuity, prostitution and lack of sexual activity or experience would fall into the same category of sexual reputation. Also classified as prohibited sexual reputation evidence is the use of certain words, euphemisms and colloquial terms which connote a sexual reputation.

To summarise: For the purposes of this study, the following material will be regarded as raising the complainant's sexual reputation whether at committal or at trial:

1. References to the complainant's prostitution.
2. Assertions that the complainant is believed/known to be promiscuous.
3. Other references to the complainant's sexual proclivities which are asserted to be commonly known.

The ways in which the above information might be introduced into proceedings include:

1. A witness states either by testimony or in a document before the court that he/she has heard from others, or has by direct observation formed the view that the complainant is a prostitute; is promiscuous; is widely known for other sexual characteristics.

2. The complainant states either by testimony or in a document before the court that other people regard her/him in any of the above ways (promiscuous etc.).

3. The use of euphemisms by any witness either by testimony or in a document before the court which imply that the complainant is a prostitute; is promiscuous; is widely known for other sexual characteristics ("she is the town bike").

1.5 SEXUAL EXPERIENCE OR LACK OF EXPERIENCE

The main source in this State to give a guide to how s.409B(3) was expected to work or be applied in the courts is Dr. G.D. Woods' Sexual Assault Law Reform in New South Wales (1981).

The main apparent difference between the New South Wales legislation and the limits imposed by the English legislation is that there is no general discretion vested in the trial judge or magistrate to admit sexual experience evidence in New South Wales. The s.409B(3) exceptions are not expressed in terms like "unfair (to the defendant) not to admit", but rather, sub-sections (a) to (f) specify the conditions which must be satisfied before the judge can agree to the admission of any evidence of sexual experience or lack of experience.

In some other respects, however, the two pieces of legislation are quite similar. For example, both require that applications to tender evidence of sexual experience be made in the absence of the jury and the prohibitions apply to both magistrates' and higher court proceedings. However, on the subject of the complainant's sexual experience with the defendant, the English and New South Wales legislations diverge. Section 2 of the English legislation suggests that any sexual experience the complainant has had with the defendant, however remote in time, is admissible without application to the judge or magistrate. It is only sexual experience with third parties which is subject to the English s.2 restrictions. Except for New South Wales, South Australia and Western Australia, other Australian States also only restrict evidence of sexual experience with third parties.

1.5.1 Section 409B(3) & (5) Exceptions to the Inadmissibility of Sexual Experience or Lack of Sexual Experience

The complainant's sexual experience or lack of experience is inadmissible unless one of the exceptions to the inadmissibility rule, which are stated in s.409B(3) and (5), are successfully raised by either the prosecution or the defence. Each of the exceptions is briefly outlined below.

1.5.2 Section 409B(3)(a)

Sexual experience or lack of experience may be admitted:

(a) where it is evidence -

(i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

For evidence of the complainant's sexual experience, or lack of experience to be admissible under this exception, the sexual experience must be proximate to the time at which the alleged offence occurred, and, the experience, or lack of experience must form part of a "connected set of circumstances in which the alleged prescribed sexual offence was committed".

Woods (1981) posits the following situation as one in which s.409B(3)(a) might be successfully raised: "(The complainant) goes to a party and consents to sexual intercourse with A, B and C, and then shortly afterwards has sexual intercourse with D which is later alleged to have been without consent; D may cross-examine and bring evidence about the consensual acts with A, B and C as part of a defence by him of honest belief as to consent".

The English Court of Appeal in Viola's case (9) also held that the above situation would be one in which the complainant's experience with A, B and C would be admissible although in Viola it was not alleged that the complainant had had intercourse with A, B and C but only that she had fondled them. Since the New South Wales legislation is not restricted to sexual intercourse but only "experience" it is likely that such experience as in Viola's case, in close proximity to the alleged offence, and in "a connected set of circumstances", would be admitted in this State.

1.5.3 Section 409B(3)(b)

Sexual experience or lack of experience may be admitted:

where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant.

This is the main s.409B(3) exception to apply to sexual contact between the complainant and the defendant. (Theoretically, it could be argued that it might also cover situations of lack of sexual contact but these

---

(9) (1982) 75 Cr. App.R., 125.

situations would be rare). The inadmissibility rule is over-ridden if two conditions are satisfied: one, that it is established that there was a relationship between the complainant and the defendant which was, two, either recent or existing at the time of the alleged offence. A further condition imposed on admissibility under this exception is that the evidence of sexual experience relates to that recent or existing relationship.

1.5.4 Section 409B(3)(c)

Sexual experience or lack of experience may be admitted:

where

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61A(1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person.

The sexual experience of the complainant with third parties or someone(s) other than the defendant may be admitted under s.409B(3)(c), but this exception will not apply to cases in which the defence is consent. It will only apply to cases in which the defendant does not concede that the sexual intercourse with which he is accused occurred. However, this exception does not provide either the prosecution or the defence with the right to canvass generally the complainant's sexual experiences with third parties.

The sub-section stipulates that the evidence must be "relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person". The prosecution will presumably try to prove that the semen etc. can only be attributable to the accused person and the defence will wish to establish that it could have been caused by some other person.

1.5.5 Section 409B(3)(d)

Sexual experience or lack of experience may be admitted:

where it is evidence relevant to whether -

(i) at the time of the commission of the alleged sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

(ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;

It is not immediately clear what sort of sexual experience or lack of experience could be raised under this exception and, indeed, it was not

utilised in any case in this study where experience was raised. Presumably, if the complainant had syphilis or another sexually transmitted disease, the defence would wish to bring this to the attention of the jury if the defendant didn't have, or didn't contract such disease. (But then the symptoms of the disease might not show up for some considerable time and, anyway, if the defendant was wearing a condom at the time of the alleged offence he might not contract the disease notwithstanding that the complainant had the disease).

It is assumed that the presence of a sexually transmittable disease in the complainant which is absent in the defendant "at any relevant time" is not automatically admissible evidence unless it is shown that the defendant must, if he had had sexual intercourse with the complainant, have contracted the disease in question. The same considerations would apply if it was the defendant who had the sexually transmittable disease.

1.5.6 Section 409B(3)(e)

Sexual experience or lack of experience may be admitted:

> where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence);

As with the previous exception, s.409B(3)(e) was not raised in any case in this study. Indeed, it is highly unlikely that the situation described in this sub-section, that the allegation of sexual assault was made after the discovery by the complainant, at some much later stage than the alleged sexual assault, that she was pregnant or had contracted some disease from the alleged offender, would happen very often.

1.5.7 Section 409B(3)(f) and Section 409B(5)

Sexual experience or lack of experience may be admitted:

(3) (f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to sub-section (5), be asked,

(5) (a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period -

(i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or
(ii) taken part or not taken part in sexual activity of a general or specified nature; and

(b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined but only in relation

to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

Section 409B(3)(f) must be read in conjunction with s.409B(5). Together these provisions cover situations in which the case for the prosecution has "disclosed or implied" that the complainant either has or has not had previous sexual experience, and it has been argued that it would be unfair to the defendant, and he would be unfairly prejudiced, if the complainant could not be cross-examined in relation to the disclosure or implication in the prosecution case. If permission to cross-examine under s.409B(5) is granted by the judge on an application to do so in the absence of the jury, such cross-examination is limited to the relevant subject matter in the prosecution case.

1.5.8 Probative Value of Evidence Outweighs Distress to Complainant

All of the exceptions to the inadmissibility of sexual experience or lack of sexual experience in s.409B(3) (a) to (f) and s.409B(5) are subject additionally to the court being satisfied that the probative value of the evidence to be introduced "outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission".

1.6 METHODOLOGY

This study will consider the impact on the conduct of cases of the procedural and evidentiary changes of the Amended Crimes Act and then compare this with the way in which the common law offences of rape and attempted rape were handled prior to the introduction of the reform legislation. It is a "before" and "after" study and looks at two 18-month periods for the purposes of this research.

Within these time frames two things must happen before a case is included in either the before or after sample: the alleged offence will have been committed and in connection to that offence a formal committal hearing will have been commenced. Each case then had to satisfy a double criterion of entry in its relevant time frame.

The cases which satisfied the entry criteria in the before, or common law sample are referred to as the Control group. The cases which entered the after, or Amended Crimes Act sample are referred to as the Study group. There are 194 complainant/defendant pairs or cases in the Control group and 228 complainant/defendant pairs in the Study group.

The complainant/defendant pair has been chosen as the basic unit of analysis because one defendant charged in relation to several complainants will not necessarily face the same type or number of charges for each complainant. The same point applies to several defendants charged over one complainant. The analyses which follow are based on complainant/defendant pairs unless otherwise stated.

This report traces the cases in the above samples through the criminal justice system from committal proceedings to trial. Of course not all cases which enter committal enter trial. Some will not proceed beyond the committal stage at all, and others which do will not result in a

trial as such, because the defendant has entered a guilty plea and will only go to a higher court for sentence. Specifically, this report examines the evidentiary and procedural characteristics of cases under the following headings:

1.6.1 Committals and Trials

- Numbers of questions put to the complainant by both prosecution and defence.
- s.409B(2) - Sexual reputation of complainant raised and by what means raised.
- Whether reputation evidence admitted and nature of evidence.
- s.409B(3) - Sexual experience (as opposed to reputation) of complainant raised and by what means raised.
- Whether sexual experience admitted and nature of evidence.
- Specific provisions of s.409B(3) utilised for admission of sexual experience evidence.
- Number of questions put to complainant concerning sexual experience.
- s.409B(3) - recent relationship provision - time spans within which a relationship was deemed to be recent.

1.6.2 Other Aspects of Trial

- Bases of defence.
- Cases involving the issue of consent.
- Means by which consent was inferred by defendant.
- Delay in complaint - extent to which raised.
- s.405B(2) - Warning to jury in cases in which delay in complaint is raised - extent to which warning was given to jury.
- s.405C(2) - Corroboration warning to jury - extent to which corroboration warning still given to jury.

2.0 COMMITTAL PROCEEDINGS

Introduction

The text below provides a brief summary of the main features of a committal proceeding.

The committal is not a trial but an administrative and quasi-judicial procedure, the main aim of which is to establish whether a prima facie case against the accused has been made out by the prosecution. Even where a prima facie case has been established, most magistrates considered not compelled to commit the accused for trial if he judged that the evidence was such that no jury would convict.

The defendant is not required to enter a plea to the charge/s against him in a committal, but, if the offence with which he is charged is not one which has a maximum penalty of life imprisonment, he may plead guilty under s.51A of the Justices Act, 1902, and dispense with the committal hearing. (10)

The prosecution evidence in committals is presented by members of the Prosecuting Branch of the New South Wales Police Department. The accused will generally be represented, but this representation would have to be at the defendant's expense, as state assistance for legal costs at committals is not provided unless the charge is murder or the defendant is a juvenile. (11)

At the end of a committal a magistrate will either commit the defendant for trial or, if he has pleaded guilty, for sentence, or discharge the defendant. In some cases, the charge/s are such that at the end of committal the defendant may exercise an option to have the case heard summarily before the magistrate.

2.1 TOTAL QUESTIONS PUT TO COMPLAINANT AT COMMITTAL

It could not be expected that the Amended Crimes Act would have any impact on the numbers of questions put to the complainant by the prosecution in the committal. This is because the elements of the offence which the prosecution must present to the court are, in most cases, the same as when, under the common law, the offence was rape or attempt rape. It was however, predicted that the defence would ask fewer questions, if only because of the restrictions imposed by the provisions of s.409B(3) & (5) of the Act.

---

(10) The Justices (Amendment) Act, 1985 amended s.51A so that defendants charged with offences carrying life penalties are no longer precluded from submitting guilty pleas at committal. However, for the purposes of this report what is stated in the text was correct at the time the cases were heard.

(11) Another exception to this rule is the Aboriginal Legal Service which does provide legal aid at committals.

Table 1 below shows the total number of questions put to the complainant by the prosecution and defence in both the Study group and the Control group. To ensure comparability between the two sets of data, certain cases have been excluded from the figures in Table 1.

In the Study group there were 44 cases in which the complainant was asked no questions at all by either the prosecution or the defence because the defendant had pleaded guilty to the charges laid at committal. As outlined in Interim Report No. 2 in this series, the option to plead guilty at committal was not available to defendants charged with rape, although those charged with attempt rape could plead guilty at committal. Consequently, the Control group contains very few guilty pleas at committal. To include guilty pleas would distort any comparisons between the two groups and suggest differences which did not exist. Hence guilty pleas have been excluded from both samples.

Another difference which might also blur legitimate comparisons between the two groups is that the Control group contains more multiple defendants than does the Study group (Control group:26.1%; Study group:14.6%).

The reason this creates a problem is that in cases involving multiple defendants each defendant can be separately represented by counsel, but this does not always happen. At committal, although not at trial, it was not uncommon for more than one defendant to be represented by the same solicitor or barrister. Teasing out which questions relate to which defendant where there is only one legal representative is almost impossible. Even where multiple defendants are separately represented, each counsel will not necessarily cross-examine the complainant or, for that matter, other witnesses. Because of the unpredictability of the ways in which cases involving multiple defendants can proceed, they were also eliminated from the figures in Table 2 and the comparable Tables 8 and 9 in the Trial segment.

The figures then in Tables 1 and 2 and Tables 8 and 9 in the Trial segment are based on single defendant/complainant pairs, and exclude defendants who pleaded guilty.

There are no major differences between the two groups in Table 1 so far as questions put to the complainant at the committal. In slightly more than 80.0 per cent of both populations the prosecution asked fewer than 200 questions; and approximately half the defence questions of the complainant were also in this range.

The means and standard deviations are shown in Table 2. Apparent differences in the means are, however, highly unreliable given the size of the associated standard deviations and should not be interpreted as reflecting actual differences between the groups.

Table 1 Questions put to complainant at committal by prosecution and defence.

No. = Distinct complainants/single defendants

	STUDY				CONTROL			
	Prosecution N=114		Defence N=114		Prosecution N=98		Defence N=98	
	No.	%	No.	%	No.	%	No.	%
No questions asked	-	-	18	15.8	-	-	12	12.3
1 to less than 100	44	38.5	31	27.1	31	31.7	29	29.6
100 to less than 200	52	45.7	27	23.7	48	50.0	17	17.4
200 to less than 300	13	11.4	18	15.8	12	12.2	13	13.3
300 to less than 400	3	2.6	11	9.6	6	6.1	13	13.3
400 to less than 500	1	0.9	4	3.5	1	1.0	3	3.0
500 to less than 600	-	-	3	2.7	-	-	1	1.0
600 to less than 700	-	-	-	-	-	-	4	4.1
700 to less than 800	-	-	-	-	-	-	1	1.0
800 to less than 900	-	-	1	0.9	-	-	2	2.0
900 to less than 1000	-	-	1	0.9	-	-	1	1.0
1000 to less than 2000	1*	0.9	-	-	-	-	-	-
2000 or more	-	-	-	-	-	-	2*	2.0
TOTAL	114	100.0	114	100.0	98	100.0	98	100.0

* Cases so marked eliminated from calculations of means and standard deviations because of anomalous characteristics of the cases in question. The anomalous characteristics of the three cases eliminated from Table 1 are these: Case 1. Prosecution - Study group. There was nothing peculiar about the case itself, but the complainant appeared to have difficulty in understanding the questions put to her and the questions had to be restated sometimes ten times before she could answer. Case 2. Defence - Control group The complainant was asked 2,584 questions over 3 days of cross-examination. Many of the questions were completely unrelated to the case and canvassed such topics as the ethnic composition of the remote region of Canada where the complainant normally lived; whether 'high-class' restaurants in Toronto hire only men to serve on table (73 questions); the complainant's duties as a social worker in Canada (87 questions). Counsel also asked 1,834 questions of other witnesses. Case 3. Defence - Control group The 14-year-old complainant was asked 2,240 questions over several days. Again this was not a complex case and the number of questions is explained by the defendant sacking his counsel mid-way through the proceedings and taking over the cross-examination himself.

Table 2

	Prosecution		Defence	
	Means	Standard deviations	Means	Standard deviations
Study group	129.76	71.3	165.94	165.03
Control group	144.91	88.01	196.23	212.31

2.2 SEXUAL REPUTATION AT COMMITTAL

The type of material which will be regarded as raising the complainant's sexual reputation in this study, and the ways in which such material may be introduced into either committal or trial proceedings are listed in the Introduction to this report.

Table 3 below shows that the prohibition on mentioning the complainant's sexual reputation in prescribed sexual assault cases was breached in 17, or 7.6 per cent of Study group cases. Sexual reputation was raised in 14.7 per cent of Control group cases, a difference which is significant at the .05 level ($x^2 = 5.37$, df = 1).

Table 3 Complainant's sexual reputation raised at committal by group

No. = Complainant/defendant pairs

	STUDY*		CONTROL**	
	No.	%	No.	%
Sexual reputation not raised	208	92.4	163	85.3
Sexual reputation raised	17	7.6	28	14.7
TOTAL	225	100.0	191	100.0

* Information unavailable in three cases.
** Information unavailable in three cases.

One surprising feature of the extent to which sexual reputation was raised in the Control group (14.7%) was that the literature on the subject suggests that it would happen more often than in fact it did. Woods (1981) for example asserts that the use of the complainant's reputation was "a standard-type defence in a rape case".

2.2.1 Type of Sexual Reputation Raised

Of the 28 references to sexual reputation in the Control group, 25 were references to the alleged promiscuity of the complainant. Only two of these references were rejected by the court. Three references related to the complainant's reputation for not taking part in sexual activity.

In the Study group, seven references were to the complainant's prostitution and the other ten were to promiscuity. One reference to promiscuity was refused by the court.

2.2.2 Prostitution References

There were no prostitute complainants in the Control group and five in the Study group involving alleged attacks by seven men. That is, there were seven prostitute/defendant pairs. Not every case needs to be discussed because in some respects they are very similar.

In Case 1, in which two defendants were charged with sexual intercourse without consent with a prostitute, the reference to her prostitution was unhesitatingly classified as breaching the prohibition stated in s.409B(2). The reference was:

Defendant to Magistrate:

> "I'd just like to ask how you could say we sexually assaulted her when she is a prostitute".

Why the above reference to the complainant's prostitution is so convincingly prohibited material is that the defence is asserting that because the complainant is a prostitute, a priori, sexual assault is impossible. However, other cases involving prostitutes are not so simple.

Five other cases involved prostitute complainants, but since they are all similar in terms of the surrounding facts attaching to the alleged offences, one case (Case 2) has been singled out to illustrate all. If noting the complainant's prostitution constitutes sexual reputation, these five cases suggest that in certain circumstances such references will be impossible to avoid. But further, these cases call into question whether references to prostitution are exclusively references to the complainant's sexual reputation.

In Case 2 it is alleged that the complainant, who worked for an escort agency, agreed to go to a motel to have vaginal intercourse with the defendant for a sum of money. However, when she arrived it is alleged that the defendant sexually assaulted her per anum. The complainant in evidence testified that as a prostitute anal intercourse was not one of the services she ever offered.

During the committal the magistrate stopped the cross-examination of the complainant, which had been canvassing generally the types of sexual services she offered to clients. He noted that as the lack of sexual experience of anal intercourse appeared to be part of the prosecution case he would "indicate this evidence (in cross-examination) is allowed under the provisions of s.409B(3) of that Section and (5) of that Section".

Clearly the magistrate does not regard this evidence as relating to sexual reputation, and therefore prohibited under s.409B(2), but sexual experience which is permissible under the s.409B(3) exceptions. Unfortunately, the transcript does not record which sub-section of s.409B(3) the magistrate means.

It might be s.409B(3)(a) - "connected set of circumstances", or, since there was an earlier reference in the transcript to intercourse between the complainant and the defendant two years earlier, the magistrate might be allowing the evidence under s.409B(3)(b) - "recent relationship" (two years is well within the range of periods which the committal courts have accepted as "recent".)

It is granted that the reference to the complainant's prostitution in this case may be sexual experience and not reputation, but more probably, both experience and reputation. We have counted the references as reputation to raise the matter for discussion and highlight some of the difficulties of classifying material in the absence of guidelines of what information was to be considered sexual reputation, and where the demarcation line is between experience and reputation.

2.2.3 Promiscuity

Unlike the ambiguous nature of some of the material in the previous paragraphs about prostitution, most of the references to promiscuity are fairly straightforward. However, some examples will also illustrate that sexual reputation is sometimes mixed in with sexual experience. It is not proposed to detail every reference to promiscuity which was made but only those which highlight the various classes of information we included as violating the s.409B(2) prohibition.

Generally, references to promiscuity refer not to specific people having had sexual intercourse with the complainant but numerous other unspecified people, with all of whom it is alleged the complainant has had sexual intercourse, or engaged in other sexual activity.

The following references all come from the one case (Case 3). There were two complainants and one defendant in this committal. The defendant was charged with sexual intercourse without consent with one complainant, and maliciously inflicting actual bodily harm with intent to have sexual intercourse with the other complainant. The two matters were dealt with jointly at committal. The sections underlined relate to reputation.

Complainant A

Testimony of Police Witness:

> (And then the defendant said:) "All right I fucked her, but it was no rape. I'd be the only bloke in X.....who hadn't fucked her".

Same Witness:

> "(the defendant) said to me then Sir, "Yes, I'll bring about twenty blokes to the Court who will say they've fucked her too".

Record of Interview:

"Q. Why did you deny having intercourse with her when you were first spoken to"?

"A. Because she's not the best woman in town and I've got a bit of pride".

Complainant B

Testimony of Police Witness:

He (the defendant) then said: "I've fucked her before. She's a moll".

One of the puzzling aspects of the above case (which amply illustrates the mix of sexual experience with sexual reputation) is that although none of the information concerning sexual reputation drew any comment from either the prosecutor or the magistrate, an application to cross-examine Complainant B about previous acts of intercourse with the defendant under s.409B(3)(b) - recent relationship - was refused by the magistrate.

2.2.4 Views Held by Others

In other cases it is not the defendant who expresses a view of the complainant's sexual reputation. It is alleged that other people unrelated to the case hold such views. Consider the following cross-examination of the complainant in Case 4:

Defence: "I put it to you Madam, that your girlfriends were calling you a moll and a slut because you went with him (the defendant) the first time you met him".

Complainant: "No".

Defence: "Girlfriends calling you a moll and a prostitute weren't they? ... I put it to you that the only reason that you wanted to have a go at the defendant is that you are worried about your reputation with your girlfriends" (stated twice).

Strictly speaking these are not references to promiscuity because they refer only to intercourse with one person and that person is the defendant. But the euphemistic terms "moll", "slut", "prostitute" connote promiscuity. No objections were raised to the admission of the above sexual reputation references.

2.2.5 Views Held by the Complainant

In two cases the complainants attributed to themselves sexual reputations not raised by anyone else. In one case the complainant said: "Everyone thinks I'm a slut" (Case 5), and in the other, the complainant said: "The boys think I'm a slut" (Case 6). It is a little uncertain if what the complainant thinks about her own sexual reputation should be classified as prohibited material but there is nothing in the legislation which says that it should be exempt.

In response to the second complainant's assertion of being "a slut" the defence asked the following question:

"Might the meaning (of slut) be extended to mean a woman who engages in all sorts of sexual activities with men?" (Case 6).

The above question was also counted as raising sexual reputation although it could be argued that since it was the complainant who made the suggestion that she was a slut, the defence should be able to obtain a precise definition of what she meant. However, the contrary view was adopted that since it was improper for the reputation to be raised in the first place, it was equally improper to seek clarification of what had been said.

2.2.6 Context in Which Sexual Reputation Raised

Appendix 1 gives details of the context in which sexual reputation was raised at committal and shows the various ways in which sexual reputation can be introduced into proceedings.

2.3 SEXUAL EXPERIENCE/LACK OF EXPERIENCE

Introduction

2.3.1 The Difference Between Sexual Reputation And Sexual Experience

An assertion that the complainant has a certain sexual reputation derives from a corpus of real or rumoured sexual experience. However, there is a qualitative difference between the two concepts and generally a greater specificity in the concept of experience than in sexual reputation. Also sexual reputation depends on the untested views or opinions of others or what the defendant claims are the opinions of others about the complainant's sexual activities. However, as previously mentioned, sexual reputation and sexual experience are not necessarily or always mutually exclusive. That is, some evidence might raise both reputation and experience.

One example of raising sexual experience, as opposed to reputation, would be to ask the complainant: "Had you had intercourse with the defendant/been a virgin before the night of the alleged offence?" This is clearly in a different class from two of the examples cited in the previous section on reputation:

Example 1: "Alright I fucked her, but it was no rape. I'd be the only bloke in X... who hadn't fucked her". Or,

Example 2: "I've fucked her before. She's a moll" (Case 3).

The last example illustrates that both sexual experience ("I've fucked her before") and sexual reputation ("She's a moll") can be raised in the same statement. This example would be counted as raising both reputation and experience.

2.3.2 Included in the Concept of Sexual Experience

The ambit of the New South Wales evidentiary restrictions embraces more than references to sexual intercourse as re-defined in s.61A of the

legislation. It encompasses "any sexual activity", which would include kissing, fondling, sexual touching, presumably even masturbation. Additionally, the restrictions in sections 409B(3)-(5) apply not only to direct disclosures of sexual experience or lack of experience, but also to implications that the complainant might have, or have not, had sexual experience.

2.3.3 Implications of Sexual Experience/Lack of Experience

Examples of the evidence which was counted as referring to sexual experience or lack of experience will be shown later in this section. Shown below is material which implies that the complainant might have had sexual experience but which was excluded, or only included in certain circumstances.

2.3.4 Marital Status

Usually the examination-in-chief of the complainant at committal (and sometimes at trial) is opened by the prosecutor asking:

> "Your name is X....? And you are a married/single woman living at Y.... Street in the suburb of Z....with your husband/parents?"

That the complainant is "a married woman" strictly speaking implies that she has had experience, if only of her husband. Conversely, that the complainant is "a single woman" might imply, albeit naively, that she has no sexual experience of anyone.

2.3.5 Motherhood

This is an equivocal category of references. To have had children is generally to have had sexual intercourse. But where the presence of a child is an integral and relevant part of the disputed facts before the court it would be illogical and pedantic to exclude mention of the child because such mention implies sexual experience.

However, in other cases, the fact that the complainant has children is in no way connected to any matter before the court. Such references to her having children or receiving a "Single Parent's Benefit", or having "stretch marks on her stomach consistent with earlier pregnancies", have all been counted as implying or disclosing indirectly that she has had sexual experience. Examples of such cases are shown later in this section.

2.3.6 Colloquial Terms Implying Sexual Activity

Most colloquial terms which imply that the complainant has had sexual experience are counted. For example the following cross-examination of the complainant was counted as implying that the complainant had had previous experience of oral intercourse:

> "And when he said 'chew it' (suck his penis) you knew what he meant didn't you?" (Case 7).

But some colloquialisms were used ambiguously and were not counted. Consider the following cross-examination of a female complainant:

"And you are what I think is referred to as a security guard?"
"Yes."
"A prison guard?"
"Yes."
"And I think the vernacular for that is 'Screw'?" (Case 8).

(This reference was not included because the intention in this instance appears more to humiliate and insult the complainant than to raise her sexual experience.)

2.3.7 Previous Allegations of Rape/Sexual Assault

Initially, it was decided that reference to a previous complaint of rape or sexual assault allegedly made by the complainant did not raise or imply sexual experience. It only raised the question of whether she had falsely accused someone in the past. For as Adler (1982) points out, previous complaints of rape are always assumed to be false complaints. However, in England, under similar evidentiary restrictions to s.409B(3)-(5), it has been held that cross-examination of the complainant about earlier complaints raises the issue of intercourse with a man/men other than the defendant and such cross-examination is not possible without leave of the trial judge.

Consequently, in this study too, references to earlier rape or sexual assault complaints will be counted as raising sexual experience.

2.4 RESULTS

2.4.1 Sexual Experience/Lack of Sexual Experience At Committal

Although evidence of the complainant's sexual reputation is totally inadmissible under s.409B(2) of the Amended Crimes Act, evidence of her/his sexual experience or lack of sexual experience may be admitted if any of the exceptions to a general prohibition on admission can be demonstrated to apply in a particular case. Table 4 indicates the extent to which the complainant's sexual experience/lack of experience was raised at committal in both groups.

Table 4 Sexual experience/lack of experience raised at committal

No. = complainant/defendant pairs.

	STUDY		CONTROL	
	No.*	%	No.**	%
Sexual experience/lack of experience not raised	151	66.8	66	34.3
Sexual experience/lack of experience raised	75	33.2	126	65.7
TOTAL	226	100.0	192	100.0

* Information unavailable in two cases.
** Information unavailable in two cases.

The figures above show that the complainant's sexual experience or lack of experience was raised twice as frequently in the Control group than in the Study group. The differences between the two populations are significant at the .05 level ($x^2 = 43.81$ df = 1).

2.4.2 Sexual Experience/Lack of Experience Admitted

The court is not constrained to accept evidence of sexual experience or lack of experience merely because the prosecution or the defence has sought to introduce such material. Table 5 shows that not all such evidence was accepted, although most was.

Table 5 Sexual experience/lack of experience at committal admitted or rejected

No. = Cases in which sexual experience/lack of experience raised.

	STUDY		CONTROL	
	No.	%	No.	%
Sexual experience/lack of experience admitted	70	93.3	126	100.0
Sexual experience/lack of experience not admitted	5	6.7	-	-
TOTAL	75	100.0	126	100.0

The committal court declined to accept evidence of the complainant's sexual experience in only five cases in the Study group (6.7%), which together contained six references to sexual experience. The references excluded were: prior sexual intercourse with a man other than the defendant (2); prior sexual intercourse with the defendant (2); condition of the hymen (whether recently ruptured) (2).

The remaining 70 cases in the Study group (93.3%) contained 94 references to sexual experience which were admitted into evidence. All of the sexual experience raised in the Control group was allowed and contained 182 references to sexual experience.

2.4.3 Number of Questions Put to the Complainant concerning Sexual Experience

The number of questions put to the complainant concerning sexual experience or lack of sexual experience are detailed in Appendix 2. There were no significant differences between the two groups.

2.4.4 Type of Sexual Experience Admitted

Sexual experience references depend for their validity on the circumstances of each case. For example, if the defence argues that the sexual intercourse alleged between the complainant and the defendant did

not, in fact, occur, it could be relevant to cross-examine the complainant about intercourse she might have had with third parties around the time of the alleged offence. However, other third party references might be completely inadmissible. Table 6 below details the sorts of references to the complainant's sexual experience which were allowed into evidence in each group at the committal proceedings.

Table 6 Sexual experience allowed in evidence at committal

No. = Committals in which sexual experience admitted

TYPE OF REFERENCE	STUDY N = 70 No.*	%	CONTROL N = 126 No.	%
Prior sexual contact/intercourse with person(s) other than defendant	39	55.7	91	72.2
Prior sexual contact/intercourse with defendant	27	38.5	26	20.6
State/condition of hymen (whether recently ruptured)/other reference to absence of virginity	17	24.2	50	39.6
Other acts/behaviour consistent with sexual activity (without reference to specific person)	7	11.4	14	11.1
Complainant was pregnant/had children	4	4.2	1	0.7

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.

Bearing in mind the introductory comments to Table 6, very little can be inferred from the figures in this table although there are apparent differences between the two populations. References to sexual experience with persons other than the defendant are higher in the Control group than in the Study group, as are questions relating to the presence or absence of virginity prior to the alleged offence. Proportionately, there are more references to earlier sexual contact or intercourse with the defendant in the Study group than in the Control group.

2.4.5 Section 409B Exceptions Used to Admit Sexual Experience

It is not proposed to describe the means by which evidence of the complainant's sexual experience or lack of sexual experience was admitted in the Control group because, apart from ss.56, 57 and 58 of the New South Wales Evidence Act few restrictions were imposed on the use of this type of evidence in rape cases.

However, in the Study group cases, alluding to the complainant's sexual experience is circumscribed by the provisions of s.409B(3)-(5) of the Amended Crimes Act. It is now proposed to examine under which exception to the general inadmissibility rule stated in s.409B(3) the complainant's sexual experience was admitted at committal. (Each of the exceptions is stated in the Introduction and need not be repeated here.)

Apart from the exceptions, the legislation stipulates in s.409B(4) that in all prescribed sexual assault proceedings, whether committal or trial, "a witness shall not be asked to give evidence" ..."which is or may be admissible under sub-section (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible." This section imposes on both prosecution and defence counsel the obligation to apply to the Court of Justice (magistrate) for permission before asking any witness questions which themselves, or the answers to which, might disclose or imply the status of the complainant's sexual experience or lack of experience. At trial the question of admissibility will not only be decided in advance of the questions being asked, but also in the absence of the jury.

Once the court has decided that some aspect of the complainant's sexual experience is admissible, section 409B(7) states that the Court, whether at committal or trial "shall record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision".

Most empirical studies of evidence in sexual assault or rape cases, both here and overseas, have observed that transcripts of proceedings do not always record why evidence of sexual experience is admitted and further, that counsel, although obliged to, do not always have the prior permission of the court before raising evidence of the complainant's sexual experience (Eyre:1981; Adler:1982; Lee:1983; Newby:1980). Similar findings were also made in the present study of committals.

In most cases in the Study group committals where sexual experience was admitted, the prior permission of the court to admit such evidence was not obtained. Or if it was obtained, no record of this was made on the transcripts or the tapes of the cases. Consequently, the cases were divided into those in which a particular s.409B exception was cited (STATED) and those in which it was inferred from the circumstances of the case, and the facts presented in the prosecution case, that had an application been made it probably would have succeeded under one or other of the s.409B exceptions (INFERRED).

Table 7 indicates the stated exceptions to the s.409B(3) inadmissibility rule which were successfully cited to justify the admission of references to the complainant's sexual experience or lack of experience at committal. Also shown are the exceptions which it is inferred (from the circumstances of the case) could have justified reference being made to the complainant's sexual experience had an application to do so been made to the magistrate.

Table 7 Section 409B(3) & (5) - exceptions used to admit sexual experience at committal

No. = Committals in Study group in which sexual experience admitted.

EXCEPTION	STATED No.	INFERRED No.	TOTAL No.	TOTAL %
S.409B(3)(b) Existing/recent relationship with defendant	6	4	10	14.2
S.409B(3)(c) Sexual intercourse contested	4	14	18	14.2
S.409B(5) Prosecution argues complainant had/had not sexual experience. Defence cross-examines	1	6	7	10.0
S.409B(3)(a) Sexual activity at or about time of alleged offence	-	7	7	10.0
Other reasons unrelated to exceptions*	-	-	5	7.1
Allowed without challenge or explanation/justification	-	-	33	47.1

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.

* This category refers to unsolicited evidence volunteered either by the complainant or other witnesses.

In 33 instances there was no apparent justification for the sexual experience which was admitted in the Study group being admitted.

In a further 31 references, although no application was made to the magistrate to admit sexual information under s.409B(3) or (5), it was probable that had such application been made it would have succeeded under the sections cited above in Table 7.

In only 11 cases were applications made and reasons stated in court for the admission of sexual experience into the committal. The five cases of "Other" reasons in the category of "Stated reasons" relate to incidental, and indeed, accidental references to sexual history which were beyond the court's control.

Case 14 Defence: "How did you know the blood was coming from your vagina?"

Complainant: "Well put it this way. I was engaged once and I'd had a miscarriage and we were still together and the first time after we'd had sex the same thing happened" (blood came from her vagina).

and later in the same case in response to a question about her certainty that there was semen in her vagina:

Complainant: "Well I'm a woman, I should know, I've had sex with men before."

2.4.12 Sexual Experience Allowed without Justification or Explanation

In 33 cases some or all of the evidence relating to the sexual experience of the complainant was allowed without explanation of how it qualified for admission. Moreover, no justification could be established for its admission. That is, the experience raised could not be related to any element of the case which would perhaps make the sexual experience relevant or admissible. Although it is not uncommon for evidence of sexual experience to be admitted without the prior permission of the court, in other cases it has been inferred that had an application been made it probably would have succeeded under one or other of the s.409B(3)-(5) exceptions. The difference with the cases in this group of 33 is that it is most unlikely that even if applications had been made (and none were) they would have succeeded.

2.4.13 Medical Evidence - Motherhood

Where the case for the prosecution has disclosed that the complainant has had sexual experience or lack of sexual experience, the defence may under s.409B(5) legitimately cross-examine on the experience so raised. However, s.409B(5) does not necessarily explain or justify why the prosecution questions were asked in the first place. Inexplicable prosecution questions are sometimes a feature of the examination-in-chief of medical witnesses.

In three cases in this category the police prosecutor, by questions to the doctor who examined the complainant after the alleged sexual assault demonstrates a pre-occupation with earlier pregnancies of the complainant. In none of these cases is it suggested that the defendant or any other man connected with the case is responsible for the pregnancies:

Prosecutor: "Doctor, I think you also found a Caesarian scar on the complainant?"
Doctor: "Yes."
Prosecutor: "Which obviously indicates that there had been a Caesarian birth?"
Doctor: "Yes."
And later to the complainant:
Prosecutor: "You receive a Supporting Mother's Benefit?"
Complainant: "Yes."

Prosecutor: "In point of fact you have a 5 year old son?"
Complainant: "He's six."
Prosecutor: "And he was delivered by Caesarian section?" (Case 4)

Maybe the original questions to the doctor were to lay the groundwork for asking the complainant the means by which her child was delivered, or to ensure that the complainant was in fact the person the doctor examined, and not some substitute complainant installed at the last minute. The interest in children extended to two other prosecution witnesses and the prosecutor established that they too had children and received Supporting Mother's Benefits.

In Case 15 the doctor gave the court a complete account of the complainant's child-bearing history in response to questions from the prosecutor:

Doctor: "The stretch marks on her stomach were consistent with previous child-bearing" ..."genitalia consistent with a mature person" ..."condition of uterus consistent with a six-to-eight-week pregnancy".

In Case 16 the prosecutor is again concerned with the means by which the complainant supports her child as well as what sexual experience he can infer from the fact that she has a child:

Prosecutor: "You are the mother of a 4-year-old son?"
Complainant: "Yes."
Prosecutor: "You are receiving an Unmarried Mother's Pension?"
Complainant: "Yes."
Prosecutor: "Having had a son you had had sexual intercourse on a number of previous occasions?"
Complainant: "Yes."

2.4.14 Medical Evidence - The Hymen

In five cases, all of which lapsed before trial, the condition of the complainant's hymen was canvassed by the police prosecutor for no reason which could be established. In one case (Case 17) the medical examination of the complainant disclosed that she was virgo intacta. This might have been relevant if penile penetration was alleged, but only the defendant's finger was alleged to have been inserted into the complainant's labia majora.

In three other related cases (Cases 18, 19 and 20) the absence of the hymen in the complainant can have no relevance since, although it was alleged that intercourse occurred with all three defendants, the charges were brought under s.61C(1)(a) - Inflict actual bodily harm with intent to have sexual intercourse. The acts of intercourse were not the subject of any charges. (The presence of a hymen might have been medically interesting if nothing else, since the complainant had four children to whom the prosecutor also referred even though they were unconnected to the case.)

Equally mysterious is the prosecutor's following exploration of the condition of the vagina in Case 21.

Prosecutor: "And you found that her vagina was capable of admitting two fingers?"

Doctor: "Yes."

Prosecutor: "And you also found that the hymen was not intact?"

Doctor: "Yes."

2.4.15 Defence Use of Medical Evidence

But even where the prosecutor has scrupulously avoided irrelevant references to the state of the hymen and the prior virginity or otherwise of the complainant, the defence will sometimes attempt to introduce such material when cross-examining the doctor.

In Case 22 the prosecutor asked no questions about the hymen and when the defence asked the doctor on cross-examination if the hymen was intact the magistrate immediately ruled that the question was inadmissible under s.409B(3). However, in Case 23, despite numerous objections from the prosecution, the defence was allowed to ask 10 separate questions of the doctor who had examined the complainant about the condition of her hymen, culminating in the direct questions.

Defence: "What was the position there [in the vagina] with regard to virginity?"

"...did you note whether she was a virgin or not?"

"When you made your examination was the hymen intact or not?"

The complainant in this case was 34 years of age and, as in another case (Case 17), it is only alleged that a finger was inserted into the vagina.

In Case 24 the prosecution objections to the line of questioning adopted by the defence were also not upheld by the magistrate and the doctor was asked:

Defence: "Did you find anything about infection - sexual infection in her blood?"

"And the cervix erosion, was that caused by intercourse?"

"Was this woman on the pill?"

"Did it appear to you, from your examination of the genitalia, that she engaged in frequent intercourse?"

In Case 25 it was the doctor who objected to the line of questions on the grounds that little could be inferred from the state of the hymen:

Defence: "What was the result of your examination of the hymen?"

Doctor: "....examining the hymen is a thankless occupation".

Defence: "Well, it was not intact was it?"

Doctor: "No. It was not intact".

2.4.16 Direct Examination/Cross-Examination of the Complainant

In the remaining eight cases in the category of unjustified or inexplicable references, the sexual experience of the complainant was raised and admitted via examination-in-chief or cross-examination of the complainant. The questions all related to sexual experiences the complainant was alleged to have had with men other than the defendant.

In Case 26 although the defence conceded that consent to intercourse was the basis of his case, he asked the complainant whether she had "been to bed with" four separate men. In similar circumstances in Case 27 the complainant was asked by the defence:

Defence: "How long had X (not the defendant) been your boyfriend?"

Complainant: "About 2 months."

Defence: "And had you been sleeping with him?"

Complainant: "Yes."

The other six cases also involved irrelevant references to men unconnected with the case who were frequently not mentioned again after it had been put to the complainant that she might have had sexual relations with them. Two cases involved defence allegations that the complainant had previously accused a man of rape (Cases 24 & 16).

In Case 28 the prosecutor introduced the marital status of the complainant into the case for the first time to establish whether or not she understood the concept of ejaculation:

Prosecutor: "You are a married woman, do you recall if he [the defendant] ejaculated?"

Complainant: "I don't know."

Prosecutor: "But you have experienced ejaculation before with your husband?"

2.5 SUMMARY OF MAIN COMMITTAL RESULTS

In summary the legislation at the committal stage had nearly halved the frequency with which the sexual experience of the complainant was raised. Moreover the nature of the reference to the complainant's sexual experience has also changed. References in the study group were less

frequently made to the complainant's sexual experience with third parties and to the question of whether or not the complainant was a virgin at the time of the offence.

Against these favourable findings, it must be said that in almost one half of the committal proceedings, evidence of sexual experience was tendered without prior application to the magistrate in contravention of section 409B(4) of the legislation. In addition, there would appear to have been many cases in which evidence and prior sexual experience was admitted not conforming to the criteria specified in section 409B(3)-(8).

3.0 TRIALS

Introduction

Of the 228 defendants in the Study group who entered committal in this study, 186 were eventually committed for trial. Of these, 45 had already entered a guilty plea under s.51A of the Justices Act at the committal and so were committed to a higher court only for sentence. A further 60, who had entered no plea at committal, pleaded guilty at the beginning of the trial before the jury was empanelled (12) and proceeded directly to sentence. Seventy-nine defendants (13) pleaded not guilty to the charges laid against them and were tried before a judge and jury of 12 people drawn randomly from the community.

In the Control group, 194 defendants entered committal; five tendered guilty pleas at committal; 62 pleaded guilty at the beginning of the trial and 78 were tried by a judge and jury.

Full details of the outcomes of the trials are to be found in Report No. 2 in this series - Sexual Assault - Court Outcome Acquittals, Convictions and Sentence at page 41. Briefly summarised, those outcomes are: 59 per cent of the Study group defendants and 45 per cent of the Control group who pleaded not guilty were found guilty by the jury. Thirty-six per cent of the Study group were acquitted by the jury and a further 4.9 per cent found not guilty by direction of the trial judge. The corresponding figures in the Control group were 47.4 per cent jury acquittals and 7.7 per cent not guilty findings at the direction of the judge.

3.0.1 Trial Procedures

Trials are substantially more formal hearings - have more "pomp and circumstance" - than committal proceedings. The trial judge is wigged and gowned in the traditional English manner, as are the Crown Prosecutor and defence counsel.

Solicitors almost invariably appear for the defendant at committals but normally at trial barristers, briefed by solicitors, represent him/her at either the District or Supreme Court of New South Wales which is where all of the cases in this study were heard. Similarly, while the prosecution case at committal is presented by a police officer from the New South Wales Police Prosecuting Branch, at trial the prosecution case is handled by a Crown Prosecutor who is a barrister.

The trial begins when the charges on the indictment are read to the defendant in open court and he is asked how he pleads; if he pleads not guilty the trial will commence. After the opening addresses by counsel the evidence-in-chief of the prosecution witnesses will be examined by the prosecutor and then subjected to cross-examination by

---

(12) This group includes one case in which the defendant changed his initial plea of not guilty to guilty shortly after the first witness was called to give evidence.

(13) Eighty-one defendants were in fact committed for trial but the transcripts of two cases could not be located and so were eliminated.

counsel representing the defendant. Usually in cases involving multiple defendants, each defendant will be separately represented by counsel and these counsel may each, on behalf of the defendant, cross-examine the evidence of any prosecution witness.

At the conclusion of the prosecution case, the defence may call witnesses whose testimony will be cross-examined by the Crown Prosecutor. The defendant does not have to testify on oath, but if he does his testimony is subject to cross-examination by the Crown Prosecutor. If the defendant chooses not to testify on oath he has the right either to remain silent or to make an unsworn statement from the dock - (the place where the defendant sits during the trial). Unsworn statements are not subject to cross-examination. (14) The defendant has the right to give evidence on oath and be cross-examined on that evidence and also make an unsworn statement from the dock at the end of the trial.

At the conclusion of the trial and following the closing addresses by the Crown Prosecutor and defence counsel, the trial judge will sum up the case in terms of the law and the members of the jury will then retire to consider their verdict of the facts presented to them in the trial.

The data in this segment were drawn from written transcripts of the trials recorded by the Court Reporting Branch of the Attorney-General's Department or by direct observation of the trial. Information about exhibits, particularly records-of-interview, was obtained from files lodged at the Office of the Solicitor for Public Prosecutions.

The remaining part of this report examines the trial process along the lines specified in the Introduction.

3.1 TOTAL QUESTIONS PUT TO COMPLAINANT AT TRIAL

As with committals, the total numbers of questions put to the complainant at trial were examined. As mentioned in the Committal section, it was predicted that the defence would ask fewer questions than previously, if only because of the restrictions imposed by s.409B. It was not anticipated that the Amended Crimes Act would have very much impact on the numbers of questions put by the Prosecution. These predictions seem to some extent to be confirmed by the figures in Tables 8 & 9 below. The reasons why multiple defendants were eliminated from Tables 8 and 9 are explained in the Committal section of this report.

---

(14) Although the defendant may not be cross-examined on the content of his unsworn statement, in terms of raising the complainant's sexual experience or lack of experience what he says is subject to the same evidentiary restrictions which are imposed by s.409B(3). Should he ignore those restrictions "The Judge shall tell the jury to disregard that matter" (s.409C(2)).

Table 8 Questions put to complainant at trial by prosecution and defence

No. = Distinct complainant/single defendants

	STUDY				CONTROL			
	Prosecution N = 46		Defence N = 46		Prosecution N = 38		Defence N = 38	
NUMBER OF QUESTIONS	No.	%	No.	%	No.	%	No.	%
1 to less than 100	8	17.3	8	17.3	7	18.4	2	5.2
100 to less than 200	27	59.0	11	24.0	20	52.6	4	10.5
200 to less than 300	8	17.3	11	24.0	10	26.3	13	34.2
300 to less than 400	2	4.3	5	10.9	-	-	8	21.0
400 to less than 500	1	2.1	6	13.0	1	2.7	3	7.9
500 to less than 600	-	-	1	2.1	-	-	5	13.1
600 to less than 700	-	-	3	6.6	-	-	1	2.7
700 to less than 800	-	-	1	2.1	-	-	1	2.7
800 to less than 900	-	-	-	-	-	-	-	-
900 to less than 1,000	-	-	-	-	-	-	-	-
1,000 and more	-	-	-	-	-	-	1*	2.7
TOTAL	46	100.0	46	100.0	38	100.0	38	100.0

* Case so marked eliminated from calculation of means and standard deviations because of anomalous characteristics. (This is the case mentioned in the Committal section, in which the defendant twice sacked his counsel and took over the cross-examination himself. He asked the complainant 1,444 questions over 3 days' cross-examination.)

Table 9

	Prosecution		Defence	
	Means	Standard deviations	Means	Standard deviations
Study group	165.63	82.23	277.04	178.62
Control group	167.52	79.52	336.16	152.44

The figures above demonstrate that there were few differences between the Study group and and the Control group in the numbers of questions put to the complainant by the prosecution. The average number of questions put by the prosecution in the Study group was 165.63 and in the Control group 167.52. In approximately three-quarters of both populations complainants were asked fewer than 200 questions (Study:75.3%; Control:71.0%).

With the questions put to the complainant by the defence, apparent differences in the mean number of questions asked by each group are unreliable given the size of the associated standard deviations shown in Table 9. Whilst in the lower ranges of questions there are substantial differences between the two populations, these pan out if, say, one looks

at defence cases concluded in fewer than 400 questions to the complainant (Study:76.2%; Control: 71.9%).

3.2 SEXUAL REPUTATION AT TRIAL

Table 10 below shows the cases in the two populations which entered trial and in which the complainant's sexual reputation was raised. As with the committals, the rarity with which the reputation of the complainant was raised in the Control group was unexpected and suggests that the allegations that sexual reputation used to be frequently raised were overstated.

Table 10 Complainant's sexual reputation raised at trial

No. = Complainant/defendant pairs

	STUDY		CONTROL	
	No.*	%	No.	%
Sexual reputation not raised	72	91.1	73	93.5
Sexual reputation raised	7	8.9	5	6.5
TOTAL	79	100.0	78	100.0

* Information unavailable in two cases.

The complainant's sexual reputation was raised in 8.9 per cent of the cases in the Study group, thereby breaching the total prohibition stated in s.409B(2) of the Amended Crimes Act. Three of the cases involved prostitute complainants and it was references to the prostitution which were classified as raising reputation. The other four cases in which reputation was raised referred to the complainant's reputation for promiscuity. All of the five cases in the Control group related to references to promiscuity. There were no prostitute complainants in the Control group.

All of the references to reputation in the Control group were accepted by the courts. However, in two cases in the Study group, reputation references in the defendant's record of interview were deleted. The record of interview was the most common means of introducing sexual reputation in both groups (Study:5; Control:4).

3.2.1 References Classified as Sexual Reputation

The type of material included as sexual reputation has been detailed in the Committal section, and the information in two of those cases (Case 2, and Complainant A in Case 3) was also admitted at trial (see Committal section for details of these cases). However, the two trial cases in which material was deleted from records of interview provide an insight

into what the Supreme Court of New South Wales regards as sexual reputation as opposed to what is accepted by the Local Courts.

In Case 44 the defendant was charged with sexual intercourse without consent and the following statements were deleted from his record of interview.

> "She tried to crack on to everyone in the joint, she has been going out with a few of the blokes most nights"
>
> and later,
>
> "She has a different boyfriend every night."

It is assumed that the deletion in Case 44 is because the words raise sexual reputation and not merely non-specified sexual experience. The deletion is along the same lines as the statement deleted from the record of interview in Case 29.

> "....she's one of the biggest roots in town. I know numerous other guys who had been sexual intercourse with her".

3.2.2 Information Received from Others concerning Sexual Reputation

In Case 30 there were five defendants and it is what Defendant 1 asserts about the complainant to Defendant 2 which constitutes the reference to sexual reputation and what Defendant 2 interprets this information as meaning which provides the second reference:

Defendant 1: "I asked him (Defendant1 2) to come back to the flat with us because we had X (the complainant) there and if he wanted to get on the boat he wouldn't have no worries" and later,

Question: "You said ...get on the boat ... What did you mean..get on the boat?"

Defendant 1: "If he wanted to root her there was no worries.

Defendant 1, then, has implied to Defendant 2 that the complainant is indiscriminately available for intercourse. Certainly, this is how the defendant interprets what he has been told and on this basis infers consent, for in his record of interview he makes these comments:

> "I was told there was a young girl there that was pretty free and easy with her body". and later, "I was told she was available for anything."

3.3 SEXUAL EXPERIENCE AT TRIAL

The distinction between and, in some cases, fusing of the concepts of sexual reputation and sexual experience has already been noted in the Introduction and in the Committal section of this report. Further, the principles adopted to classify evidence at committal as having raised the complainant's sexual experience or lack of experience are used in analysing evidence at trial. However, it is worth repeating that while sexual reputation is totally prohibited under s.409B(2), sexual experience or lack of experience is admissible if one or other of the exceptions to inadmissibility in s.409B(3)-(5) are successfully argued by either the prosecution or the defending counsel.

Tables 11 to 13 which follow quantify any differences between the Study group and the Control group in terms of whether the complainant's sexual experience or lack of experience was raised at trial; if raised, whether the evidence was admitted or rejected by the court; the contents of the evidence admitted; and the sub-sections of s.409B(3)-(5) which were used to admit the evidence.

These tables and text will be followed by a detailed analysis of the cases in the Study group in which sexual experience was admitted relative to the particular sub-section of s.409B(3)-(5) which was utilised; the circumstances of the alleged offence; and the defence to those alleged offences. Comment will also be made in this section on notable cases in which counsel failed to satisfy the courts that the sexual experience evidence they wished to introduce was admissible under s.409B(3)-(5). In a few cases cross-reference will be made to committals in which the sexual experience admitted there was refused admission in a higher court.

3.4 RESULTS

3.4.1 Sexual Experience raised at trial

The figures in Table 11 demonstrate that the complainant's sexual experience or lack of experience was raised less frequently in the Study group than in the Control group.

Table 11 Sexual experience/lack of experience raised at trial by group

No. = Complainant/defendant pairs

	STUDY		CONTROL	
	No.*	%	No.	%
Sexual experience/ lack of experience not raised	47	59.4	25	32.0
Sexual experience/ lack of experience raised	32	40.6	53	68.0
TOTAL	79	100.0	78	100.0

* Information unavailable in two cases.

Sexual experience or lack of experience was raised in 40.6 per cent of the Study group cases and in 68.0 per cent of the Control group cases, a difference which is significant at the .001 level (x^2 = 11.9, df = 1).

3.4.2 Sexual Experience Admitted or Rejected

As previously mentioned in the Committal section, the court is not compelled to admit evidence of sexual experience or lack of experience simply because counsel for the defence or the prosecution wish it to be admitted. As Table 12 below shows, not all applications to have sexual experience evidence admitted were successful at trial.

Table 12 Sexual experience/lack of experience at trial admitted or rejected

No. = Trials in which sexual experience/lack of experience raised

	STUDY		CONTROL	
	No.	%	No.	%
Sexual experience/lack of experience admitted	26	81.2	52	98.1
Sexual experience/lack of experience raised but none admitted.	6	18.8	1	1.9
TOTAL	32	100.0	53	100.0

Evidence of the complainant's sexual experience or lack of experience was rejected by the court in 18.8 per cent of the Study group cases in which it was raised and in 1.9 per cent of the comparable Control group cases. Although the differences between the two groups are significant at the .01 level (x^2 = 8.6, df = 1), this is hardly surprising when it is considered that few evidentiary restrictions were placed on the admission of sexual experience evidence before the advent of s.409B(3) - (5) and that these sections only apply to the Study group.

3.4.3 Context in Which Sexual Experience Raised

Details of the various ways in which sexual experience was raised at trial are detailed in Appendix 4 and show that evidence of sexual experience is most usually introduced via cross-examination of the complainant in both groups. Appendix 5 shows the numbers of questions which were put to the complainant about sexual experience.

3.4.4 Type of Sexual Experience Evidence Admitted at Trial

In Table 13 the evidence which disclosed or implied the complainant's sexual experience or lack of experience is categorised. Very little can be inferred from the relative frequency in the Study group of the

different categories. That is, no class of information is intrinsically either admissible or inadmissible. Admission will be determined in the Study group by a number of factors such as the circumstances of the alleged offence and the defence offered, as well as the particular sub-section of s.409B(3)-(5) under which the evidence is tendered. So, for example, while it might be improper to mention the prior virginity of the complainant in one case it would be perfectly proper in another. The same can be said about sexual experience with the defendant or with third parties.

Table 13 Sexual experience/lack of experience allowed in evidence at trial

No. = Trials in which sexual experience admitted

TYPE OF REFERENCE	STUDY N = 26 No.	%	CONTROL N= 52 No.	%
Prior sexual contact/intercourse with person(s) other than defendant	17	65.3	38	73.0
Prior sexual contact/intercourse with defendant	15	57.6	12	23.0
State/condition of hymen (whether recently ruptured)/other reference to absence of virginity	3	11.4	17	32.6
Other acts/behaviour consistent with sexual activity (without reference to specific person)	4	15.3	13	25.0
Complainant was pregnant/had children	4	4.2	1	0.7

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.

The figures in Table 13 show that the aspect of the complainant's sexual experience which was most frequently cited in both groups related to experience with persons other than the defendant. The validity of these third party references will be discussed in the text following Table 14. The evidence of sexual experience in the Study group focussed more strongly than in the Control group on the complainant's sexual experience with the defendant (Study:57.6%; Control:23.0%). In fact, the Control group responses are more concerned with questions of virginity (32.6%) than with the complainant's prior contact with the defendant. Only three references in the Study group relate to virginity.

3.4.5 Section 409B(3)&(5) - Exceptions Used to Admit Evidence of Experience

Table 14 below shows the particular sub-sections of s.409B(3) and (5) which were cited when evidence of sexual experience or lack of sexual experience was admitted into trials in the Study group. As with committals, responses are separated into Stated and Inferred. However, there is an important difference between committals and trials and it is this: In the committals when it was inferred that a particular sub-section was applicable it was on the basis that if this sub-section had been raised it probably would have been successful. In most cases, however, no application to admit evidence of sexual experience had been made to the magistrate. This was not true at trial. There was ample evidence in the transcript that an application had been made but the portion of the transcript in which the sub-section under which the evidence was admitted was frequently unavailable. In such cases it was inferred from the circumstances of the case what that sub-section was.

Table 14 — Section 409B(3)-(5) - Exceptions used to admit sexual experience/lack of experience at trial

No. = Trials in Study group in which sexual experience or lack of experience admitted
N = 26

EXCEPTION	STATED No.	INFERRED No.	TOTAL No.	TOTAL %
S.409B(3)(b) Existing/recent relationship with defendant	11	1	12	46.1
S.409B(3)(c) Sexual intercourse contested	3	5	8	30.7
S.409B(5) Prosecution argues complainant had/had not sexual experience. Defence cross-examines	1	11	12	46.1
S.409B(3)(a) Sexual activity at or about time of alleged offence	-	3	3	11.5
Allowed without challenge or explanation/justification	-	-	4	15.3

Note: Percentages do not add to 100.0 per cent because of multiple exceptions cited in some cases.

In the cases where it was recorded on the trial transcript which exception had been raised to introduce sexual experience, s.409B(3)(b) - recent/existing relationship was the most frequently cited. Only two other exceptions were mentioned in the transcripts - s.409B(3) - sexual intercourse contested (3); and s.409B(5) - defence response to prosecution questioning about sexual experience (1). Section 409B(5) was inferred to be the exception in a further 11 cases.

In four cases the evidence of sexual experience which was admitted could not be explained by reference to any of the s.409B(3)-(5) exceptions.

3.4.6 Section 409B(3)(b) - Recent/Existing Relationship

The following discussion details the circumstances in which it was argued that a relationship existed between the complainant and the defendant which was either existing or recent at the time of the alleged offence and the evidence of sexual experience related to that relationship. (See Appendix 6 for the time lags between the last alleged sexual contact between the complainant and the defendant and the alleged offence when s.409B(3)(b) was raised at trial.) Some of the applications discussed were not successful.

Time constraints as well as the definition of relationship were canvassed in Case 31. In this trial, in which five defendants were charged with having had sexual intercourse without consent, an application to cross-examine the complainant about previous acts of intercourse was made by the defence on behalf of two of the defendants but not the others.

Defendant 1's counsel submitted to the judge that there was evidence of a friendship between the complainant and the accused and that she had had intercourse with him two months prior to the alleged offence. He contended that this satisfied the requirement that the relationship be recent. In opposing the application the Crown argued that the evidence was not capable of disclosing a relationship in the meaning of the sub-section and anyway could not be said to be recent.

The judge ruled, inter alia, "that the word 'relationship' is not defined and in all the circumstances I propose to allow the question to be asked".

Defendant 2's counsel made a similar application under the same sub-section, relying on three separate acts of intercourse between the complainant and this accused, some twelve months, two months and one month before the alleged offence. What constituted the relationship, apart from the sexual acts, is not altogether clear from the transcript, but the complainant had known the accused for fourteen months before the alleged offence.

In allowing Defendant 2's application under s.409B(3)(b), the judge said:

> "I entertain some doubt - although I do not allow it to upset my ruling - as to whether the evidence which is sought to be adduced constitutes a relationship. However, it does go to the fact that there was sexual intercourse within the meaning of those terms, but whether it amounts to a relationship within the meaning of the sub-section I am a little doubtful. Nevertheless, I propose in the

> exercise of my discretion to permit the complainant to be asked the questions sought in relation to that sub-paragraph."

One month later, the same judge heard the trial of the defendant previously mentioned in Case 3 (see Reputation section in Committal). In this case another debate ensued between counsel about the precise meaning and also the intention of s.409B(3)(b), returning to the question of what constituted "a relationship" within the meaning of the sub-paragraph. And secondly, if a relationship was established, what criteria did it have to satisfy to be deemed "recent or existing".

In an application to cross-examine the complainant on previous acts of intercourse with the defendant, the defence counsel argued that:

> "the complainant and the accused were, by virtue of their ages, interests and habitats, in effect part of the same group of young people in the X..... community, frequenting the same hotel and attending parties and football matches together regularly and that there were three prior occasions on which sexual intercourse had taken place between them; those being in September/October 1981, January 1982, and March 1982. (Counsel) submitted that matters of that nature could properly be described as evidence which related to an existing or recent relationship existing by reference to the time of the commission of the offence". (Note: the alleged offence occurred on 15 April 1982).

In opposing such an interpretation, the Crown argued that the particular sub-section, s.409B(3)(b):

> "was aimed obviously at a situation where the relationship between the parties was a close sexual relationship after the style of a de-facto relationship and .... it was taking it out of context to say that merely because people live in the one town and move in the same circles and among the same group of people that a special relationship existed between them ...(T)he whole purpose of the prohibition of this type of cross-examination was to enable the jury to consider the facts in light of the particular case and it was only in exceptional circumstances such as a relationship where there was a sexual relationship continuing, a stable relationship, where this provision was to apply and not just being an acquaintance of people moving together in the same group."

In countering the Crown's submissions, the defence argued that although the acts of intercourse between the accused and the complainant had been "unarranged" they had arisen out of their association in the same group. He further submitted that the evidence whilst "it perhaps did not go strictly to the question of consent (it) did go very much to the question of the accused's belief or his knowledge as to consent".

The judge made the following ruling:

> "In support of the application it is said that the evidence upon which the questions are to be based is the fact that the complainant and the accused walked in a sort of society, so to speak, in the X..... area where they were brought into contact

> together with peer groups or those of like interests. The evidence is somewhat meagre in relation to this but, nevertheless, I think I can have some inkling of the sort of group in which it is said they participated in some social way. It is also said that on three prior occasions, namely, September/October 1981, January 1982, and March 1982 the accused and the complainant had acts of intercourse.
>
> "It is thus submitted that therein is established to a sufficient degree that I be satisfied that it amounts to evidence of a relationship which was either existing or recent at the time of the commission of the alleged offence, being a relationship between the accused person and the complainant.
>
> "I do not accept that any society or circle in which they moved would constitute a relationship within the meaning of the sub-section nor am I satisfied that it could be said that any relationship which existed was one which was existing at the time or recent to the time of the commission of the alleged offence."

The defence application was refused.

The judge's rulings concerning s.409B(3)(b) applications in Case 31 and subsequently in Case 3 are somewhat inconsistent and it is difficult to understand how the applications in Case 31 under s.409B(3)(b) would succeed if that in Case 3 failed.

In terms of time factors the Case 3 defendant's last alleged act of intercourse with the complainant, one month before the alleged offence, was closer to the date of the alleged offence than was Defendant 1's in Case 31. And his application failed on the basis of three acts of intercourse but the Case 31 defendant's succeeded on one alleged act, two months earlier.

The Case 3 defendant was described at committal by the complainant as someone she "knew quite well" and the evidence pertinent to Case 31 Defendant 1's relationship with the complainant, apart from the sexual encounter, seemed to suggest nothing more than an acquaintanceship.

The only certain thing which can be inferred from the judge's reasoning in Case 3 is that sexual intercourse between the complainant and the defendant is not, per se, sufficient to satisfy the conditions of a relationship. And even if the conditions in Case 3 had satisfied the relationship factor, that it occurred one month prior to the alleged offence failed to satisfy the existing or recent requirement of the sub-paragraph.

3.4.7 Section 409B(3)(b) - Sexual Experience with Third Parties

In Case 32, s.409B(3)(b) was utilised to introduce the complainant's sexual experience with third parties.

In this case the defence applied to have certain parts of the record of interview deleted because, he argued, these parts contained evidence which was inadmissible under s.409B(3). The parts in question contained the following statements:

> "On the Saturday night we were out having a good time and (the complainant) told me that she had had an affair with another person while she was living in a de-facto relationship with me. I lost my temper and hit her while we were driving home in the truck."

The defence objected to, ".....and (the complainant) told me that she had had an affair with another person". And later, in answer to another question in the record of interview, "I felt that I had been used so that she could go out and screw other guys".

The defence did not object to references to the de-facto relationship between the complainant and the defendant, which qualified for admission under s.409B(3)(b), but he objected to the assertion by the accused that the complainant had had relationships with other persons. The defence submitted that the evidence "disclosed or implied" that the complainant had had sexual experience and would not come within the exception stated in s.409B(3)(b) since the evidence related to a relationship between the complainant and some other person and not, as the exception required, a relationship between the complainant and the accused.

The Crown opposed the deletions to the record of interview and the judge made the following ruling:

> "The Crown has submitted firstly that the answer given by the accused in his record of interview is not evidence which discloses or implies the complainant has taken part in sexual activity. He says most of it is a statement by an accused person that she had, but it is not evidence of the fact. I am unable to accept that proposition because I think it would come within the expression, 'evidence which implies' that prohibited sexual activity.
>
> "I must say that I have considerable doubt whether it comes within the second exception. It is curious, it seems to me, that the objection to it should be taken by counsel for the accused. He concedes that the remaining portion of the answer is strictly admissible, and suggested that the offending words should be edited out. If that were done it would leave the situation where the accused person has stated:
>
> > "'On Saturday night we were out having a good time (blank). I just lost my temper and hit her.'
>
> "Which would conceal from the jury any reason why he lost his temper."

The judge then discoursed generally on the subject of the s.409B(3) provisions and the question of admissibility and, returning to the point at issue, said:

> "To my mind the question of admissibility in this case turns on the meaning of the word 'relationship' in sub-s.3(b): the relationship between an accused person and the complainant. I do not think that word necessarily means only a sexual relationship. I think it involves the complete ambit and boundaries of an ordinary relationship between a man and a woman. That being so, it would

> seem to me that where a situation occurs, such as is alleged in the present case, that during a period of co-habitation between de-facto man and wife, the de-facto wife admits to having intercourse with somebody else, I would have thought that would be evidence relating to a relationship. That is the construction I give it, otherwise a narrow interpretation of the word 'relationship' would result in a deal of evidence which is ordinary down-to-earth evidence relating to what goes on between husband and wife or de-facto husband and wife being excluded.
>
> "In all the circumstances of the case I do not propose to rule that the words mentioned in the two answers should be excluded."

But even though the judge ruled that the "recent and existing" relationship between the complainant and the defendant justified references to an "affair" with a third unnamed person, the question remains how far can the defence, or the prosecution, go in asking the complainant about her relations with this third person. Would questions which imply that not only is there one third person but there might be more than one be legitimate? For example, the following allegation rather than question was put to the complainant in cross-examination: "You had been gallivanting around, hadn't you." And later, in reference to the complainant's child: "You don't know who the child's father is, do you?"

3.4.8 Other Third Party Applications in Terms of s.409B(3)(b)

Earlier efforts by counsel to introduce third party references via s.409B(3)(b) have been less successful than in Case 32.

Attempts to have sexual intercourse without consent, where the defence is that no such attempt occurred, might qualify sexual experience evidence for admission under s.409B(3)(c) if the defence seeks to explain marks on the complainant by reference to a third party. But the application in Case 33 to ask the complainant, "Had you ever come home before with love bites on your neck?" was not made under that section of 409B, but in terms of s.409B(3)(b) - recent relationship. But the defence did not seek to ask if the defendant had ever love-bitten her neck before, only if anyone had ever done so.

In support of the application, the defence argued that a boyfriend and girlfriend relationship had been established on the night of the offence and therefore he should be able to ask the question which, of necessity, referred to a third person, since the complainant and the defendant met for the first time only several hours before the alleged offence. The judge rejected the application.

3.4.9 Section 409B(3)(c) Denial that Intercourse Occurred between Complainant and Defendant

Where the defence to the charges against the accused is that no sexual intercourse as defined in s.61A(1) had occurred between the complainant and the defendant, the defence will generally seek to explain the presence of such things as semen or injury by reference to some person other than the defendant. In very rare cases the defence might also wish to explain disease or pregnancy by reference to third parties.

Where intercourse is denied it would be grossly unfair to the accused to deny him the opportunity to bring evidence which offers an alternative explanation of the semen or injury found on the complainant, although such evidence, especially where it relates to semen, would almost always raise the sexual experience of the complainant with a third person(s). In general, such evidence could be admitted under s.409B(3)(c), although within a more restricted "time and geography" an application might succeed under s.409B(3)(a) - connected set of circumstances.

Of the 24 cases in which the defence denied that intercourse occurred between the complainant and the defendant, the sexual experience of the complainant was raised either at committal and/or trial in 13 cases. Six of the cases were straightforward enquiries about whether or not there had been prior intercourse between the complainant and a third person within the week prior to the alleged offence.

It is not proposed to discuss the six cases mentioned above, but rather to discuss some of the other cases which raise questions about the extent to which the complainant can be cross-examined, or examined for that matter, on her experience with third persons when the defendant denies that the intercourse, the subject of the charge, occurred.

In Case 43, it was the prosecution, rather than the defence, which wished to examine the complainant's sexual experience with a third party. For while the defence was that intercourse took place and that it was with consent, the prosecution alleged that no intercourse occurred, it was only attempted. The prosecution therefore wished to explain the semen found in the complainant's vagina. It was inferred that the evidence which was brought about the complainant's last act of intercourse prior to the alleged offence was allowed under s.409B(3)(c). The defence made no reference at all to the complainant's sexual experience with third parties.

While the above sexual experience of the complainant was easy to accept as relevant to the prosecution case no reason could be established why the defendant's record of interview appeared to go to the jury containing assertions by the defendant, who was the estranged husband of the complainant, that she had slept with him and other men before they married, and also with other men after they were married.

However, following the ruling in Case 32 it might be quite wrong to attribute the admission of this evidence to s.409B(3)(c). Perhaps it was admitted under the s.409B(3)(b) - recent relationship provisions. In that case, references to third party intercourse were allowed both in the examination of the complainant and in the record of interview.

3.4.10 Virginity

If the defence is anxious to show that the semen in the complainant's vagina might have been put there by someone else, the prosecution might be just as keen to demonstrate that no one but the accused could have put it there. That is, they may wish to show that the complainant lacked all sexual experience prior to the alleged offence. The key case in this regard is Case 39.

In this case prior to the medical evidence, the prosecution sought leave of the judge "to establish that prior to the day in question the complainant had not previously had sexual experience". He claimed the exception to raising the complainant's sexual experience stated in s.409B(3)(a).

The application was opposed by the defence for the reason that "the defence of the accused was that he did not have intercourse with the girl at all". The application of the prosecution was refused by the judge on the basis that the matter did not come within the sub-section, 409B(3)(a) - connected set of circumstances.

However, later during cross-examination of the doctor who had examined the complainant after the alleged offence, the defence without leave of the court asked the following questions:

Defence: "Now, doctor, if in fact the only semen within her (the complainant) was some semen that was in the low vaginal area, that was semen that could have been there for quite some time. Do you agree with that?"
Doctor: "It could have been there for the previous six or seven days."
and later,

Defence: "Doctor, in your examination of her, was there any physical obstacle to full penile penetration taking place?"
Doctor: "You are referring to the hymen, the vaginal ...?"
Defence: "Yes, among other things."
Doctor: "There was no demonstrable hymen on my examination ...."
and later,
Defence: "Was the female sexual organ fully developed?"
Doctor: "Yes."
Defence: "And there was no physical obstacle to a penis getting completely ...."
His Honour: "Have we not gone over this and over this? He has agreed with you."

The following day, the judge criticised the line of questioning which the defence had adopted with the doctor. In particular, questions relating to the absence of a "demonstrable hymen" and the presence of semen which could have been there for up to seven days clearly implied, the judge said, "that the girl may have had previous sexual experience". He went on to say: "It would, therefore, appear that the evidence the Crown Prosecutor sought to lead of the girl's prior lack of sexual experience would be admissible under s.409B(3)(c)."

The judge further noted, with displeasure, that the defence had not, prior to asking the questions of the doctor, sought permission of the court to do so as required by s.409B(4), and "that such leave should have been requested by counsel for the accused was eventually conceded by him".

The judge then ruled:

> "Such leave would, however, have been granted, as that was evidence within s.409B(3)(c). Contrary evidence clearly falls within the same provision; and for those reasons I permit the Crown Prosecutor to ask the question of the girl intended to obtain evidence of lack of sexual experience."

The prosecution then asked the complainant the following question:

Prosecutor: "Yesterday ...you said .. the man had sexual intercourse by putting his penis in your vagina."
Complainant: "Yes."
Prosecutor: "Before he did that, had that ever happened to you before?"
Complainant: "No."

3.4.11 Specificity of Examination

Case 37 raised the question of the admissibility under s.409B(3)(c) of general enquiries into the complainant's sexual past as opposed to specific questions like: "Had you had intercourse in the week prior to the (alleged offence)?"

At committal the defence asked the complainant:

Defence: "Have you ever been in that position before?"

Complainant: "Into that position as to where a guy is lying on top of me?"

Defence: "Yes?"

Complainant: "Do I have to answer that question?"

Bench: "No, you do not have to, madam."

(Whatever the complainant's answer, her sexual experience, or lack of it, would have been raised.)

At trial in Case 37, it was inferred that the following prosecution question was allowed under s.409B(3)(c):

Prosecutor: "Had anyone had any intercourse with you for any time prior to this?"

Complainant: "Not for several months, no".

The complainant was cross-examined only about this specific aspect of her sexual experience, namely the most recent time prior to the alleged offence when she had intercourse. It was again inferred that the cross-examination was in terms of s.409B(5).

3.4.12 Knowledge of Terms

Where it was not alleged that the defendant ejaculated into the vagina of the complainant nor injured her in any way, but only that the penis entered the vagina, the circumstances in which her sexual experience with third parties would be relevant would be rare. So it is most unlikely that any application under s.409B(3)(c) to introduce such experience with third parties would be made or, if made, succeed.

In Case 7 the defence was not interested in any third party in particular. It could be argued that he only wished to imply to the jury that the complainant was, in general, a sexually experienced 17-year-old because of her familiarity with certain scatological terms:

Defence: "You were asked this question by the Crown Prosecutor:
Q. "Was there any conversation about the penis?"
A. "He told me to 'flog it'."
Complainant: "Yes."
Defence: "You knew what 'flog it' meant?"
Complainant: "Yes."
Defence: "What happened then?"
Complainant: "I put it in my mouth."
Defence: "That was his penis; is that right?"
Complainant: "Yes."
Defence: "Nobody told you what to do?"
Complainant: "Meaning?"
Defence: "When he said 'Chew on it' you knew what that meant?"

At this point the prosecution objected to the line of questioning and in the absence of the jury, the defence argued the legitimacy of the questions on the grounds that it was comment that the complainant knew what the expression "chew on it" meant. In support of his application the defence referred to s.409B(3)(c). The judge failed to see the application of that part of s.409B(3) in the particular circumstances and rejected the questions.

Even if the complainant was a veritable lexicon of sexual euphemisms, it could still be argued that the probative value of such evidence would be slight.

3.4.13 Section 409B(3)(a) - Connected Set of Circumstances

The principal higher court decision concerning this exception was made in Case 31. This case has already been mentioned with regard to other applications to bring evidence of the complainant's experience under s.409B(3)(b). It should be noted that all of the following evidence was admitted at committal.

In this case the defence applied to bring evidence that the complainant had, on the day before the alleged offence, told someone:

"I haven't had sex with X (her boyfriend) for about three weeks. I'm going out tonight to get a bit".

and later,

"I'm going out to get screwed".

The defence also sought to bring evidence of a conversation the complainant is alleged to have had with another person (with whom she, in fact, had intercourse on that night) "that she needed some demonstrable relief by way of sexual relations" (Judgement transcript).

In response to this defence application under s.409B(3)(a) the judge ruled:

> "There can be no doubt, one supposes, that the sexual experience to be the subject of the evidence proposed to be led, or questions put to the complainant in respect thereof, would relate to experience of the complainant at or about the time of the commission of the alleged prescribed offences. However, I have also to be satisfied because I take the word 'and' inserted between sub-par. (i) and (ii) of sub-par. (a) to be conjunctive, that the events which are alleged form part of a connected set of circumstances in (which) the alleged prescribed offence was committed.
>
> "That is to say, the subject matter of the evidence must constitute evidence of the events which are alleged to form part of the connected set of circumstances.
>
> "I am quite unable to see how I could be satisfied that the evidence proposed to be adduced could be held to form part of a connected set of circumstances in which the alleged prescribed sexual offences were committed and I therefore propose to reject the evidence."

In another case (Case 35) the defence sought leave of the court to cross-examine the complainant on certain conversations she had had earlier on the night of the alleged offence with several men who were in the party of people with whom she was drinking in an hotel. In support of the application the defence cited the exception in s.409B(3)(a).

In so far as his application can be understood, the conversations would have demonstrated a predisposition on the part of the complainant to remain in the company of the accused, with whom she was also drinking, and "keep on drinking after the pub shut". The judge's reasoning in this case was not available, but it was noted that the application was refused.

3.4.14 No Application Made to Admit Experience

Case 40 involved two defendants, each accused of having had sexual intercourse without consent. To these charges they pleaded not guilty. Whereas they conceded the intercourse alleged, they stated that the complainant consented. Additional charges of inflicting actual bodily harm on the complainant with intent to have sexual intercourse were also laid against the defendants, to which they also pleaded not guilty.

Only one question was put to the complainant at trial by the defence which could be construed as implying sexual experience, and this was disallowed:

> Q. "You know he is a close friend of the person with whom you were having a relationship in Sydney?"

The question was objected to by the Crown and struck out. When later questioned by the judge about the line of questioning, counsel for one of the accused said that he did not intend to mean by the question a sexual relationship. Despite his intention in the matter, the court understood him to mean a sexual relationship.

However, the restraint exercised by the defence at trial was not evident at committal. Without leave of the court, the defence counsel asked the complainant if she had had a child by an ex-boyfriend who was a member of a "motor-cycle group"; if it was her habit to have friends in her bed; if she had had an unspecified involvement "with one of the chaps in the bike crew"; if at the time of the alleged offence she had been having an affair with a policeman. Of another witness the defence asked if he had previously had "sexual relations with the complainant".

3.4.15 Consent and Third Parties

Where the complainant is young and the defence to the charge is consent, and even when it isn't, the defence will probably wish to suggest to the jury that by dint of age alone they should not infer that the complainant was without sexual experience prior to the alleged offence.

In Case 41 the 16-year-old complainant was asked by the defence: "Were you living with Steve (who is not the defendant) as man and wife?" She agreed that she was, and this certainly implies (in other than exceptional biblical contexts) that the complainant has had sexual experience.

Having established that the complainant was living in a de-facto relationship, a relationship not mentioned by the prosecution, the defence showed no further interest in this relationship. No explanation could be found why this reference was allowed.

3.4.16 Records of Interview

One case in particular (Case 42) demonstrated the need for the record of interview to be thoroughly examined by both the defence and the prosecution before the document goes to the jury.

In this case, the defence conceded that intercourse had occurred but said that the complainant had consented to it. Two things went to the jury in the record of interview which, clearly, they should never have seen. The first was a statement by the accused that he "had just got out of jail" and the second was an allegation by the accused that the complainant told him that she didn't know if her husband was the father of her last child or it was "some guy she had met on a trip to Melbourne".

There is nothing in the evidence to suggest that the accused had lost his "shield" so that reference to his having been in jail should clearly have been withheld from the jury. (In another case in this study (Case 45), a new trial was ordered when the defence appealed to the Court of Criminal Appeal on the severity of sentence. During the proceedings it emerged that a bail slip in the defendant's wallet in relation to an offence, other than the one for which he had been tried, had gone to the jury.)

In relation to what the accused said the complainant told him about the possibility that the father of her last child was not her husband, the situation is less clear. It is precisely the same sort of evidence that the trial judge had ruled to be admissible in Case 32 if there was an existing or recent relationship between the accused and the complainant, and Woods (1981) has stated that the relationship between the accused and the complainant is not restricted to sexual relationships when s.409B(3)(b) is the exception cited.

There was in fact, a relationship between the complainant and the accused in Case 42, although it was not a sexual one. The complainant was tenuously related by marriage to the accused and he is described as a "close family friend".

It is not known how the court in this case would have ruled on the question of relationship. It seems that the information in the record of interview went to the jury through oversight rather than any conscious decision of the court that it should go to the jury.

3.4.17 Unsworn Statements and Sexual Experience

S.409C(1) In prescribed sexual offence proceedings referred to in Section 409B, a person may not, in any statement made under section 405, make reference to a matter which would not, by virtue of section 409B, be admissible if given on oath.

(2) Where a person has made reference, in a statement made under section 405, to a matter which would not, by virtue of section 409B, be admissible if given on oath, the Judge shall tell the jury to disregard that matter.

S.405(1) Crimes Act, 1900. Every accused person on his trial, whether defended by counsel or not, may make any statement at the close of the case for the prosecution, and before calling any witness in his defence, without being liable to examination thereupon by counsel for the Crown, or by the Court, and may thereafter, personally or by his counsel, address the jury."

Most defendants in both populations in this study made unsworn statements as opposed to giving sworn evidence at their trial (Study:87.3%; Control:85.8%). This statement contained references to the complainant's sexual experience in ten Study group cases and eight Control group cases. In nine of the Study group cases the Judge did not warn the jury to disregard what had been said and it would have been inappropriate had he done so. This is because what the defendant said was only recapitulation of sexual experience evidence which had already been admitted earlier in the trial, sometimes by the prosecution but more generally by his own defence counsel.

In one other Study group case (Case 32), some of the sexual experience mentioned by the defendant in his unsworn statement was the subject of a warning to the jury. This related to evidence of sexual experience which had been raised earlier in the trial and disallowed at that time. Sexual experience references in the Control group unsworn statements were not subject to any warnings prior to the introduction of s.409C(1).

3.5 OTHER ASPECTS OF TRIAL

3.5.1 Bases of Defence

To talk about the defence offered by the accused is not technically quite correct. The onus of proof resides with the Crown. In all contested cases it is the Crown who must prove the elements of the offences charged. However, from the line of cross-examination adopted by defence counsel and other documents before the court, for example the defendant's record of interview with the police, the bases of the defence can be inferred. Table 15 below shows the defence offered in the Study group and the Control group.

Table 15 Bases of defence by group

No. = Complainant/defendant pairs who entered trial

TYPE OF REFERENCE	STUDY N = 75 No.*	STUDY N = 75 %	CONTROL N = 77 No.**	CONTROL N = 77 %
Alibi - accused not present and positively elsewhere	5	6.7	4	5.1
Fabrication or error - accused present but no intercourse with him - intercourse with (an)other	5	6.7	7	9.0
Fabrication - no intercourse at all	19	25.3	7	9.0
Fabrication - (mistaken belief in consent)	49	66.2	58	74.3
Duress/intoxication	3	4.0	2	2.6

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.
* Insufficient information to establish defence in six cases.
** Insufficient information to establish defence in one case.

As predicted when the Amended Crimes Act was introduced (Woods:1981), the largest single category of defence in the Study group period revolves around the issue of consent (66.2%), although less frequently than in the Control group period (74.3%).

The major difference between the two groups is the higher proportion of cases in the Study group in which the defence seeks to rebut the proposition that intercourse occurred. That is, even if the Crown succeeds in proving that intercourse has occurred, the defence argues that it was not with the defendant that it occcurred (Study:25.3%; Control:9.0%).

In six cases in the Study group the defence appeared to be that there was no intercourse with the defendant, but if there was, the complainant consented to it.

3.5.2 Reasons for Belief in Consent

Table 16 below shows the reasons the defendant had for believing that consent to intercourse was given by the complainant. As with the last table, this is inferential material. Information was largely drawn from records of interview, dock statements and cross-examination of the complainant.

Table 16 Defendant's reasons for believing in consent by group

No. = Cases in which this defence offered

TYPE OF REFERENCE	STUDY N = 49 No.	%	CONTROL N= 58 No.	%
Consent inferred from complainant's compliant behaviour	28	57.1	31	53.4
Complainant initiated intercourse	6	12.2	4	6.8
Consent stated explicitly	4	8.1	10	17.2
Accused paid for intercourse	2	4.0	-	-
Complainant took active part/ 'orgasmed'/was aroused	6	12.2	11	18.9
Complainant had had consensual intercourse with defendant before	3	6.1	1	1.7
Defendant didn't use threats	1	2.0	-	-
Consent inferred from complainant's sexual reputation	-	-	2	3.4
No reason for belief in consent could be inferred from evidence	2	4.0	4	6.8

Note: Percentages do not add to 100.0 per cent because multiple reasons were stated in some cases.

In more than half of the cases in both the Study group and the Control group, the defendant also relied on inference to conclude that consent was given. That is, he inferred it from the complainant's demeanour rather than hearing her say that she consented.

Defendants in the Control group were more inclined than in the Study group to claim that consent was explicitly stated by the complainant.

3.5.3 Corroboration Warning to Jury

> s.405C (2) "On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed".
>
> "(Rape) is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent".
>
> M. Hale Pleas of the Crown 1680

Before the advent of s.405C(2) of the Amended Crimes Act the corroboration warning was almost invariably given in rape cases. Woods (1981) claims that the warning was "not strictly required as a matter of law, and is best regarded as a rule of practice, failure to observe which may result in vitiation of a conviction". The effect of s.405C(2) is to remove the possibility that a conviction for sexual assault could be overturned on the grounds that the judge has not given the corroboration warning to the jury.

The form the corroboration warning takes, although the same in essentials, varies greatly from one judge to another. The examples of the warning by two different judges in Appendices 7 and 8 illustrate this variation in format. In Case 86 the judge, while stressing the desirability and importance of "material independent of the woman who makes the complaint which supports her allegation", informs the jury that they may still, in the absence of such material, convict, "but that would only be done after exercising great caution...".

In essence what the judge in Case 87 is putting to the jury is the same as in Case 86. The difference is that this judge then goes on to list a range of situations in which a woman might make a false complaint of rape - hence the great need for corroboration of her accusation. These situations include a desire "to extricate herself from a compromising situation"; "some impulse for revenge"; and "emotional disturbance on their part due to sexual frustration".

The fear that rape complainants as a class are emotionally disturbed and tend to be dishonest is not a peculiar belief of the judge in Case 87. Loh (1980) cites Wigmore's remarks about "women coming before the courts" which relied on "modern psychiatry" (five case studies from a 1915 textbook):

> "Their psychic complexes are multifavious(sic), distorted partly by inherent defects, partly by disease, derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological (15) or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses against men".

---

(15) It is most likely that the 'temporary physiological ... condition' to which Wigmore coyly refers is either menstruation or menopause.

Wigmore goes on to recommend that no judge "should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician".

Woods (1981) describes the corroboration warning in rape trials as being grossly offensive to women and also discriminatory. He adds:

> "Is it really possible that rape victims as a class are more prone to falsehood than, for example, businessmen giving evidence in cases where their own financial advantage is in issue? Why not have a rule that judges should always warn juries that it would be 'dangerous to convict' on the uncorroborated evidence of a businessman?"

The situation now in New South Wales is that it is a matter for the discretion of the judge whether or not the corroboration warning is given to the jury in prescribed sexual offences. A similar discretion is available to the trial judge in Western Australia and Tasmania, but in other states of Australia it is the practice that the warning be given to juries.

Outside Australia, the presumption about women's lack of veracity which is implicit in the corroboration warning has also been subject to criticism. In 1983, Canada legislated to outlaw the corroboration rule altogether. Whereas the warning had been discretionary after 1975 in terms of the Canadian Criminal Law Amendment Act, 1975, from January 14, 1983, s.246.4 of the Criminal Code of Canada provided, inter alia:

> "....the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration".

In commending this reform legislation, Hinch (1985) states that s.246.4 has effectively permitted "the statements of the complainant to stand as true unless proven otherwise".

Table 17 below shows the numbers of trials in which the judge exercised this discretion in favour of giving the warning and those in which he did not give the warning. The table only shows the Study group. In all of the Control group cases the corroboration warning was given, with one exception (and this was the subject of an appeal).

Table 17 Corroboration warning given to jury

No. = Distinct Complainants

	STUDY	
	No.	%
Corroboration warning given to jury	10	28.5
Corroboration warning not given to jury	25	71.5
TOTAL	35	100.0

Information unavailable in 23 cases.

Unfortunately, in 23 cases, the transcript of the judge's summing-up to the jury was unobtainable; and it is in this transcript that the corroboration warning, if given, would be recorded.

3.5.4 Complaint

> "She must go at once and while the deed is newly done, with hue and cry, to the neighboring townships and there show the injury done her to men of good repute, the blood and her clothing stained with blood and her torn garments."
>
> Henry de Bracton
> On the Laws and Customs of England

Crimes (Sexual Assault) Amendment Act, 1981

s. 405B (2) "Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest by absence of complaint in respect of the commission of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the Judge shall -

"(a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and

"(b) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about assault."

3.5.5 Background to s.405B(2)

The background to the incorporation of s.405B(2) into the Amended Crimes Act is the statistical evidence from many local and overseas studies that sexual assault is an under-reported offence. An Australian Bureau of Statistics study - General Social Survey of Crime Victims - conducted in 1975 found that only 28 per cent of the people who claimed to have been the victim of a sexual assault had complained to the police about the matter.

But even among the reporters - those who do complain - there is not infrequently a delay before that complaint is made to anyone at all or to the police. Woods (1981) asserts that because of the psychological after-effects of sexual assault the complainant in court might be unable to "articulate the subtle processes which may cause a delay in complaint". For these reasons the compulsory warning stipulated in s.405B(2) was to be given to the jury in appropriate cases.

3.5.6 Table 18 below shows the number of cases in both groups in which the issue of complaint was raised at trial.

The figures in Table 18 affirm that many complainants in both the Study group and the Control group did not take the earliest opportunity to complain about the sexual offence they subsequently alleged and that they were asked to testify about this delay at the trial. The differences between the two groups are only slight.

Table 18 Delay in complaint by group

No. = Distinct Complainants

	STUDY		CONTROL	
	No.	%	No.*	%
Delay in complaint raised	26	44.9	19	38.8
Delay in complaint not raised	32	55.1	30	61.2
TOTAL	58	100.0	49	100.0

* Information unavailable in seven cases.

3.5.7 S.405B(2) - Warning Given to Jury

As with the corroboration warning, the warning to the jury demanded by s.405B(2) would, if given, be recorded in the judge's summing up to the jury. This segment of the transcript was not available in slightly more than a third of the Study group cases in which delay in complaint was raised. The information contained in Table 19 below is thus of only limited value.

Table 19 S.405B(2) - Warning given to jury

No. = Distinct complainants

	STUDY No.*
S.405B(2) Warning given to jury	13
S.405B(2) Warning not given to jury	3
TOTAL	16

* Information unavailable in 10 cases.

In three of the cases in which delay in complaint was raised at trial the judge failed to give the s.405B(2) warning to the jury.

4.0 CONCLUSION

The main concern of this report has been to examine those aspects of the Crimes (Sexual Assault) Amendment Act which sought to specify and limit the circumstances in which details of the complainant's sexual behaviour prior to an alleged sexual offence could be properly introduced into court proceedings. The report has also examined the provision in the Act which prohibits under any circumstance the introduction of evidence of the complainant's sexual reputation.

According to the definition of sexual reputation used in this research the total prohibition on raising the complainant's sexual reputation was breached in a small number of proceedings at both the Local and Supreme Courts. It is unfortunate that the Act, in common with comparable legislation in other Australian states, has failed to specify what was intended to be included in the concept of sexual reputation, which as it stands is a rather vague and somewhat nineteenth century notion.

In the Local Courts there has been a significant reduction in evidence relating to the complainant's sexual experience. This is now raised half as frequently as before the Act came into force. However, the results also suggest that had the relevant provisions of the Act been more stringently applied in the Local Courts substantially more evidence of sexual experience would have been excluded from the proceedings.

There was also a substantial reduction in the use made of the complainant's sexual experience in trial proceedings after the Act was introduced. The report has detailed the major judgements handed down by the Supreme Court when applications were made to admit evidence of the complainant's sexual experience, and concluded on the basis of several judgements that a wider scope than was perhaps intended by legislation has been given to some of its provisions. More particularly, the judgements of the Supreme Court confirm that much of the evidence of sexual experience accepted by the Local Courts would be inadmissible in a higher court.

Overall, the legislation must be said to have achieved its aim of reducing the level of investigation experienced by sexual assault complainants. The significant reduction in references at both committal and trial stages to sexual experience, no doubt greatly improves the position of a complainant giving evidence in sexual assault cases. It is obvious that courts dealing with sexual assault cases would benefit from some legislative clarification of the distinction between sexual experience and sexual reputation. Indeed, such clarification may greatly assist courts to greater compliance with the evidence provisions of the Crimes Sexual Assault (Amendment) Act.

APPENDIX I

Table 20 Sexual reputation raised at committal by context in which it was raised

No = Committals in which sexual reputation raised
Study group N = 17 Control group N = 28

CONTEXT	STUDY N = 17 No.	%	CONTROL N = 28 No.	%
Examination-in-chief/complainant	5	29.4	-	-
Cross-examination/complainant	4	23.5	11	39.2
Examination-in-chief/other witness	3	17.6	13	46.4
Cross-examination/other witness	3	17.6	13	46.4
Record of interview	5	29.4	11	39.2
Other	2	11.7	-	-

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.

APPENDIX 2

Table 21 — Sexual experience/lack of experience questions put to complainant at committal by group

No. = Distinct complainants

NUMBER OF QUESTIONS	STUDY No. *	STUDY %	CONTROL No.**	CONTROL %
One to five	19	63.3	21	48.0
Six to ten	6	20.0	9	20.4
Eleven to twenty	2	6.7	5	11.3
Twenty-one to thirty	3	10.0	4	9.0
Thirty-one plus	-	-	5	11.3
TOTAL	30	100.0	44	100.0

* Eliminated from table are 22 cases in which although sexual experience/lack of experience was raised, it was not raised via questions to the complainant.

** For similar reasons 10 cases eliminated from table.

Table 21A

	Means	Standard deviations
Study group	6.5	7.34
Control group	11.18	12.07

APPENDIX 3

Table 22 Recency of existing/recent relationship at Committal

No. = Cases in which recent relationship argued

MOST RECENT INTERCOURSE	STUDY No.	STUDY %
Within last week	-	-
Within one and four weeks	2	20.0
Within four weeks and twelve weeks	1	10.0
Within twelve weeks and twenty-four weeks	4	40.0
Within twenty-four weeks and one year	1	10.0
More than six years ago	2	20.0
TOTAL	10	100.0

APPENDIX 4

Table 23 Sexual experience raised at trial by context in which it was raised

No. = Trials in which sexual experience raised

CONTEXT	STUDY N = 32		CONTROL N = 53	
	No.	%	No.	%
Examination-in-chief/complainant	8	25.0	15	28.3
Cross-examination/complainant	23	71.8	41	77.4
Examination-in-chief/doctor	2	6.2	18	34.0
Cross-examination/doctor	2	6.2	9	17.0
Examination-in-chief/other witness	1	3.1	5	9.4
Cross-examination/other witness	5	15.6	4	7.5
Examination-in-chief/defendant	-	-	2	3.8
Cross-examination/defendant	-	-	2	3.8
Record of interview	7	21.8	3	5.7
Dock statement	10	31.2	8	15.1
Complainant's statement to police	-	-	1	1.9

Note: Percentages do not add to 100.0 per cent because of multiple responses in some cases.

APPENDIX 5

Table 24 Sexual experience/lack of experience questions put to complainant at trial by group

No. = Complainant/defendant pairs

NUMBER OF QUESTIONS	STUDY No.*	STUDY %	CONTROL No.**	CONTROL %
One to five	10	43.4	25	58.1
Six to ten	8	35.0	7	16.2
Eleven to twenty	3	13.0	5	11.7
Twenty-one to thirty	1	4.3	1	2.3
Thirty-one plus	1	4.3	5	11.7
TOTAL	23	100.0	43	100.0

* Eliminated from table are nine cases in which although sexual experience/lack of experience was raised, it was not raised via questions to the complainant.

** For similar reasons 10 cases eliminated from table.

Table 24A

	Means	Standard deviations
Study group	8.4	8.09
Control group	10.4	15.70

APPENDIX 6

Table 25 Recency of existing/recent relationship - s.409B(3)(b)

No. = Cases in which recent relationship argued at trial

MOST RECENT INTERCOURSE	STUDY No.	STUDY %
Within last week	5	41.6
Within one and four weeks	3	25.0
Within four weeks and twelve weeks	2	16.7
More than twelve weeks ago	2	16.7
TOTAL	12	100.0

APPENDIX 7

Corroboration Warning Given in Case 86

"The law has recognised over a long, long period of time that an allegation of rape is easy to make and that it can be difficult to refute. If you think about it, it may occur to you that that applies the more strongly where there is no real dispute about the act of sexual intercourse having occurred and the area of dispute concerns the state of mind of one or both of the parties to it. For that reason the law has always recognised that it is important in such a case to look for some material independent of the woman who makes the complaint which supports her allegation.

"There is no rule of law that says there cannot be a proper conviction in the absence of such independent material but it is recognised, and juries are always told by judges in cases of this type, that it is important to look to see whether there is such material. You may properly convict - any jury in any great trial may properly convict - even in the absence of any independent material supporting the allegation made by the complainant, but that would only be done after exercising great caution and after a careful scrutiny and assessment of the complainant and of her evidence."

APPENDIX 8

Corroboration Warning Given in Case 87

"It is not unknown for a woman, who has consented to an act of intercourse, subsequently to take fright or for some other reason to regret what has happened and seek to justify herself retrospectively by accusing the man of forcible intercourse. Indeed, it is not unknown in some cases for a woman to seek to extricate herself from a compromising situation or even merely to satisfy some impulse for revenge, by abruptly departing from her escort in a dishevelled condition and subsequently complaining of forcible intercourse when nothing approaching it has occurred. And, of course, cases have occurred of completely imaginary rape or forcible intercourse being recounted by women sometimes because of emotional disturbance on their part due to sexual frustration. Of course, in this case, you are entitled to convict on the evidence of the girl alone, if you are thoroughly satisfied as to its truth and reliability, i.e. if you are satisifed beyond reasonable doubt, even from her evidence alone, that the accused had intercourse with her, that she did not consent and that she gave clear indications, which were understood by him, that she was not consenting. But as these two people were together alone at the crucial time, it might be wise of you to look to see whether there is evidence tending to confirm or corroborate what the girl says in determining whether you are satisfied beyond reasonable doubt that this accused had intercourse with her without consent while aware that she was not consenting or while reckless in that regard."

CRIMES (SEXUAL ASSAULT) AMENDMENT ACT, 1981, No. 42

New South Wales

ANNO TRICESIMO

ELIZABETHÆ II REGINÆ

Act No. 42, 1981.

An Act to amend the Crimes Act, 1900, so as to abolish the crime of rape, to create 3 new offences of sexual assault and to make certain provisions relating to those and other offences, including provisions relating to evidence in sexual assault proceedings, and for other purposes. [Assented to, 15th May, 1981.]

See also Child Welfare (Amendment) Act, 1981.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Crimes (Sexual Assault) Amendment Act, 1981".

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Amendment of Act No. 40, 1900.

3. The Crimes Act, 1900, is amended in the manner set forth in Schedule 1.

Savings and transitional provisions.

4. (1) Section 8 of the Interpretation Act, 1897, applies to and in respect of the abolition by section 63 of the Crimes Act, 1900, as amended by this Act, of the common law offences of rape and attempted rape in the same way as it applies to and in respect of the repeal of a former Act.

(2) On and from the day appointed and notified under section 2 (2) and without affecting subsection (1), in any other Act or any instrument made under an Act—

(a) a reference to rape, the crime of rape, the offence of rape or an offence under section 63 of the Crimes Act, 1900, shall be read and construed as a reference to an offence under section 61B, 61C or 61D of the Crimes Act, 1900; and

(b) a reference to attempted rape, attempting to commit rape, attempting to commit the crime of rape, attempting to commit the offence of rape or an offence under section 65 of the Crimes Act, 1900, shall be read and construed as a reference to the offence of attempting to commit an offence under section 61B, 61C or 61D of the Crimes Act, 1900,

but a reference to a crime or misdemeanour which was punishable by death immediately before the commencement of the Crimes (Amendment) Act, 1955, shall be read and construed as not including a reference to an offence under section 61B, 61C or 61D of the Crimes Act, 1900.

SCHEDULE 1.

(Sec. 3.)

AMENDMENTS TO THE CRIMES ACT, 1900.

(1) (a) Section 1, matter relating to Part III—

Omit "*Rape and similar offences.—ss.* 62–78F", insert instead "*Offences in the nature of rape, offences relating to other acts of sexual assault, &c.—ss.* 61A–78F".

(b) Section 1, matter relating to Part XI—

Omit "405A", insert instead "405C".

(c) Section 1, matter relating to Part XII—

After "442", insert ", 442A".

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(2) Section 4 (3)—

After section 4 (2), insert:—

(3) Notwithstanding section 11A of the Interpretation Act, 1897, every heading to a provision of this Act shall be taken to be part of this Act if it appears in italics or in capital letters.

(3) Heading before section 62—

Omit the heading, insert instead:—

Offences in the nature of rape, offences relating to other acts of sexual assault, &c.

(4) Sections 61A–61G—

After the heading before section 62, insert:—

Sexual intercourse.

61A. (1) For the purposes of this section and sections 61B, 61C and 61D, "sexual intercourse" means—

(a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by—

(i) any part of the body of another person; or

(ii) an object manipulated by another person,

except where the penetration is carried out for proper medical purposes;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) cunnilingus; or

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

(2) For the purposes of sections 61B, 61C and 61D, a person shall not, by reason only of age, be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(3) Subsection (2) shall not be construed so as to affect the operation of any law relating to the age at which a child can be convicted of an offence.

(4) The fact that a person is married to a person—

(a) upon whom an offence under section 61B, 61C or 61D is alleged to have been committed shall be no bar to the firstmentioned person being convicted of the offence; or

(b) upon whom an offence under any of those sections is alleged to have been attempted shall be no bar to the firstmentioned person being convicted of the attempt.

Sexual assault category 1—inflicting grievous bodily harm with intent to have sexual intercourse.

61B. (1) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with the other person shall be liable to penal servitude for 20 years.

(2) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 20 years.

Sexual assault category 2—inflicting actual bodily harm, &c., with intent to have sexual intercourse.

61C. (1) Any person who—

(a) maliciously inflicts actual bodily harm upon another person; or

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument,

with intent to have sexual intercourse with the other person shall be liable to penal servitude for 12 years.

(2) Any person who—

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person,

with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 12 years.

Sexual assault category 3—sexual intercourse without consent.

61D. (1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 7 years or, if the other person is under the age of 16 years, to penal servitude for 10 years.

(2) For the purposes of subsection (1), a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.

(3) For the purposes of subsection (1) and without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated—

(a) a person who consents to sexual intercourse with another person—

(i) under a mistaken belief as to the identity of the other person; or

(ii) under a mistaken belief that the other person is married to the person,

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

shall be deemed not to consent to the sexual intercourse;

(b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse;

(c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse; and

(d) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

Sexual assault category 4—indecent assault and act of indecency.

61E. (1) Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to imprisonment for 4 years or, if the other person is under the age of 16 years, to penal servitude for 6 years.

(2) Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, shall be liable to imprisonment for 2 years.

(3) For the purposes of this Act, a person who incites a person under the age of 16 years to an act of indecency, as referred to in subsection (2), shall be deemed to commit an offence on the person under the age of 16 years.

Attempt to commit offence under section 61B, 61C, 61D or 61E.

61F. Any person who attempts to commit an offence under section 61B, 61C, 61D or 61E shall be liable to the penalty provided for the commission of the offence.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

Alternative verdicts.

61G. (1) Where on the trial of a person for an offence under section 61B the jury is satisfied that the accused maliciously inflicted actual bodily harm with the intent charged but is not satisfied that the harm was grievous bodily harm, it may find the accused not guilty of the offence charged but guilty of an offence under section 61C, and the accused shall be liable to punishment accordingly.

(2) Where on the trial of a person for an offence under section 61D the jury is satisfied that the person upon whom the offence was alleged to have been committed was a girl under the age of 16 years, but above the age of 10 years, and that the accused had carnal knowledge of her but is not satisfied that carnal knowledge was had without her consent, it may find the accused not guilty of the offence charged but guilty of an offence under section 71, and the accused shall be liable to punishment accordingly.

(3) Where on the trial of a person for an offence under section 61D the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under section 78A or 78B, as the case may require, it may find the accused not guilty of the offence charged but guilty of an offence under section 78A or 78B, as the case may be, and the accused shall be liable to punishment accordingly.

(5) Section 63—

Omit the section, insert instead:—

Common law offences of rape and attempted rape abolished.

63. The common law offences of rape and attempted rape are abolished.

(6) Section 64—

After "rape" where firstly occurring, insert "committed before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981,".

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(7) Section 65—

Omit the section.

(8) Sections 76, 76A—

Omit the sections.

(9) (a) Section 77—

Omit "the" where firstly occurring, insert instead "a".

(b) Section 77—

After "step-daughter", insert "the subject of the charge".

(c) Section 77—

Omit "sections" wherever occurring, insert instead "section 61E (2),".

(d) Section 77—

Omit ", 74 or 76A", insert instead "or 74".

(e) Section 77—

Omit "the female" wherever occurring, insert instead "a female the subject of the charge".

(f) Section 77—

Omit "76" wherever occurring, insert instead "61E (1)".

(g) Section 77, proviso—

(i) Omit ", 72 or 76A", insert instead "or 72".

(ii) From paragraph (c), omit "either", insert instead "that".

(iii) Omit paragraph (c) (i).

(iv) From paragraph (c) (ii), omit "that" where firstly occurring.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(h) Section 77 (2)—

At the end of section 77, insert:—

(2) Subsection (1) has effect—

(a) in relation to a charge under section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to a charge under section 61E (1); and

(b) in relation to a charge under section 76A as in force at any time before that commencement, in the same way as it has effect in relation to a charge under section 61E (2).

(10) Section 77A—

Omit the section, insert instead:—

Proceedings in camera in certain cases.

77A. (1) Any proceedings or any part of any proceedings in respect of an offence under section 61B, 61C, 61D, 61E, 66, 67, 68, 71, 72, 72A, 73 or 74 or of an offence of attempting, or of conspiracy or incitement, to commit an offence under any of those sections shall, if the Court so directs, be held in camera.

(2) Subsection (1) has effect in relation to proceedings in respect of an offence under section 63, 65, 76 or 76A as respectively in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to proceedings in respect of the offences referred to in that subsection.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(11) Section 78—

Omit "sections 71, 72, or 76 shall, if the girl in question", insert instead "section 61E (1), 71 or 72, or under section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, shall, if the person upon whom the offence is alleged to have been committed".

(12) Section 78E—

Omit "63 or under section 65", insert instead "63 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, or section 65 as so in force, ".

(13) Sections 379–380—

Omit the sections.

(14) Sections 405B, 405C—

After section 405A, insert:—

Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings.

405B. (1) For the purposes of this section, a prescribed sexual offence is an offence under section 61B, 61C, 61D or 61E or an offence of attempting, or of conspiracy or incitement, to commit an offence under section 61B, 61C, 61D or 61E.

(2) Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the Judge shall—

(a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and

(b) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

Judge not required to warn jury against convicting person of certain sexual offences.

405C. (1) In this section, "prescribed sexual offence" has the same meaning as it has in section 405B (1).

(2) On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.

(3) Nothing in subsection (2) affects the operation (if any) of any rule of law or practice which requires—

(a) a Judge on the trial of a person for a sexual offence alleged to have been committed before the commencement of this section to give the jury a warning as referred to in subsection (2);

(b) a Judge on the trial of a person for a sexual offence alleged to have been committed after the commencement of this section, being a sexual offence other than a prescribed sexual offence, to give the jury a warning as referred to in subsection (2); or

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(c) a Judge on the trial of any person to give the jury a warning to the effect that it is unsafe to convict the person on the uncorroborated sworn evidence of a child.

(15) Sections 409A–409C—

After section 409, insert:—

Depositions of previous connected proceedings may be read as evidence in committal proceedings.

409A. (1) In this section—

"deposition" has the same meaning as it has where it appears in section 409;

"prescribed sexual offence" has the same meaning as it has in section 405B (1).

(2) In a hearing referred to in section 41 of the Justices Act, 1902, being a hearing in relation to a prescribed sexual offence, where—

(a) the prescribed sexual offence is alleged to have been committed in the course of a connected set of circumstances in which another prescribed sexual offence is alleged to have been committed;

(b) a person has been committed for trial in respect of, or has been convicted of, the other prescribed sexual offence; and

(c) each of the prescribed sexual offences is alleged to have been committed on the same person,

any of the depositions of the person referred to in paragraph (c) taken at the proceedings in which the person referred to in paragraph (b) was committed or tried in respect of the other prescribed sexual offence may, in so far as they are relevant to the prescribed sexual offence the subject of the hearing, be read as evidence.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(3) Where, in a hearing referred to in subsection (2) in relation to a prescribed sexual offence, the person charged with that offence has been served with a copy of the depositions referred to in subsection (2) and has had a reasonable opportunity to examine them, the person upon whom the offence is alleged to have been committed shall not, without the leave of the Justice, be asked by or on behalf of the person so charged to give in evidence any material contained in, or to answer a question which is the same or substantially similar to a question an answer to which is contained in, a deposition which may, pursuant to subsection (2), be read as evidence.

Admissibility of evidence relating to sexual experience, &c.

409B. (1) In this section—

"prescribed sexual offence" has the same meaning as it has in section 405B (1);

"prescribed sexual offence proceedings" means proceedings in which a person stands charged with a prescribed sexual offence, whether the person stands charged with that offence alone or together with any other offence (as an additional or alternative count) and whether or not the person is liable, on the charge, to be found guilty of any other offence;

"the accused person", in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a prescribed sexual offence:

"the complainant", in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed.

(2) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except—

(a) where it is evidence—

(i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

(c) where—

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61A (1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

(d) where it is evidence relevant to whether—

(i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;

(e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or

(f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

(4) In prescribed sexual offence proceedings, a witness shall not be asked—

(a) to give evidence which is inadmissible under subsection (2) or (3); or

(b) by or on behalf of the accused person, to give evidence which is or may be admissible under subsection (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(5) In prescribed sexual offence proceedings, where the Court or Justice is satisfied that—

(a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period—

(i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or

(ii) taken part or not taken part in sexual activity of a general or specified nature; and

(b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

(6) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (5) shall be decided by the Judge in the absence of the jury.

(7) Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.

(8) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section.

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

Limitation on dock statements in certain sexual offence proceedings.

409C. (1) In prescribed sexual offence proceedings referred to in section 409B, a person may not, in any statement made under section 405, make reference to a matter which would not, by virtue of section 409B, be admissible if given on oath.

(2) Where a person has made reference, in a statement made under section 405, to a matter which would not, by virtue of section 409B, be admissible if given on oath, the Judge shall tell the jury to disregard that matter.

(16) Section 442A—

After section 442, insert:—

Circumstances of certain sexual offences to be considered in passing sentence.

442A. Where a person is convicted of an offence under section 61B or 61C and an offence under section 61D, whether at the same time or at different times, the Judge passing sentence on the person in respect of the 2 convictions or the later of the 2 convictions, as the case may be, shall, if it appears that the 2 offences arose substantially out of the one set of circumstances, take that fact into account in passing sentence.

(17) Section 476 (6) (b)—

Omit "71, 72, 76 or 76A, where the female the subject of the charge", insert instead "61E, 71 or 72, or in section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, or section 76A as so in force, where the person upon whom the offence was committed".

SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(18) (a) Section 578 (1)—

Omit "sections 63, 65, 66, 67, 68, 71, 72, 72A, 73, 74, 76, 76A, 78A, 78B, 79, 80, 81, 81A, 81B, 86, 87, 89, 90, 91A or 91B", insert instead "section 61B, 61C, 61D, 61E, 66, 67, 68, 71, 72, 72A, 73, 74, 78A, 78B, 79, 80, 81, 81A, 81B, 86, 87, 89, 90, 91A or 91B or an offence of attempting, or of conspiracy or incitement, to commit an offence under any of those sections".

(b) Section 578 (1A)—

After section 578 (1), insert:—

(1A) Subsection (1) has effect in relation to a trial for an offence under section 63, 65, 76 or 76A as respectively in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to trials for the offences referred to in that subsection.

(c) Section 578 (2)—

Omit "subsection (1)", insert instead "this section".

In the name and on behalf of Her Majesty I assent to this Act.

J. A. ROWLAND,
Governor.

Government House,
Sydney, 15th May, 1981.

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1981

REFERENCES

ADLER, Z.,
Rape - The Intention of Parliament and the Practice of the Courts, The Modern Law Review, Vol. 45, Nov. 1982.

BIRD, R.,
Osborn's Concise Law Dictionary,
Sweet & Maxwell, London, 1983.

BONNEY, R.,
Interim Report No. 2, Sexual Assault - Court Outcome Acquittals, Convictions and Sentence, January 1986, N.S.W. Bureau of Crime Statistics and Research.

CARTER, J.M.,
The Status of Rape in Thirteenth Century England 1218-1275, International J. Women's Studies, Vol. 7, No. 3, 248-259.

EYRE, W.,
Evidence in Sexual Offence Trials,
Department of the South Australian Premier, Dec. 1981.

HINCH, R.,
Canada's New Sexual Assault Law: A Step Forward for Women? Contemporary Crises, 9 (1985), 33-44.

HONORE, T.,
Sex Law, Duckworth, U.K., 1978.

LEE, A.J.,
Rape Study Research Report 3: 1980 and 1981 Court Files, Department of Justice, New Zealand.

LOH, W.,
The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, Washington Law Review, Vol 55:543. 1980, U.S.A.

NEWBY, L.,
Rape Victims in Court - The Western Australian Experience, Rape Law Reform, Ed. Scutt, J., Australian Institute of Criminology, Canberra, 1980.

SCUTT, J.,
Evidence and the Role of the Jury in Trials of Rape, Rape Law Reform, Ed. Scutt, J., Australian Institute of Criminology, Canberra, 1980.

TEMPKIN, J.,
Regulating Sexual History Evidence - The Limits of Discretionary Legislation, International and Comparative Law Quarterly, Vol. 33, Oct. 1984.

WOODS, G.D.,
Sexual Assault Law Reforms in New South Wales,
Department of Attorney-General and Justice, 1981.