

## Review 1

## Balancing the Scales — Rape, Law Reform and Australian Culture

*edited by Patricia Easta, Federation Press, 1998; 248 pp; \$40 softcover.*

Historically the criminal law failed both women and children. The reasons were many and were essentially rooted in a patriarchal society including a patriarchal parliament and a patriarchal judiciary. Since the 1960s in particular, but accelerating in the 1980s, and largely driven by the work of feminists in law and politics and in the media, there have been numerous changes made to sexual assault laws in all the Australian States and Territories. There has also been considerable resistance by way of apathy and misunderstanding as well as deliberate bloody-mindedness. Those who made systematic attempts to monitor the effects of the changes have often reported distressing results. One of the best known was the report in November 1996 by the Department for Women in New South Wales entitled *Heroines of Fortitude* — the experiences of women in Court as victims of sexual assault, a study of some 150 hearings, over a one-year period in the District Court of New South Wales, where the victim was an adult female. Another lesser known piece of research published by the University of Tasmania Law Press is Terese Henning's *Sexual Repetition and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences*.

As a daily journeyman in the trial criminal court I am constantly faced with the spectacle of juries acquitting — very often wrongly in my view sexual offenders against women and children. Most thinking trial judges I speak to express the same concerns.

Reading reports such as *Heroines of Fortitude* from New South Wales and Terese Henning's study heightened my own worries. Clearly notwithstanding the effort which went into, and the extent of; the statutory changes of the 1970s and 1980s and later, things are still going wrong. So who or what is to blame and what should be done about it?

Trial judges including me are caught between the pestle of the appellate courts and the mortar of the jury room. We are unable to do much about either most of the time. But from time to time

some of us add a fair bit of chaff to the grain as well.

Then there are the other players — and some at the defence bar play it hard and dirty, justifying their behaviour by reference to instructions and constant reference to Blackstone's dictum that it is better for ten guilty to be acquitted than for one innocent to be convicted. I have seen many of the former; very few if any of the latter. Some prosecutors are ineffectual, timorous or inexperienced. All this happens of course after a great deal of non-reporting and a winnowing by the prosecution. So we are only talking of a small part of the problem. And the whole system is bedevilled with work practice rorts and user-unfriendly facilities. The result is the commonly recorded complaint that the process is as bad as the assault. 'The process is the punishment' but here for the victim. So the recent publication of *Balancing the Scales — Rape Law Reform and Australian Culture* was very welcome.

The work is a series of essays mainly (but not entirely) by female academic lawyers working in Australia attempting to sum up the present state of play. The first two chapters briefly sketch in the cultural context and the historical development across Australia generally of changes made to substantive criminal laws in the sexual assault area with the recognition of rape in marriage, the rendering of many sexual offences as gender-neutral and the general recognition of the power and violence elements in much sexual offending which involves widening the range of conduct considered and at the same time reducing the role of sexual history and fertility status.

Then in separate chapters some of the more common legal issues are dealt with individually following a pattern of recounting the common law position, summarising the legislative reforms, and the case law responses, and finishing with proposals for further reform.

Consent, complaint, corroboration, sexual history evidence and confidentiality of counselling records are the substance of chapters 3 to 7. Issues such as the doctrine of recent complaint, the

decision in *Crofts* and the *Longman* direction, and the problems of prior sexual experience with the complainant are analysed.

The book documents gaps in the legislation and instances of ignorance or non-use at bench and bar of its provisions. Unfortunately, yet again, Australia's parliaments have each gone their own ways so just documenting the present laws is a real problem. For example, only New South Wales so far has passed legislation protecting sexual assault counselling records as privileged from subpoena. Some chapters, therefore, focus on particular States. The failure of Australian legislatures to learn from the weaknesses of each other's legislation is obvious.

Chapter 8 then deals with 'rape in marriage' — here the issues centre on under-reporting, consent especially in the absence of overt violence, and on sentencing.

Chapter 9 summarises some of the material earlier published in *Heroines of Fortitude*, a report which, for the full horror of the situation revealed in some cases in the study, should be read in full. At the same time the chapter (and the report) acknowledges that, speaking of the judiciary, the picture is certainly not entirely bleak.

As is often the case with books composed of chapters by different authors there is some overlapping and a feeling at times that the result could have been better if a single author had written the book. For example, an annoying feature for me was that of resultant stylistic differences in references to the role of judges. Some authors refer to judges as if they are a monolithic army, others acknowledge differences, some criticise 'a small number' etc. To an extent this can have the value of allowing different perspectives to be expressed.

Here, though, the position is not simply one of overlapping or stylistic difference. In chapter 10, by Freckleton, the tone of the first nine chapters is abruptly changed and the position of the complainants' advocates is recast, not by directly challenging their position — indeed it is painstakingly acknowledged — but by replacing advocacy for strengthening previous reforms with criticisms that some have 'gone too far' or are of no value. This involves also challenging suggestions made in other chapters. The views expressed include that expert evidence of a 'counter-intuitive' nature so as to inform jurors on matters

outside their usual experience is very unlikely to be admitted, that provision of closed circuit TV systems has been of little value, that recent alterations to legislation in Victoria and New South Wales and Victoria in respect of sexual experience evidence is illjudged, that relaxing the rules dealing with propensity evidence and joint trials may be going too far and that access to counselling records should not be restricted. It is not surprising that these views rely on the case law and 'commonsense' foundations of a barrister rather than the empirical evidence and feminist advocacy of other authors. For my part I take the side of the latter.

Another criticism can be made of chapter 11 by Scutt on judicial 'understanding' of the reality of women's lives. It is that the adoption of a strong position is one thing; the use of exaggerated stereotypes and lack of balance both misstates the truth and weakens the argument.

By comparison Kate Warner's chapter 12 on sentencing looks to a more evidence-based approach. She deals in turn with criticisms that sexual assault sentences treat as relevant factors:

- the fact the victim was intimately known to the offender;
- the victim's prior sexual history;
- imprudent or provocative behaviour by the victim;
- the victim's unconscious or intoxicated state;
- the type of penetration.

Warner, unlike Scutt, recognises that male judges are not monolithic and that generally some progress is being made albeit incompletely.

In chapter 13, again by Freckelton, the book turns to the question of criminal injuries compensation. Here, after expansion in the 1970s and 1980s, schemes are being dismantled or restricted — essentially for financial reasons and in the face of politicians' self-avowed concerns for victims. Whilst I disagree with some of Freckelton's conclusions in chapter 10, I endorse those in chapter 13.

The book concludes as it begins with a short chapter by the editor. Referring to post-reform lower conviction rates and recent studies of victim experiences in court, she asks if reforms have failed and why, from a feminist perspective. It is a question we must ask. Undoubtedly much of the editor's critique is correct although her suggestions about legal

practitioner education seem to me to be optimistic. The adversarial system is itself largely responsible for making such education often irrelevant.

What then is to be done? Various chapters makes suggestions, including further legislative reforms to fill in gaps and strengthen what already exists, judicial education, calling expert evidence and guideline sentencing judgments. However, other matters can also be raised.

The book essentially deals with general problems involving women victims. Specific problems concerning children are not dealt with, yet it is often in the area of serial offending against daughters and step-daughters that the rules concerning separate trials are productive of the greatest injustices. The overturning of those cases is an urgently needed reform.

The book although recently written does not deal with further appellate court decisions placing yet more obstacles in the way of prosecuting sexual offences — such as *Palmer* (dealing with leading in evidence police questioning of suspects as to possible motives for the allegation) or *KBT* (placing particularity requirements on legislative provisions themselves designed to overcome the High Court's decision in *S*).

Nor does it look at some of the questions yet to be quantified such as how much public attitudes (reflected in the jury room) have changed, or how reporting rates have changed. In one chapter Freckelton acknowledges that the growing number of child sexual abuse cases now coming to light involves greater female confidence in reporting experiences sometimes a long time after the event. In my view we sometimes also forget the capacity of the system now to deal seriously with cases which once were either ruled out as hopeless or trivialised. Not all is bad. But then there are the systemic problems such as delay or the problem of so-called 'inconsistent verdicts' (which in fact usually turn on burden and standard of proof issues in my experience) or the problem of appeal courts not ordering retrials for reasons which to the victim must seem inadequate. The accusations of lying, malice, greed, drunkenness, and so on. The irrelevant questions. The convoluted attempts to avoid the issue or to confuse; the incomprehensible double negatives and legalese. The blatant peremptory challenging of jurors for outrageous but

unspoken reasons. The tired lie that sexual allegations are easy to make but hard to rebut. As one judge recently put it to me, 'You finish up feeling like an accomplice'. Much remains to be done before women and child victims get a fair trial.

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## Review 2

### Balancing the Scales — Rape, Law Reform and Australian Culture

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In *Balancing the Scales*, criminal lawyers and legal academics consider the results of two decades of rape law reform in Australia. They ask: what impact have these changes had on women victims at trial?

Myths about female sexuality and sexual violence are features of the society in which rape and these reforms occur. Whilst noting improvements, the inescapable conclusion from *Balancing the Scales* is that lawyers, judges and jurors, wittingly and unwittingly, perpetuate many of these myths, reflecting continued hostility and suspicion towards women rape victims. The inadequate commitment to eradicating myths prevents the full promise of law reform being realised. This in turn leads to low reporting, self-blame and trial by ordeal for victims, and declining conviction rates.

The law reforms analysed by the contributors include: widened definitions of sexual offences; rules about consent; abolition of marital immunity; and changes to rules of evidence. Each contributor draws on recent judicial decisions and empirical research to compare and contrast the compliance of lawyers and judges with the law during trial. They identify implications for victims, trial processes and outcomes and consider solutions to narrow the demonstrated gaps.

Several themes emerge. First, key features of sexual offence law exclusively reflect a male non-victim perspective. Mary Heath illustrates this with definitions of what activities