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.

(JUDGE) HAL JACKSON

Judge Jackson is a judge of the District Court of Western Australia.

Review 2

Balancing the Scales — Rape, Law Reform and Australian Culture

edited by Patricia Easteal; The Federation Press, 1998; 248 pp; $40 softcover.

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

constitute sexual offences and how they are graded in severity. For example: sexual offences involving penetration, particularly penile, are seen as *real* rape, and as more violating and humiliating to women, than other forms of sexual assault.

Simon Bronitt, Patricia Easteal, Kate Warner, Pia van de Zandt and Jocelyn Scutt demonstrate the persistence of male bias and ignorance of the reality of rape at trial. This is often manifest in assumptions about norms of behaviour and sexual conduct, constructed as *common sense* about how a *reasonable person* acts. For example, a *reasonable person* would verbally object and/or physically resist being raped and report a rape to police promptly. A rape victim would be so disturbed after being assaulted as to be unable to maintain a job, but would have a clear, detailed recollection of the assault.

Definitions that move away from a phallocentric view of sexual offences, and the adoption of gender neutral concepts, are amongst solutions advocated. For example, legislation should clearly spell out the elements and requirements, avoiding imprecise terms, such as *reasonable person* and *relevant evidence,* which are susceptible to exclusively male interpretation masquerading as objectivity.

The second theme is that the consent standard is flawed. Rape trials focus on whether or not the victim consented. Many accused of rape defend their conduct by asserting that they believed the victim consented. But as Bernadette McSherry illustrates, in comparison with the high consent standard in other areas of law, — for example, medical procedures and contract — the standard for rape is unacceptably low. Like Patricia Easteal, Ian Freckelton and Jocelyn Scutt, she demonstrates that many defence lawyers and judges perpetuate the myth that the absence of verbal objection or active resistance to sexual assault equals consent.

Bernadette McSherry, Terese Henning and Simon Bronitt advocate a positive consent standard, based on Victorian law, which requires proof of a victim's 'free agreement'.

The third theme is that women rape victims continue to be viewed as non credible. Legislation requiring judges to ensure that jurors do not subscribe to particular myths that discredit women victims, exists in most jurisdictions. These myths are that delayed reporting of rape to police, prior sexual activity, and lack of witnesses to verify a woman's account of rape, justify the conclusion that a woman's account is unbelievable. Pia van de Zandt, Terese Henning, Simon Bronitt, Kathy Mack and Jocelyn Scutt demonstrate inconsistent judicial compliance with the law. Many judges filter the law in ways that deny women justice.

Several measures to address these deficiencies are proposed. Pia van de Zandt encourages continuing leadership from judges who prefer fact to myth. Kate Warner urges ongoing scrutiny of judicial compliance with the law. Patricia Easteal calls for this to be complemented by mechanisms for judicial accountability. Kathy Mack recommends adoption of the Queensland model, which requires the judge to direct the jury that if a single witness is believed, it is sufficient proof of fact.

In efforts to bypass laws that protect victims from being unjustifiably discredited, defence lawyers increasingly attempt to use victims' sexual assault counselling records as evidence. Annie Cossins highlights the need to recognise the therapeutic role of sexual assault counselling and to ensure its integrity through maintaining confidentiality of counselling records. She urges the adoption of the NSW legislation that protects such records.

The fourth theme is that expert evidence should be provided during trial about the reality of rape. *Balancing the Scales* amply demonstrates that even when the law is clear, lawyers and judges fail to comply with it. If they cannot be relied on to use their legal authority to dispel myths, others must fill the breach. For example, Pia van de Zandt, Ian Freckelton and Simon Bronitt argue that a jury would benefit from research that shows that women may delay reporting to police through fear and stigma, and that rape is traumatic, which may cloud recollection of events. Like Kathy Mack, they also argue that expert testimony is essential to ensure the court comprehends the reality of rape.

Balancing the Scales is a valuable reference, especially in the context of the Model Criminal Code discussion papers on sexual offences against the person. David Heilpern's NSW study, *Fear or Favour*, about men's experience of rape in prisons, is a necessary complement to this edition. A subsequent edition should include the experience of rape and the rape law amongst indigenous women.

Balancing the Scales may leave you feeling burdened by the injustice for women rape victims, despite substantial law reform. But it also gives impetus to those who advocate a society that affords women and men sexual autonomy. It is unjustifiable to conclude that rape law reform has gone too far towards victims after reading *Balancing the Scales.* Community confidence in the legal system demands that the gaps between the reality of sexual assault and its redress at law be pursued vigorously.

LEENA SUDANO
Leena Sudano is a law student at Flinders University of South Australia.

Letter

Dear Editor

In his article 'Same-sex marriage: which way to go? ((1999) 24(2) *Alt.LJ* 79), Sotirios Sarantakos comprehensively canvassed many of the factors influencing the general disinclination on the part of Australian gay men and lesbians to push to same sex marriage rights.

An additional factor is the Commonwealth constitution. By s.51(xxi), the Commonwealth Parliament is given the power to legislate in respect of 'Marriage'. At least for the moment, there can be little doubt that this subject-matter would be construed by the High Court as relevantly meaning a union between opposite sex partners. The chances of there being a referendum, or of a referendum passing, to include same sex couples in the term 'marriage' are zero.

Meantime, the NSW Government passed the *Property (Relationships) Legislation Amendment Act 1999.* It removes most of the more significant inequalities in relation to property and property-like rights which same sex partners in NSW have endured. It uses the model of de facto relationships legislation, now in NSW renamed the *Property (Relationships) Act 1984.* The bill for the Act can be downloaded in pdf format from http://www.gaylawnet.com/legislation.html under the heading of 'Property'.

The next fight will be to remove the inequalities in remaining areas of life, not the least of them being the discriminatory age of consent in NSW for male to male sex.

David Buchanan SC
Sydney, 22 July 1999