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