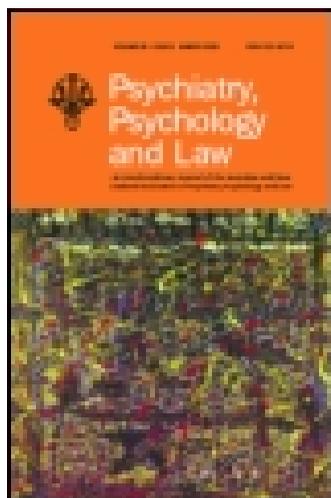


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Use of Intimate Photography in Sexual Assault Prosecution: Who Is Being Deterred?

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Sexual violence is well established as both extremely traumatic for victims and a challenging crime to prosecute, due to the paucity in most instances of corroborative evidence. Physical forensic examination of victims contributes valuable material. However, the use in these examinations of ano-genital photography of victims, which occurs in some jurisdictions and has been called for in some Australian states, raises many questions. Five concerns are identified: (1) the limited value of images as evidence in court; (2) controlling who can gain access to images; (3) creating expectations of "best practice"; (4) the psychological impact on victims; and (5) deterrence to future victims from reporting the crime. The limited uses for and risks of this practice point to the need to constrain its use, to reduce adverse effects for victims and so provide processes that encourage rather than deter reporting to police and giving evidence and so increase the accountability of offenders.

Key words: colposcopy; forensic; photography; prosecution; sexual assault; sexual violence; victims.

A Royal Commission on institutional sexual assaults, as well as recent action against the defence forces for failing to prevent sexual predation, have drawn attention to problems with responses to sexual violence in Australia from the perspective of victims. Sexual violence is widespread in Australia, with one in five women and one in twenty men experiencing physical sexual assault after the age of 15 (Australian Bureau of Statistics, 2013). A much smaller number of assaults are reported to police. Only three in ten women who experience sexual violence make even an initial report to police (Australian Bureau of Statistics, 2013). Of those assaults which are reported to police, approximately one in six proceed to

court (e.g. NSW Bureau of Crime Statistics and Research, 2012), confirming what is true of most jurisdictions, that sexual violence is an under-prosecuted crime (Herman, 2005).

Current Situation in Sexual Assault Advocacy Service Responses

Responding to sexual violence is not solely the domain of the criminal justice system. Health departments in all Australian States provide free, specialist psychosocial and medical services, delivering crisis counselling and medical care to victims of sexual violence to mitigate the serious effects. Commonly such effects include anxiety, depression, post-

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traumatic stress, impaired quality of life, sleep disturbance, substance use disorders, sexual and reproductive health problems, pain syndromes, eating disorders and gastro-intestinal problems (Astbury, 2006; Krakow et al., 2002). The large network of free health service-based advocacy services in Australia contrasts favourably with countries such as the United Kingdom, which in our experience has a far more limited density of services, and the United States, where services predominantly operate on a fee-for-service basis. In most Australian states counselling and forensic examination are provided at a single service available on a 24-hour basis, enabling crisis counselling to occur at the same presentation as collection of evidence for court. This includes physical examination of the victim and thorough documentation of findings by a forensically trained doctor or nurse. Simultaneously, prophylaxis for sexually transmitted infection, HIV and pregnancy are provided with treatment of any injury. Active follow-up and ongoing counselling and court support are part of the psychosocial response, which is provided by a professional social worker or psychologist. Counsellors also support victims with decisions about proceeding with criminal justice action; working closely with police and Attorney General's departments to ensure the support they provide is consistent with legal process. The consensus on best practice responses to adults after sexual violence is for services that are accessible, coordinated, integrated and place the needs and rights of the victim at the centre (Astbury, 2006; KPMG, 2007a,b; Olle, 2005; World Health Organization, 2003). Restoring a sense of control is a key objective of post-assault responses in Australian sexual assault advocacy services (Lievore, 2005).

A growing trend over the past 15 years is the use of colposcopic photography, particularly during paediatric sexual assault forensic assessments (Marks, Lamb, & Tzioumi, 2009). The colposcope is a gynaecological tool used to illuminate, magnify and take still or video photographic images of the ano-genital area. In this article, this tool and the images

it takes are referred to as intimate photography. A small number of forensic examiners in Australia has also begun to use this technology with adults, following practice in the United States where intimate photography in adult sexual assault forensic examinations is routine in most jurisdictions (White & Du Mont, 2009). Apart from use as evidence in court, forensic practitioners in favour of intimate photography for adult cases argue its value for teaching, peer review, research and as an aide memoire for court.

National and International Policy Position

International guidelines on medico-legal care for victims of sexual violence developed by the World Health Organization stipulate that: "the over-riding priority must always be the health and welfare of the patient. The provision of medico-legal services thus assumes secondary importance to that of general health care services" (2003, p. 17). In relation to intimate photography the guidelines state that, "although photography is useful for court purposes, it should not include images of genital areas" (World Health Organization, 2003, Annex 1, p. 2). In Australian states, other than Victoria, there appears to be no clear policy on the use of intimate photography, with decisions left to the individual judgement of practitioners providing medical/forensic assessment.¹

This article discusses the implications of intimate photography as a part of forensic assessment. It presents the perspective of past and current sexual assault advocacy service counsellors who have collectively supported many hundreds of women in the crisis and long-term follow-up period after an experience of sexual violence, including through the steps of medical examination, report to police and giving evidence.

Five concerns are identified and discussed in relation to this practice: (1) the value of the images as evidence in court; (2) access to images; (3) creating expectations of "best practice"; (4) the impact on victims; and (5) potential deterrence to future victims from

using services or reporting to police. The article confines itself to use of intimate photography in matters of adult sexual assault. Although many of the same concerns apply to child victims of sexual assault, the additional complexities that exist cannot be done justice here.

Use as Evidence for Prosecution

The first concern with the use of intimate photography relates to the value of the images as evidence in court to prosecute sexual assault matters. A challenging aspect of sexual assault prosecution is that typically there are no witnesses to the event, limiting options for evidence. Unfortunately, other types of evidence are also typically lacking – few sexual assault matters are argued on the basis of physical evidence (Du Mont & White, 2007). Two reasons for this are: first, most victims of sexual assault do not sustain injury, genital or otherwise (McLean, Roberts, White, & Paul, 2011). Evidence even of penetration after sexual assault is not routine, even among children and adolescents who were not sexually active prior to assault (White & McLean, 2006). Penetration is, of course, not evidence of sexual violence and it is well understood that most matters are argued on the basis of consent, negating the value of such evidence. Second, even where injuries to the genital area are detected, this may not provide evidence of sexual violence because micro-injuries are sustained by approximately 6% of women after consensual intercourse (McLean et al., 2011). As a result, evidence of minor genital injuries cannot be used to establish lack of consent in court (Templeton & Williams, 2006; Tjaden, 2009; White & Du Mont, 2009). This situation considerably curtails the value of such images, although they continue to be created and used.

Controlling Access to Images

A second problem with the use of intimate photography is the potential for images to be

viewed by a wide range of individuals. In the United States, images produced from intimate photography are routinely provided to police and defence counsel (Ledray, 2008). Subsequent uses of the images have included: provision of images to the assailant; posting of images on police intelligence websites; screening images of victim's breasts on television news; and tendering them in court for viewing by court personnel and juries (Ledray, 2008). Based on our experience in the Australian context, many prosecutors are wary of the use of intimate photography, and calls for the use of the technology do not originate from this quarter. Reservations are understood to relate both to concerns for victims, as well as the risk of sexual violence trials becoming expensive, protracted and inconclusive as competing interpretations of images are argued by defence and prosecution expert witnesses.

A key issue is that once images have been created by forensic examiners it is not possible to exercise absolute control over who can access the images. Medical records within which images must be stored are legal documents and subject to subpoena by defence lawyers. Although sexual assault advocacy services may resist handing over the images, this is ultimately a matter for determination by the court and beyond the service's control. Once images have been brought into existence, no guarantee can be given to victims that these will not be shown to the assailant or jury.

Some forensic practitioners accept the limitations and risks of intimate photography for prosecution, yet argue to continue to use it for peer review, education, supervision, research and publication (Brennan & Berle, 2011; Laitinen, Grundmann, & Ernst, 2013), exposing victims to risk of the images being subpoenaed.

Creating Expectations of "Best Practice"

Taking a broader policy perspective, a third risk with expansion of intimate photography is that of setting expectations that this technique represents "best practice". In our

experience, this has already begun to occur with some defence lawyers asking forensic examiners in the witness stand why intimate photography has been not been used. Such a line of questioning is designed to impugn the skills of the forensic examiner. In Australia, only a handful of doctors providing sexual violence forensic examinations are involved in this role full-time and have an interest in use of this technology. In most services, including those in regional and rural areas the examinations are carried out by forensically trained general practitioners and nurses, providing in almost all instances a high-quality, empathic response. When examinations are not performed with high frequency, as is the case in many rural settings, there is less opportunity and interest in use of photo-colposcopic equipment. Any hesitation about using the equipment is heightened by the prospect of cross-examination on the practice and findings in the adversarial court environment.

Sexual assault examinations continue to be provided by these practitioners because of their commitment to holistic care for victims in their communities, despite the after-hours call-outs and unpredictable court demands. Based on our experience, expectations of use of colposcopy is a disincentive to undertake this work, which is a critical problem in rural areas which face acute difficulties in recruiting practitioners prepared to provide forensic examinations.

Impact on Victims

In providing clinical examinations after sexual violence there is a real risk of re-traumatising victims and it is important to avoid humiliating processes that act as reminders of the violence (Astbury, 2006). While most forensic examiners recognise the risk of fragmenting and objectifying the bodies of women they are tasked with caring for (White & Du Mont, 2009), others are explicit in describing victim's bodies as crime scenes (Laitinen et al., 2013). Impacts on victims

include not only the potentially objectifying process of being draped and photographed, but the exposure and further humiliation that can occur from images being provided to the assailant or used in court. A separate concern is that 5% of victims are filmed by their assailant as part of their assault (Bergen & Bogle, 2000). In such cases, recording anogenital images as part of a forensic examination runs an even greater risk of replicating the violence experienced.

Deterrence of Reporting by Future Victims

We have found that young women who have attended sexual assault advocacy services often share their experiences of the responses they received among their peers. This often results in self-referral by other victims, which is an important access route to services. Just as young women tell others that services are free, caring, confidential and sources of prophylaxis for pregnancy and HIV, experiences of intimate photography would be shared, should this become routine. We contend that this is likely to deter victims from attending services and so receiving the benefit of the support they provide. Sexual assault advocacy services play an important role in providing information and support that can assist victims to make the difficult decision about whether to proceed with a formal police report, necessary for investigation, charging and prosecution. It is essential that the steps involved in making a formal complaint, which includes forensic assessment, be designed to minimise distress and risk. Judith Herman a specialist trauma psychiatrist, suggests that "victims [of sexual violence] understand only too well that what awaits them in the legal system is a theatre of shame" (2005, p. 573). Unless the criminal justice processes can evolve in ways that reduce the humiliation that most victims encounter, prosecution will continue to be a path taken in the overwhelming minority of cases and impunity for offenders will remain high.

Implications for Research, Policy and Practice

There is a need for greater understanding of the factors that deter those who experience sexual assault from proceeding with formal reports and the difference that alternative processes make to willingness to report. Emerging knowledge and technologies provide opportunities to improve responses and court outcomes in relation to the crime of sexual assault. As they become available, each must be scrutinised to determine the value they offer in both quarters, as well as possible unintended consequences. At this time, there are some serious concerns with the use of intimate photography in terms of its limited value as evidence in court; the lack of control over who can access the images; the risk of creating expectations of “best practice”; the impact on victims; and possible deterrence on victims from reporting to police and using services. This is a medical tool, but one with uses that extend beyond the remit of individual forensic practitioners and for this reason decisions about its use should therefore not be left to clinical judgement alone. Lack of a policy has clear implications for victims. Colleagues who elect not to use the tool the carriage of sexual assault prosecutions point to the need for a consistent policy response in Australia. In light of the negative impacts and other risks, it is suggested that the position stipulated by the World Health Organization be adopted and that intimate photography should be excluded from use in sexual assault forensic assessment for adults.

Conclusion

Increasing recognition in the community that sexual violence is widespread and a crime often committed with impunity should lead to changes that increase accountability for offenders and organisations that employ them. Currently sexual violence remains under-reported and under-prosecuted, in part due to a criminal justice system that

continues to operate as a “theatre of shame”. There is a need for attention to the whole process through which this crime is addressed, including the health services that play a critical role in increasing reporting to police, prosecution and offender accountability.

Note

- 1 In Victoria, policy directs that intimate photography is undertaken only in “exceptional circumstances” with prior approval of the Director Victorian Institute for Forensic Medicine (personal communication, Dr David Wells, Director Victorian Institute of Forensic Medicine).

References

- Astbury, J. (2006). *Services for victim/survivors of sexual assault: identifying needs, interventions and provision of services in Australia*. Issues, No. 6. Melbourne, VIC: Australian Institute of Family Studies. <http://www.aifs.gov.au/acssa/pubs/issue/i6.html>
- Australian Bureau of Statistics. (2013). *Personal safety, Australia, 2012* (4906.0). Melbourne, VIC: Australian Bureau of Statistics Retrieved from <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>
- Bergen, R. K., & Bogle, K. A. (2000). Exploring the connection between pornography and sexual violence. *Violence & Victims, 15*, 227–234.
- Brennan, P., & Berle, I. (2011). The ethical and medical aspects of photodocumenting genital injury. In J. Gall & J. Payne-James (Eds.), *Current practice in forensic medicine* (pp. 123–158). Chichester, UK: Wiley.
- du Mont, J., & White, D. (2007). *The uses and impacts of medico-legal evidence in sexual assault cases: A global review*. Geneva: World Health Organization.
- Herman, J. (2005). Justice from the victim’s perspective. *Violence Against Women, 11*, 571–602.
- KPMG. (2007a). *Review of forensic and medical services for victims of sexual assault and child abuse. Report 1 – A new approach*. Sydney, NSW: NSW Department of Health.
- KPMG. (2007b). *Review of forensic and medical services for victims of sexual assault and child abuse. Report 2 – Background and supporting information*. Sydney, NSW: NSW Department of Health.
- Krakow, B., Melendrez, D., Johnston, L., Warner, T., Clark, J., Pacheco, M., . . . Schrader, R.

- (2002). Sleep-disordered breathing, psychiatric distress, and quality of life impairment in sexual assault survivors. *Journal of Nervous and Mental Disease*, 190, 442–452.
- Laitinen, F. A., Grundmann, O., & Ernst, E. J. (2013). Factors that influence the variability in findings of anogenital injury in adolescent/adult sexual assault victims: a review of the forensic literature. *American Journal of Forensic Medicine and Pathology*, 34, 286–294. doi: 10.1097/PAF.0b013e31829a0f46
- Ledray, L. (2008). Consent to photograph: how far should disclosure go? *Journal of Forensic Nursing*, 4, 188–189.
- Lievore, D. (2005). *No longer silent: A study of women's help-seeking decisions and service responses to sexual assault*. Canberra, ACT: Australian Institute of Criminology.
- Marks, S., Lamb, R., & Tzioumi, D. (2009). Do no more harm: the psychological stress of the medical examination for alleged child sexual abuse. *Journal of Pediatrics and Child Health*, 45, 125–132.
- McLean, I., Roberts, S. A., White, C., & Paul, S. (2011). Female genital injuries resulting from consensual and non-consensual vaginal intercourse. *Forensic Science International*, 204 (1–3), 27–33.
- NSW Bureau of Crime Statistics and Research. (2012). *Progress of sexual offences through the NSW criminal justice system: 2006–2010*. Sydney, NSW: Attorney Generals Department. Retrieved from <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/sexualattritiondiagrams.pdf>
- Olle, L. (2005). *Mapping health sector and inter-agency protocols on sexual assault*. Melbourne, VIC: Australian Centre for the Study of Sexual Assault.
- Templeton, D., & Williams, A. (2006). Current issues in the use of colposcopy for examination of sexual assault victims. *Sexual Health*, 3, 5–10.
- Tjaden, P. (2009). A comment on White and du Mont's "Visualizing sexual assault: an exploration of the use of optical technologies in the medico-legal context". *Social Science & Medicine*, 68, 9–11.
- White, C., & McLean, I. (2006). Adolescent complainants of sexual assault; injury patterns in virgin and non-virgin groups. *Journal of Forensic and Legal Medicine*, 13(4), 172–180.
- White, D., & Du Mont, J. (2009). Visualizing sexual assault: an exploration of the use of optical technologies in the medico-legal context. *Social Science & Medicine*, 68, 1–8.
- World Health Organization. (2003). *Guidelines for medico-legal care for victims of sexual violence*. Geneva: World Health Organization