Law Reform Commission of Victoria

Discussion Paper No. 5

RAPE AND ALLIED OFFENCES:

Procedure and Evidence

March 1987

This is a discussion paper, *not* a report. Your comments on the matters raised in the paper would be most welcome. They will be taken into account by the Commission in compiling its report which is due to be completed by 30 June 1987. Comments should be sent to the Executive Director, Law Reform Commission of Victoria, 7th Floor, 160 Queen Street, Melbourne (Telephone: (03) 602 4566) by the 31 May 1987.

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TABLE OF CONTENTS

INTRODUCTION

1. On 21 October 1985, the Attorney-General, the Hon. J. H. Kennan M.L.C., gave the Commission a reference dealing with the law relating to sexual offences. The terms of reference direct the Commission:

- to review the law relating to sexual offences in Victoria, in particular the adequacy of the operation in practice of the amendments to the law made by the Crimes (Sexual Offences) Act 1980; and
- to recommend what, if any, reforms should be made.

2. In August 1986, the Commission published a discussion paper dealing with the substantive law relating to sexual offences. The Commission's final report on that part of the reference will be delivered to the Attorney-General in the near future. This paper deals with the procedural and evidentiary aspects of the subject. The substantive, procedural and evidentiary aspects of the laws relating to offences against children and offences against the disabled will be dealt with in later discussion papers.

3. In its discussion paper *Rape and Allied Offences: Substantive Aspects*,[1] the Commission set out the considerations which are relevant to reform of this area of the law. It referred to the law's aim of protecting sexual integrity and personal autonomy. It recognised the limitations on the effectiveness of the law in preventing the commission of offences, but stressed the law's educative and symbolic value. It emphasised the particular need to clarify and simplify the law in order to improve the efficiency of the administration of justice:

> A major objective of this reference is to identify and to recommend changes which will clarify and simplify the law. Clarification and simplification are not sought merely in order to make life easier for judges, lawyers and police officers. A far more significant factor is that clarity and simplicity lower the risk of injustices, lead to greater efficiency and lower the cost of running the criminal justice system. Cases should come to trial more quickly, take less time to try, and

1. Victorian Law Reform Commission: Discussion Paper No. 2 (1986)

involve less trauma for the victim. Also important is [the fact] that clarity and simplicity allow greater community understanding of the law.[2]

4. The Commission also stressed the social context in which reforms of the law relating to sexual offences have been taking place in recent years:

> . . . the political dimension of sexual law reform should be considered. Despite increasing recognition of the fact that children of both sexes are often the victims of sexual abuse (as indeed, to a much lesser extent are men), it is women who are the victims in the vast majority of cases. During the 1960's and 1970's women in general, and women's groups in particular, were at the forefront of sexual law reform movements on a world-wide scale. The fact that so many changes occurred in relation to rape and to other sexual offence laws was in large measure directly attributable to the efforts of women. Despite these changes, women are still concerned . . . that the reporting rates of these offences are low, that too few alleged offenders are charged and tried, and that victims are often humiliated and frequently feel they are on trial rather than the accused. They are keen that guilty plea rates be increased so that victims are spared the ordeal of giving evidence and being cross-examined. They are concerned about what they see as low conviction rates in sexual cases, especially as compared with other types of cases.[3]

The Commission went on to indicate that, while special recognition had therefore to be given to the interests of women, reform of the law relating to sexual offences had to be consistent with the basic tenets of criminal jurisprudence, including the presumption of innocence and the traditional burden and standard of proof.

5. The issues referred to in the preceding paragraphs are equally relevant to the procedural and evidentiary matters considered in this discussion paper. Recently, the position of victims in relation to the reporting, investigation and prosecution of sexual offences has received increased attention. There is a growing awareness that the trauma of a sexual offence is not confined to the actual crime. There may be ongoing physical, emotional, social and psychological problems for the victims. Criticisms of the impact of the relevant procedures on victims have grown to the point where participation in these procedures is now sometimes described as 'secondary victimisation'. Some survivors of sexual offences regard the trial proceedings, in particular, as more traumatic than the offences themselves. They point to many administrative procedures which place additional, undue stress upon victims. It is being said more and more often that the legal rules relating to the adjudication of sexual crimes reflect an unacceptable insensitivity to the position of complainants.

6. A criminal trial is not a matter of litigation between the parties. It involves a prosecution of the accused by the State. As the consequences of conviction are so serious, the law must protect the accused from the risk of injustice. However, steps can be taken to reduce the risk of further trauma being caused to victims by the rules governing procedure and evidence. A prime aim of the Commission's

2. #1.14
3. #1.15

work in this area is to make proposals for reform which will improve the position of victims without prejudicing the accused's fundamental right to a fair trial.

7. The paper is in two parts. The first part deals with procedural matters. Committal proceedings, time-limits, composition of juries and publicity are discussed in turn. The second part covers certain aspects of the law of evidence in its application to trials for sexual offences - corroboration, recent complaint and sexual history. The Commission's tentative proposals are highlighted at the end of each section. The Commission has not examined administrative arrangements and procedures in relation to the handling of sexual cases, such as police, medical, hospital, counselling and referral procedures. These are outside its terms of reference.

PROCEDURE

Committal Proceedings

8. Trials of criminal offences on indictment or presentment are normally preceded by a preliminary examination or committal hearing.[4] This takes place in a Magistrates Court. Until 1972, the committal hearing involved prosecution witnesses being called to give oral evidence, then being cross-examined and if necessary, re-examined on that evidence. The evidence was written down and compiled in the form of depositions. These were then sent to the authorities for preparation of the trial brief. In 1972, the Justices Act introduced the 'hand-up brief' system as an alternative to that procedure. Under this system the prosecution is not required to call witnesses but may tender their sworn statements instead. However, the accused may call on any prosecution witness to give oral evidence and to be cross-examined upon it. In 1976, the Law Reform Commissioner examined the committal hearing procedure in relation to sexual cases. He recommended that:

- informants in all rape cases should be required to adopt the hand-up procedure unless specifically authorised in writing by a magistrate to proceed otherwise
- the hearing should be conducted before stipendiary magistrates rather than justices of the peace
- the case for the prosecution should be presented by a legally qualified person.

These recommendations were accepted by the Government and enacted by section 2 Rape Offences (Proceedings) Act 1976. The new procedures are confined to rape, attempted rape and assault with intent to rape.

4. An indictment by the D.P.P. is also possible but see *Barton v R* (1980) 147 CLR 75

9. The procedures applicable to committal hearings have recently been re-examined by the Coldrey Committee.[5] Statistics made available to the Committee indicated that 92% of committals from the Melbourne Magistrates Court in 1984 proceeded by way of hand-up brief. To streamline the procedure, the Committee recommended that where an accused required the attendance of a witness whose statement was included in the hand-up brief, the witness should not be examined, but should only be available for cross-examination. It also proposed that a magistrate, whether on his or her own initiative or upon application by the informant, should be entitled to set aside a notice given by the accused requiring the attendance of a witness. The magistrate should only do so if it would be 'frivolous, vexatious or oppressive in all the circumstances to require a witness to attend at preliminary examination'.[6] These recommendations have been accepted by the Government and enacted in the Crimes (Proceedings) Act 1986.

Should committals be abolished?

10. The central question for the Commission is whether there should be a committal hearing at all in sexual cases. It is usually extremely distressing for the complainant in a sexual case to come to court to give evidence. This distress should be kept to a minimum. At present, two separate hearings are usually involved, even though the committal hearing is conducted by way of a hand-up brief. Abolition of committal hearings would reduce the distress suffered by complainants. But changes to pre-trial disclosures would be required if the accused were not to suffer substantial prejudice. An alternative method would have to be found for deciding whether the evidence is sufficient for a case to go to trial. It might be argued that that need is already met by the scrutiny of cases by prosecutors and by the office of the Director of Public Prosecutions. But that type of scrutiny is no substitute for impartial assessment by a magistrate. The Commission does not favour abolition of committal hearings in cases of sexual offences.

Should committal procedures be changed?

11. If committal hearings are not to be abolished, other ways of reducing the distress of complainants should be considered. One apparent source of distress to some complainants is the presence of the accused. Consideration might be given to allowing a complainant to give evidence at the committal, in the absence of the accused, at least where the accused is represented. However, this may create an obstacle to the accused's exercise of the right to instruct his or her counsel.

12. Further changes might be made to the hand-up brief procedure in the case of sexual offences. In South Australia, if the accused requests that the complainant appear at the committal hearing for the purpose of giving evidence, the victim is only required to appear if the justice is satisfied that there are 'special reasons why he should attend for the purpose of oral examination'.[7] This provision was

5. *Report on Committal Proceedings* (headed by Mr. John Coldrey Q.C., Director of Public Prosecutions, 1986)

6. S. 45B (7)

7. Justices Act Amendment Act 1976 (SA)

based upon a recommendation of the Mitchell Committee in 1975.[8] That Committee rejected the requirement of a full, detailed cross-examination of the complainant in rape cases at the committal hearing. It argued that two court appearances constituted harassment of the complainant.

> We do not think that the accused would suffer any real injustice if he were given only one opportunity to cross-examine the prosecutrix, namely upon his trial, provided that he was supplied not only with the statement prepared for the prosecutrix for the committal proceedings verified by her affidavit, but also with the original statement which she gave when first questioned by a police officer, together with any subsequent statement made by her. If there is any variation in any of these statements the accused should have the benefit of being able to cross-examine upon it at the trial. The undoubted benefit to the victim of a rape from the withdrawal of her as a witness giving oral evidence in the committal proceedings would be that she would have to make only one appearance in court, namely at the trial. We think that the justice hearing the committal proceedings should have a discretion to order the prosecutrix to give evidence orally, and that such discretion should be exercisable upon the application either of the prosecution or of the defence if either can show that there are special circumstances which justify the making of such order and we so recommend.[9]

The legislation did not implement the Committee's recommendation that discretion of the justice should be exercisable upon the application of the prosecution as well as the defence. Only the accused may request the attendance of the complainant to give evidence.

13. The South Australian legislation has not been without its critics. Shortly after it came into operation, Chief Justice Bray expressed his disquiet at its possible effects:

> It is, of course, no part of my duty to criticise the policy as opposed to the technical draftsmanship of legislation. It is for Parliament to say what the law should be and how far the traditional rights of persons accused of serious crimes should be cut down. This legislation does cut down those rights as they previously existed and does place a defendant charged with a sexual offence in a significantly more disadvantageous position than a defendant charged with any other kind of offence. It can readily be appreciated that Parliament should have striven to relieve the victim of a rape of unnecessary embarrassment. There is, of course, no reason why a person making a false charge of rape should be relieved of any embarrassment and a logician might be excused for thinking that the assumption behind the legislation is that all sexual complainants are *prima facie* genuine victims so that there is a presumption in favour of guilt before the trial to determine it has begun, contrary to the traditional presumption of innocence which surely it was not intended to weaken.[10]

8. Criminal Law and Penal Methods Reform Committee of South Australia Special Report: *Rape and Other Sexual Offences* (SAGPS 1975)

9. id. 43-44

10. *R v Byczko (No.1)* (1977) 16 SASR 506, 521

It has also been suggested that dispensing with the evidence of complainants at the committal stage may lead to a reduction in the number of guilty pleas. Without being able to test the complainant's case by cross-examination, the accused's lawyer may find it difficult to advise the accused how to plead. In some cases, a guilty plea may be postponed for some months until after the complainant has given evidence at the trial.

14. The South Australian provisions remove one source of embarrassment and distress for complainants in many cases of sexual offences. In doing so, they deprive many an accused of a formal opportunity to test the complainant's evidence before trial. For that reason, the arguments in favour of a formal procedure for pre-committal discovery are particularly strong. The amendments in the Crimes (Proceedings) Act 1986 include a form of pre-committal discovery in all cases conducted under the hand-up brief procedure. They require the service upon the accused of the following information:

- a list of the persons who have made statements which the informant intends to tender at the preliminary examination
- copies of these statements
- a copy of the information relating to the offence(s)
- a copy of any document which the informant intends to produce as evidence
- a list of any exhibits
- a photograph of any exhibit that cannot be described in detail in the list of exhibits.[11]

15. If the hand-up brief procedure in the case of sexual offences were to be amended along South Australian lines, there might be a need to require discovery of all statements made to the police by the complainant, not just the statement tendered at the committal as the complainant's evidence-in-chief. Moreover, guidance would have to be given to magistrates on what constitutes "special reasons" for allowing cross-examination of the complainant. The Mitchell Committee envisaged cross-examination where there was a disparity between the complainant's statement to the police and the statement tendered to the court as the complainant's evidence-in-chief. Another case where cross-examination might be appropriate is where the accused claims fabrication of the alleged incident by the complainant and a special motive for that fabrication.

Proposals

16. *The Commission's tentative view is that:*

- *committal hearings for sexual cases should not be abolished*
- *the complainant should not be subject to cross-examination at the committal hearing unless the magistrate decides that there are special reasons for requiring it*

11. S. 45(1)

- *magistrates should be given legislative guidance on circumstances which constitute 'special reasons'*
- *the accused's interests should be protected by requiring discovery before the committal hearing of all statements made by the complainant to the police*
- *the special rules should not be restricted to cases of rape but should apply to all sexual offences.*[12]

Time-Limits

17. In 1983, as part of an effort to improve the efficiency of the criminal trial process, legislation was passed enabling regulations to be made prescribing time-limits within which the Crown must file a presentment against an accused person and the trial must commence.[13] A presentment must now be filed within nine months from the date an accused person has been committed for trial. The trial itself must commence within 18 months from the date of committal. The legislation provides that Supreme and County Court judges may grant extensions of the prescribed periods.

18. A similar but special set of time-limits governs the pre-trial process in certain sexual cases.[14] They are based upon recommendations made by the Law Reform Commissioner in his 1976 Report.[15] The Magistrates (Summary Proceedings) Act 1975 provides that the committal hearing must commence within three months of the accused being charged. The time-limit may be extended by the magistrate. The Crimes Act provides that the trial of an accused person must be commenced within three months of the committal, or within such longer period as a Supreme Court Judge may order.

Should there be special time-limits for sexual cases?

19. A large number of common law jurisdictions have time-limits in relation to the conduct of criminal proceedings. These have been introduced to provide a discipline and an incentive in the conduct of pre-trial proceedings which are not present without them. To abolish them would be a retrograde step. The question is whether special time-limits should operate in relation to sexual

12. The special procedures for sexual cases under s.47A of the Magistrates (Summary Proceedings) Act, 1975 are confined to the offences of rape, attempted rape and assault with intent to rape, with or without aggravating circumstances. They do not extend to offences such as indecent assault and other allied offences. There is no proper basis for distinguishing in this context between some sexual offences and others.

13. Crimes (Procedure) Act 1983; Crimes (Procedure) Regulations 1984 (S.R. 346). See R. Read (ed) *Preparation of Criminal Trials in Victoria* (VGPS, 1984) 47

14. The offences of rape, attempted rape and assault with intent to rape; the relevant provisions are s. 47A of the Magistrates (Summary Proceedings) Act 1975 and s. 359A of the Crimes Act 1958

15. The Commissioner stated:

    It is always desirable in the interests of justice that a trial in respect of a criminal charge should be held as soon as practicable after the charge has been laid. Unfortunately, however, long delays often occur and this is particularly unfortunate where the result is to protract for a lengthy period the anxiety of a rape victim facing the disturbing prospect of having to give evidence of what was done to her. Report no. 5, *Rape Prosecutions* (1976) 36

offences. The justification for time-limits in relation to sexual offences is a special one. Complainants in sexual cases are often particularly nervous and distressed. To give evidence in non-sexual cases may be difficult and unpleasant. To give evidence in sexual cases is likely to be even more difficult and unpleasant. Consequently there is a stonger case than usual for completing the legal proceedings as quickly as possible.

20. At present, special time-limits are reserved for cases of rape, attempted rape and assault with intent to rape . The Commission believes that this limitation should be extended to all sexual cases. It is aware that the office of the D.P.P. may have difficulty in complying with an extension of the cases to which three month time-limits apply, particularly in light of a recent amendment to the Magistrates (Summary Proceedings) Act 1975 requiring that hand-up briefs be served 28 days rather than 14 days prior to the committal hearing.[16] Nonetheless, the Commission believes that the aim served by special time-limits in sexual cases is sufficiently important to warrant the provision of any additional resources needed by the D.P.P. to comply with the additional requirement.

Should changes be made to the present requirements?

21. There are two ancillary problems with the existing time-limits. Section 47A fixes the time-limit between charging and committal. Rules 8 and 9 of the Magistrates (Summary Proceedings) Act 1975 make it clear that a committal hearing may not be commenced after the prescribed period has elapsed.[17] That period is three months after the accused person has been charged. Technical difficulties have arisen over what it means to say that a person 'has been charged'. In *Campagnola v Attrill*, it was said that the phrase:

> . . . is used in the technical legal sense of appearing before a competent court to answer an accusation made on summons or information. Section 47A is not concerned with police procedures in a police station when a person may be 'charged' or 'informed against' or 'summonsed' or 'bailed' to appear in a court on some future occasion. It operates when a person is formally charged before a court. The limitation period fixed by section 47A is essentially concerned with events within the jurisdiction of a Magistrates Court.[18]

However, in *R v Street; Ex parte Glanville*, a different view was taken:

> I am of the opinion that the applicant was charged within the meaning of Rule (9) of section 47A of the Act at least by the time he was served with the summons.[19]

This disagreement must be resolved. It would be simpler if time commenced to run from the point when the information is laid.[20] However, there is no compulsion upon the police to lay an information for an indictable offence

16. S. 45A as amended by the Crimes (Proceedings) Act 1986

17. Unless, pursuant to Rule 10, a magistrate is satisfied special circumstances exist warranting an extension under Rule 9.

18. (1982) VR 893, 900 (Mr Justice O'Bryan)

19. Victorian Supreme Court (unreported 28 September 1983 Mr Justice Southwell)

20. The term "information" refers to the document alleging the commission, and details of, an indictable offence. An indictable offence is any offence which carries the right to trial by jury.

within any particular period of time.[21] Consideration may need to be given to whether it would be appropriate and practicable to impose a limit on the time available for laying an information.

22. The second problem concerns section 359A of the Crimes Act. This provides a power of extension in relation to the time-limit between committal for trial and the commencement of the trial. It gives this power to judges of the Supreme Court. In the overwhelming majority of cases, people charged with sexual offences are committed for trial to the County Court, not the Supreme Court. County Court proceedings may have to be adjourned in order for an application to be made to the Supreme Court. That is wasteful of time, money and other resources. A judge of the trial court should have power to consider such an application.

Proposals

23. *The Commission's tentative view is that:*

- *the present pre-committal and pre-trial time-limits should apply to all sexual cases*
- *the doubt as to when time commences to run should be resolved*
- *a judge of the trial court should have power to extend the time between committal and trial.*

Composition of Juries

24. There is no rule requiring that juries contain a minimum number of persons of a particular gender. Women have been eligible to serve on juries since 1964. Some people are ineligible to serve as jurors. Others are disqualified from doing so. Still others are entitled as of right to be excused from serving as jurors. The category of persons entitled to be excused includes pregnant women and persons who are required to undertake the full-time care of children.[22] These are the only formal factors which appear to militate in any way against equal representation of women on jury panels.

Should there be gender requirements in the composition of juries?

25. The composition of juries in sexual cases has been frequently discussed by law reform bodies and committees of inquiry.[23] In 1975, the United Kingdom's Heilbron Committee recommended that there be a minimum number of four women and four men on juries dealing with rape cases in order to maintain a reasonable balance between the sexes.

21. cf. s. 165 Magistrates (Summary Proceedings) Act 1975

22. S. 15A Schedule 4 Juries Act 1967

23. It should be noted that all the enquiries into jury composition in sexual cases referred to in this paper took place in jurisdictions where, at the relevant times, rape was not a gender neutral offence, ie., it was an offence which could only be committed by a man against a woman.

> It has been customary to attach great importance to the random selection of jurors as the best means of guaranteeing that the jury is both impartial and representative of the community as a whole, subject to the rules about ineligibility, disqualification and excusal from jury service. Our proposal might be held to infringe the principle of random selection but it seems to us less important to cling strictly to random selection than to seek to achieve a genuinely impartial and representative jury. In cases of rape we believe it to be crucial that both sexes should be adequately represented. The principle of random selection taken together with the scope for peremptory challenge is not able to guarantee this in every case and, therefore, we believe that a change is essential.[24]

26. In its 1976 report *Reducing Harassment and Embarrasment of Complainants in Rape Cases*, the Tasmanian Law Reform Commission adopted the same view as the Heilbron Committee. However, in its 1982 report, *Rape and Sexual Offences*, the Commission recommended against legislation providing that women form a prescribed percentage of jurors in sexual cases. This recommendation rested on two bases:

- a lack of any evidence that the gender composition of juries in trials of sexual offences had any differential impact on the outcome of cases
- the principle that all criminal cases tried by a jury should be treated in the same manner.

27. In 1976, the Mitchell Committee reached the same conclusion. It collected statistical information in relation to the trial of all persons indicted for rape in the South Australian Supreme Court from the beginning of 1965 to the end of 1975. The Committee concluded that the data clearly indicated that:

> . . . there is no statistically significant difference between the verdicts of male and female dominated juries, and it is safe to conclude that women are at least no more likely to convict of the offence of rape than are men. . . . In our view there is no justification for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men.[25]

28. In 1976, the Victorian Law Reform Commissioner reviewed the recommendations of the Heilbron Committee, the Tasmanian Law Reform Commission and the Mitchell Committee. He cited the empirical results obtained in South Australia in relation to the outcome of jury trials and noted some relevant Victorian statistics:

> . . . A survey made of 98 criminal cases of all kinds tried in the third, fourth and fifth courts in the County Court at Melbourne in the year ending June 1974 showed that in almost 50% of cases there were between four and nine women on the jury of twelve and that in 89% of the cases the jury included at least two women.[26]

He concluded that:

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24. *Report to the Advisory Group on the Law of Rape* (H.M.S.O., London 1975) 32
25. Report op. cit. 54
26. Report op. cit. 38

> . . . it would be a mistake to infringe the principle of random selection of juries by requiring a fixed percentage of women on juries trying charges of rape offences; . . . if it were desired to increase the proportion of women serving on juries the appropriate course might well be to reconsider the scope of the very widely expressed provisions under which women are able to claim to be excused from jury service.[27]

29. In 1977, the Royal Commission on Human Relationships followed the approach of the Heilbron Committee in England and recommended that the law should be changed to ensure that at least four men and four women serve on a jury dealing with sexual offences. However, in 1980, a national conference on rape law reform, rejected the Royal Commission recommendation.

> This Conference agrees that while it is important that both men and women should serve on juries in trials involving sexual offences, this applies equally in respect of all crimes. Provided that the law gives an equal opportunity to men and women for jury service generally, no special rule need be established in relation to rape trials.[28]

30. Much of the debate on this controversial question has been directed at the effect of the gender composition of juries on the outcome of trials. The case for change on that basis has not been made out. There is no evidence to suggest that the outcome of trials is affected by the gender composition of juries. Concern about the outcome of trials is, however, not the only consideration. Another is the public criticism which might follow an acquittal of the accused by an all male jury in a trial for the rape of a woman. The case for change on that basis is also not made out. It would imply acceptance of the view that men are more likely than women to acquit sexual offenders. As there is no evidence to support that view, such change would raise prejudice to the level of legal principle.

Proposal

31. *The tentative view of the Commission is that there should be no formal requirement concerning gender representation on juries.*

Privacy and Publicity

32. It is a fundamental principle of the administration of justice that the courts should be public and open. As a general rule, the media are free to report the details of court proceedings. This principle protects the public interest. In most common law jurisdictions, however, a number of statutory exceptions have been created. Delicate questions of public policy are involved. The case for restricting publicity in some classes of case, and in some particular instances, must be weighed carefully against the important principle that justice must be done in public and must be accessible to the public through reports of court proceedings. As Boyle has noted with respect to sexual cases:

27. ibid.

28. cf. W. Young *Rape Study*: Vol. 1: A Discussion of Law and Practice (New Zealand, 1983)

> A number of interests are at stake . . . The accused and the complainant share an interest in a minimum of publicity. They also share a conflicting interest in a public trial if it is assumed that public scrutiny contributes to a fair trial. The complainant and accused may otherwise both be vulnerable to abuse of power. There is undoubtedly a public interest in knowledge of the workings of our criminal justice system.[29]

The question whether the proceedings should be open and public comprises four distinct issues:

- whether the complainant should be entitled to anonymity
- whether the accused should be entitled to anonymity
- whether committal proceedings and trials should be closed to the public
- whether reports of proceedings in court should be published.

Should the complainant be entitled to anonymity?

33. Complainants in sexual cases are protected by provisions which preserve their anonymity. The Judicial Proceedings Reports Act 1958 places limits upon reports of court proceedings. In particular section 4(1) prohibits the publication of the name of any female, or any male under the age of 16 years, against whom a sexual offence is alleged to have been committed, or any details which might enable them to be identified. The case for preserving the anonymity of complainants was put clearly by the Heilbron Committee.

> Even in the case of a wholly innocent victim whose assailant is convicted, public knowledge of the indignity which she has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings. Furthermore since in a criminal trial guilt must be proved to the satisfaction of the jury, an innocent victim can never be sure that a conviction will follow her complaint. If the accused is acquitted the distress and harm caused to the victim can be further aggravated, and the danger of publicity following an acquittal can be a risk a victim is not prepared, understandably to take.[30]

The Committee noted the argument that there may be some disadvantage for accused persons in preserving anonymity for the complainant, but went on to observe:

> The balance of argument seems to us to be in favour of anonymity for the complainant other than in quite exceptional circumstances. While fully appreciating that rape complaints may be unfounded, indeed that the complainant may be malicious or a false witness, we think that the greater public interest lies in not having publicity for the complainant. Nor is it generally the case that the humiliation of the complainant is anything like as severe in other criminal trials. . . .[31]

29. C. Boyle *Sexual Assault* (Carswell, Toronto, 1984) 167

30. Heilbron Report op. cit. 27

31. id. 28

The Commission agrees with these views. The existing anonymity of complainants should be maintained. Indeed, it should be extended to cases not covered by section 4 of the Judicial Proceedings Reports Act 1958. In the light of amendments made in 1980 to render sexual offences gender neutral, there is no basis for the limitation to 'any female' or 'any male under the age of 16 years'. The provision should apply to any person, regardless of age or gender, who alleges a sexual offence has been committed against him or her.

Should the accused be entitled to anonymity?

34. The anonymity of accused persons is not protected. The Heilbron Committee considered the desirability of preserving their anonymity before conviction in rape and other sexual cases. It recommended against it. While there might be a case for preserving the anonymity of all accused persons before conviction, there was no case for doing so only in relation to the crime of rape. The Sexual Offences (Amendment) Act 1976 (U.K.) included detailed provisions dealing with the anonymity of complainants in rape and other sexual cases. Against the advice of the Heilbron Committee, a provision was introduced giving anonymity to accused persons as well. The Commission agrees with the English Criminal Law Revision Committee who stated:

> There is no reason in principle why rape should be distinguished from other offences . . . The 'tit-for-tat' argument - that the man should be granted anonymity because the women has it - is not in our opinion valid, despite its superficial attractiveness.[32]

The question of anonymity for the accused, particularly before the trial, has been a vexed issue in recent history. It is a difficult subject and one which is in need of detailed investigation. It seems right that the issue should be examined at large rather than in the context of sexual offences.

Should courts be closed to the public in sexual cases?

35. Complainants in rape cases already give evidence in committal proceedings which are closed to the public. Section 47A of the Magistrates (Summary Proceedings) Act 1975 imposes special restrictions on the conduct of committal hearings in relation to rape offences. Rule 3 states:

> No person other than the informant, the accused, the complainant, the legal practitioners and their clerks acting for the prosecution and the defence, the officers of the court and members of the police force whose presence is required in connexion with the proceedings and persons who have been authorised by the stipendiary magistrate to be present shall be present at the examination whilst the complainant is being examined or the statement of the complainant is being read.

Rule 4 provides that, where the magistrate does authorise a person to be present while the complainant is being examined or the statement is being read, he or she is to state briefly, by reference to the circumstances of the case, the grounds upon which permission is granted. These rules only apply to a limited range of offences, namely, rape, attempted rape or assault with intent to rape. In the view

32. 15th Report *Sexual Offences* (H.M.S.O. Cmnd. 9213, 1984) 28

of the Commission they should be extended to committal hearings of all sexual offences.

36. The question is whether there should be similar provisions in relation to the trial itself. A trial is different from a committal hearing. It is designed to be a public judicial process in which the complainant's right to privacy is generally subordinated to the demands of open justice. But a recent New Zealand study found that complainants were particularly critical of this aspect of the trial.

> They found it very difficult to give their evidence - the details of which were intimate, embarrassing and often humiliating to them - in the presence not only of the judge, jury and court personnel, but also of spectators in the public gallery. For example, in one trial which researchers observed, a large group of school children came and sat in court while the victim was giving her evidence, which she found distracting and embarrassing. At other times, the victims found the presence of the accused's friends disturbing. In general, they perceived that the process was insufficiently sensitive to their needs and their sense of vulnerability.[33]

37. Despite the distress which complainants experience in giving evidence in public, the Commission is not in favour of closed courts for the trial of sexual cases. There are means by which the distress of complainants can be alleviated without abandoning the principle that trials should be conducted in public. These include the court's power to control proceedings before it and to exclude people from the hearing on the grounds of public decency or if it becomes necessary for the proper administration of justice.[34]

Should details of the proceedings be published?

38. Some parts of the Judicial Proceedings Reports Act 1958 are particularly relevant to this question. One of these is:

> 3 (1) It shall not be lawful to print or publish or cause or procure to be printed or published -
>
> (*a*) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details, the publication of which would be calculated to injure public morals. . .

Similarly, section 48 (1) of the Magistrates Courts Act 1971 gives the court a power to prohibit publication of reports of proceedings 'if it thinks it desirable so to do on the grounds of public decency and morality'.[35] The tentative view of the Commission is that these provisions are adequate.

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33. W. Young and M. Smith *Rape: Issues of Law and Practice* (Department of Justice, Wellington, 1983) 126

34. S. 48(1) of the Magistrates Courts Act 1971 gives the courts power to exclude people from the hearing if it appears desirable on the grounds of public decency and morality. S. 81 of the County Court Act 1958 is similar in wording. These specific provisions complement the inherent power of the superior courts to exclude the public if it becomes necessary for the administration of justice. (*Scott v Scott* [1913] A.C., 417)

35. General rules concerning contempt of court may affect publicity in relation to sexual offence cases. Contempt commonly occurs when a newspaper, radio or television station disseminates information before or during a criminal trial which may influence the deliberations of the jury.

Proposals

39. *The tentative view of the Commission is that:*

- *the Judicial Proceedings Reports Act 1958 should be amended to ensure protection for complainants irrespective of gender or age*
- *the present rules applying to the presence of the public should be retained but applied to all sexual cases.*

EVIDENCE

Corroboration

40. Until 1980, there was a long-standing rule of practice which required the trial judge in all sexual cases to warn the jury of the danger of convicting the accused unless the evidence of the complainant was corroborated, that is, supported by independent evidence. A jury was free to convict in the absence of corroborative evidence but a failure by the trial judge to give a corroboration warning might result in the conviction being quashed on appeal. This rule of practice was abolished by section 62(3) of the Crimes Act which was inserted by the Crimes (Sexual Offences) Act 1980.[36] It provides that:

> Where a person is accused of a sexual offence, no rule of law or practice shall require the judge before whom the accused is tried to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the person with or upon whom the offence is alleged to have been committed. . .

41. The origin and development of the rule of practice requiring a corroboration warning in sexual cases is unclear. While writers in the seventeenth and eighteenth centuries talked generally of the unreliability of complainants in sexual cases, it was not until the late nineteenth and early twentieth centuries that a firm rule of practice emerged. The general basis for the development of the corroboration warning rule was that sexual allegations are easy to make and difficult to refute. Implicit in this was the belief that allegations of sexual assault are peculiarly likely to be false. On this basis, the evidence of complainants in sexual cases was to be examined very carefully. The rule of practice was developed

36. In cases of offences against ss. 51, 54, 55, and 59 of the Crimes Act, corroboration is still required as a matter of law. In its discussion paper *Rape and Allied Offences: the Substantive Aspects* the Commission proposed the repeal of ss. 54, 55 and 59. S. 51 will be examined in a subsequent discussion paper.

to protect those accused of rape and other sexual offences against the risk of unjust conviction.

42. In the early days of the movement towards reform of the law of rape, there was still a solid body of support for the corroboration warning. In 1976, the Mitchell Committee supported its retention in the following terms:

> The fact is that rape, unlike most crimes, is sometimes committed in circumstances which are equally consistent with a non-criminal as with a criminal act. The admitted fact that the man and woman who are not married are in bed together does not necessarily point to rape. Commonsense requires that if the woman alleges that the man raped her in those circumstances, it is essential that, unless the jury are completely satisfied that she is telling the truth and that her evidence is accurate, they will in any event look for some evidence apart from hers which tends to establish that the accused did commit an act of rape and that the sexual intercourse between the parties was not consensual. We do not think that the warning as to the dangers of acting upon the uncorroborated evidence of the prosecutrix does anything more than alert the jury to the dangers of which their own experience and commonsense should warn them.[37]

In 1976, the Law Reform Commissioner recommended the retention of the corroboration rule on the same basis as the Mitchell Committee.[38]

43. By the early 1980s, however, attitudes had changed. A majority of Australian jurisdictions have now abolished the corroboration warning rule in relation to sexual offences. The requirement to give a warning was attacked on two main grounds. The first questioned the basic assumption that the evidence of a complainant in a sexual case carries an unusually high risk of unreliability.

- It is well established that there are difficulties and traumas associated with reporting sexual offences and with having to withstand the rigours of the criminal process. There has been a great deal of publicity about these matters. This publicity may itself deter victims of rape from reporting the matter to the authorities. The filtering process which takes place is such as to render it less likely, rather than more likely, that the evidence in a trial will be unreliable.

- False accusations are not restricted to sexual crimes. The trial process and the cross-examination of the alleged victim should be sufficient, as they are with other crimes, to detect false accusations. The closing address of the defence counsel provides an opportunity to warn the jury about the unreliability of the complainant's evidence.

- The belief that sexual trials present peculiar difficulties in relation to reliability of evidence is based on the 'folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it'.[39]

37. Report op. cit. 45-46

38. Report no. 5 op. cit. 34

39. J. Temkin 'Towards a Modern Law of Rape' (1982) 45 *Mod. L.R.* 399, 417

44. A 1983 New Zealand study suggests that support for the traditional corroboration warning rule relies primarily upon anecdote and personal opinion.[40] Empirical evidence from the New Zealand study indicates that rape is not a charge easily to be made, and that a complaint to the police is usually made at considerable personal cost to the complainant. New Zealand police files do not disclose any evidence to justify the belief that there are significant numbers of false complaints motivated by jealousy, spite, or fantasy. The complaints which did appear to be false were often made by third persons and were quickly detected by the police as unfounded.

45. The second ground for attacking the corroboration warning rule was that it unjustly impedes the conviction of sexual offenders. In a high proportion of sexual cases there are no obvious signs of related physical injury. Moreover, many victims inadvertently destroy evidence by washing themselves and changing their clothing before reporting the offence. For these reasons, the task of producing corroborative evidence is often difficult. The existence of a corroboration warning rule may well prevent a number of cases from proceeding to prosecution.[41]

Should the judge be entitled to give a corroboration warning?

46. Section 62(3) of the Crimes Act abolishes the requirement that a warning be given about the danger of convicting the accused on the uncorroborated evidence of the complainant. However, it does not prevent a judge from giving such a warning. Other jurisdictions have gone further. Section 246.4 of the Canadian Criminal Code states that "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration". A similar approach was adopted in the Australian Capital Territory. The Evidence (Amendment) Ordinance (No. 2) 1985 removed the requirement to give a warning about the need for corroboration and forbade the judge from giving a warning to the jury to the effect that it was unsafe to convict an accused person on the uncorroborated evidence of the complainant. Nonetheless, the Ordinance preserved the right of the judge to comment on any evidence that "may be unreliable".

47. The fact that section 62(3) does not prevent a judge from giving a corroboration warning has led to uncertainty over the nature and form of a warning when a judge decides to give one. In *R v Kehagias*, Justices Starke and Hampel said:

> In our opinion, once the trial judge chose to give the jury a warning as to corroboration in a case involving allegations of sexual assault, he was obliged to state what corroboration is in law and to explain to the jury correctly what evidence is capable of amounting to corroboration. Section 62(3) does not have the effect of changing the law in relation to corroboration. It merely dispenses with the requirement of such a direction in a specific class of case leaving the judge a discretion to give the warning in an appropriate case.[42]

40. Young and Smith op. cit. 139

41. R. Wright 'Rape and Physical Violence' in D. J. West (ed) *Sex Offenders in the Criminal Justice System* (Cropwood Conference Series no. 12, Cambridge Institute of Criminology, 1980) 100

42. [1985] VR 107, 112

. . .

> The rules as to corroboration are essentially based on commonsense and experience and in our view if they are to be stated to the jury at all they must be stated correctly and in accordance with settled principles as to what corroboration is and what evidence is capable of amounting to corroboration. That is not to say that a judge may not offer to the jury, by way of a comment of his own, some general warnings about particular parts of the evidence.[43]

In contrast, the dissenting judge, Mr Justice Murphy observed:

> To say that he [the judge] had to direct the jury, in these circumstances, correctly as to the law of corroboration as developed by the common law, when a warning to look for evidence corroborating that of the complainant was necessary, is not capable of being sustained.
>
> The law of corroboration in this field developed because of the common law rule that it was necessary to give a warning to the jury. Once section 62(3) was passed, the common law as to the need of corroboration of a complainant's evidence in sexual offences fell to the ground.[44]

48. Subsequently in *R v Rosemeyer*, a differently constituted Court appears to have taken another approach. The Chief Justice Sir John Young stated:

> A trial judge is not required to give the jury a warning that it is unsafe to convict without corroboration in cases involving allegations of sexual assault, but he may do so if he considers it appropriate. Where a judge decides to do so he must, of course, avoid error but he is not obliged in my opinion, to go any further than he considers necessary for the purpose of acquainting the jury with their task and assisting them to come to a proper conclusion on the evidence.[45]

Mr Justice Murray expressed the view that, since the introduction of section 62(3), it is open to a judge to describe the concept of corroboration in 'whatever terms he thinks fit, providing that he does so accurately'.[46] Mr Justice Ormiston dealt at considerable length with the general question of the form of warning to be used once a trial judge decides to exercise the discretion. He noted that the relevant section is 'curiously drafted', in the sense that it merely relieves the judge of any requirement to warn the jury, but does not prohibit such a warning. After a detailed examination of the basis and development of the corroboration warning rule in sexual cases, Mr Justice Ormiston stated:

> The only conclusion one can rationally reach is that Parliament saw as outdated the existing legal rules relating to the evidence of all complainants in sexual cases and in particular the characterisation of complainants, especially women, as unreliable witnesses in those cases. That was the aspect of the rule which was antiquated, and thus 'obsolete', in the sense that it had a history extending back at least to

43. [1985] VR 107, 113
44. [1985] VR 107, 125
45. [1985] VR 945, 949
46. [1985] VR 945, 954

> the observations of Sir Mathew Hale in the seventeenth century. The amending section was so formulated as not only to leave the usual discretion to the trial judge to make an appropriate comment on the unreliability of any witness, but also to bring to an end the requirement that the evidence of all witnesses of a particular class, namely complainants in sexual cases, should be described as unreliable. The principal consequence is that any discretionary warning as to the credibility of complainants, as of any other witness not subject to the corroboration rules, must be treated as only a comment by the trial judge, subject to the usual direction that the jury may disregard any such comment.[47]

49. In the view of Mr Justice Ormiston, abolition of the requirement to give a warning must lead to the decline of any associated rules as to a corroboration warning in sexual cases. When a trial judge decides to give a warning, no particular form of words is required. Indeed, as Mr Justice Vincent noted in the recent unreported case of *R v Hunt*, there may be considerable danger in using the term corroboration at all.

> I understand the cases in which this matter has arisen to say no more than that there may be situations in which a trial judge will consider it appropriate to make some comment. That of course involves no more than an application of the normal principles in relation to the function of a trial judge in respect of the evidence which is adduced on trials conducted before him. However, it is also clear that if a trial judge chooses to make any such comment he must be careful that through the use of a term such as corroboration, which has a recognised and long accepted meaning in the law, he does not create a measure of confusion by reason of an inaccurate or incomplete exposition of the concepts involved.[48]

50. The uncertainty and disagreement revealed in these cases may stem from the fact that there are two separate warnings in issue. If a judge decides to give a warning about corroboration in the strict sense there is no reason why he or she should not be required to do so in the traditional terms. After all, it is only by reference to the traditional rules that one can explain the meaning of the term "corroboration". On the other hand, if the judge wishes to warn the jury about the unreliability of particular evidence in the circumstances of the particular case, that is another matter altogether. In such a case, there is no reason at all why any reference should be made to the term "corroboration". Indeed, it would be misleading to make such a reference since a warning relating to corroboration is based upon a general belief as to the unreliability of evidence in a class of cases, not upon the unreliability of particular evidence by reason of facts peculiar to the case in hand. If this difference is noted and followed, the problem can be readily resolved. To allow judges to give a warning on the basis of the presumed general unreliability of the evidence of complainants in sexual cases is inconsistent with the philosophy behind the 1980 amendments. On that basis, a judge should

47. [1985] VR 945, 967-8

48. *R v Hunt* (13.8.1986)

be prohibited, as in the Australian Capital Territory, from giving a warning concerning the need for corroboration.[49]

51. This proposal is not intended to affect the judge's right to give a warning about particular facts which may suggest that evidence may be unreliable. Abolition of a judge's right to comment on the reliability of particular evidence would be contrary to principle. It is an essential part of the judge's function to comment on the evidence put before the jury. The fact that the case is one dealing with a sexual offence is not a ground for making an exception to that rule. Section 62(3) should simply be amended to prevent a judge from giving a warning on the basis that the evidence in sexual cases in general is more likely to be unreliable than in non-sexual cases. On that basis, a judge in a sexual case would follow the same course in relation to commenting on the reliability of evidence as is followed in a non-sexual case.

Should corroboration be required as a matter of law in some cases?

52. There can be no conviction for offences against sections 54, 55 and 59[50] of the Crimes Act upon the uncorroborated evidence of one witness. This requirement should be abolished. The distinction between those offences where corroboration is required and those where it is not appears to have no clear basis. There is no greater danger of fabricated evidence in the case of the offence of procuring penetration by threats or fraud than there is in the case of rape or indecent assault. If the offences are not to be repealed,[51] the Commission believes that the requirement of corroboration in relation to sections 54, 55 and 59 should be abolished.

Proposals

53. *The tentative view of the Commission is that*

- *section 62(3) of the Crimes Act should be amended to forbid the giving of a corroboration warning but the judge should retain the right to comment on any aspect of the evidence in the particular case which suggests that it may be unreliable*
- *the requirement of corroboration as a matter of law in sections 54, 55 and 59 Crimes Act should be abolished.*

Recent Complaint

54. It is a general principle of the law of evidence that a previous statement by a witness made in the absence of the accused is not admissible either as evidence of the facts contained in the statement or as evidence showing the consistency

49. The Australian Law Reform Commission's view is that the corroboration requirement should be abolished and be replaced with warnings on unreliable evidence. See, in particular, draft clauses 133–4, policy issues 1009–14 and commentary 720, 1015–7, 1021–3, ALRC 26, *Evidence* (1985)

50. i.e. Procuring penetration by threats or deception, substance administration to render a person less able to resist penetration and procuring penetration.

51. See Discussion Paper no. 2 op. cit. 3.57–3.64

of the witness. At common law, an exception to this principle developed in relation to sexual offences. Both the fact that a person complained shortly after an alleged sexual offence and the contents of the complaint are admissible as evidence, but only as to the consistency of the complainant's account of the incident.[52] The complaint may not be used as evidence of its truth. For a "recent complaint" to be admissible, it must be made voluntarily at the first reasonable opportunity. It is for the judge to determine whether this condition has been satisfied.

55. In the Middle Ages, it was a defence to an allegation of rape that the woman had not raised the 'hue and cry'.[53] Early complaint, therefore, was a fact in issue. Over time, the defence based on a failure to raise the 'hue and cry' disappeared but evidence of early complaint remained admissible in relation to the victim's credibility. Chief Justice Hale stated in the seventeenth century:

> . . . if the witness be of a good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury . . . these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for an considerable time after she had opportunity to complain, . . . and she made no outcry when the fact was supposed to be done, when and where it is probable that she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.[54]

Should the recent complaint rule be abolished?

56. One problem with the recent complaint rule arises from the fact that evidence of a complaint is limited to establishing consistency in the complainant's account. However, it is unrealistic to expect a jury, however well instructed, to use evidence for a particular purpose but not for a more general purpose. Once the evidence is presented there is a danger that it will be used more widely than the law permits. The main problem with the recent complaint rule is that it is based upon the assumption that a person who promptly reports a sexual offence is in general likely to be more trustworthy than a person who delays in making a complaint. This view is now discredited. As one study put it:

> There are a variety of reasons for this large non-reporting rate, . . . They include the victim's feelings of guilt, shame or embarrassment; her fear of the police response and legal procedures; her fear of rejection by family or friends; and her unwillingness to bear the social stigma of being identified as a rape victim. In cases where the victim knows the offender well - for example, offences committed by a father, male

52. "The admission of a recent complaint in sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence": *R v Kilby* (1973) 129 CLR 460, 472 per Chief Justice Barwick

53. *R v Osbourne* [1905] 1KB 551, 559

54. *Pleas of the Crown* 663 (1678)

relative, workmate or de facto husband - she may also be inhibited from reporting by the effect which prosecution and conviction would have upon him or his family and her relationship with them.[55]

As the Mitchell Committee pointed out in 1976, failure to make an early complaint is not necessarily evidence of unreliability.[56] There are many reasons why complaints are often not made either immediately or soon after sexual offences have been committed. The Mitchell Committee concluded that the recent complaint rule served no useful purpose, was likely to mislead the jury and should be abolished. The Commission agrees.

57. If the recent complaint rule were abolished, the prosecution would not be able to lead evidence of an early complaint. However, the defence would remain entitled to cross-examine the complainant about a late complaint or to make other comment upon it. That would not be inconsistent with the abolition of the rule. There may be particular circumstances in which a delay in making a complaint requires an explanation. Should the defence choose to raise the issue, the judge should be required to warn the jury that there may be good reason for a delay in making a complaint. This approach has already been adopted in a number of Australian jurisdictions. For example, section 405 B(2) of the Crimes Act 1900 (NSW) reads as follows:

> 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 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 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 that 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.

A similar rule should be enacted in Victoria. The judge should retain the right to comment on particular facts which suggest that a delay in making a complaint may indicate unreliability.[57]

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55. Young op. cit. 39

56. 'It is no longer true, if it ever was, that a woman who is raped necessarily raises a hue and cry. Whether she complains at the first opportunity or not, depends very largely upon her personality and her temperament. It is a false assessment to assume that every woman who is raped will necessarily immediately complain to her parents or her husband or some close relative. The fact that a woman may decide to give mature consideration to whether she will or will not report the rape to the police does not of itself indicate that she is untrustworthy.' Mitchell Committee op. cit. 48

57. See *MacDonald, Davies, Ellick and Dolan* [1986] A.A. Crim. R. 297

Proposal

58. *The tentative view of the Commission is that:*

- *the rule of recent complaint should be abolished*
- *where the defence raises the issue of a late complaint, the judge should be required to warn the jury that there may be good reason for a delay in making a complaint*
- *the judge should retain the right to comment on particular facts which suggest that delay in making a complaint may indicate unreliability in a particular case.*

Sexual History

59. The common law relating to the admissibility of evidence concerning the sexual history of the complainant was summarised by the English Court of Criminal Appeal in 1973.

> It is settled law that she who complains of rape or attempted rape can be cross-examined about (1) her general reputation and moral character, (2) sexual intercourse between herself and the defendant on other occasions, and (3) sexual intercourse between herself and other men; and that evidence can be called to contradict her on (1) and (2) but that no evidence can be called to contradict her denials of (3).[58]

The law on this subject crystallised during the 19th century. It allowed evidence to be given of the sexual history of the complainant on two bases. The first was that it might be relevant to the issue whether the complainant consented to the sexual activity in question. The second was that it might be relevant to the complainant's credit.

> . . . the defence in a rape trial was free to cross-examine about any prior sexual behaviour, whether with the defendant or with anyone else. [The complainant's] experience with any third party was thought to be relevant to her credibility: the law of evidence seemed to reflect an assumption that women involved in rape cases were likely to be untruthful as a direct result of their sexual 'immorality'. Furthermore, any evidence that she was promiscuous, had a questionable sexual reputation or, indeed, that she was a prostitute was also admissible. Such general attacks on her character were regarded as relevant to the issue of consent. . . . This effectively put rape in a wholly different category from other criminal offences, and gave the defence a virtually unconstrained licence to sling sexual mud.[59]

60. Although limits were placed on the admissibility of evidence of sexual history, particularly in the form of the general discretion given to trial judges to

58. *R v King* (1973) 57 Cr. App. R. 466, 472

59. Z. Adler 'Rape—The Intention of Parliament and the Practice of the Courts' (1982) 45 *Mod LR* 664, 666

control unruly and excessively intrusive cross-examination,[60] the common law permitted material to emerge which was of doubtful relevance to the issue or was unfairly detrimental to the prosecution case. The admissibility of this evidence increased the tension and distress attendant upon the complainant's experience in court:

> There is little doubt that, as the law stood at the advent of the last decade, reforming legislation was needed; the earlier law had permitted and indeed encouraged such extensive cross-examination of rape victims that it was widely claimed that, not only did rape trials degenerate into a trial of the complainant rather than of the accused but that, by reason of the notorious humiliation and embarrassment suffered by a prosecutrix in consequence of the exposure during the trial of her private life and sexual past, rape victims were in fact deterred from reporting crimes against them.[61]

Some commentators, including some judges, claimed that legislative action was unnecessary and that what was required was greater vigilance on the part of trial judges. That view did not prevail. In 1975 the Heilbron Committee recommended reform in England. Legislation was passed in 1976, although not in the same form as recommended by that Committee. Canada and New Zealand legislated in the area in the 1970s and have produced further amendments in the 1980s.[62] In Australia, too, there has been a spate of legislation on the question. No two pieces of legislation are identical. The result is a confusing array of different statutory models.

61. In 1976 the Law Reform Commissioner recommended that legislation be enacted to:

- Provide that the defence, before cross-examining the complainant as to sexual intercourse with men other than the accused, must make application to the judge, magistrate or justices for leave to do so; that the application shall be made in the absence of the complainant; and that leave shall not be granted except as to matters considered to have substantial relevance to facts in issue (otherwise than as showing a general propensity) or to be proper matter for cross-examination as to credit.

- Provide that evidence of sexual intercourse by the complainant with men other than the accused shall be admissible if, but only if, the tribunal is satisfied that it has substantial relevance to facts in issue (otherwise than as showing a general propensity).

- Abolish the rule permitting evidence to be given for the defence that the complainant bears a bad reputation for chastity.[63]

60. The Evidence Act 1958 contains a number of provisions upon which a court can rely e.g. ss. 37, 39 and 40

61. P. McNamara 'Cross Examination of the Complainant in a Trial for Rape' [1982] *Crim L J* 25

62. In the United States, by 1980 more than 40 jurisdictions had passed legislation limiting the admissibility of sexual history evidence.

63. Report op. cit. 39-40

62. These recommendations produced a quick legislative response. The Rape Offences (Proceedings) Act 1976 amended the Evidence Act 1958 in relation to sexual history evidence. Section 37A provides that:

- The court is to forbid any questions and exclude evidence of the general reputation of the complainant with respect to chastity.
- Sexual history of the complainant with persons other than the accused is admissible only with the permission of the court.
- The permission of the court is not to be granted unless it is satisfied that the evidence is substantially relevant to the issues in the case or is proper matter for cross-examination as to credit.[64]
- Evidence is not be be regarded as substantially relevant if it does no more than suggest general disposition. Nor is it to be regarded as proper matter for cross-examination unless there are special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.[65]

63. Section 37A of the Evidence Act applies both to committal hearings in the Magistrates Court and to trials. It is limited, however, to rape, attempted rape, and assault with intent to rape. It does not affect cross-examination, or the admission of evidence, in relation to the complainant's prior sexual experience with the accused. An application must be made in the absence of the jury and, if the accused requests it, in the absence of the complainant. It has been estimated that an application for the admission of sexual history evidence is made in approximately 50% of cases and that the application is refused in more than 90% of these cases.[66] Therefore, in less than 5% of cases is permission granted.

64. A great deal of the sexual history evidence of the complainant is simply irrelevant. The complainant should be protected from attacks in the witness box which are designed simply to 'harass, annoy or humiliate' and which may result in a trial degenerating into a trial of the complainant rather than the accused. If that is not done, victims may be deterred from reporting offences. However, if sexual history evidence is relevant it should be admissible. A major purpose of the rules relating to the admissibility of evidence is to minimise the risk of an innocent person being convicted. An accused must be free to cross-examine a complainant about matters which are relevant to the issues raised. A proper and legitimate defence may involve embarrassing, even humiliating, questions being put to a complainant. But that is no justification for admitting evidence whose marginal relevance is outweighed by its prejudicial impact. As Odgers puts it:

> Information that a woman has consented to extra-marital sexual intercourse in the past may well be given considerable weight by a jury trying to decide whether consent was given on the occasion in question. Partly this is the result of ignorance. Powerful taboos still inhibit the dissemination of accurate knowledge about human sexual behaviour. But it is also an aspect of the general tendency to give too much weight

64. Leave may also be granted if the evidence is relevant to sentencing: s. 37A (3) (*b*)

65. S. 37A applies in respect of males as well as females: Interpretation of Legislation Act 1984

66. Interview with Gayle Thompson, Chief Preparation Officer, Sexual Offences Division of the Office of the D.P.P., 7 March 1986.

> to evidence from which a character inference can be drawn, to overestimate the unity of personality and to underestimate the importance of situational factors. One of the more enduring propositions supported by psychological studies is that most persons attribute their own actions to situational and environmental concerns, but attribute the same action in others to stable personality dispositions.[67]

Mr Justice Zelling made a similar point in *R v Gun; Ex parte Stephenson*:

> . . . quite a number of woman jurors will not convict for rape when the girl admits she is not a virgin, on the basis that if the girl puts so little value on her chastity why should we the jurors by our verdict cause a boy to be sent to gaol for violating it. Again this is not logical, but it is a fact of life which has been attested to in a number of jurisdictions.[68]

Should further restrictions be placed on the admissibility of sexual history evidence?

65. Some jurisdictions have taken a more restrictive approach than Victoria on the issue of the admissibility of sexual history evidence. In Canada, for example, section 246.7 of the Canadian Criminal Code makes evidence of sexual reputation, whether general or specific, inadmissible for the purpose of challenging or supporting the credibility of the complainant. Section 246.6(1) provides that no evidence may be adduced by the accused concerning the sexual activity of the complainant with any person other than the accused unless:

- it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously led by the prosecution
- it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge
- it is evidence of the sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.

As Boyle has noted:

> The evidence must tend to establish the identity of the person who had sexual contact with the complainant *on the occasion set out in the charge*, so that evidence that simply points away from the accused, but not towards anyone else in particular, or does not relate to that occasion, is inadmissible. In addition, it must be noted that only evidence of *specific instances* is admissible, so defence counsel must not be permitted to ask broad-ranging questions about the sexual life-style of the complainant.[69]

66. New South Wales has also adopted a more restrictive approach than Victoria. Section 409B of the Crimes Act 1900 provides that evidence relating to the sexual reputation of the complainant is inadmissible. Sub-section (3) of 409B is

67. S. J. Odgers 'Evidence of Sexual History in Sexual Offence Trials' (1986) *Syd LR* 73, 78

68. (1977) 17 SASR 165, 174

69. C. Boyle, *Sexual Assault* (Carwell, Toronto, 1984) 137

the central provision. It places a general prohibition on the admissibility of sexual history evidence unless that evidence is relevant to the case in one of a number of specified ways. The evidence is regarded as relevant if it:

- is related to the conduct of the complainant about the time of the alleged offence
- concerns a recent relationship between the complainant and the accused
- is related to the question whether semen, pregnancy, disease or injury is attributable to the sexual intercourse which the accused denies took place
- tends to establish that at a relevant time the complainant or the accused had a disease not present in the other
- concerns the question whether the allegation by the complainant was first made upon realising that the complainant was pregnant or had a disease.

Probative value must outweigh any distress, humiliation or embarrassment which its admission might cause the complainant. Evidence as to sexual experience may be given upon cross-examination where there is disclosure of experience and the accused would be unfairly prejudiced if the complainant could not be cross-examined.[70] Whether the different approach adopted in New South Wales provides more protection for complainants without prejudicing the interests of the accused is by no means clear. The New South Wales Bureau of Crime Statistics and Research has undertaken a major empirical study of the impact of the New South Wales legislation. A specific report is to be devoted to evidentiary and procedural matters. That report is not yet available.[71]

67. The protection of the complainant is an important goal. But it should not be achieved at the expense of justice. Commenting on criticisms of the approach under which the court retains a broad discretion to admit sexual history evidence, Elliott has observed:

> Further inroads . . . will require encroachment on the accused's right to defend himself in the best way he can. We can encroach on that without risking injustice for him if we make a rule forbidding illegitimate tactics, i.e., the appeal to naked prejudice involved in the forbidden propositions about sexually experienced women; and give the judge power to disallow what looks illegitimate in a particular case. But to forbid *by rule* potentially legitimate tactics, i.e., those which may help an innocent man to escape conviction, is to cross a hitherto uncrossed line.
>
> Those who invite us to cross it require us either to pre-judge the defendant and assume his guilt, or (the only alternative) to decree that, although innocent, he must nevertheless be hampered in his defence

70. S. 409B (3) (*f*), (5)

71. It has been said that the major value of the New South Wales provisions is that the judge must provide written reasons for admitting the evidence. This is seen as providing an avenue of review which could test claims that both distress for victims and even acquittals result from the failure of the courts to exclude irrelevant but prejudicial sexual history material. J. A. Scutt 'Sexual Assault and the Australian Criminal Justice System' in D. Chappell and P. Wilson (eds) *The Australian Criminal Justice System* (Butterworths, Sydney, 1986) 74

so that genuine rapists may be put down. If either course were ever proposed in stark terms, it would get short shrift; dressing them up in terms of justice for complainants does not make them any less unacceptable.[72]

68. The provisions in the Victorian Evidence Act 1958 are considerably less specific than the Canadian or even the New South Wales provisions. They retain a relatively broad discretion for judges and have not been the subject of substantial criticism. The Commission's tentative view is that the position set out in the Evidence Act should be maintained. However, instead of being restricted to rape offences, the sexual history provisions should apply in relation to all sexual offences.

Proposal

69. *The tentative view of the Commission is that the present position in relation to the admissibility of evidence concerning the sexual history of the complainant should be maintained but the relevant provisions of the Evidence Act 1958 should apply in relation to all sexual offences.*

72. D. W. Elliot 'Rape Complainant's Sexual Experience with Third Parties' [1984] *Crim LR* 4, 14

SUMMARY OF TENTATIVE PROPOSALS

Committal Proceedings

- Committal hearings for sexual cases should not be abolished
- the complainant should not be subject to cross-examination at the committal hearing unless the magistrate decides that there are special reasons for requiring it
- magistrates should be given legislative guidance on circumstances which constitute 'special reasons'
- the accused's interests should be protected by requiring discovery before the committal hearing of all statements made by the complainant to the police
- the special rules should not be restricted to cases of rape but should apply to all sexual offences.

Time-Limits

- The present pre-committal and pre-trial time-limits should apply to all sexual cases
- the doubt as to when time commences to run should be resolved
- a judge of the trial court should have power to extend the time between committal and trial.

Juries

- There should be no formal requirement concerning gender representation on juries.

Privacy and Publicity

- The Judicial Proceedings Reports Act 1958 should be amended to ensure protection for complainants irrespective of gender or age
- the present rules applying to the presence of the public should be retained but applied to all sexual cases.

Corroboration

- Section 62 (3) of the Crimes Act should be amended to forbid the giving of a corroboration warning but the judge should retain the right to comment on any aspect of the evidence in the particular case which suggests that it may be unreliable
- the requirement of corroboration as a matter of law in sections 54, 55 and 59 Crimes Act should be abolished.

Recent Complaint

- The rule of recent complaint should be abolished
- where the defence raises the issue of a late complaint, the judge should be required to warn the jury that there may be good reason for a delay in making a complaint
- the judge should retain the right to comment on particular facts which suggest that delay in making a complaint may indicate unreliability in a particular case.

Sexual History

- The present position in relation to the admissibility of evidence concerning the sexual history of the complainant should be maintained but the relevant provisions of the Evidence Act 1958 should apply in relation to all sexual offences.

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