Law Reform Commission of Victoria

Report No. 13

# RAPE AND ALLIED OFFENCES:

## Procedure and Evidence

March 1988

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## Procedure and Evidence

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In January 1986, the Chairperson created a Division of the Commission, in accordance with section 12 of the Law Reform Commission Act 1984, to undertake work on the reference.

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To The Hon A McCutcheon MP
Attorney-General
Parliament House
MELBOURNE VIC 3000

Dear Attorney-General,
In accordance with the provisions of section 6(1)(a) of the Law Reform Commission Act 1984, I submit the Commission's Report on Rape and Allied Offences: Procedure and Evidence.

Yours sincerely,

DAVID ST.L. KELLY,
CHAIRPERSON

March, 1988

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# SUMMARY

## *GENERAL CONCLUSIONS*

1 The legal rules relating to the adjudication of sexual crimes may impose unnecessary but significant distress upon complainants. Reforms must be introduced which will improve the position of the complainant without prejudicing the accused's fundamental right to a fair trial.

2 There is also a range of matters other than the law which affect the experiences people have of the way sexual cases are handled by the legal system. Improvements must be sought in these areas as well.

## *PARTICULAR RECOMMENDATIONS*

A. Non-Legal Matters

Para 12 *Education of Judicial Officers.* To avoid injustice and unnecessary distress to complainants, people involved in the legal process must have a good understanding of the background of sexual offences, and the impact on victims of the offences and the way in which they are prosecuted.

> *Recommendation 1:*
> *The Australian Institute of Judicial Administration should develop educational programs for judicial officers on issues in sexual assault cases, in particular the admission of sexual history evidence, the reasons why victims may not complain immediately and the closure of courts during the complainant's testimony.*

Para 13 *Police Procedures.* The Victoria Police has made significant changes in its handling of sexual offences cases in order to be more sensitive to complainants' needs. However, a number of submissions argued that the procedures need to be reviewed and changed further.

> *Recommendation 2:*
> *The Victoria Police should conduct a review of its procedures for handling sexual offences.*

Para 14 *Court Building Arrangements.* It can be very distressing for a complainant to share court building facility with the accused.

*Recommendation 3:*
*The Secretary to the Attorney-General's Department should:*

*(a) review the accommodation in existing court buildings to assess the feasibility of providing separate facilities for complainants and defendants; and*

*(b) ensure that new court buildings have separate facilities for complainants and defendants.*

Para 15 *Monitoring Procedural and Evidentiary Provisions.* It is essential that the procedural and evidentiary provisions of the criminal justice system are monitored, to enable their effectiveness to be assessed.

*Recommendation 4:*
*The Attorney-General's Department should investigate the possibility of establishing a Bureau of Crime Statistics and Research.*

B. Preliminary Examinations

Should preliminary examinations of sexual offence cases be abolished?

Paras 23–25 The abolition of preliminary examinations in sexual offence cases might reduce the distress complainants suffer because of the nature of the event about which they have to testify. However, there is no equivalent means of assessing whether evidence is sufficient for a case to go to trial.

*Recommendation 5:*
*Preliminary hearings should be retained in sexual offence cases.*

Should the hand-up brief procedure rule be extended to other sexual offences?

Paras 26–28 In preliminary examinations of cases of rape and associated offences, the prosecution is required to tender sworn statements — 'hand-up briefs' — from the complainant. This procedure limits the risk of the complainant being unnecessarily subject to courtroom questioning. The same procedure should be required in section 54 offence cases but not in cases of indecent assault. The latter are generally heard summarily, without a preliminary examination, so the complainant has to appear in court only once.

*Recommendation 6:*
*The rule requiring informants in rape cases to adopt the hand-up brief procedure should be extended to cases involving offences against section 54 of the Crimes Act.*

Reducing confrontation between complainant and accused.

Paras 30–3 Modern technology and courtroom design should be considered to reduce unnecessary confrontation between the complainant and the accused.

*Recommendation 7:*
*In investigating the use of closed-circuit television in the courts, the Secretary of the Attorney-General's Department should take account of the function it might perform in enabling a complainant in a sexual case to testify without being in the accused's presence.*

*In designing and redesigning court rooms the Secretary of the Attorney-General's Department should bear in mind the need to minimise the risk of unnecessary confrontation between the complainant and the accused.*

Restricting the right of cross-examination.

Paras 32–40 In South Australia, a complainant is required to appear at a preliminary examination to be cross-examined only if the court believes there are special reasons why this is desirable. The result is that few complainants are required to appear. A similar approach is not favoured for Victoria, because the restrictions may significantly weaken the effectiveness of preliminary examinations as a test of the strength of evidence.

*Recommendation 8:*
*There should be no change to the rules governing cross-examination of complainants at preliminary examinations in relation to sexual offences.*[1]

Complainants' statements.

Paras 42–45 Generally the police take only one statement from a complainant. If more statementts are taken, inconsistencies between them are a legitimate matter for cross-examination. Proper protection of the accused's interests therefore requires that all statements are available to the defence.

*Recommendation 9:*
*The accused should be entitled to be given a copy of all statements made by the complainant to the police.*

C. Time-limits

Paras 46–55 Special time-limits govern the pre-trial process in cases of rape, attempted rape and assault with intent of rape. They were introduced because it was recognised that the stress of victims of these crimes is so great that they should be given priority in having the cases prosecuted. If time-limits were extended to all sexual offences, the prosecution of non-sexual offences would be further delayed. That would be unfair as many of the sexual cases would be less serious than many of the non-sexual ones. Sexual penetration is a key indicator of seriousness, and therefore provides a basis for determining which sexual offences should be given priority.

*Recommendation 10:*
*The present pre-committal and pre-trial time limits for rape should be extended to offences against section 54 of the Crimes Act, but not to indecent assault.*

1. Dissent, see para 41.

When does the time-limit commence?

Paras 56–60 A preliminary examination may not be commenced if three months have elapsed after the accused person has been charged, but there is uncertainty about when that can be said to have happened. Time should commence to run from a point which can be readily identified and which gives reasonable certainty the matter will be able to proceed. It should therefore be at a point when the police have adequate information to formally commence the judicial process against the accused, and the accused is aware of the charge.

*Recommendation 11:*

*(a) Time-limits should not be imposed on the laying of informations.*

*(b) Time should commence to run when the accused has been charged by the police, and informed that prosecution proceedings have been, or are about to be, initiated.*

Who may grant extensions?

Para 61 People charged with sexual offences are generally committed for trial in the County Court, not the Supreme Court. However, only Supreme Court judges can grant extensions of time between an accused being committed for trial and the trial commencing. 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 and money.

*Recommendation 12:*
*A judge of the court where the trial is to proceed should have power to extend the pre-trial period.*

D. Composition of Juries

Should there be gender requirements in the composition of juries?

Paras 63–65 Juries do not have to contain a minimum number of persons of a particular gender. There is no evidence to suggest that the outcome of trials is affected by the gender composition of juries.

*Recommendation 13:*
*There should be no formal requirement concerning gender representation on juries.*

E. Publicity and Privacy

Should the complainant be entitled to anonymity?

Paras 68–71 Complainants in sexual cases can be greatly distressed by public knowledge of the events. The law therefore prohibits publication of complainants' names, or details which might identify them. The protection is limited because it applies only when court proceedings have begun, and certain publications are exempt from the prohibition.

*Recommendation 14:*
*The publication of any details likely to lead to the identification of a complainant, without the consent of the complainant or an order of a court, should be prohibited. The prohibition should apply from the time a complaint is made*

*to the police and should apply to law reports and legal and medical publications as well as other publications.*

Should preliminary examinations in sexual cases be closed to the public?

Paras 74–78

Preliminary examinations are closed to the public while the complainants in cases involving rape, attempted rape and assault with intent to rape give evidence. A magistrate has limited discretion to exclude the public from the proceedings in relation to other offences. There is no clear basis for maintaining a distinction between sexual offence cases, as they may all involve matters which a complainant finds extremely embarrassing. However, both the complainant and the defendant should be able to have a person of their own choice present throughout the proceedings to provide support.

*Recommendation 15:*

*(a) The restrictions on who may be present while the complainant gives evidence in preliminary examinations of rape and allied cases should apply equally in the case of other sexual offences.*

*(b) The complainant and the defendant should each be allowed to have present a person of their choice who is unconnected with the proceedings. The magistrate should inform the complainant and defendant of this right.*

*(c) Upon a request by the complainant or the defendant the magistrate should be entitled to authorise other people to remain present.*

Should the public be excluded from trials in sexual cases?

Paras 79–83

The principle that justice should be conducted openly is of considerable importance and should be maintained as far as possible. Members of the public should not be excluded unless a court believes there are strong grounds for doing so. The guidelines for the court to order the exclusion of people should include protection of a complainant from distress.

*Recommendation 16:*

*(a) The defendant and complainant should each be allowed to have present throughout the trial a person of their choice who is unconnected with the proceedings. The magistrate or judge should inform the defendant and complainant of this right.*

*(b) The exclusion of the public from trials of sexual offences should remain a matter for the discretion of the court.*

*(c) The grounds on which a magistrate or a judge may order members of the public to be excluded should be extended to include protection of a complainant from distress or embarrassment.*

Should details of the proceedings be published?

Paras 84–88

Even though complainants are not identified, publication of the details of offences may distress them. However, it is important for the community to be informed about the reality of sexual offences, and it would

be very difficult to devise guidelines to prohibit an objectionable manner of reporting.

*Recommendation 17:*
*Control of publication of details of proceedings should remain a matter for the discretion of the court.*

F. Protection for Complainants

Paras 89–91 The existing laws may be inadequate to protect a complainant from harassment by an accused or other people.

*Recommendation 18:*
*It should be an offence to harass a witness or other person concerned in any proceedings of a court.*

G. Rules of Evidence

Should the judge be entitled to give a corroboration warning?

Paras 100–104 The Court of Criminal Appeal has recently held that a judge should not warn a jury that the law regards complainants in sexual cases as an unreliable class of witness, and that it is therefore dangerous to convict without corroborating evidence. This judgement should be incorporated in a legislative statement to make the law as accessible as possible to the general community.

*Recommendation 19:*
*Section 62(3) of the Crimes Act 1958 should be amended to make it clear that the court may not give a warning which suggests that complainants in sexual cases are an unreliable class of witness.*

Should the recent complaint rule be abolished?

Paras 107–111 Under the recent complaint rule, the fact that a person complained shortly after an alleged sexual offence and the contents of the complaint are admissible as evidence, but only to buttress the complainant's credit as a witness, not as proof that the alleged facts occurred. There has been considerable controversy about whether the rule should be retained and the arguments for and against the rule are very strong. The Commission is evenly divided on the issue and its recommendation is made on the basis of the Chairperson's casting vote.

*Recommendation 20:*
*The rule of recent complaint should be retained.*

What is the relevance of 'late' complaints?

Paras 118–123 If a complainant has not complained about an alleged sexual offence at the first reasonable opportunity, the defence may cross-examine about the delay, and a judge may direct the jury to take the delay into account in evaluating the complainant's evidence. However, there may be good reasons for a delay, and the view that it indicates the likely falsity of the complaint has been discredited.

*Recommendation 21:*
*If the issue of late complaint is raised, the judge should be*

*required to warn the jury that there may be good reason for a delay in making a complaint.*

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

Paras 131–140

The law restricts the admission of evidence about the sexual history of complainants. There have been criticisms that the generality of the current criteria for excluding evidence allows in matter which should be excluded. However, more narrowly drawn, specific guidelines might unfairly encroach on the accused's capacity to legitimately defend against the allegations, and are unlikely to effectively exclude improper evidence being introduced. The admission of such evidence should be kept under review by requiring courts to provide written reasons for permitting its introduction.

*Recommendation 22:*

*(a) There should be no change to the existing law regarding the admissibility of sexual history evidence.*

*(b) Courts should be required to provide written reasons for allowing sexual history evidence to be admitted. A file of copies of the written reasons should be available for public study.*[2]

Should the sexual history restrictions apply to all sexual offences?

Para 142

Restrictions on the admission of sexual history evidence apply only in relation to cases involving charges of rape, attempted rape and assault with intent to rape. There is no proper basis for different rules in relation to other sexual offences.

*Recommendation 23:*
*The restrictions on cross-examination as to sexual history imposed by section 37A of the Evidence Act 1958 should be extended to other sexual offences.*

Who should present the prosecution case at preliminary examinations?

Paras 143–145

Because of the complex rules relating to sexual history evidence in relation to cases of rape, attempted rape and assault with intent to rape, the prosecution of those cases at preliminary examinations must be conducted by qualified legal practitioners. However, the extension of those rules to other sexual offences should not mean that qualified legal practitioners are also required in all cases. It is unlikely that sexual history evidence will be relevant unless sexual penetration is involved in the offence, such as a section 54 offence. The presence of qualified legal practitioners at many indecent assault cases will be unnecessary.

*Recommendation 24:*
*The prosecution at the preliminary examination of an offence against section 54 of the Crimes Act 1958 should be conducted by a qualified legal practitioner.*

2. Dissent, see para 41.

# 1. INTRODUCTION

1 On 21 October 1985, the Attorney-General, the Hon J.H. Kennan MLC, 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 The Commission is dealing with the reference in four parts:

*the substantive law relating to sexual offences:* a report on this part, entitled *Rape and Allied Offences: Substantive Aspects*, was released in September 1987;[1]

*procedure and evidence in the prosecution of sexual offences:* this is the subject of this report;

*sexual offences against victims with impaired mental functioning:* a discussion paper on this subject was released in January 1988;[2] and

*sexual offences against children*: a discussion paper on this subject was released in March 1988.

3 In March 1987 the Commission published a discussion paper entitled *Rape and Allied Offences: Procedure and Evidence*, which outlined the present law, examined the need for change and made tentative proposals for reform. Comments and submissions were received from a range of individuals and groups, and have been of considerable assistance to the Commission in preparing this report.

## Structure and Scope of the Report

4 The scope of this report is restricted mainly to the offences of rape and indecent assault, and offences against section 54 of the Crimes Act (procuring sexual penetration by threats, intimidation or fraud). Offences against sections 55 and 56 of the Crimes Act have not been examined, as the Commission has already recommended that they be repealed.[3] Sexual offences against people with impaired mental functioning and children, and procedure and evidence in relation

1. Law Reform Commission of Victoria, Report No. 7, *Rape and Allied Offences: Substantive Aspects*, 1987.
2. Law Reform Commission of Victoria, *Discussion Paper No. 9, Rape and Allied Offences: Victims with Impaired Mental Functioning*, 1988.
3. *Report No. 7*, paras 86–87.

to these offences, will be examined in the separate reports dealing with offences against members of those groups.

5 The next section of the report outlines the main considerations which the Commission believes should underlie reform of the law relating to sexual offences. It also identifies a number of areas of concern in relation to the criminal justice system in which action other than changes in the law is appropriate. The following section deals with procedural matters: preliminary examinations, time-limits, composition of juries and publicity. The final section covers certain aspects of the law of evidence in its application to trials for sexual offences: corroboration, the rules relating to recent and late complaints, and admission of sexual history evidence. Appended to the report is draft legislation which incorporates the recommendations of this report and the Commission's report on the substantive law relating to sexual offences. The legislation was prepared with the assistance of Mr John Finemore, Q.C.

# 2. REFORM CONSIDERATIONS

6 In its report, *Rape and Allied Offences: Substantive Aspects*,[1] the Commission set out a number of considerations which are relevant to reform of the law relating to sexual offences. 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 need to clarify and simplify the law in order to improve the efficiency of the administration of justice:

> Clarity and simplicity in the law lower the risk of injustice. Moreover, they lead to greater efficiency and reduce the cost of running the criminal justice system. Cases can come to trial more quickly and take less time to try, which may result in less trauma for the victims.[2]

7 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 social reality of sexual assault must be borne in mind. Women are the victims in the vast majority of cases. During the 1960's and 1970's women's groups were at the forefront of sexual law reform movements on a world-wide scale. The fact that so many changes were made to rape and other sexual offence laws is in large measure directly attributable to the efforts of women. Despite these changes, women's groups are still concerned about the state of sexual offence laws. They are concerned that the reporting rates of these offences are low, that too few alleged offenders are charged, tried and convicted, and that victims are often humiliated by the trial process and frequently feel that they, rather than the accused, are on trial. They are keen that guilty plea rates be increased so that victims are spared the ordeal of giving evidence and being cross-examined. No law reform project dealing with sexual offences can proceed without specific and special recognition being given to the interests of women and without placing their concerns high on the agenda of items to be considered.[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,

1. Law Reform Commission of Victoria, Report No. 7, 1987.
2. Page 8.
3. Page 8.

including the presumption of innocence and the traditional burden and standard of proof.

8 The considerations in the preceding paragraphs are as relevant to the procedural and evidentiary matters considered in this report as they are to the substantive law. 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 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'. 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. In the words of one submission:

> It is generally acknowledged that the trauma experienced by complainants in the lead up to trials and during the proceedings is so extreme that it is arguably worse than the sexual assault itself.[4]

9 A number of submissions received by the Commission in the course of this review referred to commonly held views in the community which did not accord with the experiences of victims. There is an increasing amount of research into sexual assault. One study, in particular, strongly supports what victims, their associates and interest groups have claimed for a considerable time. A South Australian Police Department report on rape[5] demonstrates the falsity of a number of 'common concepts' including:

- 'the man who rapes is a stranger'
- 'rape is a dark alley, outdoor crime'
- 'the victim is subdued by brutality'
- 'group rape involves less violence'
- 'it is the irresistibility of the victim which provokes the rape'
- 'rape is a hasty non-verbal event'
- 'female hitchhikers are the most likely victims'
- 'only strangers molest children'
- 'rape is a hot season crime'.

The report shows that another frequently held view, that many people falsely report rape, is incorrect by the finding that only 15 or 1.4% of the total of 1096 reports were found not to be substantiated. The most common reason for a prosecution not proceeding, other than because the case was unsolved or a known offender had not yet been apprehended, was that the victim refused to participate in prosecution. This provides additional strong support for changes to aspects of criminal proceedings which are unnecessarily stressful for complainants.

10 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,

4. Women's Information and Referral Exchange.
5. Rape: *A Four Year Study of Victims*, 1986.

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 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.

## Non-Legal Issues

11 The Commission's terms of reference required it to review the law. It is clear, however, that there is a range of other matters which are of great relevance to the experiences, good and bad, which people have in relation to the way in which sexual cases are handled by the legal system. The major ones drawn to our attention relate to the need for greater education of people in the legal system about sexual offences and the impact of the way in which cases are prosecuted; police procedures in dealing with sexual cases; courthouse arrangements; and the desirability of monitoring criminal justice procedures.

12 *Education.* A recurring theme in written and oral submissions is that many people involved in the legal process have inadequate understanding of the background of sexual offences, and of the impact on the victims of the offences and the way in which they are prosecuted. The consequence is a lack of sympathy or sensitivity to the situation of complainants, and therefore while procedural and evidentiary rules may be well drafted, the manner in which cases are handled causes injustice and unnecessary distress. For example:

> We believe that it is ineffectual to address the laws pertaining to sexual offences without also looking at the legal steps that lead up to the court . . . We would like to see training programmes in place for solicitors, barristers, and particularly judges. Also a provision made for subjects that deal with crime against women within law courses. The purpose for this is to provide discussion and information that challenges the myths that are widely believed about sexual offences. We believe education at all levels to deal with this subject is essential; not only as a preventative measure, but also in order to provide justice for victims of sexual assault.[6]

Comments of this kind have been made elsewhere about other legal systems in Australia.[7] The Commission believes that the Australian Institute of Judicial Administration has a key role to play in addressing those concerns.

*Recommendation 1:*

- *The Australian Institute of Judicial Administration should develop educational programs for judicial officers on issues in sexual assault cases, in particular the admission of sexual history evidence, the reasons why victims may not complain immediately and the closure of courts during the complainant's testimony.*

6. Peninsula Women's Refuge Group.

7. See for example NSW Government Violence Against Women and Children Law Reform Task Force, *Consultation Paper*, Sydney, 1987, 37–40.

13 *Police procedures.* A number of submissions called for a review of police procedures in handling sexual cases. For example:

> Although it is not the specific brief of the reference, it is impossible to separate police procedures from the law relating to sexual offences. The process of investigation is vital to procedures and further examination of the police role is needed, including attention to Standing Orders.[8]

The Commission agrees with the suggestion made to it that police should assist complainants by informing them of the outcome of each stage of proceedings. However, the calls for a review were usually in general terms rather than about specific issues. The Commission has also been advised that the Police Complaints Authority has received a number of complaints about the manner in which police have responded to complaints about sexual offences. The Victoria Police have made significant changes to bring about greater sensitivity to the needs of complainants. The Commission believes that a review would be of value in assessing the effectiveness of these changes, and indicating additional appropriate measures.

*Recommendation 2:*

- *The Victoria Police should conduct a review of its procedures for handling sexual offences.*

14 *Court building arrangements.* Several submissions referred to the accommodation in some court buildings which does not allow for the separation of persons involved in the proceedings. Problems arise whether or not there is deliberate harassment. In the words of one submission:

> It would greatly reduce trauma for the complainant if she were not forced to wait outside courtrooms in the company of the accused and his supporters.[9]

Similar views were given to the Legal and Constitutional Committee in its recent review of support services for victims of crime. The Committee subsequently recommended that the larger court complexes 'should contain separate waiting and toilet facilities for victim witnesses and their families', and that 'arrangements should be made to ensure that victims and Crown witnesses are protected from unnecessary contact with the accused and defence witnesses during the course of criminal proceedings'.[10] The Commission agrees.

*Recommendation 3:*

- *The Secretary to the Attorney-General's Department should:*

  *(a) review the accommodation in existing court buildings to assess the feasibility of providing separate facilities for complainants and defendants; and*

  *(b) ensure that new court buildings have separate facilities for complainants and defendants.*

8. Rape Study Committee.
9. Women's Information and Referral Exchange.
10. Legal and Constitutional Committee (Victorian Parliament) *A report to Parliament upon Support Services for Victims of Crime*, 1987, Recommendation 52.

15 *Monitoring the effectiveness of procedural and evidentiary provisions.* A number of submissions spoke of the need to monitor procedural and evidentiary provisions, such as how frequently requests for sexual history of complainants are admitted, and how often they are granted. Monitoring is seen as essential if those involved with the administration of justice, and the community at large, are to be able to assess the effectiveness of the rules. For example:

> The Discussion Paper (on procedure and evidence) notes the difficulty in establishing current practice in relation to many aspects of rape trials. It seems impossible to provide adequate proposals for reform in the absence of such information. Given the delicate nature of this matter perhaps consideration should be given to a closer examination of these issues by accurate documentation of current practice . . . Attention needs to be given to the lack of current statistical data which details the Victorian court experience. Such information may serve to quash currently held myths held by decision makers.[11]

16 The Commission has been very conscious of the lack of data on key issues in the present review. In contrast, a recent review of sexual offences in New South Wales was greatly assisted by the existence in that State of a Bureau of Crime Statistics and Research, which has monitored the effectiveness of the relevant legislation.[12] The establishment of a similar body in Victoria has been proposed.[13] An agency of this kind would be of considerable value in monitoring the operations of the criminal justice system and the effectiveness of reforms.

*Recommendation 4:*

- *The Attorney-General's Department should investigate the possibility of establishing a Bureau of Crime Statistics and Research.*

11. Victorian Government Women's Policy Co-Ordination Unit.
12. NSW Government Violence Against Women and Children Law Reform Task Force, *Consultation Paper*, Sydney, 1987, 37–40.
13. Various speakers at seminar 'Should Victoria Have a Bureau of Crime Statistics and Research?' held on 1 December 1987, Melbourne, sponsored by Victorian Law Reform Commission and Australian Institute of Criminology.

# 3. PROCEDURE

## Preliminary Examinations

17 A jury trial of a criminal offence is normally preceded by a preliminary examination, commonly referred to as a committal hearing. This takes place in a Magistrates Court. The preliminary examination is intended to have an important testing function. The prosecution can be brought to an end if the evidence is not of sufficient weight to support a conviction for any indictable offence.[1] This means that neither the complainant nor the accused are subjected to the stressful trial process unless the prosecution can demonstrate there is a high probability of conviction.

18 Until 1972, the preliminary examination involved prosecution witnesses being called to give oral evidence, then being cross-examined, and if necessary, re-examined on that evidence. In 1972, the 'hand-up brief' system was introduced as an alternative to that procedure. Under this system, the prosecution is not required to call witnesses but may tender their sworn statements instead. The accused may call on any prosecution witness to give oral evidence and to be cross-examined upon it.

19 In 1976, the Law Reform Commissioner examined these procedures 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
- there should be restrictions on who could be present in the Court while the complainant gives evidence
- there should be a time-limit within which a preliminary examination must commence after an accused has been charged
- hearings 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 are contained in section 47A of the Magistrates (Summary Proceedings) Act 1975. The procedures are confined to rape, attempted rape and assault with intent to rape. The

1. Section 56(1)(a) Magistrates (Summary Proceedings) Act 1975.

Government also acted on the Commissioner's recommendations that restrictions should be placed on cross-examining complainants about their sexual history. These apply to trials as well as to preliminary examinations, and are also limited to rape, attempted rape and assault with intent to rape.[2]

20 The procedures applicable to all hearings have recently been re-examined by the Coldrey Committee.[3] 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'.[4] These recommendations have been accepted by the Government and enacted in the Crimes (Proceedings) Act 1986.

21 The amendments made by the Crimes (Proceedings) Act 1986 have also modified the hand-up brief provisions to require extensive disclosure. They require the service upon the accused of the following information:

- a list of the people 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
- 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.[5]

22 Whether preliminary examinations are essential or even useful has become a matter of debate. The arguments for and against preliminary examinations were reviewed by the Coldrey Committee. It unanimously concluded that they should be retained as 'a vital cog in the machinery of the criminal law'.[6] Strong support for preliminary examinations was also given by Justices of the High Court in *Barton*:

> It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the

2. Contained in section 37A, Evidence Act 1958.
3. *Report of Advisory Committee on Committal Proceedings* (Mr John Coldrey Q.C., Chairman) Victorian Government Printer, Melbourne, 1986.
4. Page 23.
5. s.45(1) Magistrates (Summary Proceedings) Act 1973.
6. *Report of Advisory Committee on Committal Proceedings*, (i).

> accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.[7]

However, in the particular context of the procedures applicable in sexual cases, the case for abolition of preliminary examinations has also been strongly put:

> The various alterations to the law relating to committal hearings in both sexual and non-sexual cases have produced such practical changes that the original purpose of the procedure is no longer the objective. I query whether the procedure is of any use now and would favour its abolition in all cases.[8]

*Should preliminary examinations of sexual offence cases be abolished?*

23 Testifying about sexual behaviour, because it is predominantly a private matter, is often more stressful than testifying in relation to many other offences. This fact is recognised by the special rules for certain sexual cases. Abolition of preliminary examinations might 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 was sufficient for a case to go to trial.

24 In the discussion paper on procedure and evidence, the Commission suggested that preliminary examinations should be retained. The scrutiny of cases by prosecutors and by the Office of the Director of Public Prosecutions was not thought to be an adequate substitute for impartial assessment by a magistrate. Submissions to the Commission generally agreed that preliminary examinations should be retained. Some argued that evaluation of the evidence presented at the examination enables counsel to advise a person committed for trial how to plead and pointed to the possibility that abolition of the preliminary examination would reduce the rate of guilty pleas. This would, in turn, increase the number of cases in which victims would have to testify. If this were the effect of abolition, the stress on victims could be greater than is presently the case.

25 The Commission's view is that the question whether preliminary examinations should be abolished in sexual offence cases would be best addressed within a general consideration of whether preliminary examinations should be retained or abolished. That issue is well outside the scope of the present review. The special rules applying to certain sexual cases, and the recent reforms to procedures in all cases, should significantly ease the impact of preliminary examination on complainants. On balance, the Commission does not favour the abolition of preliminary examinations in sexual cases.

*Recommendation 5:*

- *Preliminary examinations should be retained in sexual offence cases.*

*Should the hand-up brief procedure rule be extended to other sexual offences?*

26 The hand-up brief procedure rule limits the risk of rape case complainants being unnecessarily subjected to court-room questioning. The Coldrey Committee urged that the procedure should be used 'wherever possible' and welcomed its

7. (1980) 147 CLR 75, 100 (Gibbs ACJ and Mason J).
8. His Honour, Judge P. Mullaly — Submission.

increasing use: 'any factor unnecessarily impeding this trend should be removed.'[9]

27 The Commission believes that the hand-up brief procedure should be required not only in cases of rape, but in cases involving offences against section 54 of the Crimes Act. These share with the offence of rape the key criterion of seriousness, the fact that sexual penetration is involved.

28 However, the procedure should not be required in cases of indecent assault. Unlike section 54 offences, a charge of indecent assault can be, and generally is, heard summarily, that is, by a Magistrates Court, without a preliminary examination.[10] The complainant therefore has to appear in court only once if the case is contested, and not at all if the accused pleads guilty. The prosecutors therefore do not prepare hand-up briefs in indecent assault cases. To be required to do so 'would obviously cause unnecessary preparation and paperwork duties.'[11]

*Recommendation 6:*

- *The rule requiring informants in rape cases to adopt the hand-up brief procedure should be extended to cases involving offences against section 54 of the Crimes Act.*

*Should preliminary examination procedures be changed in other ways?*

29 In its discussion paper, the Commission examined a number of other possible changes to the procedures at preliminary examinations: allowing the complainant to give evidence in the absence of the accused; restricting cross-examination of complainants; and providing the accused with all statements made by the complainant to the police.

(i) *Giving evidence at preliminary examinations*

30 The presence of the accused may be a source of distress to the complainant. To minimise the risk of distress, the complainant might be permitted to give evidence in the absence of the accused. However, this would be a denial of the accused's basic right to be present in order to instruct his or her counsel, and personally to cross-examine the complainant. In the future, the use of closed-circuit television may enable this right to be preserved without the physical presence of the complainant and the accused being required. The Government is already testing a closed-circuit television communication link between courts and other premises, including Pentridge. A number of American States use similar facilities to enable child witnesses to be examined in the accused's absence, and legislation to enable this to happen in British courts is presently before the UK Parliament. The New South Wales Government has recently decided to adopt the procedure.[12]

31 Even in the absence of technological devices, steps can be taken to minimize the risk of unnecessary confrontation between the complainant and the accused. Careful positioning of the witness and the accused can substantially reduce the likelihood of stressful encounters.

9. *Report of Advisory Committee on Committal Proceedings*, 17.
10. This can be done on the application of the prosecutor or the accused, or by the court itself. The accused and the court must consent to the procedure.
11. Detective Sergeant P. Laidler - Submission.
12. Crimes (Personal and Family Violence) Amendment Bill 1987.

*Recommendation 7:*

- *In investigating the use of closed circuit television in the courts, the Secretary of the Attorney-General's Department should take account of the function it might perform in enabling of a complainant in a sexual case to testify without being in the accused's presence.*
- *In designing and redesigning courtrooms the Secretary of the Attorney-General's Department should bear in mind the need to minimise the risk of unnecessary confrontation between the complainant and the accused.*

(ii) *Restricting the right of cross-examination*

32 To assist complainants, the discussion paper proposed that changes might be made to the hand-up brief procedure along lines which have been adopted in South Australia. In that State, if the defendant requests that the complainant appear at the preliminary examination for the purpose of giving evidence, the complainant is only required to appear if the court is satisfied that there are special reasons why he or she should attend for the purpose of oral examination.[13] Legal practitioners in South Australia have advised the Commission that inconsistencies in police statements and identification issues are regarded as constituting special reasons for this purpose. Successful applications for complainants to appear are said to be infrequent.

33 The 'special reasons' provision was based upon a recommendation of the Mitchell Committee in 1975.[14] 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.[15]

The legislation did not implement the Committee's recommendation that discretion of the justice should be exercisable upon the application of the pros-

13. s2 Justices Act Amendment Act 1976 (SA).

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

15. Pages 43–44.

ecution as well as the defence. Only the defendant may request the attendance of the complainant to give evidence.

34 The South Australian legislation has been criticized. 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.[16]

35 It has also been suggested that dispensing with the evidence of complainants at the preliminary examination stage may have led to a reduction in the number of guilty pleas at that stage.[17] Without being able to test the complainant's case by cross-examination, defence counsel find it difficult to advise on pleading guilty or not guilty.

36 Enquiries concerning the impact of the changes in South Australia did not produce evidence one way or another as to a diminution in the guilty plea rate. However, some practitioners, who act for both prosecution and defence, were critical of the procedure. They believed that it weakened preliminary examinations as a test of the strength of evidence, resulting in an increase in the rate of nolle prosequi decisions (the decision by prosecuting authorities not to require a person to stand trial even though there has been committal for trial). This means that some defendants and complainants have the stress of going through the preliminary stages of the judicial process without reaching a decisive outcome, which conviction or acquittal at a trial represents.

37 The Commission's proposal that the South Australian approach be adopted in Victoria drew mixed reactions. One consultant to the Commission commented:

> I agree that the South Australian approach would go a long way to overcoming the problem of the victim having to give evidence more than once. [This problem is in my view a major one and sets sexual offences apart from other crimes because I am convinced it causes some people not to report that they have been sexually attacked.][18]

16. *R v Byczko (No. 1)* (1977) 16 SASR 506, 521-522.

17. M. Goode — honorary consultant to the Commission — reporting views put by defence counsel in South Australia.

18. I. Heath, Prosecutor for the Queen — comments made as honorary consultant to the Commission.

38 Most submissions supported the approach as a reasonable means of minimising complainant's distress. Two submissions argued that the proposals did not go far enough, and that complainants should not be cross-examined at all. The requirement for 'special reasons', whether defined legislatively or by judges, was thought by the authors of one submission to constitute inadequate protection for women, as 'both legislation and the judiciary have in the past shown their anti-woman bias'.[19] The other submission suggested that 'while there may be some "special circumstances" to warrant cross-examination, we were unable to imagine what they might be'.[20]

39 Several submissions argued against any further restrictions on cross-examination of complainants. Cross-examination was seen as critical for the prosecution to assess the complainant's ability to cope at a trial, and for the defence to effectively test the strength of the evidence. It was also seen as of assistance in preparing some complainants for the trial:

> Many complainants have never had the experience of having to give evidence in a formal courtroom setting. It could be said that the committal hearing at least would give a complainant some idea of what to expect at the trial.[21]

40 The constraints upon cross-examination in relation to many sexual offences are already significant. The Commission has recommended that they be imposed in relation to other sexual offences as well.[22] Given these factors, as well as the recently introduced changes to preliminary examination procedures, and our concern about the impact of further restrictions upon the effectiveness of preliminary examinations, the Commission has decided not to recommend further changes to the rules at the present time.

*Recommendation 8:*

- *There should be no change to the rules governing cross-examination of complainants at preliminary examinations in relation to sexual offences.*

Dissent:

41 Dr Hancock dissents from this recommendation on the following grounds:

> As a general rule committal hearings should proceed by way of the hand-up brief procedure with no cross-examination of the complainant-victim. Only where it is necessary (in the interests of justice to the accused or at the request of the complainant) should the complainant be subject to cross-examination. As recommended by the Mitchell Committee in South Australia, 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 the circumstances which constitute 'special reasons' such as inconsistencies in police statements and identification issues.
>
> Rape is largely an unreported crime. The law can address the prob-

19. Women Against Rape.
20. Women's Information and Referral Exchange.
21. G. Ching, Rape Committal Section, Office of the Director of Public Prosecutions.
22. Recommendation 23, para 142.

lem area of victims' reluctance to report sexual offences by adopting practices that minimize stress to the victim.

Applications for cross-examination of complainants at committal hearings should be monitored, noting for example any increase or decrease in guilty pleas at the committal stage, whether such applications are made by the defence or the prosecution and the circumstances which constitute special reasons.

(iii) *Complainants' statements*

42 The discussion paper proposed that the accused's interests should be protected by requiring discovery before the preliminary examination of all statements made by the complainant to the police. This proposal was made as a measure to complement the proposed introduction of South Australian-style restrictions on cross-examination. The latter proposal has been abandoned by the Commission. However, the former one should be considered on its own merits, as a matter of fairness to the accused.

43 A submission by Women Against Rape argued that the proposal should not be adopted:

> Statements made by the complainant will have been at a time of stress and there may therefore be some inconsistencies which will prejudice her case and which may lead to extensive cross-examination at trial — proving a traumatic experience for the complainant. . . . The case should rest on one statement and to request more is to imply that the statement is false.

44 However, it seems that if more than one statement has been made they are already provided to the accused. A submission from Detective Sergeant Laidler of the Victoria Police advised that normally only one statement is taken from a victim, but that 'if there are further statements obtained then they should also be tendered'. Gary Ching of the Rape Committal Section, Office of the Director of Public Prosecutions, advised in his submission that it is the practice of that section to provide the accused with all statements made by the complainant.

45 Even if disclosure is not made, the existence of additional statements may be revealed in cross-examination. The statements may then have to be produced immediately if they are in court, or, if they are elsewhere, a court may order them to be provided to the defence.[23] In either case all that will have been achieved by not disclosing additional statements by the complainant is interruption and delay of the proceedings. It is now widely held that suppression of the existence of clearly relevant witness' statements is inconsistent with the proper role of the prosecution, and, if it takes place during a trial, may be a basis for appeal:

> There is no rule of law requiring the Crown to produce to the defence all statements made by all witnesses to be called by the Crown, but if the interests of justice so require, the Crown will of course produce any particular statement. Where it is shown in any case that the interests of justice require that a statement should be produced to the defence, the court may order its production. Failure to produce such a statement may result in the conviction being quashed by the Court of Appeal . . . If the Crown witness departs

23. Sections 11 and 36 Evidence Act 1958. See also *A.G. (NSW) v Findlay* 50 ALJR, 637.

> materially from his statement, the trial prosecutor is obliged to inform the accused's counsel of that fact and show him the witness' earlier inconsistent statement. It is clearly in the interests of justice that such a witness should be subjected to cross-examination on the earlier statement.[24]

Inconsistency between statements made by a complainant does not necessarily point to unreliability. Nonetheless, it is undoubtedly a legitimate matter for cross-examination.

*Recommendation 9:*

- *The accused should be entitled to be given a copy of all statements made by the complainant to the police.*

Time-limits

46 Following recommendations made by the Law Reform Commissioner, a special set of time-limits were introduced in 1976 in relation to the pretrial process in cases of rape, attempted rape and assault with intent to rape. 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.[25]

47 Section 47A of the Magistrates (Summary Proceedings) Act 1975 provides that the preliminary examination must commence within three months of the accused being charged. The time-limit may be extended by the magistrate. Section 359A of the Crimes Act provides that the trial must be commenced within three months of the committal, or within such longer period as a Supreme Court judge may order.

48 The question whether special time-limits should be imposed in relation to sexual offences requires a choice to be made about competing interests. The major argument against giving priority to sexual cases is that it lengthens the delay in non-sexual cases. The stress suffered by some victims of sexual assault may be less, or no more, than that suffered by some victims of serious non-sexual offences. Justice requires the prompt determination of charges of non-sexual offences as well as sexual ones, particularly in cases where the accused is remanded in custody pending trial.

49 However, there are a number of factors which support the giving of priority to the determination of sexual cases. One is that relatively speedy adjudication of cases would encourage more offences to be reported, as there is a strongly held view that sexual offences are considerably underreported, in part because of the lengthy delays in cases being heard. A further consideration is that while giving evidence in non-sexual cases may be difficult and unpleasant, the difficulty and unpleasantness are likely to be much greater in sexual cases. To overcome the

24. R.M. Read, *Preparation of Criminal Trials in Victoria*, Director of Public Prosecutions (Victoria), Melbourne, 1984, 22–23.

25. Law Reform Commissioner, Report No. 5, *Rape Prosecutions*, Melbourne, 1976, 36.

effects of being a victim of a non-sexual offence may be difficult; to overcome the effects of being a victim of a sexual offence is often far greater. In the words of one submission:

> In my view there is only one (albeit extremely powerful) reason for imposing time limits in relation to sexual offences and that relates to the psychological effect that such an offence has on a complainant. Most healthy human minds have the ability to follow a natural process of blocking out and reducing the memory of unpleasant experiences. Whilst most victims of violent crime who have healthy minds are subject to this process, in my experience it is more acute in rape cases presumably because the effect of the crime is so horrendous that the process is accelerated. The result is that the longer the period of time which elapses between a victim suffering the attack and having to give evidence about it, either at committal or at trial or both, the more difficult it is for the victim to have her mind refreshed by the statements that she made at the time of the offence. In these circumstances it is extremely important that the time limits be imposed strictly so that the victim can get on with giving a well remembered version of events in evidence and then commence the natural healing process to her psyche as soon as possible after all legal processes have been determined.[26]

50 The special nature of sexual cases clearly warrants continuing to give priority for the most serious offences, and these are properly identified in the present legislation as rape, attempted rape and assault with intent to rape. This view was generally supported in the course of consultation on the discussion paper. Submissions differed, however, on the question of whether the time-limits should apply to other sexual offences. In the discussion paper, the Commission tentatively proposed that the special time-limits should be extended to all other sexual offences. The reason was that sexual cases should be treated alike. The Commission acknowledged that the Office of the Director of Public Prosecutions might have difficulty in coping with an extension of the cases to which the special time-limits apply, particularly in light of recent legislation requiring that hand-up briefs be served 28 days prior to the committal hearing, rather than the present 14 days.[27]

51 Most submissions supported this proposal. The points made in support included the following:

- as in the case of the more serious sexual offences, long delays in proceedings discourage victims from reporting crimes;
- while they are relatively less serious than rape, offences such as indecent assault may nonetheless be extremely distressing for victims. Consequently, the same rules should apply to all offences.

52 However, strong arguments were also put against the proposal, largely because it would result in priority being given to less serious cases in place of more serious ones. Indecent assault includes many acts of a less serious kind. These should not get priority over offences such as inflicting grievous bodily harm or attempted murder.

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26. P.A. Willee.
27. Section 45A of the Magistrates (Summary Proceedings) Act 1975 as amended by the Crimes (Proceedings) Act 1986.

53 The Commission's concern about the consequences of extending the application of special time-limits was reinforced by a submission from the Office of the Director of Public Prosecutions:

> Presently the Criminal Trial Listing Directorate has difficulties in listing all rape matters prior to the expiration of the 3 months time limit. If more matters . . . are subject to such time limits this would inevitably result in non-sexual offences suffering even greater delays than at present. Accordingly whilst in principle I agree that the time limits and special rules ought to apply to other sexual offences in practice I envisage that the present resources available to the police force, the Director of Public Prosecutions and the court system would lead to an untenable and intolerable delay for nonsexual cases awaiting trial.[28]

54 A number of submissions supporting the extension of time-limits also indicated awareness that the effectiveness of an extension would depend on the allocation of resources. As the Women's Legal Resources Group submission put it, 'we are concerned that if the time limits are not realistic, cases may be inadequately prepared by the prosecution'. The consequences of that would be either badly presented cases, or requests for adjournments to allow the prosecution to prepare cases properly, both of which would be distressing for the complainants.

55 The Commission believes that a fair balance would be struck between the competing interests if the special time-limits were extended to offences against section 54, but not to indecent assault. Although there are few prosecutions against section 54, the offence involves penetrative conduct. The fact that penetrative conduct is regarded more seriously than non-penetrative conduct was affirmed in the Commission's first report on the reference. This should be reflected in the law. The Commission recommended the extension of the crime of rape to cover certain types of penetrative conduct now covered by indecent assault. If that recommendation is accepted, indecent assault will, in practice, be restricted to less serious sexual assaults. These should not have priority.

*Recommendation 10:*

- *The present pre-committal and pre-trial time limits for rape should be extended to offences against section 54 of the Crimes Act, but not to indecent assault.*

*When does the time-limit commence?*

56 A preliminary examination may not be commenced if three months have elapsed after the accused person has been charged.[29] Difficulty has arisen over what it means to say that a person 'has been charged'. In Campagnolo v Attrill, Mr Justice O'Bryan 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'

28. G. Ching, Rape Committal Section, Office of the Director of Public Prosecutions.

29. Rules 8 and 9, section 47A Magistrates (Summary Proceedings) Act 1975. Rule 10 enables a magistrate to extend the period if special circumstances exist.

> 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.[30]

However, in R v His Honour Judge Dixon Ex parte Glanville, Mr Justice Southwell took a different view, favoring the interpretation 'that the applicant was charged when the information was laid and sworn and the summons issued.' At a later point he stated:

> 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.[31]

The conflict of views needs to be resolved.

57 The discussion paper suggested the simplest approach would be for time to run from the laying of the information, that is, when the information is placed before a court or justice of the peace and sworn by the informant. It noted that there is no requirement on the police to lay an information within a particular period of time. The first court appearance of an accused may therefore be a considerable period of time after the police decision to prosecute. The discussion paper suggested that there was a need to consider whether it would be practicable and appropriate to impose a time-limit for laying an information.

58 Only two submissions addressed this point. The Women's Legal Resources Group bluntly opposed it. The Law Institute proposed that the information:

> be laid within three months of the date of the alleged offence or within three months of the date of the alleged offences being first reported to the police. This should apply unless a Court grants an extension of that time and from there time with respect to pre-committal and pre-trial time limits should run from the date when the information is laid.

59 This proposal would certainly put considerable pressure on the police and the Office of the Director of Public Prosecutions to act quickly. However the Commission has reservations about its practical consequences. If time commenced to run from the date of an alleged offence, that would require numerous applications for an extension of time, as many victims delay in complaining about sexual offences and, regardless of how promptly a complaint is made, it may take considerable time to apprehend the offender. Even if time commenced to run from the date an offence is first reported to the police, there would still be many cases in which an application would have to be made.

60 Time should commence to run from a point which can be readily identified and which gives reasonable certainty the matter will be able to proceed. It should therefore be at a point sufficiently advanced not to hamper police and prosecution preparation and which is known to all including the accused. The laying of an information is a clearly identified stage when the police have gathered sufficient information to commence formally the judicial process against an

30. (1982) VR 892, 900.

31. Victorian Supreme Court, unreported 28 September 1983.

accused. However the person accused may not have been located by that time, and may therefore not be aware of the charge. The time-limit may expire before the person is brought before a court for the first time, and an extension would have to be sought. The Commission therefore sees merit in defining time as beginning to run when the accused has been located and has formally been made aware that prosecution of the offence has been, or is about to be commenced. This point of time can be clearly identified by reference to certain formal procedures.

- When the police bail a person against whom they intend to proceed, but before an information has been laid;
- When a justice or court receives an information, and determines that the accused person who is in custody should be bailed or remanded in custody;
- When an accused person who has not previously been bailed or remanded in custody in relation to the offence is arrested on a warrant, and then bailed or remanded in custody; or
- When an accused person who has not previously been bailed or remanded in custody in relation to the offence is served with a summons.

*Recommendation 11:*

*(a) Time-limits should not be imposed on the laying of informations.*

*(b) Time should commence to run when the accused has been charged by the police, and informed that prosecution proceedings have been, or are about to be, initiated.*

*Who may grant extensions?*

61 A magistrate has power to extend the time-limits within which a preliminary examination must be held.[32] Section 359A of the Crimes Act gives judges of the Supreme Court a power of extension in relation to the time-limit between committal for trial and the commencement of the trial. 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. The discussion paper proposed that a judge of the trial jurisdiction should have power to consider such an application. All submissions which commented on this proposal agreed with it.

*Recommendation 12:*

- *A judge of the court where the trial is to proceed should have power to extend the pre-trial period.*

Composition of Juries

62 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 entitled as of right to be excused from serving as jurors, including pregnant women and persons who are required to undertake the full-time care of

32. Rule 9 Section 47A Magistrates (Summary Proceedings) Act 1975.

children.[33] 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?*

63 The composition of juries in sexual cases has been frequently discussed by law reform bodies and committees of inquiry, and different conclusions have been reached.[34] In the discussion paper the Commission's tentative view was that as there is no evidence to suggest that the outcome of trials is affected by the gender composition of juries, it was not appropriate to make any proposal regarding the composition of juries in sexual cases. Consultation on the paper has strengthened this view. A number of submissions commented on the lack of evidence about the significance of gender composition of juries. Some saw that as sufficient reason not to change the present system, particularly in view of anecdotal accounts that female jurors of certain backgrounds are less sympathetic to complainants than male jurors of the same background. Others felt that the lack of evidence was not an adequate ground for failing to act on the issue:

> Regardless of whether we believe women or men to be more sympathetic to the complainant in rape cases, it is surely reasonable to aim for a jury which reflects the composition of our society.[35]

64 A major recurring concern in responses to the discussion paper was the belief that the outcomes in sexual offence cases are affected by the prevalence in the community of myths regarding rape and allied offences. There is no evidence that there is a disproportionate acceptance of these myths according to gender. The appropriate issue for attention is not jury gender composition but attitudes generally. In the view of one submission:

> It is irrelevant to speculate on how jurors think in rape cases and such speculation merely serves to distract attention from the need to reform the procedural and evidentiary aspects of rape cases.[36]

65 The Commission believes that a key means to secure change in procedural and evidentiary areas is to dispel myths and counter the influence of attitudes which prejudice the fair hearing of complainants. A number of recommendations in the report are directed to that aim.[37]

*Recommendation 13:*

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

Publicity and Privacy

66 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

33. Section 15A Schedule 4 Juries Act 1967.

34. See Law Reform Commission of Victoria, *Discussion Paper No. 5 Rape and Allied Offences: Procedure and Evidence*, paras 24–29.

35. Women's Information and Referral Exchange, submission.

36. Women Against Rape.

37. Recommendation 1 para 12; recommendation 21 para 123.

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:

> 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.[38]

67 The question whether the proceedings should be open raises five distinct issues:

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

*Should the complainant be entitled to anonymity?*

68 The anonymity of complainants in sexual cases is protected by the Judicial Proceedings Reports Act 1958, which places limits upon reports of court proceedings. In particular, section 4(1) prohibits the publication of the name of a person against whom a sexual offence is alleged to have been committed, or any details which might enable them to be identified.

69 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.[39]

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.

38. C. Boyle, *Sexual Assault*, Carswell, Toronto,1984, 167.

39. United Kingdom, *Helibron Report to the Advisory Group on the Law of Rape*, HMSO, London, 1975, 27.

> 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 . . .

70 In its discussion paper the Commission expressed agreement with these views. No submission disagreed with them. Indeed, a number of submissions pointed to gaps in the protection offered by the present legislation. One significant gap is that the Judicial Proceedings Reports Act refers only to proceedings in a court or before justices, and does not protect a complainant prior to legal proceedings being commenced. To be effective, protection should begin as soon as a complaint to the police is made. Another is that the prohibition does not apply to law reports or technical publications for the legal or medical professions. The Commission can see no justification for the name of a victim to be included in a report or technical publication. Reference to a victim could be limited to initials, and other identifying details could be removed, without depriving readers of any essential information.

71 There should be two exceptions to the prohibition. First, the right to anonymity is a right that should be able to be waived by the complainant. Second, a court should be able to order identification in exceptional circumstances — for example, if a complainant cannot give consent and identification is seen as essential to tracing the offender.

*Recommendation 14:*

- *The publication of any details likely to lead to the identification of a complainant, without the consent of the complainant or an order of a court, should be prohibited. The prohibition should apply from the time a complaint is made to the police and should apply to law reports and legal and medical publications as well as other publications.*

*Should the accused be entitled to anonymity?*

72 The anonymity of accused persons is not protected. The Heilbron Committee considered the possibility of preserving their anonymity before conviction in rape and other sexual cases. It recommended against it, arguing that 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. Nonetheless in 1976 the UK Government legislated to give anonymity to both complainants and accused persons. The provision has been criticised by the English Criminal Law Revision Committee in the following terms:

> 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.[40]

73 In its discussion paper, the Commission agreed with this criticism. It stated that the question of anonymity for the accused, particularly before the trial, is a difficult subject which is in need of detailed investigation. It concluded that the

40. Criminal Law Revision Committee, 15th Report *Sexual Offences*, HMSO, Cmnd. 9213, 1984, 28.

issue should be examined at large rather than in the context of sexual offences. Submissions generally agreed with the Commission's approach. The only circumstances in which the identity of the accused should not be disclosed is where this would enable identification of the victim — for example, in cases of incest, and of rape within marriage.

*Should preliminary examinations in sexual cases be closed to the public?*

74 Preliminary examinations are closed to the public while complainants in cases involving rape, attempted rape and assault with intent to rape give evidence. Rules 3 and 4 of section 47A of the Magistrates (Summary Proceedings) Act 1975 provide that the only people who may be present while the complainant is being examined, or the complainant's statement is being read, are the informant, the accused, the complainant, the prosecution and defence lawyers and their clerks, court officers and members of the police force connected with the proceedings. The magistrate may authorize other persons to be present, and must state the reasons relevant to the circumstances of the case why the authorization has been given.

75 The rules relating to preliminary examinations of other offences are less restrictive. Under section 43 of the Magistrates (Summary Proceedings) Act 1975, if it appears desirable to the magistrate, 'in the interests of justice or of public morality or of the reputation of a victim of an alleged sexual assault', the magistrate may exclude anyone except the people conducting the prosecution, the defendant, and the counsel and solicitor of the defendant. Therefore, there is currently no absolute discretion to hold the proceedings in private.

76 In the discussion paper the Commission suggested that the rules applying to rape and allied cases should be extended to preliminary examinations of all sexual offences. The Commission maintains that view. There seems no clear basis for excluding the public while evidence of a complainant is presented in a rape case, but allowing the public to be present if the charge is indecent assault or procuring penetration by fraud.

77 The rules need to be extended in another way. The rules relating to trials, but not those relating to preliminary examinations, recognise the desirability of the presence of a support person[41] for both the accused and witnesses. A magistrate or County Court judge may not make an order to:

> authorize the exclusion from the Court of the mother or any female friend of any prisoner or party to or witness actually being examined in such cause or matter . . .[42]

78 A similar rule should apply in relation to preliminary examinations. A number of submissions drew attention to the uncertainty surrounding the position of other persons wishing to offer support to a complainant by being present in court. Such a person may be authorized, but this requires an application to be made. Similarly, the presence of a supportive person for the defendant requires authorization. One submission cited an instance in which a sexual assault counsellor was ordered out of a preliminary examination, and commented that 'this has the effect of isolating the complainant from sources of emotional support and may

41. The person provides support by their presence, not by participation in the proceedings.

42. Section 47(3)(a) Magistrates Courts Act; section 81(2) County Court Act 1958.

affect the quality of her evidence'.[43] Comments were also made that complainants should be informed about their right to have a person present. The Commission agrees with these views.

*Recommendation 15:*

*(a) The restrictions on who may be present while the complainant gives evidence in preliminary examinations of rape and allied cases should apply equally in the case of other sexual offences.*

*(b) The complainant and the defendant should each be allowed to have present a person of their choice who is unconnected with the proceedings. The magistrate should inform the complainant and defendant of this right.*

*(c) Upon a request by the complainant or the defendant the magistrate should be entitled to authorize other people to remain present.*

*Should the public be excluded from trials in sexual cases?*

79 The power of courts to exclude people from preliminary examinations of sexual cases is considerable. There are no equivalent provisions for the exclusion of the public at the trial itself. There are powers of exclusion, but they make no distinction between sexual and other cases. Section 4 of the Magistrates Court Act 1971 permits a court to exclude persons under the age of 18 years, or any person or category of persons if desirable on the grounds of public decency or morality. No reference is made to the needs of the complainant. '[T]he mere fact that the parties or witnesses might be embarrassed by giving the evidence in public would not suffice.'[44] Section 81(1) of the County Court Act similarly provides that a court may exclude persons under the age of eighteen years at any time. Moreover, a court may order all or any category of persons to be excluded 'if it appears . . . on the grounds of public decency and morality'.

80 A trial is different from a preliminary examination. 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.[45]

81 In the discussion paper, the Commission suggested that the trial of sexual cases should continue to be in open court. It pointed out that there are means by which the distress of complainants could be alleviated without abandoning the principle that trials should be conducted in public. The major ones are the court's power to control proceedings before it and to exclude people from the hearing on

43. Eaglehawk and Long Gully Community Health Centre.

44. G. Nash, *Magistrates' Courts*, Vol I, The Law Book Company, 1975, para 134.

45. W. Young and M. Smith, *Rape Study Vol. 1 — A Discussion of Law and Practice*, Department of Justice and the Institute of Criminology, Wellington, 1983, 126.

the grounds of public decency or if it becomes necessary for the proper administration of justice.[46] However, some submissions argued for wider powers to close the court. One cited a recent case involving a 'particularly degrading and horrific rape'. It was well publicised in the media and attracted men working in the vicinity of the Court who came to listen to the complainant's evidence.

> This incident was brought to our attention by members of the Sexual Offences Squad who were present at the hearing and despite the victim's obvious discomfort and it being brought to the attention of the prosecutor nothing was done about the matter.[47]

82 Submissions differed as to whether the appropriate measures to avoid such incidents, and to assist complainants generally, should include closure of the court while the complainant gives evidence. Most submissions put the view that open courts should be favoured as a matter of principle, but that judges should exercise more frequently their discretion to exclude individuals or groups, such as school children or friends of the defendant, whose presence might cause particular difficulties for the complainant. For example:

> Whilst closed courts may be preferred there is some concern to preserve the processes of public justice. Thus, it may be preferable to suggest that judges automatically raise the question of whether the nature of proceedings are such that consideration should be given to court closure for whole or part of the trial. In any case, judges should be encouraged to more frequently exercise discretion regarding court closure and victims should be made aware of the judges' ability to exercise such discretion.[48]

83 The Commission agrees that unnecessary distress to the complainant should be avoided. However, it believes that the fundamental principle that criminal trials should be conducted in public should be maintained as far as possible. It considers that discretionary powers of exclusion provide an appropriate balance between individual and public interests. The guidelines for the exercise of those powers should be amended to include protection of the complainant from distress or embarrassment as a ground for exclusion of members of the public. That should make magistrates and judges more prepared to act in the situations which are a source of significant criticism. If a judge or magistrate wishes to close the court to the public, the complainant and defendant should each be able to have present a support person of their choice.

*Recommendation 16:*

*(a) The defendant and complainant should each be allowed to have present throughout the trial a person of their choice who is unconnected with the proceedings. The magistrate or judge should inform the defendant and complainant of this right.*

*(b) The exclusion of the public from trials of sexual offences should remain a matter for the discretion of the court.*

*(c) The grounds on which a magistrate or a judge may order members of the*

46. Section 48(1) Magistrates Courts Act 1971. Section 81 County Court Act 1958. These specific provisions complement the inherent power of the superior courts to exclude the public if it becomes necessary for the proper administration of justice: *Scott v Scott* (1913) A.C., 417.

47. Detective Sergeant Laidler.

48. Rape Study Committee.

*public to be excluded should be extended to include protection of a complainant from distress or embarrassment.*

*Should details of the proceedings be published?*

84 Section 3(1)(a) of the Judicial Proceedings Reports Act 1958 provides that it is an offence to publish:

> 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'.[49]

85 Four submissions commented specifically on the issue of publication of details of proceedings, each arguing that the present restrictions are inadequate, or at least inadequately enforced. Two argued that reporting details of rapes is unnecessary and caters to 'public morbidity',[50] or the public's desire for entertainment:

> Details of the rape that describe what happened in the crime should not be released to the press; there should be a ruling to prevent sensationalising sexual offences. The specifics of the crime often lead to reporting that twists the crime into an incident to thrill the wider community; again at the cost of the victim. . . . There seems no need for the public to know of specifics, especially when there is a chance that it may serve to encourage other men to commit similar crimes.[51]

86 Other submissions objected not to the publication of details but to the 'salacious'[52] or 'pornographic'[53] manner of reporting:

> (It) is important that reports of sexual offence trials are published. The public must be made aware that frequent acts of violence are perpetrated by men against women, that these acts are not socially acceptable, and that they carry penalties. However, sexual offence trials are often reported in a fashion that borders on the pornographic, with graphic descriptions designed to titillate rather than to disgust. We would like the Commission to exercise its educative function by suggesting some guidelines for the reporting of these cases.[54]

87 Whether or not the reporting is intended to titillate readers, complainants may be distressed by the publication of details of offences, even if the complainants are not identified. However, it is important for the community to be informed about the reality of sexual offences.

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49. 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.
50. Women Against Rape.
51. Peninsula Womens Refuge Group.
52. Women's Legal Resources Group.
53. Women's Information and Referral Exchange.
54. Women's Information and Referral Exchange.

88 The manner of some reporting may be objectionable and distressing, but it would be extremely difficult to devise and effectively impose suitable guidelines. A court would find it difficult to judge a report in terms of what effect the author intended it to have. Assessing a report in terms of the effects it had would be just as difficult, if not more so. On balance, the Commission believes that prohibiting the reporting of evidence is a matter which should remain within the discretion of the magistrate or judge.

*Recommendation 17:*

- *Control of publication of details of proceedings should remain a matter for the discretion of the court.*

Additional Measures to Protect Complainants

89 In the course of consultation, the Commission received a number of comments about the desirability of greater protection for complainants. Several submissions referred to the need for additional measures to protect complainants from actual and anticipated harassment. There are ways in which persons can be deterred from making contact with complainants. One is the power under the Bail Act to impose special conditions on bail undertakings of those charged with offences. Special conditions may be imposed if it is necessary to ensure that:

(b) an accused person does not not commit an offence whilst on bail

(c) an accused person does not endanger the safety or welfare of members of the public, or

. . .

(d) an accused person does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.[55]

90 The Commission has considered whether the Bail Act should contain mandatory non-contact conditions, at least in applications before justices of the peace. However, contact may be unavoidable in a case where the complainant and the accused are employed at the same place or live in the same vicinity. The Bail Act provides adequate powers for courts to impose conditions to protect complainants against those accused of committing offences against them. Both those considering bail applications, and the police themselves, should consider the desirability of non-contact conditions in sexual cases.

91 Another means of deterring harassment of complainants is prosecution for interference with a potential witness. In relation to both the Magistrates and County Courts it is an offence to wrongfully influence or attempt to influence any witness or any person concerned in any way with the proceedings of the court.[56] The offences relate to any person, not just the accused, who tries to influence a witness. Conduct which might interfere with a witness freely coming to give evidence may constitute contempt of court, and can be dealt with by the Supreme Court, even if it relates to a matter in the Magistrates or County Courts, and even if it takes place after the proceedings have concluded.[57] The law should clearly state that the community regards as unacceptable any conduct which is intended to cause distress to a complainant, even if it is not intended to influence, or interfere with, the giving of evidence.

55. Section 5(2) Bail Act 1977.

56. Section 46(3)(b) Magistrates Courts Act 1971.

57. *R v Wright* (No. 1) [1968] VR 164.

*Recommendation 18:*

- *It should be an offence to harass a witness or other person concerned in any proceedings of a court.*

92 Further protection is available for some complainants with the proclamation of the Crimes (Family Violence) Act 1987 on 1 December, 1987. This Act provides for intervention orders in cases of family violence. A court may make an intervention order if satisfied, on the balance of probabilities, that a person has assaulted, threatened to assault, harassed or molested a family member. A family member includes an unrelated person who is ordinarily a member of the household. An intervention order may contain any conditions thought desirable or necessary by the court. These may include restricting access to the person complaining or to the locality in which that person lives or works, and prohibiting the defendant from causing another person to engage in conduct restrained by the court. The procedure is designed to be speedy and effective while recognizing the rights of the person against whom an order may be made.

93 Information obtained from other States in which similar types of order have been introduced suggests that they have been reasonably effective.[58] It may provide a model for a more general system of protection for complainants who may be at risk of harassment by offenders or people associated with them.

58. Unpublished papers delivered by H. L'Orange and N. Seddon at the National Human Rights Congress, sponsored by the Human Rights and Equal Opportunity Commission, Sydney, 26 September 1987.

# 4. EVIDENCE

## Corroboration

94 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 has been abolished by section 62(3) of the Crimes Act, which 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, but nothing in this sub-section restricts the operation of any enactment requiring that the evidence of a witness be corroborated.

Corroboration is still required as a matter of law in cases of offences against Sections 51, 54, and 55 of the Crimes Act.[1]

95 The purpose of the corroboration warning rule was to protect those accused of sexual offences against the risk of unjust conviction. The rationale for its development was that sexual allegations are easy to make and difficult to refute. Implicit in the rule was the belief that allegations of sexual assault are peculiarly likely to be false.

96 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 requirement. 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

1. The corroboration requirement for section 51 offences is examined in the Commission's discussion paper on victims with impaired mental functioning. The Commission's Report, *Rape and Allied Offences: Substantive Aspects*, recommended repeal of the corroboration requirement for section 54, and total repeal of section 55.

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.[2]

In 1976, the Law Reform Commissioner recommended the retention of the corroboration rule on the same basis as the Mitchell Committee.[3]

97 By the early 1980s the rule was subject to considerable criticism 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. In the view of one commentator, 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'.[4] Critics of the rule argued that well established difficulties associated with reporting sexual offences and with 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, it is argued, 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.

98 Evidence from a 1983 New Zealand study indicated 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.[5] New Zealand police files did 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. A major South Australian police study of rape cases also found a very low rate of false complaints.[6]

99 The second ground for attacking the corroboration warning rule was that it may well prevent valid cases from proceeding to prosecution. 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.

*Should the judge be entitled to give a corroboration warning?*

100 Section 62(3) of the Crimes Act abolished the requirement that a corroboration

2. Criminal Law and Penal Methods Reform Committee of South Australia, Special Report: *Rape and Other Sexual Offences*, SAGPS, Adelaide, 1976, 45-46.
3. Law Reform Commissioner, Report No. 5 *Rape Prosecutions*, Melbourne, 1976, 34.
4. J. Temkin, 'Toward a Modern Law of Rape', (1982) 45 *Modern Law Review* 399, 417.
5. W. Young and M. Smith, *Rape Study Vol 1, A Discussion of Law and Practice*, Department of Justice and the Institute of Criminology, Wellington, 1983.
6. See Chapter 2, para 9.
7. 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.

warning must be given. However, it did not abolish the *right* of judges to give such a warning. Different approaches have been taken by the Supreme Court as to the nature and content of the warning in cases where the judge decides to give one. Some courts have stated that the warning should be in much the same terms as if section 62(3) had not been passed. Others have taken the view that the traditional form of warning is inconsistent with that section.[8]

101 In its discussion paper the Commission suggested that while judges should continue to have the right to comment on the reliability of specific evidence in particular cases, they should be prohibited from giving a traditional warning on the basis of the presumed general unreliability of the evidence of complainants in sexual cases. This type of corroboration warning was inconsistent with the philosophy behind the 1980 amendments. The Commission's view received strong support in a number of submissions.

102 Shortly after the release of the discussion paper a decision of the Court of Criminal Appeal clarified the law in a manner consistent with the Commission's approach. In *R v Williams*,[9] the court had to consider the following comments by the trial judge:

> You know that the law has a vast experience of trying sexual cases of all types, not just involving complaints of females against men, but also men against men, boys and girls against men, boys and girls against women, women against women. In these settings, it has been well known, and indeed demonstrated chapter and verse, that those making allegations may for an infinite variety of reasons and in certain cases for no ascertainable reason, invent or make serious allegations against innocent persons by alleging that, for instance, sexual contact of some form or other has taken place when it has not or alleging that they did not consent when, in fact, they did.
>
> History shows that there is a tendency for unfounded accusations of sexual assaults to be made by all ages of both sexes which, of course, are easy to make and difficult for the person named, the accused, to refute. I have no doubt you have heard it said, especially in a setting where the issue is consent or not, that a sexual crime is one of the easiest charges for one person to make against another and one of the most difficult for the person to refute.

103 In a joint judgment, Justices Murphy, Brooking and Hampel stated:

> Section 62(3) has done away with the rule that on the trial of a sexual offence the jury must be warned that it is dangerous to convict on the complainant's uncorroborated evidence.
>
> This has the result that the law no longer regards complainants in sexual cases as an unreliable class of witness, and it is wrong for a judge to convey to a jury that the law does so regard them.
>
> If the judge does raise with the jury the question whether they should look for evidence which supports or confirms that of the complainant, he should never do so in a way which tends to convey to them that he is directing them as to the law or giving them a

8. See, for example, *R v Kehagias* [1985] VR 107, and *R v Rosemeyer* [1985] VR 945.
9. Unreported, 28 May 1987.

> warning which the law in its wisdom has found to be desirable. For anything he may say about supporting or confirmatory evidence is by way of comment on the facts of the particular case, not by way of warning required by the law. That is not to say that such comments on the facts should not be made when a judge considers them appropriate in the particular case in the interests of justice. Such comments may be expressed in terms of an approach founded in common sense and human experience.

104 The judgment in *R v Williams* is to be welcomed. However, the Commission believes that a legislative statement incorporating the judgment is necessary, particularly in light of earlier differences of view in the Court over the nature and content of a warning, and on the principle that the law should be as accessible as possible to the general community.

*Recommendation 19:*

- *Section 62(3) of the Crimes Act should be amended to make it clear that the court shall not give a warning which suggests that complainants in sexual cases are an unreliable class of witness.*

'Recent Complaints' of Sexual Offences

105 It is a general principle of the law of evidence that a witness giving evidence in chief[10] may not be asked whether he or she formerly made a statement consistent with the testimony being given. At common law, an exception to this principle developed in relation to sexual offences. This is known as the recent complaint rule. Under this rule 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 to establish the consistency of the complainant's account of the incident. The complaint may not be used as evidence of the truth of the facts of which complaint was made. As explained by Chief Justice Barwick, the evidence has:

> 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.[11]

For a 'recent complaint' to be admissible, it must be made voluntarily at the first reasonable opportunity. It is for the court to determine whether these conditions have been satisfied.

106 In the Middle Ages, it was a defence to an allegation of rape that the woman had not raised the 'hue and cry',[12] because such behaviour was regarded as evidence that she had consented. 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 the fact 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

10. For the purposes of this report, 'evidence in chief' is the evidence by the complainant in response to questions put by the prosecution, prior to any cross-examination by the defence.
11. *Kilby v R* (1973) 129 CLR 460, 472.
12. *R v Osborne* (1905) 1 KB 551, 559.

> 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.[13]

*Should the recent complaint rule be abolished?*

107 In its discussion paper, the Commission proposed that the recent complaint rule should be abolished. It did so on two grounds. The first was the significant problem that arises from the fact that evidence of a complaint is limited to establishing consistency in the complainant's account, not proof of its truth. It is unrealistic to expect a jury, no matter how well directed, to use evidence for one 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.

108 The second ground was that the rule is based upon the assumption that a person who promptly reports a sexual offence is likely to be more trustworthy than a person who delays in making a complaint. This view was seen as discredited because, as one study put it:

> There are a variety of reasons for (the) large nonreporting 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 rapé victim. In cases where the victim knows the offender well for example, offences committed by a father, male 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.[14]

The case for retention of the rule

109 Submissions to the Commission were divided on the question whether the recent complaint rule should be abolished. One view was that the rule should be retained because it may be of advantage to the prosecution, particularly if there is no independent evidence to support the complaint.

> Whilst lack of evidence of recent complaint may not be an indication of the falsity of the complainant's evidence, there are many cases in my experience where the fact of the recent complaint is so inherently credible that what would otherwise be an almost impossible complaint to substantiate on the other available evidence is sheeted home because the complainant's credibility becomes unassailable. In these circumstances it is proper to retain the rule rather than dispense with it. There are clever rapists in our society who can and do subdue women by the application of force skillfully

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

14. W. Young and M. Smith, *Rape Study Vol. I, A Discussion of Law and Practice*, Department of Justice and the Institute of Criminology, Wellington, 1983, 39.

and without physical signs being apparent afterwards. This leaves the victim unable to understand how easily they have been subjugated let alone explain that to a jury.[15]

110 While aspects of the rule may be confusing to juries, some argue that the effect of abolishing the rule may be to mislead them. This is because the rule allows certain evidence to be admitted without which juries might have a false picture of the complainant's conduct. Such criticism of the impact of the abolition of the rule in 1976 led the South Australian Government in 1984 to reintroduce it. As the Attorney-General explained to Parliament:

> [T]he Chief Justice has recently expressed the view that the removal of the prosecution's right to lead evidence of a complaint made by the complainant immediately after the alleged crime was a mistake and should be reversed. He considers that the present law puts the prosecution at a considerable disadvantage and deprives the complainant of the right to tell the court that she complained as soon as she could after the incident. The question of whether and when a complaint was made springs naturally to the mind of a jury considering the credibility of an alleged victim and causes confusion in their minds to the detriment of the case for the prosecution.
>
> Prosecutors agree with the Chief justice. To be unable to show that, for example, a 16 year old girl who alleges she was raped by the side of a road complained of rape to a driver of a car who came to her assistance, leaves a large gap in the prosecution case.[16]

111 The view that juries would be misled by not hearing any evidence of a recent complaint has also been put by a member of the Victorian Bar Law Reform Committee:

> At best they would be left to wonder and at worst they would assume that there was no complaint from the complainant. This can only seriously and unfairly prejudice the complainant's credibility. This is a worse situation than one in which the question of complaint can be gone into fully although the jury is warned that it should only use the evidence of the recent complaint in determining what credibility it will place on the evidence of the complainant.[17]

It was suggested that the rule should be re-examined in the context of a broader review of the law of evidence, and that 'in the meantime, the least unsatisfactory option . . . is to leave the existing law as it stands'.

112 A broader review of the law of evidence has recently been completed by the Australian Law Reform Commission (ALRC). The review concluded that not only should the recent complaint rule be maintained, but that evidence of prior consistent statements should be able to used as evidence of the facts asserted in them.[18] Indeed, the recommendations of the review would allow the admission of evidence similar to recent complaints in all criminal trials.[19] The Victorian

15. P.A. Willee, submission.
16. The Hon C J Sumner, Legislative Council, South Australia, 12 September 1983, Hansard, 775.
17. T.H. Smith Q.C., comments to Bar Law Reform Committee on Law Reform Commission discussion paper.
18. The Law Reform Commission, Report No 26, Interim, *Evidence*, AGPS, Canberra, 1987, 693.
19. The Law Reform Commission, Report No. 38, *Evidence*, AGPS, Canberra, 1987, see generally chapter 10.

Law Reform Commission will shortly review the ALRC recommendations and report on whether they should be adopted in Victoria.

113 A further argument in favour of retention of the rule is that the defence is entitled to use the fact of a late complaint as a basis for querying the reliability of a complainant. The Commission's discussion paper proposed that this rule be retained. The submission from Women Against Rape argued that it was inconsistent and inequitable to deny a woman credit for prompt reporting, by abolishing the recent complaint rule, but to retain the rule allowing her credit to be impinged because of a delayed complaint. The same argument was put in the comments prepared for the Bar Law Reform Committee:

> The effect of the proposal (to abolish the recent complaint rule) will . . . be to significantly shift the balance in rape trials and shift it in favour of the accused. I am not aware of any need to do so in this way.[20]

The case for abolition of the rule

114 Some of the major arguments against the rule have been pointedly summarized in the following way:

> This rule has origins deep in the common law, and was said by Holmes J to be 'a perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape'. In its conditions of contemporaneity and spontaneity it is reminiscent of the res gestae exception to the hearsay rule. It constitutes an exception to the general rule that a witness's credit should not be bolstered by the party calling him, at least in advance of any attack. It is potentially prejudicial in putting before the jury a sometimes lurid account of the facts which the judge must then solemnly instruct the jury to be no evidence of them. It is illogical in supporting the witness's testimony without itself being evidence of the facts it asserts. It is anomalous in applying only to a small and bizarre assortment of offences in some of which sexual relationship is disputed, in others of which violence is disputed, in some of which absence of consent is a necessary ingredient, and to some of which it is irrelevant. It creates resentment in applying to admit previous consistent statements made by one party to the proceedings when no such concession is made to the other.[21]

115 Another important argument is that, while the rule may benefit some complainants, it also entrenches stereotyped expectations of the behaviour of rape victims. This prejudices victims who do not complain promptly. Moreover, retention of the rule is inconsistent with reforms such as the abolition of the corroboration warning rule, which are designed to counter ill-based assumptions about the credibility of women in sexual cases. The Women's Legal Resources Group submission for example, acknowledged the value of the rule in specific cases but supported its abolition because of 'the sexist origins of the rule which imply as does the corroboration warning that women are particularly unreliable witnesses.' One of the Commission's consultants commented:

20. T.H. Smith QC, comments to Bar Law Reform Committee on law reform discussion paper.
21. D. Byrne and J.D. Heydon, *Cross on Evidence*, Butterworths, Sydney, 1986, 413.

> [T]here should be no special provisions in these trials that distinguish them from any other category of criminal activity . . . [I]dentifying rape and allied offences as separate from other forms of criminal assault is a reflection of male attitudes which are of historic political significance and not appropriate in redefining the conduct of criminal trials in the 1980s.[22]

116 Finally, the value of the recent complaint rule to the prosecution is itself uncertain. If the rule were abolished, the relevant evidence could often be admitted on the basis of other rules. The doctrine of res gestae permits a statement made by the complainant to be admitted if it is 'contemporaneous' with the alleged offence. There is no precise guideline for what constitutes adequate proximity between the statement and the relevant events, although it is clearly more restricted in time than the 'first reasonable opportunity' condition for admission of a recent complaint. As well, if it is suggested in cross-examination that the complainant's allegations are a recent invention, evidence of a previous consistent statement may be led to rebut the attack. Therefore if the prosecution is not permitted to introduce evidence of a recent complaint, it may be able to do so if the defence tries to exploit the absence of that evidence by suggesting that it indicates the complainant has fabricated her or his story.

Conclusion

117 There is considerable merit in the arguments in favour of abolition of the rule of recent complaint, particularly in light of the unreal assumption that juries will not use the fact of complaint as evidence of its truth. But that rule is an exception to the general rule that prior consistent statements are inadmissible. There are also strong arguments in favour of abolition of the rule against admitting prior consistent statements. For those who accept the latter arguments, abolition of the recent complaint rule would extend the operation of a rule which, as the Australian Law Reform Commission has recommended, should itself be abolished. The issue is therefore an extremely difficult one. The Commission is evenly divided on the issue. On the basis of the Chairperson's casting vote, the recommendation is that no change be made to the existing law.

*Recommendation 20:*

- *The rule of recent complaint should be retained.*

'Late Complaints' of sexual offences

118 A 'late' complaint can be described as any complaint made out of court that could not be legally classified as an admissible recent complaint; that is, it was not made as speedily as could reasonably be expected.[23] The defence is entitled to cross-examine the complainant about the lateness of a complaint or to make other comment upon it. Cross-examination as to a delay in complaining is usually designed to suggest that the delay indicates that the complaint is a false allegation. In *Kilby*, the High Court of Australia stated that it would be proper for a trial judge to direct a jury that when evaluating the evidence of the complainant it is entitled to take account of failure to make a complaint at the earliest reasonable opportunity.[24]

22. C. Benjamin.
23. *R v Manning* (1910) 13 WALR 6 (FC).
24. (1973) 129 CLR 460, 465, Barwick CJ.

119 As noted in relation to the recent complaint rule, the suggestion that a delay in making a complaint indicates the likely falsity of the allegation has been discredited. A number of Australian jurisdictions have responded to it by requiring judges to warn juries that complainants may have good reasons for delaying their complaints. In New South Wales, for example, section 405B (2) of the Crimes Act 1900 states that:

> 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.

120 While section 405B makes it mandatory for a judge to comment that there may be good reasons for a delayed complaint, it does not prevent the giving of a direction about the possible significance of a late complaint to the question of the complainant's credibility. As was stated in *McDonald, Davies, Ellick and Dolan*:

> Making obligatory the giving of directions that there may be good reasons for the absence of a complaint or for the delay in making it, whether or not such reasons were suggested in the evidence, is certainly to be seen as tilting the balance in favour of the complainant — no doubt because of the difficulty she may often have in articulating those reasons herself — but it should not be seen as standing the law on its head to exclude what in common fairness and common experience should also be taken into account in favour of the accused. In my opinion, the trial judge in a sexual assault case should as a general rule, in addition to giving the directions required by s 405B, continue to direct the jury that the absence of a complaint or the delay in making one may be taken into account by it in evaluating the evidence of the complainant and in determining whether to believe her.[25]

121 In its discussion paper, the Commission suggested that the abolition of the recent complaint rule should be complemented by the introduction of a provision similar to the New South Wales legislation requiring a warning regarding delay or absence of complaint. The general right of a judge to comment upon particular facts which may indicate unreliability was to be maintained. Most submissions supported the Commission's proposals. As one submission reminded us:

> Women still suffer significant stigma and the ramifications of social ambivalence about rape and its causes which militate against

25. (1985) 17 *Australian Criminal Law Reports* 297, 306.

prompt reporting of such offences.[26]

122 Some submissions opposed the proposal. In the view of the Law Institute:

> The implementation of this proposal is an insult to the intelligence and common sense of the jury and has the danger of the judge, by being required in every such case to give such a warning, influencing the course of the trial excessively. Where there is a late complaint the prosecutor in examination-in-chief can elicit the reason for that and the prosecutrix, when being cross-examined, can give the explanation for the delay. This can be followed up in re-examination. The late complaint will be the subject of comment by both the prosecution and the defence in their respective addresses to the jury. The jury is then in a position to make of the late complaint what it thinks fit in the light of the other evidence. The danger of the proposed required warning is especially great in those cases where the fact of the late complaint vitiates the allegations made.[27]

123 Despite these concerns, the Commission believes that it is vital that the judge give members a warning wherever the issue of late complaint is raised. This is necessary to counter the possibility of ill-informed views determining the jury's response to the complainant's evidence. The jury would still be able to take the delay in complaining into account in deciding whether the complainant's evidence was reliable.

*Recommendation 21:*

- *If the issue of late complaint is raised, the judge should be required to warn the jury that there may be good reason for a delay in making a complaint.*

Sexual History

124 The law provides that in all trials witnesses should be protected from attacks in the witness box which are 'intended to insult or annoy'[28] and which may result in a trial degenerating into a trial of the complainant rather than the accused. If that protection is not given, complainants may be harmed by the experience of giving evidence, and other victims may be deterred from reporting offences. However, for a considerable period the general form of protection did not prevent cross-examination of the complainant in a trial for sexual offences from extensive cross examination about his or her sexual history.

Under the common law:

> . . . 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, that she was a prostitute was also

26. Women's Legal Resources Group.
27. Law Institute of Victoria.
28. s.40 Evidence Act 1958.

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.[29]

125 In recent years, in particular, the defects in this approach have become apparent. Legislation restricting the right of cross-examination about sexual history was passed in England in 1976. Canada and New Zealand legislated in the area in the 1970s. By 1980, more than 40 jurisdictions in the United States of America had passed legislation limiting the admissibility of sexual history evidence. In Australia, too, there has been a spate of legislation. However, no two pieces of legislation are identical.

126 The Victorian provisions are found in section 37A of the Evidence Act 1958. Under that section:

- 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.
- Evidence is not to 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.

127 The section applies to preliminary examinations and to trials for 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.[30] Therefore, in less than 5% of all cases is permission granted.

128 Some jurisdictions have taken a more specific approach than Victoria on the issue of the admissibility of sexual history evidence. In Canada, for example, no evidence may be led 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

29. Z. Adler, 'Rape — The Intention of Parliament and the Practice of the Courts' (1982) 45 *Modern Law Review* 664, 666.

30. Interview with Gayle Thompson, Chief Preparation Officer, Sexual Offences Division of the Office of the Director of Public Prosecutions, 7 March 1986.

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.[31]

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 broadranging questions about the sexual life-style of the complainant.[32]

129 New South Wales has also adopted a more specific approach than Victoria.[33] Evidence relating to the sexual reputation of the complainant is totally inadmissible. Sexual history evidence is inadmissible unless it is relevant to the case in one of the following specified ways:

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

The probative value of admissible evidence must also outweigh any distress, humiliation or embarrassment which its admission might cause the complainant. The judge must provide written reasons for allowing an application to admit sexual history evidence.

130 A major purpose of the rules relating to the admissibility of evidence is to minimise the risk of an innocent person being convicted. If sexual history evidence is relevant it should be admissible. 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 the marginal relevance of which is outweighed by its distressing impact on the complainant. The issue is whether a proper balance between the interests of the accused and the complainant has been struck in Victoria.

31. s.246.6(1) Canadian Criminal Code, 1986.
32. C.Boyle, *Sexual Assault*, Carswell, Toronto, 1984, 137.
33. s.409B(3) Crimes Act 1900.

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

131 In its discussion paper, the Commission suggested that the law on this matter was satisfactory. While the protection of the complainant is an important goal, it should not be achieved at the expense of justice. The Commission gave weight to the following comments on criticisms of the approach under which the court retains a broad discretion to admit sexual history evidence:

> 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 prejudge the defendant and assume his guilt, or (the only alternative) to decree that, although innocent, he must nevertheless be hampered in his defence 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.[34]

132 The Commission's proposal to retain the present position drew a mixed response. One view was that sexual history, even between complainant and defendant, should not be admitted at all, as it was regarded as irrelevant to the issue of whether there was consent at the time of the alleged offence:

> Sexual history of the woman is never a proper nor relevant matter for a rape trial. Similarly, a woman's sexual history with the accused bears no relevance to the issue of rape. It should thus not be raised. We recognise that in some cases the relationship of the woman to the accused will be revealed by the evidence, but it is the occurrence of rape that is the important issue and not the nature of the relationship. Therefore the nature of their relationship should not be raised as an implication of consent on the woman's behalf.[35]

133 Another view was that guidelines should be introduced, as in Canada and New South Wales, to restrict cross-examination to specific situations. Several submissions proposing this approach stated that the present restrictions do not work effectively. Two reasons were cited:

- in many cases no application is made by, or required of, defence counsel before cross-examination of women about their sexual history occurs; and
- defence counsel introduce sexual history evidence obliquely, for example, by questioning about 'lifestyle'.

34. D.W. Elliot, 'Rape Complainant's Sexual Experience with Third Parties' (1984) *Criminal Law Review*, 4, 14.

35. Women Against Rape, submission.

134 Some submissions argued that sanctions are necessary to enforce the restrictions. One suggestion was that evidence about the accused's convictions for sexual offences should become admissible if the defence introduced sexual history evidence without leave of the court. However, as one submission noted, an accused who gives evidence already runs this risk if the defence involves imputations on the complainant's character.[36] Section 399(5) of the Crimes Act provides that if:

> the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, then the accused can be asked any question tending to show that he has committed or been convicted of or been charged with any offence other than that where with he is then charged, or is of bad character.

However, permission to cross-examine on past convictions and character is apparently given only rarely.[37] The sanction is also irrelevant if the accused has no prior convictions or has committed no other conduct which constitutes evidence of 'bad character'.

135 It was also suggested in submissions that a defence lawyer who asked questions which breach the restrictions should be subject to disciplinary action by the profession. This is already the case:

> While he must advance his client's interests to the best of his ability, the practitioner cannot subordinate everything to those interests. He must not make irresponsible attacks on his adversary, and he must not recklessly attack, malign, and defame without some sound basis in fact. These requirements are fundamental and breach of them can lead to the practitioner being struck off the roll. Thus, questions which affect the credibility of a witness by attacking his character may not properly be asked by a practitioner unless the cross-examinationer has reasonable grounds for thinking that the imputations conveyed by the questions are well founded, and even then only if he believes that the answers might materially affect the credit of the witness.[38]

136 The Commission does not agree that the relationship between the complainant and the accused is always an inappropriate or irrelevant matter for the jury. It would be extremely difficult for a jury to assess conflicting accounts about whether consent was given on a particular occasion without being told whether the persons concerned were total strangers, husband and wife, or had some other relationship. The Commission also doubts whether the specific criteria adopted in other jurisdictions are preferable to the more general discretion given to judges in Victoria. A recent study of the effectiveness of the New South Wales provisions found that in 41.25% of cases where sexual history evidence was admitted at committal, and in 10.25% where it was admitted at trial, it was done with no application, challenge or justification or at least without the required record. A Government Task Force reviewing sexual offence legislation expressed its concern:

36. Women's Legal Resources Group.
37. Law Reform Commission of Victoria, Unsworn Statements in Criminal Trials, Report No. 2, Melbourne 1985, para 3.10.
38. K. Gifford, *Legal Profession, Law and Practice in Victoria*, Law Book Company, Sydney, 1980, 343.

> at the number of cases in which inadmissible evidence is permitted in sexual assault proceedings, indicating a need for more vigilance on the part of prosecutors, magistrates and judges.[39]

The Task Force saw the appropriate solution not in tighter guidelines or sanctions, but in better training of judges, magistrates and prosecutors.

137 The Task Force also decided not to recommend an extension to the specific criteria to deal with what it called 'character' evidence about complainants, that is, evidence which indirectly raises issues on which evidence could not be led directly:

> A blanket prohibition on evidence about the complainant's character could preclude evidence relevant to establishing the circumstances of the alleged offence. Attempts to specify exemptions from such a provision are likely to be ineffective and lead to the same problems currently being experienced. Lastly, there is the problem of defining the rather vague concept of 'character'.[40]

138 The Commission agrees with this view. It would be extremely difficult if not impossible to define 'oblique' or lifestyle evidence. If it is relevant, it should be admitted because its exclusion may create a gap in the picture being presented to the court, and seriously impede the task of the jury. If it is not relevant, it should be excluded as an improper attack on the complainant and the courts have adequate power to do so. Criticisms made in submissions about trials in Victoria also suggest that the issue is not the substance of the law but whether those involved in the proceedings are applying it with sufficient care and vigilance. The admission of sexual history evidence has therefore been nominated as an area which should be covered in the proposed education program for judicial officers.[41]

139 It has been said that the major value of the New South Wales provisions is that the judge or court 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 court to exclude irrelevant but prejudicial sexual history material.[42] However, according to the Bureau of Crime Statistics and Research this has not proved to be the case, as written reasons are frequently not provided or are not readily accessible.[43]

140 Nonetheless, the Commission believes that the requirement should be adopted in Victoria. It would not impose a significant burden on the judiciary, as the number of cases in which permission is granted is apparently small. Provision would have to be made for copies of the documents recording the reasons to be readily accessible for study, in a manner which does not disclose the identity of complainants.

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39. New South Wales Government, Violence Against Women and Children Law Reform Task Force, Consultation Paper, Sydney, 1987, 40.
40. Task Force, Consultation Paper, 40.
41. Recommendation 1, para 12.
42. J.A. Scutt, "Sexual Assault and the Criminal Justice System" in D. Chappell and P. Wilson (eds), *The Australian Criminal Justice System: The Mid 1980's* Butterworths, Sydney, 1986, 74.
43. Interview with R. Bonney, 27 July 1987; See also R. Bonney, Interim Report No. 3 — Court Procedures, NSW Bureau of Crime Statistics and Research, 1987.

*Recommendation 22:*

*(a) There should be no change to the existing law regarding the admissibility of sexual history evidence.*

*(b) Courts should be required to provide written reasons for allowing sexual history evidence to be admitted. A file of copies of the written reasons should be available for public study.*

Dissent:

141 Dr Hancock and Ms McCulloch dissent from part (a) of this recommendation. In their view, there should be further restrictions on the admissibility of sexual history evidence along the lines of the New South Wales approach, with legislative specification of a limited range of circumstances where such evidence may be admitted. Furthermore, a sanctioning mechanism should be devised to deal with instances of non-compliance with the rules governing admission of sexual history evidence, including oblique references to the complainant's morality and sexual reputation.

*Should the sexual history restrictions apply to all sexual offences?*

142 The restrictions on sexual history evidence are limited to charges of rape, attempted rape and assault with intent to rape. In its discussion paper, the Commission suggested that the restrictions should be extended to all sexual offences. All of the submissions which commented on this issue agreed with this view. Whether there is a basis for different rules in relation to offences against victims with impaired mental functioning and children will be examined in our reports on those subjects.

*Recommendation 23:*

- *The restrictions on cross-examination as to sexual history imposed by section 37A of the Evidence Act 1958 should be extended to other sexual offences.*

*Who should present the prosecution case at preliminary examinations?*

143 Rule 2 of section 47A of the Magistrates (Summary Proceedings) Act 1975 provides that in preliminary examinations of cases of rape, attempted rape and assault with intent to rape, the prosecution must be conducted by a qualified legal practitioner. The reason for this was given by the Law Reform Commissioner in 1976.

> . . . Strong opinions have been expressed, by persons well qualified to know, that in some cases the complainant at the committal hearing in respect of a rape offence, is cross-examined in such oppressive and repetitive detail, and at such inordinate length, as to suggest that an attempt is being made to intimidate her. Furthermore, even where there is no ground for any such imputation, the strains upon her are sometimes allowed to be aggravated by a failure to require strict compliance with the rules of evidence which limit cross-examination, and the tendering of evidence, relating to her previous sexual activities. Those rules . . . make up a complex body of law, and their proper application often requires the drawing of difficult distinctions of law and fact. But the justices who hear, and the prosecutors who conduct, rape committal proceedings, though

they are in some cases very experienced, commonly lack the advantage of an education in the law.[44]

144 Police prosecutors, who are often not qualified legal practitioners, generally prosecute at preliminary examinations of offences against section 54 of the Crimes Act and offences of indecent assault. In its discussion paper, the Commission suggested that the restrictions on sexual history evidence should apply to all sexual offences. This would have the consequence that the rule about the conduct of the prosecution by a qualified practitioner would become applicable. Some submissions strongly supported this approach. However, submissions from the Victoria Police denied that it was necessary or desirable for legal practitioners to conduct the prosecution in these cases. The Victoria Police pointed out that since the introduction of section 47A, the Police Prosecutors training course has been set up to remove police shortcomings in evidence and procedure. Moreover, the Commission's proposal would require significant additional resources in order to provide an adequate number of qualified practitioners.[45]

145 The Commission recognises the force of this submission. It has concluded that legally qualified legal practitioners should be required to conduct the prosecution in offences against section 54 of the Crimes Act but not in cases of indecent assault because:

- section 54 always involves sexual penetration, which the community regards as the most serious form of offence
- indecent assault frequently does not involve sexual penetration, and the Commission has recommended that digital penetration and cunnilingus involving penetration, which are presently included in this offence, should be included within the offence of rape
- sexual history evidence is far more likely to be relevant to sexual penetration cases than others, and the presence of legally qualified practitioners at many indecent assault cases would therefore be unnecessary.

*Recommendation 24:*

- *The prosecution at the preliminary examination of an offence against section 54 of the Crimes Act should be conducted by a qualified legal practitioner.*

44. Law Reform Commissioner, Rape Prosecutions (Court Procedures and Rules of Evidence), Melbourne 1976, 21.

45. Sergeant C. Moffitt and Detective Sergeant P.A. Laidler, submissions.

# APPENDIX I

## DRAFT LEGISLATION

Many of the recommendations in this report and the Commission's report *Rape and Allied Offences — Substantive Aspects* require legislation for their implementation. With the assistance of Mr John Finemore QC, the Commission has prepared the following draft legislation to indicate how the recommendations in the two reports might be given legislative expression.

A BILL

for

An Act to amend the Crimes Act 1958, the Evidence Act 1958, the Magistrates Court (Summary Offences) Act 1975 and for other purposes.

CRIMES (SEXUAL OFFENCES) ACT 1988

The Parliament of Victoria enacts as follows:

### Part 1 — Preliminary

Purpose

1 The purpose of this Act is to amend the law relating to sexual offences in the light of the recommendations of the Law Reform Commission in its reports number 7 and 13, Rape and Allied Offences: Substantive Aspects and Rape and Allied Offences: Procedure and Evidence.

Commencement

2 This Act comes into operation on a day to be proclaimed.

Transitional Provisions

3 The amendments to the Crimes Act 1958 and the Summary Offences Act 1966 apply only in relation to offences committed or alleged to have been commiitted after this Act has been proclaimed.

Amendments to the Crimes Act 1958

4 Section 2A(l) is amended by:

(a) deleting the definition of 'Rape';

(b) inserting the following definitions:

'Vagina' includes a surgically constructed vagina;

'Sexual penetration' means:

(i) the introduction (to any extent) of a part of the body or an object by a person into the vagina or anus of another person; or

(ii) the introduction (to any extent) of the penis of a person into the mouth of another person; or

(iii) the continuation of sexual penetration.'; and

(c) Sections 2A(2) and (3) are repealed.

*Assault with intent to rape*

5 After section 31(3) insert:

'(4) A reference in this or any other Act to assault with intent to commit rape is a reference to the offence under section 1(a) of assault on another person with intent to commit the indictable offence of rape.'

*Rape*

6 For section 44 substitute:

'44. A person who intentionally sexually penetrates another person without that person's consent and without believing that that person is consenting to that act is guilty of the indictable offence of rape.

*Penalty:* Imprisonment for twenty years.'

7 For section 45 substitute:

'45. (1) A person who intentionally touches another person in indecent circumstances without that person's consent and without believing that that person is consenting to that act is guilty of the indictable offence of indecent assault.

*(2) Where a person is charged with indecent assault committed upon a person under sixteen years, the consent of the person under sixteen is no defence to the charge unless, at the time the offence is alleged to have been committed —

(a) the accused was, or believed on reasonable grounds that he or she was, married to the person; or

(b) the accused believed on reasonable grounds that the person was of or above the age of sixteen years; or

* Section 45(2) is the present section 44(3) of the *Crimes Act* 1958, and is being reviewed as part of the Commission's review of sexual offences against children.

(c) the accused was not more than two years older than the person.

*Penalty:* Imprisonment for ten years.'

*Aggravating circumstances*

8 Section 46 is repealed.

*Procuring persons by threat or fraud*

9 For section 54 substitute:

'54. A person who —

(a) by threats or intimidation procures any person to take part in an act of sexual penetration;
or

(b) by any fraudulent means procures any person to take part in an act of sexual penetration —

is guilty of an indictable offence.'

*Penalty:* Imprisonment for five years.

*Administration of drugs etc.*

10 Section 55 is repealed.

*Abduction and detention*

11 Section 56 is repealed.

*Duty of Judge as to instructions in trials for sexual offences*

12 Section 62 is amended by inserting at the end of the section:

'(4) In a trial of an alleged offender for a sexual offence —

(a) If a question arises concerning the delay of the complainant in making a complaint in relation to the offence, the judge must instruct the jury that there may be good reason for delay in making a complaint in relation to a sexual offence; and

(b) The judge must not instruct the jury that the evidence of complainants is more likely to be unreliable in sexual cases than in other cases.'

*Time limits on certain prosecutions*

13 Section 359A is amended as follows:

(a) In sub-section (1)(a) and (1)(b) for '45' substitute '44 or 54, the offence of attempting to commit rape or of assaulting with intent to commit rape.'

(b) In sub-section (2) for 'The Supreme Court' substitute 'The Court to which a person has been committed for trial'.

*Repeal of alternative verdict provisions*

14 Section 425 (1)(a), (b), (e) and (f) and 425 (2) are repealed.

Amendments to the Magistrates Courts Act 1971

*Exclusion from court in sexual cases.*

15 After section 47(3) insert:

'(4) In a trial of an alleged sexual offender:

(a) The magistrate may order members of the public to leave the court in order to protect the complainant from distress or embarrassment.

(b) The complainant and the accused are each entitled to have present throughout the trial one person of their choice who is not connected in any way with the proceedings.

(c) If the magistrate makes an order to exclude persons from the court, he or she must advise the complainant and the accused of their right to choose one person to be present.'

Amendments to the Magistrates (Summary Proceedings) Act 1975.

16 Section 47A is amended as follows:

(a) In the heading, delete 'Offences involving rape', and substitute 'Sexual offences', and delete 'and whether or not it is alleged that there are aggravating circumstances'.

(b) In section 47A(l) for 'or assault with intent to rape' substitute 'assault with intent to commit rape or an offence against section 54 of the Crimes Act 1958'.

(c) Rule (3) is repealed.

(d) For Rule (9) substitute —

'The prescribed period for the purposes of these Rules means in relation to the preliminary examination into an offence to which these Rules apply the period of three months after the person has been —

(a) first granted bail in respect of the offence; or

(b) has first been remanded in custody in respect of the offence; or

(c) has been served with a summons for the offence —

whichever first occurs, or such longer period after the relevant occurrence referred to in paragraph (a), (b) or (c) as is fixed by a magistrate, either —

(i) before the period of three months or any longer period fixed by a magistrate has elapsed; or

(ii) where an order has not been made under Rule (10) and special circumstances warrant a later fixation after such period or periods.'

(e) After sub-section (2) the following is inserted:

'(3) In relation to a preliminary examination in respect of an alleged sexual offence —

(a) only the following persons may be present while the complainant is giving evidence or the statement of the complainant is being read —

(i) the informant;

(ii) the defendant;

(iii) the legal practitioners and their clerks acting for the prosecution and the defence;

(iv) the court officials whose presence is required;

(v) the members of the police force whose presence is required for court security;

(vi) persons who are authorized by the court to be present;

(vii) a person chosen by the complainant and a person chosen by the accused, neither of whom may be connected in any way with the proceedings; and

(b) the magistrate must advise the complainant and the accused —

(i) that each person is entitled to choose a person to be present who is not connected in any way with the proceedings; and

(ii) that each may apply for other persons to be present.

(4) A person charged with a sexual offence is entitled to be supplied with a copy of —

(a) any statement in writing; and

(b) any record of any oral statement —

made by the complainant in relation to the alleged offence.'

Amendments to the County Court Act 1958

*Who may be in Court during a trial*

17 The following section is inserted.

'81A In a trial of an alleged sexual offence:

(1) The judge may order members of the public to leave the court in order to protect the complainant from distress or embarrassment.

(2) The complainant and the accused are each entitled to have present one person of their choice who is not connected in any way with the proceedings.

(3) If the judge makes an order to exclude members of the public from the court, the judge must advise the complainant and the accused of their right to choose one person to be present.'

Amendment to the Supreme Court Act 1986

*Who may be in Court during a trial*

18 The following section is inserted into the Supreme Court Act 1986:

'18A. In a trial of an alleged sexual offence:

(1) The Court may order members of the public to leave the court in order to protect the complainant from distress or embarrassment.

(2) The complainant and the accused are each entitled to have present one person of their choice who is not connected in any way with the proceedings.

(3) If the Court makes an order to exclude members of the public from the court, the court must advise the complainant and the accused of their right to choose one person to be present.'

Amendments to the Judicial Proceedings Reports Act 1958

*Restrictions on reports of alleged sexual offences*

19 Section 4 is amended as follows:

(1) For sub-section (1) substitute —

'(1) A person must not, in relation to an alleged sexual or unnatural offence, publish or cause to be published in any newspaper or document or by other means any information likely to lead to the identi-

fication of the alleged victim unless a Judge of the Supreme Court or a County Court or a magistrate orders to the contrary, or the alleged victim consents.'

(2) In sub-section (5) omit 'or any volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law'.

Amendments to the Evidence Act 1958

20 Section 37A is amended by:

(a) deleting from section 37A(l) 'of rape, attempted rape or assault with intent to rape' and substituting 'involving a sexual offence'.

(b) deleting from section 37A(l) 'and whether or not it is alleged that there are aggravating circumstances'.

(c) adding 'his or' before 'her' in Rule (2)(a).

(d) adding 'or her' after 'his' and 'or she' after 'he' in Rule (3)(b)(i).

(e) inserting after Rule (5) —

'(6) Where a court has granted leave under Rule (2) to lead evidence or to cross-examine, the court must state in writing its reasons for granting leave and a copy of each statement must be filed in the court and be available for inspection by any person.'

Amendment to the Summary Offences Act 1966

*Protection of participants in proceedings*

21 After section 17 insert:

*'Offence relating to the Administration of Justice.*

17A A person must not harass a person because that person has taken part, is about to take part or is taking part in a criminal proceeding in any capacity.

*Penalty:* 10 penalty units or 3 months imprisonment.'