LAW REFORM COMMISSIONER

Report No. 5

RAPE PROSECUTIONS

(Court Procedures and
Rules of Evidence)

MELBOURNE
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CONTENTS

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SECTION 1. INTRODUCTION.

1. By letter dated 24th July 1975 the Honourable the Attorney-General, acting under Section 8 (b) of the Law Reform Act 1973, referred to the Law Reform Commissioner, for investigation and report, certain aspects of criminal prosecutions for rape. The letter of reference (omitting formal parts) was in the following terms:—

" I refer to our recent discussion of problems arising in relation to the trial of persons charged with rape.

As you will be aware the Government is concerned about the prevalence of this crime, and it is conscious of the stress and embarrassment sometimes suffered by the victims of rape as the result of preliminary hearings and trials.

I am, of course, aware of the difficulty of reducing the possible embarrassment of the victim, without the risk of depriving the accused of his right to test the evidence against him. As you know from our discussion, questions which have arisen are whether it is practicable to avoid the victim having to give evidence at the preliminary hearing and whether some limit could be placed on the cross-examination of the victim as to her previous sexual experience.

In the circumstances, I would appreciate your investigating and advising me whether amendments could be made in relation to Court procedures and the law of evidence affecting rape trials."

2. Upon receipt of this reference a preliminary examination was made by the Law Reform Advisory Council of the problems to be investigated and of possible lines of reform. Views were then sought, by correspondence and in conferences, from a large number of persons and bodies having either expert knowledge, or a special interest, in the relevant areas. The help so sought was most generously given. Australian and overseas writings and statute law relating to rape and rape prosecutions were studied and statistical investigations were undertaken into rejection rates in Victoria for complaints of rape and into conviction rates in rape trials in this State. A Working Paper (No. 4) was then prepared and widely circulated, putting forward for consideration eight possible reforms, and inviting comment and criticism. Numerous responses were received, many of them containing detailed comments and criticisms. In some cases objection was taken to one

or more of the eight proposals, but for the most part these were approved. Some of the responses, however, though approving the proposals so far as they went, urged that more drastic remedies were desirable or suggested additional areas for reform. The responses were all given careful consideration, and a final examination of all proposals that fell within the terms of reference was made by the Law Reform Advisory Council before the preparation of this Report.

3. The organizations and individuals whose views were obtained, either before the issue of the Working Paper or in responses to it, included women's organizations and legal professional bodies, rape crisis centres and law reform agencies, criminologists, psychiatrists, law professors and lecturers, senior police officers, policewomen, government medical officers, magistrates, crown prosecutors, defence counsel and trial judges; and it is desired, in particular, to acknowledge the assistance received from the bodies and persons named in Appendix A to this Report.

4. The recommendations for law reform that are made in this Report do not go outside the field delimited by the terms of reference, namely that of court procedures and rules of evidence applicable in prosecutions for 'rape offences' — an expression which is used in this Report to cover rape, attempted rape and assault with intent to rape.

5. Police procedures for investigating rape offences are not within that field. But it is a matter of significance, in relation to the problems arising under the reference, that in Victoria the Police Department has in recent times revised its investigation procedures in the light of complaints[1], both here and overseas, that police methods have been adding unnecessarily to the embarrassment and emotional disturbance suffered by rape victims. Administrative changes have been made by the Department which are expected to meet the main grounds of complaint so far as it is practicable to do so consistently with proper investigation. It is now the established procedure for the statements of women and girls alleging rape to be taken by women police officers. A series of impressive special courses was conducted during 1975, each course giving a week's full-time instruction in proper methods of carrying out this branch of police work, with due regard to the problems of complainants. In all, there are 80 policewomen who have passed through such a course, and it is now only in very exceptional circumstances that any policewoman other than a woman police officer of

[1] Compare W.E.L. (Vic.) Resolutions of 20th July 1975: Submission of Aust. Fed. of Professional and Business Women's Clubs (Vic. Div.) to Law Reform Commissioner October 1975: Rape Programmes of Channel 9, 7th to 9th October 1975: "Women as the Victims of Crime" by J. P. Noble (Aust. Institute of Criminology) pp. 6-7: "Rape" by Corinne Morgan, Legal Service Bulletin (Fitzroy) July 1975, p. 226: "The Victim in a Forcible Rape Case: A Feminist View", by P. L. Wood, 11 Am. Crim.L.Rev. 348-350: "Rape, The All American Crime", by Susan Griffin, 10 Ramparts 26, 32: "Victimology and Rape: The Case of the Legitimate Victim", by Weis and Borges, (1973) 8 Issues in Criminology, 71, 102-3. Submission of Women Against Rape Co-operative Ltd. to Law Reform Commissioner, 13th April 1976.

the rank of sergeant or above, or one of these 80 policewomen would be required to interview a complainant alleging rape. Moreover a special rape squad of six full-time policewomen has been functioning from Russell Street Headquarters since early in 1976 to guarantee round-the-clock availability of policewomen to handle rape cases reported in the metropolitan area. It could well be a further improvement, however, if the services of women doctors could be enlisted, and the necessary special investigational skills imparted to them, so that they could conduct the medical examinations of those complainants who feel they cannot face examination by a male doctor. For although, where possible, the requests of such complainants are, it is understood, always acceded to, women doctors with the appropriate special training or experience are not ordinarily available.

6. The substantive law of rape, like police investigation procedures, falls outside the field for enquiry delimited by the terms of reference. But a statement, in outline, of what, under the substantive law as it now stands, are the essential elements of the crime of rape, seems desirable at this stage in order to provide a basis for the examination of the evidentiary and procedural problems raised by the terms of reference.

7. To establish a charge of rape against an accused man four matters must be proved:—

(i) That sexual intercourse was had with the complainant (to the extent, at least, of some degree of penetration).

(ii) That the accused was the man by whom the act was done.

(iii) That it was done without her consent.

(iv) That it was so done intentionally, he being aware that he did not have her consent, or else aware that this might well be so and recklessly determining to have intercourse whether she was consenting or not.

Accordingly, the four basic issues that arise in rape trials are those of Penetration, Identity, Consent and Guilty Intent.

8. The House of Lords, in D.P.P. v. Morgan (1975) 61 Cr. App. R. 136, when laying down that an intention to have intercourse without consent (in the sense above described) is an essential element of the crime of rape, drew attention to the fact that this principle involves that an accused person is not guilty of that crime if he genuinely believes that he has the woman's consent, even though there be no reasonable grounds for his belief. The high-lighting of this last point caused apprehension in England that the decision would have disastrous consequences; and the Heilbron Group was appointed to enquire whether the law needed to be altered. Less concern was caused here by the decision because in this State it had for many years been well settled that an intention to have intercourse without consent (as

defined in 7 (iv) above) was an essential element of the crime of rape[2]; and none of the disastrous consequences which were apprehended in England by commentators on Morgan's Case have eventuated in this State.

9. In its Report[3] the Heilbron Group advised that Morgan's case was right in holding that an intent to have intercourse without consent (as defined in 7 (iv) above) is necessary to constitute rape, and it proposed no alteration of the law as there laid down. What it recommended was the embodying of the decision in statutory form with a warning against possible misunderstanding or misuse. The Tasmanian Law Reform Commission has expressed similar views to those of the Heilbron Group[4]; and the Criminal Law and Penal Methods Reform Committee of South Australia[5] has approved of the principles laid down in Morgan's Case.

SECTION 2. THE BASIC DIFFICULTY.

10. Coming now to the field which is the subject of the reference, namely that of the court procedures and rules of evidence applicable to prosecutions for rape, the basic difficulty for the reformer is that, as the letter of reference recognizes, this is a field in which conflicting policies meet. On the one hand it is obviously of great importance that criminal proceedings against a man who has raped a woman should be so conducted as to inflict the least possible additional suffering and harm upon his victim. But on the other hand it is essential, if we are to avoid, so far as practicable, the convicting of innocent men, and if justice is to be seen to be done in our courts, that a man accused of rape should be allowed every reasonable facility for defending himself. The concern which has been aroused by this conflict of policies has been an important factor in causing law reform enquiries to be undertaken, in a number of jurisdictions, into the field of rape law, both substantive and procedural.

SECTION 3. THE NEED FOR REFORM.

11. It is clear that where the victim of a rape reports the crime to the police, the investigation by them of her complaint, and the subsequent committal hearing and the trial, and the re-actions of her family and friends, commonly subject her to very severe stresses[6], the usual sequence in this State being as follows:—

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[2] See R. v. Hornbuckle (1945) V.L.R. 281: R. v. Daly (1968) V.R. 257: R. v. Flannery & Prendergast (1969) V.R. 31.

[3] Cmnd. 6352 Sections 23, 57-9 and 81-3.

[4] Report No. 3, February 1976.

[5] Report on Rape and Other Sexual Offences, 1976.

[6] Compare "Victimology & Rape, The Case of the Legitimate Victim", by Weis & Borges, (1973) 8 Issues in Criminology 71.

(a) First she is called upon to make to the investigating policewoman a statement detailing precisely what occurred, and to answer questions designed to ascertain whether her complaint should be accepted as genuine. She is also, if the offence is recent, subjected to an intimate medical examination by a male doctor. And where this occurs it may be many hours after reporting the offence before she is free to take a shower or bath, and to change her clothes and go to her home.

(b) She then has to face, perhaps a husband or fiancé, or perhaps a family or friends, whose attitudes, not infrequently, are unsympathetic and suspicious.

(c) She may have to attend identification parades and point out the man or men who raped her.

(d) After a lapse of time she has to give evidence at the committal hearing, describing in detail, in the presence of strangers, how the offence was committed, and thereby reviving her original emotional trauma.

(e) After a further lapse of time, which can be a year or more, the trial comes on and if there is a plea of "not guilty" she is required once again to give her evidence describing in detail what occurred.

(f) In the witness box, whether at the committal hearing or at the trial, she will usually have to submit to searching cross-examination. In the course of it she may be asked embarrassing questions as to her past sexual experiences; and her answers to these, if they disclose to persons near to her matters which she has previously kept secret from them, may be a cause of much unhappiness. Sometimes, moreover, the right to cross-examine is exercised at oppressive length or in an intimidating fashion so that she is made to feel that she is the person on trial.

(g) In some cases the number of parties and proceedings greatly aggravates the stresses to which she is subjected[7]. Thus if there are, say, four persons accused she may be cross-examined by four counsel at the committal hearing and again by four counsel at the trial.

(h) Where the accused is acquitted, even if only for the reason that there is a doubt as to identification, her emotional trauma is likely to be greatly increased by a feeling that she has been branded as a liar or as promiscuous.

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[7] In one particularly unfortunate case there were three persons accused and they were arrested at substantial intervals of time, and were committed and tried separately. Moreover one of the trials miscarried so that there had to be a re-trial. The complainant in consequence, was required to give evidence upon seven separate occasions.

12. It is therefore most desirable, both in mercy to rape victims and for the good repute of our system of criminal justice, that the relevant court procedures and rules of evidence should be examined, and such amendments as are proper made to them in order to minimize the contribution that they make towards the sufferings of victims.

13. Such reforms, it may reasonably be expected, would have the further advantage of causing, in time, an increase in the proportion of rapes reported to the police[8]; and this view has been strongly supported in responses to the Working Paper. It does not seem justifiable, however, to expect more than a moderate increase; for failure to report may be due to a variety of motives unrelated to any fears of police or court procedures[9]. Among the most obvious would be:—

(1) Fear of publicity and consequent social stigma.

(2) Fear of hostile or suspicious reactions from husband, family or friends.

(3) Recoil from the prospect of having to confront the rapist.

(4) Fear of retaliation by the rapist or his friends.

(5) A distraught condition which prevents decision until it is felt to be too late for a report to be credible.

(6) A sense of guilt because of having encouraged sexual liberties or knowingly incurred obvious danger.

(7) Where, as would seem to be most often the case[10], the rapist is a friend, neighbour, relation or acquaintance, recoil from exposing him to the drastic penalties of the criminal law or to disastrous social consequences.

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[8] Rape has been said to be probably the most under-reported crime; compare 117 U. Pa. L.R. 277: but estimates of the extent of reporting vary greatly. Dr. Paul Wilson has estimated that only 30% to 50% of rapes are reported to the police ("The Age", Melbourne, 9th October, 1975). Dr. John Helmer appears to consider that there are indications that the figure lies between 10% and 25% ("National Times", Melbourne, 10th November, 1975). A survey in Queensland gave a figure of 71% for all sex offences ("Crime & the Community", Wilson & Brown: University of Queensland Press). American estimates range from high figures to as low as 5% (P. L. Wood, 11 Am. Crim. L. Rev. 347). Surveys may need to be regarded with caution unless the truth of responses has been investigated. Indeed in the opinion of the Criminal Law & Penal Methods Reform Committee of South Australia no reliable statistics exist or could be obtained: Report on Rape and Other Sexual Offences, (1976), Sec. 15.1.

[9] For references to such other motives compare "Lessening the Rape Victim's Ordeal", Sydney Morning Herald, 15th April 1976: "Rape Reform Legislation. Is it the Solution?", by Sasko and Sesek, (1975) 24 Clev.St. L.R. 489: Report of Criminal Law & Penal Methods Reform Committee of South Australia, cited in note 8 above: "Ohio's New Rape Law", by Barbara Child, (1975) 9 Akron L.Rev. 338: Submission of Women Against Rape Co-Operative Ltd. to Law Reform Commissioner, 13th April 1976: "Wanted for Rape" by Dr. John Helmer, National Times, Melbourne, 10th November, 1975.

[10] See "The Offence of Rape in Victoria", by Hodgens, McFadyen, Failla & Daly, (1972) 5 Aust. N.Z.J. Criminol. 231: "An Investigation into Rape and Attempted Rape Cases in Queensland", by Ross Barber, (1973) 6 Aust. N.Z.J. Criminol. 221.

Moreover, even among the class of victims for whom a fear of the ordeal of police and court procedures is the dominating consideration, it may be debatable how large a proportion would be induced to report by a reduction of the stresses of what would continue to be, in the eyes of most people, an ordeal. But even though, for these reasons, a very large increase in the proportion of rapes reported could not be expected, there could well be a substantial one and this would be an important gain.

SECTION 4. THE LIMITING CONSIDERATIONS.

14. The need being clear for substantial reforms in relief of rape victims, the area for consideration and debate becomes that of the form and extent of the changes that should be made. And here there are policy considerations of the first importance which impose limits upon what can properly be done.

15. A person accused of any serious crime ought to be, and under our system of criminal justice is, presumed to be innocent until he has been tried and found guilty; and no person, therefore, who is so accused, ought to be denied the benefit of the basic procedural rights which an innocent man may need to exercise in order to defend himself against an unfounded charge.

16. Under the normal practice in this State the basic procedural rights of an accused man include:—

(i) A right to require that his accusers be produced before a magistrate and then and there make their allegations against him on oath in his presence, and

(ii) a right to require that they then and there submit to cross-examination so that he may ascertain precisely what they are prepared to swear against him, what admissions they are prepared to make, and whether their credibility is open to attack.

Ordinarily it is only by the exercise of these rights that he can hope to have the charge dismissed or withdrawn and so to avoid the stigma attaching to have to stand his trial. And failing a dismissal or withdrawal, the exercise of those rights may be necessary to enable him to be properly prepared to defend himself against his accusers at the trial. Indeed, where it is suspected that the accusers have not been candid under cross-examination at the committal hearing, it is sometimes considered necessary to make still further investigations by enquiry agents.

17. The basic procedural rights of the accused include also, the right to cross-examine his accusers in the presence of the jury at the trial, and to do so as to their credibility as witnesses as well as upon the facts in issue.

SECTION 5. IMPORTANCE OF SAFEGUARDS IN RAPE PROSECUTIONS.

18. In relation to charges of rape offences there are strong grounds for regarding the maintenance of the basic procedural rights of accused persons as being of special importance, and those grounds may be summarized as follows:—

(i) **The Severity of the Penalties.**

Rape carries a maximum penalty of 20 years imprisonment—one which is not exceeded by any penalty laid down in the Crimes Act 1958 except that for murder. Moreover the sentences imposed for rape are commonly in the range from 5 years to 10 years, and even lengthier sentences are by no means unknown. Even where mitigating circumstances are expressly found to have existed, imprisonment for up to 10 years is authorized by the Act, and the same is true of the offences of attempted rape and assault with intent to rape: see sections 44 and 45.

(ii) **The Many Opportunities for Plausible but Unfounded Allegations.**

(a) The opportunity for a woman to make a plausible but unfounded allegation of rape against a man must, it seems clear, occur on vast numbers of occasions each year in this State; for the number of consensual acts of extra-marital sexual intercourse occurring each year can hardly be put at less than several hundreds of thousands[11].

(b) On a very high proportion of those occasions there will be no third person who can give evidence of what occurred, and the circumstances will be such that the woman, if she chooses to do so, can plausibly allege, either at the scene or subsequently, that she was raped by her companion, and can without difficulty fabricate apparent confirmation, such as torn clothing, bruising, scratches, or overturned furniture[12]. And semen will commonly be found on medical examination to confirm that an act of intercourse did take place.

(c) By comparison there must be relatively few occasions upon which a person's lawful activities can easily and plausibly be represented to have constituted serious non-sexual crimes such, for example, as murder, robbery, house-breaking or embezzlement.

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[11] See Working Paper No. 4, para. 23.

[12] Compare "Rape Offenders and Their Victims", by Professor John M. Macdonald, M.D. (Charles C. Thomas, 1971), p. 261. It has been pointed out that it is unwise for doctors to express opinions as to whether rape has occurred because they may too easily be deceived: see the same work at pp. 107-8: "Medilogical Aspects of Rape", by Graves & Francisco, (1970) Medical Aspects of Human Sexuality 109, 114: and compare "The Rape Controversy" by Coote & Gill, (N.C.C.L. 1975), p. 9.

(iii) **The Many Powerful Causes for Unfounded Allegations.**

The causes which produce unfounded allegations of rape seem, when taken together, to be peculiarly strong and numerous as compared with the causes likely to produce unfounded allegations of non-sexual crimes. In Appendix B there is set out an analysis of the more important causes of unfounded allegations of rape[13].

(iv) **The High Proportion of Unfounded Rape Complaints.**

(a) A survey of selected Victorian Police Districts carried out by the Assistant to the Law Reform Commissioner for the purposes of Working Paper No. 4 and of this Report shows that out of 135 complaints of rape offences received during 1974 and 1975 in those Districts, 68 or approximately 50%, were not accepted by the Police as being well-founded. In more than half the 68 cases the complainant, after being questioned, signed a statement that complaint was no longer made that any offence had been committed. Details of this survey are set out in Appendix C. Doubtless some of the 50% that were not accepted were in truth well-founded. The women police officers, however, by whom the complainants were interviewed appear to have been both competent and sympathetic and it does not seem likely that erroneous rejections were numerous. Moreover there must certainly, it is suggested, have been a proportion of unfounded rape complaints among the 50% that were accepted[14]. Balancing these considerations, therefore, it seems probable that the genuinely unfounded complaints, like the complaints not accepted, were something like half of the total complaints made.

(b) It would seem that in New South Wales the proportion of rape allegations rejected by the police as being unfounded is about 40%[15].

(c) In the United States figures published by the F.B.I. and by police departments as to the proportion of unfounded complaints of rape offences range from 25% down to 2%[16]. These figures have been seriously challenged, however, on the grounds that, on the one hand, they are kept low by not recording some

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[13] In Chapter 11 of "Rape Offenders and Their Victims", by Professor John M. Macdonald M.D. (Charles C. Thomas, 1971) there is a catalogue of such causes which mentions most of those referred to in Appendix B.

[14] A survey made of the 163 committals in this State during 1973 and 1974 in respect of rape offences discloses that even among these cases which had survived the scrutiny of the committal proceedings there were 13.5% in which the Prosecutors for the Queen either decided to proceed only in respect of non-rape charges or decided not to proceed at all.

[15] "Lessening the Rape Victim's Ordeal", Sydney Morning Herald, 15th April, 1976.

[16] Compare "Rape Offenders & Their Victims", by Professor John M. Macdonald M.D. (Charles C. Thomas, 1971) pp. 107, 209: "Against Our Will" by S. Brownmiller (Simon & Schuster, 1975) p. 387.

unfounded rape complaints and by classifying others as "investigation of persons", and that on the other hand they are inflated by classing complaints as unfounded even though they are considered to be genuine, if there are difficulties of proof because of special statutory requirements or otherwise. Recent unofficial estimates put the proportion of complaints that are not well founded at 50% or higher[17].

(v) **The Special Features of Rape Trials Tending to Produce Erroneous Verdicts.**

(a) In a rape trial there is usually no third person who can give an independent account of the events upon which the charge is based. The complainant, like the accused, is ordinarily impelled by the strongest motives of self-interest to try to obtain a favourable verdict[18]. The jury, therefore, is commonly presented with two highly partisan and widely different versions of what occurred. Moreover emotions are likely to be aroused which may be either indignation on behalf of the complainant or sympathy for the plight of the accused. And where the issue is consent or non-consent very special difficulties can arise in determining the truth of the matter. In 65% to 75% of cases the complainant is in the company of the accused of her own free choice[19] and not uncommonly the alleged rape occurs in a courtship situation[20], in which one can point, not only to a motive for committing rape (if consent is refused) but also to a motive for consenting. In such situations the question whether there was consent or not can be difficult to answer, even for the two parties themselves; and, at the trial, each account is likely, whether consciously or not, to be falsified, to a greater or lesser degree by reason of defensive needs[21].

(b) The natural effect of these special features is to increase the danger of erroneous verdicts being returned.

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17 See "Comment", 117 U. Pa. L. Rev. p. 279 (n. 8): "Excusing Rape" by Dr. E. M. Curley and Commentary thereon by Stephen White (papers presented in 1975 at Seminar of Research School of Social Sciences, A.N.U.).

18 She can hardly fail to realize that a verdict of not guilty is likely to cast a serious and unpleasant reflection upon her. Contrast the situation of, say, the car owner in a prosecution for car theft: see "Consent in Rape" by E. W. Puttkammer, 19 Ill. L.R. 410.

19 See "The Offence of Rape in Victoria", by Hodgens, McFadyen, Failla and Daly, (1972) 5 Aust.N.Z.J.Criminol. 231: "An Investigation into Rape and Attempted Rape Cases in Queensland" by Ross Barber, (1973) 6 Aust.N.Z.J.Criminol. 221, 228 & 229.

20 Compare Ross Barber (supra) at p. 223.

21 As to the difficulty in drawing a clear line between consent and non-consent see further, "Victims of Criminal Violence", by Professor Henry Weihofen (1959) 8 J.Pub.L. 210: "Victimology & Rape: The Case of the Legitimate Victim" by Weiss & Borges, (1973) 8 Issues in Criminology, 79, 89, 92: "Rape Offenders & Their Victims", by Professor John M. Macdonald, (Charles C. Thomas, 1971), p. 235: "The Offence of Rape in Victoria" (supra) at p. 234: Heilbron Report, Cmnd. 6352 paragraphs 9-11: "Intimate Behaviour", by Desmond Morris, (Corgi Books, 1971) where the arousal stages of courtship and mating rituals of the human species are listed.

SECTION 6. HOW SERIOUS IS THE DANGER OF WRONGFUL CONVICTIONS FOR RAPE OFFENCES?

19. The observations in Section 5 of this Report as to the vast number of opportunities that occur for the making of plausible but unfounded complaints of rape offences, as to the many powerful causes for such unfounded complaints, as to the high proportion that they represent of the total complaints for rape offences, and as to the special features of rape trials, give strong reason for apprehension that, even with the existing procedural safeguards for accused persons, there is a special danger of wrongful convictions for rape offences.

20. That this special danger exists has for centuries been the view of judges, prosecutors and others with extensive experience of rape trials and of persons who have studied what occurs at such trials.

21. Thus in the seventeenth century we find Sir Matthew Hale, C.J.[22], stating that in trials for rape, caution is called for because "the court and jury may with so much ease be imposed upon without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses". And his view has again and again been cited and re-affirmed by writers on the criminal law.

22. Coming to modern times we find that Sir Travers Humphreys, for many years a Treasury prosecutor and later a High Court judge, observed that "charges of sexual indecency by women quite without foundation were, in his fifty years experience of crime, so frequent that he came to think of them as one of the commonplaces of crime"[23]. His conclusion was that in any sexual case the evidence of the woman concerned should be "watched and probed with the greatest care".

23. Dr. Glanville Williams has expressed the view that there is sound reason for requiring corroboration in the case of all sexual offences because "these cases are particularly subject to the danger of deliberately false charges resulting from sexual neuroses, fantasy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed"[24].

24. In Victoria, Dr. K. M. Bowden, the Government Pathologist, who gave evidence in many criminal trials, has said that false accusations of sex crimes are common and that much care is necessary in testing the statements of women and young girls[25].

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[22] 1 Hale P.C. pp. 626-636.
[23] See "Miscarriage of Justice" by C. G. L. DuCann (Frederick Muller Limited 1960) pp. 218-9.
[24] "The Proof of Guilt" by Glanville Williams (Stevens & Sons, 1963), pp. 158-160.
[25] "Forensic Medicine" by K. M. Bowden, 2nd ed. (Jacaranda, 1965), p. 329.

25. Ruth Brandon and Christie Davies, in their work "Wrongful Imprisonment"[26] said that their experience bore out Sir Travers Humphreys, "both with regard to witnesses and with regard to the kind of crime".

26. A final illustration is that, writing in August 1975, an able and experienced Prosecutor for the Queen in this State expressed himself as follows:—

> "I think Prosecutors are in a good position to appreciate the extent to which false sexual allegations are made. For my part I have no doubt that false allegations are made and that such occasions are not so rare as to indicate that rules of general practice are unnecessary. It is important also to appreciate that false allegations are not always patent. I am constantly amazed by the skill and ingenuity involved in some false allegations".

27. In a number of responses to the Working Paper, however, it has been forcefully maintained that opinions such as those quoted are erroneous and reflect male sexist and mysogynist attitudes; that the prospect of having to face a police interrogation and give evidence in court is a most powerful disincentive to the making of deliberately false accusations; that the weeding out of false accusations by the investigating police, the committing magistrates and the crown prosecutors, ensures that all, or substantially all, the men put on trial for rape offences are in fact guilty; and that the true view is that the danger of a wrongful conviction for a rape offence is non-existent or negligible.[27]

28. The arguments so put forward, ought not, it is submitted, to be accepted. In the first place they give no sufficient reason for denying the detachment and challenging the conclusions of the long line of legal writers and experienced observers whose views have been referred to. Secondly, though the disincentive to which the responses draw attention is undoubtedly a powerful one, it can hardly be expected to be generally effective against incentives possessing the extreme strength of many of those referred to in Appendix B. And thirdly, though the weeding out processes eliminate implausible allegations, it is not in the implausible ones, but in the plausible though unfounded ones, that the danger lies. It may be added that the conviction rate in Victoria on presentments for rape offences is a high one, exceeding that for homicide in its various forms: see Appendix D.

29. It is, in the nature of things, impossible to ascertain what is the proportion of wrongful convictions for rape offences[28]. But the number of

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[26] George Allen & Unwin Ltd., 1973, at pp. 132-3.

[27] Compare generally "Rape Reform Legislation. Is it the Solution?" by Sasko and Sesek, 24 Clev. St.L.R. 489.

[28] An attempt has, it is true, been made to estimate the relative frequency of wrongful convictions, as between different categories of offences, by comparing the ratios of pardons, plus quashings on the merits, to total convictions, in the several categories: see Brandon & Davies (referred to in para. 29) at pp. 19-23, 264-5. This method, however, appears to assume that, in the case of the offences being compared, there is a relatively uniform relationship between the number of wrongful convictions and the number of pardons and quashings; and such an assumption may not be justified.

specific cases that one finds referred to in writings on rape makes it clear that subsequent discovery of error is by no means uncommon. Examples of such references will be found in:—

Wigmore on Evidence, 3rd edn. pp. 744-5;
Macdonald, "Rape Offenders & Their Victims", (Charles C. Thomas, 1971) at pp. 254-265;
Orenstein, "Examination of the Complaining Witness in a Criminal Court", (1951) 107 Am. J. of Psychiatry, 684,686;
Bartholomew & Lord, "The Pre-Sentence Report — Another Look", (1975) Howard Journal of Penology.23.
Brandon & Davies, "Wrongful Imprisonment", (London: Allen & Unwin, 1973) pp. 133-5.

SECTION 7. GENERAL POLICY TO GOVERN MOVES FOR REFORM.

30. In the light of the whole of the preceding discussion the proper conclusion, it is suggested, is that, in the selection and framing of reforms aimed at ameliorating the situation of the rape victim in prosecutions for rape offences, considerable caution is called for lest the result should be to increase substantially the numbers of false accusations, the numbers of persons forced to stand trial upon such accusations, and the incidence of wrongful convictions.

SECTION 8. SHOULD COMMITTAL PROCEEDINGS FOR RAPE OFFENCES BE ABOLISHED?

31. This drastic move was recommended by W.E.L. resolutions published in July 1975,[29] but it is submitted that to alter the law in this way would be highly undesirable[30]. It is true, of course, that there are cases in which accused persons do not need or desire a committal hearing. But to deprive all persons charged with rape offences of the benefit of being able to confront, investigate and challenge their accusers at such a hearing would be seriously inimical to the interests of justice: compare paragraph 16, and note 14 above. Furthermore a substantial amelioration of the situation of rape victims in relation to committal proceedings can be achieved by certain less drastic changes which are recommended in the succeeding paragraphs of this Report.

[29] See also Resolutions of Seminar on "Women as Participants in the Criminal Justice System", Canberra, 18-21/6/75 appended to Report No. 3 (1976) of Tasmanian Law Reform Commission.

[30] This was the conclusion, also, of the Tasmanian Commission in its Report No. 3 (1976) which points out that abolition would deprive accused persons of a fundamental right to have an enquiry by a judicial officer, independent of the prosecution, before being required to stand trial.

32. The view that one ought to proceed with caution in this particular area may be thought to be confirmed by the considerations:—

(i) That the current tendency for sexual activity, and the discussion of sex, to be uninhibited should make it easier for many complainants to give evidence of the intimate details of what occurred.

(ii) That though many victims do appear to find the court proceedings extremely traumatic, others appear to enjoy the role of heroine, or the opportunity to strike back at the accused; and still others appear quite matter-of-fact about what occurred.

(iii) That there are many situations just as likely to be traumatic for a Crown witness as that of the complainant in a rape trial, e.g. the case of a woman charging her son, her husband or her father with, say, attempted murder, or incest, or infanticide, or with having made away with all her assets.

(iv) That the testing of the Crown case in the relative privacy of the committal hearing may often lead the accused to take a course which saves the Crown witnesses from having to face a trial[31].

SECTION 9. THE HAND-UP BRIEF PROCEDURE.

33. In the Working Paper it was suggested that consideration should be given to requiring police informants to adopt the "Hand-up Brief Procedure"[32] in committal proceedings for rape offences unless otherwise directed by a senior officer.

34. Under that procedure the prosecution serves on the accused, not less than 14 days before the committal hearing, copies of the statements of all or any of its witnesses, accompanied by certain other documents; and then, unless the accused, at least 5 days before the hearing, serves a counter-notice that he desires the attendance of a witness whose statement has been so served, the prosecution may tender in evidence the statement of that witness in lieu of calling him or her to give oral evidence.

35. It seems reasonable to conclude that if the police adopted the "Hand-up Brief Procedure" in all prosecutions for rape offences, complainants would, in many cases, be relieved from having to give evidence at the committal hearing and sometimes from having to give evidence at all. For it could be expected that accused persons would refrain from giving notice requiring the complainant to attend:—

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[31] Compare "Rape Interview" by Bothman & Petersen, Legal Service Bulletin, July 1975, 228. From Appendix D hereto it appears that about 45% of the cases against persons committed (or if not committed, presented) for rape offences are disposed of by pleas of guilty to such offences or to lesser charges.

[32] Magistrates (Summary Proceedings) Act 1975, Sections 45-47: Justices Act 1958, Sections 42B, 42C and 42D.

(a) Where they intend to plead guilty, and either see no point in giving a notice or else desire to be able to claim credit, before the sentencing judge, for having spared the complainant altogether from having had to give evidence of what was done to her.

(b) Where, though they intend to plead not guilty, their legal advisers belong to the school of thought (now diminished in numbers) which considers it the best tactic not to give the prosecution witnesses experience of cross-examination before the trial.

36. It appears however, that the use made by the police of the "Hand-up Brief Procedure" is limited, and that the main reasons for this are that the procedure involves more office work, and that many senior officers consider it bad tactics, in those cases which prove to be defended, for the prosecution to show its hand and disclose to the Defence at the committal hearing any changes that prosecution witnesses may have made in their stories.

37. Almost all the responses to the Working Paper, including those from the Law Institute of Victoria and the Crime Practice Committee of the Victorian Bar Council, approved of the proposal that there should be a provision requiring the use of the "Hand-up Brief Procedure" in prosecutions for rape offences[33].

38. As to the proposal, however, that the requirement should be subject to a dispensing power, differing views were expressed. The majority of the Crime Practice Committee considered that there should be no dispensing power. The Law Institute considered that there should be such a power but that it should be exercisable only by a stipendiary magistrate. This, too, was the view of the minority on the Crime Practice Committee.

39. It is considered that a requirement with no dispensing power at all would be unsatisfactory, because situations can readily be supposed in which special circumstances would make it extremely inconvenient, or even impossible, for the prosecution to present its case without a dispensation. On the other hand, however, to confer a dispensing power on senior police officers, as suggested in the Working Paper, could result in a continuance of the status quo; and the appropriate solution. it is submitted, is the one proposed by the Law Institute, of conferring the power upon a judicial officer unconnected with the prosecution.

40. It is important that requests for dispensation should involve no unnecessary formality, expense or delay, and with this in mind it is *recommended* that it should be enacted:—

(i) That where a person is charged with a rape offence the informant, in relation to the evidence of the complainant, shall follow the

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[33] An exception was the response from the Royal Victorian Association of Honorary Justices, in which the view was expressed that "it is only by observing and hearing the witness that the truth can be found".

procedure laid down in Section 45 of the Magistrates (Summary Proceedings) Act 1975 unless he is authorized in writing by a Stipendiary Magistrate not to do so.

(ii) That an application for such an authorization may be made out of court and without notice to the accused, and either in writing or orally.

(iii) That an authorization shall not be granted unless the magistrate is of opinion that in the particular case there are special circumstances which make the grant desirable in the interests of justice.

41. In the Working Paper it was suggested that the time limits fixed under the "Hand-up Brief Procedure" might be shortened. But upon a consideration of the responses received it is thought that the times fixed are appropriate and that any substantial shortening of them could lead to an increase in the number of counter-notices given by the defence.

SECTION 10: OTHER PROPOSALS TO REDUCE THE STRAINS OF THE COMMITTAL HEARING UPON RAPE VICTIMS.

42. Two factors which often add to the strain of the committal hearing upon a rape victim are:—

(i) the presence of members of the public who have no legitimate interest in hearing the intimate details of her misfortune, and

(ii) the presence of members of her family and close friends, whose future relations with her may be impaired if she gives a candid account of her own activities before and during the rape.

43. It has long been the law that when a magistrate or justice holds a committal hearing he is not sitting in open court[34]. And by S. 43 of the Magistrates (Summary Proceedings) Act 1975 he is given a discretion to order the exclusion of all persons other than the parties and their representatives. It is considered, however, that a stronger protective provision than this is desirable to meet the needs of the complainant; and it is *recommended* that it should be enacted that during her evidence at committal proceedings in respect of rape offences no persons other than the parties and their representatives and essential court staff and police officers shall enter, or remain in, the courtroom unless by permission of the Court and that where such permission is granted the Court shall state, by reference to the circumstances of the case, the reasons for granting the permission[35].

[34] Compare Justices Act 1958, S. 42. The hearing, of course, is not a criminal trial and the vital policy considerations which require that such trials should be held in public do not need to be extended to it.

[35] Compare with this last suggested provision clause 44 of Bill No. C-71 introduced into the Canadian Parliament on 17/7/75: and see generally "W.E.L. Rape Submissions" by Sybil Hardie, Legal Service Bulletin Sept. 1975, p. 274.

44. The Heilbron Committee, in its recent report[36], has recommended the introduction, in England, of legislation to prohibit the publication, except by leave of a Judge, of the names of rape victims or particulars enabling them to be identified. The Committee considered that such legislation was desirable, not only to protect victims from hurtful publicity, but also to encourage the reporting of rape offences. In Victoria, however, we already have, in Sec. 4 of the Judicial Proceedings Reports Act 1958, a comprehensive and carefully drawn provision restricting the publication, in relation to any proceedings in any court or before justices in respect of any offence of a sexual or unnatural kind, of —

(a) The name, address or school or any other particulars likely to lead to the identification of the alleged victim or

(b) Any picture purporting to be or to include a picture of the alleged victim.

Publication of any such matter in any newspaper or (with certain exceptions) in any document, or on radio or television, is prohibited under penalty of a heavy fine or imprisonment unless the court or justices grant leave to publish, and the material is published in conformity with the order granting leave. This provision, it is suggested, is adequate and appropriate to protect the anonymity of rape victims, in those cases (and they are the vast majority) in which anonymity can be preserved without injustice to the Defence; and accordingly no further legislation in this area is now proposed for consideration.

45. 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, as will presently be shown in some detail, 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.

46. As a safeguard against the imposing on complainants of strains arising in the ways described in the preceding paragraph it is *recommended*

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[36] Cmnd. 6352. Compare also "The Heilbron Report" by J. C. Smith, (1976) Crim.L.R. 97: Report No. 3 (1976) of Tasmanian Law Reform Commission: Report on Rape and Other Sexual Offences, of the Criminal Law and Penal Methods Reform Committee of South Australia (1976) Section 15.3.

that legislation should be enacted[37] requiring that, where a rape offence is charged, the committal hearing shall be before a Stipendiary Magistrate, with or without other justices, and the case shall be presented by a Prosecutor who is legally qualified. It is suggested further that the Prosecutors might be instructed to regard it as their responsibility to endeavour to secure that complainants are treated with due consideration and are not subjected to unnecessary strains[38].

47. Responses to the Working Paper have suggested that a provision should be enacted to protect persons charged with rape offences from receiving harmful publicity unless and until a prima facie case has been made out against them and they have been committed for trial. The question, however, of the protection of accused persons from harmful publicity arises in relation to committal proceedings for all serious offences; and upon the whole it is not thought that the considerations peculiar to rape offences are sufficient to warrant the enactment of a special provision[39]. Furthermore, if an enquiry is to be undertaken into the adequacy of the general provisions for the protection of accused persons that are contained in Section 44 of the Magistrates (Summary Proceedings) Act 1975, (to be proclaimed) the present does not appear to be an altogether appropriate occasion.

SECTION 11. CROSS-EXAMINATION OF COMPLAINANT ON SEXUAL INTERCOURSE WITH OTHER MEN.

Sub-section (i). Objections Raised to Such Cross-examination.

48. Much criticism has been directed against the rules of evidence which, in many situations, permit the cross-examination of the complainant as to sexual intercourse by her with men other than the accused[40]. It has been urged that such activities on her part can have no relevance, or no substantial relevance, either to the issue of consent or to the question of her veracity[41]. And it has been pointed out that cross-examination on these matters can be used for the illegitimate purpose of intimidating the

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[37] In the Working Paper it was suggested that these matters might best be left to administrative action but the responses provide strong grounds for preferring legislation.

[38] Compare Report No. 3 (1976) of the Tasmanian Law Reform Commission.

[39] Compare what is said in the Report of the Heilbron Group (Cmnd. 6352) Sections 176-8: and in "The Heilbron Report" by J. C. Smith (1976) Crim. L. R. 106. In New Zealand a general provision giving protection until conviction was enacted by Act No. 47 of 1975 but repeal of its provisions is now contemplated.

[40] Such cross-examination, it would appear, occurs at trials much less frequently than might be supposed: compare "The Offence of Rape in Victoria", by Hodgens, McFadyen, Failla and Daly (1972) 5 Aust. & N. Z. J. Criminol. 225: "Rape Interview" by Bothman & Petersen, Legal Service Bulletin, July 1975, p. 228.

[41] Compare "The Victim in a Forcible Rape Case: A Feminist View", by P. M. Wood, 11 Am.Crim.L.Rev. 345: "Rape and Rape Laws: Sexism in Society & Law", by Camille E. Le Grand, 61 Calif.L.Rev. 938-9: "Rape Reform Legislation", Sasko and Sesek (1975) 24 Clev. St.L.R. at p. 484.

complainant, and in the hope that the jury, if they should find difficulty in reaching a verdict, will acquit the accused, for the reasons (perhaps not fully articulated) that the penalty for rape is very severe and that the complainant has not taken much harm[42]. Experienced prosecutors and defence counsel, it is true, regard cross-examination for such purposes as being both reprehensible and likely to antagonize the jury. But no doubt the inexperienced (and some others) are at times guilty of this kind of abuse, when judicial control is lacking[43].

49. Basing themselves upon considerations such as these, increasing numbers of persons have been contending that, both at the trial and at the committal hearing, all cross-examination of the complainant, with respect to sexual intercourse by her with men other than the accused should be prohibited[44]. It will, however, be the submission of this Report that such a prohibition would be productive of grave injustice and that the proper way to overcome current abuses is by alterations in procedure which will ensure firmer judicial control. The argument that whenever the complainant's character is attacked this should expose the accused's character to attack is examined in Section 13 of this Report.

Sub-section (ii). Relevance of Such Cross-examination to the Issues.

50. In a trial at law the test for determining whether cross-examination is permissible, as being relevant to the facts in issue, is not, as appears sometimes to be suggested, to enquire whether the facts sought to be elicited would "prove" or "disprove" some fact in issue. The test it to ask whether they would tend to render more probable the contention of one party as to a fact in issue, or less probable the contention of his opponent[45]. Furthermore this question of relevance has to be judged, not in a vacuum, but by reference to the circumstances of each case, as disclosed by the evidence.

51. This being so, there can clearly be no justification for asserting that evidence of sexual intercourse by the complainant with other men can have no relevance to the issues in a rape trial. Indeed such activity is often of the highest relevance in such a trial and its relevance can be to one or some or

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[42] Compare P. M. Wood (supra) at p. 351: "The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, & Character", by Richard A. Hibey (1973) 11 Am.Crim.L.Rev. 309, 311.

[43] Compare "Rape Interview" by Bothman & Petersen, Legal Service Bulletin, July 1975, p. 229.

[44] Compare Camille E. Le Grand (supra) at p. 939 "Women as the Victims of Crime", by John P. Noble, (Aust. Inst. of Criminology): W.E.L. Resolutions of July 1975: The Age Opinion Poll 29/9/75: Response to the Working Paper by Women against Rape Co-operative Limited: Resolution 1 in Appendix to Report No. 3 (1976) of Tasmanian Law Reform Commission.

[45] Compare "Notes and Comments" by F. Eisenbud, (1975) 3 Hofstra L. Rev. 403, 412-416: Martin v. Osborne (1936) 55 C.L.R. at p. 375: Barnes & Co. Ltd. v. Sharpe (1910) 11 C.L.R. at p. 472.

all of the basic issues which can arise in relation to rape. Of this the following illustrations are offered:—

a. **Penetration.**

A woman fears that she is pregnant to a man who cannot, or will not, marry her. She encourages a second man to have intercourse but he fails to effect penetration. He blames her, they quarrel, and he slaps her across the face. She cries out for help and accuses him of rape. At his trial the Crown supports her evidence of penetration by medical evidence that she is at an appropriate stage of pregnancy for her condition to have been caused by the alleged act of intercourse. It is obvious that it would be relevant to the issue as to penetration for the accused to question the prosecutrix as to acts of intercourse with the other man which could have produced the pregnancy[46].

b. **No Rape by Anyone.**

A girl is accustomed to going about with a group of youths and having intercourse with all of them. One night, after she has had intercourse with several of them, a new member of the group asks her to do the same for him. She dislikes him and refuses and there is an exchange of insults and blows between them. The police arrive and all are taken to the watch-house. The girl is under the age of consent, and assumes that she will be medically examined; and in order to protect her friends and punish the newcomer, she tells the police that he raped her. At his trial it is vital to his defence to elicit from the prosecutrix not only the fact of her intercourse with the others on the same night, but also her established sexual relationship with the others. The former fact will provide an answer to evidence by the Crown of the presence of semen; but the latter is needed, in addition, in order to show the girl's motive for alleging rape against the accused when in fact there was no rape by anyone.

c. **Identity.**

A woman is raped in her flat at night. Her screams bring the neighbours but the rapist escapes by a window. The accused, who lives nearby, and is on parole following a conviction and sentence for carnal knowledge, is picked up as a suspect and identified by the prosecutrix in a line-up. His defence is an alibi and he believes that the prosecutrix has deliberately charged the wrong man. He has an eye-witness who saw the rapist enter the flat with a key shortly before the screams were heard and he wishes to cross-examine the prosecutrix to show that during the 12 months before the rape she had been having intercourse in her flat at night with a man who used to enter with a key; and that about a month before the rape she broke off her

[46] Compare also the situation where there is internal bruising from abortion. "The Rape Controversy" by Coote & Gill, (N.C.C.L., 1975), p. 9.

relationship with that man. These facts would clearly be relevant to the issue as to the identity of the rapist.

d. **Consent.**

A number of young men in a car call at the home of a young woman with whom some of them are acquainted and invite her to come for a "burn". She does so and when they return her to her home she alleges that she was raped by all of them. The defence is that the intercourse was consensual. Enquiries made of her room-mate disclose that, immediately before setting out for the drive the prosecutrix said to her, "I hope I can get a bit to-night, I haven't had a bit for a while". Defence counsel wishes to elicit from the prosecutrix in cross-examination the following facts, all of which it is submitted would be relevant to the issue as to consent:

(a) That before the night in question she had been used to having intercourse quite frequently,

(b) that if she went without it for long her desire for it became very strong,

(c) that this was her state on the evening of the alleged rape,

(d) that before setting out in the car she made the statement which her room-mate alleged, and

(e) that the truth was that when she went for the drive she expected and desired to have intercourse with some or all of the men.

e. **Rebuttal of Prosecution Evidence.**

The prosecution, in order to support the complainant's evidence that she did not consent, has elicited evidence from her that she was a virgin before the act charged, (or that she is a married woman and had never had intercourse outside marriage). Defence counsel has information that in fact she had previously had intercourse with certain other men. He is clearly entitled to cross-examine the complainant to obtain admissions of those previous acts; and any such admissions will not merely go to her credit. They will be relevant to the issue of consent, because they will negative part of the prosecution's case upon that issue.

f. **Belief that Consenting.**

The complainant goes for a drive with a youth she knows and a number of other young men. When the car is parked she and her friend are left alone in the car and have intercourse with her consent. He then tells her that she will have to let the others have intercourse, asserting falsely that they are criminals who will beat her up and very possibly kill her and dump her body somewhere if she resists. He then leaves her in the car and tells the others that she is willing and is waiting for them to have their turns. In succession they go to the car and have intercourse with her, she being too frightened to make any

objection or to resist. After she has been driven home she complains to the police, and they arrest the accused, who was the last to have intercourse. He believed, at the time he had intercourse with the complainant, that she was consenting to what he did. The fact that, to his knowledge, the acts of intercourse which preceded his took place without objection or remonstrance from the complainant, had led him to expect that she would consent in his case. And this expectation was confirmed, in his mind, by her appearance of acquiescence when he himself sought to have intercourse with her. In these circumstances it will clearly be relevant (though obviously not conclusive) in relation to his defence of belief in consent, to elicit the fact that, to his knowledge, the acts of intercourse which preceded his had taken place without objection or remonstrance from the complainant.

52. The illustrations given in the preceding paragraph are, it is considered, fatal to any contention that cross-examination as to acts of intercourse by the complainant with other men can have no relevance to the issues[47]. But some of those who seek to exclude cross-examination with respect to such acts put forward a narrower contention. They say that at least such cross-examination should be regarded as irrelevant to the issues whenever the only basis for claiming that it is relevant is to argue that the fact that the complainant had consensual intercourse with other men makes it more probable that she had consensual intercourse with the accused.

53. This narrower contention, however, does not involve any new doctrine. For it has long been a settled rule of the law of evidence that where a person is alleged to have committed a specified act, evidence of his having done acts of the same class is not admissible for the purpose of leading to the conclusion that he is a person likely from his conduct or character to have done the act alleged. This rule against admitting evidence of the commission of acts pointing to a propensity in order to show the commission of an act alleged, is one of very general application[48]. It applies, of course, to prevent the Crown, in a criminal prosecution, from supporting its allegation that the accused committed the crime charged, by evidence that he has committed crimes of the same class and therefore has a propensity to commit that kind of crime[49]. But it applies equally to prevent an allegation of negligent driving against a defendant in a running-down action from being supported by evidence that he has driven a car

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[47] They also require a rejection of the restricted view as to the relevance of acts of intercourse with other men that is taken in the Report of the Heilbron Group, Cmnd. 6352, Sections 131, 137 and 138: In support of such rejection see Report No. 3 (1976) of Tasmanian Law Reform Commission, Section 12: "Compulsory Process II" (1975) 74 Mich.L.Rev. 191 at 208-9.

[48] Compare Martin v. Osborne (1936) 55 C.L.R. at p. 375: Bugg v. Day, (1949) 79 C.L.R. at p. 467: Cross on Evidence, Aust. edn. pp. 368-371.

[49] Compare Makin v. A.G. for N.S.W. (1894) A.C. at p. 65; Boardman v. D.P.P. (1974) 3 All. E.R. 887.

negligently on other occasions and therefore has a propensity to do so[50]. And it applies equally[51] where the Defence, in a rape prosecution, alleges that the complainant, on the occasion which is the subject of the charge, had consensual intercourse with the accused, and seeks to support that allegation by evidence that she has had consensual intercourse with other men on other occasions and therefore has a propensity to engage in such acts.

54. The rule against proof by evidence of acts showing a propensity cannot be justified on the ground that such evidence can have no weight. Indeed it can, in some circumstances, be of the highest cogency[52]. The evidence is excluded for reasons of policy, namely to prevent the protracting of trials by the introduction of collateral issues, to prevent unfair surprise, and to exclude evidence the prejudicial effect of which may exceed its real weight[53].

55. The existence of the rule involves that ordinarily cross-examination of the complainant with respect to acts of intercourse with other men than the accused cannot be justified as admissible on the issue as to consent, because it will only go to show a general propensity to consent. In special situations, however, it has a further relevance to that issue which renders it admissible. And perhaps the most important of these special situations are:—

(a) Where the cross-examination is directed to showing that the complainant is a prostitute[54].

(b) Where it is directed to showing system.

56. In the first of these two situations the cross-examination has an additional relevance to the issue of consent because the fact that the complainant follows the occupation of providing sexual services for a fee makes it more probable that, on the occasion of the alleged rape, the intercourse was engaged in by her in the course of her occupation and

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50 See Bugg v. Day, (1949) 79 C.L.R. at pp. 464 and 467.

51 Compare R. v. Holmes (1871) 1 C.C.R. 334: R. v. Riley 18 Q.B.D. 481: R. v. Thompson, (1951) S.A.S.R. 135: R. v. Taylor, 85 W.N. N.S.W. (Pt. 1) 392. This proposition, it is considered, is too well established to be affected by what might appear to be contrary general observations in Lowery v. The Queen, (1974) A.C. 85. Evidence of previous acts of intercourse with the accused himself is not excluded by the rule, since it tends to show not a mere general propensity, but a special personal relationship between the accused and the complainant: compare Cross on Evidence, Aust. Edn. p. 273-4, 421: McConville v. Bayley, (1913-14) 17 C.L.R. at p. 512: R. v. McCready (1967) V.R. 325.

52 Compare Cross on Evidence, Aust. edn. p. 371: Wigmore on Evidence, 3rd edn. Sec. 200 citing Cardozo J.

53 Cross, pp. 368-370: R. v. Holmes (1871) 1 C.C.R. 334.

54 Compare R. v. Bashir & Manzur (1969) 3 All. E.R. 692: R. v. Krausz, 57 Cr. App. R. 466.

under promise, or in expectation, of a fee[55]. To put the matter in another way the cross-examination is directed to showing a special motive for consenting to intercourse with the accused. In the second case the cross-examination supports the inference of consent by showing that on the occasion of the alleged rape the complainant's course of action followed precisely the same pattern as her course of action on other occasions on which intercourse was consensual.

57. The rules governing cross-examination with respect to acts of intercourse by the complainant with other men where the questions are sought to be justified as being directed to the issues in the case (see particularly paragraphs 50, 53 and 55 above), may be summarized by saying that in general the law allows such cross-examination in all cases in which it is relevant to one of the issues; but not where it goes merely to support an allegation of consent by showing a general propensity to have consensual intercourse. Some additional ground for claiming relevance needs to be shown, as illustrated in the preceding paragraph and paragraph 51. And if this can not be done the cross-examination is not allowable as going to the issues. It has to be justified, if at all, as going to credibility. These rules, it is considered, are fair and reasonable and do not call for alteration, though better procedures are desirable to facilitate the proper enforcement of them.

Sub-section (iii). Relevance to the Credibility of the Complainant.

58. Where cross-examination of the complainant as to intercourse with other men is not admissible as going to the issues it may nevertheless be warranted if it tends to impair to a material extent her credibility as a witness; and it may satisfy this test in a variety of different ways. For example it may be directed to eliciting that she has lied in a previous answer (as by saying that she was living alone in a flat when in fact she was living there with a man in a de facto relationship). It may be directed to showing that she has tried to deceive the court by adopting the dress, demeanour, and vocabulary of an inexperienced girl of school age, when in fact she is an adult with a wide experience of intercourse in many forms and settings. It may be directed to obtaining an admission that in custody proceedings she committed perjury by falsely denying adultery. It may be directed to showing that on other occasions she has had consensual intercourse with men and then charged them with rape. It may be directed to showing that she accepted appointment to an office with a company or organization and rendered no services for her salary other than sexual intercourse with the head of her department. Or it may be directed to general character and credibility, as distinct from past lying or dishonest behaviour.

59. Some of the responses to the Working Paper suggested that cross-examination of a witness as to general credibility should be confined to

[55] Compare Martin v. Osborne, (1936) 55 C.L.R. 367, where the service provided was that of transporting passengers by bus and the inference was drawn that they were being charged for the service.

matters pointing to a predisposition or propensity to lie. But the law does not so confine it and any such limitation would be most undesirable. For it would deprive a party of the right to cross-examine an opposing witness as to the commission of offences of the gravest kind, such as planned murder and arson, and also as to such conduct as abandonment or neglect of children, neglect of filial obligations, breaches of confidence, abuse of power, and unscrupulous business methods.

60. In general, and subject to a controlling discretion exercisable by the court, a party, when cross-examining as to general credibility, is entitled to seek admissions of any really discreditable behaviour; and this principle is supported by the consideration that if a witness has, for his own purposes, chosen to do things which he must have been aware were serious breaches of accepted codes of proper behaviour in the community, then the court or jury may reasonably feel a doubt as to how far it can rely on his having refrained, in his evidence, from committing, for his own purposes, breaches of the accepted code against giving false evidence[56].

61. In former times, it would seem, any act of extra-marital intercourse on the part of a woman would ordinarily have been regarded as so serious a breach of accepted codes of proper behaviour as to impair her credibility as a witness. But this is ancient history. Under the more relaxed and tolerant code of what is proper sexual behaviour that has now become accepted in most sections of the community, the mere fact that a woman has engaged in extra-marital intercourse would not ordinarily be regarded as impairing in any way her credibility as a witness. Indeed some would today assert that there is no form of sexual activity which could properly be regarded as a sufficiently serious breach of accepted codes of proper behaviour to affect credibility. Such appears to have been the view taken in the Report of the Heilbron Group[57], but it is submitted that this goes too far. There are, it is thought, still forms of intercourse that would be generally regarded as seriously discreditable and therefore as weakening confidence in the reliability of a witness. It is perhaps sufficient to refer, by way of illustration, to prostitution, intercourse in the presence of members of the public, participation in "gang-bangs", promiscuous solicitation of intercourse with strangers and intercourse with more than one man at the same time.

62. In the light of these various considerations firm judicial control will ordinarily be necessary to confine within proper limits the cross-examination of complainants as to credit, when the questions relate to intercourse with men other than the accused.

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[56] Accordingly, the principle allowing cross-examination as to general credibility does not need to call in aid any doctrine that certain forms of behaviour are sinful or contrary to immutable rules of morality.

[57] Cmnd. 6352, Sections 108 and 131.

Sub-section (iv). Procedure to Protect against Improper Cross-examination.

63. Under existing procedures it is not easy for judges, magistrates or justices to confine within its proper limits the cross-examination of a complainant as to sexual intercourse by her with other men. Commonly they are not told in advance what the cross-examination is directed to eliciting, and it is natural that they should assume that the cross-examination is legitimate until the contrary appears; and by then the damage may have been done. Furthermore they may be reluctant to intervene before it is clearly necessary for them to do so, because intervention will probably involve disrupting the proceedings by sending the complainant out of court and also, where there is a jury, sending the jurors to their room.

64. It is therefore *recommended* that provision should be made that the Defence, before cross-examining the complainant as to sexual intercourse with men other than the accused, must make application to the judge, magistrate or justices for leave to do so[58]. It should be provided that the application need not be supported by sworn evidence unless the tribunal requires it[59]; that the application shall be made in the absence of the jury, if any, and, if the accused should so request, in the absence of the complainant; and that leave shall not be granted except as to matters considered to have substantial relevance to facts in issue otherwise than as showing a general propensity or to be proper matter for cross-examination as to credit.

SECTION 12. CALLING WITNESSES TO PROVE INTERCOURSE BY COMPLAINANT WITH OTHER MEN.

65. Sometimes it is the Crown that wishes to call such evidence, and the following is an example of such a case. A girl is abducted, badly beaten up and raped by a group of youths in a car. A week later she is abducted by another group who claim to be members of the same gang as the first group and who say that she will have to "turn it on" for them, too. She begs them to let her go, but when they refuse she makes no resistance while each of them has intercourse with her. Upon the trial of the second group the Crown seeks to prove the first abduction, beating up and rape, pointing out that such evidence will render more probable its contention that the girl

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[58] Compare "The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, & Character", by R. A. Hibey (1973) 11 Am. Crim.L.Rev. 326: "W.E.L. Rape Submissions" by Sybil Hardie; Legal Service Bulletin Sept. 1975, p. 274: Bill introduced into the Victorian Assembly by Mr. Holding on 7/10/75: Canadian Bill C-71 of 17/7/75: The Robbins' Rape Evidence Law (1973-4) Ch. 569 (Calif.): "Rape Reform Legislation. Is it the Solution?" by Sasko and Sesek (1975) 24 Clev. St. L.R. at pp. 482-3, 497-8: Report No. 3 (1976) of Tasmanian Law Reform Commission, Section 12.

[59] Ordinarily the application should be capable of being dealt with satisfactorily by ascertaining from counsel what he is seeking to elicit and what his instructions are, and it will not be necessary to hear evidence on a voir dire.

did not consent to the second rape and that the accused knew she was not consenting.

66. Ordinarily, however, it is the Defence that desires to tender evidence of intercourse with other men, following denials of it by the complainant during her cross-examination; and the rules of evidence applicable in this situation are open to serious criticism.

67. The Defence may call evidence that the complainant is a prostitute or evidence that she bears a notoriously bad reputation for want of chastity[60], but as a general rule it may not call evidence to contradict any denial by her of having had intercourse with a person other than the accused[61]. This prohibition would be in accordance with the general rules of evidence if it applied only in those cases in which the facts denied by the complainant and sought to be proved by evidence went only to her credit and were not relevant to any facts in issue. For in relation to matters going merely to credit a witness' denial is final. But the prohibition does not seem to be confined to matters of credibility; and, as may be seen from the examples given in paragraphs 51 and 56 there are many situations in which proof of acts of intercourse with other men would be highly relevant, so that a total prohibition against contradicting the complainant's denial of such acts would place in her hands a dangerous power to defeat justice. Furthermore the rule permitting the Defence to call witnesses to say that the complainant bears a bad reputation for chastity is an anomalous and little-used survival from the past, and if made use of today is less likely to promote justice than injustice.

68. It is therefore *recommended* that it should be enacted:—

(i) That evidence of sexual intercourse by the complainant with men other than the accused shall be admissible in rape prosecutions where the tribunal considers that it has substantial relevance to facts in issue[62] otherwise than as showing a general prospensity.

(ii) That the rule permitting evidence to be given for the Defence in rape prosecutions that the complainant bears a bad reputation for chastity be abolished.

SECTION 13. CROSS EXAMINATION OF ACCUSED.

69. Responses received to the Working Paper indicate that it is widely supposed that a complainant can be asked in cross-examination any

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[60] Compare R. v. Greatbanks (1959) Cr. L.R. 450: Report of Heilbron Group, Cmnd. 6352, Sections 93-96.

[61] Compare R. v. Hodgson (1812) Russ. & Ry. 211: R. v. Clarke (1817) 2 Stark 211: R. v. Barker (1829) 3 C. & P. 588: R. v. Holmes (1871) L.R.I.C.C.R. 334: Cross on Evidence, Aust. Edn. p. 421.

[62] Compare Report on Rape and Other Sexual Offences by the Criminal Law & Penal Methods Reform Committee of South Australia, Section 15.9.2.

questions whatever about her sexual activities, but that the accused, when being cross-examined, cannot be asked any corresponding questions. This is erroneous, however, both as to the complainant and as to the accused.

70. As regards the complainant, it has been pointed out in Section 11 that she can be cross-examined only as to

(i) matters relevant to the issues (otherwise than merely by showing a general propensity) and

(ii) matters affecting her credibility, as by showing previous lying, dishonesty or other really discreditable behaviour.

71. As to the situation of the accused:—

(i) He can be cross-examined, just as the plaintiff can be, upon all matters that are relevant to the issues, otherwise than merely by showing a general propensity. For example if his defence is that he was in a distant town at the time of the alleged rape he can be cross-examined as to whether he was not in fact in bed with a woman in a brothel near the scene of the rape an hour or so before it occurred.

(ii) He is liable, if the judge gives leave, to be cross examined as to matters merely affecting his credibility whenever he has adduced evidence of his own good character or "the nature or conduct of the defence is such as to involve imputations on the character" of the complainant[63]. And these quoted words are satisfied not only where the imputation arises from cross-examination of the complainant as to credibility but also (subject to one narrow exception), where it arises from Defence cross-examination, or Defence evidence, with respect to the facts in issue.

(iii) The narrow exception referred to is that if the imputation results from, or forms part of, the accused's denial of the facts alleged against him, this does not open his character to attack[64].

(iv) That exception involves that if the Defence, in a rape case, merely contradicts the allegation that the intercourse was without consent by evidence of the words and conduct by which consent was given, then neither the assertion that there was consent, nor even the fact that the words and conduct took an indecent form discreditable to the complainant, or made reference to her previous sexual activities, will open the plaintiff's character to attack[65].

(v) The exception, however, according to the doctrine laid down by the High Court, is not a special rule for rape cases; it applies to all

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[63] Crimes Act 1958, Section 399 (e) (ii).

[64] See Dawson v. The Queen (1961-62) 106 C.L.R. pp. 10-11, and 22.

[65] R. v. Turner, (1944) K.B. 463: Curwood v. The King (1944-45), 69 C.L.R. p. 587, 588-9.

criminal trials[66]. Take, for example, a trial for house-breaking with intent to steal. Suppose that it is shown that the accused was found in the house, after having entered it in the absence of the owner by opening an unlocked back door, and the owner gives evidence that he did not authorize the accused to enter. If the accused's defence is a denial that he entered without consent he does not open his own character to attack by giving evidence that he had been invited by the owner to come to the house in terms showing that it was for the purpose of homosexual intercourse.

72. It has recently been proposed[67] that whenever a man accused of rape brings out anything at all about the previous sexual conduct or experience of the complainant then, even if the case is one within the exception just referred to, this should bring Section 399 (e) (ii) of the Crimes Act into operation and enable the trial judge, in his discretion, to allow cross-examination of the accused as to his character and prior convictions.

73. It is not considered, however, that this change would be desirable. It would involve the introduction of a special rule — an exception to the exception — for persons standing trial for rape. And this would, in some cases, make it more difficult for them to defend themselves than it would be for other accused persons. This would increase the risk of wrongful convictions for rape when that risk is already a cause of some misgivings[68]. Furthermore, enquiries indicate that Prosecutors would not favour the change because they would expect juries to feel that the Crown was acting unfairly, and because they would expect appeals to be brought against the judge's exercise of discretion, and a number of new trials to be ordered.

SECTION 14. THE CORROBORATION WARNING.

74. It is a long-settled rule of practice that at the trial of any person upon a charge of rape, or of any other sex offence, the judge should give the jury a warning upon the subject of corroboration. This warning should inform them that it is dangerous to convict a person of a sex offence upon the evidence of a complainant unless it is corroborated; that the law does not say that it is not open to them to do so; but that it says they ought not to do so unless, after a careful scrutiny of the uncorroborated evidence they are clearly convinced that it is true. The warning should point out, further, that corroboration, for this purpose, means some evidence which is independent of that of the complainant; which they are satisfied is true; and which confirms in some material particular, both that the crime charged

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[66] Dawson v. The Queen at pp. 10-11 & 22. In England a different view appears to have been taken: Selvey v. D.P.P. (1970) A.C. 304: Report of Heilbron Group, Cmnd. 6352 paras. 116-7.

[67] See W.E.L. Resolutions of July 1975.

[68] See Section 6.

was committed, and that the accused was the person who committed it. The judge should then indicate to them the sort of evidence which, if they accept it, may be treated as corroboration and, in an appropriate case, indicate also the areas of the evidence in which it may be found[69].

75. In recent times the propriety of giving this warning has been challenged. It has been argued that such a warning is unnecessary in rape cases and that it casts an unmerited slur upon the prosecutrix[70]. And these views have been promoted and supported by writings in the United States which have attacked with much success the statutory requirements of corroboration existing in many of the States.

76. It is submitted, however, that no change should be made in our existing rule of practice[71]. That rule is altogether different in its nature from the strict statutory requirements which in some of the American States, such as New York, were so exacting as to make convictions for rape almost impossible to obtain[72]. Under our practice there is a very substantial conviction rate: see Appendix D to this Report. And, indeed, where corroboration exists, as is usually the case, and the jury regard it as credible, our practice probably promotes convictions, because it points out to the jury that the complainant's evidence is corroborated by independent evidence[73]. Where there is no corroborative evidence, on the other hand, or the jury do not find it acceptable, the warning would seem to be most desirable, in view of the considerations set out in Section 6 of this Report[74].

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69 Compare R. v. Matthews & Ford (1972) V.R. 3; R. v. Turnsek (1967) V.R. 610.

70 "Rape Interview" by Bothman & Petersen, Legal Service Bulletin, July 1975, p. 229: "The Rape Corroboration Requirement: Repeal not Reform", 81 Yale L Rev. 1365: "The Case for Repeal of the Sex Corroboration Requirement in New York" by F. J. Ludwig, 36 Brooklyn L. Rev. 378: "The Requirement of Corroboration in Prosecutions for Sex Offences in New York", by Irving Younger, 40 Fordham L. Rev. 263, 276-7.

71 Compare Report on Rape and Other Sexual Offences (1976) by Criminal Law and Penal Methods Reform Committee of S.A., Section 15.6.

72 See American citations in Note 70 and "Definition of Forcible Rape" by H.S.S. (1975) 61 Va. L. Rev. pp. 1530-2.

73 Compare "Juries & the Rules of Evidence", L.S.E. Jury Project, (1973) Crim.L.R. 208.

74 See also "Sex Offences: The American Legal Context", by M. Ploscowe, 25 Law & Contemporary Problems 217: "Corroborating Charges of Rape" 67 Colum.L.Rev. 1137. And it may be noted that the Canadian Criminal Law Amendment Act 1975, which repeals a statutory corroboration requirement, does so, as appears from explanatory notes to the Bill, in the expectation that the Courts will be able, where it is desirable to do so, to give an appropriate warning.

SECTION 15. HARDSHIP TO COMPLAINANT FROM MULTIPLE HEARINGS.

77. In view of the severe trauma that can be caused to a rape victim by the multiplication of court hearings[75], the suggestion has been made that where the complainant has given evidence at committal proceedings against one or some of a group of men charged with raping her, and thereafter another member of the group is charged, the Crown should present him for trial under S. 353 of the Crimes Act 1958 without allowing him the benefit of a committal hearing. It is not thought, however, that this would be a satisfactory solution. The victim could still be called on to face a succession of trial hearings; and there could be a serious injustice to an accused person if he was deprived of a committal hearing where his defence depended on aspects of the facts which had not been investigated in any way at the committal hearing held before his arrest.

78. It would appear to be a more appropriate remedy to confer on a complainant who has given her evidence twice against one or more of her assailants a right to say that she will not pursue the matter further; and it is therefore *recommended* that the law should be amended to provide as follows:—

That a complainant who has given evidence at a committal hearing and trial, or at successive trials, in respect of a charge of the commission of a rape offence against her:—

(i) Shall have the right to decline to give evidence for the prosecution in any subsequent trial in respect of that charge or in any subsequent committal hearing or trial in respect of a charge of any other rape offence alleged to have been committed against her or any other person upon the same occasion as that in relation to which she has so given evidence.

(ii) Shall be advised by the Crown of her right so to decline before being called on to give any such further evidence on its behalf, and

(iii) Shall not be liable to any punishment for contempt or otherwise for declining to give any such further evidence.

79. In those cases in which a right arose to decline to give evidence for the prosecution, and the right was exercised, the Crown would still be able to proceed with charges when there was adequate confessional or eye-witness evidence, or the deposition or written statement of the person exercising the right was admissible in evidence against the accused, either at common law or under statutory provisions[76]. But in such a situation the Defence, of course, might require that the person exercising the right should give evidence on its behalf, if her evidence was favourable to the Defence on the particular charge with which the Crown was proceeding.

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[75] Compare paragraph 11 (g) and note 7 above.

[76] Compare Taylor on Evidence, 10th edn. sections 464-472: and see Justices Act 1958 Sec. 208: Crimes Act 1958 Sec. 413: Magistrates (Summary Proceedings) Act 1975 Sec. 163.

SECTION 16. TIME LIMIT ON PROCEEDINGS.

80. 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. It is therefore *recommended* that provision should be made that the trial of any person charged with a rape offence shall not be commenced later than three months after his committal for trial unless the court of trial shall for good cause shown grant further time during the three months or during an extension thereof. Delays, however, often occur between the laying of the charge and the committal hearing; and it has been submitted both by the Law Institute and by the Crime Practice Committee of the Bar that at this stage, also, a time limit should apply. It is considered that here again a three month period would be appropriate; and it is therefore further *recommended* that provision should be made that the committal proceedings in respect of rape offences shall not be commenced later than three months after the laying of the charge unless a Stipendiary Magistrate shall, for good cause shown, grant further time during the three months or during an extension thereof.

SECTION 17. BAIL.

81. Two serious problems have been found to arise where bail has been granted to persons charged with rape offences. One is that there have been cases in which a person so charged has, while on bail, committed one or more further rape offences. The other is that sometimes a person so charged will, while on bail, try to intimidate the complainant by standing about watching her or by following her.

82. In this Paper no proposals are put forward for consideration in relation to these matters, and this for the following reasons:—

(a) The Statute Law Revision Committee, during 1974 and 1975, conducted a full enquiry into the question of Bail, travelling to the United States and Canada for the purpose of investigating the problems involved.

(b) In its Report made on 13th February 1975 it has recommended that a separate Bail Act should be enacted to bring into operation the provisions necessary for the proper operation of a bail system.

(c) In particular the Committee has recommended that the Bill should establish the criteria which should be considered in deciding whether or not a person should be kept in custody; and it has stated that the matters to which regard should be had include the protection of the public and the likelihood of the accused committing similar offences while on bail.

(d) The Committee has recommended, further, that the Bill should contain provisions requiring the presentation of information to the tribunal by the police where bail is opposed.

(e) As regards the problem of intimidation the remedy appears to lie, not in the field of law reform, but in that of administration. Sections 31 and 41 of the Magistrates (Summary Proceedings) Act 1975 give power to impose special conditions when granting bail, and to recall bail and amend or supplement the conditions. And Section 362 of the Crimes Act 1958 confers a power to revoke bail. But it would seem that where intimidation of the complainant occurs she finds it difficult to induce the authorities to take action to protect her. What is needed would appear to be, not any change in the law, but appropriate administrative action to ensure that adequate steps are taken to protect Crown witnesses who complain of being subjected to intimidation.

SECTION 18. COMPOSITION OF JURIES.

83. The Report of the Heilbron Group[77] recommended that there should be a minimum of four men and four women on the jury in rape trials. The Group recognized that its detailed proposals for the bringing about of this result might be held to infringe the principle of random selection of juries, and would require a restricting of the right of challenge. It recognized, also, that there would be a likelihood of creating some substantial difficulties in court administration. But it took the view that it was worthwhile to accept these consequences, with a view to obtaining more impartial and representative juries.

84. The Group's proposal was considered by the Tasmanian Law Reform Commission[78] which said that in rape cases there should always be some women jurors, and added that it had a preference for seeing women form "at least half of the jurors" in such cases.

85. It has been pointed out, however, that if you reject, for rape cases, the view that random selection is the best method of seeking impartial and representative juries, then you throw doubt on the appropriateness of that method in all those criminal cases in which the victim or the accused is a member of a racial, national, religious or other community having special interests and characteristics[79]. And this could lead to demands for privileges which would make the selection of juries impossibly complicated.

86. The Criminal Law and Penal Methods Reform Committee of South Australia has made a survey of all indictments for rape in that State from the beginning of 1965 to the end of 1975, which shows that the proportion

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77 Cmnd. 6352, paragraphs 179-189, and recommendations 12 & 13.
78 Report No. 3 (1976).
79 See "The Heilbron Report" by J. C. Smith, (1976) Crim. L. R. at p. 106.

of verdicts of guilty was substantially the same for juries with a majority of females, juries with a majority of males, and juries with equal numbers of each[80]. In the light of this, and having regard to other more general considerations, the Committee concluded that it was undesirable to depart from the principle of random selection merely because the charge was one of rape; and it said that it had reached this conclusion for reasons similar to those which had impelled it, in a previous report, to recommend that there should be no provision for trial by jurors selected from the occupational or ethnic group of the accused.

87. The South Australian survey provides clear evidence that to require the inclusion of a proportion, or for that matter a majority, of women on the juries trying rape cases would make no difference at all to the number of accused persons convicted or acquitted. The change would, at most, give a greater appearance of impartiality, and even this, perhaps, only to the casual observer. For experienced observers might well take the view that the jurors most likely to acquit would be women of the complainant's age group, and that the jurors most likely to convict would be middle-aged men[81]. Furthermore, it seems clear that any appreciable improvement in appearances would be limited to a relatively small proportion of rape trials. For a survey made of 98 criminal cases of all kinds tried in the 3rd, 4th and 5th courts of the County Court at Melbourne in the year ending June 1974 showed that in almost 50% of the cases there were between 4 and 9 women on the jury of 12 and that in 89% of the cases the jury included at least 2 women[82]. These figures indicate that, in this State criminal trials in which there are no women on the jury are a rarity; and this has been confirmed by enquiries made of the relevant Court Offices. Those enquiries indicate, further, that the composition of juries in rape cases does not differ materially from that in criminal cases generally; and that, because of the numbers of women on the panels, it would ordinarily be impossible for an accused person, by the exercise of his right of challenge, to obtain an all-male jury.

88. The proper conclusion, it is submitted, is that it would be a mistake to infringe the principle of random selection of juries by requiring a fixed percentage of women jurors on juries trying charges of rape offences; and that if it were desired to increase the proportion of women serving on juries the appropriate course might well be to re-consider the scope of the very widely expressed provisions under which women are able to claim to be excused from jury service[83].

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[80] Report on Rape and Other Sexual Offences (1976) Section 17.

[81] Compare "Wanted for Rape", by Dr. John Helmer, National Times, Melbourne 10-15 November 1975.

[82] See "Jury Representation and Predictability", by Corinne Morgan (unpublished thesis) at p. 51.

[83] See Juries Act 1967 Section 4 (4) and Schedule 4. Enquiries indicate that at present the proportion of women upon a jury panel is about one-third.

SECTION 19. SUMMARY OF RECOMMENDATIONS.

89. The following clauses summarize the principal measures recommended in the preceding paragraphs of this Report. As the terms of reference (para. 1) speak only of rape, the proposals for reform are put forward in relation only to rape offences, i.e. rape, attempted rape and assault with intent to rape. But this limitation is not, of course, intended to suggest that none of the proposed changes would be appropriate for any non-rape offences.

(1) Require informants in all cases of rape offences to adopt the "Hand-up Brief" procedure unless authorized in writing by a Stipendiary Magistrate not to do so; and provide that application for authorization may be made informally, but shall not be granted unless there are special circumstances (para. 40).

(2) Provide, in relation to the committal proceedings for rape offences, that during the evidence of the complainant no persons other than the parties and their representatives and essential court staff and police officers may enter, or remain in, the courtroom unless by permission of the Court, and that where such permission is granted the Court shall state, by reference to the circumstances of the case, the reasons for granting the permission (para. 43).

(3) Require that the committal hearing in respect of rape offences shall take place before a Stipendiary Magistrate with or without other justices and that the case shall be presented by a Prosecutor who is legally qualified (para. 46).

(4) Provide that the Defence, before cross-examining the complainant as to sexual intercourse with men other than the accused, must make application to the judge, magistrate or justices for leave to do so; that the application shall be made in the absence of the jury, if any, and, if the accused should so request, in the absence of the complainant; and that leave shall not be granted except as to matters considered to have substantial relevance to facts in issue (otherwise than as showing a general propensity) or to be proper matter for cross-examination as to credit (para. 64).

(5) Provide that evidence of sexual intercourse by the complainant with men other than the accused shall be admissible if, but only if, the tribunal is satisfied that it has substantial relevance to facts in issue (otherwise than as showing a general propensity) (para. 68).

(6) Abolish the rule permitting evidence to be given for the Defence that the complainant bears a bad reputation for chastity (para. 68).

(7) Provide that a complainant who has given evidence at a committal hearing and trial, or at successive trials, in respect of a charge of a rape offence against her shall have the right to decline to give

evidence for the prosecution at any subsequent proceedings against any person in respect of that offence, or in respect of any other rape offence (whether against her or any other person) that is alleged to have been committed upon the occasion as to which she has so given evidence; and that the Crown, before calling upon her to give any such further evidence, shall advise her of her right to decline (para. 78).

(8) Provide that the trial of a person charged with a rape offence shall not be commenced later than three months after his committal for trial, unless the court of trial, for good cause shown, shall grant further time during the three months or during an extension thereof; and provide, also, for a three months' time limit between the charge and the committal hearing, unless further time is, in like manner, allowed by a Stipendiary Magistrate (para. 80).

DATED the 21st day of June, 1976

T. W. SMITH
(LAW REFORM COMMISSIONER)

APPENDIX A.

ACKNOWLEDGMENTS.

It is desired to make particular acknowledgment of the assistance received from the members of the Law Reform Advisory Council (Mr. John Donoghue, Professor H. A. J. Ford, Mr. J. A. Gobbo Q.C., Mrs. Gillian Johnson, Mr. A. R. Lobban, and Mr. R. McGarvie Q.C.); from the Legal Assistant to the Commissioner (Mrs. Jan Palmer); from the Secretary to the Commissioner (Miss E. L. Russell); and from the following organizations and persons:—

The Australian Federation of Business and Professional Women's Clubs (Vic. Divn.)

The Australian and New Zealand College of Psychiatrists

Australian Women Against Rape

The Australian Law Reform Commission

The Council and the Legislation "A" Committee of the Law Institute of Victoria

The Council and the Crime Practice Committee of the Victorian Bar

The Crown Solicitor's Office

The Criminal Law and Penal Methods Reform Committee of South Australia

The National Council of Women of Victoria

The Rape Crisis Centre — Perth W.A.

The Royal Victorian Association of Honorary Justices

The Society of Labor Lawyers

The Sydney Rape Crisis Centre

The Tasmanian Law Reform Commission

The Victoria Police

The Women's Electoral Lobby (Vic.)

Women Against Rape Co-operative Ltd.

Dr. Allen Bartholomew,
Mr. David Biles,
Dr. J. H. W. Birrell,
Ms. R. Bonney,
Mr. Columb Brennan,
Mr. A. K. Brown, S.M.,
Dr. J. P. Bush,
Mr. T. R. Carney,
Acting Dep. Commr. W. D. Crowley,
Dr. E. M. Curley,
Ms. Julie Dahlitz,

Dt. Ch. Super. G. Davidson,
Mr. Ian D. Elliott,
Mr. Gareth Evans,
His Honour Judge Forrest,
Mr. W. Fuerst, J.P.,
Dr. Stanley Gold,
Ms. Sybil Hardie,
Dr. J. Helmer,
Fr. E. J. Hodgens
Professor C. Howard,
Mr. P. H. Kearney,
Mr. W. M. R. Kelly,
Dr. Graham N. King,
Miss Valerie Y. Lamb, J.P.,
Professor D. J. Lanham,
P/W. Insp. Margaret McVeigh,
Mr. G. A. Madden,
The late Mr. J. P. Moloney, Q.C.,
Mr. Paul R. Mullaly,
Professor P. G. Nash,
Ms. Kerry Petersen,
P/W. Insp. Barbara Porter,
Mr. F. R. Power, J.P.,
Mrs. A. Serianni,
Mr. John Smythe,
His Honour Judge Southwell,
Det. Insp. J. O. Tappe,
Mr. B. G. Teague,
Mr. C. J. T. Thompson, Ch. S.M. (retd.),
Professor Louis Waller,
Det. Ch. Insp. K. P. Walters,
Mr. Mark Weinberg,
Mr. Stephen White,
Mr. C. R. Williams,
Dr. Paul R. Wilson.

APPENDIX B.

CAUSES OF UNFOUNDED ALLEGATIONS OF RAPE.

In the first place there are certain not uncommon situations which cause women to make false allegations of rape, because to do so seems the only way to extricate themselves from serious difficulties. Examples are:—

(i) Where an explanation is demanded by anxious parents, or a suspicious husband, of a return home in the early hours, and especially when recent intercourse has left some traces[1].

(ii) Where an explanation is needed for being found in the act of intercourse or in a highly compromising situation[2], especially where important rights such as custody of children may be affected.

(iii) Where an explanation of pregnancy is needed by a woman who is unmarried or divorced or separated from her husband or whose husband has been sterilized or has been long absent.

(iv) Where a woman desires an abortion performed within the law.

(v) Where the contracting of a venereal disease calls for explanation.

Secondly there are cases in which the woman, at the time of the intercourse, is in two minds, feeling both fear and desire and therefore giving contradictory indications to the man, or in which she has a change of mind which is fractionally too late, or in which she protests, but only to preserve status; and then subsequently, because she feels guilty and remorseful or fears pregnancy, or for both reasons, her mind rejects the idea that she could have consented and, by the mechanism of selective recall which we all possess she genuinely remembers the event as a rape and reports it as such[3].

Thirdly there are situations in which the cause of a false allegation is a desire to injure the accused arising out of a past or existing sexual relation with him. In such situations the sexual background of the desire to injure, the ease with which evidence of rape can be fabricated, and the gravity of the offence of rape, are likely to combine to make that crime rather than any other the one that is falsely charged. Examples of such situations are:—

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[1] It was a saying of Kinsey that the difference between a "good time" and a rape may hinge on whether a girl's parents are awake when she finally arrives home; "Rape Offenders and Their Victims", by Professor John M. Macdonald, M.D. (Charles C. Thomas, 1971), p. 221: see further "The Offence of Rape in Victoria", by Hodgens, McFadyen, Failla and Daly, 5 Aust.N.Z.J.Criminol. 225, 35: "Lessening the Rape Victim's Ordeal", Catherine Harper, Sydney Morning Herald, 15th April, 1976.

[2] Compare "Rape Offenders & Their Victims" (supra) at p. 20.

[3] "Victims of Criminal Violence" by Professor Henry Weihofen, (1959) 8 J.Pub.L. 209: "Corroboration — Sexual Cases", Williams (1962) Crim.L.R. 662: "Victimology and Rape: The Case of the Legitimate Rape Victim" by Weis and Borges, (1973) 8 Issues in Criminology 71, 79: "Rape Offenders & Their Victims" by Professor John M. Macdonald M.D., (Charles C. Thomas, 1971), pp. 84, 91, 235-6.

(i) The jealous woman who discovers that her lover is unfaithful.

(ii) "The woman scorned". She may have allowed intercourse only after a long courtship and under promise of marriage and then found herself rejected. But the same motive may operate where the intercourse is on slight acquaintance and she is then treated with contempt, e.g. by being pushed out of the car to find her own way home.

(iii) The woman "beaten-up" in a quarrel with her lover.

(iv) The woman needing to rid herself of an ex-lover who will not accept his dismissal and is making her life intolerable.

Fourthly, there are those cases, of which there is abundant medical evidence, in which an unfounded allegation of rape is made because the woman has an abnormal personality by reason of which she confuses ordinary rape fantasies (which, it seems, are common enough) with actual events, and believes firmly in their reality and describes them convincingly and in detail[4]. It has been said by Helene Deutsch, (referred to in note 4) and has been confirmed by the submission to the Law Reform Commissioner by The Australian & New Zealand College of Psychiatrists (30/3/76), that "it is precisely rape fantasies that often have such irresistible verisimilitude that even the most experienced judges are misled in trials of innocent men accused of rape by hysterical women".

Fifthly, there are cases in which the cause of false allegations is that the accuser is a psychopath who obtains a malicious pleasure from what she does and is seeking the notoriety that attaches to the role of victim and star witness[5]. And sixthly there are the cases in which the accusation is made for purposes of blackmail. In these last two categories there is a likelihood that a charge of rape will be selected by a woman, in preference to other possible criminal charges, as being the one best adapted to secure her objective, whether it be notoriety or money or marriage.

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[4] Wigmore on Evidence 3rd edn. Sec. 924 (a) quoting Drs. Menniger, White and Lorenz: "Psychoanalysis, Psychiatry and the Law", p. 131 — citing Helene Deutsch (1945): "Psychiatric Evaluation of the Mentally Abnormal Witness", (1950) 59 Yale L. J. 1327-30: "Examination of the Complaining Witness in a Criminal Court" by Leo L. Orenstein M.D. (1951) 107 Am. J. of Psychiatry 684: "Sex Offences — Credibility of the Complaining Witness", 43 Iowa L. Rev. 651: "Testimonial Capacity" by H. A. Davidson M.D., 39 Boston U.L.R. 176-7: "Victims of Criminal Violence" by Professor Henry Weihofen (1959) 8 J.Pub.L. 209: "Erotic Professional Indiscretions" by R. W. Medlicott (1968) 2 A.N.Z.J. of Psychiatry, 17: "Rape Offenders and Their Victims", by Professor John M. Macdonald M.D. (Charles C. Thomas, 1971), pp. 209-231: for two instances of fantasies by groups of young girls see "Truth in Medicine" by R. W. Medlicott 56 N.Z. Medical Journal 166.

[5] Compare Davidson (see preceding note,) — p. 179: Macdonald (see preceding note): and 59 Yale L. J. (see preceding note).

Finally there are, of course, numerous causes which may, at times, result in unfounded rape charges, but which may, equally well, result in charges of non-sexual offences such, for example, as common assault or robbery. The most important, perhaps, of such causes are psychoses and other mental conditions of various kinds[6] and personal hatred not arising from any sexual relationship, but the category includes, also, such causes as the desire to obtain attention and sympathy or to conceal from parents the fact that visible physical injuries have been inflicted by a husband.

[6] Compare "Witnesses, Psychiatry and the Credibility of Testimony", by R. Slovenko (1966) 19 U.Fla.L.Rev. 1, 14.

APPENDIX C.

RAPE OFFENCES.

COMPLAINTS NOT ACCEPTED BY POLICE AS WELL FOUNDED.

1. In order to throw light on the extent to which unfounded complaints of rape offences are made to the police an analysis (set out below) was made by the Assistant to the Law Reform Commissioner of the job books of the women police officers who interviewed the persons by whom complaints of rape offences were made between January 1974 and November 1975 in four selected Victorian Police Districts.

2. These four districts were chosen because in each of them there was a high incidence of rape complaints and because they covered a wide range of suburbs and some seaside and country areas, and were considered to provide a reasonably representative sample of the areas in which rapes occur. The localities within the respective Districts are as follows:—

"B" District — Flemington, Moonee Ponds, Essendon, Brunswick, Coburg, Pascoe Vale, Fairfield, Northcote, Footscray, Kingsville, Newport, Yarraville, Williamstown.

"H" District — East Malvern, Malvern, Ashburton, Camberwell, Chatham, Balwyn, Box Hill, Burwood, Caulfield, Glenhuntly, Murrumbeena, Elsternwick, St. Kilda, Elwood.

"P" District — Dandenong, Mt. Waverley, Oakleigh, Springvale, Doveton.

"Z" District — Berwick, Frankston, Pakenham, Garfield, Bunyip, Carrum, Cranbourne, Mornington, Hastings, Dromana, Rye, Rosebud, Sorrento, Koo-wee-rup, Lang-Lang, Westernport Area.

3. The job books are books of original entry in which all interviews held are recorded. They do not classify the interviews as involving or not involving complaints of rape offences. That classification was made in the course of analysing the job books; and in order not to produce an artificially inflated figure for the proportion of complaints not accepted, the analysis was restricted to those cases in which a complaint of a rape offence was made at the outset of the interview. In some cases a complaint or suggestion of a rape offence was introduced only at a late stage of the interview and those cases were not included in the analysis.

4. From comments appearing in entries in the job-books of policewomen, and from enquiries made, it would seem that the main categories of persons making complaints which the police do not accept are:—

(i) Persons who make up the story:—
  (a) To placate parents or
  (b) For fear that a husband or a "de facto" will discover unfaithfulness or
  (c) To explain pregnancy or to obtain an abortion or
  (d) To obtain sympathy or attention;

(ii) Persons under the influence of hallucinatory drugs or drink or mentally retarded.

There is also an occasional case of rape fantasy which is detected only because the story told, though firmly believed in by the complainant, can, in some respect or respects, be demonstrated to be contrary to fact.

Analysis of Entries in Job Books of Selected Police Districts. (Jan. 1974 to Nov. 1975)

Police Districts	"B" District	"H" District	"P" District	"Z" District	
No. of Entries of Complaints Received	47	44	27	17	135[2]
No. of Complaints of Rape Offences not Accepted by Police					
(i) Dealt with as Non-Rape Offences only	5	3	—	1	9 (7%)
(ii) Written Statement (after questioning) that No Complaint Made of Any Offence	15	11	9	4	39 (29%)
(iii) Complaint Not Accepted though No Withdrawal Statement[1]	10	4	3	3	20 (14%)
Total Not Accepted	30	18	12	8	68 (50%)

1. In 9 of these 20 cases the girl or woman admitted her complaint was unfounded or did not support a complaint made by another person on her behalf. In a further 3 the police were asked by her or such other person not to proceed. In the remaining 8 the entry stated that no offence had been committed, or else recorded special circumstances which gave grounds for such a conclusion e.g. mental trouble coupled with history of rape complaints.

2. Figures furnished by the Victoria Police relating to rape complaints handled by the newly formed Rape Investigation Squad between 9/12/75 and 20/5/76 are as follows:—

Complaints of rape received	22	(100%)
Accepted only as non-rape sexual offences	4	(18.2%)
Written statement that no complaint made of any offence	6	(27.3%)
Accepted as rape cases	12	(54.5%)

APPENDIX D.

CONVICTION RATES.

A. Victorian Conviction Rates for Rape Offences.

(Rape, Attempted Rape and Assault with Intent to Rape)

	1973	1974	Total
Committals for rape offences	79	99	178
Less undisposed of	2	13	15
Disposed of	77	86	163
Additional persons presented for rape offences though committed only for lesser offences	12	10	22
Persons committed (or, if not committed, presented) for rape offences	89	96	185
Convictions obtained against those persons			
(i) Pleas of guilty to rape offences	24	15	39
(ii) Verdicts of guilty of rape offences	16	32	48
(iii) Pleas of guilty to lesser offences, though presented for rape offences	12	13	25
(iv) Verdicts of guilty of lesser offences, though presented for rape offences	3	2	5
(v) Pleas of guilty to lesser offences, where not presented for rape offences	5	16	21
Total convictions	60	78	138

Of the total of 185 persons covered by the survey 75% were convicted; 47% of the 185 being convicted of rape offences.

B. N.S.W. Conviction Rates for Rape Offences.

Report No. 21 of the N.S.W. Bureau of Crime Statistics and Research gives the findings of a survey made in 1974 of the results of trials arising out of reports of rape offences. It shows that of a total of 76 persons covered by the survey 76% were convicted; 55% being convicted of rape offences or murder.

C. Comparison with Rates for Murder and Other Homicides.

(i) A survey made of the presentments in Victoria during the years 1973 and 1974 upon charges of murder, attempted murder, wounding or shooting with intent to murder infanticide and manslaughter disclosed that, of 132 persons presented, 84 were convicted of an offence. The annual conviction rates upon these presentments were 62% for 1973 and 65% for 1974.

(ii) The N.S.W. Statistics of Higher Criminal Courts (1973) published by the Australian Bureau of Statistics show that in N.S.W. over the four years 1970-1973 the conviction rate in the case of all persons charged with murder or manslaughter (other than driving offences) was 83%.

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