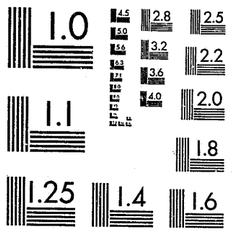

LAW REFORM COMMISSION OF TASMANIA

WORKING PAPER

ON

RAPE LAW REFORM

By

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INTRODUCTION

On 30th October 1979, the Attorney-General referred the matter of rape and crimes of a sexual nature to the Law Reform Commission with the following terms of reference:-

"(1) Generally, to investigate and consider the law relating to the crimes of Rape, Indecent Assault, and other crimes of a sexual nature, and attempts to commit such crimes, and to recommend such changes (if any) as appear to be necessary.

(2) In particular, to recommend whether or not it should be made a crime for one party to a marriage to engage in sexual intercourse, and other sexual acts, within marriage, without the consent of the other party to the marriage.

(3) To recommend whether or not there should be any variations in the maximum scale of punishments applicable to such crimes or attempts, and, if so, whether this should depend on the severity of the violence or injuries suffered by the victim, or on other specific grounds.

(4) To make such recommendations, if any, as may seem desirable to any of the rules of evidence or rules of court procedure relating to the crime of Rape, or other crimes of a sexual nature, or attempts to commit the same.

(5) To consider whether any recommendations, additional to those contained in the Law Reform Commission Report and Recommendations for reducing harassment and embarrassment of complainants in Rape cases, are desirable in relation to this reference.

(6) Having regard to the Criminal Injuries Compensation Act 1976, and the provisions of the Criminal Code, to consider the adequacy or otherwise of measures providing for financial restitution or compensation of victims of Rape or other crimes of a sexual nature or attempts to commit the same, and to make such recommendations as may seem desirable and practicable in the circumstances.

In the consideration of the above reference due regard shall be given to the rights of the accused person as well as the rights of the victim."

The Commission considered that because of the controversial nature of the subject and the lack of uniformity of the classic law and procedure, the matter required a balanced consensus of informed public opinion to be reached on a national basis. Accordingly it was decided to plan a National Rape Conference, and to await its outcome before considering possible legislative changes.

The Conference was organized by the Commission in association with the Australian Institute of Criminology and the University of Tasmania, and was held from 28 - 30th May in Hobart. Approximately 200 people attended including judges, lawyers, police officers, social workers, health workers, representatives from women's organizations and rape centres, politicians and representatives from law reform bodies and church groups. In addition to the presentation of papers, three workshop sessions were organized to discuss the substantive law, evidence and procedure and treatment of victims. The results of discussion were recorded and formed the basis of the resolutions which were considered at the plenary session. At this session

resolutions both of a general nature and a specific nature were passed. The former indicated the strength of opinion governing change and the realization that the problem goes beyond mere legislative changes, for example, the following resolution was passed with only five dissentients -

> "This Conference agrees that Australian Laws and procedures relating to rape and sexual assaults are seriously defective, and should be urgently modified so as to protect the victims of rape, encourage the reporting and prosecution of offences (with concurrent treatment for victims and offenders) and educate the community generally towards condemnation of sexual violence and harassment in all its forms.
>
> Such reforms should be consistent with fair protection of the rights of accused persons."

Following the publication of the Conference papers and resolutions[1] the Law Reform Commission decided a discussion paper based on those resolutions should be prepared.

This paper therefore covers the areas of rape law reform considered at the Conference, outlines options for reform and presents the arguments for and against. A questionnaire is included to obtain specific reactionsto the options.

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1. J. Scutt (ed.), Rape Law Reform

I. THE SUBSTANTIVE LAW

THE EXISTING LAW

1. The crime of rape is set out in S. 185 of the Criminal Code in the following terms:

> "(1) Any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime which is called rape.
>
> Charge: Rape"

It is clear that since the decision in Snow [1962] Tas. S.R. 271 that the ingredients of the crime of rape are first an intentional act of penetration by the accused of a woman not his wife, and secondly, absence of her consent. An intention to have intercourse with the victim without her consent or regardless of whether she was consenting or not is not an ingredient of the crime in Tasmania. If the accused mistakenly believed she was consenting his defence lies under S. 14. This section provides that a mistaken belief must be honestly and reasonably held, and it has been decided that the burden of proving the existence of such a belief rests on the accused on the balance of probabilities. (Martin, [1963] Tas. S.R. 103). This also appears to be the position in Western Australia and Queensland (See Attorney-General's Reference No. 1 of 1977, [1979] W.A.R. 45 and Thomson [1961] Qd. R. 501 at 516). The position in the other "common law states" and in the United Kingdom is different and is exemplified by the House of Lords decision in Morgan [1976] A.C. 182. In Morgan's Case it was held by a majority that the mental element for the crime of rape required proof beyond reasonable doubt of an intention to have intercourse without the consent of the victim, either aware that this is so, or aware that it might be so and recklessly determining to have intercourse whether she was consenting or not. It follows then that no

man can be convicted of rape if the jury entertain a reasonable doubt about the existence of an honest although not necessarily reasonable mistake by the accused as to consent.

In Tasmanian legal circles there has been some disquiet about the decision in Snow, and there have been indications that it "might need to be reconsidered on some suitable occasion" (per Neasey J. in Bell, [1972] Tas. S.R. 127 at 132). Nevertheless the occasion has not yet arisen and Snow's Case represents the strict legal position although its effects have been modified by the decision of Court of Criminal Appeal in Ingram [1972] Tas. S.R. 250. In this case it was held that as it is almost impossible for a man to unintentionally effect penetration, the result of the decision in Snow was to reduce the mental element in rape to "microscopic proportions" unless a liberal approach was taken to the operation of the defence of mistake. Accordingly it was held that jury should be directed to consider mistake wherever the evidence leaves room for it, even in the absence of a claim by the accused of a belief in consent and despite assertions by the accused that the victim orally consented.

2. Carnal knowledge is defined by S. 1 of the Code as:

> "penetration to any the least degree of the organ alleged to be known by the male organ of generation".

Two points can be made about this definition: First, penetration of the vagina by inanimate objects is excluded. Secondly, although penetration of orifices other than the vagina is not expressly excluded, in practice charges are only laid on the basis of vaginal penetration and judicial interpretation could well so confine it.

Consent is also defined by S. 1 and means:

> "A consent is freely given by a rational and sober person so situated as to be able to form a rational opinion on the matter to which he consents. A consent is said to be freely given when it is not provided by force, fraud or threats of whatever nature."

Despite the apparent width of these words it would seem that their effect is not clearly settled. In Schell [1964] Tas. S.R. 184, Crisp J. (following Papadimitropoulis (1957) 98 C.L.R. 249) held that in the case of rape it is consent to the physical character of the act and to the identity of the male person only which is in issue. It follows then that sexual intercourse procured by fraud as to antecedent inducing causes or status or attributes of the accused does not destroy the reality of consent. However in Woolley v. Fitzgerald [1969] Tas. S.R. 65, Chambers J. raised some doubts as to the application of Papadimitropoulis and suggested without deciding, that if there was fraud as to "the matter to which he consents" then there was no consent. On this view fraud as to other matters would vitiate consent.

A literal interpretation of the words would not limit "threats" to threats of immediate physical harm to the victim, but in the absence of any Tasmanian authorities, there must be considerable doubt as to how far the courts would extend the words to cover threats of force to other persons, or threats of harm other than personal physical danger.

3. Other non-consensual sexual offences are:-

Indecent assault, which consists in essence of an unlawful assault by a male upon a female in circumstances which are in the juries' opinion, indecent, (S. 127);

unnatural carnal knowledge which includes subjection with or without consent of a female or a male, by a male to an act of sodomy, (S. 122);

indecent practices between male persons, which includes an indecent assault by one male on another as well as consensual acts between males, (S. 123).

Criminal offences which supplement the law of rape are:-

forcible abduction, which consists of taking away or detaining a female by force against her will with intent that she be married to or carnally known by any person, and abduction, which covers similar conduct without force, (S. 186);
procuring defilement of a female, which deals with inducing a female to have carnal knowledge by threats, intimidation, false pretences or representations, or by administering drugs with intent to stupefy, (S. 129).

The Decision in D.P.P. v. Morgan

4. Brief mention of the House of Lords decision in Morgan's Case is necessary because of the mixed public reaction in Australia that the case provoked. The facts need not be related and the ratio of the

case, that if a person had honestly believed that the woman was consenting to intercourse he should not be convicted, even where that belief was not based on reasonable grounds, has already been stated. Far less controversially the case also provides a clear ruling that recklessness as to whether the woman was consenting or not is sufficient for the purpose of criminal liability in a rape case.

5. On the one hand the ruling excited considerable criticism both in the United Kingdom and in Australia, and was described by some as tantamount to a "rapist's charter" and as "a green light for rapists". The critics claimed that the practical effect of Morgan would be that in order to be acquitted of rape, an accused need merely assert his mistaken belief as to consent however ridiculous his story might be. They argued that the minority view that the crime of rape consists of having intentional intercourse with a woman without her consent is just and proper and should be adopted. As a matter of policy the law should maintain a balance between victim and the accused, and as Lord Simon's dissenting opinion in Morgan pointed out, where a woman has been subjected to sexual intercourse without her consent it is unfair to the victim that the perpetrator should escape punishment merely because he unreasonably believed she consented. Therefore the position in Tasmania can be defended on the ground that it is fair to the woman and not in the least unfair to the man to require the issue of mistake to be established as honest and reasonable on the balance of probabilities. Lord Cross of Chelsea's comments in Morgan are relevant -

> "there is nothing unreasonable in requiring a citizen to take reasonable care or ascertain the facts relevant to his avoiding doing a prohibited act..."

6. On the other hand the decision was considered favourably by various Law Reform Commission Reports in Australia and New Zealand. In South Australia[2] it was noted that the law in that State accorded with Morgan and no change was recommended, and the Law Reform Commissioner of Victoria reported similarly.[3] In New Zealand[4] the Criminal Law Reform Committee took the view that the law as stated in Morgan is also the law in New Zealand, but the position should be clarified by statutory amendment. In Tasmania, a Law Reform Commission Report[5] approved the decision in Morgan and recommended that declaratory legislation be enacted to avoid misunderstanding and presumably to overrule the decision in Snow's Case. The Working Group established to comment on the report disagreed. They considered the common law approach expounded in Morgan's Case should not be incorporated into the Code.

Those following the common law approach as exemplified by the decision in Morgan, do so because the decision in Snow (and the minority view in Morgan) absolves the crown from the necessity of proving a guilty mind and is contrary to a fundamental principle of law which requires proof beyond reasonable doubt of "mens rea" (an evil intention or knowledge of wrongness of the act).

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2. Criminal Law and Penal Methods Reform Committee of South Australia, Special Report: Rape and Other Sexual Offences, March 1976.

3. Law Reform Commission (Victoria) Rape Prosecutions (Court Procedures and Rules of Evidence) 1976. Under the Crimes (Sexual Offences) Act 1980, the common law deposition of rape applies.

4. Report of the Criminal Law Reform Committee (New Zealand): The Decision in D.P.P. v Morgan, May 1980.

5. Law Reform Commission (Tasmania). Report and Recommendations for Reducing Harassment and Embarrassment of Complainants in Rape Cases. 1976.

Furthermore it is argued that inconsistency as to the required mental element for rape is undesirable and leads to uncertainty and amendments should be made to make it clear that rape requires an intention to have intercourse without consent or recklessly indifferent as to whether there is consent.

7. The opinion expressed in three Australian Law Reform reports previously mentioned, that most criticism of rape law is directed against rules of evidence, practices and procedures, has been criticised as complacent, conservative and piecemeal[6]. The resolutions passed at the National Rape Conference in Hobart clearly indicate the demand for reform in the substantive law of rape in the opposite direction of Morgan's Case.

The relevant issues which were the subject of resolutions passed are set out below and the arguments in favour and against are stated.

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6. e.g. D. O'Connor.

IMMUNITY OF HUSBANDS

8. In Tasmania a husband does not commit rape if during the marriage, no matter what degree of estrangement exists short of final divorce, he forces his wife to have intercourse with him without her consent. This immunity does not extend to protect him from assault if he inflicts or threatens violence, or from any other indecent assault if he also assaults her accompanied by circumstances of indecency.

In common law jurisdictions there have been decisions which have eroded the common law position; and in South Australia legislation was passed in 1975 purporting to ensure that cases of rape within marriage involving violence and gross indecency would involve criminal responsibility for rape, but the situation fell short of simply abolishing the immunity[7]. In Victoria, the Crimes (Sexual Offences) Act of 1980 provides that where the parties to a marriage are living separately and apart, the existence of a marriage shall not consitute or raise a presumption of consent to sexual penetration. S. 94 of the Northern Territory Draft Criminal Code Bill 1981 adopts a different approach to partial abolition of the immunity. It provides that a person shall not be guilty of an offence by reason only of that person having sexual intercourse "in the natural sense" with, but without the consent of a person to whom he was legally married and living together as a spouse, where there was no decree of separation in force, proceedings for dissolution of marriage were not in progress and he was not to his knowledge suffering from a communicable venereal disease. Presumably, in all other situations liability exists, so that if the parties are living apart a spouse is liable for all non-consensual acts of marital intercourse, if they are living together and proceedings are

7. Section 73 Criminal Law Consolidation Act 1935 - 1976 (South Australia).

in progress or he has a venereal disease he is liable for all non-consensual acts of intercourse, but if they are living together and neither of those conditions exist, he is liable for non-consensual sexual intercourse in its broader or "unnatural" sense only, such as cunnilingus, fellatio etc. The proviso relating to a decree of separation is curious, for it is not possible to get such a decree under the Family Law Act. In contrast, the New South Wales Crimes (Sexual Assault) Bill 1981 provides for total abolition of the immunity.

9. At the National Rape Conference the following resolution was passed:

> "This Conference agrees that any immunity which currently protects men against prosecution for rape within marriage should be abolished, noting that:
>
> (a) husbands have for many years been liable to be convicted of indecent assault if they in fact rape their wives and this has not led to any undermining of family life.
>
> (b) The abolition of immunity for husbands would emphasize the community's condemnation of sexual violence within the family."

In New South Wales, the Women's Advisory Council to the Premier have recommended that the immunity be abolished.

In the United Kingdom a majority of the Criminal Law Revision Committee have recently recommended that the husband's exemption should be removed with the proviso that a prosecution for marital rape should require the consent of the Director of Public Prosecutions[8].

Those defending the immunity mention the following arguments:-

10. Unfounded and even malicious prosecutions would result

To unequivocally criminalize rape within marriage would be putting "a dangerous weapon into the hands of the vindictive wife"[9]. Similarly some argue that threats to reveal an occasion of alleged rape could be held as a bargaining counter in negotiations for maintenance and the division of property.

11. Difficulty of Proof

Proof of rape is always difficult, but when the parties have been cohabitating, proof would be particularly difficult. Unless the wife could show marks of injury or the husband had made admissions, the prosecution would have to rest solely on the wife's evidence. "Prosecutions would be unlikely and police would have the time wasting and distasteful task of investigating the wife's complaint"[10].

12. Strain and Breakdown in Family life would be encouraged

The proponents of this argument reason that if a wife would invoke the law of rape in all cases in which her husband forced her to have intercourse, by calling the police and initiating investigation, bitterness and argument would be prolonged and any chance of

8. Working Paper on Sexual Offences, (1980)
9. Criminal Law and Penal Methods Reform Committee of South Australia, Special Report - Rape and Other Sexual Offences (1976), P. 14.
10. Minority opinion. Criminal Law Revision Committee, Working Paper on Sexual Offences, (1980), Para 35.

reconciliation diminished if not destroyed. A marriage breakdown in this kind of case would be particularly distressing to children of the marriage. The protection of the family law rather than the criminal law is appropriate.

In favour of abolition of the immunity it can be argued -

13. The immunity of husbands is archaic, unsupported by principle, anomalous, unjust and contrary to sexual equality.

The present law is archaic and is generally taken to be derived from a statement of principle by Sir Mathew Hale to the effect that a marriage contract renders the wife's consent to sexual intercourse irrevocable. Other scholars suggest the immunity embodies the idea of a married woman as the property of her husband, and it is further suggested that the immunity afforded to husbands is evidence that the purpose of rape law was to protect male proprietary interests.

The present law in relation to marriage has changed, social attitudes have improved the status of women and wives are no longer regarded as subordinate to their husbands.

It is totally unreasonable to infer that by marrying, a wife intends to make her body accessible to her husband at all times. Why, it is asked, should women on marriage lose an essential human right which they in fact had up until the time of marriage?

The majority view of the Criminal Law Revision Committee, is that the immunity does not rest upon any sound basis of principle and in some quarters is much resented.[11] It is also said it does not represent a fair balance between the rights of the victim and the accused.[12]

Some proponents of removal of the immunity concede that its removal is unlikely to deter rape in marriage, at least in the short term, but consider the symbolic effect of the recognition by the law that married women are autonomous individuals with rights equal to other citizens to be important and to justify the removal.[13]

The existence of the immunity has been said to give rise to certain grave anomalies which make this law ridiculous. First, a woman who is cohabitating with a man can refuse him sexual intercourse, and her refusal if it can be proved, will make him guilty of rape if he proceeds. Secondly, a wife can unilaterally withdraw her implied consent to cohabitation and her husband has no right in law to detain her and he can be prosecuted if he does.[14] Why then cannot she withdraw her implied consent to sexual intercourse.

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11. Para. 37

12. e.g. C. L. Mitra, ".. For she has no Right or Power to Refuse her Consent". [1979] Crim. L.R. 558.

13. e.g. P. Sallman, "Rape in Marriage and the South Australian Law", in J. Scutt (ed.) Rape Law Reform, P. 79.

14. Certainly for assault, and perhaps even abduction if he detains her with intent to have sexual intercourse.

14. Domestic violence should be officially discouraged

Violence including sexual violence within the family should not be condoned but condemned. If a wife with or without sufficient reason should refuse matrimonial relations with her husband, threats or force should be a response condemned by the courts. Fear that family life may be undermined and prospects of reconciliations diminished by abolition of the immunity ignore the effect of subjecting an unwilling wife to an act of intercourse.

15. Fear of unfounded complaints is unwarranted

The fear of unfounded and malicious prosecutions is not a valid and sufficient reason to retain the immunity, for the criminal law has efficient safeguards to deal with false complaints of crime in police investigation procedures and discretion to prosecute, committal proceedings and finally by requiring proof beyond reasonable doubt. As Treloar argues "a vicious wife would get nowhere in the obstacle course of the justice process, meanwhile the law condones a free-for-all for vindictive husbands". Moreover reforms in the U.S. and South Australia have certainly not resulted in a spate of cases.[15]

16. Difficulties of Proof

The argument that there will be difficulties in proving absence of consent cannot be accepted as sufficient reason for allowing husband's immunity. The Criminal Law Revision Committee points out that these difficulties are not confined to rape within marriage. The law does not, and should not turn a blind eye to "offences" which are difficult to prove. Illegitimacy and paternity hearings, fraud,

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15. P. Sallman, op. cit., P. 84. C. Treloar, "The Politics of Rape - A Politician's Perspective", in J. Scutt (ed.), Rape Law Reform, P. 191, at 194.

prostitution and other sexual offences in private are not ignored on the grounds of difficulty of proof.

17. Compromise Solutions unacceptable

Those advocating removal of the immunity reject compromise solutions such as Michigan Code, which abolished the common law rule in the case of parties living apart where one has filed for divorce, or the South Australian or Victorian reforms outlined earlier. Such solution are said to be too complicated and confusing or to create insuperable problems of definition.[16] The difficulties with the South Australian reform are formidable[17] and Scutt and others point out the problems of interpreting the phrase "living apart". Additionally, such solutions would be objectionable in principle to proponents of removal of the immunity.

IMMUNITY OF BOYS UNDER 14

18. Under the Code and at common law there is a total immunity from liability for rape on the part of boys under the age of 14 years, for they are conclusively presumed to be incapable of sexual penetration.[18] This does not prevent such a boy from being found guilty where appropriate as an aider or instigator, nor from conviction for indecent assault, although in reaching such a verdict the jury would have to be directed to put out of their minds the fact that he had achieved penetration. In some jurisdictions, e.g. Victoria, this immunity has been [abolished], and the New South Wales Bill provides for abolition.

16. Criminal Law Revision Committee, Para. 41.

17. J. Scutt, Consent in Rape "The Problem of the Marriage Contract", (1977) 3 Monash Law Review, P. 255 at 277-284.

18. S. 18 (3) Criminal Code.

19. Although it has been argued the incidence of rape would not seem to be so great as to warrant any change in the legislation,[19] at the National Rape Conference the following resolution was passed unanimously -

> "This Conference agrees that the law should not provide any artificial immunity against prosecution for rape for males under the age of fourteen years."

20. It is argued that it is unrealistic to presume all males under 14 years are incapable of sexual intercourse.

In England the Criminal Law Revision Committee recommended abolition of the presumption stating that cases of boys under 14 committing rapes do occur and are a matter of public concern, particularly in cases of "gang bangs". The older boys will be convicted of rape while those under 14 who may have played a leading part, can only be convicted of aiding and abetting.

21. The effect of removal of the presumption of physical incapacity would mean that boys from 7 years of age to 14 years could be convicted of rape provided the prosecution would prove sufficient capacity to know the act was wrong.[20] No liability for any offence attaches to persons under 7 years.[21]

GENDER NEUTRALITY

22. At the National Rape Conference it was resolved unanimously that -

> "males and females should be equally liable and equally protected under the criminal laws relating to non-consenting sexual behaviour."

19. W. J. E. Cox, "Law Reform Under the Tasmanian Criminal Code", in J. Scutt (ed.), Rape Law Reform, P. 62.

This would necessitate both redefinition of rape and indecent assault.

In Victoria this change has been implemented by the Crimes (Sexual Offences) Act 1980, for all the sexual offences in that act are sex neutral. The preamble to the Act states -

> "Whereas it is desirable for the law to protect all persons from sexual assaults and other acts of sexual coercion ....
> And whereas it is desirable for the law to protect and otherwise treat men and women so far as possible in the same manner ...".

In both the New South Wales Bill and the Northern Territory Draft Criminal Code Bill the proposed sexual assaults are sex neutral.

23. It is argued that in keeping with philosophical notions of anti-discrimination and equality, non-consensual sexual offences should be sex neutral. Gender neutrality is also important if laws relating to sexual assault are to be placed on a similar footing with other criminal laws and normalized as far as it is possible.

24. Such a change would provide clarity, clearly distinguishing between non-consensual and consensual sexual activity, and more effective protection for victims of homosexual rape. Under the existing law the same crime covers consensual and non-consensual homosexual practices, a position which stigmatizes the innocent victim and the offender. It is also an unnecessary proliferation to have one crime for indecent assault upon a female (Section 127), and another for indecent assault by any male upon another male. Furthermore, there seems to be no reason why a woman should not be subject to the criminal process if she indecently assaults a male.

WIDENING THE CONCEPT OF SEXUAL INTERCOURSE

25. At present, the law in Tasmania would seem to confine rape to penetration of the vagina by the penis. Cases of assault in which other forms of penetration occur must be dealt with as indecent assault, and unless a case of unnatural carnal knowledge (penetration of the anus), can be proved, they generally attract lesser penalties.

26. A substantial majority of delegates at the National Rape Conference resolved:-

> "the concept of sexual penetration should be broadened to include other physical penetration as well as penetration of the vagina by the penis, so as to cover cases of oral and anal penetration, or the use of inanimate objects in penetration, or penetration by other parts of the body."

This change has been implemented in Victoria by the Crimes (Sexual Offences) Act, 1980, S. 4 (c), and is provided for in the New South Wales Bill, with the addition of cunnilingus and the "continuation of sexual intercourse" as defined. This latter provision would cover the situation which arose in Richardson [1978] Tas. S.R. 178. The Northern Territory Draft Criminal Code adopts the wide definition of the W.E.L. Draft Bill. In South Australia sexual intercourse includes oral and anal penetration by means of the penis (Criminal Law Consolidation Act 1935-1976, S. 5).

27. It is argued that some acts of penetration such as penetration by means of a bottle are equally if not more demeaning and degrading than vaginal penetration. An adequate definition of sexual penetration is necessary to ensure the recognition of the seriousness of such other

forms of penetration. Moreover the present law operates to the disadvantage of women by treating them as a special case, instead of assimilating rape to analogous sexual assaults on men.

28. Those who disagree with widening the concept of sexual intercourse to include other kinds of penetration generally do so on the grounds that such conduct does not accord with the popular concept of rape. The absence of the risk of pregnancy is also considered a relevant reason for denying the extension.[23]

GRADATION OF RAPE AND INDECENT ASSAULTS INTO DEGREES OF SEXUAL ASSAULT

29. At the National Rape Conference the following resolution was passed:-

"that as a matter of principle there should be introduced a gradation of offences of sexual assault, of varying degrees of seriousness."

This resolution envisages an amalgamation of existing offences into one category and a grading of that category by reference to circumstances of aggravation, (e.g. penetration, use of a dangerous weapon), each grade attracting different maximum penalties. The existing law in Tasmania imposes an overall maximum for indictable offences of 21 years, with the exception of murder and treason. In most other states and territories each crime has its own statutory maximum and rape attracts a heavier maximum than indecent assault.

30. In Victoria the offences of rape and indecent assault are graded into four distinct offences attracting different maximum penalties. The maximum penalty for indecent assault is 5 years, for indecent assault with aggravating circumstances, 10 years; for rape, 10 years; and for aggravated rape, 20 years. Attempted rape or assault with intent to

23. Report of the Advisory Group on the Law of Rape, Cmnd. 6352, (the Heilbron Committee, and the Criminal Law Revision Commission), Working Paper on Sexual Offences, 1980, Para. 45.

commit rape is punishable by a term of imprisonment not exceeding 5 years, and when aggravating circumstances exist, 10 years.

Circumstances of aggravation exist if the offender inflicts serious personal violence on the victim or another; if the offender has with him an offensive weapon; if before, during or immediately after, the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or another person is present or in the vicinity aiding or abetting; or if the offender has a prior conviction for indecent assault or rape.

31. The Michigan Code has four degrees of sexual assault, or "criminal sexual conduct". They are Criminal Sexual Conduct (C.S.C.) in the First Degree punishable by life imprisonment (sexual penetration with any of seven aggravating circumstances including being armed with an offensive weapon, causing personal injury to the victim, the victim being under 13 years of age); C.S.C. in the Second Degree punishable by a maximum of 15 years (sexual contact with similar aggravating circumstances as C.S.C. in the First Degree); C.S.C. in the Third Degree punishable by a maximum of 15 years (sexual penetration in any of three circumstances including using force or coercion to accomplish sexual penetration); C.S.C. in the Fourth Degree punishable by a maximum of 2 years (sexual contact in either of two circumstances including force or coercion). "Force or coercion" is stated to include but not be limited to a list of 5 circumstances. They are the actual application of physical force or violence; coercion by threats of force or violence; threats to retaliate (including threats to physically punish, harass or extort) in the future against the victim or any other person; unethical medical treatment; overcoming the victim by concealment of purpose. Absence of consent is not an ingredient of the offence, the use of a

weapon, or force or coercion etc. are substituted. The prosecution does not therefore have to prove absence of consent but the defence may raise consent to rebut the charge of "force or coercion".

The more significant differences in the circumstances of aggravation between the Michigan Act and the Victorian Act are first, the inclusion of the commission by the offender of a serious degrading and humiliating act in the latter Act as an aggravating circumstance. Secondly the former Act includes sexual offences against children under 16 years and mentally defective or physically incapacitated persons in the various degrees of criminal sexual conduct.

32. The Women's Electoral Lobby draft also has four similar degrees of sexual assault, but the maximum penalties are lower than the Victorian Act and the circumstances of aggravation include only causing grievous bodily or mental harm and threats with a dangerous weapon. Like the Victorian Act it does not purport to cover sexual offences intended to protect children or mentally disordered people within the four degrees of sexual assault. The four degrees are:- aggravated sexual assault, grade one, attracting a maximum of 14 years imprisonment (unlawful sexual intercourse causing grievous bodily harm, grievous mental harm or accompanied by threats with a dangerous weapon); aggravated sexual assault, grade two, attracting a maximum penalty of 10 years (unlawful sexual act with the same circumstances of aggravation as grade one); sexual assault, grade one, attracting a maximum penalty of 5 years (unlawful sexual intercourse); sexual assault, grade two, attracting a maximum penalty of 2 years (unlawful sexual act).

The Northern Territory Draft Code is an adoption of the W.E.L. Draft with differences in terminology, one difference in the maximum penalties and the inclusion of a fifth offence, "sexual intercourse with

a young person."

32 A. The New South Wales Bill adopted yet another approach. There are four grades or categories, only one of which actually requires proof of sexual penetration. Sexual assault category 1 is inflicting bodily harm on the victim or another person present or nearby with intent to have sexual intercourse with the victim (penalty maximum of 20 years). Sexual assault category 2 is inflicting actual bodily harm or threatening to inflict bodily harm by means of an offensive weapon upon the victim or another person present or nearby with intent to have sexual intercourse with the victim (penalty maximum of 12 years). Sexual assault category 3 is sexual intercourse without consent and with recklessness as to consent (penalty 10 years). Sexual assault category 4, indecent assaults and acts of indecency with persons under 16 years.

Arguments justifying the concept of a ladder of sexual offences are as follows:-

33. Removal of juries' reluctance to convict

Classification of all non-consensual acts of sexual intercourse under the heading of rape, involves grouping together such a wide range of behaviour as pressing a relationship further than one partner wishes to a vicious attack by a stranger. Similarly, indecent assault covers such gross acts as forcible oral intercourse as well as the relatively minor act of bottom pinching. Reluctance of juries to convict in all but the most serious cases is an inevitable result. A range of charges reflecting the subtle range of sexual conduct would provide a more sensible alternative and enable juries to select a grade of the offence appropriate to the gravity of the case.

34. Reduction of sentencing disparity

Leaving a wide discretion in the court to impose an appropriate penalty is dangerously subjective and results in widely varying sentence in similar cases. Empirical studies have demonstrated the existence of unwarranted sentencing disparities beyond doubt,[24] and such disparities are unjust to the accused and subversive of criminal justice in general. The legislature has a duty to clarify the crime, to recognize what penalty fits the crime and to grade the crime according to seriousness.

35. More appropriate penalties

The problem of penalties being incurred in not very serious cases of rape which are heavier than penalties imposed for brutal and serious indecent assaults would be avoided. Notwithstanding the power to impose the same maximum penalty for rape and indecent assault in Tasmania, judicial policy has resulted in the same practice.

36. Educative effect

A gradation of offences would have an educative effect concerning standards of behaviour not acceptable to the community.

37. There is at present an unnecessary proliferation of sexual offences

A ladder of offences would introduce clarity and certainty. If something similar to the W.E.L. draft were adopted which comprises four offences the following offences could be abolished -

rape (S. 185); indecent assault (S. 127); procuring the defilement of a woman by threats or fraud or administering drugs (S. 129); sodomy (S. 122 (a)); indecent practices between males (S. 123).

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24. e.g. R. D. Francis and I. R. Coyle, "The Sentencing Process: A New Empirical Approach". (1978) 35 Proceedings of the Institute of Criminology 13-41.

If the inclusion of sexual offences on children and mentally disordered offenders as in the Michigan Act is thought to render the situation too complex, these could be dealt with as separate offences outside the four degrees of sexual assault. However their inclusion would render the crimes of defilement and defilement of a defective redundant.

Against a gradation of the Offence it is argued:-

38. A set of statutory maxima attached to a gradation of offences according to seriousness unduly restricts judicial discretion. Existing flexibility enables the courts to impose a penalty appropriate to all the facts of a particular case without constraints of statutory maxima imposed by reference only to certain basic ingredients of the crime. For example some cases of indecent assault may be more deserving of condemnation and punishment than some cases involving penetration.

39. Rape should be preserved as a distinct form of criminal misconduct because as such it is well understood and established in popular thought.[25]

40. It would be unnecessarily complex as the Michigan legislation demonstrates.

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25. By retaining the term rape, the Victorian proposal avoids this objection.

The Police.

41. A gradation of offences with specific services for each will make the police by charging the crime best suited, the determiners of sentence.[26] A variation of this objection to a gradation of offences is that it would encourage "plea bargaining".

CONSENT

42. A suggestion frequently espoused is that injustice to the victim caused by difficulties in proving absence of consent and the courts distorted interpretation of consent, should be firmly confronted by including in the definition of the offence a list of objective criteria (e.g. force, threats), proof of which would avoid the necessity of proving absence of consent.[27]

A variety of models have been suggested.

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26. See C. H. Fogarty, "Police Attitudes and Problems in Rape Law and Rape Law Reform", in J. Scutt (ed.) Rape Law Reform, P. 157 at 160. Two comments have been made in reply to this argument. First, the police would not become the 'determiners of sentences', but the legislature would have indicated the type of non-consensual sexual offence which deserve the higher penalties, and secondly the police would be given a greater indication of the way in which discretion should be exercised. J. Scutt, op. cit. P. xvii.

27. However consent could be raised to rebut the claim of force or threats. Theoretically at least, for the same purpose, the defence of mistake under S. 14 of the Criminal Code could be raised and left to the jury if there was some evidence capable of supporting an alternative finding on the balance of probabilities that the alleged victim was freely consenting.

In cases where the Crown could not rely upon any objective criteria to evidence lack of consent, it would have to of course prove absence of consent, and frequently where there was some evidence of mistake it would want to prove an intention to have intercourse without the victim's consent or regardless of whether she was consenting or not (on the balance of probability) in order to negative the defence of belief in consent.

43. The Michigan Criminal Sexual Act does not expressly mention consent (see para. 31).

44. The W.E.L. Bill in its four degrees of sexual assault, proscribes unlawful sexual intercourse and unlawful sexual acts. "Unlawful sexual intercourse" and "unlawful sexual act" include any act of sexual intercourse or sexual act respectively, "which is carried out without the full and free consent of any one of the parties". It is also provided that the unlawful nature of the sexual intercourse or sexual act is evidenced by, but is not limited to a list of ten circumstances which include overcoming the victim by force, violence or sudden attack; coercion to submit by threats of force or violence on the victim or a companion of the victim; coercion to submit by threatening future punishment (including physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion or public humiliation or disgrace) to the victim, or any other person; mentally incapacitating the victim by administering drugs; impersonation; fraud as to character of the act; exploitation of the victim by a person in a position of trust or authority; mental deficiency of victim; submission under circumstances of kidnapping, false imprisonment, forcible confinement or extortion. The Northern Territory Draft Code adopts the W.E.L. drafts list of non-consensual situations with some modifications. Most importantly, fraud is not limited to the nature of the act of sexual intercourse, but covers "fraudulent misrepresentation of some fact", and the list includes the situation where the victim is known to be a lineal ancestor, sibling or descendant of the perpetrator (S. 88 (2) Draft Criminal Code Bill).

In relation to consent, the W.E.L. draft and the Northern Territory Draft Code differ from the Tasmanian Code by elaborating on the meaning of "force, fraud or threats of whatever nature"[28] and extending existing law as to the circumstances in which consent is negated. The W.E.L. draft goes further than the Michigan Code in the extent to which it extends the common law, although both lists of circumstances do not purport to be exhaustive. In the New South Wales Bill absence of consent is not an ingredient of sexual assault categories one and two, but is specifically made an ingredient of category 3. It is provided that consent may be vitiated by a mistaken belief known to the accused as to identity or the existence of a marriage between the parties, and by threats or terror directed at the victim or any other person.

45. In the A.C.T., the Working Party studying rape law reform, accepting in general the recommendations of the Royal Commission on Human Relations, has proposed a series of sexual assaults in which consent would be irrelevant when the use of violence, threats of injury to any person or property, false pretences or drugs is involved. Such a proposal it is claimed, goes further than the Michigan Code and the W.E.I. draft by providing not merely that absence of consent need not be proved at the outset by the prosecution, but by not allowing consent as a defence. However a lesser charge is contemplated of "merely" effecting sexual penetration without that person's consent. It is difficult to see how consent can be so completely ousted. What is the accused's position if he denies the use of violence or threats? He must also assert consent if he is not to be found guilty of the lesser charge.[29]

28. Criminal Code S. 1.

29. A. Watson, "Reform of the Law of the Australian Capital Territory relating to Rape and other Sexual Offences", in J. Scutt (ed.), Rape Law Reform, P. 67.

46. A substantial majority of delegates at the National Rape Conference were in favour of the following resolution -

> "in a sexual assault case where grievous bodily harm is inflicted, either immediately before or during sexual intercourse, consent to the sexual intercourse should not be an issue.
>
> Note: this will equate rape (or aggravated sexual assault) with other cases of non-sexual assault in which grievious bodily harm is inflicted".

This was a compromise resolution and clearly does not go as far as approving a list of coercive situations in which absence of consent is presumed. It is partly inspired by the existing common law rule that a person cannot consent to the infliction of grievous bodily harm,[30] so that in such cases consent can never be a defence. It would appear that the resolution means that in cases where grievous bodily harm is inflicted consent cannot be raised by the defence as an answer to the charge. Presumably in such a case the prosecution would have to prove that serious harm was intended or foreseen by the accused. Difficulties were encountered at the Conference in relation to the discussion of consent because of problems of comprehending exactly the effect of "removing" the question of consent in certain cases and how it would work in practice. Superficially the suggestion sounds more radical than a closer examination reveals.

The new Victorian Act retains consent as an ingredient of sexual assault with and without penetration.

30. See S. 53 Criminal Code.

The arguments in favour of defining a set of objective circumstances which will render an act unlawful (as in the W.E.L. draft) or defining the offence itself by reference to objective intent and avoiding all mention of consent (as in the Michigan draft) are as follows:-

47. It minimizes the issue of consent and focuses attention upon the acts of the accused rather than the accused's perceptions of the victim's state of mind and the characteristics of the victim.

48. It specifically identifies the behaviour that is proscribed. An extensive but not exhaustive list of examples of non-consensual situations avoids the problems of a vague generalized definition of consent. Such definitions can be interpreted to exonerate the accused in situations which many women would regard as non-consensual, e.g. where the victim is coerced by threats of public humiliation, or threats of violence to a third party, or where the accused impersonates another person.

49. Judges have abrogated the function of the jury, by not leaving to the jury the issue of consent, but structuring it along the lines of resistance and fear of death or mortal injury.[31]

50. If the role of consent were minimised, it would no longer be the major component of defence strategies, and this could go a considerable way towards ameliorating the experience of the victim in the witness box. The present focus on consent virtually demands

31. J. Scutt, "Evidence and the Role of the Jury in Trials for Rape", in J. Scutt (ed.) Rape Law Reform, P. 89, 99-101.

that a defence counsel who is doing his job properly, must challenge the sexual integrity of the complainant and attempt to present her in the most unfavourable light.

51. Some commentators have argued that if lack of consent is presumed to exist in cases of force or coercion, this would render unlawful many areas of sexual activity otherwise lawful because lawful sexual intercourse involves some degree of force.[32]

52. The usefulness of a list of examples on non-consensual situations said to preclude the necessity of proving absence of consent has been questioned on the grounds that they are only instances of the type of evidence a prosecutor must be able to adduce before expecting to establish absence of consent. A realistic generalized definition of consent (such as is contained in S. 1 of the Tasmanian Criminal Code) is said to be the best safeguard for the victim.[33]

32. This argument has been answered by Coonan (op. cit., at P. 40) by asserting that the use of the terms 'force or coercion' in legislation prohibiting an activity must imply some element of hostility on the part of the actor, thrusting in a forceful manner would not be sufficient. Secondly, she argues the same problem of interpretation occurs in the existing definition of rape.

33. See W. J. E. Cox (op. cit., at P. 61).

REMOVAL OF THE SEXUAL ELEMENT

53. Some recommendations for reform have suggested that the law relating to sexual offences would be best reformed by removing altogether the sexual element from the legislation and dealing with sexual offences under other broad categories of the law. For example the U.K. Sexual Law Reform Society thought this approach would have a beneficial effect upon policy and court attitudes and offences with a sexual element would be handled less emotionally.[34]

54. Against this proposal it is said no matter how labelled it is impossible to remove the sexual element from the offence. The special inter-personal nature of sexual relations will be the subject of focus in looking at sexual offences no matter what the offence is called. Injuries suffered by a victim from a sexual attack cannot be considered in exactly the same light as a non-sexual assault. It involves an added indignity and humiliation to the victim and is generally considered more censoriously by the public at large. Approaches such as the Michigan Code and the W.E.L. draft attempt to render the crime free of the emotive connotations of "rape", yet at the same time to focus on the reality of the damage suffered by an aggressive attack that is directed at an individual's sexual integrity.

34. Report of the Working Party set up by the Executive Committee of the Sexual Law Reform Society U.K.

AMALGAMATION OF RAPE AND INDECENT ASSAULT

55. W. J. E. Cox, Q.C., Crown Advocate for Tasmania, has suggested that the crime of rape should be included in the crime of indecent assault, retaining a broad definition of consent rather than listing circumstances in which it would not have to be proved, thus leaving the judge full discretion in sentencing. Within this framework he suggested a husband's immunity should be abolished, a broader definition of penetration be adopted, and distinctions based upon gender of offender and victim be abolished.[35]

For those proponents of a ladder of offences and proof of objective criteria instead of the absence of consent such a reform would not go far enough to remedy the injustices and ineffectiveness of the present law. Certificates of previous convictions, without details, would also fail to differentiate grave offences from comparatively minor indecent assaults, for example "bottom pinching".

35. W. J. E. Cox, op. cit., at P. 57-62.

II. EVIDENTIARY MATTERS

57. Much of the dissatisfaction with rape law is with the actual conduct of the trial. It is felt that the prosecutrix gets a bad deal, and in particular the following issues are raised:-

(a) the power of the accused through counsel to cross-examine victims about their sexual and general behaviour;

(b) the requirement of corroboration of the victim's evidence;

(c) the evidence of early complaint or failure to complain promptly;

(d) the composition of juries who hear the case;

(e) the unfair statement from the dock to blacken the character and reputation of the victim.

It is alleged such matters tend to put the victim on trial, to humiliate, harass and embarrass the victim, and to discourage the reporting of rape. Furthermore, rather than being assisted by the special evidentiary rules applied in rape and sexual assault cases, the jury are distracted and acquittals occur in clear cases.

PRIOR SEXUAL HISTORY

58. Existing Position

Evidence of sexual history of the victim in rape trials is generally admissible on two grounds, the first is relevance to the issue of consent, and secondly relevance to credit.

Evidence that the complainant "is of notoriously bad character for want of chastity or common decency ... or that she is a common prostitute" may be given by the defendant, and she may be cross-examined as to such matters.[36] The evidence principally relates to the issue of consent, it being contended that such a woman is more likely to have consented to the sexual intercourse.

Evidence of sexual intercourse with others or general reputation is admissible if relevant to a fact in issue, e.g. to belief in consent, or to the existence of pregnancy or semen.

Evidence of sexual intercourse with the defendant is admissible on behalf of the defence, and cross-examination of the victim is permissible, "because it is highly relevant to the issue of consent as acts of voluntary intercourse between the same two people are liable to be repeated".[37]

Cross-examination of any victim as to intercourse with other men or with any particular man named to her, is permissible on the grounds of relevance to credit.[38] It is argued that such matters are relevant to veracity, for if a complainant is not chaste she is therefore not truthful and her evidence not believable.

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36. Archbold, (38th ed.) Para. 2885.
37. Cross on Evidence (2nd. Aust. ed.) Para. 10.56 P. 2-3.

Cross-examination of the victim or evidence of her reputation with a view to showing she consented does not thereby expose the defendant's character to attack.

With the aim of reducing the distressing and humiliating exposure of the sexual past of the complainant, following a previous report of the Law Reform Commission of Tasmania, S. 102A of the Evidence Act was passed. This provides that questions in cross-examination of the alleged victim of rape with respect to her prior sexual behaviour with other persons are prohibited, unless in the opinion of the court the proposed question is directly related or tends to establish a fact or matter in issue. So the provision excludes questions as to credit, and attempts to tighten judicial control as to questions addressed to a main issue.

In other parts of Australia similar legislation, striking in its lack of uniformity of terminology, has been enacted limiting judicial discretion to admit such evidence. Initially applauded, there is now considerable disenchantment with the reforms. The following points are made:-

59. Evidence of prior sexual conduct is rarely relevant to a fact in issue and is never relevant to credit. Reputation for chastity has no bearing upon veracity. The law is anachronistic and should be amended to conform with current community standards.[39]

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39. See People v. Thompson 76 Mich. App. 705 712 (1977), and J. Scutt "Admissibility of Sexual History and Allegations in Rape Cases" (1979) 53 A.L.J. 817.

60. Such evidence is highly prejudicial to the prosecution case, and impedes enforcement of rape law. Empirical enquiry has shown that the admission of evidence concerning the character of the victim interferes with the judgment of the jury as to the commission of the crime and leads to wrong acquittals. In a jury study, Kalven and Zeisel[40] showed that where there was an "assumption of risk" by the victim, the alleged offender would be found not guilty (or guilty of a lesser offence where possible), although in most cases according to the trial judge it was a clear case of rape. Instances where such acquittals occurred were where the victim had illegitimate children, where the victim was a prostitute or where the victim had a prior sexual relationship with the accused (her jaw was broken in two places in the course of the alleged rape). In a simulated jury study, it was found those questioned would nominate the act as "rape" where the victim was a virgin before the event, but "not rape" on the same facts where the victim was a divorcee.[41]

It is therefore contended that evidence of sexual relationships should be excluded, if not because irrelevant, then because the probative value does not outweigh the prejudicial nature of that evidence.

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40. H. Kalven and H. Zeisel, The American Jury (1966)

41. S. Felman-Summers and Lidner, Perceptions of Victims and Defendants in Criminal Assault Cases. (1976) 3 Criminal Justice and Behaviour, 135.

61. It is generally conceded that the admission of the sexual history evidence of the complainant is humiliating and embarrassing and in particular cross-examination as to such matters is harassing and distressing. It is argued that not only is it unfair that rape and sexual assault victims should be singled out in this way, it is also alleged that it is unfair that counsel may interrogate the victim about her prior sexual behaviour, but if the accused has a prior record of sexual offences this is not disclosed to the jury. Apart from psychological consequences to the victim, the effect of the trauma of the court hearing is to discourage the reporting of rape. In Western Australia, Lee Henry found that 28% of victims in her sample who did not inform the police mentioned court procedure as one of the reasons for not reporting rape,[42] but only one mentioned court procedures as the only reason (No. 57). In Wilson's study, two of his sample of 70 unreported rape victims mentioned court procedures as the principal reason for not reporting the attack to the police.[43]

Thus it would appear that although the distressing nature of court procedures is by no means the predominant reason for non-reporting, it is a contributing factor to the number of unreported rapes.[44]

62. Amendments to the evidence laws in Australia are inadequate, and ineffective, adding nothing to the protection already afforded witnesses by existing rules of evidence, should a court choose to invoke those laws. Moreover, the negative experiences of woman rape victims in the court room stem from deeply embedded attitudes which

42. "Hospital Care for Victims of Sexual Assault" in J. Scutt (ed.) Rape Law Reform 163-177, at P. 171.

43. P. Wilson, The Other Side of Rape, P. 58.

44. Compare V. B. Nordby's opinion of the effect of the Michigan Reforms, post, at P. 38.

are not amenable to the superficial procedural tinkering that has already occurred.

These arguments are supported by an examination of the operation of the reforms. In W.A., preliminary results of a study of rape trials are said to indicate that the reforms are ineffective, first because application for defence to cross-examine about prior sexual history is almost always granted and secondly, because the kind of evidence caught by the provision is only a small component of the kind of material used by the defence in a distressing matter. Victims were still questioned on aspects of their general behaviour and reputation, e.g. seductive dressing, drinking in pubs, hitch-hiking, with the insinuation that because of their character they were likely to have agreed or caused the accused to believe they consented.[45] The South Australian legislation is said to be self-defeating "by leaving discretion with the trial judge, which exercise is so difficult to upset on appeal".[46] It also seems, and some would say inevitably, that there are glaring loopholes in the legislation and for this reason the legislation has been the subject of much judicial criticism. The South Australian amendment has attracted the most comment, judicial and otherwise, and it appears that it contains at least five major and four minor defects.[47] Some claim that the only effect of the amendments has been to prolong the trial.

45. L. Newby, "Rape Victims in Court - The Western Australian Example", in J. Scutt (ed.), Rape Law Reform, P. 115.

46. R. O'Grady and B. Powell, "Rape Victims in Court - The South Australian Example", in J. Scutt (ed.), Rape Law Reform, P. 127.

47. P. McNamara, "Cross-Examination of the Complainant in a Trial for Rape", (1981) 5 Criminal Law Journal, 25-48.

63. In Tasmania the amendment has not been interpreted judicially but in the light of the S.A. legislation the following matters could be still admissible.

(a) Evidence of prostitution if the court considers it relevant to consent or a belief in consent;

(b) previous sexual intercourse with the defendant;

(c) evidence of virginity on the grounds it may negative an inference of consent and as part of the background circumstances of the offence in order that the court may better assess the victims alleged reaction to the sexual advance;

(d) in joint trials evidence of prior sexual relationship with another accused could be admitted as relevant to consent;

(e) evidence of promiscuity, or in cases of gang rapes evidence of consensual group incidents may be admitted as relevant to consent or belief in consent;

(f) evidence as to the defendant's belief as to her past sexual morality and activities and of the grounds of that belief.

On the other hand, those opposing further changes put forward the following arguments -

64. The need to encourage the prosecution of rapists by protecting the victim from harassment and humiliation in court cannot further encroach upon the defendant's fundamental right to cross-examine. A general prohibition would be productive of gross injustice.

65. Women frequently make false complaints of rape, and special rules are necessary to protect the accused's rights. There should be a discretion to allow the admission of relevant evidence relating to the sexual behaviour of the victim.

The following suggestions have been made by those advocating further reform.

66. The exclusionary approach. This approach involves listing specific types of sexual history evidence to be taken into consideration by a court, and proscribing all references to any other such evidence. The Michigan model is frequently advocated. This provides that evidence of the victim 's sexual conduct is not admissible unless it is evidence of the victim's past sexual conduct with the defendant, or evidence of specific instances of sexual activity showing the source of semen, pregnancy or disease, and it is material to a fact in issue in the case and its inflammatory or prejudicial nature does not outweigh its probative value.

An evaluation of the Michigan Act has described this reform as one of the major contributors to the increase in reports and convictions of rape, and the lessening of trauma by victims in the court-room. It is claimed the prohibition does not unduly interfere with defendants' rights for they still have all the traditional safeguards against false charges on which the law relies, police investigation, prosecutional discretion, the reasonable doubt, burden of proof, and the ability of the jury to evaluate the issue of credibility.[48]

At the National Rape Conference the following rules were proposed by a substantial number of the delegates -

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48. V. B. Nordby, op. cit., at P. 15-17, 27. She concedes however that in camera determination with more flexibility may be required to satisfy constitutional defects in the amendment.

(a) Rape victims giving evidence in court should not be cross-examined about sexual behaviour with other persons than the accused except, in the exercise of the court's discretion, after application by the accused in the absence of the jury, where:

(i) such evidence is part of a defence by the accused that he did not have sexual intercourse with the victim, and that the presence of semen, pregnancy, disease or injury was caused by some other person; or

(ii) such evidence is relevant to rebut a claim initiated by the prosecution or the victim that she was at the relevant time a virgin, or that around the relevant time she had not had intercourse with other persons.

(b) Rape victims giving evidence in court should not be cross-examined about sexual behaviour with the accused (apart from the incident in question) except in the exercise of the court's discretion, after application by the accused in the absence of the jury, where such evidence relates to an ongoing or recent relationship between the accused and the victim.

The Michigan legislation is directed at the admission of evidence generally. The National Rape Conference resolution was directed at cross-examination only, so such evidence could be tendered in examination in chief by the defence (e.g. of prostitution or promiscuity), or by the prosecution, (e.g. of virginity), hence the necessity to allow cross-examination of the victim to rebut claims of virginity etc. by the prosecution. The Rape Conference proposal also differs from the Michigan provision by allowing the admission of evidence in cross-examination of a prior sexual relationship to explain the origin of an injury. The Royal Commission on Human Relationships

also recommends (echoing one of the recommendations of the Heilbron Committee), expansion of the Michigan rules to include evidence of prior sexual acts:

> "where the prior sexual acts were part of a pattern of behaviour which was strikingly similar to [the alleged victim's] alleged behaviour at or about the time of the offence".

This inclusion has been criticised, primarily on the grounds that "pattern of behaviour" and "striking similarity" would be difficult to determine.[49]

67. The procedural approach. For some, the solution lies in applying the rules of evidence and admissibility as they are applied in other cases. Rape and sexual offences should be equated so far as possible with other offences and special rules eliminated. The general rules of admissibility of sufficiently relevant evidence in criminal cases should apply, including the discretion to disallow examinations and offensive questions (S. 102 Evidence Act). Special rules do not assist juries to be objective, but confirm them in their commonly held beliefs as to the sexual nature of women. Such myths as the belief that women provoke men into committing acts of sexual violence or lead them to believe they will acquiesce, simply because they have in the past consented to intercourse with others, or have signalled their availability by their behaviour or dress, are reinforced. Reform would take away from defendants in rape cases the opportunity not available in other cases, to escape punishment by the device of smearing the victim's reputation and making her previous personal life the key and leading issue in the case. The relevance of evidence of sexual and general behaviour could then be reviewed in each case in the light of contemporary standards.

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49. See e.g., comments in the New South Wales Department of the Attorney and Justice Report. Rape and Other Sexual Offences, (1977) para. 13 (d) at P. 29.

The usefulness of listing situations in which it is surmised particular evidence will be relevant is doubted. It is pointed out that even if evidence of sexual behaviour is inadmissible, in practice other irrelevant evidence of general behaviour (drinking habits, dress) are admitted to discredit and humiliate the victim and distract the jury. In all cases the relevance of such matters should be questioned by the judge.

The problem of evidence of the defendant's opinion of the victim's past sexual morality and sexual activity being sought to be admitted as a basis for the defence of mistaken belief in consent, could be lessened by a strict application of the rules of evidence. Belief in consent should be derived from the complainant's response to the accused's advances. The judge should approach the evidence giving weight to the complainant's behaviour immediately prior to and throughout the event charged, and should reject evidence of her sexual past and reputation as insufficiently relevant to a belief in consent.

68. The W.E.L. proposal involves a procedure in which the trial judge will be given a real opportunity for proper consideration of the relevance and admissibility of the evidence according to general rules of evidence without formalised guidelines. It requires an application to a judge in chambers for leave to admit evidence relevant to a material fact of the crime, and, then if granted, a hearing in the absence of the jury to determine whether the evidence is admissible. Reasons for admitting the evidence are to be clearly stated. This proposal was contingent upon the monitoring of the procedure, and if it fails to aleviate current problems, the introduction of a statutory prohibition and guidelines was recommended.

The advantages of this scheme are said to include the fact that the attention of the judge will be drawn to the need for thinking through the relevance and admissibility of the evidence. Difficulties of imputations and inferences alerting the jury to matters pertaining to sexual history before the trial judge is able to intervene and rule on admissibility, and problems of authorities being cited for the admission of seemingly irrelevant evidence, will be avoided. The formulation of reasons for the conclusion that evidence was admissible or not, could facilitate appeal and the appeal procedure would therefore act as a means building up common law guidelines.

69. The discretionary approach. A compromise suggestion is that the broad concept of the existing amendments (i.e. prohibiting sexual history with a judicial discretion to relax), be retained, but that amendments be introduced in all states to close loopholes and introduce uniformity.

It has been suggested that such an amendment should include the following features:-[50]

- application to all sexual assaults;
- absolute prohibition of all forms of evidence of sexual reputation of the complainant, with exceptions relating to activities in which the defendant was involved; prohibition subject to leave of evidence in any form of sexual experiences or lack of them of the complainant and evidence of the accused's belief as to those experiences;
- authorise leave only with the consent of the complainant or where the accused has denied or intends to deny the offence on oath and where the proposed evidence is substantially relevant to a fact in issue (and not merely to credit) and of such cogency that its real probative value in relation to the defence outweighs any distress, humiliation or embarrassment which its admission could inflict on the complainant;
- provide that evidence of sexual behaviour other than with the accused should not be deemed cogent or substantially relevant to a fact in issue simply because of any inference it may raise of general sexual disposition;

50. P. McNamara, "Cross-Examination of the Complainant in a Trial for Rape". [1981] 5 Crim. L. R. 27.

- require that an application for leave be heard and determined in the absence of the jury (if there is one).

The provisions in the Northern Territory Draft Criminal Code go some of the way to meeting this proposal, but it leaves open the possibility of allowing cross-examination of the complainant in relation to sexual activities, if it is a proper matter for cross-examination as to credit (S. 97). The New South Wales Bill contains more detailed provisions disallowing evidence of sexual experience or activity or lack of it with a list of specific and narrow exceptions in which leave may be granted to admit evidence.

70. Indirect attacks on General Character or Reputation

The problems raised by indirect attacks on the general character or reputation of the victim by defence counsel is also complained of and must be reviewed. Evidence as to the kind of clothes the victim was wearing, that the parties were drinking together before the attack, or the victim walking alone at night or hitch-hiking, is more commonly used than focusing simply on the character or reputation of the victim. It involves trying to insinuate before the jury that a woman who behaves in these ways is "asking for it" and is quite reasonably to be taken to be consenting. As well as being extremely embarrassing to the complainant, such evidence has also been shown to interfere with a "proper" finding by the jury. Jocelynne Scutt points out that the admission of such evidence is not relevant to the issue of whether the victim did in fact consent, but like evidence of a sexual relationship between the accused and the victim, admission might be held justified on the grounds that it is relevant to a belief in consent, and it may distract the jury and lead to an acquittal in a clear case. She suggests the solution might be "to work to eliminate the myths that encourage an individual to believe that a woman is consenting when she is not, and to enlighten the jury (and the judge) as to these myths also."[51]

51. "Admissibility of Sexual History Evidence and Allegations in Rape Cases" op. cit., P. 830.

CORROBORATION

71. Existing Law

There is a rule of practice created by judicial precedent which requires that the jury should be warned by the judge that it is dangerous to convict of rape (and sexual offences where there is a victim) unless the evidence of the complainant is corroborated in some material respect, in particular, by independent testimony implicating the accused. This appears to be accepted in Tasmania despite the absence of specific provision in the code. In contrast, the crimes of indecent assault, procuration, defilement, and acts of unnatural carnal knowledge are required by the express terms of the code to be corroborated.[52] i.e. they are incapable of proof without corroboration.

72. Danger of False Accusations

The justification for the rule is that rape is "an accuration easily to be made" and the motivation for falsehood or occasion for inaccuracy is great but disproof is difficult.[53] Rape is a serious crime and the consequences of wrongful conviction are severe. Because of the generally private nature of the act it is essential that the jury be warned of the danger of acting upon the uncorroborated testimony of the victim.

In particular the danger of false accusations is stressed. Archbold states:-

52. S. 136 Criminal Code.

53. e.g. Hales Pleas of the Crown, Vol. 1., P. 634.

"the jury should be warned in plain language that it is dangerous to convict on the evidence of the complainant alone, because experience has shown that female complainants have told false stories for various reasons and sometimes for no reason at all".[54]

The reasons for false accusations are said to be to placate parents, to cover up unfaithfulness to a wife or "defacto", to explain pregnancy, to obtain an abortion, to obtain sympathy or attention, the effects of hallucinatory drugs or alcohol or mental retardation, or rape fantasy.

73. There is a very real danger that juries will be unable to look objectively at the accused's behaviour. Because of repugnance of rape and natural sympathy for a woman involved in a rape case, juries will be predisposed towards the victim thus detracting from the fundamental rule requiring proof of guilt beyond reasonable doubt.

Those criticising the rule put forward the following reasons for abolition:- The requirement of corroboration, or at least a mandatory warning to the jury in all cases, has given rise to much cause for resentment by women as a class, and has resulted in the alleged victim in the majority of cases, being treated automatically with undue suspicion with the result that she is practically as much "on trial" as her alleged assailant. The result is that the victim is discouraged from reporting rape. Rather than any automatic requirement of corroboration or a mandatory warning, the trial judge should only bring it to the attention of the jury[55] if there is some evidence to suggest a false complaint.

54. (39th ed.), Para. 1430.
55. Law Reform Commission of Tasmania, Report No. 21, Report and Recommendations on the Law and Practice relating to Corroboration (1978), P. 60.

74. The present law and procedures relating to corroboration is too complex and must in many cases be unintelligible to juries and laymen. Abolition of special rules relating to corroboration would simplify trials and make them more easily understood.[56]

75. Abolition of corroboration requirements would not unduly prejudice the rights of the accused. He is adequately protected by the requirement of proof beyond reasonable doubt, appellate review for the sufficiency of evidence, and counsel and the judge's right to comment on any weakness in the prosecution case.[57]

76. In terms of the justification for the corroboration rule that it protects against false accusations, Wigmore and other authorities state it is of minuscule practical value.

"In imposing an evidentiary standard more befitting a public event, the law necessarily frustrates the prosecution of an inherently furtive act".[58]

Claims, such as that of the Victorian Law Reform Commissioner that "a high proportion of total complaints for rape offences are false, are strongly resented and criticised on the grounds of complete lack of sound empirical support. It is conceded false accusations are sometimes made, as they are made in relation to other crimes, and individuals must be protected against them. For most other crimes it is accepted that the ordinary rules are sufficient protection against the false complaint, and rape and sexual offences should not be singled out for special treatment.

56. L.R.C. op. cit. P. 15.
57. L.R.C. op. cit. P. 15.
58. People v. Linzy 31 N.Y. 2nd 99, quoted by Nordby op. cit.

77. It abrogates the jury's fact finding role. The task of the jury is to find guilt or otherwise on the evidence as presented. When warned in accordance with the rule, the jury may be confused into seeking "something more" than that which would convince them beyond reasonable doubt of the guilt of the accused. The authority of the judge in intruding into the territory of the jury may lead them to overreact in seeking "proof beyond proof".[59] In many American states the practice has been abandoned long ago. In Virginia and Georgia it has been held that a caution should not be made by the judge as it is an encroachment into the fact-finding sphere of the jury.[60]

78. The underlying justification for the rule that rape is an allegation easily to be made and difficult to prove is not borne out by the facts of present day rape cases and trials.

First, a rape charge is not difficult to defend. Statistics show that rape has a very high acquittal rate. Secondly, it is not a charge "easily to be made". On the contrary there are extremely cogent and persuasive reasons for not reporting rape, and official statistics and studies show that where the charge is made it is frequently not proceeded with because the woman has chosen not to participate in the investigation. It would also seem that many victims, influenced as equally as the rest of society by the prevailing mythology attached to rape, do not classify the event as criminal.

79. The Royal Commission on Human Relationships cites American evidence to show that the corroboration rule does effect the conviction rate for rape (by lessening the chance of conviction), and at the very least sees the rule as a bar to the implementation of their considered policy to equate sexual and non-sexual cases as much as possible.

59. Jocelynne A. Scutt op. cit. P. 99. Tasmanian Law Reform Commission op. cit. P. 14.

60. Crimp v. Commonwealth 23 S.E. 760.

80. At the National Rape Conference it was unanimously resolved by the delegates that the corroboration rule in rape cases be abolished. Dr. Scutt speaking at the same conference suggested that "current instructions as to credibility of witnesses in the general run of criminal cases should be reaffirmed and reinforced rather than a special case for rape being declared to exist. A jury should be instructed clearly that they are the sole and exclusive judges of the credibility of witnesses ....". She said the judge should alert the jury as to determinants of credibility.[61]

81. The Tasmanian Law Reform Commission has in a previous report recommended abolition of rules of law requiring corroboration or mandatory warning of the dangers of convicting without corroboration, in all cases other than bigamy and treason, with the proviso that the trial judge should enjoy an unfettered discretion to comment on any evidence as he sees fit. No legislative result followed.

82. The new Victorian amendment expressly abolishes the rule of law or practice requiring corroboration for rape, indecent assault, sexual offences against young persons and incest.[62] However it specifically provides that for acts of penetration with intellectually handicapped persons, procuration, abduction and prostitution,[63] corroboration is required. The New South Wales Crimes (Sexual Assault) Amendment Bill provides for abolition of the rule requiring the judge to warn the jury in cases of sexual assault categories one, two, three and four. The Explanatory Notes indicate that he retains a discretion to do so.

61. Scutt, op. cit., P. 107.

62. Crimes Act, S. 62 (3).

63. Crimes Act, S. 51 (s), S. 54 (2), S. 55 (2), S. 59 (2).

83. Rather than total abolition of the concept of corroboration or retaining the detailed established rules on corroboration, in sexual cases, a compromise solution has been suggested which involves continuing to use the concept of corroboration, but employing a less technical and more realistic definition of the term. The test of "independent testimony" and "material particulars" would be abandoned, and the question of whether any relevant and admissible evidence can provide support for the victim's testimony would be an issue of fact for the jury on which the judge should provide guidance only. It would not be an issue of law. Support for this approach can be found in the High Court in Kelleher v. R. (1974) 131, C.L.R. 534. [64]

COMPLAINT

84. The existing law:

On a charge of rape and kindred offences, the fact that a complaint was made by the victim shortly after the alleged offence, and the particulars of such complaint, may be given in evidence, not as evidence of the facts complained of, but as evidence of the consistency of the conduct of the victim with her evidence given at the trial.[65]

The failure of a victim to make an early complaint is not evidence that she consented to the intercourse. It is a circumstance to be taken into account in evaluating her evidence that the intercourse was without consent.[66]

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64. See Andrew B. Clarke, "Corroboration in Sexual Cases" 1980 Crim. L.R. 362-371.
65. e.g. See Archbold, Para. 2884.
66. Kilby v. The Queen 47 A.L.J.R. 369.

85. National Rape Conference Resolution:

A substantial majority of the delegates at the Conference agreed:

"that the law should be amended to exclude from rape trials any evidence either that the victim complained or did not complain at an early time after the occurrence of the offence".

86. The Royal Commission on Human Relationships made a similar recommendation with a proviso that it may be admitted under general rules if applicable.

87. The above recommendations go further than the South Australian amendment which provides that evidence of a complaint otherwise than in the presence of the accused is inadmissible, unless introduced by cross-examination or in rebuttal of evidence tendered by or on behalf of the accused.[67] This allows the accused to refer by cross-examination or otherwise to absence of any early complaint by the victim, but does not allow the victim or prosecution to use evidence of early complaint except by way of rebuttal.

The New South Wales Bill provides that before evidence is given or questions asked which tend to suggest an absence of or delayed complaint, the judge must give a warning to the jury that no complaint or a delayed complaint does not necessarily indicate a false allegation, and that there may be good reasons for the victim hesitating or refraining from making a complaint about the assault.

Those who favour abolition of the rule do so on the following grounds.

88. The rule is, as Holmes J. stated in 1898 "a perverted survival of the ancient requirement that she (the prosecutrix) should make hue and cry as a preliminary to bringing her appeal".

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67. S. 34 (1) Evidence Act.

The rule is illogical. If a victim does complain immediately the prosecution will use this fact, but an early complaint does not lead to the necessary inference that the victim is telling the truth. If a victim has not made a complaint as early as she might have done, the defence will use this fact to cast doubt on the veracity of the witness. The rule is based upon what is today at least, the assumption that a woman who has been raped will immediately complain to a third party. On the contrary she may well decide to give calm consideration to whether or not she will report the offence. Research concerning the reasons for non-reporting of rape indicate that the decision to complain is not a decision which is inevitably easily reached.

89. The rule is confusing to the jury in its application. It requires that the jury be told that the complaint is not to be taken as evidence of the facts contained in it, but merely is evidence of the consistency of the victim's story and may be used to negative consent. It is then told that the complaint cannot amount to corroboration.

Such a direction may well be confusing to a jury unskilled in the application of the rules of evidence.

UNSWORN STATEMENTS

90. Existing Law

S. 371 (f) of the Criminal Code provides that at a criminal trial an accused person may make an unsworn statement from the dock either verbally or in writing.

Unsworn statements are not caught by the Evidence Act provision which seeks to limit the admission of sexual history evidence.

91. The suggestion that this right of the accused be abolished has been canvassed for many years. In some common law jurisdictions debate has resulted in abolition e.g. New Zealand and Western Australia. In Tasmania abolition was recommended by the former Law Reform Committee without legislative results.[68] At the National Rape Conference, a proposal to prohibit the dock statement was passed. Many of the objections relate specifically to the use of the statement in rape cases. In such cases the accused has frequently used it, not only to put his version of the facts, but as a means of launching an unrestrained attack on the character of the victim without being liable to cross-examination upon such allegations and without the Crown being able to contradict material bearing on credit in the statement. And this after the jury has witnessed the victim being subjected to vigorous cross-examination by counsel for the accused.

However, argument in favour of abolition and retention seems usually to be put on the basis of an across the board proposal rather than relating to rape only.

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68. Recommendations for Revisions of the Criminal Code (No. 1) In New South Wales the Crimes (Sexual Assault) Amendment Bill provides that dock statements may not refer to inadmissible matters relating to sexual experience and activity of the complainant.

The following arguments are commonly advanced in favour of its retention:

92. Many accused, because of lack of education or other shortcomings are incapable of doing themselves justice under cross-examination by an experienced prosecutor;

93. Almost every accused, as a result of the emotional strain upon him because of the possible consequences of the trial in relation to his liberty is at a disadvantage to all other witnesses;

94. Occasional abuses should not be used to justify abolition of its proper use;

95. The rule is a harmless survival from a former age when it was a valuable concession and not an urgent matter for reform.

The following arguments are commonly advanced in favour of its abolition:-

96. Once the accused was given the right to give evidence, the right to make an unsworn statement became anachronistic;

97. The right has often been abused in practice; for example, by being used to introduce inflammatory or otherwise inadmissible materials;

98. An innocent man has nothing to gain by declining to give evidence; the statement is merely a device to assist the guilty.

III. PROCEDURAL MATTERS

Composition of Juries

99. Suggestions have been made that changes should be introduced to ensure some women at least serve on juries in rape cases. In Tasmania the present position is that women do not automatically serve on juries, but may do so if they notify the Sheriff in writing that they do care to serve.[69]

100. The Tasmanian Law Reform Commission has recommended that women form at least half of the jurors in rape cases, noting that it has become a usual practice for the defence to object to women jurors.[70]

The Royal Commission on Human Relationships recommended that in cases involving sexual penetration, juries should consist of at least four men and four women. Justice Heilbron's Advisory Group made a similar recommendation in the United Kingdom for rape trials.

At the National Rape Conference however the following resolution was passed with only one dissentient.

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

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69. Jury Act, 1899, S. 4.

70. The Working Party reviewing the recommendations disagreed.

Arguments for and against a minimum number of each sex on juries.

101. In support of their recommendation the Heilbron Advisory Group stated that it was less important to cling strictly to random selection than to seek a genuine and impartial jury. In cases of rape it was considered "a proper balance of the views of both sexes is of .... paramount importance in reaching a proper view about the attitude of the man and the woman".[71]

102. The actual effect of the composition of juries in terms of sex in rape trials is questioned by some on the basis of empirical data. Although counsel attach importance to sexual composition of juries, in South Australia a study of the sex composition of juries and verdicts in rape trials from 1966-1975 showed no significant differences between the verdicts of male and female dominated juries, supporting the conclusion that women are at least no more likely to condone the offence of rape than men.[72] Such evidence indicates that there is no justification for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men.

103. A further objection to the suggested reform is that it is ideologically defective because it isolates the crime of rape from other crimes. Instead it is suggested that court administration should be improved to encourage all members of the public to serve willingly to cut down on exemptions. The Sydney Women's Electoral Lobby recommends child care facilities within court buildings to encourage mothers with young children to serve.

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71. Report of the Advisory Group on Rape, op. cit. P. 31.

72. Criminal Law and Penal Methods Reform Committee, Special Report Rape and Other Sexual Offences, 1976.

104. A comment on the Heilbron Report has pointed out that if you reject the view that random selection is the best method of seeking impartial and representative juries, then you throw doubts on the arpropriateness of that method in all 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.[73]

105. The administrative difficulties are seen by some as an obstacle, by others as insufficient justification for abandoning a necessary reform.

Equal Responsibility for Women for Jury Service

106. In accordance with the spirit of the movement for sexual equality it is argued that the rules requiring jury service should be sex neutral.

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73. This was the basis for the Working Party's disagreement with the Tasmanian Law Reform Commission's proposal.

THE COMMITTAL PROCEEDINGS

107. Abolition of committal proceedings in sexual assault cases has sometimes been called for and the question has been considered and rejected by various law reform bodies in Australia. However other less drastic suggestions have been made to ensure more privacy for the victim at the committal stage. Two of these, that committal proceedings be held in closed court unless the Magistrate otherwise orders, and that committal proceedings be heard by a legally qualified magistrate, have been accepted and embodied in legislation.[74].

It should be mentioned that S. 56 (1) of the Justices Act already provided that the room or place in which committal proceedings are heard is not an open court, and justices may exclude any person other than counsel, prosecutors or the defendant.

108. Hand-Up Brief Procedure

In order to relieve the victim of the ordeal of giving her evidence and being subjected to cross-examination twice, it has been suggested that a "hand-up brief" procedure be adopted at the committal stage. The Tasmanian Law Reform Commission recommended that legislation be enacted providing that in rape cases the complainant's statutory declaration or signed statement be accepted in lieu of personal attendance.[75]

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74. S. 185 (2) Criminal Code added by Criminal Code Act (No. 2) 1976. The New South Wales Crimes (Sexual Assault) Amendment Bill goes further, and provides that any proceedings in respect of certain offencesmay be held in camera.

75. See also recommended reforms of Royal Commission on Human Relationships, op. cit., P. 187.

As the Working Party reviewing the Law Reform Commission paper pointed out, the Justices Act provides that in all cases statutory declarations may be received as evidence, but the justices may, if they think just cause exists, or shall, if the opposite party requests, require the witness to attend for further examination or cross-examination.[76]

In South Australia too, written statements may be tendered, but in sexual cases the complainant is no longer required to appear upon request by the defence unless the prosecution shows special reasons for requiring oral examination. Such special leave must be granted by the magistrate.[77] The question then is, should the present position in Tasmania be changed to only accede to the defence's request for the victim's appearance if the magistrate considers special reasons exist?

109. In favour of dispensing with the victim's appearance it is stated that the victim would be spared unnecessary distress and humiliation and no injustice would result, provided there was a discretion to call the victim where necessary. The accused or his counsel would be compelled to consider seriously whether her presence was essential, and if dispensed with this fact could be used in mitigation by the accused.

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76. S. 57 (2) Justices Act.

77. Justices Act, 1976 (S.A.).

110. Objections on the grounds that the person accused of rape should not be treated differently from accused in other cases is answered by the W.E.L. proposal, which recommends the procedure for all crimes unless the court considers the presence of any witness imperative for compelling reasons of justice.

111. The W.E.L. proposal in particular is rejected by the Director of the New South Wales Criminal Law Review Division, on the grounds that it is "unduly intrusive upon the proper function of committal proceedings." He points out that occasionally when committal hearings do not result in committal for trial, it is because when fairly tested by cross-examination essential witnesses do not live up to the written statement prepared by the police. He also questions how the magistrate is to assess whether "compelling reasons of justice" exist.

PUBLICITY

112. Rape is a crime which commonly attracts sensational publicity causing further humiliation to the victim. It is argued victims should be granted anonymity, not only to protect them from hurtful publicity, and to prevent distasteful and cheap sensationalism, but to encourage victims to report crimes of rape (or sexual assault) to ensure that rapists do not escape prosecution.

Following recommendations by the Tasmanian Law Reform Commission that legislation provide for non-publication of the complainant's name or address unless the court otherwise orders. S. 103 AB of the Evidence Act was passed which provides that the court may, in rape cases, make an order forbidding the publication of the name of any party or witness and any reference or allusion to such a party or witness which could disclose his or her identity if it is desirable to do in the interests of administration of justice.

Criticisms of S. 103 AB Evidence Act

113. It has been suggested that this measure is ineffective because although it is within the court's power to prohibit publication, it is frequently not asked to do so, and so the aims of relieving the victim from further distress and encouraging the reporting of rape are frustrated.

114. The criteria for forbidding publication are vague, and satisfactory criteria would be difficult to formulate. The practice of ordering non-publication must inevitably be uneven depending upon the victim's knowledge of her rights, the attitudes of the prosecution and the discretion of the judge or magistrate. Since the complainant is seldom legally represented the question also arises as to who is to apply for non-publication of names and addresses.

115. Thirdly, it can be criticised as being too narrow, by applying only to proceedings in rape cases. Victims in other cases of sexual assault should be protected by legislation, the discretion of the press cannot be relied upon to refrain from publication.

The following alternative is available:-

116. Prohibition of publication of names etc. of victims in rape and sexual crimes.

The Heilbron Group recommended that complainants who allege rape should remain anonymous, however a judge, upon application in chambers at any time before trial, should have the power to dispense with restrictions on publication in exceptional circumstances, namely where the actual identity of the complainant is essential for the

discovery of potential witnesses. Breach of anonymity should be a criminal offence and a suitable penalty should be devised.[78]

The Advisory Group's terms of reference were confined to rape, but in Victoria, there is a provision which prohibits publication of name and particulars of victims of offences of a sexual or unnatural kind unless the court grants leave to publish.[79] Similar legislation exists in South Australia (publication of identity of victims of sexual offences is forbidden unless the Court orders it or the victim consents) Western Australia (confined to rape) and Queensland.

117. These proposals are open to the criticism that they tend to make the offence of rape and other sexual offences more anomalous than at present by creating special provisions with regard to them. Perhaps the answer is that sexual offences are generally treated more attentively and sensationally by the media than other crimes, and the victims of sexual offences are in a peculiarly embarrassing situation justifying intervention.

118. Secondly, there is an argument that it would be quite unfair that the complainant should be anonymous and not the accused. But the rationale behind recommending anonymity for the victim (to encourage

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78. The Heilbron Group Report, op. cit. Paras. 163-166, 174.

79. Judicial Proceedings Reports Act 1958, S. 4.

reporting of rape and protection from hurtful publicity) does not apply to the accused. He should be treated on an equal basis with other accused persons, and proposals that accused persons should be given anonymity before conviction is another issue. This is not to say there are not good reasons for suggesting that the accused's identity should be concealed in all cases until such time as he had been convicted or at least committed for trial.

119. A third criticism is that any further restrictions on information about trials places too much importance on the victim's rights to privacy and too little on the public's right to know. The balance between this conflict of interests has to be resolved.

PLACE OF TRIAL

120. At the National Rape Conference it was agreed by a substantial majority -

> "that particular problems arise for rape victims in country towns and that therefore appropriate authorities should be obliged to grant a change of location for the court hearing on application of the rape victim if she feels she is placed in a position of embarrassment or personal difficulty".

The New South Wales Women's Advisory Council to the Premier pointed out that victims in suburban areas have similar problems maintaining their anonymity and therefore formulated a more general proposal.

TIME LIMIT ON PROCEEDINGS

121. Time limits on proceedings have been suggested for rape cases. The Tasmanian Law Reform Commission Report recommended that in rape cases the trial be within 3 months of committal unless the trial judge gives an extension for reasons stated.

The Victorian Report makes a similar recommendation, and also a recommendation that committal proceedings should not be commenced later than 3 months after the laying of the charge. The new Victorian amendments to the Crimes Act have partially implemented this proposal.[80] Trials in rape cases must be commenced within 3 months of committal or charge in cases of no committal.

122. This proposal is supported on the obvious grounds of not prolonging the anxiety of rape victims. Others would argue that all cases should be heard as soon as possible, and rape cases should not be unduly particularised unless there are compelling reasons for doing so. Rather the position of the rape victim could be ameliorated by equating rape and sexual offences with other offences as far as possible.

123. The Working Party reviewing the Law Reform Commission's recommendations regarded a time limit on proceedings as wrong in principle and impossible to administer:-

> "To arbitrarily give priority to hearings of rape cases over cases which may be more deserving of early hearing without regard to such factors ... (availability of witnesses, complexity of the trial) ... is wrong in principle."

80. S. 359 A Crimes Act 1958.

IV. TREATMENT OF VICTIMS

124. Concern is frequently expressed about the unsympathetic and sometimes hostile attitude of police to rape victims and the inadequacy of assistance to the victim to cope with the social and psychological trauma following the rape and its investigation. It is further suggested that the financial compensation available is inadequate.

THE POLICE

125. The police are criticised because some of them appear to consider that unless there is physical injury, rape is not sufficiently serious to merit police intervention, and because they are pre-occupied with the falsity of complaints. Research carried out for the Royal Commission of Human Relationships indicated that twenty-eight of forty-four experienced police officers stated that the possible falsity of a false complaint was uppermost in their minds when they first received a complaint. Such concern to establish the authenticity of the complaint is said to sometimes lead to cynical and harsh interrogation, and to rejection of valid complaints. Such impressions of police attitudes to rape discourage potential complainants from reporting.[81] The problem of false complaints is dealt with in some detail in Appendix A. Lengthy delays and prolonged and repeated questioning is another source of criticism of police treatment of rape victims.

Many suggestions have been made to change police procedures to achieve more considerate treatment of rape and sexual assault victims.

81. One third of a group of referrals to Sexual Assault Referral Centre in Perth W.A. gave police related reasons for not reporting rape to the police. Lee Henry.

Rape or Sexual Assault Squads

126. Special police squads to deal with sexual offences have been suggested for "main population centres". These squads should be specially trained and composed of equal numbers of men and women of equivalent rank and experience. The needs of these squads should be borne in mind when recruiting and training new police.

127. Rape squads have been formed in some states but elsewhere they are opposed. In Tasmania the police oppose the idea on the ground of "constraints imposed by economics and demography". Instead it is suggested that the training of police be improved to "better enable every police officer to compassionately deal with a rape situation".[82]

128. Other reasons given for rejecting a rape squad are that they are only viable in areas where there are no fewer than 200 offences per year, high concentrations of population in a fairly small area, and sufficient number of women detectives.[83]

Police Education

129. Suggestions are frequently made for improvement in police education. For example, that courses in crisis intervention, with special reference to identifying crisis situations and the needs of sexual assault victims should be available to all police officers.

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82. C. H. Fogarty, op. cit.

83. Interdepartmental Task Force Report: Care for Victims of Sexual Offences.

It has also been suggested that training courses should seek to reorientate current police views about rape, myths about victim precipitation should be exposed together with training in interrogation procedures, counselling and reaction to stress in rape cases.[84]

130. The Tasmanian Law Reform Commission in its report stated -

> "The manner in which the initial complaint is received and dealt with is most important. There should be a sympathetic and understanding hearing given to the complainant in as comfortable conditions and as speedily as possible ...
> The way in which the complaint is received and recorded and the nature of the interrogation and matters of instruction in police procedure, rather than strict law reform. It is however suggested that information should be sought from Victoria and Queensland, both of which states have police procedures whereby selected ... police officers undergo special training courses in how to deal with rape cases, from the initial complaint through to trial ... Secondment of trained officers from other state forces might be worth considering, to help train our own officers if necessary in this field."

131. The Tasmanian Police Academy has for some years had training programmes for its cadet officers in how to deal with sexual offenders.

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84. P. Wilson, The Other Side of Rape, P. 96.

The week long course entitled "Victimology", covers legal and forensic matters and makes considerable use of outside speakers to deal with the sociological and psychological aspects of sexual crimes, anxiety reduction techniques and crisis intervention. From time to time speakers from groups such as Women Against Rape address the cadets at the Police Academy. Cadets are given written instructions on procedures to be followed in interviews with victims of sexual offences. These instructions do stress the need to treat the victim tactfully and compassionately, not in an accusatory manner, and without comment on such matters as provocative clothing or the dangers of hitch-hiking. Matters are included however, such as the section on false complaints, of which objection could be made on the grounds of overemphasis and reinforcement of sceptical attitudes towards the rape victim. The Victimology course is only available to cadets, and senior police officers who have not undergone the course will be more likely to be involved in investigating rape complaints. In-service training programmes may be worth implementing.

Other Recommendations

132. Other recommendations which are not dependent upon the formation of a rape squad include increasing the number of women in the police force,[85] that police spend minimum time with the initial interview and regard all complaints as medical emergencies and that women police officers be called immediately a complaint of sexual assault[86] is made;

85. National Rape Conference, Resolution 14

86. Report on the Interdepartmental Task Force, P. 2.

that a complainant should be given the choice of telling her story initially to a female officer;[87] that a simple protocol be used incorporating information such as time sequences to enable subsequent evaluation as well as to providing a guide for initial and main interviews and to reduce the need of repeated questioning;[88] that the police should inform rape victims of the existence of a rape crisis centre; that a police woman should accompany the victim to court unless the victim desires otherwise; that court procedures should be explained.

133. Evaluation of these recommendations necessarily requires some understanding of the current position in Tasmania in relation to the receipt and investigation of complaints. The Police Standing Orders which deal with such matters are not available to the general public, however the written instructions to police cadets relating to interviewing victims of sexual offences are enlightening. These suggest, inter alia, that -

(i) the victim be given the choice of being interviewed by a male or female officer. If preference is shown for a male, a police woman should be on stand-by, to give assistance generally, to accompany the victim to the medical surgery, to be present when she is photographed and to take possession of her clothing;

87. Law Reform Commission, P. 6.

88. Report on the Interdepartmental Task Force, P. 2.

(ii) ensure that immediate medical attention is not necessary;

(iii) to conduct the interview in a quiet and private room and to ensure the complainant is as comfortable as possible;

(iv) allow her the choice of having a parent or friend present;

(v) advise parents or relatives that supportive medical treatment may be required;

(vi) suggests medical examinations are best conducted by a Government Medical Officer, but the victim be given a choice of medical practitioners if she expresses such a desire;

(vii) the interviewing officer should advise the victim that he or she will be available to give any assistance, to discuss any emotional problems, to assist her through the committal proceedings and the trial, and to familiarise her with court proceedings;

(viii) during visits the interviewer should assess the victim's emotional condition and advise further medical supportive treatment if necessary;

(ix) explain court procedures in advance;

(x) explanations in cases of acquittals.

134. Police instructions to trainee cadets would seem to satisfy many of the recommendations specified in para. 131. However it has been suggested that the existing practice is ad hoc, and depends too much on the individual police officers involved. It seems, for example, that it is by no means an invariable practice that a woman police officer accompanies a victim at committal proceedings. It is claimed improvement in the treatment by the police of victims of rape cannot be achieved by mere administrative changes. Legislation in the form of a code of procedure for police officers is necessary. W.E.L. recommends that this should cover all dealings with the public,

victims, witnesses and offenders. This would make both the police and public aware of the standards and procedures required, and help ensure adherence to such procedures. Police believe criticisms of them are unfounded, legislatively imposed standards which must be complied with would satisfy the public that this is so.

135. A possible objection to a code of procedure is that the primary obligation of the police is law enforcement and there is a need for discretion in the handling of the victims of all crimes including sexual assaults. A code of mandatory procedures for dealing with victims and witnesses may often obstruct law enforcement.

MEDICAL AND COMMUNITY CARE

136. The existing position

In March 1978, the Minister for Health publicly announced that the major public hospitals in Hobart, Launceston, Devonport and Burnie have set up special rape counselling and care service for rape victims. He stated that each hospital had arranged for experienced and sympathetic doctors to be called in at any time to examine and care for victims of sexual assault. Guidelines for use by doctors have also been circulated to those doctors likely to become involved.

However it would now seem that a centre with a panel of doctors is operating only at the North-Western General Hospital. In Launceston and Hobart there have been objections which have prevented either panels of doctors or centres getting off the ground. It is questioned whether the population in Tasmania and the small number of sexual assaults warrants full-time centres set up exclusively to deal with sexual assaults. Accordingly the Royal Hobart Hospital is not willing

to change its present system in which a rape victim is taken to casualty and a gynaecologist is called.

There are no rape crisis centres in Tasmania.

137. Medical facilities, standards of medical treatment, and follow-up care provided for victims of sexual offences are said to be quite inadequate.

At the National Rape Conference this need was reflected in the following resolutions:-

"that adequate and ongoing funding must be provided for the establishment and/or continuance of sexual assault referral centres in hospitals and that adequate and ongoing funding must be provided for the establishment and/or continuance of autonomous rape crisis centres and women's health centres in the community so that victims of sexual offences may be adequately and sensitively cared for in a centre of their choice".

"that specialized and forensic training for medical staff working with rape victims is essential and that particular regard should be paid to the procedures adopted in Western Australia".

In Tasmania difficulties have been encountered in attempting to get any improvements in medical and community care of rape victims implemented.

Sexual Assault Referral Centres

138. These are specialist units in major hospitals concerned with the examination, treatment and counselling of victims of sexual assault. The Sexual Assault Referral Centre in Perth was Australia's first hospital based centre. It provides a 24 hour, 7 day per week service for male and female victims of sexual assault. It is staffed by a

team of female counsellors and a panel of female doctors, although if a victim wishes to see a male doctor or counsellor this can be arranged. The medical team is specially trained in the forensic aspects of their work by the senior doctor on the panel. The counselling staff consists of one full-time professionally trained social worker and other non-professional counsellors who are given in service training on crisis intervention and counselling of victims of sexual assault.

139. When a call is received regarding a recent assault the victim is advised to come as soon as possible to the Hospital's Emergency Department. Upon arrival victims go immediately to the centre, by-passing normal Emergency Department Routine. Initial contact is with a doctor and counsellor and further contact is with the same doctor and counsellor avoiding unnecessary repetition of the victim's story. Police involvement is discussed at the commencement of the interview, as this determines the nature of the medical examination, and if the police have not been informed the Centre attempts to give information and support to enable an informed decision to be made regarding reporting the offence. No attempt is made to encourage or discourage reporting. The medical examination is then undertaken. This involves physical examination and treatment of injuries, collection of medical evidence if the offence has been, or is to be reported, discussion and treatment of possible pregnancy and venereal disease. Further medical follow up continues at varying intervals for up to 12 weeks, at which the counsellor is always present.

The aim of counselling is to assist victims with any emotional or psychological, social or practical problems resulting from the assault.

A shower is provided, and new clothing if necessary, and the victim is then transported to their accommodation or to police headquarters. If the victim requires admission to hospital, care is continued on the ward by the original doctor and counsellor.

140. Before leaving the centre victims are given an information sheet explaining how to contact the centre, telephone numbers to contact their doctor or counsellor at any time. When medical follow-up is required information is supplied about general follow-up available, and information on compensation. If a victim wishes, the counsellor will accompany her/him to court hearings and other legal consultations.

Good liaison exists with the police, and they are the major single referring source. There is a "liaison detective sergeant", with whom any problems, complaints against police, or queries are discussed.

141. The centre also has an important educational role involving the police force, social workers and the medical profession. Lectures and seminars are also run in schools and with community groups in an attempt to change the attitudes of society in general to rape and rape victims.

142. The New South Wales Task Force recommended that sexual offence units be established in seven major public hospitals. It recommended that in the absence of major physical injury, crisis care be the paramount consideration at the initial contact with the victim, and that this be followed by a physical examination using a standardised evidence kit similar to the South Australian Kit. Police interrogation should follow the medical examination although it was conceded in the case of police interviews a short initial interrogation would be necessary before the police reach the centre with the victim.

At the unit a 24 hour on-call crisis counsellor should be available and an interpreter service. Follow-up should be arranged in all cases for crisis counselling and for medical examination for prevention and diagnosis of V.D. and pregnancy.

At least 6 centres have been established in hospitals in the metropolitan and outer areas.

Panels of Doctors

143. A rather less ambitious proposal is that "all large public hospitals should have a panel of doctors trained in the examination and treatment of rape victims available to attend at any time of the day or night". The panel should include a sufficient number of women so that victims would have the choice of being examined by a woman doctor. In addition to treatment of any injuries and obtaining evidence for court proceedings, the victim could obtain advice and follow-up care in relation to mental health, venereal disease or pregnancy. The victim should be kept separate from other patients and if unaccompanied she should not be left alone. The hospital social worker should see each rape victim and advise her of available supportive facilities, arrangements for follow-up visits should always be made, as shock is sometimes delayed. Other features of this recommendation include a guide for doctors, and a pamphlet about rape for victims.[89]

89. Royal Commission on Human Relationships, op. cit., P. 181-183.

144. Country Areas

Sexual Assault Referral Centres, and "panels of doctors" can only be possible in large public hospitals. In country areas the problem is more difficult. The Royal Commission on Human Relationships recommended that country doctors who might be involved in the examination of rape victims should be kept adequately informed of the procedures to be adopted and the matters to be investigated. A document was suggested, a guide covering the emotional reaction of the victim, how to help her clinical management, venereal disease testing, a checklist for purposes of evidence and information about referral services.

The New South Wales Task Force believed their recommendations for medical education generally and special training for government medical officers in crisis care counselling, medical examination techniques and requirements, as well as the use of protocols for the collection of evidence and sexual offence evidence kits would improve the treatment of victims in rural and marginal metropolitan areas.

Rape Crisis Centres

145. The National Rape Conference expressed support for both sexual assault referral centres in hospitals, and autonomous rape crisis centres and women's health centres in the community, to give the victim a choice in the care available. Some may prefer to go to an assault centre in a respected public hospital but others may well find an independent rape crisis centre more supportive.

146. Rape crisis centres are usually housed together with other enterprises organised by women's groups. They provide counselling and support for the rape victim. Counsellors rarely have professional training. They are chosen on their ability to communicate with and assist victims rather than on academic qualifications. They work on a part-time basis for little or no pay. The centres offer a broad range of services including information (for example, about abortion services, V.D. clinics), telephone counselling; person to person counselling; court support (going to court with the victim); police and medical support (accompanying victims to the police and to hospital for medical examinations); speaking engagements; and lessons in self-defence techniques.

147. Proponents of rape crisis centres object to hospital based sexual assault referral units being the sole option available. Their main point is that hospitals are not a good environment to care for rape victims. Some rape victims require no medical treatment and to attend hospital would not be appropriate. They feel hospitals reinforce the feeling of helplessness generated by rape and the idea that only professionals can help. Another objection to hospitals is that they discourage a feeling of identity, the victim is a "rape case" and this defeats the purpose of a woman regaining a sense of control over her own life. Privacy is a problem in hospitals, and not all doctors and nurses are sympathetic.

148. Rape crisis centres are not without their critics. In particular the police generally believe such centres are inhibiting factors in rape investigations because of delays in reporting to police and because counsellors discourage the reporting of rape.[90] Some complain of the radical feminism and anti-male outlook of those running the centre.

The Royal Commission on Human Relationships suggested Rape Crisis Centres should include amongst their counsellors a broader cross-section of ages and outlooks so they can relate to a wider range of victims. There also needs to be a better relationship between the rape crisis centres and police, with police informing all victims of the existence of the centres and the centres refraining from discouraging reporting to police. The Royal Commission also suggested that some minimum level of training should be required before placing counsellors in the position of advising rape victims.

149. As stated previously there is no rape crisis centre in Tasmania. An investigation by government authorities, medical practitioners and representatives of women's groups into the facilities offered to rape victims resulted in a decision in favour of the setting up of hospital based centres rather than rape crisis centres. The main reason for this decision was that they are cheaper to run than rape crisis centres and more suitable to a small decentralized population. To set up and run a rape crisis centre in each of the major population centres in Tasmania funded by the government would be very expensive. Hospital based centres can utilise existing hospital social workers, and doctors are on call at all times. Furthermore Rape Crisis Centres depend very much

90. C. H. Fogarty, op. cit., P. Wilson, op. cit., at P. 75.

on voluntary work, and there are doubts about the availability of enough people to keep a centre running effectively. It is also recognised that by utilizing the public hospitals and so working within the system, the referral clinics may well be accorded greater credibility and therefore be more likely to achieve the attitudinal changes necessary to ameliorate the position of rape victims.

FINANCIAL COMPENSATION

150. Under the Criminal Injuries Compensation Act, 1976, compensation may be awarded where a person suffers "injury" as a result of criminal conduct. Injury is defined as "impairment of bodily or mental health" and "becoming pregnant". The maximum amount payable is $10,000.00. There have been 43 actions brought under the provisions of this Act, three of which have been in respect of rape or attempted rape. The damages awarded in these three cases ranged from $3,850.00 - $7,035.00, including specific amounts for pain and suffering, economic loss (where claimed) and legal costs.

151. At least two suggestions for change have been made. Firstly, that the current maximum award to victims of crime should be increased to $20,000.00 (Royal Commission on Human Relationships).

152. Secondly, W.E.L. considers that an increase of this nature is not what is required. Instead a scale of injury compensation along the lines of scales used in Workers Compensation legislation should be adopted as a mechanism for deciding upon claims, and the scale should be reviewable in relation to inflation rates.

The disadvantage of a flat upward limit with no guidelines as to how this sum is to be proportioned in relation to harm suffered, is that it may involve unjustified disparity in awards made by different judges,[91] and that inflation will lead to constantly recurring dissatisfaction with the state of the criminal injuries compensation legislation.

91. This criticism cannot be levelled at the present Tasmanian position. All claims are heard by the Master.

SUMMARY

I. THE SUBSTANTIVE LAW

1. Existing Law (paras. 1-7)

In Tasmania the law requires that to be guilty of rape it must be proved that the accused intended to have sexual intercourse with a woman and that she did not consent. An honest and reasonable belief in consent is a defence to the charge. For a variety of reasons this is considered by many to be unsatisfactory.

2. Immunity of husbands (paras. 8-17)

Those defending the immunity argue that abolition would result in unfounded and malicious complaints, difficulties of proof and encouragement of breakdown in family life. In favour of abolition, the immunity is said to be archaic, anomalous, unjust and contrary to sexual equality. Difficulties of proof, fears of unfounded complaints and undermining of family life are discounted on the grounds of lack of substance. For reasons of equality, justice and the need to condemn violence it is claimed the immunity must go. Compromise solutions are rejected on principle and on the practical ground of insuperable interpretative difficulty.

3. Immunity of boys under 14 (paras. 18-21)

The irrebuttable presumption that males under the age of 14 cannot achieve sexual penetration is criticised as being unrealistic and artificial. Some commentators, however, feel the incidence of rape committed by males under 14 is too insignificant to warrant change.

4. Gender Neutrality (paras. 22-24)

It is argued that for reasons of sexual equality and clarity sexual offences should be sex neutral.

5. Widening the Concept of Sexual Intercourse (paras. 25-28)

It is argued the concept of sexual penetration should be widened to include oral and anal penetration by means of the penis and the use of inanimate objects in penetration of the vagina or anus. This it is said would ensure recognition of the seriousness of such acts and facilitate amalgamation of analagous acts on males. Some dissent from this proposal exists on the ground that such conduct does not accord with the popular concept of rape, nor does it involve the risk of pregnancy.

6. A gradation of rape, indecent assault etc. into degrees of sexual assault (paras. 29-41)

Amalgamation of existing sexual offences into one category, graded according to circumstances of aggravation and attracting different maximum penalties is envisaged as the important central framework for reform of the substantive law of rape. In support of this proposal it is argued that by providing a range of options graded according to seriousness, that juries would be less reluctant to convict, penalties would be more appropriate and sentencing disparities avoided, and clarity and certainty would be achieved. Opposing the proposal it is argued that it would unduly restrict judicial discretion, and that it is too confusing and complex. Rape should be preserved as a distinct form of criminal misconduct because it is well understood and established in popular thought.

7. Consent (paras. 42-52)

An important feature of the graded sexual offence model is a list of objective criteria such as force and threats, proof of which would avoid the necessity of proving absence of consent. The advantages of such an approach are said to be first, that it focuses attention upon the accused actions rather than the personal characteristics of the victim and the absence of her consent. Secondly, that it specifically identifies what is proscribed, avoiding the problems of vague generalised definition of consent. Some critics of such a provision fear it would render some consensual sexual activity unlawful, and others doubt its usefulness.

8. Removal of the Sexual Element (paras. 53-54)

Sometimes it has been suggested that the myths and sensationalism and stigma associated with sexual offences and victims would be best dealt with by ignoring the sexual element of offences and dealing with them under other less emotive and broad categories of the law. On the other hand, many commentators point out that no matter how labelled, the sexual element of offences cannot be removed. The best that can be done is to free the criminal law of emotive terminology such as "rape" and to deal with sexual assaults in as much the same way as other crimes as possible.

9. Amalgamation of Rape and Indecent Assault (para. 55)

This has been suggested as an alternative to the graded sexual offence model.

II. EVIDENTIARY MATTERS

10. Existing Law (para. 57)

There is much dissatisfaction with the various evidentiary rules applicable to rape cases. It is submitted they unnecessarily

humiliate, harass and embarrass the victim, discourage the reporting of rape and distract the jury causing acquittals in clear cases.

11. Prior Sexual History (paras. 58-70)

At common law the prior sexual history of the complainant may be admissible if relevant to a fact in issue or to credit. In Tasmania, cross-examination of the alleged victim as to prior sexual behaviour is forbidden by statute if it is relevant only to credit, but sexual history evidence is still admissible in many cases. The admission of such evidence is opposed because it is both extremely embarrassing to the victim and highly prejudicial to the Crown's case, leading to wrong acquittals. To date the reforms in Australia are claimed to be inadequate, unnecessarily non-uniform, full of loopholes and some say their only effect has been to prolong the trial. The following suggestions have been made to alleviate the problem:-

(i) the exclusionary approach - a statutory prohibition of evidence with narrow and specific exceptions;

(ii) the procedural approach - the elimination of special rules applicable to rape, and the strict application of general rules of evidence;

(iii) the discretionary approach - closing the loopholes of the existing statutory amendments to the common law rules.

12. Corroboration (paras. 71-83)

By a rule of practice a judge is required to warn the jury that it is dangerous to convict of rape unless the evidence of the complainant is supported in some material respect. The crimes of indecent assault, procuration, defilement and acts of unlawful carnal knowledge are required by the express terms of the Criminal Code to be corroborated. The rule is justified on the grounds of the danger of false accusations, the ease with which complaints may be made, the difficulty of disproof and the need to off-set the jury's natural bias and sympathy for the alleged victim. The corroboration rules are challenged on the grounds that they have automatically caused the alleged victim to be placed under undue suspicion and consequently discouraged the reporting of rape. The allegedly high incidence of false complaints is denied on the basis of lack of sound empirical support and the claim that rape is a complaint easily made and difficult to disprove is rejected as being entirely unsupportable. Abolition of the rules of law and practice requiring corroboration is recommended by its critics with the proviso that the trial judge should alert the jury of the determinants of credibility and have an unfettered discretion to comment upon any evidence as he sees fit.

13. Complaint (paras. 84-89)

On a charge of rape and kindred offences, the fact that a complaint was made by the victim shortly after the alleged offence, and the particulars of such a complaint are admissible as evidence of the consistency of the victim's story, but not as evidence of the facts on which the complaint is based. She also may be cross-exarined as to her failure to make an early complaint. The rule is criticised as being anachronistic, because it is based upon the now erroneous assumption that a woman raped will immediately complain about it. It is also pointed out that the rule is very confusing to juries.

14. Unsworn Statements (paras. 90-98)

The right of the accused to make an unsworn statement from the dock is defended, mainly on the grounds that it assists those accused, who by reasons of lack of education, intelligence or fluency, are unable to do themselves justice in the witness box. It is criticised as being anachronistic, and liable to abuse by the introduction of otherwise inadmissible evidence.

III. PROCEDURAL MATTERS

15. Composition of Juries (paras. 99-106)

In Tasmania women are not automatically included on the jury roll, and the roll and therefore juries are frequently composed of more males than females. It has been recommended that in rape trials, at least six or four members should be female to ensure a proper balance of views and an impartial jury. This proposal has been criticised on three main grounds. First, that evidence has shown that the sex composition of juries makes no significant difference to verdicts. Secondly, it involves the introduction of even more special rules for rape, further isolating it from other crimes. Thirdly, its adoption would throw doubt on the appropriateness of random selection of juries in other cases, e.g. where the victim or the accused is a member of a minority group. Rather than abandoning random selection, it is suggested the Jury Act be amended to ensure women are equally liable for jury service as males, or that court administration and facilities be improved to encourage all members of the public to serve.

16. Committal Proceedings (paras. 107-111)

In Tasmania there is legislative provision for the admission by consent of statutory declarations as evidence at committal hearings. It has been suggested that this provision should go further, and the appearance of the victim should be dispensed with in all cases (or in cases of sexual assault) to avoid unnecessary distress and humiliation. It is claimed no injustice to the defendant would result from such a procedure provided the magistrate could order the personal appearance of the victim if special grounds or compelling reasons of justice exist. Such a move is opposed by some who consider it unduly intrusive upon the proper function of committal proceedings and to involve too much difficulty in assessing whether adequate reasons for appearance exist.

17. Publicity (paras. 112-119)

Section 103 AB of the Evidence Act provides that courts may in rape cases, make an order forbidding publication of the name or disclosure of the identity, of any party or witness. It is argued that this provision is ineffective and inadequate to protect the victim from embarrassing publicity and to encourage the reporting of rape. First, because courts frequently do not invoke the power, secondly the criteria are too vague and thirdly it is too narrow by applying only to rape and not to other sexual offences. An alternative suggestion is a provision which in cases of all sexual offences invariably prohibits publication of the identity of the victim unless the court grants leave. This proposal has itself attracted the criticism that is too great an encroachment upon the public's right to know and it is also unfair to the accused who is not similarly protected.

18. Place of Trial (para. 120)

It has been suggested that victims of sexual assault should be entitled, in country areas at least, to obtain a change of location for the court hearing, if she feels she is placed in a position of embarrassment or personal difficulty.

19. Time limits on Rape Proceedings (paras. 121-123)

To avoid prolonging the anxiety of the victim, time limits on instituting proceedings for rape have been recommended, usually of 3 months from charge to committal, and 3 months from committal to trial. It is opposed on the ground that it is wrong in principle to single rape out in such a way and it would be very difficult to administer.

IV. TREATMENT OF VICTIMS

20. Rape Squads (paras. 126-128)

Rape squads of specially trained men and women police officers have been suggested with the aim of providing more informed, sympathetic and efficient treatment of victims by police.. In Tasmania opposition exists on the grounds of economic viability. It is claimed a rape squad is only viable where there are at least 200 reported rape offences per year in a reasonably small area.

21. Police Education (paras. 129-131)

It has been suggested police education should incorporate in-service and cadet crisis intervention programmes with special reference to the needs of victims of sexual assaults. It is said such courses should also seek to expose the myths about victim precipitation and false complaints.

22. Procedure on receipt and investigation of complaint (paras. 133-135)

Changes to avoid repeated and lengthy interviews, to provide immediate emotional support and medical treatment for sexual assault victims have been suggested. These include increasing the number of women in the police force, short initial interviews followed by immediate conveyance to sexual assault clinics, the use of protocols to guide interviews, accompanying the victim to all court hearings and explanation of court procedures. To ensure compliance with such standards legislation in the form of a code of procedure is recommended.

23. Sexual Assault Referral Centres (paras. 136-143)

Sexual Assault Referral Centres have been set up in many public hospitals on the mainland and are operating successfully. They provide medical examinations, initial and follow-up medical treatment and counselling for victims of sexual assault. An alternative is a panel of doctors who are informed and sympathetic about the problem of victims of sexual assault. On call at any time to attend at the public hospital concerned, they could provide immediate medical examination and attention, and then each victim would be seen as a matter of course by the hospital social workers.

24. Country Areas (para. 144)

Special education in crisis counselling and medical examination techniques for sexual assault victims by government medical officers and other doctors working in country areas have been suggested. Sexual evidence kits and protocols for the collection of evidence have also been recommended for distribution.

CONTINUED

1 OF 2

25. Rape Crisis Centres (paras. 145-149)

These are independent centres providing counselling and support for rape victims in a non-medical environment. They provide an alternative to the victim who is reluctant to attend a public hospital. The viability of rape crisis centres in Tasmania is doubted.

26. Financial Compensation (paras. 150-152)

Increases in the current maximum awards to victims of crime have been recommended. An alternative is the substitution of a scale of injury compensation similar to the Workers' Compensation Act model.

Tear out and return this section

QUESTIONNAIRE

1. Immunity of Husbands (paras. 8-17)

Do you consider the exemption of the criminal liability of husbands for rape should be:-

(a) abolished .....

(b) retained .....

(c) abolished where the parties are "living apart" .....

(d) abolished in the following cases - actual bodily harm, or threats of bodily harm, acts of gross indecency, or threats of the commission of a criminal act against any person .....?

2. Immunity of males under 14 years (paras. 18-21)

Do you consider the irrebuttable presumption that males under 14 years of age are incapable of achieving sexual penetration should be abolished?

(a) Yes.....

(b) No.....

3. Gender neutrality (paras. 22-24)

Do you consider sexual offences should be sex neutral?

(a) Yes.....

(b) No.....

4. Widening the definition of sexual intercourse (paras. 25-28)

Which of the following should the definition of sexual intercourse include -

(a) vaginal penetration by the penis .....

(b) anal penetration by the penis .....

(c) oral penetration by the penis .....

(d) vaginal penetration by means of inanimate objects .....

(e) anal penetration by means of inanimate objects .....

(f) vaginal penetration by other parts of the body .....

(g) anal penetration by other parts of the body .....

5. Categories of Sexual Assault (paras. 29-41)

Should existing non-consensual sexual offences be replaced by a ladder of degrees of unlawful sexual assault graded according to circumstances of aggravation and attracting different maximum penalties?

(a) Yes.....

(b) No.....

6. Offences against children (paras. 31-32)

Should sexual offences against children be included within the framework of the categories of sexual assault (as in the Michigan legislation) or dealt with separately?

(a) included.....

(b) dealt with separately.....?

7. Consent (paras. 42-52)

Do you favour the legislative enactment of a list of situations in which absence of consent or unlawfulness is presumed?

(a) Yes.....

(b) No.....

8. Non-consensual Situations (paras. 42, 52)

Upon proof of which of the following circumstances, if any, should absence of consent or unlawfulness be presumed:-

(a) none .....

(b) infliction of grievous bodily harm .....

(c) infliction of bodily harm on the victim or another .....

(d) threats of bodily harm with an offensive weapon .....

(e) overcoming the victim by force of violence .....

(f) coercion to submit by threats of force or violence to the victim .....

(g) coercion to submit by threats of prior violence to a third person .....

(h) coercion to submit by threats of future punishment (including physical and mental punishment, extortion or public humiliation or disgrace) to the victim or another .....

(i) mentally incapacitating the victim by administering drugs .....

(j) impersonation .....

(k) fraud as to the character of the act .....

(l) exploitation of the victim by a person in a position of trust or authority .....

(m) mental deficiency of the victim .....

(n) submission while being unlawfully detained .....

9. Amalgamation of rape and indecent assault (para. 55)

Rather than the existing law or the graded sexual offence model, do you favour amalgamating rape and indecent assault into one offence of indecent assault?

(a) Yes .....

(b) No .....

10. Prior Sexual History (paras. 58-70)

Indicate which of the following options you favour for dealing with the issue of admission of evidence of the prior sexual history of the complainant.

(a) The exclusionary approach; there are two models-

(i) to prohibit all evidence of prior sexual history with the exception of evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of the victim's past sexual activity to explain the source of semen, pregnancy or disease, where it is relevant to a fact in issue and its inflammatory or prejudicial nature does not outweigh its probative value .....

(ii) (A) to prohibit cross-examination of the victim about sexual behaviour with persons other than the accused, except after application by the accused in the absence of the jury where such evidence is part of a defence by the accused that he did not have sexual intercourse with the victim and that the presence of semen, pregnancy, disease or injury was caused by some other person, or such evidence is relevant to rebut a claim that the victim was a virgin or that around the relevant time she had not had intercourse with other persons.

(B) to prohibit cross-examination of the victim about previous sexual behaviour with the accused except where it relates to an ongoing or recent relationship between the accused and the victim .....

(b) The procedural approach, which involves the abolition of the special rules applicable to rape and indecent assault and application for leave to admit evidence of sexual history on the grounds of relevance according to the general rules of admissibility of relevant evidence.
.....

(c) The discretionary approach, which involves closing the loopholes of the existing statutory amendments to the common law rules (i.e. redrafting S. 102 A of the Evidence Act), and a requirement that application for leave be heard and determined in the absence of the jury .....

(d) The existing discretionary approach .....

11. Corroboration (paras. 71-83)

Do you favour abolition of the rules of law and practice requiring corroboration or mandatory warnings of the need for corroboration in cases of sexual offences?

(a) Yes .....

(b) No .....

12. Complaint (paras. 84-89)

Do you consider the rule of evidence which allows admission of the evidence that a victim complained or did not complain shortly after the alleged offence should be

(a) abolish .....

(b) retained .....

(c) retained with the proviso the trial judge be required to warn the jury that delay or failure to complain does not necessarily imply falsity .....

13. Unsworn statements (paras. 90-98)

Do you consider the rule of law which allows the accused to make an unsworn statement from the dock either verbally or in writing should be abolished?

(a) Yes .....

(b) No .....

14. Composition of Juries (paras. 99-106)

Which of the following alternatives do you favour?

(a) amendments to ensure that at least half of the juries in rape trials consist of women; .....
or

(b) amendments to ensure that women are equally liable for jury service as men; .....
and/or

(c) improvements in court facilities (e.g. provision of child care) and administrative efficiency to encourage all members of the public to serve; .....
or

(d) the present position .....

15. Committal proceedings (paras. 107-111)

Do you consider the appearance of a victim of a crime should be dispensed with at the committal stage of the hearing and written statements accepted instead unless in the magistrate's opinion there are special reasons requiring her appearance?

(a) in all cases .....

(b) in sexual offences .....

(c) in all cases only if the defendant agrees (the present position) .....

16. Publicity (paras. 112-119)

Do you consider the existing law which provides that a court may prohibit publication of the name of a party or witness in cases of rape should be amended to forbid publication of the names of victims of all sexual offences unless the court grants leave to publish?

(a) Yes .....

(b) No .....

17. Place of Trial (para. 120)

Do you consider a victim of a sexual offence should be entitled to obtain a change of location for a court hearing?

(a) in country towns .....

(b) in all areas .....

(c) never .....

(d) as of right or at the discretion of a Judge? .....

18. Time Limits (paras. 121-123)

Should there be time limits of 3 months from charge to committal and from committal to trial in cases of rape and sexual assault?

(a) Yes .....

(b) No .....

19. Rape Squads (paras. 126-128)

Do you favour the formation of special squads of police men and women to deal with sexual offences in Tasmania?

(a) Yes .....

(b) No .....

20. Police Education (paras. 129-131)

Do you favour improvements in the education of police in relation to sexual offences, e.g. more extensive crisis intervention programmes?

(a) Yes .....

(b) No .....

21. Police Procedures (paras. 133-135)

Do you favour the enactment of a legislative code of procedure to ensure compliance with appropriate standards of conduct for receipt and investigation of complaints of sexual assault victims?

(a) Yes .....

(b) No .....

22. Treatment of Victims (paras. 136-149)

Which of the following measures for the treatment and counselling of rape victims of sexual assault do you support?

(a) Sexual Assault Referral Centres in the major public hospitals .....

(b) panels of doctors rostered to attend sexual assault victims in the major public hospitals .....

(c) provision of special education in crisis counselling and medical examination of sexual assault victims for government medical officers .....

(d) provision of sex evidence kits and guides relating to collection of evidence for country doctors .....

(e) Rape Crisis Centres .....

23. Financial Compensation (paras. 150-152)

Do you consider the existing financial compensation available to victims of crimes including sexual assault is -

(a) adequate .....

(b) inadequate and the maximum amount payable should be increased .....

(c) inadequate and should be replaced by a scale similar to that used in Workers' Compensation Schemes .....

END