

RAPE LAW REFORM

Edited by
Jocelynnne A. Scutt

Australian Institute of Criminology

RAPE LAW REFORM

A COLLECTION OF CONFERENCE PAPERS

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Though Eve was made from Adam's rib
Nine months he lay within her crib
How can a man of woman born
Thereafter use her sex with scorn?
For though we bear the human race
To us is given but second place
And some men place us lower still
By using us against our will.

Chorus :

Reclaim the night and win the day
We want the right that should be our own.
A freedom women have seldom known
The right to live, the right to walk alone
without fear.

If we choose to walk alone
For us there is no safety zone
If we're attacked we bear the blame
They say that we began the game
And though we prove our injury
A judge can set a rapist free
Therefore the victim is to blame
Call it nature, but rape's the name.

Chorus :

Reclaim the night and win the day
We want the right that should be our own.
A freedom women have seldom known
The right to live, the right to walk alone
without fear.

A husband has his lawful rights,
Can take his wife when'er he likes
And courts uphold time after time
That rape in marriage is no crime
The choice is hers and hers alone
Submit or lose your kids and home
When love becomes a legal claim
Call it duty but rape's the name.

Chorus :

Reclaim the night and win the day
We want the right that should be our own.
A freedom women have seldom known
The right to live, the right to walk alone

without fear.

And if a man should rape a child
It's not because his spirit's wild
This system gives the prize to all
Who trample on the weak and small.
When fathers rape they surely know
Their kids have nowhere else to go
Don't try to forget and don't ask us to
Forgive them. They know what they do.

Chorus :

Reclaim the night and win the day
We want the right that should be our own.
A freedom women have seldom known
The right to live, the right to walk alone
without fear.

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The task of editing these proceedings was given considerable encouragement by the vigorous and informed participation of all persons attending the conference and, of course, of those devoting time, effort and enthusiasm in writing and presenting papers. An additional spur to the editing was the recognition by the conference that current laws and procedures in the field of rape are entirely inadequate and should be reformed. It is hoped that these proceedings will serve as a valuable resource in moves toward the introduction of adequate and effective laws dealing with rape and similar offences in all Australian jurisdictions.

Sincere thanks are also due for the tireless and competent typing skills of Jocelyn Terry, Peggy Walsh, Evelyn Jacobsen and Barbara Jubb.

Jocelyne A. Scutt, 1980

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INTRODUCTION

Since the early 1970s, with the rise of the new feminist movement, demands for social and political recognition of woman's position *vis a vis* rape and rape laws have been loudly voiced. The call for changes to rape laws has been accompanied by agitation for changes to police and hospital procedures, and for a reassessment of community and court attitudes towards victims of rape. The first Australian Rape Crisis Centre was opened in Sydney, New South Wales, in 1974 and in 1976 the *Sydney Women's Electoral Lobby Draft Bill and other recommendations on sexual offences** was published. In the mid-1970s the call of women's organisations was taken up by various law reform committees and allied bodies. Numerous reports were produced. In some instances, this flurry of activity led to minor changes to substantive law and/or laws relating to evidence in rape cases.

Although there appeared to be substantial agreement as to the need for reform, at the same time it became clear that there was little agreement as to how such reform should be designed. Furthermore, little evaluation was being carried out of any reforms put into practice, and overseas efforts, although noted in some jurisdictions, were not understood by many.

Acknowledging that 'reforms' had involved little of substance and much rhetoric, the Australian Institute of Criminology, the Tasmanian Law Reform Commission and the University of Tasmania Law School, with substantial support from the Tasmanian and New South Wales' governments, the federal Attorney-General and the New South Wales' Law Foundation, organised a National Conference on Rape Law Reform, held in Hobart, Tasmania from 28-30th May, 1980.

The Conference was planned with a view to concentrating upon the reform of the law of rape; to evaluate changes introduced in some Australian jurisdictions; and to take advantage of the introduction of new laws into the United States', bringing before the conference results of an evaluation study of the operation and effect of the new Michigan sexual assault law. Thus three sessions dealt specifically with the substantive law of rape and laws of evidence, one session concentrating upon the Michigan legislation. Recognising, however, that rape does not take place in a legal vacuum and that law reform is a political as well as a legislative issue, two further substantive issues were canvassed: the problems facing victims of rape in police, hospital and community contact; and the politics of rape and rape law reform.

* For an outline of these proposals, see Appendix II, this volume.

Attended by approximately 200 persons, conference participants included judges, queen's counsel, practising barristers and solicitors, academic lawyers and lawyers in government; social workers and health workers; representatives from women's organisations; workers from rape crisis centres, refuges and women's health centres; representatives from various government departments - including Youth and Community Services, Community Welfare, Health Commissions, Departments of Attorneys-General; police officers; politicians from each political party; representatives from law reform bodies and committees; journalists; church groups. Women and men were equally represented; all states and territories were represented; conservative political views and radical political views were well represented along side middle-of-the-road political opinion. All sessions and workshops were fully attended, testifying to the very real interest of participants and to the seriousness with which each viewed the issues. The papers contained in this volume are those presented as the basis for discussion at the National Conference on Rape Law Reform.

The United States' Example

Principal drafter of the Michigan sexual assault legislation, Dr. Virginia Nordby, outlines in her paper "Reforming Rape Laws - The Michigan Experience" the problems facing law reformers in Michigan in 1974, prior to the passage of the Michigan *Criminal Sexual Conduct Act*; analyses the law passed to correct inadequacies of the pre-reform situation; and evaluates the operation and effect of the new Michigan law in light of court decisions since its passage and in terms of an extensive evaluation research study which has been underway for the past three years. She enumerates the goals of rape law reform :

- * the law should reflect accurately a community consensus that certain conduct is so threatening to the general welfare that it should be criminalised.
- * the law should establish a scheme which assures certainty of conviction in the appropriate case, so far as this is possible.
- * the law should protect the victim of crime from further victimisation by the legal process itself.

To effect these goals, the Michigan law brought changes in the following manner :

- * the law is gender neutral : men and women can be victims or offenders.
- * there are degrees of sexual assault, taking in the 'old' offences of rape, indecent assault and the like.
- * force and consent are clearly defined.
- * the problem of rape in marriage is addressed.

- * corroboration is rendered unnecessary.
- * previous sexual history of the victim is made subject to clear evidentiary rules as to relevance and admissibility, and to procedural rules.

Perhaps the most controversial legal issue raised by the new law is that of the exclusion of sexual history evidence of the victim with third parties. As Virginia Nordby points out, the question of excluding evidence of this nature '... has been hotly debated ... nationwide'. Thus far, however, '... the majority of judges faced with making a decision' under the Michigan law have upheld the constitutionality of the provision. Interpreting the law, courts have proclaimed that '... there is no fundamental right to ask a witness irrelevant questions. Cross-examination of a rape victim on the subject of sexual behaviour with third persons is irrelevant ...' In one decision, the court held that it was reversible constitutional error '... for the trial court to apply [a] blanket statutory exclusion.' Preferable would be an *in camera* determination as to the relevance of evidence in a particular case. As Nordby concludes, the law '... is still in flux' :

'... *In camera* determination, with more flexibility, may be required. But courts are clearly committed to preserving the legislative policy [of exclusion of sexual history evidence] except in extreme circumstances.'

In the second part of her paper, Dr. Nordby discusses the on-going evaluation study of the Michigan law. Interviews were conducted with 170 rape crisis centre staff, police, prosecutors, defence attorneys and judges in six counties of Michigan. In sum, the study shows positive gains for those seeking improvements for victims of rape and for those hoping to see the law operating as effectively as can be hoped. Although it is acknowledged that to the question :

'Is the "average" person (here, woman) safer from rape?'

the answer is :

'Probably not'.

Nordby finds as a result of evaluation, '... the "average" rapist who commits forcible rape, *Criminal Sexual Conduct 1*, is more likely to be reported to the authorities, arrested and convicted of his crime than before the law went into effect.'

The Substantive Law

Addressing the Australian situation, Helen Coonan, New South Wales solicitor, reviews proposals from the Royal Commission on Human Relationships, the Women's **E**lectoral Lobby *Draft Bill on Rape and other*

sexual offences, and looks at the Michigan legislation in its possible local application. She strongly acknowledges the work of the Royal Commission in taking the most 'radical stand' of all official Australian committees, as to the need for review of the laws of sexual offences and the extent of that review. She concludes that the major defect of the Royal Commission approach was a failure to acknowledge the problems of consent beyond that of 'consent' in cases involving serious bodily injury. Although the recognition that sexual intercourse carried out in circumstances involving the infliction of grievous bodily harm should be clearly non-consensual is to be applauded (that is, the issue of consent should not be raised in such cases), this does not assist in those instances where no such harm is inflicted; yet these are too likely to be the more numerous cases. A reform that does not confront the issue does not go far enough. Ms. Coonan contends there is merit in defining, without limiting, the issue of non-consent, by stating a series of objective circumstances that will render an act unlawful rather than unlawfulness arising from the essence of what the victim was doing in the particular case. This is the approach both of the Michigan legislation and of the Women's Electoral Lobby *Draft bill*.

W. J. E. Cox, Q.C., Crown Advocate for Tasmania, in a comprehensive review of issues raised in a jurisdiction ruled by a *Criminal Code* rather than by common law, takes issue with the need for defining non-consent. 'The best safeguard for the victim', he states, 'is a realistic definition of consent not instanced by an extensive but not necessarily exhaustive list of examples of non-consensual situations but a generalised approach such as that of the [Tasmanian] Code :

'... a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents ...'

Yet the problem with this definition, and the reason for the Women's Electoral Lobby draft approaching the issue in the manner it does, is that despite the apparently logical nature of 'consent' under the Code and at common law, judicial decision-making has distorted the meaning of consent in rape. Thus at common law it is frequently said that rape is sexual intercourse without consent, or 'with consent, where that consent is extorted by force, fear, threats or fraud'. This immediately raises the question of what does 'consent' mean? Can it in anyway reasonably be said that a person *consents* when *forced*? when *fearful*? when *threatened*? when *defrauded*? Second, at common law there is considerable lack of clarity as to the meaning of 'threats', the nature of threats required to render 'consent' negated, the direction from which those threats are to come, and to whom the threats should be made. For example, cases have clearly held threats must extend to threats of fear of death or serious bodily injury - yet many types of threat can as a matter of fact render an individual non-consenting. Furthermore, should the threat be made by the accused himself - or is submission in the face of threats by another sufficient to eliminate consent at law? Do the threats need to be directed at the victim - or are threats to a relative, companion, stranger sufficient at law to eliminate consent as a matter of fact?¹ As for fraud, it has been held² that where a man enters the bed of a woman, she thinking

him to be her *husband*, when in fact he is not, and commences sexual intercourse with her, that will be rape. Where a man enters the bed of a woman, she thinking him to be her *de facto spouse* when in fact he is not, that will *not* be rape.³ The law is an ass - unless the legislature clarifies the issue.

Coonan and Cox agree, however, that the 'special' nature of rape as a crime to be committed only by men, the victims of which can be women only, should be eliminated. Both favour a broadening of the definition to include the crime today called 'rape' within the general run of sexual offences involving non-consent. However, Helen Coonan wishes to eliminate 'rape', replacing it with a graded offence of 'sexual attack', 'sexual abuse', or 'sexual assault'. W.J.E. Cox favours collapsing 'rape' into the offence of indecent assault and leaving it entirely to the judge's discretion as to the seriousness with which any particular 'indecent assault' will be regarded. Helen Coonan clearly considers the court - judge and jury - should be given good guidance by the legislature as to 'what sexual conduct ought to be proscribed', and of the seriousness with which various forms of non-consensual sexual conduct are regarded by the community, as translated into legislation by the Parliament.

In a paper describing the position in a jurisdiction wherein the common law reigns, the Australian Capital Territory (which follows, basically, the criminal law position current in New South Wales), Arthur Watson favours, in some measure, the recommendations of the Royal Commission on Human Relationships, adopting a pattern of gradations of an offence incorporating the 'old' offences of rape and indecent assault and the like. Here, however, the grading system differs radically from that introduced by the Michigan sexual assault legislation. Rather than accepting a policy which basically distinguishes simply between sexual assaults involving serious bodily injury or threats with dangerous weapons, and those sexual assaults not accompanied by 'aggravating circumstances', a complicated gradation system sets varying penalties for a broad range of offences :

- * An assault offence (basically rape/attempted rape under the original law) involving serious bodily injury will be punishable by imprisonment for life (maximum).
- * An assault offence involving bodily injury will be punishable by 14 years imprisonment (maximum).
- * An assault offence involving threats of injury to person or property, or use of any offensive weapon, will be punishable by 10 years imprisonment (maximum).
- * An assault offence involving a victim who is unconscious will be punishable by 10 years imprisonment (maximum).
- * An assault offence involving inducements by deceit, false pretence, administration of liquor or a drug, impersonation of the woman's husband, will be punishable by imprisonment for seven years (maximum).

It is not immediately clear why, for example, a sexual assault carried out upon an unconscious victim will render the actor likely to receive a harsher penalty than a sexual assault carried out by way of impersonation, deceit, pretence, or administration of liquor or a drug. Does the community wish to distinguish between these forms of unlawful conduct? Could it be said that an actor taking advantage of an unconscious person is more heinous than one who administers liquor or uses guile? It might be contended that the person using guile is indeed the more harmful, for he has in effect planned the crime and addressed his mind to using deceitful means. What of the case where the person plies his victim with liquor, so that she is half-unconscious? At what stage does the victim become 'unconscious' for the purpose of rendering the actor liable to the ten year rather than the seven year penalty? Again, the issue raised earlier of impersonation of a *husband* rather than of *any person to whom the victim would have given her consent, and to whom she thought she was consenting* is unresolved; indeed, the common law mix-up is proposed to be written into the legislation.⁴

Nonetheless, there are points of commonality between Arthur Watson's paper and those of the two former writers on the substantive law, particularly in relation to the eradication of the term 'rape'; on the recognition that as in other assaults involving the infliction of grievous bodily harm, consent should not be an issue; that there should be a broadened definition of 'unlawful sexual penetration', involving oral and anal intercourse, and penetration effected by means of foreign objects and/or parts of the body in addition to the penis; and that the crime of 'sexual assault' or 'unlawful sexual acts' or the like should be one of which both males and females are capable of being convicted, and of which both males and females are capable of being victims.

In his paper, "Rape in Marriage and the South Australian Law" Peter Sallmann of the Department of Legal Studies, La Trobe University in Victoria, restricts his brief to a discussion of a specific aspect of the substantive law: that of marital rape. Having undertaken, together with Professor Duncan Chappell of Simon Fraser University, Vancouver, Canada, a comprehensive review of the operation and effect of the 'rape in marriage' law passed in South Australia in 1976, Sallmann concludes:

'Each Australian state should legislate to completely remove the immunity from prosecution of a husband for the rape of his wife.'

Peter Sallmann acknowledges that the criminal law is really 'no solution' to the problem of domestic violence involving rape. Nonetheless, he states, there 'are clearly strong reasons for lifting the immunity of husbands from prosecution'. Husbands who commit the act and who are 'caught' will be - and should be - appropriately punished. As well, the idea that upon marriage a woman consents to intercourse at all times, without regard to her own wishes and desires, would be recognised as archaic. Furthermore, all individuals, married or not, should be equally protected by the law - at least in theory. Finally, the important symbolic effect of the recognition, by the law, that married women are autonomous individuals with rights equal to other citizens, cannot be ignored.

The 'rape in marriage' question was also touched upon by Helen Coonan, Virginia Nordby, W. J. E. Cox and Arthur Watson. Under the Michigan legislation the final solution, due to political pressure, was to provide that the old common law rule would be abolished in the case of parties living apart, where one had filed for divorce. Nordby acknowledges that this was not the original intention of those formulating the reform. Admittedly, there is now protection for a group of persons desperately in need : women who have left their husbands are who seek divorce are frequently victims of abusive attacks by those spouses, often involving sexual abuses. Nonetheless, those women who are not in a position to leave, cannot obtain finances for divorce proceedings, who are delayed by problems with filing for divorce - or who simply wish to be protected by the law whether or not they are set to divorce the abuser - remain unprotected. Virginia Nordby is currently involved in attempts to have the Michigan law extended to cover those cases, and it is the latter approach that is approved by both Cox and Coonan. Coonan states :

'The common law ruthlessly reinforces woman's subordinate position in marriage. Removal of the husband's immunity at least accords to wives theoretical sexual equality in marriage and would afford them some protection by the criminal law in extreme cases.'

Cox succinctly sums up that the law should :

'Make any person who indecently assaults [rapes] his/her spouse whether by conduct involving penetration or otherwise criminally liable for his/her actions.'

A somewhat contrary view is put by Arthur Watson, representing the federal Attorney-General. He proposes that marital immunity from prosecution alleged to exist at common law should be extended to include *de facto* spouses. The immunity should, he states, be 'limited' to partners living together, whether or not they are legally marriage. The difficulty of determining 'living together' in view of decisions on this issue under the *Family Law Act 1975* (Cwth) is not addressed; nor the irony that if a married woman were able to show that, although under the same roof, she and her husband were 'living separately' and therefore his forced act of sexual intercourse qualified as rape, she would have more protection than the *de facto* wife - for if the *de facto* wife remained in the 'matrimonial home' with her *de facto* husband, she could not, presumably, qualify in any way as 'living separately and apart' - or could she? The class-bias of the Australian Capital Territory proposal is neither aired - although this points importantly to the fact that a person possessed of financial means to leave the family home would qualify for protection under the law, whilst the woman too poor to set up on her own, or without supportive parents or the like, would remain subject to her husband's importunity, aggression and brutality, without redress. Finally, the basic proposition fails to be recognised : that no person should remain unprotected by the law, simply because she is a married person, and that no person should escape prosecution, simply because he has wed his victim.

Certainly any proposal that rape in marriage should not only continue to have the support of the legal system, but that this support ought to be extended to cover relationships outside legal marriage would be calculated to please few. Conservatives will no doubt be outraged at the proposition that *de facto* relationships should be granted a status likened in some way to marriage. Those concerned with humanity will no doubt be shocked by any proposed legitimization and continued legitimization of violence, lack of concern and consideration, within *de facto* relationships and within marriage.

Acknowledging that Australian laws and procedures relating to rape and sexual assaults 'are seriously defective and should be urgently modified', the plenary session of the conference passed a number of resolutions addressing questions of substantive law reform. Protection for victims of rape was emphasised in conjunction with reforms being consistent with fair protection of the rights of accused persons. It was particularly interesting to note that over 96% of those attending the workshops agreed that rape in marriage should no longer receive support of the law, and in debate at the plenary session, the resolution confirming this stand was passed with only four dissentients. Resolutions* included :

- * any immunity protecting men against prosecution for rape in marriage be abolished.
- * any artificial immunity against prosecution for rape for males under the age of fourteen years be abolished.
- * laws proscribing non-consensual sexual behaviour should be gender-neutral.
- * 'rape' and similar offences should be replaced by a gradation of sexual assault offence of varying degrees of seriousness.
- * sexual assault involving grievous bodily harm should not raise questions of consent.
- * the concept of 'sexual penetration' should be broadened to include all forms of sexual penetration.

The Law of Evidence

Evidence laws and their operation, the role of the jury in rape cases, and the part played by the judge are covered in a series of papers looking first at jury research, then at specific cases in Western Australia and South Australia prior to and following 'reforms' of evidence laws in those jurisdictions. Jocelyne A. Scutt's paper, "Evidence and the Role of the Jury in Trials for Rape" looks first at the 'puritanical and prudish' attitude of the law and courts toward sexual offences generally.

* Resolutions in full are included at the end of this Introduction.

The 'special' nature of rape has led to the introduction of special rules - such as the corroboration warning - and to the distorted application of laws of evidence (or the abject failure, in many cases, of courts to apply the laws of evidence as they are applied in the general run of criminal cases). This approach to sexual offence trials has been adopted by the courts, contests Scutt, allegedly to guard against juries being overcome with anger and hatred for the accused in such cases; rather than 'assisting' juries in this way, 'special rules' have served only to confirm juries in their common beliefs as to the 'sexual nature' of women : that is, that women are responsible for acts of sexual violence committed against them; that they 'provoke' men into committing those acts; or that they lead men to believe they will acquiesce, simply because they have in the past consented to intercourse with others, or in a general way 'signal their availability'.

Dr. Scutt questions - if juries are considered, by courts, to be incompetent in trials for rape so as to require being hedged about by special rules, would the answer be to rid the courtroom of the jury altogether in such trials? She rejects this proposition - for if the jury is removed, the decision-maker will remain the judge, who may equally be confused as to woman's sexuality, may equally be likely to hold the view that 'women are responsible', that mini-skirts, hitch-hiking and drinking in bars 'cause rape'. After recounting jury studies and simulated jury studies showing the misconceptions held by jurypersons, Scutt concludes that the way to improve decision making powers is by eliminating special rules, discarding the corroboration warning, applying the rules of relevance and admissibility as they are applied in other criminal cases, and alerting jurypersons to their own misconceptions, prejudices and to the myths commonly held in the community.

Liza Newby of the Faculty of Law at the University of Western Australia analyses the operation of evidence laws in a paper titled : "Rape Victims in Court - The Western Australian Example". In a continuing study of transcripts of rape trials three years prior to and three years after 'changes' to evidence laws in Western Australia, Liza Newby finds alleged reforms are ineffective. Her study to date has shown that 'restricted evidence' within the terms of the Western Australian legislation is rarely sought to be entered into evidence. Rather, matters that appear on their face - and in substance - to be irrelevant, but which are not within the restricted terms of the legislation, are entered into evidence without demur. It is this type of evidence that frequently leads to an acquittal, despite the apparent guilt of an accused. As she concludes, '... defence strategies in dealing with complainants in the witness box ... [show] that the problems for rape victims in court are far too complex to be amendable to simple solutions in the form of procedural "tinkering" with the laws of evidence.' She concludes a far greater effort is required :

- * the legal definition of rape should be reformulated.
- * problems of 'consent' must be addressed.
- * written affidavit evidence should be used where possible to minimise the trauma for the victim.

- * a courtroom advocate should be given the task of 'reminding' the court of its responsibilities to witnesses, as well as to prosecution and defence.
- * reform of rape laws should be carried out with a constant acknowledgement that law reform should be used as an educative tool.

In a paper prepared jointly by Rosemary O'Grady, social researcher and currently at the University of Adelaide Law School, and Belinda Powell, barrister and solicitor of the Supreme Court of South Australia, 'changes' to evidence laws in South Australia (similar to those discussed in Liza Newby's paper) are described and analysed. In "Rape Victims in Court - The South Australian Example" O'Grady and Powell contend that from the viewpoint of the practising lawyer, prohibition of the adducing of evidence of sexual experiences of the alleged victim, except by leave of the jury, has had the most immediate effect of all legislative reforms in the area of non-consensual sexual offences. However they point out that the judge continues to have power to grant leave to adduce all evidence : 'the situation seems to be that the legislation defeats itself by leaving discretion with the trial judge, which exercise is so difficult to upset upon appeal'. Belinda Powell and Rosemary O'Grady conclude it would be preferable to take one of two approaches :

- * to require strict adherence to the rules of evidence as they exist (without guidelines for rape trials); or
- * carefully worded legislation setting out clearly exceptions to a general rule as to what evidence cannot - and what can - be considered to be relevant and admissible.

Again with the proviso that victims of rape should be protected and there should be fair protection of the rights of accused persons, the plenary session of the conference passed a number of resolutions* relating to reform in the area of evidence laws and court procedure, including :

- * the introduction of strict guidelines as to evidence as to sexual history of the victim that will not be admissible into trials for sexual assault, and what will be admissible and relevant.
- * evidence of complaint should be bound by the ordinary rules of hearsay.
- * the corroboration warning to be abolished.

* Resolutions in full are included at the end of this Introduction.

- * no special rules should be made for the composition of juries in sexual assault/rape trials, but every effort and facility should be provided so that men and women serve equally on all juries in all trials.
- * a change of venue should be granted in appropriate cases on application of the victim of rape/sexual assault.

Police and Community Issues

Socio-political, police and community issues are covered in Part III of the volume, being dealt with by representatives from each field - the legislature, the police, a hospital centre for victims, and a rape crisis centre. Joan Cossedge, M.L.A. gives a broad overview, taking a radical stand on the inadequacy of research into rape and rape law effectiveness. She points to shortcomings of police and hospital procedures, to shortcomings of police training and training for hospital personnel to make them more caring of victims of sexual offences, and to the trauma involved for the victim who decides to go to court. She calls for a concerted effort by governments to campaign against rape, recognising it not as a party political problem, but as an issue affecting our entire society.

Colin Fogarty of the Tasmania Police clearly states his view that the police are obliged first to determine whether a crime has been committed - then to investigate. They must establish the truthfulness of every complaint. He believes any criticism of police as being uncaring in this regard 'is unfounded'. 'Rape squads' should not be established, for they cannot be supported due to economics and demography, as well as the proper role of the police. Law reform frequently acts to the disadvantage of police, 'replacing one problem with another'; law reformers '... appear bent on the destruction of law and order' and 'increase the police load'. Mr. Fogarty does not have a high opinion of rape crisis centres, and concludes that many workers at such centres are untrained and unskilled - although the centres themselves 'should have received credibility'.

In his paper, Colin Fogarty comments in conclusion that if laws 'are changed to categorise the crime of rape into levels of seriousness with a specific sentence for each, police by charging the crime best suited will also become determiners of sentences.' Several comments must be made in relation to this contention. First, police would *not* thereby become 'determiners of sentences'. Rather, the legislature would have taken upon itself the responsibility for clearly indicating the types of offence, involving sexual activity of a non-consensual nature, which are taken to be 'most serious' and most deserving of a high penalty; the legislature would have decided which offences are 'less serious' and less deserving of a high penalty. Second, police would be given a greater indication, by the legislature, of the way in which discretion should be exercised: with a gradation scheme setting sexual penetration with grievous bodily harm at one end of the scale; sexual assault not involving penetration and involving no grievous bodily harm at the other; and two categories in between, one of sexual assault without penetration but with grievous bodily harm and one of sexual assault with penetration but

without grievous bodily harm - police receive a clearer message than at present as to the crime with which an offender ought to be charged. Presently, a person who has committed rape might be charged with rape; if the act has involved the commission of grievous bodily harm, he might be charged with the latter, rather than with rape; police might charge the offender with indecent assault, unlawful wounding, assault causing actual bodily harm, or any one of a number of other similar offences. As Dr. Nordby points out, under the Michigan scheme, which adopts a gradation system, police and prosecutors have found the system to operate better than in the past : no longer are they faced with the possibility of charging an offender with any one of varying types of offence. The elements making up the particular charge are clearly indicated in the criminal sexual conduct statute.

In a paper titled "Hospital Care for Victims of Sexual Assault" Lee Henry, social worker with the Sir Charles Gairdner Hospital Sexual Assault Referral Centre describes the work of the centre in caring for victims of sexual assaults. Established in January 1976, this was the first hospital centre in Australia set up to care for victims. In addition to developing a programme designed to create a caring atmosphere for victims of immediate sexual assaults, the centre provides counselling for victims of assaults of years past. Every consideration is given to problems victims might experience with family, friends and relationships following an attack; a real opportunity is given for a victim to decide whether she wishes to proceed through a police investigation and on to trial; continuing counselling is available throughout the process. In her paper, Ms. Henry also provides statistics gleaned from records of persons passing through the centre : these include information as to who or what agency referred the victim to the centre; the age of the victim; type of offence; police involvement in the case; reasons for not reporting to the police; reasons for not continuing through the court process with the case. Victims are reported as stating, in this regard :

'I have heard that the police give you a really rough time.'

'I am not going to the police, they won't believe me.'

'I am not standing up in front of people and talking about this.'

'I am not going through all that [police and court] for nothing. The guy gets off.'

Meredith Carter and Rosalind Harris of *Women Against Rape* report similarly upon the reactions of women after rape. Their paper, "*Women Against Rape - Community Care for Victims of Sexual Assault*" points out with harrowing realism the lack of community caring for victims, lack of government concern for bodies attempting to assist them, and the inadequacy of the law's response to victims :

'In 1979, after two young women were attacked in their own home and one was raped, the assailant fled with his own knife in his groin, put there by his victims ... This was the first time a media report in Victoria had been carried

of a woman fighting back. However the police response in the following week was first, that women should not hitch-hike - although the assault provoking this remark took place in the victims' home; and that women should not go out at night - although "going out at night" had not led to the particular attack. Then, unbelievably, a Detective-Superintendent Bennett erupted with a gem : Resist by all means - scream, scratch or kick, but do not use violence. Violence begets violence. *Women Against Rape* ask -

Who is doing the begetting?'

The Conference was clear in its support both of sexual assault referral centres in hospitals, so that these institutions may at last begin to become more responsive to the real needs of victims; and of autonomous rape crisis centres and women's health centres in the community, to give alternative care to victims. Clearly, victims will have individual responses and will not always perceive their needs in a like manner. Some victims of rape will require *no* medical treatment, and therefore to attend a *hospital* would not be seen as appropriate - and rightly so. Indeed, it would be wrong to 'ghetto-ise' victims of one type of assault, so that rather than assisting them in seeing the attack in the light of reality, they are forced to conform with a stereotypical ideal of 'what rape victims are like'. If the aim is to help victims, then programmes must be funded adequately by governments so that varying needs of victims may be met.

Equally, the conference recognised problems of policing, of courts and of the legal system generally in trying to overcome past, frequently reprehensible, attitudes toward victims of sexual attacks. The conference agreed that the presence of women in equal numbers with men at every level of police, hospitals and the legal system should be aimed for, as hopefully assisting both victims and persons working in the system. That is, victims would have a real choice of a male or female medical practitioner, police officer and the like. As well, the day-to-day working together, in a professional way, of men and women at equal levels of seniority and authority should assist in overcoming stereotypical ways of viewing male and female persons; it should lead to the realisation that men and women share common emotions, common reactions; that women are no more 'devious' than men; that women are no more likely than men to falsely accuse. Resolutions affirmed :

- * Adequate and ongoing funding to be provided for centres in hospitals, and for rape crisis centres and women's health centres in the community.
- * Affirmative action and equal opportunity programmes to be introduced into all Australian police forces.

- * Affirmative action and equal opportunity programmes to be introduced into all medical and nursing programmes, and into all hospitals and other medical institutions.
- * Affirmative action and equal opportunity programmes to be introduced into all law schools and legal courses, and into all levels of the criminal justice system.
- * Specialised and forensic training to be introduced for medical staff working with victims of sexual assault.
- * Initiatives should be taken in all jurisdictions to educate police, judges, magistrates, lawyers, doctors and all others concerned in cases of sexual assault as to the need for a sensitive understanding of the position of the victim.*

The Political Issues

In the final Part of this volume, Marjorie Levis of Women's Electoral Lobby puts a feminist view of the politics of rape, and Carol Treloar, journalist and former press secretary to Peter Duncan, M.P. (at the time of the passage of the South Australian rape law reforms) puts the politician's perspective of the politics of rape law reform.

In "The Politics of Rape - A Politician's Perspective" Carol Treloar describes the nature of the reform that took place in South Australia in 1976, and the manner in which the legislation was piloted through the community and through the legislature. A society of men that smirks at Norman Mailer's pronouncement that '... a little bit of rape is good for a man's soul', yet which at the same time 'postures about the place condemning rape', is '... plainly underpinned by hypocrisy,' she concludes. Although the government wished to bring the law of rape in marriage into line with the law governing rape outside marriage, political pressures were too great, and an amending clause was introduced to qualify the absolute principle of criminalising marital rape. Carol Treloar's paper exposes too well the dilemma facing feminist law reformers : political processes dominated by patriarchal ideals will at worst crush feminist ideals, at best distort them.

'Rape,' states Marjorie Levis in "The Politics of Rape - A Feminist Perspective", 'is the ultimate act of sexism'. Levis traces the origins of rape laws to the protection of man's property, and the need for a woman to seek protection from the deed by appending herself to a husband-father-provider. She develops this theme through an expose of the myths of rape :

* Resolutions in full are included at the end of this Introduction.

All women want to be raped.

No woman can be raped against her will.

She was asking for it ...

These myths crudely state women have no autonomy which they have a right to protect and to be protected, without bartering their sexuality for that protection.⁴ They imply women have no control over their sexual wants, needs and desires. They imply women are for the taking - but if she *belongs* to someone else, brother, you watch it ... then, it's rape.

Ms. Levis concludes that rape law reform is an integral part of the process by which women may regain control over our own selves - yet it is not alone the answer. Women alone cannot change the nature of rape; nor can women prevent rape. Rather, the task is for men to accept their own sexuality : '... as long as sexism exists, while masculinity means aggression ... rape will exist.'

Conclusion

This collection represents the present state of play, in Australia, as to reform of the law of rape. Yet the aim of any law reformer must be, ultimately, to achieve reform - and to make that reform meaningful. As with all conferences, it remains to be decided whether the National Conference on Rape Law Reform was 'just a talk fest' - or whether it has spurred real initiatives toward formulation and passage of more adequate and effective laws. And as with all volumes of conference proceedings, it remains to be decided whether this volume will promote further airing of, and action on, the issues.

It is important, in recognising how far our society has come along the path toward confronting rape, that the final resolution of the conference acknowledged '... the destructive power of sexual assault on women to the fabric of society', urging state and federal governments not to allow the issue to go unresearched and uncared for. Furthermore, on-going concern of governments was called for.*

In this regard, it is heartening to note that a report on the conference and proposals for reform based on conference resolutions has been introduced into the Australian Capital Territory by Maureen Horder (Australian Labor Party) and Elizabeth Grant (Liberal Party), both of whom attended on behalf of the House of Assembly. In New South Wales - where the government funded ten representatives of women's organisations to attend the conference and has since consulted them as to proposals, in addition to sending a large contingent of government representatives - community discussion is to take place, based on a paper produced, at the behest of the Premier of New South Wales, by the New South Wales' Women's Advisory Council, to be followed by firm proposals being put to the government and

* A full text of this resolution appears at the end of this Introduction.

thence to the Parliament. As well, the Tasmanian Law Reform Commission is currently dealing with a Reference on rape law reform and the Australian Law Reform Commission presently has before it a Reference on evidence laws - including the issue of evidence in trials for rape.

Both the holding of the conference and the resolutions drawn from it show how far every sector of the community has progressed in acknowledging the problem of rape. The papers in this volume testify to the progress of legal thinking on the issue; they testify to the need for changing current community and police attitudes toward victims of rape - which are, albeit at an uneven level, perhaps improving. What will result? Whether law reform is to be counted upon is one question; the second is whether law reform will even be the beginning of the answer.

Jocelynn A. Scutt, 1980

- ¹ This issue is dealt with in Jocelynn A. Scutt, "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 (1) *University of Western Australia Law Review* 52.
- ² On this issue, see Jocelynn A. Scutt, "A Disturbing Case of Consent in Rape" (1976) 159 *Journal of Criminal Law* 206; (1976) 160 *Journal of Criminal Law* 271; Jocelynn A. Scutt, "Fraudulent Impersonation and Consent in Rape" (1975) 9 *University of Queensland Law Journal* 59.
- ³ See sources cited at note ² ante; also Jocelynn A. Scutt, *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. Thesis, University of Michigan, Ann Arbor, MI, 1978).
- ⁴ See Jocelynn A. Scutt, "The Economics of Sex : Women in Service" (1979) 51 (1) *The Australian Quarterly* 32.

RESOLUTIONS

These resolutions do not necessarily cover each and every issue relevant to sexual offences law reform; but they do clearly indicate the demand for reform, and the direction which reform should take.

1. 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.

5 dissentients only

2. 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 emphasise the community's condemnation of sexual violence within the family.

4 dissentients only

3. THIS CONFERENCE AGREES THAT the law should not provide any artificial immunity against prosecution for rape for males under the age of 14 years.

Unanimous

4. THIS CONFERENCE AGREES THAT males and females should be equally liable and equally protected under the criminal laws relating to non-consenting sexual behaviour.

Unanimous

5. THIS CONFERENCE AGREES THAT as a matter of principle there should be introduced a graduation of offences of sexual assault, of varying degrees of seriousness.

Substantial majority - no less than two-thirds

6. THIS CONFERENCE AGREES THAT 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.

*Substantial majority - no
less than two-thirds*

(Note: This will equate rape (or aggravated sexual assault) with other cases of non-sexual assault in which grievous bodily harm is inflicted.)

Unanimous

7. THIS CONFERENCE AGREES THAT 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 or anal penetration, or the use of inanimate objects in penetration, or penetration by other parts of the body.

*Substantial majority - no
less than two-thirds*

8. THIS CONFERENCE RECOGNIZES THAT in some jurisdictions in Australia, victims of rape are subject to irrelevant cross-examination about prior sexual history. This is unacceptable and a deterrent to reporting of rape offences.

It is agreed therefore that the following rules should be reflected in Australian laws:

- 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.

*Substantial majority - no
less than two-thirds*

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

*Substantial majority - no
less than two-thirds*

10. THIS CONFERENCE AGREES THAT the rule requiring the judge in rape cases to direct the jury that while it may convict on the evidence of the victim alone (there being no other evidence) it should be careful of doing so, should be abolished.

Unanimous

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

1 dissentient only

12. THIS CONFERENCE AGREES 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 the application of the rape victim if she feels she is placed in a position of embarrassment or personal difficulty.

*Substantial majority - no
less than two-thirds*

13. THIS CONFERENCE AGREES 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.

*Substantial majority - no
less than two-thirds*

14. THIS CONFERENCE AGREES THAT sustained efforts must be made by all States and Territories, with particular attention being paid to the needs of country areas, to encourage women to join police forces and to undertake medical training and legal training, so that women may be equally represented at all stages of the processing of sexual offences cases, and to enable victims to exercise a real choice as to whether a woman or man is involved at each stage.

5 dissentients only

15. THIS CONFERENCE AGREES 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.

Unanimous

16. THIS CONFERENCE AGREES THAT in all States and Territories initiatives or further initiatives should be undertaken to educate police, judges, magistrates, lawyers, doctors and all others concerned in the processing of rape or sexual assault charges as to the necessity for sensitive understanding of the position of the victim.

Unanimous

The above resolutions were passed on the basis of motions drafted by the Resolutions Committee, as expressing a near-consensus view following workshop discussions. These motions were before the conference participants at the final session in written form for their consideration.

After the nominated end of the final session (at 6.20 p.m.), it was moved that:

'This conference agrees that the defendant in a rape trial who makes a statement from the dock should be prevented from making any comment or allegation about the previous sexual behaviour or experience of the victim with the accused or other persons, or about the victim's reputation for chastity, and should be confined to an account of the actual incident in question.'

An amendment was then moved that:

'This conference agrees that the right of the defendant in a rape trial to make a statement from the dock should be abolished.'

The proposal to *limit* the dock statement in rape trials was put to the meeting and lost, and the proposal to *prohibit* the dock statement was put and carried.

However, it subsequently became clear that because of the late hour, and a certain confusion about the effect of the motions - which were not before the meeting in written form - many delegates were confused about which version they were voting for. However, it can be said that, at the very least, an overwhelming majority of participants favoured severe limitation of the use of the dock statement in rape trials, if not total abolition.

The final (and unanimous) act of the conference was to pass certain motions presented by the chairperson, Mr. J. B. Piggott of the Tasmanian Law Reform Commission :

'Recognizing the destructive power of sexual assault on women to the fabric of society and recognizing the value of this conference in bringing together those concerned with the administration and enforcement of the law for consultation and discussion with women and men working for reform, this conference resolves :

1. That the Commonwealth and State Governments be urged to continue the search for the most effective reforms of substantive, evidential and procedural law of rape and other sexual offences;
2. That the Australian Institute of Criminology act as a clearing-house to collect and monitor on-going statistics and research throughout Australia;
3. That it be suggested to the Commonwealth and State Attorneys-General that a similar broadly-based conference be held at the end of three years to consider and evaluate the progress of reform in the intervening period.

THE UNITED STATES' EXAMPLE

'Rape, as an issue, did not arise because certain feminist leaders viewed it as "the issue" nor did it arise because it was a designated topic on a consciousness-raising list. Instead, rape became an issue when women began to compare their experiences as children, teen-agers, students, workers, and wives and to realise that sexual assault, in one form or another, was common. Conditioned to believe that the rapist was sick and a social aberration, while at the same time held accountable for attracting and precipitating the sexual violence we often experienced, many women repressed their memories of rape. It was either an incident unrelated to their "normal" lives as women or a situation that they had let "get out of hand". In her first sessions of consciousness-raising a woman would "admit" that she had been a "seductive child" or that she must have given her date "the wrong idea". But as women compared their experiences they began to come to some understanding of the anger they had kept hidden even from themselves. The pattern that emerged from their individual experiences was not a common pattern of assault - some had been brutally raped by a stranger while others had been psychologically assaulted by a lover - but a common pattern of responses that they encountered - "You're lying", "It was your fault", "You should have been more careful", "You're exaggerating". Through the process of consciousness-raising, women moved on from the discovery that sexual assault was not just an individual and unique experience to the realisation that rape, as an issue, was a means of analyzing the psychological and political structures of oppression in our society...'

Noreen Connell and Cassandra Wilson, *Rape - The First Sourcebook for Women*, by New York Radical Feminists (1974), at p. 3

REFORMING RAPE LAWS → THE MICHIGAN EXPERIENCE

Virginia Blomer Nordby[#]

In America, those who work and advocate for women's legal rights do so against an historical backdrop and with a great sense of commitment to the women who struggled in the same cause many years before us. One hundred and thirty-two years ago a group of American women gathered at Seneca Falls, New York, and drafted the most famous document in the history of American feminism. The *Seneca Falls Declaration of Sentiments* was modelled after the *Declaration of Independence*. Like the *Declaration of Independence* it was a statement of principles and goals. It asserted that "... all men *and women* are created equal." It went on to spell out a list of grievances against the male dominance of government and law and resolved that change must occur.¹ Today each one of us soberly recognises how few of those grievances have been alleviated, how few of those demands met, in the long years intervening.

Bearing in mind the problem of rape and violence against women, the pleas of our foremothers from Seneca Falls in 1848 are the more poignant -

'The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.

Item 1 He has compelled her to submit to laws, in the formation of which she has no voice ...'

Certainly a major breakthrough has come for Australia, with proposed rape law reform seeing law makers, law enforcers, law interpreters, law reformers, dialoguing with women about laws affecting them so deeply.²

'*Item 2* In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master - in law giving him power to deprive her of her liberty, and to administer chastisement...'

Rape in marriage is still part of the agenda.

[#] Principal drafter of the Michigan *Sexual Assault Law* and Director of Affirmative Action Programmes, University of Michigan, Ann Arbor, Michigan, U.S.A.

'Item 3 He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man ...'

The notion that 'loose women' cannot be raped is still with us.

'Item 4 He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God ...'

Today, police advise women : If you don't want to risk rape, stay home, never trust a stranger, lock your doors, don't hitchhike.

'Item 5 He has endeavoured, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life ...'

Rape is a statement about power and domination. It is an act of violence aimed at subjugation and humiliation.

General Background to Michigan Rape Law Reform

In 1974 most of these grievances of the first women's rights movement were still unmitigated in Michigan. Michigan law on rape, termed 'carnal knowledge', stated as follows :

'M.C.L.A. 750.520

Any person who shall ravish and carnally know any female of the age of 16 years, or more, by force and against her will, or who shall unlawfully and carnally know and abuse any female under the full age of 16 years, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be life. Such carnal knowledge shall be deemed complete upon proof of any sexual penetration however slight.'³

In 1972, the base year for our subsequent study of community attitudes and the operation of rape laws in Michigan pre- and post- the reforms, 90 people were convicted under this statute in the entire state of

Michigan. Fifty-five of those 90 actually went to prison. The average sentence was 11 years. But in that same year at least 3,370 victims of rape were treated at Detroit hospitals alone; 900 rapes were actually reported to Detroit police alone. The Federal Bureau of Investigation (F.B.I.) reported Detroit to be the highest of all American cities in what has crudely been called 'the rape stakes' - 83.4 rapes per 100,000 people. The law was so ineffective that assailants often taunted their victims with 'You'll never be able to prove this ...'⁴

Of course, this shocking situation was not unique to Michigan. Between 1967 and 1972 the incidence of rape nationwide had increased 62%. By 1974, one rape every ten minutes; one of every 500 women that year, 71% planned in advance, 43% gang-rape, 85% choking, beating, weapon. Groups across the country were pressing for a concerted attack on the problem. It was clear, certainly, that considerably more than merely reforming the law would be required. We needed improved medical treatment and community support for victims; we needed extensive training for police, with sensitive women officers handling cases from complaint through to trial; we needed general public education on the nature and extent of the problem so that jurors would approach cases without the burden of traditional myths and fantasies; we needed thoughtful prison rehabilitation programmes for those convicted of sexual assault. *But* we also needed to change the law because the existing statute, as interpreted, clearly was the single largest hurdle to advancement in these other areas and significantly undercut the benefits which might have been derived from such advancement.

The direction rape law reform should take varies from state to state, from one jurisdiction to another. It cannot be approached with a simplistic formula. In New York, recently, the state legislature finally repealed a rule requiring that every element of the crime of rape be supported by independent corroborating evidence.⁵ That was all the reform needed at that time. The California state legislature recently approved an evidentiary rule prohibiting any evidence of the victim's prior consensual sexual activity with third persons; a restricted, but important, change.⁶ At the other end of the spectrum is the possibility of revising the law pertaining to all sex offenses of any kind. This was recently done in Ohio and is part of a proposed Michigan *Criminal Code* reform. In the middle are proposals such as our reform⁷ which attempt to deal with forcible sexual assaults, but not other sex offenses, but which have broader goals than merely changing evidentiary rules. In 1974 there were several states considering this approach - Washington, D.C., Washington State; measures were being developed in Maryland, New York, California, and the general recommendations of the National Organisation for Women took this approach.

The Goals of Rape Law Reform

What should be the *goals of law reform* in this area? To set about reform efforts without identifying objectives is risky. *First*, and most important, a criminal law should accurately reflect a community consensus that certain conduct is so threatening to the general welfare that it should be criminalised and should result in confinement and deprivation of liberty. Whatever one may think of the present penal

approach or the present system of criminal justice, at this point in time reform of rape laws must take place within the confines of the existing system.

There seems little doubt but that the community consensus has eroded as to several aspects of the old common law of rape. Of course, few dispute that violent sexual assault in a dark alley by a stranger who cuts the victim with a knife ought to be criminalised conduct. But the total exemption which common law always gave to husbands who rape their wives, seems less than generally acceptable today.⁸* In 1848 husbands could legally chastise and beat their wives, as well as rape them.** But today, when many young couples refuse to marry because of tax disadvantages, it is hard to believe that there is a community consensus favouring legalised rape of wives by husbands.

The problem of statutory rape*** is another area where the community consensus has changed significantly over the years. A number of complex social factors are involved, which require lengthy discussion and analysis; but clearly, the idea that a man should be imprisoned for life for a willing voluntary sexual relationship with a 15 year old girl does not receive the same universal agreement now that it might have received a century ago. So the first goal of law reform should be to accurately describe the criminalised activity so that it conforms to modern community views.

A second goal of law reform should be to establish a scheme which assures certainty of conviction, insofar as that is possible. Again, there is much current debate about the deterrent or rehabilitative value of institutional confinement as to the total crime problem.⁹ But working within the present system, it is clear that the certainty of punishment is the key - the most significant deterrent.

Because rape is almost always a furtive, secretive crime, it is usually difficult to prove, but evidentiary rules and judicial interpret-

* This is so not only in the United States, but in the United Kingdom and in Australia also. In 1976 the United Kingdom Parliament debated a provision recognising the liability of husbands for raping their wives - on this debate see Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash Law Review* 255-277; for the position in Australia, see Helen Coonan, "Reforming the Substantive Law of Rape", this volume; Peter Sallman, "Rape in Marriage and the South Australian Law", this volume; and Carol Treloar, "The Politics of Rape - A Politician's Perspective", this volume. (Editor's note.)

** So too in Australia. See Jocelyne A. Scutt, "Domestic Violence : A Review of Social, Legal and Political Supports" in *Living Together* (1980, A.N.U. Centre for Continuing Education, Canberra). (Editor's note.)

*** 'Unlawful carnal knowledge' is the common term used in Australia for 'statutory rape'. (Editor's note.)

ations throughout the years often have made it even more difficult to get convictions. A clear goal of law reform should be to close these loopholes. In addition, certainty of conviction is often jeopardized by overly severe penalties which do not match the societal concern about the criminalised conduct. Juries tend to compromise on the issue of guilt because the maximum penalty is life imprisonment.* To ensure that the maximum penalty more closely matches the injury, degrees of crime were established in the Michigan reform proposal.

A *third goal of law reform* should be to protect the victim of crime from further victimisation by the legal process itself. There is little a criminal statute can do to protect a victim who reports a crime from harassment by the accused (if he is out on bail) or his friends, from suspicion and ostracism by the victim's family and friends, from curiosity seekers and muck-rakers. But a statute can protect a victim from harassment and invasion of privacy at the trial.

The Michigan Women's Task Force on Rape actively considered a variety of other plans to aid rape victims beyond the trial process, including general victim-compensation plans (since then adopted by the state), civil suits for damages, and restitution to the victim as a condition of parole. Since these all seemed to be ideas whose time had not yet come, they were not included in the original reform proposal. The principal effort of Michigan reform toward achieving the third goal was redefinition of the resistance standard¹⁰ and change in the evidentiary rules as to admissibility of sexual history.

Rationale and Design of the Michigan Sexual Assault Reform

How have these general propositions been reflected in the Michigan law reform?

1. *Sex-Neutral Application.* From the face of the old statute, it was clear that rape was a crime which only a male could commit, and then only if the victim were female. The reform changed this, substituting for both rape and sodomy laws the single sex-neutral crime of sexual assault (later changed to criminal sexual conduct). This change brought Michigan law into conformity with the *Equal Rights Amendment*¹¹. That Amendment has now been approved by Congress and 35 states. Only three more state ratifications are required for it to be passed.

The Amendment provides :

'Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.'

Legal scholars are not certain whether female-specific rape laws will be

* For an account of the way in which juries are affected by the state of the law, see Jocelyne A. Scutt, "Evidence Laws and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

held unconstitutional under the *Equal Rights Amendment*, and interesting arguments can be made on each side.¹² Notwithstanding this, the proposed reform was in complete conformity with the *Equal Rights Amendment* because it is sex-neutral in its application. Its passage ended all doubts about whether the rape laws will be valid under *E.R.A.* The reform did not reflect either data or beliefs that homosexual rapes were increasing significantly.

2. *Degrees of Sexual Assault.* Under the old Michigan law there was a confusing overlap between rape, sodomy, gross indecency, indecent liberties, and the like. The key distinction between those various offences turned on whether or not there was sexual penetration. Under the reform, degrees of sexual assault were determined by both the factor of penetration and the factor of actual injury to the victim. The new scheme permitted a closer tailoring of the charge to the actual seriousness of the deed in the case at hand, thereby more specifically implementing society's goals in criminalising the behaviour involved. Thus, serious injury coupled with penetration constituted first degree assault. In the case of a child under twelve, the injury is presumed; in the case of threat with a dangerous weapon, the potential for death justifies removing the injury requirement. So also with the remaining degrees: the seriousness of the offence is determined by the two factors of penetration and injury rather than penetration alone, as under the old law.

3. *Force.* The old Michigan statute required that carnal knowledge be achieved by force, but gave no further definition of the dimensions of that requirement. The early case of *People v. Murphy*¹³ states that:

'... the victim must do everything she could under the circumstances to prevent the defendant from accomplishing his purpose. Otherwise it is not rape ... Resistance must have continued from the inception to the close.'*

If the victim did not resist to the utmost to the end, the requisite element of 'force' was not established. Cases and hornbooks** support this interpretation.¹⁴

Obvious difficulties with this definition of the requirement have arisen. For example in *Don Moran v. People*¹⁵ the defendant physician induced his patient to submit to intercourse in lieu of an allegedly dangerous operation. The court held that the facts did not appear to meet the legal requirements of 'force', and the jury should have been

* Although in common law it is frequently stated 'submission is no consent', the cases show otherwise in the instance of the fully grown, adult woman in charge of her faculties. Numerous instances can be cited of judges requiring 'resistance' and struggle and the like. See for example *R. v. Hinton* [1961] Qd. R. 17; also comments in Liza Newby, "Rape Victims in Court - The Western Australian Example", this volume; Jocelyne A. Scutt, "The Standard of Consent in Rape" (1976) 20 *New Zealand Law Review* 620. (Editor's note.)

** Standard texts; criminal law books containing statements of principles. (Editor's note.)

instructed that a finding of some force beyond that necessary to engage in intercourse with a consenting female is required by the law. Only one appellate case in Michigan has considered whether unresisted intercourse with a mentally deficient female can be rape in the absence of a showing of some force beyond that generally required to do the act. In *People v. Croswell*¹⁶ the court required such a showing of 'force' in order to sustain a rape conviction. However, Justice Cooley recognised that such a rule might make mentally deficient women 'fair game' to any who would take advantage of them. He therefore qualified the ruling :

'If therefore a man, knowing a woman to be insane, should take advantage of that fact, to have knowledge of her person, when her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, we should have no difficulty in holding the act to be rape, notwithstanding distinct proof of opposition might be wanting.'¹⁷

Questions about the requirement of 'force' arise when the victim is unable to resist because of physical helplessness, drugs or intoxication. In *Hirdes v. Ottawa Circuit Judge*,¹⁸ a civil action involving this issue, the court asserted that rape could occur under these circumstances, particularly if the defendant intentionally produced the victim's state of intoxication. 'The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed'.* Dicta in the *Don Moran case*¹⁹ suggests a simpler resolution of the matter :

'And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs, and that directly exerted by his hand and for the same purpose.'²⁰

There are many cases where the victim has been threatened with a gun, beaten up, kidnapped or forcibly confined, forced to watch while her companion was beaten up, or in some other way has been intimidated or coerced prior to the actual act of penetration, but has in fact not resisted at all when the 'carnal knowledge' took place. What becomes of the

* Similar views have been expressed at English common law. For a complete review of these cases, see Jocelyne A. Scutt, "Consent in Rape : Lack of Mind on the Part of the Victim" - Chapter 3 in *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. Thesis, University of Michigan, 1978). (Editor's note.)

'force' requirement in such situations? *People v. Phillips*²¹ enunciated the standard :

'We think it is well and properly settled that the terms "by force" do not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection, but that force or violence threatened as the result of non-compliance, and for the purpose of preventing resistance, or extorting consent, if it be such as to create a real apprehension of dangerous consequences or great bodily harm, or in such as in any manner to overpower the mind of the victim so that she dare not resist, is, and upon all sound principles, must be, regarded, for this purpose, as in all respect equivalent to, force actually exerted for the same purpose.'²²

What sort of acts or threats* would be enough to 'overpower the mind of the victim'? This was a question of fact for the jury in each case** but it is not hard to imagine that victims whose reputations had been destroyed on cross-examination were more likely to be found to have suffered from 'weakness of will'. Appellate decisions suggest that the threat of a dangerous operation in the future would not be enough to satisfy the old 'force' requirement, but having been raped immediately before by two of the defendant's companions probably was enough.²³ Being threatened with a gun was enough. In sum, the cases seemed to state that the requirement of 'force' was met if the victim was in abject fear of her life.*** This interpretation is confirmed by hornbooks and standard jury instructions.²⁴

* On the question of threats relevant in rape cases in English and Australian law, see Jocelyne A. Scutt, "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 *University of Western Australian Law Review* 52. (Editor's note.)

** But for the contention that the jury's role in this area has been usurped by judicial pronouncements and the control of the judge in particular cases, see Jocelyne A. Scutt, *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. Thesis, University of Michigan, 1978). (Editor's note.)

*** The law in England held similarly that the victim should be in abject fear of her life or of at least serious bodily harm. See source at * ante. Also see *R. v. Hinton* [1961] Qd. R. 17 - '... where consent is an issue the trial judge should direct the jury that they should carefully scrutinise the evidence in respect of the following questions: (1) Is the girl virtuous? (2) Did she scream or call for help? (3) Did her body or clothing show any mark or tear indicating resistance to force? Negative answers to these questions carry a strong presumption that her testimony is false or feigned.' See also H. Snelling (1970) 2 *Australian Journal of Forensic Sciences* 103. (Editor's note.)

By requiring the victim to resist to the utmost until the act was completed or until her mind was overcome by abject fear of her life, the law required of a rape victim a level of resistance required in no other crime of violence. It denied her the opportunity to rationally assess her danger and choose the safest course of action. Indeed, it forced her to ignore the good advice generally given by the police and self-defence experts about victim behaviour in the course of armed robberies and other crimes of violence.

The Michigan reform legislation dealt with these complex issues in several ways. *First*, it listed coercive situations in which the element of force will be presumed to exist. These include the potentially fatal occasion when the actor is armed with a dangerous weapon, cases where the actor threatens the victim with force or violence or retaliation, cases where the actor forcibly confines, kidnaps, robs or assaults the victim. *Secondly*, the reform gives the victim the right to rationally assess her danger and act accordingly and requires only that there be a showing that the victim believed the actor had the ability to execute his threats. *Third*, the reform lists situations where no showing of force will be required because the victim is incapable of resisting. Those include situations where the victim is physically helpless, mentally defective (and the actor has reason to believe this), mentally incapacitated as a result of conduct by the actor, or taken by concealment or surprise. *Fourth*, in the traditional 'forcible' rape situation, the reform redefined the element of force as overcoming the victim through the actual application of physical force, physical violence, or superior physical strength. *Finally*, in situations such as the *Don Moran case*, the reform makes sexual penetration a crime when the actor '... engages in the medical treatment or examination of the victim in a manner or for purposes which are not medically recognised as ethical or acceptable'.

The reform thus incorporated into the statute the wiser, more flexible and more humane rules enunciated by Michigan appellate courts over the years.

4. *Consent*. With no direction from the old 'carnal knowledge' statute, courts struggled with the definition of what was meant by the vague and open-ended requirement that the carnal knowledge be 'against her will'. Since the consent of the victim does not relieve defendants from any other assaultive criminal charges, there is no analogy to use for guidance. Moreover, the willing, affirmative, fully co-acting participation that most people regard as necessary for sexual union, has nothing whatsoever to do with the legally defined 'consent' which will excuse a person from the crime of violence known as rape.

Proof of a subjective state of mind is always difficult and imposes a heavy burden on the party required to carry the proof. Since rape is generally a private crime, the burden is even greater. In general, under the old law, non-consent was established by a showing of resistance to the utmost. A failure to resist was excused only if the victim was in abject fear of her life, as required for a showing under the 'force' requirement. The victim was taken to have consented if she stopped fighting at any time prior to intercourse, but it was always

proper to show the surrounding circumstances and the physical strength or weakness of the victim as bearing upon the degree of resistance required to show non-consent.*

However, 'consent' induced by injury or threats of immediate physical injury were not regarded as legal consent at all. In a recent Wisconsin case,²⁵ dealing with a rape at gunpoint, the court recognised that resistance may be dangerous under certain conditions, saying :

' ... a choice, while philosophically a choice, is legally unfair and is legally no choice; it does not constitute legal consent.'

In response to the argument that the victim did not know whether or not the defendant would use the gun, the court added :

'... the law does not require a woman to become a martyr by testing the sincerity of a threat to rape at gunpoint ...'

The old Michigan law imposed an extra and unfair burden on the prosecutor by requiring a showing of non-consent in such cases. If actual force or threats of force sufficient to meet the 'force' requirement can be shown, it is redundant to also require a separate showing of 'non-consent' as part of the case in chief. The laws of several other states now recognise the injustice in this situation by providing that proof of the victim's consent can be shown as an *affirmative defence* but need not be established beyond a reasonable doubt as part of the prosecutor's case.²⁶ When the victim is threatened with a dangerous weapon, or is beaten, robbed or kidnapped, the possibility of her willingly consenting to sexual intercourse is so unlikely that it ought only be raised as an alternative theory for the defence rather than have to be shown from the outset. *This is the approach of the new Michigan law. Consent is an alternative theory raised to rebut the charge of force or coercion.*

There are other situations where a victim might 'in fact' consent but the law ought not to allow such a defence at all. These are the situations of mental incapacity, physical helplessness, trick or fraud

* This is similar to the situation under English common law, as applied in Australia. For example, the well-worn phrase 'submission is no consent' was made in the context of a case involving a very young child who passively submitted to the act of intercourse; this was held to be 'no consent'. In the case of adult women in full possession of their faculties, however, the cases imply some resistance is necessary, or at least signs of outward resistance are intrinsic to the issue of whether or not she consented. On this, see for example *Holman v. The Queen* [1970] W.A.R. 2 - 'A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously permits it ... it is not rape.' See also *R. v. Hay* [1968] Qd. R. 459; *R. v. Hinton* [1961] Qd. R. 17. (Editor's note.)

discussed earlier with regard to the issue of 'force'. Under the old law, even if courts went beyond the issue of force in these cases, they still had to deal with the element of 'consent'. The facial vagueness of the law on this point made the outcome in any particular case difficult to predict. Under the Michigan cases, the argument could have been advanced in particular cases that the particular victim was drugged or physically helpless and ought not to be held legally capable of consenting. But absent specific statutory language, that argument was tendencious and rarely prevailed in any but the most extreme cases. The new legislation deals with this point in a similar manner to the Californian and Wisconsin revision.²⁷

5. *Statutory Rape.* Statutory rape* is often discussed under the rubric 'age of consent' because the rationale usually asserted for prohibiting sexual activity with girls below a certain age is that they are not capable of intelligently and knowingly consenting. Other rationale and state legislative purposes can be easily postulated for criminalising this activity. At common law, the age was ten,²⁸ and that was the age in Michigan until 1887 when it was raised to 14 years. In 1895 it was again raised to its present 16.

The reformed law takes advantage of its scheme of degrees of sexual assault to differentiate cases in which the societal concern for the victim is greater than it is in other cases. The reform has retained the age of 16 as the age below which any penetration or contact is criminal even though the victim willingly participates. This is made only third degree assault because, regardless of one's personal view of the morality of the conduct, the fact is that many teenagers today are sexually active before 16. Sexual activity by children under 12, on the other hand, presents a different and more compelling set of societal concerns and is therefore classified as first degree sexual assault. Also classified as first degree are those tragic situations where a young person between 12 and 16 years is victimized by a relative or member of the same household or by a person in authority over him or her.

6. *Married Couples.* Another aspect of the common law of rape often discussed under rubrics about presumed consent or non-consent is the 'rule' that a husband cannot rape his wife. Some scholars suggest that the marriage contract renders the wife's consent irrevocable; others see the rule as a holdover of old common law notions that the wife belonged to the husband in a near-property relationship. Modern legal commentators worry about rights of marital privacy, were the rule to be otherwise.²⁹

As social and legal ideas about marriage as a partnership continue their present development, it may be that the spousal immunity from sexual assault soon will become unacceptable. The common law rule has

* That is, 'unlawful carnal knowledge' as for example contained in the *Crimes Act* (1900) N.S.W. section 67 - Carnally knowing girl under ten. Whosoever carnally knows a girl under the age of ten years shall be liable to penal servitude for life. And re carnal knowledge of a girl between ten and sixteen years, see section 71. Similar provisions are contained in criminal legislation for the other Australian jurisdictions. (Editor's note.)

already received some judicial modification in England in *R. v. Clarence*³⁰ where dicta suggest a wife can refuse her husband if he has venereal disease; *R. v. Clarke*³¹ where after decree of separation, a husband can be guilty of raping his wife; and *R. v. Miller*³² where after a petition for divorce has been filed, forced intercourse will constitute an assault even though the injury is classified as only 'an hysterical and nervous condition'.

The Michigan reform modified the common law rule only in those situations where two certain and provable events have occurred :

- a. the couple are living apart; and
- b. one of them has filed for legal separation or divorce.³³

This protects marital privacy when the marriage is still viable and on-going, but also protects a large and seriously victimised group of women presently ignored by the law, those in the process of obtaining a divorce.*

7. *Corroboration.* The Michigan reform legislation states that there shall be no requirement of corroboration, but in doing so it merely incorporates the existing Michigan law. It is well-settled that there is no requirement in Michigan that a rape conviction requires independent corroborating evidence. In *People v. Borowski*³⁴ for example, the court held that even in a statutory rape case, '... the testimony of the prosecutrix, if believed by the jury, was sufficient to justify conviction.'

Traditionally, corroboration requirements have been highly disfavoured by the law.³⁵ Thus at common law the only use of it was the rule that the evidence of one witness, without corroborating circumstances, could not sustain a conviction for perjury.** There are a variety of other situations where '... the motivation for falsehood or occasion for inaccuracy is ... great, and the disproof difficult',³⁶ such as cases of fraud, prostitution, illegitimacy and paternity hearings, transactions between a decedent and one in a confidential relationship, and sexual offences of all kinds.³⁷ But in none of those circumstances did the common law impose a requirement that the issue of fact could not go to the jury without independent corroborating evidence.

* For the situation as Australian legal scholars (with varying viewpoints see the situation of rape in marriage and the solution to the legal situation, at least, see Helen Coonan, "Reforming the Substantive Law of Rape", this volume; Arthur Watson, "Rape Law and Rape Law Reform in the Australian Capital Territory", this volume; Peter Sallman, "Rape in Marriage : The South Australian Experience", this volume; Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash University Law Review* 255-277; Terry Buddin, "Revision of Sexual Offences Legislation : A Code for New South Wales?" (1977) 2 *University of New South Wales' Law Journal* 117-151; Jocelyne A. Scutt, "To Love, Honour and Rape with Impunity : Wife as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming). (Editor's note.)

** On the issue of accomplices and children and corroboration generally in rape, see Jocelyne A. Scutt, *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. thesis, University of Michigan, 1978). (Editor's note.)

The asserted justification for corroboration rules is that they protect against the danger of false accusations. Yet Wigmore and others state that in terms of that objective, the requirement is of miniscule practical value.³⁸ Its overall effect produces mischievous consequences, placing an unrealistic premium on legal niceties. A recent New York case³⁹ stated :

'In imposing an evidentiary standard more befitting a public event, the law necessarily frustrates the prosecution of an inherently furtive act.'⁴⁰

The imposition of a corroboration requirement in rape cases, but no others, raises substantial constitutional equal protection issues in America about the treatment of female victims.⁴¹ In a recent Washington D.C. case⁴² Superior Judge Theodore R. Newman, Jr., stated that the only reason behind the D.C. corroboration requirement is 'blatant male chauvanistic sexism. The time has come for the law to stop being a sexist ass ...' In *People v. Linzy*⁴³ Court of Appeals Judge Scileppi said :

'By contemporary standards the corroboration requirement expresses an almost irrational doubt toward the claims of women who have been victimised sexually, with virtually nothing to commend its continued use.'⁴⁴

The Michigan courts, in refusing to impose any artificial requirement of corroboration, have relied on the traditional safeguards against false charges to which the law always looks : police investigation, prosecutorial discretion, the 'reasonable doubt' burden of proof, and the ability of the jury to evaluate the issue of credibility. In the early case of *People v. Miller*⁴⁵ the court decided to follow the common law rule that no special requirement of corroboration would be imposed in rape cases, noting that 'credibility can be safely left to the jury'.*

8. *Prior Consensual Sexual Activity with Third Parties.* Evidence of prior sexual activity between the *defendant* and the *victim* in the case at hand is admissible as tending to show a scheme, plan, or system.⁴⁶ The reform makes no change in this rule.

Before the passage of the reform legislation, evidence of prior consensual sexual activity of the *victim* with *third parties* was generally admissible, but the decision always rested with the discretion of the trial judge. In two Michigan cases the specific holding was that the defendant was *not* substantially prejudiced by the trial judge's refusal to

* For an account of the way in which such rules as the corroboration rule and the broad allowing of various types of prejudicial and irrelevant and/or inadmissible evidence into the trial for rape has interfered with the ability of juries to properly judge in these cases, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

allow evidence of specific acts of consensual sexual activity between the victim and a third party. Appellate courts have made similar rulings under the reform legislation.⁴⁷

The victim's prior sex life is said to have some bearing on two issues in a rape trial. The first is the issue of consent and the second that of credibility.

As a threshold matter, it is important to recognise a fundamental premise on which both the old law and the reform rest. That is, as a matter of substantive law, every person has a right to decline sexual activity and every victim of forcible, unwanted sexual penetration is intended to be protected by the law. Some do not agree with this premise, arguing instead that some people should be 'fair game' and outside the scope of the law's protection. Proposals in the American *Model Penal Code* to give certain rape defendants an absolute defence if the victim was 'sexually promiscuous' reflect this view. No such ideas have ever been part of the Michigan law. Clearly proposals to decriminalize sexual assaults on some classes of victims would never pass equal protection scrutiny or be acceptable to the vast majority of citizens in this state. So we must begin with the premise that the law protects all people from unwanted, forcible sexual activity. As the Michigan Supreme Court quaintly announced in 1888 :

'... every woman, no matter how far she may have stepped aside from virtue, has a right to return to that path, and if she desires to follow in the path of rectitude, to be protected by law.'⁴⁸

Nonetheless from the earliest cases, the victim's prior reputation for chastity has been thought relevant on the issue of whether or not she consented. Thus, the victim could be asked on cross-examination about specific instances of past sexual activity with third parties. However, evidence of specific instances could not be brought in to contradict her. The reason given for the latter rule was that it was not fair to expect her to be prepared to meet all such charges, that the issue was too collateral to the one at hand, and that such evidence was too inflammatory and prejudicial to justify its slight probative value.

It is hard for most women to accept the burden of judgment about relevancy made by male jurists 50 or 100 years ago - even 200 hundred years ago.⁴⁹ Certainly today women do not agree that there is any logical relationship between having consented to sexual relationships with one man in the past and the likelihood of consenting to another man in the future. Even the judicial presumption that a virgin will fight harder than an unchaste woman if she is truly 'non-consenting' would not find general support today. Evidence of prior consensual sexual activity is of very dubious probative value on the issue of consent, but is highly prejudicial to the prosecution's case. It has been the principal inhibiting factor in the enforcement of the rape law.

If evidence of this type is not relevant or admissible on the issue of 'consent', it ought not to be admissible to impeach the victim's credibility. This was the rule in Michigan even before the reform in statutory rape cases where consent was not a defence.

The main purpose of impeachment testimony is to test the witness' credibility. Testimony as to truth and veracity is therefore important; but what relevance has 'reputation for chastity' to one's veracity?

In this area the trial judge has always had unfettered discretion. The reform removes this discretion and substitutes a statutory prohibition. The cases make it clear that this does not unduly prejudice the defendant, does not interfere with defendants' rights, but merely assures that highly inflammatory and arguably irrelevant matters will not be injected. The reform does take away from defendants in rape cases an opportunity not available to defendants in any other case to escape punishment by the strategy of smearing the victim's reputation and making her previous personal life the key and deciding issue in the case. But the reform does not deny to rape defendants any opportunity now accorded persons charged with other crimes. They still have available all the traditional safeguards against false charges on which the law rightly relies, as in the case of the elimination of the corroboration rule: police investigation, prosecutorial discretion, the reasonable doubt burden of proof, and the ability of the jury to evaluate the issue of credibility.⁵⁰

Those then were the goals and the intended changes of the Michigan reform effort. Subsequent evaluation of those efforts take two forms:

- a. analysis of appellate decisions interpreting and applying the new law, and
- b. analysis of the effect of the law in the criminal justice system and in the crime of rape.

Evaluation : Analysis of Appellate Decisions Interpreting the Statute

1. *Exclusionary Evidentiary Provision, M.C.L.A. 750.520j*. Since the question of excluding evidence of a rape complainant's prior sexual activity has been a hotly debated issue nationwide,⁵¹ it is not surprising that several panels of the Michigan Court of Appeals have already confronted the issue. Thus far, the majority of the judges faced with making a decision for that court have upheld the constitutionality of the Michigan provision. However, the opposing considerations⁵² are still surfacing and being mulled over by the appellate judges, some of whom are surely postponing final judgment until they are presented with more varied fact situations. The Michigan Supreme Court has yet to make any pronouncement on the question or grant leave to appeal in any of the cases discussed below.

The first case addressing the constitutionality of changes in evidence rules under *M.C.L.A. 750.520a* and following, including the exclusionary evidentiary provision, was *People v. Denmark*⁵³. Defendant charged broadly that the whole statute was unconstitutional on the theory that the legislature had no authority to modify the rules of evidence (regarding exclusion of evidence and the lack of corroboration or resistance requirements), and that this task was solely the function of the judiciary. The court found no merit in this contention. It held that the

legislature has the authority to modify the common law rules of evidence. The legislature was therefore legitimately exercising its authority and the statute would stand unless found to be infected with constitutional errors or later superseded by court rule.

The cases following *Denmark* under the new statute have directly addressed the issue of defendant's constitutional right to a fair trial as it is affected by excluding all evidence of complainant's prior sexual activity with third persons. In *People v. Thompson*⁵⁴ the defendant contended that a blanket exclusion offends his *Sixth Amendment* fundamental right of confrontation and cross-examination of his accuser. However, the *Thompson* court makes short shrift of the defendant's argument. Judge Burns, writing for the court, flatly states that there is no fundamental right to ask a witness irrelevant questions. Cross-examination of a rape victim on the subject of sexual behaviour with third persons is irrelevant and '... in no way probative of the victim's *credibility* or *veracity*. If it were, the relevancy would be so minimal, it would not meet the test of prejudice.'⁵⁵

On the issue of whether the victim's sexual activity with third persons can be probative of *consent*, the court responds :

'Again, the significance of such evidence on the issue - consent this time - is minimal. The fact that a victim has consented to sexual intimacy with a third party does not indicate sexual consent to intimacy with the defendant.

While factual situations in which the victim's sexual behavior with third persons is arguably probative of consent are imaginable (footnote omitted), the probative value of such evidence would not outweigh the prejudice to society and the criminal justice system of the consequences of its admission.

The state clearly has a legitimate interest in encouraging the rape victim to report the crime and to prosecute and present testimony against the offender. These interests are served by discouraging the usually pointless and sometimes cruel treatment of rape victims in the criminal justice system. Moreover, there is the possibility that in its deliberations the jury will consider the "bad character" or "provocative behavior" of the rape victim whose life history has been paraded before it in the most intimate detail.'⁵⁶

The court concludes that the legislature acted within its powers in enacting the statute and that there was no infringement of the defendant's constitutional rights.

In *People v. Dawsey*⁵⁷ Justice Maher briefly reviews Michigan case history on the issue of whether evidence of a complainant's chastity is relevant to her credibility, noting those cases with approval which '... indicate a proper scepticism for the view that sexual activity can be equated with moral character and thus with testimonial reliability.'⁵⁸

In a footnote, Justice Maher disposes of the argument that evidence of chastity may be relevant to showing a complainant's unhealthy obsession with sex or a pre-disposition to accusing defendants of imaginary sex offences. In his view, proof of mental abnormality is an acceptable means of impeachment resting on a completely different basis from impeachment by demonstrating lack of chastity.⁵⁹

Justice Maher then turns to the issue of whether defendant was improperly precluded from substantiating his defence of consent by the trial court's ruling. The crux of his argument is contained in the following comments :

'While evidence indicating that the complainant is a person of "indiscriminate promiscuity" (citation omitted) may tend to prove her consent to sex on a particular occasion, a complainant's willingness to engage in sex with certain partners does not make it more likely that she consented to the incident for which defendant stands charged.'⁶⁰

He then cites a number of sources generally upholding the proposition that testimony of complainant's specific prior sexual acts is not reliable evidence that she consented to a particular act with the defendant. However, he does not foreclose the possibility that denial of defendant's ability to produce witnesses to testify to complainant's general reputation for chastity might raise '... a serious question about the statute's constitutionality'. Since the question was not raised on this appeal, he feels no need to decide it.

The dissent in *Thompson*, written by Judge Kaufman, disputes the majority opinion that defendant's line of questioning only went to the issue of complainant's veracity and, by extension, credibility. Since the defence of consent in this case turned totally on the witness' credibility, the majority was wrong in adopting such a narrow approach. Justice Kaufman examines both issues in detail. He begins by assuring that :

'I recognise that in cases of this type, the state has a "legitimate interest" in encouraging the prosecution of rapists by protecting witnesses from harassment and humiliation on the witness stand. The legislature is validly concerned with ensuring that complainants are not unnecessarily subjected to the traumatic experience of having their private lives paraded before them in the court room. The question is how to balance the competing interests [of defendants' fundamental right to cross examination against the state's and complainants' rights and interests]'.⁶¹

In a concurring opinion in *People v. Patterson*⁶² Judge Cavanagh extracts the following conclusion from his review of the federal constitutional cases :

'Taken together, *Chambers*, *Davis*, *Washington* and *Roviato* establish a constitutional standard for the admission of evidence favorable to the accused, but opposed by a strong state interest. In each case, a part of that standard involves the probative value of the evidence, and in each case the requisite probative value is cast in terms of the potential impact of the evidence on the outcome of the case. (Footnote omitted.) The rule which I would abstract from these cases is that, irrespective of its prejudicial impact on the state's interests, a defendant is constitutionally entitled to cross-examine the prosecutrix about prior sexual conduct with third persons if the witness' responses, when considered with other evidence in the case, might be sufficient to raise in the mind of a juror a reasonable doubt as to whether the intercourse was consensual.'⁶³

He draws no distinction between whether evidence is offered to prove consent or to impeach credibility as regards the applicability of his constitutional analysis. In spite of his concern about constitutionality he emphasises that only in the extraordinary case should evidence of complainants prior sexual activity with third persons be admissible and '*... extends no invitation to ignore the legislative policy and the manifest will of the people ...*'⁶⁴ Judge Cavanagh also includes some procedural guidelines such as *in camera* hearings on admissibility of evidence and cautions trial courts to protect the complainant from any harassment or humiliation.

In the instant case, Judge Cavanagh holds that it was indeed reversible constitutional error for the trial court to apply the blanket statutory exclusion. But the trial court had taken the precaution of holding an *in camera* hearing on defendant's offer of proof in order to preserve it for appeal. The evidence was therefore available for review by the appellate court. Applying his constitutional standard, the judge finds absolutely no showing that the evidence of complainant's prior consensual sexual activity with three other men was relevant to either the issue of consent or of credibility. (Evidence that the victim had had sexual relations with her boyfriend on the night of the rape had been admitted into evidence under one of the statutory exceptions.) Neither was there any basis for inferring that the complainant was biased against the defendant.

In *People v. Khan*⁶⁵ the jury had convicted defendant of third degree criminal sexual conduct under *M.C.L.A. 750.520 (d)(1)(b)*. Defendant contended that his *Sixth Amendment* right to confront adverse witnesses was denied when evidence of complainant's previous sexual activity with third persons was excluded. Prior to discussing the defendant's contention at greater length, the court elicits what it views as the salient policy objectives for excluding evidence of complainant's prior sexual acts with third persons :

'... we observe that [M.C.L.A. 750.520j (1)] - an integral part of Michigan's criminal sexual conduct act - represents *an explicit legislative decision to eliminate trial practices under former law which had effectively frustrated society's vital interests in the prosecution of sexual crimes*. In the past, countless victims, already scarred by the emotional (and often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would beer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.'⁶⁶

The court also quotes at length from Berger⁶⁷ regarding the truth-finding function which rape shield statutes may foster by eliminating undue harassment of the complainant, encouraging complaints and avoiding a parade before the jury of inflammatory, distracting evidentiary proofs of complainant's sexual behaviour.

Even if the court were to recognise some relevance as shown on the record before it, it refuses to hold that the trial court abused its discretion. Although the court does not hold that M.C.L.A. 750.520j is free from constitutional defects,⁶⁸ it refuses to balance the state interests in evidentiary exclusion against the defendant's *Sixth Amendment* rights barring some strong showing of logical relevance.

In sum, the law is still in flux. *In camera* determination, with more flexibility may be required. But courts are clearly committed to preserving the legislative policy except in extreme circumstances.

2. *Multiple Count Conviction for One Act of Criminal Sexual Conduct.* The manner in which M.C.L.A. 750.520 (b)(1), the provision governing criminal sexual conduct in the first degree, was written has caused some controversy in the courts as to how a defendant may be charged and convicted under that provision. M.C.L.A. 750.520 (b)(1) states generally :

'A person may be guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists ...'

Seven sections (a-g) follow each describing varied circumstances, any of which in conjunction with sexual penetration of another person would constitute commission of the felony of first degree criminal sexual conduct. The penalty for conviction under any one section of M.C.L.A. 750.520 (b)(1) is imprisonment for life or any term of years.⁶⁹ Confusion has arisen because, as the statute is written, a defendant may be charged under the various sections of M.C.L.A. 750.520 (b)(1) not only in the

alternative but cumulatively. The problem with which the courts have tangled is whether, given facts revealing only one alleged act of sexual penetration chargeable under several sections of the provision, a defendant can be charged and convicted cumulatively of several felonies stemming from that one act.

In *People v. Nelson*⁷⁰ the court ruled :

'In the light of the fact that the Legislature was responding to a public demand for tightening up of the criminal laws regarding sexual violence, we are constrained to conclude that, in general, the legislative purpose of the new criminal sexual conduct statute was to strengthen, not weaken, within constitutional strictures, the criminal law describing unlawful sexual conduct. Consistent with that legislative purpose is an interpretation that each listed circumstance is the basis for a separate offense and conviction.'⁷¹

However, the more recent case *People v. Robinson*⁷² rejects the holding in *Nelson*. The defendant in *Robinson* had been convicted of three counts of first degree criminal sexual conduct based on two acts of sexual penetration. This panel of the court held that only one count of criminal sexual conduct in the first degree or several counts in the alternative could be charged on the basis of one act of sexual penetration. The court does not reach the constitutional issue of double jeopardy.

Judge Holbrook notes Judge Beasley's reasoning in *Nelson*, but he finds no explicit or implicit indication of a legislative intent to impose multiple punishments for one act of sexual penetration :

'We hold that the criminal sexual conduct statute was not intended to provide for a more severe sentence for rape, but to expand its scope so as to *include the various special circumstances that could amount to criminal sexual conduct in first degree.*'⁷³

Since the legislative intent in this matter is at best ambiguous, the rule of leniency in construing criminal statutes must be applied. The *Robinson* analysis has been upheld by the state Supreme Court in *People v. Willie Johnson*.⁷⁴

3. *Statute Void for Vagueness?* In *People v. Patterson*⁷⁵ the defendant generally alleged that the statute was too vague to meet constitutional due process requirements. The court replied that the statute provided fair notice of the forbidden conduct and was not impermissibly vague.

Defendants in several other cases have raised the issue of impermissible vagueness regarding particular words or terms within the statute. In *People v. Thompson*⁷⁶ the defendant argued that the definitions of 'personal injury' and 'sexual contact' were void for vagueness.

Since defendant's conduct clearly fitted within the terms of the statute, he could not raise the issue.

The defendant in *People v. Denmark*⁷⁷ claimed that the word 'affinity' was unconstitutionally vague as used in connection with a charge of criminal sexual conduct with a person under sixteen.⁷⁸ The court holds that 'affinity' has long been clearly defined under Michigan law and that, even absent affinity in this case, the defendant's conduct was clearly proscribed under that statute as criminal sexual conduct in the third degree.⁷⁹ The defendant also challenged the term 'sexual penetration' as unconstitutionally vague. The court dismissed his contention, finding the term '... not so vague as to leave the public without a concrete estimate of its legal meaning'.⁸⁰ Furthermore, the use of this concept closely parallels that under the prior law.

Evaluation : A Study of the Effect of the Reformed Law in the Criminal Justice System

In 1977 a study was begun to determine the impact of Michigan's *Criminal Sexual Conduct (C.S.C.)* statute and related innovations in the way sexual assault cases are viewed and handled by the criminal justice system. The study measured changes in the frequency with which cases are processed by the criminal justice system (that is, changes in reports, arrests and convictions over time), as well as changes in the procedures used to handle them. The study examines the activity and influence of crisis centres which may contribute to improvements in victim's experience. Because rape and its treatment are affected by cultural stereotypes, or rape mythology, this dimension and its influence on members of the criminal justice system are also of central importance. Furthermore, recognising that they may have some affect - or may not - a study of crisis centres in Michigan was conducted during the early months of the project.

The study design incorporated concern for research findings which will have immediate practical utility for anti-rape activists, other state legislatures which may be considering similar law reforms, and members of the criminal justice system. Accordingly, people from these groups were consulted at length before data collection was begun. Also, time series analyses of report, arrest, and conviction data for forcible rapes (*C.S.C. 1*) and, as a comparison, for aggravated assaults in Michigan (obtained from F.B.I. Uniform Crime Reporting System, Michigan State Police) were carried out.

Intensive (up to two hours) face-to-face interviews were conducted with those who must deal with *C.S.C.* cases on a frequent basis and who would be expected to be most informed about the advantages and disadvantages of the new statute. Because there was a need to establish perceived differences between the new and old laws, the sample was designed to include, whenever possible, respondents who had had experience with both - that is, people who had been at their present jobs since before April 1975, when the new statute went into effect.

Those interviewed were 170 rape crisis centre staff, police, prosecutors, defense attorneys and judges in Wayne, Calhoun, Ingham, Genesee, Oakland and Kent counties. Fifty-five percent of all reported

rapes in Michigan take place in Wayne County, the state's population centre including Detroit. The five other counties in the sample are also in the most populous area of southern lower Michigan, and were selected for the purpose of analyzing the effect of the new *C.S.C.* law across a variety of settings. Only Calhoun County lacks a crisis centre allowing for a comparative assessment of the influence of such victim assistance agencies. Respondents were randomly selected from lists of the most experienced criminal justice system officials in each county.

The researchers recognise that victims themselves are best able to judge the quality of their experience in the criminal justice system. On the other hand, most sexual assault victims fortunately are not in a position to compare differences between the old and new statutes. Victims were excluded from the sample for this reason, and because it was felt that they are an already vulnerable population.

The principal sections of the interview dealt with the following : demographic information about respondent; respondent perceptions of the efficiency of other criminal justice system officials; respondent perceptions of interagency linkages (networks) and community environments; and respondent's attitudes toward women and the crime of rape. In addition, several sections probe for information about procedures and decisions taken with regard to issuing warrants, plea bargaining, pre-trial activities, *in camera* hearings, trial tactics, and evidence requirements. Separate interview schedules were prepared for prosecutors, judges, defence attorneys, police and community-based agency staff. The majority of the items were closed-ended questions to facilitate coding and data management.

As a starting point, one could ask the question typically posed about crime-related interventions :

'Is the "average" person (here, woman) safer from rape?'

The answer is :

'Probably not'.

But the 'average' rapist who commits forcible rape, *C.S.C. 1*, is more likely to be reported to authorities, arrested and convicted of his crime than before the law went into effect. There is, of course, no such thing as an 'average' rapist or 'average' victim, and stereotypes such as these have often harmed anti-rape efforts directed at changing social norms about rape and its motivations. But because of limitations imposed by police reporting procedures, this discussion will primarily concern *C.S.C. 1* - typically considered to be an 'average' rape.

As a preventive measure, the new statute seems to be limited to indirect effects on the incidence of rape : in the short run, by removing rapists from society and, over the long run (especially when combined with other consciousness-raising activities), by redefining as criminal those actions toward women which were formerly considered to be 'appropriate sexual advances'.

1. *Reports.* From 1972 to 1977 (three years before the law reform and two years after), reports of forcible rape (*C.S.C. 1*) in Michigan increased 30 percent. This increase is comparable to that of reports of aggravated assault (that is, unlawful attack using a dangerous or deadly weapon by one person upon another for the purpose of inflicting bodily injury), which were up 22 percent for the same period. (It is unfortunately not possible to compare aggravated assault reports with reports of *C.S.C. 2, 3* and *4*, since the latter statistics are not kept by the Michigan State Police. Were these data available, the number of reports of *C.S.C.* would, of course, be considerably greater.)

Changing awareness of rape. These percentages might indicate that crimes of personal violence in general are on the increase. But when respondents were asked to name the three most important reasons for the increase in rape reports, 74 percent cited 'changes in public attitudes'; 46 percent, 'the effects of women's liberation'; and 42 percent, 'the increased sensitivity of the criminal justice system.' About 38 percent of the respondents felt that the new *C.S.C.* law was one of the three most important reasons, and 35 percent said the 'general increase in violence' was responsible for the increase in rape reporting. These findings suggest that, in the opinion of those who deal with sexual assault, neither the law nor absolute increases in the rate of violence are as important to reporting as is a changing awareness of rape both within and outside the criminal justice system.

2. *Arrests.* Arrest data for the two crimes of aggravated assault and forcible rape are dramatically different. While *arrests for aggravated assault increased 17 percent between 1972 and 1977, arrests for C.S.C. 1 increased 62 percent during that time.*

Prosecutors' and police officers' descriptions of their own arrest-related activities confirm what the crime data show. When police interview a rape victim, they have three options: they may determine that a sexual assault has not in fact occurred (unfounding); they may decide that they need more evidence, and continue the investigation; or they may conclude that the existing evidence justifies asking the prosecutor to issue a warrant, which is necessary to make an arrest. A constellation of factors enter into the decision, including not only objective evidence, but also police determination of the victim's veracity and whether the assault was reported promptly.

Police and prosecutor willingness to seek and issue warrants. Forty percent of police say that they determine equally serious crimes to be unfounded more frequently than *C.S.C.* cases (that is, police do not *seek* warrants as often for equally serious crimes). Similarly, 35 percent of prosecutors report that they deny warrants for equally serious crimes more often than they do for *C.S.C.* Respondents were referring to *all C.S.C.* cases, not simply *C.S.C. 1*, the only degree for which Michigan State Police arrest data are available.)

It is not clear, however, why police are more likely to seek warrants and why prosecutors are more likely to issue them in *C.S.C.*

cases than in other crimes involving personal injury. Does perhaps the degree structure make it easier to determine that the elements needed to charge a crime are present? Do police and prosecutors feel differently about *C.S.C.* crimes, assigning them a higher priority and therefore processing complaints more thoroughly? Do 'rape evidence kits' ensure better evidence collection? Do police and prosecutors feel pressure - from the community, from others in the system - to seek warrants? Finally, are *C.S.C.* complaints viewed as being more reliable?

Police and prosecutor estimates of fabrication in *C.S.C.* cases.

Unfortunately, prosecutors and police are *less* likely to believe sexual assault victims than victims of other crimes. In spite of the fact that respondents report that they seek and issue *C.S.C.* warrants more than in other cases, many (27 percent) criminal justice system officials feel that *more* rape complaints are fabricated than are complaints of other equally serious crimes. Not surprisingly, of all criminal justice system respondents, defence attorneys are the most distrustful of women who file reports of sexual assault (50 percent said there are more fabrications in sexual assault than in other equally serious crimes). But 29 percent of police officers, with whom victims often have first contact, believe more *C.S.C.* complaints are fabricated than in other crimes.

Use of polygraphs. Further, *C.S.C.* victims must submit to polygraphs (lie detector tests) more often than do other crime victims according to our respondents. They typically attribute this to the nature of the crime. Sixty-nine percent of respondents who said more polygraphs are given in sexual assault cases explained that *C.S.C.* is a 'one-on-one' situation, in which establishing that a crime occurred hinges on the truthfulness of those involved. In one county, police officers noted that the chief prosecutor has a firm policy of requiring polygraphs of all *C.S.C.* victims except in cases involving brutally violent attacks. Others indicated that in their opinion, if a *C.S.C.* victim refused to take a polygraph, she was probably not telling the truth. Yet clearly, being required to take a polygraph can only be more traumatizing to the victim of sexual assault, and the widespread use of polygraphs seems to confirm biases against these victims on the part of criminal justice system actors. (It may be, however, that the use of polygraphs serves to inform the biases of police and prosecutors. Their use may actually be contributing to the observed increase in arrests in these cases.) And respondents, in their descriptions of reasons for unfoundings and warrant denials, do indicate biases against women, a preoccupation with determining complainants to be 'worthy victims', and mis- or non-use of the law. It is not possible to determine whether the mistrust of these victims is limited to women or if male victims of sexual assault encounter the same or more difficulties.

3. *Convictions.* Between 1972 and 1977, convictions for *C.S.C.* 1 increased over 90 percent (aggravated assault information not available). In the opinion of respondents, this increase seems to be largely due to the new law. According to 79 percent of all respondents, prosecutors' chances of winning *C.S.C.* cases have improved.

Characteristics of the law. Overall, when respondents were asked to cite the three most significant aspects of the new law, 71 percent thought the prohibition on past sex-history was more important; 58

percent named the degree structure or some aspect of it; while 32 percent indicated that the codification and/or terminology of the new law was one of its three most significant features.

Specific items in the new statute may be contributing to the sharp increase in convictions in *C.S.C.* cases. All respondents were asked to indicate the importance of factors which led to convictions in *C.S.C.* cases under the new and old laws. They report a decisive increase in importance of the following items under the new laws :

- * victim's sex-history
- * resistance of the victim
- * corroborative witnesses
- * physical injury of the victim
- * defendant's use of a dangerous weapon
- * outcry by the victim at the time of the attack.

The lesser importance of these items for obtaining convictions is consistent with the law reformers' goal of 'normalisation' of the crime. However,

- * victim demeanour
- * prompt report
- * non-consent by the victim

continue to be perceived as key factors in getting *C.S.C.* convictions. While the former two items are of significance in other crimes, non-consent of the victim is a demand of proof unique to sexual assault. The lingering importance of this item suggests that in *C.S.C.* cases, demands of proof placed on victims continue to be greater than those placed on victims of other crimes.

Changing attitudes. Along with the impact of statute-related factors, convictions in forcible rape cases may be increasing as a result of changes in attitudes towards rape. Sixty percent of judges report that juries are more likely to convict in *C.S.C.* cases than they were formerly, but judges are less likely to credit the new law specifically. They believe that jury behaviour has changed in this regard due to public awareness about rape and altered public attitudes about sexual behaviour in general.

Plea bargaining. Although respondents mention the importance of the degree structure, it does not seem to have facilitated plea bargaining, in the opinion of judges, defence attorneys and prosecutors. According to these respondents, plea bargaining in *C.S.C.* is about as common as it is in other equally serious crimes, and a majority (59 percent) feel that the law has not influenced this practice.

The prohibition of sex-history evidence and changes in public attitudes toward sexual assault both appear to be major factors in the observed increase in sexual assault convictions. But these are also crucial in terms of other consequences which cannot be reflected in crime data - rather, these elements have the most impact in the courtroom.

4. *The Law's Effect on 'Rape in the Courtroom'*. If the 'average' woman is not safer from being raped on the street or in her home, the 'average' rape victim does seem to be safer from 'rape in the courtroom'. According to 77 percent of our respondents, the victim's experience in the criminal justice system is less traumatic under the new law. Forty-three percent of these cited the prohibition on evidence related to past sexual history as the most important factor; 19 percent felt that a change in attitudes toward women and the crime of rape contributed most importantly to the improvement; and 13 percent said that crisis centre support was crucial in helping to make the experience less onerous. Only three percent of all respondents stated that the victim's experience had actually deteriorated under the new law.

Because judges may still allow the victim to be cross-examined about her sexual past if it is deemed relevant, and because of concern over whether sexual history is in fact being excluded, prosecutors, defence attorneys and judges usually act in accordance with the law⁸¹ - that is, they rule to admit this evidence when the defendant and victim have had a previous sexual relationship, or to show the origin of pregnancy or disease.

5. *Types of Cases Covered by the Law*. The general improvements in victim experience seem to have accrued to more than the victim of the classic 'back alley rape'. Under the law's expanded coverage, more types of people are reporting assaults and different kinds of cases are being tried. Sixty-six percent of all respondents said that these 'marginal cases', which formerly might not have reached the criminal justice system, are now coming to their attention. Respondents listed the following kinds of case they are handling with greater frequency : victims of homosexual rape (four percent); victims legally separated from spouses (23 percent); and perhaps as an indirect result of the law, 31 percent of the respondents said that victims of incest are increasingly making reports.

Significant by its omission, however, is mention of *C.S.C. 4*, the kind of 'marginal' case which Task Force members specifically included in order to assign criminality to 'sexual advances' women find objectionable. Because crime data on reports, arrests and convictions for *C.S.C. 4* are lacking, it is difficult to know whether this misdemeanour is now being taken seriously by legal system members and/or whether it is used primarily for the purposes of plea bargaining. For a majority of respondents, *C.S.C. 4* does not seem to be of consequence.

Conclusion

The law works, but possibly not as well as it could - and should. Many of its objectives have been achieved : reports, arrests and convictions are up. Victims experience less trauma in the court system; a wider range of cases gets into the system. To some extent there is a widening definition of the continuum of violence. The prohibition of past sexual history evidence is undoubtedly one of the major contributors to each of these improvements.

But these changes must not be judged only against the gravity of the situation the law was designed to ameliorate. They also must be seen against the trauma a *C.S.C.* victim can still expect to experience in the criminal justice system :

'Long waiting periods in hospitals, perhaps with psychiatric emergencies; rough insensitive exams by doctors who do not take the crime seriously and may lose or mishandle evidence; police officers who ask detailed, often rude and irrelevant questions and who may demand that a polygraph test be taken and who, after all, may decide the case is not worth investigating; busy prosecutors who may not take the time to explain the confusing maze that is the criminal justice system, or even to study the case until its trial date, a date which may be put off time and time again; a time of great psychological pain in which no counselling is available; a time during which the defendant or friends make death threats; a time during which neighbours and acquaintances read the details of the assault in the newspaper; finally, a trial, in which a defense attorney asks questions to embarrass, confuse or humiliate while twelve strangers and a judge, and sometimes the press and others, look on; and eventually, just perhaps, if everything goes very, very well, a conviction and a sentence that will keep the offender off the streets - until the next time ...'⁸²

Changing the law is only the start ...

FOOTNOTES

- ¹ For a full account of the *Declaration of Sentiments and Resolutions* from the first women's rights convention, see *Voices from Women's Liberation* (Compiled and edited by Leslie B. Tanner, 1970, Mentor, N.Y.) in Part I - Voices from the Past, at 43-46.
- ² The National Conference on Rape Law Reform brought together some 200 persons from every Australian state, including judges, queens' counsel, barristers, solicitors, academic lawyers, lawyers in government departments, politicians, women's refuge workers, rape crisis centre and health centre workers, representatives of women's organisations, law enforcement officers, health professionals, social workers, representatives from Attorneys-Generals Departments, Attorneys-General, representatives from various government departments - for example, Youth and Community Services, Health Commissions, Welfare, etc., academic lawyers, workers in sexual assault referral centres in hospitals, medical practitioners and so on.
- ³ In Australia, the definition is contained in the various *Crimes Acts* and *Criminal Codes*; see further various papers in this volume in Part II - The Substantive Law.
- ⁴ Note that in Australia the first victimisation study to be undertaken (conducted by the Australian Bureau of Statistics in 1975) shows women reporting to surveyors that they have suffered from a rape attack in numbers proportionate to reports from women victims in the United States. However, women in Australia are fifty percent less likely to report the attack to police. See John Braithwaite and David Biles, "The First Australian Victimization Survey - Women as Victims of Crime" *The Australian Quarterly* (forthcoming).
- ⁵ On this issue, see Note, "The Corroboration Rule and Crimes Accompanying Rape" (1970) 118 *University of Pennsylvania Law Review* 458; Note, "The Rape Corroboration Requirement : Repeal Not Reform" (1972) 81 *Yale Law Journal* 1365.
- ⁶ For criticism of the Californian position prior to the law reform, see Comment, "Rape and Rape Laws : Sexism in Society and Law" (1973) 61 *Californian Law Review* 919.
- ⁷ See Michigan *Criminal Sexual Conduct* law, Appendix 2, this volume.
- ⁸ For a criticism of the alleged position at common law, see Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash Law Review* 255-277; Comment, "The Common Law Does Not Support a Marital Exception for Forcible Rape" (1979) 5 (2/3) *Women's Rights Law Reporter* 181-200.

- ⁹ On this issue in the Australian context, see for example Australian Law Reform Commission, *Interim Report - Sentencing* (Australian Government Printing Service, Canberra, A.C.T., 1980).
- ¹⁰ In United States' law it was clearly considered a 'resistance standard' had to be met in order that the crime could qualify as 'rape'. This standard has not been so explicit in Australia, however cases come readily to hand wherein judges have clearly called for resistance - or signs of resistance - on the part of the victim. On this issue, see for example Liza Newby, "Rape Victims in Court : The Western Australian Experience", this volume.
- ¹¹ For an account of the terms of the *Equal Rights Amendment* and the issues involved, see Californian Commission on the Status of Women, *Impact E.R.A. - Limitations and Possibilities* (1976, Les Femmes Publishing, Millbrae, California).
- ¹² See Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment : A Constitutional Basis for Equal Rights for Women (1971) 80 *Yale Law Journal* 871, 893 and 954.
- ¹³ See also *People v. Geddes* 301 Mich. 258, 3 N.W. 2d 266 (1962); Gillespie, 4 *Michigan Criminal Law and Procedure* (2nd edition, 1953) at p. 2177.
- ¹⁴ *Ibid.*
- ¹⁵ 25 Mich. 356, 12 Am. R. 283 (1872).
- ¹⁶ 13 Mich. 427, 87 Am. Dec. 774.
- ¹⁷ *Ibid.*
- ¹⁸ See also *Burke v. Commonwealth* 105 Mass. 376.
- ¹⁹ 25 Mich. 356, 12 Am. R. 283 (1872).
- ²⁰ *Ibid.*
- ²¹ 385 Mich. 30, 187 N.W. 2d 211 (1971).
- ²² *Ibid.* (Emphasis added.)
- ²³ Although this 1969 decision was regarded as a major liberalisation.
- ²⁴ See Comment, "Forcible and Statutory Rape : An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62 *Yale Law Journal* 55; Comment, "Towards a Consent Standard in the Law of Rape" (1976) 43 *University of Chicago Law Review* 613.
- ²⁵ For an analysis of cases dealing with threats, see Jocelyne A. Scutt, "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 *University of Western Australia Law Review* 52-76.

- 26 See California *Penal Code* p. 261; Ohio Statutes p. 2907.02; Pennsylvania Statutes p. 3121.
- 27 California *Penal Code* p. 261; Illinois *Criminal Code*, Ch. 38, p. 1101; and Wisconsin *Criminal Code*, p. 944.02.
- 28 At English common law an age under which sexual intercourse would classify 'unlawful carnal knowledge' was not set; in the United States' the common law was interpreted so as to set a downward limit on the capacity to 'consent' at 10 years. On this issue and for further references, see Jocelyne A. Scutt, *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. thesis, University of Michigan, 1978).
- 29 Generally on the issue of rape in marriage, see references at fn. ⁸ supra; also Jocelyne A. Scutt, "To Love, Honour and Rape with Impunity : Wife as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming); and Helen Coonan, "Reforming the Substantive Law of Rape", this volume; Peter Salman, "Rape in Marriage and the South Australian Law", this volume; and Carol Treloar, "The Politics of Rape : A Politician's Perspective", this volume.
- 30 (1889) 22 Q.B. 23.
- 31 (1949) 2 All E.R. 448.
- 32 [1954] 2 Q.B. 282.
- 33 See Michigan *Criminal Sexual Conduct* law, Appendix 2, this volume.
- 34 330 Mich. 120 (1951).
- 35 See generally *Wigmore on Evidence*.
- 36 Note, "The Corroboration Rule and Crimes Accompanying Rape" (1970) 118 *University of Pennsylvania Law Review* 458.
- 37 *Ibid.* See also *People v. Radunovic* 21 N.Y. 2d 186, 287 N.Y.S. 2d 33, 234 N.E. 2d 212 (1967).
- 38 7 *Wigmore On Evidence* (3rd edition), at p. 2061.
- 39 *People v. Linzy* 31 N.Y. 2d 99, 335 N.Y.S. 2d 45, 286 N.E. 2d 440 (1972); see also Note, "The Rape Corroboration Requirement" (1972) 81 *Yale Law Journal* 1375.
- 40 *People v. Linzy* 31 N.Y. 2d 99, 335 N.Y.S. 2d 45, 286 N.E. 2d 440 (1972).
- 41 Comment, "Rape and Rape Laws : Sexism in Society and Law" (1973) 61 *California Law Review* 919.
- 42 Reported *Detroit Free Press*, February 1st, 1974.

⁴³ 31 N.Y. 2d 99, 335 N.Y.S. 2d 45, 286 N.E. 2d 440 (1972).

⁴⁴ *Ibid.*

⁴⁵ The 'common law rule' is simply that the judge should warn the jury of a need for corroboration in order to bolster the victim's story, saying that it is 'dangerous' to convict on the word of the victim alone. On this issue, see Jocelyne A. Scutt, "Sexism and Psychology : An Analysis of the 'Scientific' Basis of the Corroboration Rule in Rape" (1979) 5 *Hecate* 35-49.

⁴⁶ *People v. Abbott* 97 Mich. 484 (1893); *People v. Smith* 388 Mich. 93 (1972); *People v. Scott* 21 Mich. App. 217 (1970).

⁴⁷ See this paper, *infra*.

⁴⁸ This quotation has somewhat of the same flavour as statements from Sir Mathew Hale about it - where, for example, he stated that even harlots or prostitutes were protected from rape by the law. See *Hale's Pleas of the Crown*, vol. 1.

⁴⁹ *Hale's Pleas of the Crown* - to which law texts invariably refer when outlining the law of rape was published in the 18th century and written in the 1600s.

⁵⁰ On the question of the capacity of the jury to deal with rape cases, and the wariness experienced by judges in allowing the jury to undertake their task of determining questions of fact, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume.

⁵¹ For example, the National Women's Convention held in Houston, Texas, in September, 1977 passed resolutions in this area; see also Note, "Law - A Revolution in Rape - Keeping a woman's past sex life out of court" (1979) *Time Magazine* (April 2nd, 1979), at p. 50.

⁵² See discussion Note, "Michigan's Criminal Sexual Assault Law" (1974) 8 *Michigan Journal of Law Reform* 215; also Note, "Recent Statutory Developments in the Law of Forcible Rape" (1975) 61 *University of Virginia Law Review* 1500.

⁵³ 47 Mich. App. 402 (1977).

⁵⁴ 76 Mich. App. 705 (1977).

⁵⁵ *People v. Thompson* 76 Mich. App. 705, 712 (1977).

⁵⁶ *Ibid.*

⁵⁷ 76 Mich. App. 741 (1977).

⁵⁸ *People v. Dawsey* 76 Mich. App. 741, 748 (1977).

- 59 *People v. Dawsey* 76 Mich. App. 741, 749 (1977), n. 1.
- 60 *Ibid*, 752.
- 61 76 Mich. App. 705, 760 (1977).
- 62 79 Mich. App. 400.
- 63 *People v. Patterson* 79 Mich. App. 400, 409.
- 64 *Ibid*, 410.
- 65 Docket No. 28122, released January 5th, 1978.
- 66 Docket No. 28122, released January 5th, 1978, at 6.
- 67 Vivian Berger, "'Man's Trial, Woman's Tribulation" : Rape Cases in the Courtroom" (1977) 77 *Columbia Law Review* 1.
- 68 On this issue, see generally discussion Note, "Michigan's Criminal Sexual Assault Law" (1974) 8 *Michigan Journal of Law Reform* 215; Note, "Recent Statutory Developments in the Definition of Forcible Rape" (1975) 61 *University of Virginia Law Review* 1500; Peter Westen, "The Compulsory Process Clause" (1974) 73 *Michigan Law Review* 71; Peter Westen, "Compulsory Process II" (1975) 74 *Michigan Law Review* 191.
- 69 M.C.L.A. 750.520 (b)(2).
- 70 79 Mich. App. 300 (1977).
- 71 *People v. Nelson* 79 Mich. App. 300, 319 (1977).
- 72 Court Docket No. 77-198 (1978).
- 73 *Ibid*, at 6.
- 74 Docket No. 60015; argued January 11th, 1979 (Calendar No. 12); decided June 18th, 1979.
- 75 79 Mich. App. 393 (1977).
- 76 76 Mich. App. 705 (1977).
- 77 74 Mich. App. 402 (1977).
- 78 M.C.L.A. 750.520 (b)(1)(b).
- 79 M.C.L.A. 750.520 d.
- 80 *People v. Denmark* 74 Mich. App. 402, 412 (1977).
- 81 For the position prior to changes, see Vivian Berger, "'Man's Trial, Woman's Tribulation' : Rape Cases in the Courtroom" (1977) 77 *Columbia Law Review* 1; Note, "The Victim in a Forcible Rape Case : A Feminist View" (1973) 11 *American Criminal Law Review* 335.
- 82 *Ibid*.

THE SUBSTANTIVE LAW

'Right then he get off his clothes. Gonna tend to business. Now, the bad thing there is, the way Carter told it, and I know it so, those little girls come around looking for what they used to, hot dog. And what they get is knockwurst. You know we are like that. Matter of fact, Carter did force her. Had to. She starting to holler, Ow, it hurts, you killing me, it hurts. But Carter told me, it was her asked for it. Tried to get away, but he had been stiff as a stone since morning when he stop by the store. He wasn't *about* to let her run.

Did you hit her? I said, Now Carter, I ain't gonna tell anyone. But I got to know.

I might of hauled off and let her have it once or twice. Stupid little cunt asked for it, didn't she? ... She could of wriggled by the scoop of my armpit if I had let her ...

...

Girl lying on my bloody cot pulling up a sheet, crying, bleeding out between her legs. Carter had tore her up some ... He told me, Man, I couldn't stay there, that dumb cunt sniffing and that blood spreading around her, she didn't get up to protect herself, she was disgusting ...

...

The next day I learned worse ... Hector found me outside the store ... He said, Every bone between her knee and her rib cage broken, splintered. She been brutally assaulted with a blunt instrument or a fist before death.

Worse than that, on her leg high up, inside, she been bitten like a animal bit her and bit her and tore her little meat she had on her. I said, All right, Hector, Shut up. Don't speak.

...

Then court. I had a small job to say, Yes, it was my place. Yes, I told Carter he could use it ...

In court Carter said, Yes, I did force her, but he said he didn't do nothing else.

Angie said, I did smack her when I seen what she done, but I never bit her, your honour, I ain't no animal ...

...

But that was my room and my bed, so I don't forget it. I don't stop thinking, That child ... That child ... And it come to me yesterday, I lay down after work : Maybe it wasn't no one. Maybe she pull herself the way she was, crumpled, to that open window. She was tore up, she must of thought she was gutted inside her skin. She must of been in a horror what she got to remember - what her folks would see. Her life look to be disgusting like a squashed fish, so what she did : she made up some power somehow and raised herself up that windowsill and hook herself onto it and then what I see, she just topple herself out. That what I think right now.

That is what happened.

RAPE LAW REFORM - PROPOSALS FOR REFORMING THE SUBSTANTIVE LAW

Helen Coonan[#]

Past years in Australia have seen a great deal of publicity, general media coverage, and expert analysis on the subject of rape. The call for reform, once spear headed by radical feminists, has now spread throughout the community at large and permeated sections of the legal profession concerned with reform of the criminal law. It appears manifestly evident that the seemingly even handed approach of the law in this regard in fact disadvantages persons who have been the subject of sexual attack.

The need for reform of the law of rape should be fairly obvious. Community attitudes and values have evolved gradually while the law has remained unchanged.* It is realistic to assume that there is today a wide divergence between actual human behaviour and laws regulating sexual conduct. The present rape laws are widely known for the ease with which they can be breached rather than enforced. If the law in this area is not to be brought into total disrespect at all levels of our society, reform must be delayed no longer.

Considerable difficulties nonetheless beset the would be reformer of laws relating to rape. The commission of rape and sexual offences of similar nature has far reaching social, psychological and emotional implications for the victim as well as the accused, and these cannot be controlled by legislation alone. Other reforms must accompany law reform if there is to be any real amelioration of the plight of rape victims.

There is, however, a pressing and urgent need for the introduction of a comprehensive and clear code of sexual conduct which the criminal law purports to regulate. The real object and the purpose of law reform in this area should be to redress the balance against the victim in the substantive law, in court procedures and in rules of evidence whilst ensuring that the rights of the accused are safeguarded and the interests of justice served.

Further, in stressing the need for complete review of the laws relating to all aspects of criminal sexual conduct, the question of what sexual conduct ought to be proscribed is immediately raised. There is a growing acceptance of the notion that consensual sexual activities engag-

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* Frequent recourse in discussions of the law is had, for example, to the pronouncements of Hale CJ. - uttered in 17th century England. (Editor's note.)

ed in by willing and responsible persons ought not to be the concern of criminal law. The underlying assumptions are that the law has a protective role to play on behalf of an unwilling party and those deemed too young or too feeble minded to be capable of consent.

Proposals for Reforming Substantive Law

Several major reports have addressed the notion of rape law reform, including the *Mitchell Report*,¹ the *Victorian Law Reform Commissioner's Report*,² the *United Kingdom Report of the Advisory Group on the Law of Rape*,³ the *Report of the Royal Commission on Human Relationships*⁴ and the *Report of the Criminal Law Review Division*⁵ of the New South Wales' Department of the Attorney-General and of Justice. All have made recommendations on reform of the substantive provisions of the law of rape. Of these, the Royal Commission took the most 'radical' stand as to the need for review and the extent of that review.

Report of the Royal Commission on Human Relationships. Currently the crime of rape amounts to an act of intercourse imposed by a man upon a woman not being his wife, that is, without her consent. The Commission on Human Relationships adopted the approach that all acts of a sexual nature involving aggression should be classed together. The Commission took the view that acts of violence involving non-consensual sexual activity were in themselves assaults and should take their place in the criminal law together with ordinary acts of assault. The Commission therefore recommended the amendment of current sections of the various Crimes Acts relating to assault to incorporate assaults of a sexual nature.* The issue of penetration should no longer be relevant, at least where grievous bodily harm or other severe violence was involved.

Recognizing that acts of an aggressive sexual nature are acts of violence and should be treated as such, in the Commission's view classification of all non-consensual acts of sexual intercourse under the one heading without recognition of the degree of violence involved (as in rape as presently defined), isolates the attack from all other like offences and renders a jury unlikely to convict. In accordance with this assessment, the Commission recommended, for example, that where there is an attempt at sexual intercourse accompanied by the commission of violent acts resulting in grievous bodily harm, malicious wounding, attempted strangling and so forth, the penalty should be the same as if no attempt at sexual penetration or actual penetration had been made. Where sexual penetration or attempted penetration occurred in the absence of violence

* For example, with the *Crimes Act* (1900) New South Wales (and in force in the Australian Capital Territory) section 33 would be amended to read: 'Whosoever - maliciously by any means wounds or inflicts grievous bodily harm upon any person, or maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person, with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or any other person, or with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for life.' (Editor's note - italics indicate amendment.)

or in the absence of outside signs of physical damage, that offence would accord with other provisions of the *Crimes Act* relating to assault in which no injuries were caused or violence used.

The Commission intended to remove from the legislation the consideration of rape as a special category or as comprising an offence able only to be committed against women by men, as in present legislation. Further, on the Commission's recommendations the issue of the victim's consent or lack of it would become irrelevant where grievous bodily harm was caused by or during a sexual attack. This accords with the common law position as accepted in other assaults that no person can consent to acts involving grievous bodily harm. However the issue of consent would continue to arise with sexual acts or attempts not accompanied by acts of violence. Conspicuously missing from the report of the Commission is any discussion of or analysis as to the issue of consent. Because rapes take place where acts of violence, or overt violence are missing, the question of consent cannot be ignored.

The Women's Electoral Lobby Draft Bill. Of all official reports and recommendations made for reform of the law relating to rape, it is difficult not to be impressed with the style and clarity of the Michigan *Sexual Conduct Act* which has been used as a frame work for the Women's Electoral Lobby *Draft Bill on Sexual Offences*. This approach adopts four degrees or grades of sexual assault :

1. Aggravated sexual assault involving penetration providing a maximum penalty of 14 years' imprisonment.
2. Aggravated sexual assault providing a maximum penalty of 10 years' imprisonment.
3. Sexual assault involving penetration providing a maximum penalty of five years' imprisonment.
4. Sexual assault providing a maximum penalty of two years' imprisonment.

In cases involving children, there is provision for any sexual assault to be deemed to be one 'causing grievous bodily harm' to bring it within the most serious categories of the gradation system.

The Women's Electoral Lobby approach has been to adopt similar definitions as to 'sexual intercourse' and the like, as those appearing in the Michigan Code. Further, under the Women's Electoral Lobby *Draft Bill* is a defined set of circumstances - numbering ten in all - which can be taken by the court to evidence a lack of consent on the part of the victim.⁶ There is merit in stating a series of objective circumstances that will render an act unlawful rather than unlawfulness arising from the accused's perceptions, and the perceptions of the court of what the victim was doing. The advantage of defining the offence by reference to objective criteria is that it minimizes the issue of consent and focuses attention on the actions of the accused. It specifically identifies the behaviour that is to be proscribed.

One of the provisions of the Michigan Code, and adopted in the Women's Electoral Lobby proposal, is that 'force or coercion' used to accomplish sexual penetration will render the act culpable as 'criminal sexual conduct' (or 'sexual assault'). Some commentators have contended that this would render unlawful many areas of sexual activity otherwise lawful.⁷ In other words, lawful sexual intercourse involves some degree of 'force' on the part of the party involved in the act of penetration. However the use of the terms 'force or coercion' in legislation prohibiting an activity that when undertaken in a truly consensual fashion is pleasurable must imply some element of hostility on the part of the actor. The lawfulness or otherwise of the activity must be judged as far as possible in terms of the objective circumstances of the assault as outlined in the legislation, and utilising everyday rules of interpretation of statutes. Thus it is unlikely in the extreme that any court would hold the law as precluding sexual activity simply on the ground that penetration in practice is accomplished by thrusting in a forceful manner. Second, this problem of interpretation does not arise out of the Michigan or Women's Electoral Lobby provisions alone, but is common to the common law definition of rape - that it is sexual intercourse without consent, or as sometimes stated, where accomplished by 'force, fear or fraud'.⁸

The Michigan legislation and Women's Electoral Lobby proposal define sexual relations as mutual and are non-sexist, applying as they do to both sexes and to all types of non-consensual sexual activity. The value of the approach taken in 'sexual assault' or 'criminal sexual conduct' legislation lies in its focusing the enquiry where it properly belongs - on the culpability of the accused person and on his or her actions, rather than upon the victim's consent.

Gradation of the Offence

Most proposals for reform of the law relating to sexual assault take into account the need to incorporate into the legislation recognition in the offence and the accompanying penalties of the degree of harm caused by the particular offence. Leaving a wide discretion in the court to impose an appropriate penalty is dangerously subjective and results in widely varying sentences.⁹ The difficulties of the present law has had the effect of subjecting to legal sanctions only the most brutal and extreme examples of unconsenting sex and largely ignores the wide variety of ways in which men force themselves sexually upon women. At present the offence of rape is an umbrella offence embracing a wide variety of activities, all of which are punishable by the same maximum penalty of penal servitude for life.¹⁰ Obviously the offence of rape covers a wide diversity of sexual activities some of which are extremely serious and others less so. Rape can range from a non-consensual act accompanied by violence and physical injury to the victim, pack rape, rape in marriage, rape of a tiny child, institutional rape, right through to 'date rape' or so-called 'petty rape' - and still amounts prima facie to the one crime 'rape'. The legislature has a responsibility to clarify the crime, recognising by statute both what penalty fits the type of crime and grading the offence according to seriousness as in the Michigan Code. No doubt the availability of alternate verdicts for attacks and the varying degrees of seriousness would be welcome to juries who it seems at present may be reluctant to convict an accused person of rape in all but

the most obviously serious of cases.¹¹

Sexual Offences as a Separate Category in the Criminal Law

Some recommendations for reform have suggested that the law relating to sexual offences would best be reformed by removing altogether the sexual element from the legislation and dealing with sexual offences under other broad categories of the law. The United Kingdom Sexual Law Reform Society thought this approach :

'... highly desirable because of the beneficial effect this would have both upon policy and on Court attitudes generally; at present it is within the experience of several of us that "sexual cases" are sometimes handled more emotionally by those in authority than non-sexual crimes of a more objectively serious and anti-social nature ...'¹²

The Human Relationships Commission saw merit in incorporating sexual offences into existing laws relating to assault - so that as far as possible sexual attacks should be indistinguishable in law from any other assault. The focus would then be on the harm caused and seriousness of the abuse rather than on the sexual nature of the attack.

Despite the attractiveness of this rationale, such an approach is calculated simply to 'pour new wine into old bottles'. No matter how it is labelled, it is impossible to remove the 'sexual' element from the offence. The special interpersonal nature of sexual relations will be the subject of focus in looking at sexual offences no matter what the offence is called, try as we might to erase this. Clearly the damage done to a victim that results from a sexual attack cannot be considered totally in the same light as a non-sexual assault. Both the Michigan and the Women's Electoral Lobby approaches attempt to render as far as possible the crime free of the emotive nature 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. Both take into account the sexual element of the act, combined with a real enquiry as to the nature of the harm or the seriousness of the assault.

Labelling the Offence

There can be no doubt that our community has endowed the word 'rape' with emotive overtones. Furthermore 'rape' has a common law meaning inappropriate to define the types of sexual assault which the law should recognise and proscribe. Terminology to be preferred in legislation referring to sexual offences is that which moves away from 'rape', which has done little service to the majority of its victims in the past, and continues today to protect aggressors from conviction rather than women from assaultive acts of a sexual nature. A preferable term would be 'sexual assault', 'sexual abuse', 'sexual attack', or 'sexual injury'.

Common Law Immunities

At present, with the exception of section 12 of the South Australian *Criminal Law Consolidation Act*, unless and until a decree nisi for dissolution of marriage is pronounced or a separation agreement entered into,* a husband cannot be convicted of the offence of rape upon his wife. This 'rule' stems from a statement of 'principle' by Sir Mathew Hale many centuries ago when he said :

'... by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'¹³

Underlying this immunity is the notion of the wife's continuing consent. This is an unrealistic notion since although a married woman will usually be amenable to sexual relations with her spouse she no doubt expects to have some say in the time, place and manner of such relations and undoubtedly expects to be able to expressly refuse such relations on occasion. These choices are clearly open to the husband without fear of legal sanctions, and it is difficult to understand why they ought not to be extended to the wife. Paradoxically, perhaps, a *de facto* wife who is sexually assaulted by her *de facto* husband is entitled to the full protection of the law, such as it is. At best a married woman in similar circumstances would only be entitled to complain of assault.¹⁴ It is difficult to see that problems of proof in the case of parties cohabiting is any less difficult than in the case of parties actually legally married.

The current laws relating to rape in marriage highlight another paradox. Upon marriage a wife consents to cohabitation. If at some later stage she unilaterally withdraws that consent her husband has no right either in law or in fact to detain her. He can be prosecuted for kidnapping or a similar offence. Why cannot a wife also withdraw her implied consent to intercourse with her husband? That there is any justifiable distinction for the differential treatment of these two factors in marriage - that is, cohabitation on the one hand and sexual intercourse on the other - is hard pressed to be discovered.

Indeed, in looking at this issue it is useful to advert to the principles and substance of the *Family Law Act* 1975 (Cwth) as the most recent legislative expression of rights and obligations of parties to a marriage. Clearly in theory at least this Act assumes both parties are

* Or where an injunction has been taken out of the Family Court of Australia under section 114 of the *Family Law Act* 1975 (Cwth), perhaps. On this issue, and in particular in relation to the South Australian position, see Peter Sallman, "The Law and Rape in Marriage in South Australia"; and Carol Treloar, "The Politics of Rape - A Politician's Perspective", this volume; and the sources cited therein. (Editor's note.)

equal. The marriage can be terminated by the unilateral decision of one party alone on the basis that, if the relationship is no longer mutual, there is no point in continuing the marriage. This notion of choice clearly extends to marital sexual relations. If non-consensual, such sexual relations would not have to be endured.

One of the most disturbing features of the spousal immunity rule is therefore the scant protection the criminal law offers married women. The *Family Law Act* specifically envisages circumstances where parties can live separately and apart under the one roof and still have grounds to dissolve their marriage on the expiration of 12 months separation. There are a great number of people who simply do not have sufficient resources to set up separate households prior to divorce. Parties living separately and apart under the one roof are just as separate and apart as if they live in separate residences and in these circumstances unwarranted sexual advances by husbands are not uncommon.¹⁵

The *Family Law Act* offers to women some protection in the form of personal restraint orders or by allowing the wife in an appropriate case, sole occupation of the matrimonial home prior to divorce. Such solutions involving in many instances high legal costs, substantial delays, and the distinct possibility of the husband's contempt of court order, these solutions are not always the most practical.¹⁶ It is totally unacceptable and unrealistic for married women to be in a situation where they theoretically have no choice in the time, place, circumstances or incidences of sexual relations with their husbands. In these circumstances the wife is little more than a chattel.

The common law ruthlessly reinforces woman's subordinate position in marriage. Removal of the husband's immunity at least accords to wives theoretical sexual equality in marriage and would afford them some protection by the criminal law in extreme cases. Surprisingly the *Mitchell Report* stated :

'It is only in exceptional circumstances that the criminal law should invade the bedroom. To allow prosecution for rape by a husband upon his wife with whom he is cohabiting might put a dangerous weapon into the hands of a vindictive wife and an additional strain upon the matrimonial relationship.'¹⁷

The proposition in the first sentence appears to ignore the fact that the bedroom is the place where most rapes, particularly marital rapes, occur. The law has no hesitation in invading the privacy of the bedroom if, for example a burglary or robbery took place in a private residence. There is also an inherent illogicality in the fact that a married woman has (once again, theoretically - as in practice it affords little protection) some redress against the husband who physically assaults her,¹⁸ but no redress if she is raped beyond an ordinary assault complaint.

The usual objections to removal of spousal immunity are unacceptable. First, the fear of the vindictive wife and the false complaint is surely more imagined than real. As is well known, the criminal law has developed effective safeguards to deal with false complaints of crime. There is no reason to believe that such safeguards would not operate effectively in respect of a complaint by a spouse. Another common objection is that such a complaint by a wife against her husband presents enormous problems of proof. No doubt with our present law this is true, as juries are likely to assume the wife consented or that the husband believed she consented.* However this difficulty is not such that the immunity rule should remain. As mentioned previously, difficulties arise in other cases of rape, and yet this does not lead to a general move for revision of the law to grant immunity to persons outside formal marriage relationships simply on the basis that the crime is 'difficult to prove'.** Furthermore removal of immunity at least gives wives theoretical sexual equality and in extreme cases would offer the wife some protection.

Where but for the existence of the marital relationship a person's actions would be subject to the sanctions of the criminal law, the interests of public policy are not served by ignoring such acts any longer. The original proposal for amendment to the South Australian *Criminal Law Consolidation Act* - that no person shall :

'... by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with or to indecent assault by that other person'¹⁹

should be utilised by the various Australian jurisdictions to show clearly to the courts that those who commit rape in marriage are no longer to be granted protection by the legal system, at the expense of their victims. Sadly, this provision was amended during its passage through Parliament so that its ambit is restricted, its meaning confusing and by its terms it may also restrict the rights of spouses in relation to complaints of indecent assault as well as rape. The amended South Australian provision should not, therefore, be adopted.

Conclusion

Whatever view is taken as how best to reform the laws relating

* On the question of jury attitudes toward rape and the evidence presented to them, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

** But for a proposal that the immunity of husbands be extended to *de facto* spouses in the Australian Capital Territory, see Arthur Watson, "Reform of the Law of the Australian Capital Territory Relating to Rape and Other Sexual Offences", this volume; see also comments "Introduction", this volume. (Editor's note.)

to sexual offences, no one considers it an easy task. It is extremely difficult to regulate an area of human behaviour such as sexual relations, which is normally good and pleasurable and only on *some occasions* unlawful. How is it possible at the same time to safeguard both the rights of the accused and the integrity of the victim?

No doubt some improvement will be effected by renovating the existing laws and procedures, or by the introduction of a new code, but there will be no meaningful social progress until there is a fundamental change in the way men and women treat each other. We all need to examine our sexism from its most minor manifestation to the most major, of which rape is perhaps the supreme example.

FOOTNOTES

- ¹ Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report - Rape and Other Sexual Offences* (1975, Government Printer, Adelaide, S.A.).
- ² Law Reform Commissioner of Victoria, *Rape (Court procedures and rules of evidence)* (1976, Government Printer, Melbourne, Victoria).
- ³ *Report of the Advisory Committee on the Law of Rape* (Heilbron Committee) (1975, H.M.S.O., London, Eng.)
- ⁴ Royal Commission on Human Relationships, *Final Report* vol. 5, at "Rape and Other Sexual Offences" and "Recommendations", pp. 189-195, 233 (1977, Australian Government Printing Service, Canberra, A.C.T.).
- ⁵ New South Wales' Department of the Attorney-General and of Justice, Criminal Law Review Division, *Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.), and *Supplement to the Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.).
- ⁶ The Women's Electoral Lobby *Draft Bill* is contained in Appendix 1 to this volume. The set of circumstances as defined in the Bill is set out in clause 9. (See Appendix II, this volume.)
- ⁷ See, for example, comment in the Report of the Criminal Law Review Division of the Department of the Attorney-General and of Justice, *op. cit.*
- ⁸ For an analysis of the problems arising in relation to this definition at common law see, for example, Jocelyne A. Scutt, "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 *University of Western Australia Law Review* 52-77; Jocelyne A. Scutt, "The Standard of Consent in Rape" (1976) 20 *The New Zealand Law Journal* 462-467; Jocelyne A. Scutt, "Fraudulent Impersonation and Consent in Rape" (1976) 9 *University of Queensland Law Journal* 59-65; Jocelyne A. Scutt, "Fraud and Consent in Rape : Comprehension of the Nature and Character of the Act and its Moral Implications" (1976) 18 *Criminal Law Quarterly* 312-324.
- ⁹ See for example, John E. Newton, *Factors Affecting Sentencing in Rape Cases* (1974, Australian Institute of Criminology, Canberra, A.C.T.); Ivan Potas, *Sentencing Violent Offenders in New South Wales* (1980, Law Book Company, Sydney, N.S.W.).
- ¹⁰ Under the *Crimes Act* (N.S.W.) 1900, and under the other various criminal law statutes in other states, except note that in Victoria under the *Crimes Act* the maximum penalty for rape is twenty one years.

- ¹¹ Even here, juries may well not convict. Take for example the recent case in New South Wales where a woman was hit over the head with a wheelbrace, dragged out of the car and forced to an act of sexual intercourse, the accused was convicted of assault occasioning actual bodily harm but not of rape. See *W.E.L. Informed* (monthly newsletter of the Sydney Women's Electoral Lobby), June, 1980; also report "Mainly female jury finds assault, not rape" in *Sydney Morning Herald* 28.5.1980.
- ¹² *Report of the Working Party* set up by the Executive Committee of the Sexual Law Reform Society (U.K.) in October 1970.
- ¹³ For an analysis of the current position in common law, see Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash Law Review* 255-277; Jocelyne A. Scutt, "To Love, Honour and Rape with Impunity : Wife as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming).
- ¹⁴ *Ibid*; *Hale's Pleas of the Crown*, vol 1, p. 629.
- ¹⁵ See for example Duncan Chappell, "Rape in Marriage in South Australia" in *Violence in the Family* Jocelyne A. Scutt, ed, 1980, Australian Institute of Criminology, Canberra, A.C.T.); also Royal Commission on Human Relationships, *Final Report*, vol 4.
- ¹⁶ See for example Penny Stratmann, "Domestic Violence and the United Kingdom Legislation" in *Violence in the Family* (Jocelyne A. Scutt, ed, 1980, Australian Institute of Criminology, Canberra, A.C.T.).
- ¹⁷ Criminal Law and Penal Methods Reform Committee of South Australia, *op. cit.*
- ¹⁸ See Jocelyne A. Scutt (1977)(1980) *op. cit.*; Duncan Chappell (1980) *op. cit.*
- ¹⁹ See *Criminal Law Consolidation Act* (S.A.) s. 73 (5) (before amendment).

LAW REFORM AND RAPE UNDER THE TASMANIAN CRIMINAL CODE

W. J. E. Cox, Q.C. #

When considering law reform in probably all areas and certainly in as sensitive an area as that of the criminal law in relation to rape and other sexual assaults, it is important to bear in mind that there is no one answer of universal territorial application, let alone one which will satisfy all who urge reform. In addition to philosophical differences, differences arise in the nature of laws applicable in each Australian jurisdiction - whether the common law applies, or whether a criminal code has been introduced.

In Tasmania the common law has been replaced by a *Criminal Code*.¹ The law as contained in that Code and interpreted by Tasmanian courts will be here set out. Anomalies and weaknesses, differences between the Tasmanian law and that of other states - whether based on common law or codified - will be dealt with. Suggestions for reforms both desirable and viable in the Tasmanian context will be made. A primarily parochial approach will be taken, although it is hoped that comments may be considered pertinent to other jurisdictions and capable of adaptation thereto, if not of adoption therein.

Rape and Intention Under the Tasmanian *Criminal Code*

The crime of rape is set out in section 185 of the Tasmanian *Criminal Code* in these 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.'

Since *Snow*² - a decision of the Tasmanian Court of Criminal Appeal in 1962 - it is clear that the essential ingredients of the crime of rape in Tasmania are first, the intentional act of penetration by the accused of a woman not his wife and second, the absence of her consent to the act. Unlike other states of the Commonwealth and the United Kingdom, there is no requirement for the Crown to prove an intention on the part of the accused to have intercourse with the victim against her will, he either being aware she was not consenting or else aware that this might

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be so and recklessly determining to have intercourse whether she was consenting or not, as held in *Morgan's case*³. It has followed from this proposition, and been confirmed by later Courts of Criminal Appeal,⁴ that an honest belief in the fact that the woman is consenting on the part of the accused, based on reasonable grounds, is a matter of exculpation or defence in respect of which the onus of persuasion on the balance of probabilities lies on the accused.

The Tasmanian position therefore differs from that laid down in the decision of the House of Lords in *Morgan's case*. Indeed, Lord Cross of Chelsea, the senior law lord present (and one of the majority) specifically pointed out⁵ that the relevant English Act did not say that a man who has sexual intercourse (or to use our expression 'carnal knowledge') commits an offence; it says that a man who *rapes* a woman commits an offence. It could clearly be argued that had the House of Lords been considering rape as defined in the Tasmanian Code the majority decision would not have prevailed.

Critics of the majority decision in *Morgan's case*, the ratio of which is confined to the proposition that no man may be convicted of rape if he believes that the woman is consenting, even if his belief is not based on reasonable grounds, would find some consolation in the fact that this proposition is not the law in Tasmania. They would be heartened further to know that not only must such a belief be based on reasonable grounds to amount to a defence but that the existence of such a belief must be established by the accused. The Crown does not have to negative the reasonable possibility of the existence of such a belief; the accused must establish the probability of its existence. This burden is a probative burden and not an evidential one.⁶

No doubt such an approach is anathema to the common law purist who insists on the establishment of the accused's guilty intent beyond a reasonable doubt. To the purist, the prohibited act in rape is non-consensual sexual intercourse and the guilty state of mind is an intention to commit it.⁷ Despite some rumblings of concern that *Snow's case* '... might need to be reconsidered on some suitable occasion' that decision '... must at the present time be taken to represent the law in Tasmania.'⁸

So far as the crime of attempted rape is concerned however, the Court of Criminal Appeal in *Bell's case*⁹ has laid down clearly that the accused's state of mind for a conviction to be sustained must be one involving a specific intention to commit the crime of rape and that the prosecution must therefore prove that the alleged acts of the accused were done with intent to have carnal knowledge of the woman without her consent. It remains to be seen if the suggested '... undesirable inconsistency in the law'¹⁰ between the mental states required for the completed crime as opposed to the attempt to commit it will be allowed to remain or whether judicial re-appraisal will remove it. Clearly, if either is held to be wrongly decided, it will be *Snow* rather than *Bell*. However there is no contradiction between the two and both propositions are tenable in the same way that while varying intentions may support a murder conviction, only a specific intention to cause death or to do 'wilful murder' suffices in an attempted murder charge.

The Actus Reus of Rape Under the Tasmanian Criminal Code

Problems of definition arise in relation to the activity which constitutes the *actus reus* of rape. The Code under section 1 defines carnal knowledge in these terms :

- '(1) In the Code unless the contrary intention appears - 'carnal knowledge' means the penetration to any the least degree of the organ alleged to be known, by the male organ of generation.'

This definition does not exclude the penetration of organs other than the vagina. It is clear from section 122 which deals with "unnatural" carnal knowledge that it must include at least anal penetration, section 122 providing, amongst other matters :

- '(122) Any person who -
 ...
 (c) consents to a male person having carnal knowledge of him or her against the order of nature,
 is guilty of a crime.'

It seems therefore that the subjection by a man of a female not his wife without her consent to an act of sodomy may be the subject of a charge of rape. There seems to be no instance in the records of the Crown Law Department of this state where such a charge has been laid on that basis alone. It seems no less arguable that other forms of penetration could constitute carnal knowledge for the purpose of a charge of rape. There is, however, no dearth of obiter dicta confining rape to penetration of the vagina and no doubt one would have to face the argument that in the context of section 185 dealing with rape, the organ alleged to have been known cannot be other than the vagina, or alternatively, that it is implicit from the whole concept of rape that the contrary intention is shown so as to limit the relevant organ for rape purposes to the vagina.

One difficulty arising as a matter of construction is that involved in the question of the moment of time when the crime is committed. The Code provides that carnal knowledge *means* penetration to any the least degree. Other jurisdictions speak of the crime being 'deemed complete' upon proof of penetration to any the least degree. The wisdom of avoiding too fine an enquiry into the degree of penetration and into the occurrence or not of an emission of seed was recognised by the passing of a statute in the reign of George IV¹¹ but problems have arisen as to whether one can aid and abet the commission of the crime by a principal offender where the acts of encouragement only occur after initial penetration. The Queensland Court of Criminal Appeal has in *R. v. Mayberry* answered that question in the affirmative :

'I am quite unable to understand that a man, having effected penetration, ceases to be having carnal knowledge of a woman at that instant of time, though he remains to complete the act of sexual intercourse for some time thereafter, the normal reason for his attack.'¹²

In Tasmania the problem arose in circumstances where a possible version of the facts was that the accused, though honestly but mistakenly believing the woman to be consenting at the moment of initial penetration came to a realization before withdrawal that she was not in fact consenting and continued the act of intercourse notwithstanding. The Court of Criminal Appeal in *Richardson*¹³ unanimously held that a man in those circumstances could not be said to have committed the crime of rape, although a verdict of guilty of indecent assault was substituted on the basis that continuance of the act in the knowledge that the woman was not consenting was clearly an assault accompanied by circumstances of indecency. The same view of similar but not identical legislation was taken by the South Australian Full Court in *Salmon*.¹⁴

The value of such an approach was defended in *Richardson*¹⁵ by Nettelfold J. who said :

'That technical approach produces a realistic and acceptable result. To test that take the case of a thirty-year old woman who seduces a youth of seventeen years into having intercourse. No precautions against conception are taken. After the act has continued for some time, fearing the risk of conception, she makes it plain that her consent is withdrawn but the youth, his passion aroused, continues with the act. The contention that, on those facts, he is guilty of rape is quite unacceptable. To convict in such a case would be to impose grave liability in a case where there is trivial culpability. And it is no answer to that example to say that the youth would not be prosecuted. In a civilised society liability for crime is fixed by law and not by administrative discretion.'¹⁶ *

* For those who have engaged in sexual intercourse it is doubtful whether 'realistic' is the adjective to apply to this type of decision making. In the act of intercourse the initial penetration is not normally followed by the penis lying inert in the vagina. Sexual intercourse usually consists of a number of 'penetrations', so that although 'consent' might be given (or be believed to have been given) to initial penetration, if that consent is withdrawn at some stage during the act, it is more realistic to consider that any penetration taking place after that consent is withdrawn (or believed to have been withdrawn), the act taking place will be carnal knowledge without consent, or rape. (Editor's note.)

Consent in Rape Under the Tasmanian *Criminal Code*

Consent is another area calling for particular consideration. The Code defines consent in the following terms :

- '1. In the Code unless the contrary intention appears - 'consent' means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents. A consent is said to be freely given when it is not procured by force, fraud, or threats of whatever nature.'

The decision of the High Court in *Papadimitropoulos v. The Queen*¹⁷ has established that it is the consent to the physical act of penetration which is in question upon an indictment for rape :

'Such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing cause cannot destroy its reality and leave the man guilty of rape.'¹⁸

But it has been held¹⁹ that a rational person so situated as to be able to form a rational opinion upon the matter to which he or she consents may be a mental defective within the meaning of the (now repealed) *Mental Deficiency Act* 1920. Although such a person may be the successful prosecutrix of a charge of defilement of a defective she may yet be shown by the evidence to be capable²⁰ of 'giving such a consent to the physical act as the Code requires', so as to preclude any finding of guilt of rape.

Immunities Under the Tasmanian *Criminal Code*

No matter what degree of estrangement short of final divorce may exist between them, a husband may not commit the crime of rape against his wife under the Tasmanian Code. It is said that this exemplifies the myth of a husband's proprietary rights according to law over his wife. Whether this be so or not, the alleged proprietary right does not extend to protect him :

1. from the infliction of violence upon her, which, under the Code is punishable as an assault;
2. from subjecting her, irrespective of her consent, to unnatural carnal knowledge, or
3. from any other assault accompanied by the element of indecency which ingredients comprise the crime of indecent assault.

Also under the Code there is total immunity from liability for rape on the part of a boy who has not attained the age of 14 years. This, however, does not prevent his being found guilty where appropriate of rape as an aider, abettor or instigator, nor his being convicted of indecent assault, although in reaching that conclusion the jury would have to be directed to put out of their minds the possibility even that he had in fact achieved penetration.

Indecent Assault under the Tasmanian *Criminal Code*

Any consideration of the general question of law reform in relation to rape under the Code must take into account the existence of the other (not necessarily less serious) crime of indecent assault. This crime is contained in section 127 :

'(1) Any person who unlawfully and indecently assaults a female is guilty of a crime.'

Unlike rape, in respect of which a rule of practice created by precedent requires that the jury should be warned by the judge that it is dangerous to convict unless the evidence of the complainant is corroborated in some material particular by other evidence implicating the accused, the crime of indecent assault upon a female, in common with incest, indecent assaults upon males and acts of unnatural carnal knowledge, is required by the express terms of the Code itself to be thus corroborated. This crime, assuming the evidence warrants it, is an alternative conviction upon an indictment charging rape.²¹ It consists in essence of an assault by a male upon a female, accompanied by circumstances which to the jury's mind are indecent. It can fairly be said to be capable of covering all factual situations falling short of rape itself which are contemplated by the Michigan *Sexual Conduct Act* save that the accused is ex hypothesi male and the victim female.

Indecent assault is not necessarily a less serious crime than rape. This is recognised by the Code, for apart from a few crimes for which the mandatory punishment is death or life imprisonment all crimes are punishable by a maximum sentence of 21 years imprisonment and/or fine.²² * It is true that some crimes are regarded as intrinsically more grave than others (for example, the intentional infliction of grievous bodily harm would be regarded as more grave than mere wounding which requires no specific intention) and accordingly tend to attract penalties within different ranges, but this flexibility in sentencing theoretically enables the courts to impose a more severe punishment upon a serious case of indecent assault than upon a case of rape where culpability is set at the lower end of the scale. Some cases of indecent

* Note that in this respect Tasmania is unique in Australia. No other jurisdiction conforms to the pattern of sentencing as set out in the Tasmanian *Criminal Code*; other jurisdictions have a varying range of maximum penalties for a broad range of offences. (Editor's note.)

assault can be more deserving of condemnation and punishment than some cases of rape. The provisions of the Code enable the judges to apply a penalty appropriate to the gravity of the particular case without the constraints of different statutory maxima imposed by reference only to the basic ingredients of the various crimes.* It would seem, nonetheless, that this flexibility is to a large extent purely theoretical, for the plain fact is that rapes consistently attract penalties of imprisonment which are manifestly greater than any penalty for an indecent assault and this would seem to point to the existence of a judicial view that only in the most exceptional case could an indecent assault be regarded as more heinous than a rape. In the same way, attempted rape would seem to be consistently regarded as more serious than indecent assault.

Rape Law Reform Under the Tasmanian *Criminal Code*

The most significant aspects of the substantive law of rape and other sexual offences under the Code have been recounted. It is proper to ask whether they are satisfactory or whether reform is appropriate.

Intention and Reform. Despite the widespread acceptance of the common law approach reiterated in *Morgan's case*²³ that to constitute rape there must be an intent to have intercourse without consent, the offender either knowing such consent is absent or recklessly indifferent to its presence or absence, it is submitted that the approach taken by the Tasmanian courts since *Snow's case*²⁴ is just and proper. To the victim there can be no question but that she has been subjected to the crime of rape, for the jury must be satisfied beyond reasonable doubt that sexual intercourse was had with her by the accused without her consent. Again, the comments of Lord Cross of Chelsea in *Morgan's case* are relevant :

'There is nothing unreasonable in the law requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act. To have intercourse with a woman who is not your wife is, even today, not generally considered to be a course of conduct which the law ought positively to encourage and it can be argued with force that it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care to ascertain

* The contrary argument, in favour of a set of statutory maxima laid down in legislation in accordance with the basic ingredients of particular crimes, or in accordance with the basic ingredients plus aggravating factors, and basic ingredients minus such factors, is that it is the responsibility of the legislature to signify to the judiciary the type of offences it (and through the Parliament, the community) considers more or less worthy of punishment. If complete discretion is granted to judges, it could be said the legislature abrogates that responsibility. (Editor's note.)

tain that she is consenting to the intercourse and be at the risk of a prosecution if he fails to take such care. So if the *Sexual Offences Act* 1956 had made it an offence to have intercourse with a woman who was not consenting to it so that the defendant could only escape liability by the application of the *Tolson* principle, I would not have thought the law unjust.' ²⁵

The *Tolson*²⁶ principle includes the proposition that the person seeking to rely on mistake must establish its existence. I contend that the requirement to establish the defence on the balance of probabilities is not an unfair burden on the accused in the circumstances.

Gender Neutrality. Some reformers, including advocates of the Michigan laws, claim present distinctions between rape and other sexual offences against women or against men are artificial and should all be dealt with by the criminal law under a general classification of 'criminal sexual conduct' or term of like import. All sexual offences at least of a non-consensual nature should be so dealt with, they say, irrespective of the sex of the offender and/or the victim, but should be graded according to whether or not penetration of or by a sexual organ has occurred and whether or not certain aggravating features such as the causing of grievous bodily or mental harm accompany the offence.

It seems logical to abolish any distinction based only upon gender of the offender and victim. One crime for indecent assault by 'any person' upon a female²⁷ and another for an indecent assault by any male person upon another male person²⁸ as under the Tasmanian Code seems to be an unnecessary proliferation. Furthermore the latter charge is presently inappropriately labelled 'indecent practice between male persons', the word 'between' importing a mutuality of purpose which is unwarranted and which thereby stigmatises the innocent victim as well as the offender. There also seems to be no reason why a woman should not be subject to the criminal process if she indecently assaults a male. As the Code presently stands, such an activity is not a crime in itself.

Whether non-consensual sodomy of a male is called an indecent assault or a rape (and the latter term would be quite acceptable in modern parlance) it is a very grave invasion of the victim's bodily and emotional integrity and of personal dignity and is a hostile degrading act of violence of no less seriousness, in many cases, than the crime of rape. There is no reason in principle why, if the general concept of rape as non-consensual sexual penetration is maintained, such a 'homosexual rape' should not be included in the same context and likewise described as rape.

Penetration as an Issue. As regards penetration, if this is to be taken as a point of delineation between named offences or grades of offence, the question seems to depend very largely on how these offences are described. That is, the issue is whether or not it is appropriate to include not only intrusions by the penis to any opening of the victim's

body but also intentional intrusions by any other part of the body of the offender, or of any object manipulated by the offender into the victim's genital or anal openings. If, as some reformers wish, this whole class of sexual activity is to be called 'rape', it seems to me to be inappropriate to suggest that an offender who penetrates a victim not by the insertion of his penis but by inserting his finger in her vagina should be found guilty of rape.* Pragmatically, I would suggest that juries would demonstrate a counter-productive resistance to any such finding. On the other hand, if the general range of non-consensual sexual crime was described as 'criminal sexual conduct', 'indecent assault', 'sexual assault' or some such term then if penetration is a line of demarcation in the grading of the offence the broader definition of penetration is likely to be more acceptable.

Gradation of the Offence. Many reformers urge first an amalgamation of existing sexual offences into one classification and second, a grading by reference to circumstances of aggravation, one such circumstance being the fact of penetration. But does this really achieve anything? To grade offences and to impose by statute different maximum penalties automatically reduces the flexibility a court should have to impose a penalty commensurate with the gravity of the circumstances of the particular case. Thus, under the amended draft Bill²⁹ advocated by the Women's Electoral Lobby and Women Against Rape the least serious offence of 'sexual assault, grade one' (or simply 'sexual assault') which consists of an unlawful sexual act not involving penetration nor causing grievous bodily or mental harm is punishable by two years' maximum imprisonment; but that could involve an assault of a very depraved kind upon a very young child and be such as to excite a sense of public outrage which the sentencer cannot and should not leave out of account.³⁰**

* But as to whether such an act need necessarily be any less damaging than an act involving a penis or an object, see *Holdsworth* (1977, unreported, *The Times*) where a woman was penetrated by the assailant's beringed fist, the assault being described by the medical practitioner as a particularly vicious one, the injuries sustained being worse than those sometimes suffered during particularly difficult child-birth. (Editor's note.)

** Two issues arise here. First, the Women's Electoral Lobby *Draft bill* was drafted with a view to covering non-consensual sexual acts involving adult persons; the question of young persons was dealt with separately in a later submission. Under this submission, the proposal was put forward that a minimum age should be selected under which any act of sexual intercourse or any sexual act involving a child under that age would automatically qualify as 'aggravated sexual assault involving penetration' or 'aggravated sexual assault'. These acts qualify for the most serious penalties. Second, it is difficult to contemplate that a sexual act carried out in the circumstances outlined would not cause 'grievous bodily or mental harm'. They would thereby qualify for the most serious penalties. It should also be noted generally in relation to penalties that those in the W.E.L. document were set with a mind to a general revision of all penalties under criminal legislation, to bring them into line with contemporary thought as to appropriate penalties for all offences, not only those involving a sexual element. (Editor's note.)

Such legislation in effect asserts that no indecent assault not possessing these particular aggravating characteristics could warrant the imposition of a greater penalty than two years' imprisonment no matter what the circumstances of the crime or of the offender.*

Notwithstanding the power to impose the same maximum sentence for rape and indecent assault, the view has been taken that the former crime is intrinsically more serious than the latter and judicial policy has resulted in the imposition of sentences of far less severity for a bad indecent assault than for a rape not containing any particularly aggravating circumstances. Does the fact that there is a distinction in the statute itself lead to this type of approach? If it does, then may not the better course be to abolish rape as such, make it but one of any number of unlawful sexual assaults and punish the conduct alleged and proved not according to any particular name-tag it is given, but according to the totality of the circumstances? What Crips J. said on an appeal against sentence for an offence of dangerous driving is, in my respectful view, equally appropriate in this context :

'The truth is that all these offences under this section of the *Traffic Act* may involve in their commission infinite questions of degree. The consequences of the criminal act are, in my opinion, relevant to the matter of punishment but they possess no priority, positively or negatively, in the totality of relevant circumstances which should be taken into account. One cannot with safety categorise generally such circumstances into grades or divisions of importance, and for myself I deprecate attempts to do so as tending to a logic that is unreal, and, because it purports to discover so-called principles or rules, improperly restrictive of the discretion which the court should apply and exercise in a given case.'¹

* Under the Women's Electoral Lobby draft Bill a crime of the type herein described would most certainly come within the terms of the more serious categories of offences, classifying as 'aggravated sexual assault, grade two' (or simply 'aggravated sexual assault') which consists in the non-consensual sexual act being accompanied by grievous bodily harm and/or grievous mental harm, or where a dangerous weapon is involved. With respect, it is difficult to understand that a crime such as that described could be classed by anyone as coming within the least serious of the offences created under the Bill. Indeed, one of the major principles underlying formulation of that reform proposal was that the legislature should indicate to the judiciary the types of crime to be classed as 'most serious' - and which should be so classed, in the mind of the community; and those which could be classed as 'least serious' - and which should be so classed, in the mind of the community. See further comments "Introduction", this volume. (Editor's note.)

The maintenance of the present clear distinction between rape and indecent assault and the relegation in effect of indecent assault to the ranks of minor crime can be due to no other factor than that of penetration. It is to be questioned whether the courts have not given to the fact of penetration a significance which it does not always deserve. That it is a factor to be taken into account is not contested, but it should not be regarded as having any priority in the totality of relevant circumstances. Its significance will vary from case to case. Why should an indecent assault upon a young woman by a bunch of louts who subject her to the indignity of inserting a bottle into her vagina be regarded as of less seriousness than her rape by one of them in complete privacy a day before or a day later? Is a manual interference with a child too young to appreciate the sexual significance of the act of penetration any less serious than the introduction of the penis 'to any the least degree' and whether or not accompanied by the emission of semen? The grading of offences by reference to the fact of penetration (however defined) can lead to a hide-bound approach improperly restrictive of the discretion which the court should apply in any given case.*

What then if the crime of rape were to be removed as a separate offence and to be treated as just another non-consensual sexual assault? The courts would be just as free to take into account the degree of violence, if any, the consequences, the significance in the circumstances of the particular complaint of assault taking the form of penetration as opposed to some other act of indecency and all other factors considered by the sentencer when dealing with any type of crime. Equally, the absence of penetration would not automatically dispose the judge to view the offence as relatively minor. Advantages arise in relation to the question of sentencing, and also in other directions.

Rape is an emotive subject. There are, it is claimed, some persons who continue to believe the myth that 'nice girls don't get raped', or who cannot visualise the neatly dressed accused in the dock as a rapist because of a preconceived picture of a rapist as some sex-crazed monster leaping out of the dark. The guilt or otherwise of a man in respect of an

* It should be noted that the criticisms made in this paragraph no longer are made in respect of the Women's Electoral Lobby draft Bill, for that proposals clearly takes into account the likelihood of penetration by way of foreign objects and or other parts of the body being equally damaging, equally harmful as penetration by way of a penis. It also takes into account the likelihood of some persons having an inability to appreciate the significance of an act of sexual penetration, whatever the means by which it is carried out. Further, the draft Bill takes into account not only penetration and other forms of sexual acts of a non-consensual nature, but accompanying aggravating factors such as grievous bodily harm, grievous mental harm and the use of a dangerous weapon in the course of the crime. (Editor's note.)

indecent assault, on a Crown case that he had intercourse with a woman without her consent is a far less emotive issue than the question whether or not he is guilty of rape. There is reason to hope that it would be presented by counsel, regarded by witnesses, considered by juries and ultimately disposed of by judges more dispassionately than is the issue of guilt in many rape trials. On the local scene, it seems that such a change would resolve problems in relation to the definition of carnal knowledge exemplified in *Richardson's case*.³²

One argument that might be raised against such an amendment is that a failure to grade sexual assaults may undermine the importance of the jury's fact finding responsibilities. Should not a jury determine the specific question whether an indecent assault took the form of penetration particularised by the Crown in the indictment or some lesser form as perhaps conceded by an accused? Primarily the jury's obligation is merely to find a verdict of guilty or not guilty of the crime charged. A verdict of guilty of indecent assault in such a case leaves the question of what form it took unresolved by them and entrusts the finding of such facts to the judge, a task to which he or she must address his or her mind in order to pass an appropriate sentence. This problem can be resolved by a vigorous use of the power of the jury when returning a general verdict to find specially upon any question submitted to them by the judge.³³

Consent and Reform. What of the question of consent and the need for reform? It is said that the Michigan legislation³⁴ and the Women's Electoral Lobby drafts³⁵ reduce the importance of the element of lack of consent and focus attention upon the acts of the accused rather than the mental attitudes of the victim or offender.³⁶ These mental attitudes are, however, at the heart of the crime today called rape and indeed are at the heart of the criminal sexual conduct proscribed by the Michigan legislation and proposed in Australian 'sexual assault' revision. Each of the indicia of unlawfulness of such conduct as set out in clause 9 of the revised draft prepared for the Women's Electoral Lobby - which provides that :

'... the unlawful nature of the sexual intercourse or the sexual act will be evidenced by but is not limited to the sexual intercourse or the sexual act occurring under one or more of the following circumstances -

- i. when the accused overcomes the victim through the actual application of physical force or violence, or by sudden attack.
- ii. when the accused coerces the victim to submit by threatening to use force, violence, or physical strength on the victim.
- iii. when the accused coerces the victim to submit by threatening to use violence on a companion of the victim.

- iv. when the accused coerces the victim to submit by threatening future punishment to the victim, or any other person.

Future punishment as used in this subsection includes threats of future physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion, or public humiliation or disgrace.

- v. when the accused, without prior knowledge or consent of the victim, administers to or has knowledge of someone else administering to the victim any intoxicating substance, drug or anaesthetic, which mentally incapacitates the victim.
- vi. when the accused by words or acts induces the victim to submit in the belief that the person undertaking the act of sexual intercourse or the sexual act is some other person.
- vii. when the accused by words or acts induces the victim to submit in the belief that the act of sexual intercourse or the sexual act is some other act.
- viii. when the accused is in a position of authority, or professional or other trust over the victim, and exploits this position to induce the victim to submit.
- ix. when the victim is physically helpless to resist, or is mentally incapacitated or emotionally incapable of understanding the nature and character of the act or its implications.
- x. when the victim submits under circumstances involving kidnapping, false imprisonment or forcible confinement or extortion.'

are but instances of the type of evidence a prosecutor must be able to adduce before expecting to establish an absence of consent. The bald assertion 'I did not consent' unaccompanied by evidence of circumstances consistent with the act yet having taken place notwithstanding the absence of that consent would never suffice. The indicia in the draft are examples of such circumstances. Thus the draft talks of 'overcoming the victim', 'coerces' or 'induces' the victim and the like. The best safeguard for the victim is a realistic definition of consent not

instanced by an extensive but not necessarily exhaustive list of examples of non-consensual situations but a generalised approach such as that of the Code :

'... a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents ...'

and not procured by force, fraud or threats.*

Immunities Against Prosecution. As to reforming immunities against prosecution for rape, the incidence or rapes by youths under 14 years of age would not seem to be so great as to warrant any change in the legislation. As to husbands, it is interesting to note that the Michigan statute still retains the husband's immunity unless the couple are living apart and one of them has filed for separate maintenance or divorce. Nonetheless, the marriage bond does not licence the infliction of violence and if the non-consensual act occurs in circumstances constituting an assault and is accompanied by an indecency, there appears to be no reason why even now a husband should not bear the consequences in terms of liability to criminal conviction.³⁷ There is no reason why the same principle should not apply to cases of rape. No doubt the precise circumstances of the relationship between the parties and of the acts allegedly constituting the offence would have to be taken into account by the sentencer if guilt is established.

Conclusion

To sum up, the following reforms are desirable :

* The Women's Electoral Lobby draft Bill was compiled specifically with the problems arising out of a generalised statement as to non-consent in mind. 'Consent' in rape has been defined broadly to include instances where many *women* would not consider the act of intercourse to be consensual, although the court has considered such intercourse to be consensual. 'Lack of consent' has been defined in restrictive terms, so that few circumstances qualify as 'non-consensual' in law. On this issue see, for example, Jocelyne A. Scutt, "The Standard of Consent in Rape" (1976) 20 *The New Zealand Law Journal* 462-467; "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 *Western Australian Law Review* 52-76; "Fraudulent Impersonation and Consent in Rape" (1976) 9 *University of Queensland Law Journal* 59-65; "Fraud and Consent in Rape : Comprehension of the Nature and Character of the Act and its Moral Implications" (1976) 18 *Criminal Law Quarterly* 312-324; and see further comments "Introduction", this volume. (Editor's note.)

1. Abolish rape as a separate offence.
2. Include rape within the offence of indecent assault - for example,

'Any person who has carnal knowledge of any other person without the consent of that person, or who unlawfully and indecently assaults any other person is guilty of a crime.

Charge ; Indecent Assault.'
3. Ensure that any defence of honest mistake as to consent should be based on reasonable grounds and let the accused establish its existence on the balance of probabilities.
4. Do not grade the new offence of indecent assault by reference to any particular aggravating circumstances (penetration included) but leave the judge full discretion in sentencing. Where appropriate let the jury find the relevant facts for sentencing purposes.
5. Define consent broadly rather than attempt to proscribe patterns of behaviour from which an absence of consent would normally be inferred.
6. Make any person who indecently assaults his/her spouse whether by conduct involving penetration or otherwise criminally liable for his/her actions.

FOOTNOTES

- 1 *Criminal Code Act 1924* (Tasmania).
- 2 [1962] Tas. S.R. 271.
- 3 [1976] A.C. 182.
- 4 *Martin* [1973] Tas. S.R. 103 and *Ingram* [1972] Tas. S.R. 250.
- 5 *Morgan's case* [1976] A.C. 182, 203.
- 6 For a definition of the various burdens of proof, see A.P. Bates, T.L. Buddin and D.J. Meure, *The System of Criminal Law - Cases and Materials in New South Wales, Victoria and South Australia* (1979, Butterworths, Sydney, New South Wales), at p. 312.
- 7 Per Lord Hailsham in *Morgan's case* [1976] A.C. 182, 214.
- 8 Per Chambers J. in *Ingram v. The Queen* [1972] Tas. S. R. 250, 262 and also *R. v. Bell* [1972] Tas. S.R. 127, 132 per Neasey J.
- 9 [1972] Tas. S.R. 127.
- 10 Per Neasey J. in *Bell's case* [1972] Tas. S.R. 127, 132.
- 11 9 Geo. IV, #31.
- 12 *R. v. Mayberry* [1973] Qld. R. 211, 229, per Hanger CJ.
- 13 [1978] Tas. S.R. 178.
- 14 [1969] S.A.S.R. 76.
- 15 [1978] Tas. S.R. 178.
- 16 *Richardson* [1978] Tas. S.R. 178, 188.
- 17 [1957] 98 C.L.R. 249.
- 18 *Papadimitropoulos v. The Queen* (1957) 98 C.L.R. 249, 261.
- 19 *R. v. Schell* [1964] Tas. S.R. 184.
- 20 *R. v. Schell* [1964] Tas. S.R. 184, 192.
- 21 Section 335 *Tasmanian Criminal Code*.
- 22 Section 389 *Tasmanian Criminal Code*.

23 [1976] A.C. 182.

24 [1962] Tas. S.R. 271.

25 *Morgan's case* [1976] A.C. 182, 203.

26 In *R. v. Tolson* (1889) 23 Q.B.D. 168, 181 Cave J. concurred with the majority that a belief on reasonable grounds that the first spouse is dead is a good defence to bigamy and stated : 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the maxim *'actus non facit reum, nisi mens sit rea'*. (a) Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. It has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication.' For an account of the effect of the decision and its relation to the later findings in *Morgan's case* see *Archbold's Pleading, Evidence and Practice in Criminal Cases* (40th edition, Stephen Mitchell, editor, 1979, Sweet & Maxwell, London), at pp. 939-940.

27 Section 127 Tasmanian *Criminal Code*.

28 Section 123 Tasmanian *Criminal Code*.

29 See Appendix II, this volume.

30 See for example *Austin v. The Queen* [1971] Tas. S.R. 277.

31 *Wise v. The Queen* [1965] Tas. S.R. 196, 202.

32 [1978] Tas. S.R. 178.

33 See section 383 Tasmanian *Criminal Code*.

34 See Deidre O'Connor, "Rape Law Reform - The Australian Experience" (1977) 1 *Criminal Law Journal* 305; (1978) 2 *Criminal Law Journal* 318.; also Virginia Blomer Nordby, "Rape Law Reform : The Michigan Experience", this volume; and Jocelyne A. Scutt, "Reforming the Law of Rape : The Michigan Example" (1976) 50 *Australian Law Journal* 615-624.

35 See Appendix II, this volume.

36 See Appendix II, this volume for the Michigan *Criminal Sexual Conduct* legislation.

37 On this issue, see Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash University Law Review* 255-277; Jocelyne A. Scutt, "To Love, Honour and Rape with Impunity : Woman as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming).

REFORM OF THE LAW OF THE AUSTRALIAN CAPITAL TERRITORY RELATING TO RAPE
AND OTHER SEXUAL OFFENCES

Arthur Watson[#]

The interest of the Commonwealth of Australia in the criminal law is two-fold. Parliament has created criminal offences designed to secure the effective operation of Commonwealth laws, of the various agencies of the Commonwealth, and for the protection of Commonwealth property. It could also have created a comprehensive code to govern crimes in all Commonwealth enclaves. That has not been the choice, however, and in the main it has been the policy to adopt or apply state laws for that purpose. The efficiency of that policy is being re-examined but, for the present at least, there is no Commonwealth law with regard to, for example, rape committed by a member of the defence force or in a service establishment.

There is, however, a further area in which laws of the Commonwealth operate. Section 122 of the Constitution gives the Commonwealth Parliament plenary power to make laws for the government of the Territories. In the Australian Capital Territory, the method of exercising that power is for one of the six ministers responsible for such matters to prepare, for the endorsement of the Governor-General in Council, Ordinances for the peace, order and good government of the Territory.¹ Subject to disallowance by either House of Parliament,² the Ordinances provide the normal legislative framework for the Territory. At first glance this would seem to provide the simplest legislative process available in any part of Australia. Appearances are, however, deceptive and the established procedures for consultation with interested bodies, approval by the Territory's House of Assembly and the susceptibility of those concerned to the activities of pressure-groups ensure that, in the Territory as elsewhere, law reform is not for the short-winded.

Current Australian Capital Territory Rape Law

As for the specific question of reform of the laws of the Australian Capital Territory so far as they relate to rape and other sexual offences, current law in the Territory is in the *Crimes Act* 1900 of New South Wales, as amended, in its application to the Australian Capital Territory, by Ordinances of the Territory. New South Wales is a common law state and adoption of its *Crimes Act* which had formerly operated in the geographical areas occupied by the A.C.T.) means that the definition of rape in the Territory is the traditional common law form, that is, intercourse by a man with a woman, who is not his wife, without consent of that woman. Growing dissatisfaction with many of the developments in this area of the law has led to a number of movements for change.

Department of the Attorney-General for Australia, Canberra, Australian Capital Territory.

History of Rape Law Reform Proposals in the Australian Capital Territory

The impetus for the present reform proposals in the Australian Capital Territory came from the *Report of the Royal Commission on Human Relationships*.³ It is salutary to note that the legislation now being considered represents the third attempt, in comparatively recent times, to effect reforms to the criminal laws of the Territory. For historical purposes, the record shows a first *Draft Criminal Code for the Australian Territories*⁴ submitted to the Attorney-General, Mr. N. H. Bowen, Q.C., as he then was, by the Law Council of Australia in February 1969. A document of almost terrifying conservatism, it was totally ignored from the moment of tabling in Parliament. Some six years later a Working Party* presented to the then Attorney-General, Mr. K. Enderby, a report⁵ on Territorial criminal law that contained a number of what I regard, still, as worthwhile reforms. Tabling of that Report caused such a furore - due mainly to deliberate misrepresentation of some of its contents⁶ - that no action was taken to implement any of its proposals. Instead the Report was referred to the Territory's House of Assembly where it disappeared in a sea of incomprehension. It has not since re-emerged.

The Royal Commission has, however, gone a good deal further in its recommendations than did earlier enquiries, particularly in regard to rape and other sexual offences.⁷ Following publication of the Report, a Working Group comprised officers from the Department of the Attorney-General, the Department of the Capital Territory, the Office of Women's Affairs, the Australian Capital Territory Health Commission and the Australian Capital Territory Police.

Ultimately the Working Party decided to support, in general terms, most of the recommendations of the Royal Commission on changes to procedural and evidentiary law and on the desirability of redefining sexual offences to remove the element of consent in the most serious cases. Officers of the Attorney-General's Department subsequently discussed the conclusions of the Working Party with the Attorney-General and for that purpose have had prepared a series of drafts of an Ordinance effecting a number of reforms in this area of the law.

Unfortunately, these discussions have not yet reached a point where it can be said that the proposed legislation has the endorsement of the Attorney-General. Moreover, as at least one of his Ministerial colleagues is to be consulted before a draft Bill is available for public scrutiny, it is not possible to put forward in detail the proposals finding expression in the draft Bill. While there are some areas in which there appears to be agreement on the proposed reforms, in others little more can be done than to indicate the present trend of thinking.

Royal Commission Recommendations taken into Consideration

In regard to proposed changes to the law in the Territory, it is pertinent to canvass in general terms those recommendations in the report of the Royal Commission that are relevant.⁸ In all, there are 57

* Mr. Watson was chairperson to the Working Party. (Editor's note.)

recommendations of this nature, many of which deal with purely administrative matters, while some reflect existing law in the Australian Capital Territory. Thus Recommendations 1 to 9 are wholly administrative in nature, being designed to secure better treatment of rape victims. Recommendations 10 to 13 relate to the receipt of medical evidence and victim evidence in writing. The law of the Territory makes provision for written statements to be admitted as evidence in committal proceedings, but only with the consent of the defendant. It is probably unrealistic to expect any change to the requirement for the consent of the defendant. In England and in four Australian jurisdictions⁹ provision is made for committal proceedings to be conducted entirely 'on the papers'; that is, all evidence is tendered in the form of written statements. However, in each case, the consent of the defendant is required before that procedure can be employed.

Recommendation 14 relates to a court being closed when the victim gives evidence. The *Court of Petty Sessions Ordinance* gives a magistrate hearing committal proceedings a general power to exclude persons from the court in the interests of justice.

On the matter of publication, Recommendations 24 and 25 of the Commission report stated that publication of any material identifying the victim of a sexual offence should be prohibited and courts should have a discretion to prohibit publication of any evidence in a trial or committal proceedings for a sexual offence. Section 83 of the *Evidence Ordinance* of the Territory provides that where it appears to a court that publication of evidence is likely to prejudice the administration of justice, or it is desirable that the name of a party to or a witness in such a proceeding be not published, the court may make an order forbidding the publishing of evidence or of the name of a party or a witness.

Where a court makes such an order it may also order that persons specified or all persons except persons so specified shall remain outside the courtroom for such period as the court specifies. These provisions apply both to proceedings in the Court of Petty Sessions and to those in the Supreme Court.

The Commission's Recommendation 39 that the age of consent to sexual intercourse between school teacher and pupil be 17 years represents present Territorial law.

Recommendation 23 relates to the composition of juries. The *Juries Ordinance* was amended in 1979 to remove the provision allowing women to claim complete exemption from jury service. Further amendment was not considered desirable. (When Crown Prosecutor it was my observation that women were well-represented on Australian Capital Territory juries long before the Ordinance was amended, and that position still obtains.)

Recommendation 26 concerns the establishment of a scheme for criminal injuries compensation. This matter has been under consideration, and in October 1979 the Attorney-General announced that such a

scheme would be set up. The Australian Law Reform Commission recently presented a report¹⁰ dealing, amongst other matters, with this same subject, but not in quite the same way.

Present law accords with Recommendation 40 that sexual intercourse with a child under 10 years should be equivalent to the most serious rape offence.

Reform of the Substantive Law in the Australian Capital Territory

The most important recommendations in the Royal Commission report concern reform of the laws of evidence¹¹ and reform of the substantive law¹² relating to sexual offences. The Working Party agreed that the present definition of sexual offences is unsatisfactory. In general terms, it accepted the view of the Royal Commission that where offences involve the use of violence, threats, false pretences or drugs, consent should be irrelevant, and there should be no distinction, so far as penalty was concerned, between cases where penetration was effected and where it was attempted. Since reaching the latter conclusion other reasons have emerged to confirm the desirability of adopting that course. Further, it was agreed that the law should no longer continue to draw a distinction between sexual penetration of a male and that of a female. It also accepted there should be a range of offences to reflect the severity of the harm caused in different circumstances.

The Attorney-General has approved those parts of the draft Bill giving effect to those changes. With regard to the substantive offences, thinking proceeds along the following lines :

1. The most serious offence occurs where a person inflicts bodily injury upon another person and effects, or attempts to effect, sexual penetration of that person; and the offence should be punishable by imprisonment for life.#
2. A person who inflicts bodily injury on another person with intent to effect sexual penetration of that person or of any person commits an offence punishable by imprisonment for 14 years.#
3. A person who uses, attempts to use or threatens to use any firearm or offensive weapon or instrument, or threatens injury to any person or property, or otherwise assaults any person with intent to effect sexual penetration of any person commits an offence punishable by imprisonment for 10 years.

To emphasise that violence is the key ingredient of these offences, provision should be made that the alternative counts that may be added in indictments are to be for assault occasioning grievous bodily harm or actual bodily harm, instead of indecent assault as under the present law.

4. A person who effects, or attempts to effect, sexual penetration of another person who is unconscious is guilty of an offence punishable, on conviction, by imprisonment for 10 years.
5. A person who effects sexual penetration of another person having induced that person to permit that sexual penetration by means of -
 - a. a deceit or a false pretence;
 - b. the administration of liquor or a drug;
 - c. the impersonation of a woman's husband,
 is guilty of an offence punishable, on conviction, by imprisonment for seven years.

Consistent with the recommendations of the Royal Commission, consent of the victim should not be a defence to any of the above offences.

There should also be a less serious offence of 'merely' effecting sexual penetration of another person without that person's consent. The penalty should be imprisonment for five years unless two or more people act together in committing the offence, in which case the penalty is imprisonment for 14 years.

Provision is also to be made for the following, which were the subject of recommendations by the Royal Commission :

1. Replacement of the term 'sexual intercourse' by the expression 'sexual penetration', in substantially like terms as in Recommendation 29.
2. Limitation of the 'defence' of marital consent to cases where the spouses (whether legal or *de facto*) are living together.
3. The presumption that boys under 14 are incapable of intercourse is abolished.

Two subjects have not been addressed. It was an early government decision that there is to be no change in the law of the Territory relating to incest. Further, the Attorney-General has reserved, for the present, any decision on the 'age of consent'.

Comparison of the Proposals with the Michigan Sexual Assault Law¹³

The Australian Capital Territory proposals have a sexual neutral application, as have the Michigan reforms. Further, there is provision for a scale of offences and penalties.*

No reform is necessary in the Australian Capital Territory to remove the element of force, as the common law has long drawn a distinction between consent and submission.** Further, it is present law that it is an offence to induce a woman to have sexual intercourse by a false pretence or false representation, by the use of an intoxicating drug or by impersonation of the woman's husband. These specific categories are extended in the Australian Capital Territory proposals to include sexual penetration of an unconscious person.***

As for consent, in respect of the Michigan law it has been said :

'When the victim is threatened with a dangerous weapon, or is beaten, robbed or kidnapped, the possibility of her willingly consenting to sexual intercourse is so unlikely that it ought only be raised as an alternative theory for the defence rather than have to be shown from the outset. This is the approach of the new Michigan law. Consent is an alternative theory raised to rebut the charge of force or coercion.' ¹⁴

The Territory-proposals go further. In such cases, the 'consent' of the victim to sexual penetration is no defence at all.****

In relation to marital rape, an often cited rule is that no husband can be prosecuted for rape of his wife. The Michigan reform modified the common law 'rule' only in those situations where two certain

* But note that the scale of offences and penalties differs markedly from those under the Michigan scheme - see Virginia Blomer Nordby, "Reforming Rape Laws - The Michigan Experience", this volume. (Editor's note.)

** But note an analysis of present Australian law that points out the confusion in this area, 'resistance' in fact being required in numerous instances. See Jocelyne A. Scutt, "The Standard of Consent in Rape" (1976) *New Zealand Law Journal* 462; "Consent Versus Submission: Threats and the Element of Fear in Rape" (1977) 13 *Western Australian Law Review* 52; see also comments "Introduction", this volume. (Editor's note.)

*** It can be questioned why impersonation should be limited to a woman's husband rather than it being recognised that impersonation of any person to whom the woman would have freely consented - e.g. fiancée, lover, de facto spouse - renders 'consent' void. On this issue, see Jocelyne A. Scutt, "Fraudulent Impersonation and Consent in Rape" (1976) 9 *University of Queensland Law Journal* 59; also comments "Introduction", this volume. (Editor's note.)

**** See comments "Introduction", this volume. (Editor's note.)

and provable events have occurred - first, that the couple be living apart; and second, that one of them has filed for legal separation or divorce. As has been said of the Michigan approach to rape in marriage :

'This protects marital privacy when the marriage is still viable and ongoing, but also protects a large and seriously victimised group of women presently ignored by the law, those in the process of obtaining a divorce.'¹⁵

The Australian Capital Territory proposals take the matter further; thus the 'defence' of marital consent is limited to cases where the spouses (whether legal or *de facto*) are living together.

The inclusion of *de facto* spouses in the marital immunity provisions has brought a mixed reaction. One view expressed is that it takes away the protection afforded by the law to women living in *de facto* relationships.¹⁶ Other women at the Hobart Conference on Rape Law Reform, spoken to informally, saw it being consistent with the law's increasing recognition of *de facto* relationships.*

In the plenary session of the National Conference, delegates approved six motions calling for reform of the substantive law of rape. Five of these reforms find expression in the proposed amendments to the Australian Capital Territory laws. These are :

1. A scale of offences and penalties.
2. Consent is no defence when grievous bodily harm is inflicted.
3. A broadened definition of sexual intercourse should be adopted.
4. The law should be gender-neutral.
5. Boys aged under 14 years should not be immune from prosecution for rape.

The sixth motion called for the abolition of husband immunity from prosecution for rape. As mentioned earlier, the proposed Australian Capital Territory reform does not remove the immunity; it does, however, restrict it.

* Several points arise from this matter. It should be noted that from discussions in the workshops at the National Conference on Rape Law Reform in Hobart, 28-30th May, 96% of participants agreed to the abolition of spousal immunity from prosecution for rape as fundamental to rape law reform; in the plenary session only four persons voted against the motion of abolition. The conference had approximately 200 registered delegates, with well over 150 - approximately 170 - remaining for the plenary session. See other comments "Introduction", this volume. (Editor's note.)

Reform of Evidence Laws in the Australian Capital Territory

Turning to laws of evidence, the most important recommendations of the Commission concern cross-examination of the victim as to prior sexual behaviour¹⁷ and the requirements of complaint and corroboration of the victim's evidence.¹⁸

Legislation restricting cross-examination of the victim or prior sexual behaviour is already in force in South Australia, Victoria, Western Australia and Tasmania.¹⁹ It seems inevitable that this reform will be generally accepted in the near future.

So far as concerns the Australian Capital Territory in this regard, however, two special factors affect both the likelihood and the method of this reform's being effected. First, the Australian Law Reform Commission currently has before it a reference on the laws of evidence applicable to proceedings in federal and territory courts.²⁰ Rather than adopt a piecemeal approach to amending the laws of evidence, it would be proper to await report from the Commission, so to effect in one piece of legislation whatever changes are required.

The second factor flows from the disallowance by the Senate, in 1971, of the *Evidence Ordinance* of the Australian Capital Territory. The Senate had failed to note, and was not informed, that the evidentiary provisions relating to criminal trials had been repealed by a separate but contemporaneous Ordinance. As disallowance merely revived the laws repealed by the *Evidence Ordinance* the Territory was left for some time with no statutory provisions relating to criminal matters and there was some understandable uncertainty as to what the relevant common law principles were. In consequence no criminal trials could be held until some expedient was adopted. The expedient which satisfied the Senators responsible for disallowance, whose principal concern was said to be over such a major subject as evidence being dealt with by subordinate legislation, was to pass an Act of Parliament - *The Australian Capital Territory Evidence (Temporary Provisions) Act 1971* - providing that the provisions of the *Evidence Ordinance* should, notwithstanding disallowance by the Senate, continue in force until 31st May 1972. In 1972 the operation of the Act was extended for a further year but in 1973 the inventor of the expedient, by now Attorney-General, ended the farce by repealing the 'temporary' provisions.

The result is that the Australian Capital Territory now has an Act, not an Ordinance, governing the law of evidence. The Act cannot be amended by Ordinance nor, in the view of the Senate Committee on Regulations and Ordinances (whose duty it is to scrutinise all subordinate legislation laid before Parliament) should such a major topic be dealt with by Ordinance in any event.

While logically supportable, this view leads to considerable difficulty in the Australian Capital Territory which, alone of the substantial Territories, has no popular assembly with legislative powers. Space must be found in the Parliamentary programme for legislation relating to evidence. The practical difficulty of doing this may be illus-

trated in the simplest way. In 1971 when the Senate first made this approach necessary, the annual volume of Acts was an unusually large 1120 pages. It has never been so small since. The last bound volume from 1978 comprises 1859 pages of legislation. In my own experience the task of obtaining sufficient priority for new legislation to be introduced is by no means easy, even when the legislation has substantial Australia-wide significance. For an Act that would relate solely to one Territory there would be a substantial increase in the degree of difficulty.

Unfortunately, it seems equally unlikely that the present Senate Committee on Regulations and Ordinances can be persuaded to modify its attitude to the range of matters that can be covered by Ordinances. If this assumption is wrong (and I propose to continue working to so prove myself wrong), there would remain a need for a short Act repealing the existing *Temporary Provisions Act*, but this would be a comparatively simple exercise.

Accordingly, no matter which course is adopted, moves to reform this area of the law will be bound to encounter difficulties. There is, however, no reason why life should be easier for law reformers than it is for other people.

FOOTNOTES

- ¹ See section 12 *Seat of Government (Administration) Act* 1910 (Cwth).
- ² The procedures of which are detailed in section 12 *Seat of Government (Administration) Act* 1910 (Cwth).
- ³ Royal Commission on Human Relationships, *Final Report* (1977, Australian Government Printing Service, Canberra, A.C.T.).
- ⁴ Law Council of Australia, *Draft Criminal Code for the Australian Territories* (submitted to the Attorney-General (the Hon. N.A. Bowen, Q.C., M.P.) by the Law Council of Australia together with Commentary by the Council's Co-ordinating Committee). (February 1969, Government Printing Service, Canberra, A.C.T.)
- ⁵ *Report of the Working Party on a Criminal Code for the Territories* (1975, Australian Government Printing Service, Canberra, A.C.T.).
- ⁶ It is interesting to note that the furore in relation to this Report parallels that relating to the Report of the Royal Commission on Human Relationships. The objection related to the deletion of the specific crime of incest from the statute books, a recommendation made in view of the fact that crimes of an exploitative nature amounting to incest - rape, carnal knowledge of minors, and the like, would be dealt with under the standard heads of criminal law; thus crimes relating to incest would be superfluous. The media took up the criticisms, putting the view that incest was to be 'legalised' if the Report's recommendations were accepted.
- ⁷ These recommendations are dealt with in Part VII of the Royal Commission's Report.
- ⁸ See recommendations 1-57, Royal Commission on Human Relationships, *Final Report* vo. 5, pp. 232-236.
- ⁹ See outline in Department of the Attorney-General and of Justice, New South Wales, Criminal Law Review Division, *Supplement to Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.).
- ¹⁰ See Australian Law Reform Commission, *Discussion Paper No. 10 - Options for Sentencing* (1979, Australian Government Printing Service, Canberra, A.C.T.); also Australian Law Reform Commission, *Sentencing - Interim Report* (1980, Australian Government Printing Service, Canberra, A.C.T.).
- ¹¹ Recommendation Nos. 15-22.
- ¹² Recommendation Nos. 27-38, 55-57.

- 13 See Virginia Blomer Nordby, "Reform of Rape Laws : The Michigan Example", this volume; also Michigan *Criminal Sexual Conduct* legislation, Appendix II, this volume.
- 14 Virginia Blomer Nordby, *op. cit.*
- 15 *Ibid.*
- 16 Comment by Dr. Jocelyne A. Scutt at the Hobart Conference on Rape Law Reform, 28-30 May 1980.
- 17 Recommendation Nos. 15-20.
- 18 Recommendation Nos. 21, 22.
- 19 See Attorney-General and Justice Department of New South Wales, Criminal Law Review Division, *op. cit.*
- 20 Reference handed to Australian Law Reform Commission on 18 July 1979.

RAPE IN MARRIAGE AND THE SOUTH AUSTRALIAN LAW

Peter A. Sallmann[#]

Each Australian state should legislate to completely remove the immunity from prosecution of a husband for the rape of his wife. This view is taken as a result of a study of the South Australian rape-in-marriage legislation and some of the literature on the subject.¹

During the 1970s all Australian states undertook an analysis of their laws relating to rape and other sexual offences²; most states introduced reforms.³ For the most part these 'reforms' dealt with the procedural and administrative aspects of the processing of rape and other sexual offence complaints. Some states, of which South Australia was one, tackled the substance of the law. In examining the nature and scope of the substantive law of rape one runs headlong into the traditional common law position, of some centuries standing, that husbands cannot be guilty of raping their wives except as accessories in relation to a principal offender or offenders.

Since the Second World War a number of English court decisions have eroded the common law position. The general thrust of these decisions has been the removal of the immunity from prosecution of husbands in cases where court orders such as decrees nisi for divorce, separation arrangements and injunctions are in force in respect to the marriage. Overall these decisions have been characterised by a strong spirit of caution and conservatism.

The South Australian Approach

In 1975 the South Australian government gave a special brief to the Penal Methods Reform Committee (the Mitchell Committee) to report on the law relating to rape and other sexual offences.⁴ The committee examined the state of the law and on the question of the rape-in-marriage immunity commented:

'The view that the consent to sexual intercourse given upon marriage cannot be revoked during the subsistence of the marriage is not in accord with modern thinking. In this community today it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it irrespective of her own wishes. Nevertheless it is only in exceptional circumstances that the criminal law should invade the bedroom. To allow a prosecution for rape by a

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husband upon his wife with whom he is cohabiting might put a dangerous weapon into the hands of the vindictive wife and an additional strain upon the matrimonial relationship. The wife who is subjected to force in the husband's pursuit of sexual intercourse needs, in the first instance, the protection of the family law to enable her to leave her husband and live in peace apart from him, and not the protection of the criminal law. If she has already left him and is living apart from him and not under the same roof when he forces her to have sexual intercourse with him without her consent, then we can see no reason why he should not be liable to prosecution for rape.'⁵

This was the reasoning which lead the Mitchell Committee to recommend that a husband should be indictable:

'... for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof notwithstanding that it was committed during the marriage.'⁶

The South Australian Labor government of the day rejected the advice of the Mitchell Committee as regards marital rape. The then Attorney-General, Mr. Peter Duncan, introduced legislation in October 1976 which completely removed the immunity from prosecution of a husband for the rape of his wife and thus flew in the face of the Mitchell Committee recommendation.

After a particularly tortuous passage through Parliament, during which the Bill was subjected to various amendments, a very different version of rape-in-marriage from that intended by the original Bill emerged - a concept of rape-in-marriage which, although in some respects an improvement on the previous law, contains a number of regressive elements and considerable interpretative problems.⁷ In effect the South Australian legislation establishes a new concept of 'aggravated rape' within marriage but falls well short of simply applying the normal law of rape to the marriage situation. It means that the so-called 'worst cases' of rape-in-marriage, those involving violence, threats of violence, acts of gross indecency and the like, are now within the scope of the law of rape. There is no necessity that the acts in question take place while the husband and wife are living apart.⁸

The South Australian legislation, containing as it does so many provisos and qualifiers, is full of interpretative snags which will cause the courts great problems when, and if, more cases come to light. More importantly, the law in South Australia still contains the anomalous and anachronistic notion that married women are in a different position from non-married women in terms of consent to, or refusal of, sexual intercourse. (The question of de facto relationships, of course, simply

adds bite to the anomaly.)

Conclusions Arising Out of the South Australian Experience

It was a study of the background to, and impact of, the South Australian legislation which resulted in the following general conclusions.

Criminal Law As No 'Solution'. The criminal law should not be seen as any kind of 'solution' to the problem of severe instances of unacceptable behaviour in the community. It has always been said that the criminal law should only be used as a last resort in dealing with human behaviour. In our sort of society the kinds of behaviour which fall into this 'last resort' category have traditionally been defined by the criminal law.

It is fair to say that the 'last resort' criterion has never been taken very seriously. The current calendar of types of behaviour covered by the criminal law is immensely varied. It ranges from conduct such as murder, robbery, rape and serious assaults, which have always been regarded seriously, to all sorts of trivial offences of a regulatory nature which carry criminal penalties and are dealt with by the criminal mode of trial and process.

Even in regard to the most serious forms of criminal behaviour, however, there have long been debates, and probably always will be, about what it is sought to achieve by applying to them the criminal law and the machinery of criminal justice. There are, of course, many arguments and many points of view. Some see the criminal justice system as a mechanism for exacting retribution and revenge upon a wrong-doer. Some see it as a means of incapacitating offenders through long terms of imprisonment, so that they cannot repeat their misdeeds, at least in the outside community, for the duration of their stay in prison. Yet another group see the primary purpose of the criminal law and criminal justice system as being that of making denunciatory, moral, symbolic and educative statements about the nature of right and wrong conduct.

By far the predominant school of thought, however, is that the law should be used to 'control' unacceptable behaviour. This may mean a variety of things to many different people. To some it means holding the level of criminal activity at some prescribed point. To others it means engaging upon a campaign to remove criminal activity altogether - the 'war on crime' syndrome.

Some people quite legitimately adopt a combination of the various ingredients so that their ideal criminal justice system seeks to serve quite a variety of purposes. The problem with the eclecticism of this approach is that of reaching some sort of agreement on the proportions of the ingredients to include in the final mixture.

The point arising from this debate is that increasingly in recent years criminologists and sociologists of law have come to agree that the criminal law and the criminal justice system are very ineffective in controlling the rates of crime and influencing basic patterns

of behaviour. It seems generally agreed, and not without a good deal of commonsense, that home, parents, siblings, peer groups, school, church, community, social, environmental, economic and political factors are far more important determinants of the levels of types of criminal behaviour in the community at any one time than the law and the justice system. The criminal law is simply an inadequate mechanism for controlling behaviour in a highly complex, urbanised, multi-cultural society such as ours.

As far as behaviour such as rape-in-marriage is concerned this point has great poignancy because there also seems to be some level of consensus about the idea that the criminal law is least effective as a 'deterrent' or 'controller' in those fields of human activity involving passions and close human relationships. (Domestic homicides are possibly the best examples of this.)

The idea of deterrence theory has certainly not been defeated but the modern version is a relatively modest one which suggests that the law and the criminal justice system may work to 'control' some sorts of crime in the cases of some people, in some circumstances at some particular times. It is generally agreed that situations of the rape-in-marriage type probably lie outside the likely effective area of operation of deterrence theory.

The importance of this is simply that if the proponents of removal of the marital rape immunity are arguing their case on the basis that applying the full force of the law to husbands will reduce the level of the incidence of rape-in-marriage then their efforts may be misguided.

Supports for Removal of Immunity. There are clearly strong reasons for lifting the immunity of husbands from prosecution *other than* the hope that in doing so there will immediately occur a drop in the level of rape-in-marriage situations. In quite a crude and simple sense it would allow the punishment of husbands who got caught. Such punishment need not be administered with a view to persuading that particular husband not to do it again nor with a view to attempting to convince husbands generally that they ought not to do it. It would simply be done as retribution for a reprehensible piece of behaviour.

More important is that the lifting of the immunity would remove the anomaly contained in the ridiculous proposition that marriage denotes an undertaking by a wife to consent on all occasions to sexual intercourse with her husband. Although the law has been modified in this century the basic immunity still stands in nearly every common law jurisdiction in some form or other and the only way to 'clear the air' is to remove it altogether. This would have the very important effect of establishing some vital principles about the status of married women in our society. It would give them the autonomy, independence and freedom which modern day social conditions demand that they should have. There is a significant long-term symbolic and educative role which the law can play in this area. Perhaps such a process may even result, in the long-term, in the lowering of the incidence of the behaviour. As one of the respondents in our South Australian study said, in referring to the rape-in-marriage legislation:

'I think it's a bit like the *Sex Discrimination Act*. I see the *Sex Discrimination Act* in South Australia as being more a statement of government policy on what the population should be thinking, rather than as an effective measure for controlling sex discrimination. And I think the rape-in-marriage legislation is the same thing. I think that it is a statement of the Government's about the way in which we should regard women - I don't know that it was ever anticipated that it would be anything other than consciousness raising for the next two or three years.'⁹

Symbolism and moral education will not always provide a sound basis for criminalising behaviour. In the case of rape-in-marriage it does seem an appropriate criterion to apply. As one recent commentator on the Canadian scene has remarked:

'Change, whether it be legal change or, on a broader scale, social change, does not come in tidy, pre-measured instant packages which solve all problems simultaneously and provide easy answers and smooth roads. Therefore the preferred order of priorities, at least within the law reform context, should be, first to change the law so that it reflects the principle and value of equality in marriage, then to observe the law in operation and determine what, if any, further changes are necessary.'¹⁰

'*Rape*' as *Sexual Assault*. A tentative proviso must be placed upon the recommendation that all Australian jurisdictions should introduce legislation to provide that marriage should no longer be a bar to prosecution of a husband for rape.

Ideally there should be no need to be examining what to do about the law in respect to rape within marriage. There would be no need to do so if we no longer had an offence of 'rape' as such but restructured that whole area of the law so that what is now 'rape' would simply be dealt with as an offence of assault. The fact that rape itself has always been singled out by the law as a discrete and peculiar offence has by definition led to many conceptual and practical difficulties of which rape-in-marriage is merely one.

What I suggest, therefore, is that every Australian jurisdiction should conduct an intense and exhaustive examination of the nature and scope of what is meant by 'rape'. Such an examination would automatically need to take place with a view to including the whole problem within a restructured concept of assault. If necessary, of course, within a new law of 'assault' what was formerly 'rape' could itself be graded in accordance with different levels of seriousness.

Unfortunately, this type of examination is most unlikely to occur. Strong pressures for reform of rape laws in Australia began to emerge in the 1960s and culminated in a varied series of piece-meal

reforms during the 1970s. The momentum now appears to have subsided. Politicians are now in a more comfortable position, from which they can point to those reforms which have been carried out, as an argument against the need for more, especially if 'more' involves radical reappraisals of basic conceptual categories.

Whether or not such fundamental inquiries are conducted in no way diminishes the power of the arguments for the removal of the husband immunity. There is no real practical possibility of re-doing the whole reform effort and that being the case it seems that for quite some considerable time to come courts will be dealing with the traditional offence of rape. That being the case notions of equality and fairness within marriage and simple social justice generally demand that the immunity be removed.

In saying this the impression should not be conveyed that the concept of rape-in-marriage is straightforward. Further complexities and arguments against removal of the immunity need to be examined carefully. One major argument (relied upon by the Mitchell Committee in South Australia) can, however, be dealt with here. That is the argument that 'vindictive wives' would use the law against innocent and unsuspecting husbands. The history of events in South Australia since the passage of its legislation tends very much to give the lie to this argument. In three and a half years two trials involving marital rape have taken place. This is hardly a spate of cases, whether brought by vindictive or non-vindictive wives.

Simple Removal of Immunity. The fourth major point can be succinctly stated. Apart from questions of substance it is far simpler to remove the immunity altogether than attempt to partially remove it by hedging the main provision about with various qualifications and conditions such as in South Australia. The South Australian provision is complex and unwieldy in the extreme.¹¹ It has probably survived only because of the paucity of cases which have arisen to test it.

During the South Australian research study the then Chief Crown Prosecutor was asked what he thought of the drafting of the rape-in-marriage provision. He replied:

'It is so wide and so nebulous that ... I am sure it will cause the courts considerable concern as the years go on.'¹²

As far as substantive issues are concerned, if a government finds itself in a position where it truly considers it cannot remove the immunity altogether or is forced by pressures of politics to reach a compromise position, then the South Australian legislation should be scrutinised extremely carefully to avoid making the same mistakes.

Conclusion

The final point to be made comes full circle to the first point. The problem of rape-in-marriage is clearly the tip of a far larger problem which is that of domestic assault generally. Any

'assault' on rape-in-marriage must proceed by examining the issue in the context of this much broader dimension. This simply adds to and complicates the point earlier made as to the ineffectiveness of the law in controlling these sorts of behaviour. This is not to say that the criminal law should not apply. It should. Many of these situations are deserving of the application of punishments. What needs to be said is that 'solutions' to the massive and important problems of domestic assault generally and rape-in-marriage specifically must be sought for the most part outside the immediate province of the law in the general social, economic and political conditions of our time.*

* For a commentary upon and analysis of the passage of the South Australian legislation relating to rape in marriage, see Carol Treloar, "The Politics of Rape - A Politician's Perspective", this volume. For general comments on the issue of rape in marriage, see Helen Coonan, "Rape Law Reform - Proposals for Reforming the Substantive Law", this volume. (Editor's note.)

FOOTNOTES

- 1 This particular study was carried out by the writer with Professor Duncan Chappell of Simon Fraser University in Vancouver, Canada, in the first half of 1978 when he was at La Trobe University, Victoria. The study was made possible by a grant from the Australian Criminology Research Council. (A full report of the research study is imminent.) For a previous note in relation to the findings of the research study, see Duncan Chappell, "Rape in Marriage - The South Australian Experience" in *Violence in the Family* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology, Canberra, A.C.T.) 137-144. For other references, see this paper.
- 2 For an overview of these reforms in Australia see Deidre O'Connor, "Rape Law Reform - The Australian Experience", Parts I and II (1977) 1 *Criminal Law Journal* 305 and (1978) 2 *Criminal Law Journal* 115.
- 3 See outline of reforms in Department of Attorney-General and of Justice of New South Wales, Criminal Law Review Division, *Supplement to Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, New South Wales).
- 4 See Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report - Rape and Other Sexual Offences* (1976, Government Printer, Adelaide, South Australia).
- 5 *Ibid.*
- 6 *Ibid.*
- 7 For a penetrating analysis of the interpretative problems posed by the South Australian section see Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash Law Review* 255-277.
- 8 Section 73 *Criminal Law Consolidation Act 1935-1976* (South Australia).
- 9 Interview with Judy McPhee, an Adelaide lawyer interviewed during the research study into rape in marriage in South Australia after 'reform' of the law.
- 10 Joanna McFayden, "Inter-spousal rape : The need for Law Reform" in J. Eeckelaar and Leslie Katz, *Family Violence : An International and Interdisciplinary Study* (1978, Butterworth, Sydney, N.S.W.), at p. 196.
- 11 See Jocelyne A. Scutt, *op. cit.*
- 12 Interview in Adelaide, June 1978, conducted in relation to the study undertaken by the writer and Professor Duncan Chappell.

THE LAW OF EVIDENCE

'A perusal of depositions and, it must be acknowledged, of the transcripts of actual jury trials, has revealed cases where the court insufficiently addressed itself to the test of relevance, and to its responsibility to exercise the powers, and to discharge the duty, conferred and imposed by ... the *Evidence Act* ...

Wells J. in *R. v. Gunning; ex parte Stephenson*
(1977) 17 S.A.S.R. 165, 179

'With most of what Wells J. has said about the pre-existing law, ... and the unfortunate failure in the past to make use of such provisions as [contained in the] *Evidence Act*, some of the responsibility must be borne by the courts, I entirely agree ... I find it hard to believe that any reasonable person at the present time could assent to any of the following absurd propositions -

1. That a willingness to have sexual intercourse outside marriage with someone is equivalent to [a willingness to] have sexual intercourse outside marriage with anyone.
2. That the unchaste are also liable to be untruthful.
3. That a woman who has had sexual intercourse outside marriage is a fallen woman and deserves any sexual fate that comes her way.

Yet it is all too likely that a covert appeal, if not to the affirmative of those propositions, at least to the attitude that underlies them, has been made in the past by means of cross-examination as to credit ..."

Bray CJ. in *R. v. Gunn; ex parte Stephenson*
(1977) 17 S.A.S.R. 165, 167-168

'[In introducing the new evidentiary provisions in South Australia] Parliament had to consider three problems : First, the Courts tolerated almost unlimited ferreting into the girl's past and attack on her character by direct question, by innuendo, and regrettably sometimes by smear. I agree with Wells J. that active and vigilant use of ... the *Evidence Act* 1929 would have been quite sufficient to stop this pernicious process. However, it is equally well-known to all of us who have practised in these Courts that that did not happen. Secondly, admitted prior unchastity by the girl was frequently treated by the jury as having a bearing on her veracity. The absurdity of that has been exposed by the Chief Justice in his judgment, but the problem was a real one notwithstanding the unreasonableness of the assumption. Similarly it appeared to be accepted, sometimes at least by juries, that because the girl had had intercourse with one male, usually her boyfriend, she could be treated as fair game by any lout who by force or fear or both compelled her to submit to his will. The third problem was one which has been referred to in a number of publications in this area, and which I have observed for myself when watching women members of a jury, and that is that quite a number of women jurors will not convict for rape when the woman admits she is not a virgin, on the basis that if the girl puts so little value on her chastity why should we the jurors by our verdict cause a boy to be sent to gaol for violating it. Again this is not logical, but it is a fact of life which has been attested to in a number of jurisdictions.'

Zelling J. in *R. v. Gunn; ex parte Stephenson*
(1977) 17 S.A.S.R. 165, 173-174

EVIDENCE AND THE ROLE OF THE JURY IN TRIALS FOR RAPE

Jocelynn A. Scutt[#]

'In July 1979, Justice Jones said that "... imprudent behaviour of many young women did not excuse offences committed on them, but lessened the moral culpability of the offender." He said there were "... too many young women hitching lifts and accepting rides with cars full of young men" they did not know. They fraternised and drank with men they did not know, in bars, and did their best to bring disaster on themselves. "These foolish young women should behave with more dignity and show some elementary prudence ..."

Statements by Mr. Justice Jones
published by Australian Women Against Rape (1979)

'Judges [have] warned women "time and time again" against hitchhiking or accepting lifts with strangers ... such behaviour all too often [leads] to sex attacks ...'

Begg J. in Central Criminal Court
New South Wales (1979)¹

'At this point in the testimony the woman asked ... defense [counsel], "Am I on trial? ... It is embarrassing and personal to admit these things to all these people ... I did not commit a crime. I am a human being." The lawyer, true to the chivalry of his class, apologised and immediately resumed questioning her ...

The jury, divided in favor of acquittal ten to two, asked the court stenographer to read the woman's testimony back to them. After this reading, the Superior Court acquitted the defendant of both charges of rape and kidnapping.'

Susan Griffen (1979)²

That the law has taken a puritanical and prudish attitude toward sexual offences cannot be denied. Although non-consensual sexual acts are

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simply assaults, the law has chosen to group them apart from the usual run of assault crimes, placing them in a separate category of offences. As for 'unnatural offences', the coyness of courts and legislatures in dealing with them is notable for the lack of fundamental fairness there displayed : potential defendants are not notified in advance of the types of acts that will bring them into conflict with the criminal law. Thus in upholding a conviction for fellatio under the sodomy provision, one court stated :

'The manner of committing the offense being too indecent to be set forth in the indictment itself, we are at a loss to perceive how it could be consistently incorporated in a bill of particulars ... [T]he principal grounds upon which the indictment [is] held sufficient [despite the lack of any outline of acts upon which the charge is based] ... is, the fact that such a crime cannot be described without shocking the moral sensibilities ...'³

In similar vein in *R. v. Hornby and Peaple*⁴ a conviction for 'gross indecency' was upheld despite the lack of clarity as to what the charge entails. The court considered that in such 'class of case' it was 'understandable' that the '... feelings of the jury and other people in court' should be so regarded by chair or judge as to '... warrant passing over the details of the evidence ...' This failure to state prohibited acts finds its forerunner in early criminal law treatises, as where *Blackstone* was cited with approval in *Kelly v. People*⁵ :

'I will not act so disagreeable a part to my readers, as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It will be more eligible to imitate the delicacy of our English law, which treats it, in its very indictments, as a crime not to be named ...'⁶

That courts fail to put before juries the full details of evidence to assist them in a determination of guilt or innocence is salutary, for it is difficult to conceive of a jury being equipped to judge without being fully apprised of all relevant facts. The solicitousness of the law for the 'better feelings' of the jury seems to arise from the belief that somehow, in matters involving allegations of unlawful sexual acts, juries are incapable of undertaking the set task : that of viewing the relevant evidence and making a decision based upon that evidence.

However it is interesting to observe what is a disparity in the treatment of sexual cases other than rape, and that of the rape case. Unlike the unnatural offence example, where evidence of vital importance to the charge is likely to be kept away from the jury, in the rape case the method adopted by courts is to present to the jury facts that may well be irrelevant to the issue. Cases may be found where statements are admitted alleging that the woman was a prostitute years before the crime

charged; that she has borne illegitimate children, and so on. Here, information as to the sexual activity of the victim of the offence, not of the accused, is admitted to 'assist' the jury. The rationale is that juries may be upset by rape cases so as not to be able to take a balanced view. Information as to sexual activity of the victim is 'necessary' to offset the repugnance juries will 'inevitably' feel toward the party who is charged with the offence.

Although the approach in the rape case is distinguishable from that of the 'unnatural offence' instance where evidence as to the crime itself is excluded, it can yet be seen that there is a certain similarity. The rules appear to be grounded in the belief that somehow, in sexual matters the jury is incapable of performing without being governed by special rules including or excluding evidence. Yet this approach surely brings the jury system into disapprobation: if the jury is not fully competent, without special rules and warnings, in sexual cases, is it competent in other cases? Rather than hedge the jury about with mechanisms purportedly designed to prevent jurors from being overcome with horror and disgust at the crime revealed to them, and therefore incapable of judging impartially, a better remedy might be to remove the jury from the criminal justice system.

The Jury as Fundamental to the System

Trial by jury has been taken to be 'evidence of the Excellency of the Laws of England above those of other Nations'; 'upon all Accounts it is settled ... in ... the Kingdom of England, trial by jury seems to be the best Trial in the World.'⁷ Such a positive view of the system has been adopted in the United States and in Australia.⁸

Although disagreement is expressed as to the exact origins of trial by jury, it is said to have grown out of the trial by a jury of twelve witnesses consisting of person most knowledgeable about the circumstances of the alleged crime and of the individual said to have committed it. During Hale's time, twelve persons made up the required number; none could be nominees of prosecution nor of defence; each was required to fulfill a certain property qualification; none could participate who was 'Convict of any notorious Crime that may render them unfit for that Employment'.⁹ Additionally kin or persons having some alliance with any of the parties were disqualified from sitting; persons '... such as are prepossessed or prejudiced before they hear ... Evidence' could not be jurors; jurors were required to be unanimous in their verdict.¹⁰

Perhaps as a result of changes in community living, the idea that the jury should be well acquainted with the issues prior to trial gave way to that of a body brought together to learn, through exposure to witnesses presented to them by defence and prosecution, the facts of the offence and circumstances surrounding alleged involvement of the accused. Today, others of the traditional standards governing operation of the jury system have gone by the way. Thus in England a jury may, in a criminal case, return a majority verdict of ten of the twelve jurors. The notion that a jury consisting of less than the traditional number of twelve may serve is now accepted by the Supreme Court in the United States; several jurisdictions have instituted juries of less than twelve.¹¹

That juries should be limited to male persons with property holdings is no more the case ; women and men may serve equally in most jurisdictions, propertied or no.¹²

The institution has in the past been seen to uphold some community sense of justice, and this view continues in some circles today :

'The exercise of the jury power is the only way in which the principle of community justice can be fully applied... The American public insists on fair trials, insists on justice in law, and insists that juries have the power to mete out justice. This insistence cannot be quelled in our free society. Juries are the means whereby community justice can be applied, they have the power to apply it, they do apply it, and their act in so doing meets with public approval. Freedom from restraint allows the exercise of the great power of juries. This power is tempered by the sobering effect of great responsibility. A juror is and feels himself to be an integral part of our system of self-government. Power and responsibility give dignity to jury service and propel jurors to perform this civic duty ably.'¹³

However not always is the jury viewed thus. In recent times the idea has been put that the criminal justice system does not mete out justice, does not result in fair trials. Dispensing with the rhetoric, researchers undertaking studies of what juries really think, how potential jurors see themselves, how the role of jury service is assessed by the community have found a low public sense of a need for 'community justice' - through the operation of the jury system - particularly where those studied have been called upon to serve as jurors; little sense of a 'great responsibility' of service; no insistence upon fulfilling such a role in order to be 'an integral part of our system of self-government'. 'Dignity' and 'able service' appear sometimes to be remote from the call to jury-service. Thus in one study it was found that 'more than half' those called for jury duty in a particular county approached the court in an attempt to escape serving, citing medical reasons, personal hardship, financial drawbacks; obtaining medical certificates; seeking the help of outsiders to assist them in avoiding the duty to serve.¹⁴ In studies of jurors following service, 'almost unanimous' affirmative answers were given to questions such as 'Did you find juror service to be interesting?' 'Did you serve willingly?'¹⁵ yet a 'nearly unanimous' affirmative answer was given to the question : 'If I were selected for jury duty again, I would do everything I could to get out of it.'¹⁶ Other studies have found some increase in satisfaction experienced by individuals after having participated as jurors; nonetheless even here jurors were described as seeing themselves as 'expendable pawns' and 'serving no purpose'. Writers and researchers looking at court administration have found such charges to be validated by what occurs in the courtroom and corridors of the court-building.¹⁷

Jury selection procedures are also criticised, charges being made that black participants are deliberately prevented from service; that women are similarly regularly excluded by way of challenge; that class-bias in selection of jurors is evident; that factors such as youth, age, political affiliation, religious background, 'trendiness' and the like are principal factors governing the selection of jurors or their dismissal by way of challenge.¹⁸

That the jury is, or is capable of being, impartial has been questioned. Studies show jurors as influenced by dress, class, manner of witnesses, as well as victim-witnesses in particular. Additionally jurors seem to be affected in their decision-making by these sorts of attribute in terms of advocates appearing before them.¹⁹ On these grounds suggestion has been made that rather than an impartial body viewing the facts and making an objective assessment, irrelevant input determines the outcome of the case. That any attempt to force the jury '... to become mentally blind to the [appearance] of the accused sitting before them involves both an impossibility in practice and a fiction in theory' has led to a contention that juries might be better judges if they read transcripts of trials rather than attending a trial in person.²⁰

Yet clearly it is not only the jury that may be swayed by irrelevancies; judges can also be influenced thereby. Additionally, the judge is capable of influencing jury decisions by way of control over actions of the jury, at least as far as summing-up is concerned. It is therefore important to look at the operation of the jury in relation to rape trials, at the role played by the judge, and to determine whether the jury is capable of exercising its duties appropriately in that type of case. Otherwise, because judges will be all that is left if juries are rejected as decision-makers, it may be discovered that removal of the jury system has been too precipitate a step, and that rape trials continue to suffer from 'wrong-headed' ideas.

The Jury as Arbiter in the Rape Trial : General Issues

Impartiality of the Jury. The emphasis in criticism of the jury for its lack of impartiality has traditionally been directed toward the effect of prejudicial attitudes toward the party accused of the crime. In certain circumstances prejudice plays a part in the jury's assumption of guilt of an accused. However although it can be contended that black defendants are at a disadvantage when confronted by a jury, sometimes biased views may operate in their favour. One writer has put the view :

'In criminal cases the discrimination does not always run against the [black] defendant. It is part of the Southern tradition to assume that [blacks] are disorderly and lack elementary morals, and to show great indulgence toward [black] violence and disorderliness "when they are among themselves"... This is particularly true in minor cases which are often treated in a humorous or disdainful manner. The sentences for even major crimes are ordinarily reduced when the victim is another [black]. Attorneys

are heard to plead (sic) the juries :
 "Their code of ethics is a different one from ours". To the patriarchal traditions belong also the undue importance given white "character witnesses" in favour of [black] offenders. The South is full of stories of how [blacks] have been acquitted or given a ridiculously mild sentence upon recommendations of their white employers with whom they have good standing.'²¹

The rule appears to be that '... as long as only [blacks] are concerned and no whites are disturbed, greater leniency will be shown in most cases.' However where whites are the alleged victims of black defendants, the rule swiftly alters. Most particularly, writings reveal that where the charge is rape, the black defendant is likely to suffer from a lack of impartiality on the part of the jury. It has thus been pointed out :

'Nowhere is the spirit of mob violence so strong as it is in the courtroom or just outside while a person who is accused of some particularly heinous crime [like rape] is being tried. The air is charged with an undercurrent of tension and there is a feeling of suspense, as if some exciting incident may occur at any moment. Under circumstances of this kind it is rather difficult for the jury or even the judge to escape being influenced by the feeling which permeates the throng.'²²

Although the extreme position adopted in the southern United States, sometimes referred to as the 'Southern rape complex' and summed up in the view that '... any assertion of any kind on the part of the [black] constituted in a perfectly real manner an attack on the Southern woman ... [where] the term "rape" stood as truly as for the *de facto* deed' is not necessarily that adopted elsewhere, research shows clearly that the intrusion of racially biased attitudes into the courtroom can influence the jury to decide against the defendant. Similarly where the defendant is shown to be poor, lower class, illiterate, the jury may react negatively.²³

However the relevance of such factors to jury decision-making in the rape case must be seen in the overall context of the allegation - the equally important factor being the character and traits of the victim. Various studies of simulated juries have shown a lack of impartiality where the victim of the crime is a divorcee or a prostitute, or is an unmarried woman who at the time is not a virgin. Similarly in the study of jury trials by Kalven and Zeisel²⁴ factors extraneous to the criminal event, concerning the character of the victim, intervened to interfere with the judgment of the jury as to the commission of the crime. Thus where in the simulated studies those questioned would nominate the act as 'rape' where the alleged victim was a virgin before the event, upon those same facts the answer would be that the happening was 'not rape' when the alleged victim was a divorcee at the time of the attack.²⁵

In the jury study, the impartiality of jurors was interfered with by such issues as whether the victim was living in wedlock or in an unmarried relationship, or had borne children though unwed.²⁶ Such issues as what clothes the victim was wearing have also interfered with impartial decision making. There is also evidence that where the victim of rape is black, the jury will fail to look on the incident with impartiality; rather, black victims are more likely to be classed as non-victims, particularly where the assailant is white.²⁷

A further factor relevant to lack of neutrality is that of the general sex-bias that is admitted to exist in current society. It has been said :

'[S]ex based prejudice may affect the way in which the jury perceives female *witnesses* in a case. If jurors are permitted to indulge in stereotyped assessments of women witnesses - "Women are emotional, excitable and don't pay close attention to details" - without such stereotypes being exposed and confronted, the credibility of the witnesses may suffer substantially.'²⁸

Thus in a rape case, as the principal witness is female it may be predicted that stereotypes can interfere with the findings of the jury and may prevent them from viewing the evidence in the impartial manner required. Although some stereotypes may set the weight in favour of a particular female victim, as where the jury sees her as defenceless, pure, attacked by a psychologically unbalanced defendant, this in itself is application of un-thoughtout characterisations based upon sexist attitudes. When this sort of assessment is seen in the context of community attitudes, the particular relevance of lack of impartiality of the jury as arbiter in the offence of rape becomes obvious.

Jury as Organ of Community Justice. One of the most explicit differences between rape trials and trials for other offences is revealed in studies of community attitudes. In a study of jury verdicts it was found that where there was 'an assumption of risk' on the part of the victim, the offender would be found 'not guilty', although according to the judge's analysis of the case, the verdict should have been otherwise. Thus where the victim had been drinking prior to the event, and particularly where she was drinking with the defendant, or at least was his social companion, the jury brought in an acquittal, or where possible found the individual guilty of a lesser crime than rape. Further instances included prior sexual intercourse with the accused : in one case where the judge concluded a 'savage' rape had taken place, the jaw of the victim having been broken in two places, the jury acquitted. The judge assessed the acquittal as resulting from the introduction into evidence of sexual intercourse, social outings and drinking on the part of the victim. Where a defendant attested to prostitution on the part of the victim, this led to an acquittal. Similarly in the case of illegitimate children, a victim of what the judge saw as 'brutal rape' was considered by the jury to have been complicit or not worthy of protection, so the jury acquitted.²⁹

In assessing the number of rape cases in which a jury decided in favour of the defendant, apparently on grounds of 'assumption of risk' by the victim, Kalven and Zeisel found that disagreement between judges and juries on the question of guilt was 'virtually 100%'. The conclusion was that the jury '... chooses to redefine the crime of rape in terms of its notions of assumption of risk' :

'Where it perceives an assumption of risk the jury, if given the option of finding the defendant guilty of a lesser crime, will frequently do so. It is thus saying not that the defendant has done nothing, but rather than what he has done does not deserve the distinctive opprobrium of rape. If forced to choose in these cases between a total acquittal and finding the defendant guilty of rape, the jury will usually choose acquittal as the lesser evil.'³⁰

This type of verdict finds its support in prevalent ideas of sexuality and sexual relations. Thus women are conditioned to be passive recipients of 'favours', to use indirect methods of securing what they want. Males are conditioned to be aggressive, to initiate sexual activity, to initiate all relations of a 'courting' nature between sexes. The prevailing attitude is that 'it is up to the woman to draw the line'; that male persons 'are easily carried away'; that 'some women ask for it ... she led him on.' Because it is only recently that the issue of rape has surfaced in everyday discussion, views held by society in general centre around the idea that 'nice girls can't be raped'. Simply, this attitude translates itself into the proposition that 'if she was raped, she can't be a nice girl; if she's not a nice girl, then she wasn't raped (she asked for it); therefore she is not a nice girl and she wasn't raped (she led him on)'.

That this is the mechanism behind many jury verdicts is borne out by simulated jury studies. Where examples are studied, the victim in the example varying in terms of sexual status, as a general rule the assessment of the incident as 'rape' is most often made where the victim was a virgin or a married woman. One study clearly revealed the attitude that if the woman was involved in a sexual incident with an individual to whom she was not married, and which she claimed was rape, the incident downgraded her status automatically and she could thus be held responsible for the event. Thus where the individual classed as victim was a married woman, the assessment was that she was responsible, for 'nice married women' are not involved in sexual encounters with those to whom they are not married. As she was involved in such an incident (the rape) the woman could not be a 'nice' married person and must thus have precipitated the event.³¹ In some studies there appears to be an identification mechanism at work for where female university students were confronted with examples of rape incidents they classed married women and unmarried non-virgins as victims of rape, but divorcees and prostitutes in identical circumstances were held responsible for the act and not victims of the crime.³² This supports the proposition that women reclassify rape victims according to some communal-value : that is,

they identify themselves with victims who relate to themselves, classifying these women as 'victims'. Where the victim does not match up to their view of themselves, the victim is seen as precipitator or participant in the act. Here the young women could see themselves in the unmarried non-virgin category and were able to perceive of themselves as married women, but could not identify with divorcees or prostitutes; thus the latter (traditionally 'bad women') were likely to be classed 'bad' and incapable of being victims of rape. Young women would similarly be swayed as jurors.

Composition of the Jury. Research shows that importance is attached by counsel to the composition of the jury. Where the crime charged is rape, particular attention is paid to gender of jurors. Although in one comparison study of rape trials and verdicts there was shown to be no difference in verdicts of guilty or not guilty, whether numbers of male and female jurors were equal, predominantly male or predominantly female, efforts by counsel in attempting to interfere with sex make-up of juries is evident.³³ Thus counsel have been advised :

'Commonsense, combined with some appreciation of how the female mind works, will go a long way toward deciding the sexual composition of your jury. Women jurors are desirable if the defendant happens to be a handsome young man ... Women are desirable if the principal witness against the defendant is a woman. Women are somewhat distrustful of other women ...'³⁴

Although this advice may be applicable generally to jury trials, in the case of rape trials, where the defendant is always a man, principal witness always a woman, composition of the jury along such lines is often striven for. It has also been stated :

'Biases against women may ... be held by women jurors : to some extent, therefore, the trial attorney must be as concerned about the hostilities of women jurors as about those of men. It seems reasonable to assume, however, that prospective women jurors will neither carry the range of stereotypes concerning women that men will, nor cling to those stereotypes as intensely as men, particularly in the face of persuasion and contrary evidence. Moreover, nascent feelings of sisterhood (for sister defendants, attorneys, witnesses and jurors) may be developed to a considerable degree under the voir dire questioning of a skilled and sensitive trial counsel.'³⁵

Yet here again where the charge is rape, it is relevant to note the findings of simulated jury research. In the earlier cited case of the study of university women it is to be expected that 'feelings of sisterhood' would be developed to a more significant degree than in the community at large. Nonetheless the findings were that the victim as divorcee or prostitute was not included under the umbrella of 'sisterhood'. Women remained reluctant to class that type of incident as rape. This seems to

show that despite growing sisterhood, women are prepared to accept certain stereotypical ideals of traditional society as automatically disqualifying a victim from being a subject who was raped. Thus it may be that however the jury is composed, the victim's rights will be ignored and the accused may almost invariably be favoured in the rape case.

The Jury as Arbiter in the Rape Trial : Questions of Fact

Factual Issues. The basic issue upon which the jury is required to make a pronouncement is : did the accused do the act and commit the crime charged? Contained within this determination are several questions of fact : was the accused the assailant? was there no consent to penetration? did the accused possess the requisite *mens rea*?*

As for the question of penetration, the type of evidence to be placed before the jury will include the victim's account of the offence; medical examination of the victim; medical examination of the accused; forensic evidence; any direct eye witness evidence. These directly relate to the commission of the crime so as to assist a jury in coming to a determination on the facts. Similarly on the matter of identity, scientific evidence may link the accused with the crime. As the commission of the crime requires close proximity of victim and assailant, the victim's identification must be of some weight. Where a rape has taken place it would be unlikely that criticisms commonly made of identification evidence will be valid. Thus it would not be likely that the principal witness had 'a momentary glimpse' of her assailant; nor that it 'all happened too quickly' for clear identification. Nonetheless it has been said :

'The element of identification ... has a long history of its erroneous proof in criminal cases. The combination of this historical truth with the emotion-laden circumstances peculiar to instances of rape infect the identification experience instinct with unreliability. It goes without saying that adversaries in a rape trial must probe the identity element with great care.'³⁶

Facts for the jury would include the showing of an 'adequate opportunity' for victim to observe the assailant; evidence as to 'distance, duration, angle of view, weather, daytime, nighttime, lighting, obstruction to vision'; the condition of the victim at the time of and during the attack - such as fright, 'fatigue, preoccupation, age, health, impairment to the senses, ethical medication, drugs, intoxication'; additionally evidence of others attesting to facts linking the accused with the crime will be relevant to the jury's deliberations.³⁷

With consent, factual issues for the jury include statements by victim and by accused :

* For commentary on the Tasmanian Code position re *mens rea* in rape and a brief look at the United Kingdom position (taken in other jurisdictions in Australia) see W. J. E. Cox, "Rape Law Reform and the Tasmanian Criminal Code", this volume. (Editor's note.)

'In terms of its presentation, ... organisation and quality surrounding the ... assertion of consent must not be inferior to the presentation of the Government's case. In the final analysis, however, its success depends upon which version of the facts the jury will believe. Thus, the advocates must not only make their cases believable, they must also make the other side's case unbelievable.'³⁸

Thus, types of evidence relevant to the determination are objective facts, sometimes scientific in nature, sometimes independent observation of the crime. How does this recounting of the factual issues to be placed before the jury measure up to the information that is, in rape cases, actually placed before them?

Matters Influencing Introduction of 'Factual' Evidence. It is in the determination of the facts that the influence of special rules governing rape cases can be seen. The fear of the false complaint and conviction of innocent persons is recognised most clearly in the admission into evidence of matters said to relate to the commission of the crime or to show the lack thereof. The most obvious rule is that requiring introduction of corroborative evidence or at least that the jury should seek corroboration of the victim's story. Thus a jury may, having regard to the circumstances surrounding the alleged crime, determine that the act taking place was one of sexual intercourse, that the victim was not consenting, and that the accused was possessed of the requisite state of mind. Yet where there is a mandatory rule of corroboration (as exists in some United States jurisdictions), the jury will be precluded from bringing in its verdict on the facts, unless there is evidence additional to that of the victim. Despite a conclusive finding on the evidence presented, lack of corroboration will render a determination of guilt void.³⁹ Yet the task of the jury is to find guilt or otherwise on the evidence as presented. Even where there is simply a rule (as in Australian jurisdictions) that the judge must warn the jury of the dangers of convicting on uncorroborated evidence of the victim-witness, this 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 that they should scrutinise the evidence of the complainant carefully, the jury may be confused into seeking 'something more' than that which had convinced them beyond a reasonable doubt of the guilt of the accused. The 'seeking for something more' is clearly futile, for the arbiter of fact cannot be 'surer than sure' of guilt, where the finding is properly made; yet the authority of the judge in intruding into the territory of the jury may lead them to overreact in seeking 'proof beyond proof'.⁴⁰ Furthermore, if the judge declines to give the 'corroboration warning', the defendant may appeal and have the jury's decision of guilt set aside.⁴¹

Even apart from the corroboration issue, there are clear indications of judges intruding into questions of fact. Thus on the issue of consent it has been stated that the jury *must* 'carefully scrutinise the evidence' in terms of the following :

'(1) Is the girl virtuous? (2) Did she scream or call for help? (3) Did her body or clothing show any mark or tear indicating resistance to force? Negative answers to these questions as Sir Mathew Hale put it ... carry a strong presumption that her testimony is false or feigned.'⁴²

Courts have further adopted the approach that lack of struggle will imply consent, and the jury is bound to acknowledge this :

'... no jury could believe she screamed ... [T]here were no marks on her body and no tears in her clothing - no physical signs that she had made a real fight to protect herself. "Girls over sixteen, and adult women are likely to be capable of offering some resistance to rape. Therefore in a true charge we should expect to find not only marks of violence about the vulva, but also injuries of varying extent upon the body and limbs." ... Moreover there were no scratches or other marks upon the [girl's] ... body.'⁴³

Where a complainant stated in evidence that she '... was struggling with everything [she] had', on appeal the verdict of guilty was upset on the ground that the jury should have been told that the injuries she displayed (or failed to display) were inconsistent with this contention.⁴⁴ This makes it clear that rather than leaving to the jury the issue of consent qua consent, judges structure the issue of consent according to some judge-made standard along the lines of 'resistance'. The jury is thereby not the trier of facts, as such. Rather the jury acts as trier of *particular facts*, trier of facts within those boundaries set by the judges. Judges thus usurp the power of the jury in assuming that certain fact situations denote 'consent', whilst other fact situations denote 'lack of consent'.

This process may be illustrated where threats or fear are said to intrude into the giving of a 'true' consent. If the threat is not one of 'fear of death', then the jury is not competent to consider that the act was gained by submission only. Although the jury might believe the individual woman to have been threatened in such a way as that she, personally, submitted to sexual intercourse and did not consent, the jury is directed otherwise. Judicial pronouncements as to what is, what is not, 'consent' restrict the finding of threats to those where the woman was 'in fear of her life', in 'mortal danger' and the like. Indeed the judge has the upper hand in the ability to restrict the jury by not putting to them the proposition that the woman was threatened, where the threat was not such as by judicial pronouncement has been considered legally sufficient as a general rule to oust consent in rape. The factual question of consent thus becomes a mixed question of fact and law.⁴⁵

Similarly on the question of fraud and consent ; judges have earlier held that fraud as to identity vitiates consent - but fraud as to identity must be fraud as to whether the man was the woman's husband or not. Thus were a male person to defraud a woman into believing that, as he entered her bed, he was in fact her fiancee or lover (to whom she would have consented, and thought it was himself to whom she was consenting), when in fact he was not, the jury would not be entitled to hold that on the facts the woman did not consent, because she was giving authority not to the person doing the act, but to the person whom she believed him to be. The jury would not be entitled to find the act was rape... although if the woman had believed the intruder to be her *husband*, the act would be held rape.⁴⁶ Again the jury's fact-finder role is abrogated.*

The special situation of rape between spouses is also illustrative of the finding of fact by a jury being ousted by prior judicial determination. Thus it is sometimes said that within marriage there can be no rape. Thus what could be seen as a question of fact - did this particular individual consent to this particular act of intercourse - has become a question of law. 'Consent' is interpreted not by reference to the act of intercourse, but by reference to 'marriage contract'. Such a case is therefore considered by most not to be capable of coming before a jury, sidestepping as it does even prosecutorial action.⁴⁷ In this instance, the jury's role of fact-finder is abrogated before it can begin.**

In each of these instances of consent as a matter of fact being restricted, the reluctance of judges to allow juries to deal with the issues may be traced to a particular policy. That is, the policy of looking at the victim and her characteristics rather than at the accused. Failure of judges to address the issue of intention of the accused - whereby his actions could show knowledge of consent or recklessness thereto - has led to juries being directed to consider that certain fact situations cannot indicate a lack of consent - whatever the truth of the matter.⁴⁸

The Jury as Arbiter in a Rape Trial : Admissible Facts

Sexual History Evidence. With sexual history evidence, rather than keeping facts from the jury or binding the finding of the jury by specifying particular fact situations as fulfilling certain judicial standards, contrarily judges have allowed great latitude to counsel in admission of evidence. Matters pertaining to sexual history of the complainant have been admitted for the purpose of impeaching the woman's cred-

* For further comment on the question of husband impersonation and the question of consent, see "Introduction", this volume. (Editor's note.)

** Further on the issue of rape in marriage, see Helen Coonan, "Rape Law Reform : Proposals for Reforming the Substantive Law" and Peter Sallman, "Rape in Marriage and the South Australian Law", this volume. (Editor's note.)

ibility or showing that she was in fact a consenting party. This has been allowed despite the authoritative view that in the '... ordinary case' the value of character evidence impeaching or sustaining a party or witness '... is commonly much exaggerated', being comparatively futile and of no real probative service.⁴⁹ Furthermore, rules of a general nature have developed in the law to define the parameters of what should be accepted into the court for the purpose of decision-making in criminal cases. Thus the general rule of admissibility of evidence in criminal cases is that '... all evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded.'⁵⁰ Even where it is relevant, not all evidence will thereby automatically be admissible; some evidence will be subject to exclusionary rules; as well, the judge is possessed of a discretion to exclude evidence, although it is relevant, on grounds that it may be confusing to the jury, may inflame them and the like.

The issue here becomes that of why seemingly extraneous information should be entered into evidence, in rape cases, on the ground that it will assist the jury. In some situations evidence that a woman has had a prior sexual relationship or is in a current sexual relationship with the accused may be relevant to show the state of mind of the accused at the time of the alleged crime. Yet sexual history evidence has been entered into rape trials as a matter of course, whatever its relevance or lack of relevance. As has succinctly been observed :

'Ordinarily, information that the prosecuting witness sleeps with her boyfriend or goes around with married men or has borne some illegitimate children cannot help the jury decide on any reasoned factual basis whether or not she agreed to relations with *this* person on *this* occasion or whether she perjured herself on the stand. And naturally, if the accused does not even claim consent he should not be able to expose her love life merely to blacken her reputation ... And clearly a defendant in a prosecution for rape has no inherently greater right to introduce *all* probative facts than does any other accused party.'⁵¹

The major argument for a broadened right to admit evidence seems to rest upon the idea that juries may be naive in sexual matters and may be innocent as to 'feminine artifice'. Wigmore in putting the argument that rape should be a special case with admission of general reputation evidence to show that a complainant was not chaste, for example, contended the purpose was to show the jury that a woman's word might not therefore be believable. Wigmore stated :

'No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician.'⁵²

In his treatise, Wigmore is at pains to bring evidence to support the view that women are likely to complain, falsely, of rape. Thus '... fantasies of being raped are exceedingly common in women, indeed one may almost say that they are probably universal'; ... a complainant shows her falsity where she exhibits an 'intensely erotic propensity ... in [a] wanton facial expression, ... sensuous motions, and a manner of speech.'⁵³ To take this approach and contend that prosecutions for rape call for admission of evidence pointing out to a jury that some offences of rape may be prompted by malice, or produced by fantasy, is unrealistic on several counts. Not only psychiatrists see women as capable of wantonness and falsity : the general public holds such views, too. Thus to present a jury with such information serves only to confirm them in a belief they currently hold. Further, Kalven and Zeisel show with some persuasiveness that introduction of evidence of a sexual nature nullifies a possible conviction for rape, because the jury take it upon themselves to attribute to the victim some blame connected directly to her sexual past.⁵⁴ Therefore the strongest argument is that rather than enlightening the jury, admission of this evidence impedes the course of justice.

Other Evidence. Additional evidence in rape cases is that of a general nature such as what the complainant was wearing at the time of the offence, or what she was in the 'habit' of wearing; did she wear night-clothes? did she live in a 'seamy' neighbourhood? The rationale once again is that judges are afraid that juries will be unable to look objectively at the accused's alleged part in the crime. The contention is that juries will automatically be predisposed toward the victim and therefore require information (of questionable relevance) as to the woman's character.

The fallacy here is clear : juries may be 'indignant' in many cases, not only those alleging rape. Juries may be inadequate to their task in crimes other than rape. Yet special rules remain special for rape and are not introduced as protections against indignation in other crimes. Furthermore, although varying approaches may be found there is strong evidence to support the view that where the allegation relates to 'simple rape' juries are not likely to be indignant against the accused, but are likely to be disposed against the victim. They will be further prejudiced by introduction of evidence not related to rape but to that of '... does the victim fit the stereotype of the "bad" girl as seen in popular thought. Certainly, the fact that a woman does not wear nightclothes does not affect whether or not she was the victim of rape; it will affect some jurors - those who consider persons who do not wear night clothes as being immoral and not deserving of protection from the criminal law.

Reform of the Jury

Administration of the System. That juries make mistakes in rape cases and do not convict in clear cases has led to proposals for reform of the jury. In England and in Australia suggestion has been made that rape juries should always be composed of four male persons, four female persons, with the remaining four being chosen without reference to gender.⁵⁵ The proposition has been criticised elsewhere and has obvious defects. The major ideological argument against it is that it isolates rape from the general run of crimes; the practical argument is that probably it would raise difficulties in court administration. The aim of

any reform should be to streamline court administration rather than to hamper it.⁵⁶

A more promising reform proposal is that administration of the jury system, together with general administration of the courts, should be improved. If jurors make wrong decisions or fail to understand the issues before them, fail to listen to evidence, are swayed by irrelevancies, this reveals a general problem to be overcome only by revising court procedures. Proceedings should be made more understandable to the triers of fact. Current practices must be overhauled so that all members of the community can participate painlessly. Provision of facilities such as creches for those having young dependents are necessary. Business persons and others in paid-work will require as clear as possible an indication of time that may be spent serving (as, indeed, will all); proper recompense of a financial nature must be provided; loss of jobs through jury service must be provided against.

It is also clear that much of the time lost by those serving on juries is lost due to mismanagement in drawing-up court dockets, failure of counsel to appear, failure of witnesses and defendants to appear. Suggestions for more efficient use of court personnel and 'stand-by' cases so that proceedings need not be disrupted by failure of persons to appear have been made and should be put into effect. This would serve the purpose, hopefully, of enabling jurors more willingly and ably to serve.

To eliminate prejudicial attitudes not only existing in rape cases but across the board, counsel should develop methods of questioning prospective jurors to uncover partisan or biased attitudes, to make jurors aware of these, so that they can be forewarned if tempted to indulge them in their decision making. As has been said :

'When they have been sensitised to the issue of sex-based prejudice in jury trials, lawyers have generally framed the problem in terms of bias against a female *party* to an action. The task of the trial counsel is, then, to help the client *directly* by seeking to expose and overcome sex-based prejudices against her which may affect the jury's verdict. This is clearly an appropriate and important function for trial counsel to assume.'⁵⁷

It is also incumbent upon counsel to expose sex-based stereotypes where a witness is female and where an attorney ~~is~~ female. As well counsel must work to expose attitudes leading some jury persons to being overwhelmed by sexist attitudes when coming to a decision in the jury-room. Jury persons possibly holding minority views should be alerted :

'In such a situation, the trial attorney may want to bolster the woman juror against what may be pressures from other jurors to "cave in". This may be done, for example, through voir dire

questions emphasising the rights of women and the independence of their personal judgment ; "Do you believe that women have the right to be free of discrimination based on their sex? Do you think that women always vote the way their husbands vote? If you were the lone hold-out on the jury after hours of deliberation, would you be influenced by the fact that the other eleven jurors disagreed with you?" Similar questions may also be asked of *male* jurors to force them to confront sexist prejudices against female members of the jury.⁵⁸

It may be impossible to eliminate fully possible prejudicial attitudes and to programme for complete impartiality. The appropriate mechanism is not, however, to interfere with composition by requiring a certain number of persons from each sex, race, or ethnic origin, religion to serve (a practicably impossible task), but to meet the issue by exposing to jurors the tendency of particular attitudes to influence their decision-making. Indeed, this approach may serve to have an overall educative effect upon jurors and upon the judiciary, continuing outside the courtroom, when judge and jury go about their daily lives.

New Directions for the Jury. As well as alerting jurors to general attitudinal problems the jury must be educated on issues relating specifically to the commission of the relevant offence. Where the crime of rape is in question, directions have been developed to 'help' jurors. These rules have rather hindered. The 'Hale rule' is the most explicit of these.

Under the rule, a warning is required to be given in rape trials as to the intemperancy of accepting the victim's evidence alone :

'... the excellency of the trial by jury is that they are triers of the credit of the witnesses as well as the truth of fact; it is one thing whether a witness be admissible to be heard, another thing, whether they are to be believed when heard. It is true rape is a most detestable crime, and therefore ought severely to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.'⁵⁹

The content and value of the rule have been discussed in recent United States' cases that are relevant to the Australian situation. Noting that an authoritative re-examination of the Hale warning had not been carried out 'for decades', the court in *People v. Rincon-Pineda*⁶⁰ proceeded to undertake an analysis of the rule and its place in the modern criminal trial for rape. The court concluded ;

'In light of ... examination of the evolution of the cautionary instruction, and with the benefit of contemporary and empirical and theoretical analyses of the prosecution of sex-offenses in general and rape in particular, we are of the opinion that the instruction ... has outworn its usefulness and in modern circumstances is no longer to be given mandatory application.'⁶¹

The underlying philosophy of the cautionary instruction should be studied. The court considered that statements contained in the instruction are not borne out by the facts of present-day rape cases and trials :

'We next examine whether such a charge is so difficult to defend against as to warrant a ... cautionary instruction in the light of available empirical data... Of the FBI's four "violent crime" offenses of murder, forcible rape, robbery, and aggravated assault, forcible rape has the highest rate of acquittal or dismissal ... Equally striking is the ranking of forcible rape at the bottom of the FBI's list of major crimes according to percentage of successful prosecutions for the offense charged. ... As to sex offenses other than forcible rape and prostitution, the percentage of prosecutions ending in acquittal or dismissal is almost 50 percent higher than the average for all major crimes ... A similar situation is indicated by California crime statistics, which show forcible rape to have an acquittal rate second only to bookmaking, with prosecutions for other sex offenses resulting in acquittal or dismissal more frequently than the average for all felonies.'⁶²

The court acknowledged findings that the jury '... chooses to redefine the crime of rape in terms of its notions of assumption of risk', such that juries will frequently acquit a rapist or convict him of a lesser offence, notwithstanding clear evidence of guilt.⁶³ The court concluded that such a tendency :

'... is especially dramatic in the situation supposedly most conducive to fabricated accusations : where the prosecutrix and the accused are acquainted, and there is no evidence of extrinsic violence to the prosecutrix.'⁶⁴

As well, research gives strong support to the contention that rape is *not* a charge 'easily to be made'. On the contrary, the statistics show that where the charge is made, frequently at the police-stage there is nullification, not because the charge is unfounded, but for varying reasons, perhaps because the woman chooses not to participate in the

investigation. Further, families have been found to dissuade victims from pursuing the offence.* Additionally sociological and psychological literature shows that many victims of rape do not classify the event as criminal, taking blame upon themselves. Sometimes an individual who could on the evidence be charged with rape is charged with other crimes committed during the course of the rape, but is not prosecuted for the offence of rape. Sometimes where rape is committed together with other crimes, the latter are prosecuted successfully, whilst the rape prosecution ends in acquittal. Often the accused is charged with sexual crimes lesser than rape, although rape is the crime that has been committed.⁶⁵

In other cases, criticisms of cautionary instructions in rape trials have been voiced. The view has been put that the instruction is '... a personal opinion by the judge concerning the facts of the case', and as such is not acceptable in court. In Virginia and Georgia it has been held that a caution may properly be put in argument, but is an encroachment into the fact-finding sphere of the jury and should not be put by the judge as an instruction.⁶⁶

To solve the problem, 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 the witnesses who have testified in [the] case.' Determinants of credibility to which the jury should look include the following matters and they should be alerted by the judge to these :

'[A witness'] demeanour while testifying and the matter in which s/he testifies; the character of his/her testimony; the extent of his/her capacity to perceive, to recollect, or to communicate any matter about which he testifies; the extent of her/his opportunity to perceive any matter about which s/he testifies; her/his character for honesty or veracity or their opposites; the existence or non-existence of a bias, interest, or other motive; a statement previously made by her/him that is consistent with her/his testimony; a statement made by him/her that is inconsistent with any part of his/her testimony; the existence or non-existence of any fact testified to by her/him; her/his attitude toward the action in which s/he testifies or toward the giving of testimony; his/her admission of untruthfulness; his/her prior conviction of a felony.'⁶⁷

In addition instructions alerting juries that the final test is not in

* This has been shown to be so in Western Australia, where the sexual assault referral centre in the Sir Charles Gairdner Hospital has kept statistics relating to failure to continue with the case. See Lee Henry, "Hospital Care for Victims of Sexual Assault", this volume. (Editor's note.)

'... the relevant number of witnesses, but in the relative convincing force of the evidence' should be given as a matter of course in all trials. In this way it is possible to avoid 'feeding upon' the prejudices of jurors holding racist, sexist or other prejudiced beliefs; no reference should be made to the fact that a particular type of case is under consideration requiring special cautionary warnings, or that a particular type of witness has appeared, in order to cast doubt upon veracity. It is the nature of the evidence that at all times should come under scrutiny and to which the attention of the jury should properly be directed.⁶⁸

Suggestion has been made that it would be better to alert the jury to pitfalls and fallacies prevalent in the trial of particular types of crime. Should a jury be alerted to the difficulties inherent, as a result of socio-cultural attitudes, in the prosecution of a rape case, for example?

An obvious difficulty here is that an accused might contend that his rights have been abrogated where a judge explains to a rape-trial jury current mythology surrounding the crime of rape. However this might be rebutted by the fact that myths as to rape reflect not only against the victim, but also against the accused. Certainly the idea of the rapist as psychopath is a stereotype that may affect the accused adversely. Eliminating this cardboard figure from consideration by explaining to a jury the pitfalls of too easy classification of an accused may help rather than hinder the defendant. Further, as the courtroom is designed as a place wherein justice is dispensed, it seems to avail nothing to that cause by enabling erroneous beliefs to remain unchallenged. If a balanced picture is placed before the jury - by recounting and discounting commonly held myths pertaining to the crime of rape, to victims and to accused persons, and reporting upon the error of these stereotypes as evinced in research studies, as well as explaining to the jury of what the crime of rape truly consists, it would be difficult for an accused to protest that his rights had been abused. Rather, the rights of accused, victim and society in general would be better served. Furthermore, this approach to the trial would hopefully have an educative effect beyond the confines of the courtroom.

Conclusion

As has been said of current proposals to change rape laws :

'Temporary measures, such as crisis centres or legislative reforms, may be able to alleviate current atrocities, but until the time when the rape victim is no longer looked upon with suspicion and distrust, most rapists are likely to commit the crime with impunity. The bias against the rape victim ... can only be dispelled if people become aware of the quandry in which she has been placed by a society which tends to adopt a male perspective. Exposing the defects in the present system is the first step in curing them.'⁶⁹

Certainly if the jury is to be retained as a part of the criminal justice system, then those who must become aware, as a top priority, of the difficulties attaching to rape trials and the prosecution of rape as an offence, are persons serving as jurors. Part of the responsibility lies on counsel in rape trials to alert members of the jury to their own prejudices. However the ultimate responsibility lies upon a system seeking to retain the jury, to meet with problems encountered in keeping 'community justice' in the courtroom. Where judges are required to adopt a balanced approach to the rape trial by following procedures presently adhered to in other criminal trials and in addressing prejudicial issues that may in the past have swayed their own judgment, juries will be provided with a proper opportunity for viewing the crime of rape, and the rape trial, in the proper context. When the jury is to be the final arbiter, it must be given all information appropriate to that decisions : a recounting of the nature of rape in its social setting would seem to be such information.

FOOTNOTES

- ¹ Cited Ellen Goodman, "The Victim of Rape : *What Progress?*" (1979) 14 (1) *Australian Journal of Social Issues* 21.
- ² *Rape - The Power of Consciousness* (1979, Harper & Row, San Francisco), at p. 12.
- ³ *Kelly v. People* 61 N.E. 425, 426 (1901).
- ⁴ [1946] 2 All E.R. 487.
- ⁵ 61 N.E. 425 (1901).
- ⁶ *Blackstone's Commentaries* cited *Kelly v. People* 61 N.E. 425, 426 (1901).
- ⁷ Mathew Hale, *The History of the Common Law of England* (1713, reprinted 1716, 1739 and 1971 ed. Cla-sics of British Historical Literature), at p. 160.
- ⁸ See Article Three, United States' Constitution; Sixth Amendment, United States' Constitution; and for an outline of the various State provisions see S. W. McCart, *Trial by Jury : A Complete Guide to the Jury System* (Revised ed, 1965), Appendix C, at p. 195; see also section 80 *Australian Constitution Act* (1900).
- ⁹ Mathew Hale, *op. cit.*, at p. 161.
- ¹⁰ Mathew Hale, *op. cit.*, at pp. 165-166; see also S.W. McCart, *op. cit.*; *Holdsworth's History of the Laws of England*.
- ¹¹ For example, Oregon has instituted the six-person jury in criminal trials. On this issue, see generally Walbert, "The Evaluation of *Williams v. Florida*" (1971) 22 *Case Western Law Review* 529; H. Zeisel, "And Then There Were None ... : The Diminution of the Federal Jury" (1971) 38 *University of Chicago Law Review* 710; Besier and Varrin, "Six-Member Juries in the Federal Courts" (1975) *Judicature* 425.
- ¹² See generally S. W. McCart (1965) *op. cit.*
- ¹³ S.W. McCart (1965) *op. cit.*, at pp. 114, 151.
- ¹⁴ John P. Richart, "Juror's Attitudes Toward Jury Service" (1977) 2 *Justice System Journal* 233; see also Jerome Frank, *Courts on Trial - The Myth and Reality of American Justice* (1965), at p. 126 *et. seq.*
- ¹⁵ This is not necessarily contradictory to the earlier stated findings that potential jurors "... did everything they could" to escape service. There are some persons who wish to serve on juries and more of those will reach the jury than those who endeavour to escape. No doubt many efforts of those seeking to escape were successful.

- ¹⁶ Allen, "Attitude Change Following Jury Duty" (1977) 2 *Justice Systems Journal* 2-3; see also Schott, "Trial by Jury : Reflections of a Juror" (1977) 13 *Trial* 56.
- ¹⁷ See generally for example Ash, "On Witnesses : A Radical Critique of Court Procedure" (1972) 48 *Notre Dame Lawyer* 386; John McDonald, "Towards a Bicentennial Revolution in Criminal Justice : The Return of the Victim" (1976) 13 *American Criminal Law Review* 649; Jerome Frank, *op. cit.*, at p. 126 *et. seq.*; and Duran, Bearden, Gustofson and Ashworth, "Individual Perceptions of Jury Service" (1977) 28 *Alabama Law Journal* 395; Allen (1977) *op. cit.*; Richart (1977) *op. cit.*
- ¹⁸ See for example Van Dyke, "Selecting a Jury in Political Trials" (1977) 27 *Case Western Law Review* 609; Kairys, Kadane and Lahocxky, "Jury Representativeness : A Mandate for Multiple Source Lists" (1977) 65 *California Law Review* 776; La Rue, "A Jury of One's Peers" (1976) 33 *Washington and Lee Law Review* 841; Comment, "Jury Selection - 6th Amendment Right to a Fair Cross-Section of the Community - A Change in Emphasis?" (1976) 41 *Moquette Law Review* 446.
- ¹⁹ See for example J. Goldstein, *Trial Techniques* (1969) : "... the jury tries the lawyers rather than their clients ... without realising it, the jurors allow their opinions of the evidence to be swayed in favour of the side represented by the lawyer they like."
- ²⁰ See video-tape trials recounted in Note, "Six-Member and Twelve-Member Juries : An Empirical Study of Trial Results" (1973) 6 *University of Michigan Journal of Law Reform* 712; S. Diamond, "A Jury Experiment Re-analyzed" (1974) 7 *University of Michigan Journal of Law Reform* 520.
- ²¹ Gunnar Myrdal, *An American Dilemma : The Negro Problem and Modern Democracy* (1944, 1962). This is borne out in the case of the black Australian also - see generally Australian Law Reform Commission, *Interim Report - Aboriginal Customary Law Reference* (1977); Royal Commission on Human Relationships, *Final Report* (1977).
- ²² C.S. Magnum, *The Legal Status of the Negro* (1940) at p. 274.
- ²³ See however Ronald Francis and P. Coyle, "The Sentencing Process : A New Empirical Approach" (1978) *Institute of Criminology Proceedings of a Seminar on Sentencing* 13.
- ²⁴ *The American Jury* (1966).
- ²⁵ See for example, S. Feldman-Summers and Lindner, "Perceptions of Victims and Defendants in Criminal Assault Cases" (1976) 3 *Criminal Justice and Behavior* 135; S. Feldman-Summers, "Conceptual and Empirical Issues Associated with Rape" in *Victim and Society* (Emilio Viano, ed, 1977).
- ²⁶ H. Kalven and H. Zeisel, *The American Jury* (1966).

- ²⁷ See sources cited at note ²⁵ *supra* and Jones and Aronson, "Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim" (1973) 26 *Journal of Personality and Social Psychology* 415; and see P. Wilson, "Victims of Rape : The Social Context of Degradation" (1976) 9 *Australian and New Zealand Journal of Criminology* 249.
- ²⁸ M. Soler, "'A Woman's Place ...' : Combatting Sex-Based Prejudice in Jury Trials Through Voir Dire" (1975) 15 *Santa Clara Lawyer* 535, at 540.
- ²⁹ H. Kalven and H. Zeisel, *op. cit.*, at p. 256 *et. seq.*
- ³⁰ *Ibid*, at pp. 253-254.
- ³¹ Jones and Aronson, *op. cit.*; and see comments in S. Feldman-Summers and Lindner, *op. cit.*; also Rose, "Rape as a Social Problem : A Byproduct of the Feminist Movement" (1977) 25 *Social Problems* 73; M. Amir, *Patterns in Forcible Rape* (1971, University of Chicago Press, Chicago); Weis and Borges, "Victimology and Rape : The Case of the Legitimate Victim" (1973) 8 *Issues in Criminology* 71; Note, "The Victim in a Forcible Rape Case : A Feminist View" (1973) 11 *American Criminal Law Review* 335.
- ³² S. Feldman-Summers and Lindner, *op. cit.*.
- ³³ See R. Hibey, "The Trial of a Rape Case : An Advocate's Analysis of Consent, Corroboration, and Character" (1972) 11 *American Criminal Law Review* 309.
- ³⁴ H. Rothblatt, *Successful Techniques in the Trial of Criminal Cases* (1961), at p. 23; cited M. Soler (1975) *op. cit.*, at p. 536.
- ³⁵ M. Soler, *op. cit.*, at pp. 539-540, fn. 18.
- ³⁶ R. Hibey, *op. cit.*.
- ³⁷ See for example *R. v. Graham* (1949) 10 Crim. App. Rep. 149; *Robinson v. Commonwealth* 459 S.W. 2d 147 (1970); and see P. Wall, *Eyewitness Identification in Criminal Cases* (1965); Hibey, *op. cit.* at p. 312 *et. seq.*
- ³⁸ R. Hibey, *op. cit.*, at pp. 321-322.
- ³⁹ See Jocelyne A. Scutt, "Corroboration and Consent in Rape" (chapter 7 of thesis titled *Substantive and Evidentiary Issues of Consent in Rape* University of Michigan Law School, 1979); Jocelyne A. Scutt, "Sexism and Psychology : An Analysis of the 'Scientific' Basis of the Corroboration Rule in Rape" (1979) 5 (1) *Hecate* 35.
- ⁴⁰ See sources cited at fn. ³⁹ *supra*.

- ⁴¹ See generally R. Ligertwood, "Failure to Warn in Criminal Cases where Corroboration May be Required" (1976) 50 *Australian Law Journal* 502; *Kelleher v. The Queen* (1974) 48 A.L.J.R. 502; and cf. *R. v. Salmon* (1924) 18 Cr. App. Rep. 50; *R. v. Graham* (1910) 4 Cr. App. Rep. 218.
- ⁴² *R. v. Hinton* [1961] Qd. Rep. 17; see also *R. v. Hay* [1968] Qd. Rep. 459.
- ⁴³ *Holman v. The Queen* [1970] W.A.R. 2; also H. Snelling, "Consent in Rape" (1970) 2 *Australian Journal of the Forensic Sciences* 103.
- ⁴⁴ See sources cited fns. ⁴³ and ⁴⁴ *supra*.
- ⁴⁵ On this issue, see Jocelyne A. Scutt, "Consent Versus Submission : Force, Fear and Threats in Rape" (1976) 13 *University of Western Australia Law Review* 52.
- ⁴⁶ See discussion in *R. v. Clarence* (1888) 22 Q.B.D. 23 and Jocelyne A. Scutt, "Fraudulent Impersonation and Consent in Rape" (1976) 9 *University of Queensland Law Journal* 59.
- ⁴⁷ See *Hale's Pleas of the Crown* vol. 1, at p. 629; Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash University Law Review* 255; *R. v. Clarence* (1888) 22 Q.B.D. 23.
- ⁴⁸ See comments supporting this view in *D.P.P. v. Morgan* [1975] W.L.R. 913; South Australian Criminal Law Reform and Penal Methods Reform Committee, *Special Report - Rape and Other Sexual Offences* (1976, Government Printer, Adelaide, South Australia).
- ⁴⁹ 6 *Wigmore on Evidence* (1970, Chadbourne Revision), SS. 1908, at p. 580.
- ⁵⁰ *Cross on Evidence* (Australian edition 1970, J.A. Gobbo, ed), at p. 16; see generally Jocelyne A. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 *Australian Law Journal* 817.
- ⁵¹ V. Berger, "'Man's Trial, Woman's Tribulation' : Rape Cases in the Courtroom" (1977) 77 *Columbia Law Review* 1, at pp. 56-57.
- ⁵² 3A *Wigmore on Evidence* (1940 edition), SS. 924a, at p. 737.
- ⁵³ *Ibid.*
- ⁵⁴ H. Kalven and H. Zeisel, *op. cit.*.
- ⁵⁵ Royal Commission on Human Relationships, *Final Report* (1977); "Heilbron Committee" - *Report of the Advisory Committee on the Law of Rape* (1975, H.M.S.O., London, England).
- ⁵⁶ See generally comments in Jocelyne A. Scutt, "The Jury and Court Administration : A Brief Overview of Research" (1980) *Law Society Journal*.
- ⁵⁷ M. Soler, *op. cit.*, at 540.

- ⁵⁸ *Ibid*, at p. 541.
- ⁵⁹ *Hale's Pleas of the Crown* vol. 1, at p. 634.
- ⁶⁰ 538 P. 2d 247, 14 Cal. 3d 864, 123 Cal. Rptr. 119 (1975); see also *State v. Feddersen* 230 N.W. 2d 510 (1975).
- ⁶¹ *People v. Rincon-Pineda* 538 P. 2d 247, 256.
- ⁶² *Ibid*, 257-258, citing FBI Uniform Crime Reports, 1973 (1974), table 18, at p. 116 and FBI Uniform Crime Reports, 1974 (1974), at p. 35.
- ⁶³ H. Kalven and H. Zeisel, *op. cit.*
- ⁶⁴ *People v. Rincon-Pineda* 538 P. 2d 247, 257-258.
- ⁶⁵ See comments H. Kalven and H. Zeisel, *op. cit.*, at 254 *et. seq.*; also M. Amir, *op. cit.*.
- ⁶⁶ *Crump v. Commonwealth* 23 S.E. 760, 98 Va. 833 (1895); *Black v. State* 47 S.E. 370, 119 Ga. 850 (1971).
- ⁶⁷ C.A.L.J.I.,C. 2.20, cited *People v. Rincon-Pineda* 538 P. 2d 247, 260-261, fn. 7.
- ⁶⁸ Note that there is a special case in relation to accomplices to crime, where they give evidence against their confederates. However it would clearly be wrong to class the rape victim together with the accomplice. On this issue, see Jocelyne A. Scutt, thesis *op. cit.*
- ⁶⁹ Note, "The Victim in a Forcible Rape Case : A Feminist View" (1975) 11 *American Criminal Law Review* 335, at p. 354.

RAPE VICTIMS IN COURT - THE WESTERN AUSTRALIAN EXAMPLE*

Liza Newby[#]

Prosecutions for the crime of rape have been described as 'man's trial', but 'woman's tribulation'.¹ When filtered through commonly held standards about male and female sexual behaviour, rules of criminal law and procedure with regards to rape are likely to be experienced by a rape victim who reports the offence to police and is prepared to follow through to give evidence in subsequent court hearings as, in effect, placing *her* on trial - or, at least requiring her to positively establish her own sexual integrity. The treatment received by rape victims in the hands of the criminal justice system has been documented as substantially adding to the trauma induced by the assault itself, and is perceived as effectively discouraging many others who have been so assaulted from coming forward to the police. Much current concern with rape law reform stems from a desire to amend the legal framework within which sexual attack is dealt with as a criminal offence, so as to minimise the peculiarly harsh effect of the processes of law upon rape victims, without unduly detracting from the right of the defendant to make a proper defence to the charge.

All criminal hearings involve a conflict of interest between the state and the person accused. Procedural rules are intended to strike a proper balance between the needs of the community to prosecute criminal offences and the rights of an accused person to affirm his or her innocence. This scheme has traditionally made no allowance for the particular difficulties involved in the court room appearance of a complainant-witness in prosecutions for rape. Unlike trials for most other criminal offences, in rape cases the main basis of defence commonly turns upon whether or not the complainant consented to sexual intercourse (or her behaviour was such as to reasonably induce the defendant to believe she consented)** and thus constitutes a direct 'frontal' attack on her integrity. Where such a defence is mounted, defence counsel is faced with the task of convincing

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* A preliminary report on research into the experience of complainant-witnesses in rape trials in Western Australia, with particular reference to the effect of recent legislative restrictions on the admissibility of sexual history evidence. (Editor's note.)

** Or her behaviour was such that the defendant honestly believed she was consenting to the act. On this issue, see *Morgan's case* (1976) A.C. 182 and further comments W. J. E. Cox, "Law Reform and Rape Under the Tasmanian Criminal Code", this volume. (Editor's note.)

a jury that firstly, the complainant's sexual history, character, and general behaviour is such that she is likely to have consented (or make it reasonable for the accused to believe she consented)² and second, that a plausible reason exists for her 'crying rape' when she had in fact consented to sexual intercourse, however 'hesitant, reluctant, grudging or tearful'³ she may have been.

In an attempt to remedy this imbalance, in recent years many jurisdictions have amended their evidence laws so as to restrict the introduction of that kind of prejudicial evidence. It is in this context that the present study is being carried out. The object of the research is to look at the experience of rape victims in rape trials, with particular emphasis on the processes whereby defence counsel typically 'manage' their assault on her sexual integrity. The research is also designed to assess whether the special rules of evidence for rape cases currently applying in Australian states afford adequate protection to the complainant-witness, or indeed have effected any realistic change at all to her experience in the court room.

Background to the Western Australian Position

The Western Australian amendments to the *Evidence Act* were passed in 1976, becoming law in May 1977. They adopt a 'loophole' approach, prohibiting introduction of evidence as to the 'sexual experiences', 'disposition', or 'reputation' of a complainant (with persons other than the accused), but allowing the judge a discretion to admit such evidence if he or she is satisfied that it has 'substantial relevance to the facts in issue or the credit of the complainant'.⁴

Transcripts of all rape trials heard in the Supreme Court of Western Australia from January 1974 to December 1979 were studied for the purpose of determining what type of evidence was admitted into court in cases prior to the *Evidence Act* amendments, and whether evidence was held inadmissible following those amendments. Out of a total of 165 rape cases coming before the court in that period, 113 involved pleas of 'not guilty' and proceeded to trial. This preliminary report is based on data collected from transcripts of 38 of these trials, 21 occurring before the amendments came into force, 17 taking place since that date.

It has been cogently argued from a legal perspective that the amendments to evidence laws in rape cases are inadequate, adding nothing to the protection already afforded a witness by existing general rules of evidence, should a court choose to invoke those laws.⁵ It is further pointed out that the negative experiences of women alleging rape in the court room stem from deeply embedded attitudes to sexuality and the role of women in sexual relationships, and as such are not amenable to the superficial procedural 'tinkering' that has already occurred.⁶

These assertions are empirically supported by the results obtained in this study. Transcripts so far examined show that amendments to laws of evidence restricting certain kinds of sexual history evidence appear to have made little direct difference to the style and content of defence cross-examinations of rape complainants. This is partly due to the 'loophole' provisions where, if application is made for leave to

circumvent the prohibition, it is almost always granted,* and partly because the kind of evidence 'caught' by the provisions forms only a small component of the kinds of material used by defence counsel in a manner likely to be distressing to the witness.

Major Difficulties Facing Complainant-Witnesses

The particular difficulties experienced by complainants giving evidence in rape trials are attributable to three main factors, all of which are more or less unique to this kind of offence.

The Trauma of Rape and its Recounting. Rape involves a serious and often violent attack upon a woman's person, and on her control over her own sexuality. As such, a considerable degree of trauma is always involved. This pain is exacerbated when it has to be relived again and again as the story is told and retold to police, to prosecutors and finally - in court. To a certain extent this distress can be minimized through sympathetic police questioning, as well as the use of 'hand-up' briefs⁷ at the committal stage (although during the course of the study one experienced defence lawyer stated he was in favour of hand-up briefs in all cases *except* rape cases because, as part of defence tactics, it was important to 'test out' the complainant as a witness).** However there is inevitably some degree of personal pain involved for the victim in giving evidence.

The Privacy of Sexual Activities. Rape involves sex, and discussion of personal details about parts of the body, sexual practices and other matters that are usually treated as private. Our society has extremely strong taboos against talking about sexual matters openly. For most individuals, discussion of intimate sexual details in a public forum, before strangers, would be an embarrassing experience, bringing unwarranted shame upon the person recounting personal activities. When the forum is the formal and intimidating atmosphere of a superior court

* For the situation in Victoria, where laws have been amended similarly to those in Western Australia, application was made by 13 accused persons during the periods January 1st to December 31st 1978 and July 1st to December 31st 1979 (figures for the first half of 1979 being unavailable), for leave to cross-examine the complainant in relation to trials for rape offences - rape, assault with intent to rape and attempted rape - as to prior sexual history with persons other than the accused. The application was granted to nine accused persons - that is, approximately 70% of applicants. (Editor's note - information obtained from a personal letter dated June 5th, 1980 from the Hon. Haddon Storey, Attorney-General for Victoria.)

** Note that in England the House of Lords has explicitly held that committal proceedings should not be used for this purpose in any case - including rape - in the *Massaro case*. See Editorial, "Committal Proceedings Abolished?" (1980) *Justice of the Peace* (April 5th) 199. (Editor's note.)

trial, such feelings can only be exaggerated. In one case for example, the complainant was a classic 'legitimate'⁸ victim in that she was a married woman at home with her young child when an intruder entered, threatened her with a knife and raped her. The issue was not that of consent, but whether the accused had actually achieved intercourse, so the woman was spared any challenge to the essence of her story; nevertheless she was required to go into considerable detail about the fact that she was menstruating, whether she was wearing a sanitary napkin, to what degree it was soiled, how the defendant re-acted to it, what happened to it during the assault, and so on.

The Issue of Consent. Probably the most important component of rape trials affecting the victim is the consent issue. In nearly all rape cases, the accused will allege, as his major defence, that he had sex with the complainant, but that she agreed to it, or at least her behaviour and circumstances were such that he was justified in believing that she agreed. This, or necessity, involves defence counsel in trying to persuade the jury that the witness is lying and that her conduct during the incident complained of was so sexually 'inviting' that, if it did not actually amount to consent, it sufficiently contributed to the sexual attack so as to remove the defendant's criminal responsibility for it.

Rules of Evidence and the Question of Consent in Western Australian Trials

In 34 of the 38 cases in the sample, consent was the principle issue, and in 30 of them it was the only issue. This occurred however unlikely it might appear on the face of it that the victim would have consented in the circumstances. For example, in one case *prior to the introduction of the special evidentiary laws*, a 12 year old school girl was given a lift by a youth she knew slightly as a friend of her older brother, on her way home from school, driven into the bush and raped. The defence alleged she consented, questioning her regarding her virginity and 'boy-friends'. In another similar case occurring *after the amendments came into effect*, defence counsel asked for and received permission to introduce evidence that the 16 year old complainant was not a virgin, to 'counteract the effect of her youthful and innocent appearance'.⁹

In cases where consent *is* the principal issue, and witnesses have undergone extensive cross-examination on that point, if the accused is subsequently acquitted (as occurred in 18 out of the 34 'consent' cases in the sample) the effect on the complainant can be devastating. At this level, the intricacies of burden of proof rules are quite lost upon her; she experiences the verdict as a vindication of the accused's assertions, and herself as publicly humiliated, and exposed as vindictive, untrustworthy and promiscuous.

In constructing a defence case based upon consent it is possible to identify four major strands of 'attack' commonly used by defence counsel to undermine the complainant's evidence. Of these, only one is in any way 'caught' or controlled by the 'restricted evidence' rules.

Continual Questioning as to Details of the Rape. The most obvious and widely adopted line of questioning is to require the witness to re-iterate again and again the details of the rape incident, sometimes for several hours. The purpose is to test her story for inconsistencies and to attempt to twist her interpretation of events so as to make them consistent with an assumption of consent. Thus, to one girl who went to a party and was multiply raped, it was alleged that 'she must have known what might happen when she went to a party where she knew there were going to be bikies present', and therefore by implication, she had agreed to it. The process is subtle, the innuendo invidious. In another case, two girls hitch-hiking home late one night were raped by the man from whom they accepted a lift. In trying to demonstrate the accused's reasonable belief in their consent, the defence lawyer repeatedly questioned them as to why they had not struggled, called for help or jumped out of the car - this when the car was speeding along lonely roads late at night, and both girls were subsequently badly beaten, one to the point of unconsciousness.

If consent itself is the issue, a further component of this style of questioning is to attempt to present a reason for falsely accusing the defendant. This normally follows the line of alleging fear of discovery of having engaged in illicit sex by parents, husbands, boy-friends. One woman, raped by her ex-fiance after an argument at her flat, was asserted to have reported the sexual encounter as rape 'because she was ashamed at being caught in the act by the caretaker' who had come to see what the noise was about.

Relationship Between Accused and Victim Prior to the Rape. If there has been a relationship between accused and complainant prior to the report of rape, particularly if the relationship has been sexual, this is always discussed in detail. Knowledge of a previous sexual relationship between accused and victim appears to predispose a jury to believe in consent unless there are other aggravating factors, such as excessive violence.* In the six cases involving alleged rapes by ex-menfriends or husbands, four resulted in acquittals. In one case, where the accused alleged a prior sexual relationship but the complainant denied it, counsel challenged her in court with intimate details of lovemaking techniques she was supposed to use, what she cried in moments of passion, and so on. The defendant in this instance had earlier asserted, 'I am a man, man is first, woman is last, and when man wants it man does it'. He was acquitted.

General Character or Reputation of the Victim. The third strategy employed by defence counsel in 'consent issue' cases is to challenge the general character of the witness as being of 'the type'

* Even in cases involving aggravating circumstances such as violence, juries acquit seemingly as a result of the fact that a sexual relationship has existed between the parties prior to the rape. Further on this issue, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

likely to have agreed to sex or to lead the accused to believe she agreed. This kind of evidence is far more commonly used than focusing simply on the sexual character or reputation of the complainant. It involves, generally, trying to put over the idea that 'this sort of woman, who behaves in this kind of way, in these circumstances is quite reasonably to be taken to be consenting'.

A significant proportion of cases in the sample (16) involve girls or women out at night, alone or with friends, going to hotels or a party, drinking, and then either walking or seeking a lift home with men they hardly know, or, alternatively walking alone or 'hitching', and being followed or picked up by men who have seen them at the pub. In each of these 16 cases reference is made to what the witness was doing there at that time of night - didn't it mean she had gone looking for sex, and so on.

Girls who hitched were asked if they often accepted rides from strangers; women who had drunk too much, smoked too much, worn 'seductive (?)' clothing were questioned on this aspect of their behaviour. In one case a girl at a 'bikie' party had told a strange boy who was making sexual advances to her to 'fuck off' - this was taken by defence as indicating to the defendants that she was 'a rough case' and therefore likely to agree to sex with them. In another instance a girl who had had too much to drink left the pub early to walk home alone. She was accosted by four boys who followed her, took her into the sand dunes near her flat, raped her, and then handed her over to another group of three boys who each did the same. The circumstances, combined with her inability to resist, and passivity due to her intoxication, were treated by defence as evidence of acquiescence.

Sexual History Evidence within the 'Restrictive' Evidence Amendments. Restricted evidence within the definition of the amendments to the *Evidence Act* is not utilized as often as might be supposed. Under the amendment 'restricted matters' can be entered into evidence only after application of the accused to the judge, and at the judge's determination that '... it would be unfair to the defendant to exclude those matters.' 'Restricted matters' are defined as :

- '(a) the sexual experiences (of any kind and at any time) of a complainant with a person other than the defendant; and
- (b) a complainant's disposition in sexual matters excluding her disposition with respect to the defendant; and
- (c) a complainant's reputation in sexual matters, excluding any matter included among the *res gestae* connected with any offence with which a defendant is charged at the trial.'¹⁰

This kind of evidence was used in only seven of the 21 cases heard prior to the coming into effect of the evidentiary restrictions and in three of these it was mentioned only briefly - twice involving a single question about virginity, and once in a short discussion of the paternity of the complainant's seven illegitimate children.

In each of the four cases out of the total of 17 *following the introduction of the amendment* where it was considered necessary to introduce such evidence, permission was granted when requested, and in two cases without any requirement on defence counsel to demonstrate 'substantial relevance.' In one of these a woman leaving her *de facto* husband after a violent argument and seeking a lift at a hotel from a truckie going to the town where her brother lived had been raped by the truckie on the basis of (as he quaintly put it) '... no root, no ride ...' It was alleged that as she had formerly been a prostitute, she was more likely to have accepted such a bargain. In another hitch-hiking case, the evidence was introduced by the 'back door', in that it was stated that the witness had told the accused that she '... often had sex with men who picked her up hitch-hiking', and that this was the reason for his belief in her consent this time.

What Value the 'Reforms'?

From this examination of typical defence strategies in dealing with complainants in the witness box it can be seen that the problems for rape victims in court are far too complex to be amenable to simple solutions in the form of procedural 'tinkering' with the laws of evidence. The demands of an adversarial system, when combined with a substantive law defining rape solely in terms of consensual or non-consensual sexual intercourse virtually demand that a defence counsel who is properly doing the job must challenge the sexual integrity of the complainant, to her inevitable distress and humiliation. The assault on her character is direct, but the process by which it occurs is complicated and subtle. In attempting to re-interpret events in favour of the defendant, counsel plays upon widely held sexual stereotypes and attitudes about appropriate female behaviour, to present the witness in a detrimental light. This is done through employment of a combination of the various strategies outlined, of which reference to the kinds of evidence precluded by special evidence laws, for only a small component.

In considering the reform of laws relating to sexual assaults, it is as well to bear these complexities in mind. The present situation of rape complainant-witnesses is to a very real extent the result of legal definitions of rape, combined with a criminal process designed to protect a defendant's rights in an adversarial system. But court rooms are not immune from the values and opinions of society. The experiences of rape victims in court are also very much a product of current social attitudes toward sexuality and the 'proper' nature of male and female relationships, sexual and otherwise. They reflect uncertainties about appropriate behaviour in sexual relationships; they reflect also the differences in interpretation and expectation as between men and women that are often placed on certain social situations.

Conclusion

In placing the rape trial in its social context and developing policies for change in the law in this area, the following factors should be considered :

Legal Definition of Rape. The legal definition of rape should be reformulated so as to minimise the role of 'consent' in sexual assaults. If this issue ceased to be the principal ingredient in a rape charge, it would not 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.

Changes to Procedural Laws. Changes to procedural laws should be made to minimise the effect of the adversarial system upon the complainant, to the extent that this can be done without unduly affecting the rights of the accused. Two possible solutions spring to mind and deserve consideration. One involves extending the use of written affidavit evidence, such as presently exists in the provisions for 'hand-up' briefs, instead of holding committal hearings. The other concerns the possibility of providing a complainant-advocate who, if not actually empowered to appear on *behalf* of the complainant, could act in the court room to 'remind' the court of its responsibilities to the witness as well as to the prosecution and defence.

Law Reform as an Educative Tool. An important component of law reform is its educative function. In the area of rape, this is particularly so, as the legal issues reflect in large part the difficulties and confusion experienced by society generally when dealing with the subject of sexuality. It may well be that as community perceptions alter, so to will the victim's situation as she experiences the court room process. In particular, education of judicial officers (whose responsibility it is to deal with rape as a legal issue) about the problems of complainant-witnesses in rape trials could lead to some reform occurring without the necessity for substantive legal change, through a more rigorous application of existing rules.

Sexual assault is after all not simply a legal problem; it is also a social one.

APPENDIXR. v. Smith (1979) - A Case Study

Ms. Brown is a divorced woman in her early thirties living alone with two young children. She was divorced some three years ago and has had emotional problems coping with her situation, particularly her feelings of failure and of loneliness. Since her marriage break-up she has been involved in one serious affair, with a man named Steve, in his early twenties. She was very much in love with him, but he broke it off after six months, as he found her too dependent upon him.

A few weeks after the end of her affair with Steve, Ms. Brown met the accused, Smith, at a family gathering. They had known each other as children, but had not seen much of each other since. Their principal point of contact had been Smith's wife, who was an acquaintance of Susan Brown's.

Smith subsequently called on Ms. Brown two or three times for a cup of coffee, or a chat. Each time he came, there were other adults in the house. At the time Ms. Brown remarked to friends that she didn't like him, and she was worried about him as a married man, coming round as he did.

On the night in question she was home alone with the children and in bed when the 'phone rang fairly late (about 10.00 p.m.). It was Smith, sounding drunk, saying he was going to come round and 'fuck her'. She told him not to, and went back to bed. The 'phone rang again. There were more sexually explicit suggestions; she told him to go home to his wife, and hung up.

Next he appeared on the doorstep, banging on the door, demanding admittance and looking very drunk. She was frightened the noise might wake the children or neighbours, so she let him in, thinking to give him a cup of coffee, sober him up and send him home.

While he was in the house he raped her. There was a struggle, she received bruises on her arms where he held her down, and one on her neck where he had leant. Her panties were torn. He left almost immediately.

She was distressed and rang her ex-boyfriend, Steve. He wasn't home. She kept ringing every half hour until he got home at around 3.00 a.m. He told her to calm down and go to sleep; it was too late for him to come around that night but he would come first thing in the morning. At 7.30 a.m. he arrived, they went to the Sexual Assault Referral Centre at Queen Elizabeth Medical Centre and from there to the police. In the aftermath of the rape Steve was quite supportive of Susan Brown but he made it quite clear that he was not going to resume a relationship with her. Steve knew Smith, as they worked at the same place of employment.

At the trial, the defence was one of consent. Smith claimed that Ms. Brown had been trying to have an affair with him, had telephoned him several times at work, and had generally pleaded with him to come round more often. He had resisted, but eventually had decided one night, when he had had too much to drink, to take her up on her offer. She had received him willingly, and they had had sexual intercourse before he left. The bruises on her arms and neck he attributed to love-bites and other consequences of energetic lovemaking. She denied this, and she particularly denied ever ringing him at his place of work.

At this stage of counsel's cross examination of Ms. Brown the defence asked for leave to introduce restricted evidence.

It appeared that Ms. Brown kept a diary in which she recorded her most private thoughts and feelings, particularly about her relationship with Steve. Her ex mother-in-law had found the diary one day, without telling Ms. Brown, and had taken it and forwarded it to the defence solicitors. In it were several statements about her passion for Steve, her despair and distress at the ending of the relationship, and one remark about her being prepared to 'do anything to get him back'. She also expressed fantasies about what the relationship would be like should it resume, including one comment that she could imagine being raped by Steve. The language of the diary was emotional, colourful, and extremely personal. In the last entries she mentioned Smith's visits, but in very neutral terms.

The diary was admitted in evidence under section 36 (1) B of the *Evidence Act* and Ms. Brown was cross examined on its contents for some hours. She was very tearful and distressed to begin with, but eventually she simply became withdrawn and resigned, answering questions in a flat monotone.

Defence counsel was not aggressive nor hostile. He simply used his skills as a lawyer to re-interpret Ms. Brown's evidence and develop from her diary and general situation a plausible explanation for her accusation. The picture emerged as follows : Ms. Brown was a lonely and emotionally disturbed woman who was distraught at Steve's rejection of her. She encouraged Smith, and when he eventually succumbed to her advances and had sexual intercourse with her, she used this opportunity to allege rape. She hoped that as a result, Steve would feel sorry for her, and so create a situation where she might renew the relationship with him.

Much was made of the fact that Steve was the first and only person whom she contacted after the rape. Much was also made of an admission in the diary that she had once run Smith's place of work. It emerged that she had telephoned to contact Steve. Had she admitted this before the section 36 B application she would herself have introduced the question of her relationship with Steve; however such legal niceties were lost on the jury, who simply regarded her as caught out in a lie. They evidently believed in this fairly implausible story sufficiently for it to put a doubt in their mind as to Smith's guilt. He was acquitted.

Discussion with staff at the Sexual Assault Centre who had counselled Ms. Brown revealed the aftermath of this case. There was no doubt in their minds that she had in fact been raped, and that the trial experience and the verdict had and continue to have a devastating affect on her emotional health.

FOOTNOTES

- ¹ See Vivian Berger, "'Man's Trial, Woman's Tribulation' : Rape Cases in the Courtroom" (1977) 77 *Columbia Law Review*]-99.
- ² Note that in Western Australia it is a defence to rape if the circumstances are such that the defendant has '... an honest and reasonable belief that the woman was consenting' - see Western Australian *Criminal Code* 1900, section 24. For further commentary on *mens rea* in rape, see W. E. Cox, "Law Reform and Rape Under the Tasmanian Criminal Code", this volume.
- ³ *R. v. Holman* [1970] W.A.R. 1, per Jackson CJ.
- ⁴ Section 36B *Evidence Act* 1906-1976.
- ⁵ Jocelyne A. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 *Australian Law Journal* 817-831.
- ⁶ *Ibid*, and see also Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume.
- ⁷ 'Hand-up briefs' (declarations made in writing by witnesses) avoid the need for witnesses to appear in court in committal proceedings. For an outline of those jurisdictions wherein this approach is adopted, see Department of the Attorney-General and of Justice, New South Wales, Criminal Law Review Division, *Supplement to Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, New South Wales).
- ⁸ See Weis and Borges, "Victimology and Rape - The Case of the Legitimate Victim" (1976) 8 *Issues in Criminology* 7 for an account of the philosophies underlying the idea of the 'legitimate' victim versus the victim who is 'responsible' or 'partly to blame'.
- ⁹ In both cases the accused was convicted.
- ¹⁰ See *Evidence Act* (Western Australia) re 'restricted matters'; also see an outline of various 'reforms' to evidence laws in Australian jurisdictions in Department of the Attorney General and of Justice, New South Wales, Criminal Law Review Division, *op. cit.*

RAPE VICTIMS IN COURT ← THE SOUTH AUSTRALIAN EXPERIENCE

Rosemary O'Grady[#] and Belinda Powell^{##}

For the practising lawyer in South Australia, the legislative reform which has had the most immediate effect upon the conduct of rape trials (and is most indicative of a policy stand by the legislature) is the amendment to the South Australian *Evidence Act* 1936 prohibition on the adducing of evidence of sexual experiences of the alleged victim, except by leave of the judge. Other amendments are, of course, important,* however the administration of section 34i of the Act raises questions of the value and effectiveness of legislation relating to sex offences generally.

Like the passing of the *Sex Discrimination Act*¹ of South Australia, it is a sad matter that government must legislate to ensure that people treat each other in a reasonable and civilised manner; or, as with the amendment to the *Evidence Act*, to prevent juries having before them information which they will or might misuse because of irrational but innate sexist bias. (That leaves aside the question of whether they should make *any* use of such information, misguided, sexist or not.)**

The South Australian Position Prior to 'Reform'

Before the passage of section 34i, in South Australia as elsewhere, women were cross-examined upon their previous sexual conduct and that evidence was allowed and considered relevant because it tended to make the existence of a material fact - that is, consent or non-consent - more or less probable. The way the old rule worked was on a series of premises :

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* For comment on other changes in South Australia, see Carol Treloar, "The Politics of Rape - A Politician's Perspective", this volume, and Peter Sallmann, "Rape in Marriage and the South Australian Law", this volume. (Editor's note.)

** For commentary on the effect of irrelevant evidence on jurors - and judges - see Jocelynne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

1. That women who possess the character trait of unchastity consent more readily than chaste women to sexual intercourse.
2. That the complainant's reputation establishes that she possesses the character trait of unchastity.

From those premises follows the conclusion : That the character trait of unchastity makes her more likely to consent than would she if she lacked this trait.

The leap to the conclusion invokes the common assumption that women who engage in non-marital intercourse are immoral and that immoral women are more likely to consent to intercourse on any occasion with any man.

Alternatively, the cross-examination tested the complainant's credit, the presumption being that the unchaste are also liable to be untruthful.

Under the *Evidence Act* amendment, section 34i reads :

- '(1) In proceedings in which a person is accused of a sexual offence, evidence of a statement made by the alleged victim of the offence -
 - (a) after the time the offence is alleged to have been committed; and
 - (b) 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.
- (2) In proceedings in which a person is accused of a sexual offence, evidence of -
 - (a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or
 - (b) the sexual morality of the alleged victim of the offence,shall not be adduced (whether by examination in chief, cross examination, or re-examination) except by leave of the judge.

- '(3) Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that -
- (a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and
 - (b) the introduction of the evidence is, in all the circumstances of the case, justified.'

But prior to that enactment judges already had power to rule that evidence sought to be elicited was *irrelevant* or that it had nothing to do with a complainant's *credit*.² And the powers and duties of judges were strengthened by sections in the *Evidence Act* dating back to 1888 preventing harassment or vexatious questioning.

Rationale for the South Australian 'Reform'

Why, then, do we not use the powers already available? The legislature, in its amendments, means to record a public policy. The need for this is conceded by Wells J. in *The Queen v. Gun*³ :

'A perusal of depositions and, it must be acknowledged, of the transcripts of actual jury trials, has revealed cases where the court insufficiently addressed itself to the test of relevance, and to its responsibility to exercise the powers, and to discharge the duties, conferred and imposed by sections 23 to 25 (inclusive) of the *Evidence Act*.'⁴

His honour continued :

'But those courts were no doubt prompted in what they did or did not do by the realisation that a charge of rape is a serious one, and by a reluctance to prohibit an accused's counsel from exploring ways open to him of testing the prosecution's case or of advancing the defence case.'⁵

Against the courts' determination to protect the solemnity of the charge

of rape from possibly frivolous use,* Parliament was persuaded to enact statutory law intended to protect some of the interests of the prosecu-
rix.

Problems with the South Australian 'Reform'

Drafting of the Provisions. Unfortunately, some would say 'inevitably', the legislation left loopholes, and has been the subject of much judicial criticism, most notably by Wells J. in *The Queen v. Gun*.⁶ To paraphrase that analysis :

1. The first problem is in the use of the word 'evidence'. The Victorian legislation, passed for reasons similar to those of the South Australian amendment,⁷ is a little more careful. Does the South Australian Act and does the recent New South Wales' proposal⁸ intend that reference can be made to the sexual experience of the alleged victim in an accused person's unsworn statement,** and under the legislation questions may still be asked by the trial judge, or a juror by leave of the judge?
2. As the law presently exists it may be an accused's defence that he believed a complainant was consenting. He may say on oath of possibly by unsworn statement that in his presence the complainant said or did this or that. And the complainant could not give her version in examination or be cross-examined about the matter - despite the separate rule that the accused is obliged to put his case.
3. The South Australian legislation bars only evidence of the sexual experiences of the alleged victim *prior* to the date of the alleged offence.
4. In the South Australian Act and the New South Wales proposal⁹ only the 'alleged victim' is given protection. An earlier victim giving evidence of rape perpetrated by the accused in similar circumstances would be liable to cross-examination.

* Although it can seriously be questioned as to whether 'frivolous use' would in reality ever be made of the charge of rape! (For a refutation of the type of 'evidence' upon which this fear has been based, see Jocelyne A. Scutt, "Sexism and Psychology : An Analysis of the 'Scientific' Basis of the Corroboration Rule in Rape" (1979) 5 (1) *Hecate* 35.) (Editor's note.)

** But on this, now see *R. v. De Angelis* (1979) 20 S.A.S.R. (Editor's note.)

More difficulties, in similar vein, demonstrate the inadequacy of the legislation.¹⁰

Strict adherence to the rules of relevance insisted upon by prosecutors, coupled with intelligent, non-sexist judicial administration would be sufficient, safe and normal protection for the prosecutrix.

Complete Discretion Remaining with the Judge. A further difficulty with legislation is that whatever the terms of the various enactments, each gives the judge power to grant leave to adduce the evidence. Subsection (3) of the South Australian provisions reads :

'Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that -

- (a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and
- (b) the introduction of the evidence is, in all the circumstances of the case, justified.'

Already, judicial pronouncements have been made in South Australia as to the circumstances in which that leave will be granted.

The Chief Justice itemised, in *The Queen v. Gun*¹¹, five examples :

- * where the accused's defence is that he believed the woman was consenting, he must be allowed to say so if that includes knowledge/belief of the complainant's previous sexual behaviour: technically this refers to his state of mind, not her behaviour.
- * If the defence is that the complainant consented but subsequently, because she did not get the money she asked for, she made a false accusation of rape.
- * Where the defence is consent, previous sexual experience between the complainant and the accused will almost always be relevant.
- * Where the complainant is experienced or sophisticated, and consent is the defence, it may be relevant to enquire into her past sexual experience as a test of the truth of her account of the details of the alleged crime. This situation is distinguished from that of 'an unsophisticated and inexperienced girl'.
- * Where medical evidence implies previous intercourse on the part of the complainant it is relevant to test this 'since if she puts forward a false claim to virginity that will reflect adversely on her credibility.'

The old rule returns - if it ever went anywhere else.

The situation seems to be that the legislation defeats itself by leaving such matters in the discretion of the trial judge, the exercise of that discretion being so difficult to upset upon appeal.*

Continuing Exercise of Sexist Practices of Counsel. The policy of the legislation can also be defeated, however, by sexist behaviour on the part of counsel for the defence who attempt to evade the rules of evidence and the intention of the Act. Jacobs J. in *The Queen v. Gray*¹² referred to such applications in this way :

'... [Counsel] in the absence of the jury, asked if he could properly comment on the fact that nothing was known of the girl's prior sexual experience, by reason of my ruling that no such question could be asked of her. I ruled that such a comment should not be made, not only because in my opinion my ruling ought to conclude the matter but because it seemed to me improper to invite the jury to speculate upon evidence which had been ruled inadmissible - even although it was open to the jury to draw an inference if they thought it was relevant from the medical evidence.'

Summing Up as to Evidence Provisions Under the South Australian 'Reform'

At present, interpretation of the South Australian legislation shows that strict adherence to the rules of evidence existing in other criminal cases, particularly those of relevance, should be relied upon in preference to special rape legislation. Alternatively, legislation should be carefully worded, and should *set out* the exceptions to the general rule enacted. The rule of relevance does in very strict circumstances allow evidence of the complainant's sexual history and in this regard disagreement may be voiced¹⁴ at the complete prohibition in relation to activity with partners other than the accused, which has been proposed by some groups.¹⁵ The Michigan model** may provide an answer;¹⁶ altern-

* It should also be questioned here, with respect, that one of the problems aimed at being overcome by the introduction of the South Australian provisions was that of archaic ideas as to sexuality - women's sexuality in particular - and the desire to review admission of evidence of sexual behaviour in the light of contemporary standards. It therefore does not seem to be a useful exercise to simply list once again, in a vacuum and without the benefit of an actual case involving the outlined circumstances before the court, a series of situations in which it is surmised that particular evidence will be relevant. Surely that should be left until the specific case arises where the evidence might be deemed to be relevant, and the judge in *that case* is s/he who should give her/his mind to the question. (Editor's note.)

** For the Michigan provisions, see Appendix II this volume. (Editor's note.)

atively, the approach could be to develop the comment in *The Queen v. Gun* in which Bray CJ. attends to the matter of the unsworn statement.

Nevertheless, the question of relevance must be broached by law reformers. Inference of consent by man or woman can continue to be drawn from prior patterns of behaviour clearly similar to the conduct in issue. The evidence should be admissible only where :

1. It is evidence of specific acts. A single past act is not probative of present acts. Only related patterns of behaviour should be admissible.
2. The pattern of conduct has similar characteristics particularly as to the participants, The identity of persons and similarity of conduct alike, although not conclusive of present consent, meet the standard of logical relevance.
3. The pattern of conduct should not be too remote in time.
4. The evidence should be necessary to the proper conduct of the accused's defence.
5. The probative value of the evidence should outweigh the prejudicial effect.

Affidavit Evidence at the Preliminary Hearing

Tied hand in hand with the amendment to the South Australian *Evidence Act* is the amendment to the *Justices Act* prohibiting the calling of the alleged victim to give evidence at the preliminary hearing unless the justice is satisfied there are special reasons why he or she should attend. They are 'tied hand in hand' because, to the best of the writers' experience and information, an application to have the complainant called involves also an application to cross-examine on sexual history.

Clearly, if identity were in issue the complainant should be called to testify at the preliminary hearing. But this amendment again leaves the discretion with the judge. His Honour, Chief Justice Bray remarked that one object of procuring a complainant's attendance on the preliminary hearing may be to cross-examine her there about sexual experiences and the same tests, he says, apply.*

* But see House of Lords in *Massaro's case*; Editorial, "Committal Proceedings Abolished?" (1980) *Justice of the Peace* (April 5th, 1980) 199. (Editor's note.)

All this, perhaps, begs the question in that the relevance or the justification (to use the South Australian terms) of cross-examination as to sexual experiences and morality would have *real* meaning and could be considered properly if the decision in *Morgan's case**¹⁷ that an accused's defence of belief that the woman was consenting need not be on reasonable grounds were to be reversed judicially or legislatively.

The Issue of Intention and its Relation to Evidence in Rape Cases

The South Australian enactment of a definition of intention in rape cases is in the following terms :

A person who has sexual intercourse with another person without the consent of that other person -

- (a) knowing that that other person does not consent to sexual intercourse with him or
- (b) recklessly indifferent as to whether that other person consents to sexual intercourse with him shall be guilty of the felony of rape.

What is enacted is perhaps better understood by describing the necessary intention of the accused in negative terms.

The crime is committed by a man who has intentional intercourse with a woman without her consent and without any belief on his part that he has her consent.

The Crown would have to prove the absence of belief in consent. The precise state of the accused's mind about consent would be irrelevant. The belief is lacking if he realises that the woman *might not* be consenting, but nevertheless proceeds with intercourse. But that does not meet the problem of an unreasonably held belief. We think that the proposition that a duty of care should be imposed upon the man to ensure that the other party is consenting is worth further investigation.¹⁸ It is only in such circumstances that the amendments to the *Evidence Act* are safe from being rendered ineffectual by judicial interpretation.

Conclusion

The attempt by the legislature - even if subsequently aborted by the courts - *may* be criticised as paternalistic of complainants in rape and other sexual offences. But if the ordinary rights afforded accused persons have been misused and misinterpreted to the detriment of complainants, then we as a community must be prepared to suffer the immediate embarrassment of legislation rather than education.

* For comment on *Morgan's case*, see W. J. E. Cox, "Law Reform and Rape under the Tasmanian *Criminal Code*", this volume and Helen Coonan, "Rape Law Reform - Proposals for Reforming the Substantive Law", this volume. (Editor's note.)

FOOTNOTES

- ¹ *Sex Discrimination Act 1975* (South Australia); see generally Chris Ronalds, *Anti-Discrimination Legislation in Australia - A Guide* (1979, Butterworths, Sydney).
- ² See Jocelyne A. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 *Australian Law Journal* 817.
- ³ 17 S.A.S.R. 165.
- ⁴ *R. v. Gun; ex parte Stephenson* (1977) S.A.S.R. 165, 179. See also *R. v. Byczko (No. 1)* (1977) 16 S.A.S.R. 506; Case Note, "*Byczko : Stephenson*" (1978) 2 *Criminal Law Journal* 242.
- ⁵ *Ibid.*
- ⁶ (1977) S.A.S.R. 165.
- ⁷ *Rape Offences (Proceedings) Act 1976.*
- ⁸ Proposal put forward in 1977 in New South Wales Department of the Attorney-General and of Justice, Criminal Law Review Division, *Supplement to the Report on Rape and Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.), at p. 30, clause 14F :
- '(1) In proceedings in which a person is accused of a sexual offence, cross-examination by or on behalf of the accused and/or evidence as to -
- (a) sexual activity on the part of the alleged victim of the offence other than that the subject of the proceedings; or
- (b) the general sexual reputation of the alleged victim of the offence,
- shall not be admissible except by leave of the court first obtained in the absence of the jury, if any.
- (2) Leave to cross-examine and/or to lead evidence as to such sexual activity and/or general reputation shall not be granted -
- (a) unless the court is satisfied that such cross-examination and/or evidence could reasonably be regarded by the court and/or by the jury as being material to a proper determination of the issues arising in the particular case;

- (b) if such cross-examination and/or evidence is intended to be directed solely to the issue of whether or not the alleged victim of the offence in fact consented to the sexual activity the subject of the charge.'

⁹ *Ibid.*

¹⁰ See Jocelyne A. Scutt, *op. cit.*

¹¹ (1977) S.A.S.R. 165; see also cases and sources cited at note⁴ *ante*.

¹² (1977) 17 S.A.S.R. 534.

¹³ *R. v. Gray et. al.* (1977) 17 S.A.S.R. 534, 542.

¹⁴ Belinda Powell disagrees with the suggestion that there be complete prohibition in relation to activity with partners other than the accused.

¹⁵ Complete prohibition has been suggested by Sydney Rape Crisis Centre; a proposal in these terms was put up and passed by resolution at the National Women's Conference in Houston, Texas in September 1977 in the U.S.A.; the W.E.L. Sydney proposal envisages guidelines which restrict the admission of certain types of evidence completely, and allows admission of clearly defined types of evidence only after application by an accused, a hearing by the judge in chambers, and determination by the judge as to the evidence that will be admissible and the reasons for that admission. (For the latter proposal, see Appendix II, this volume.)

¹⁶ Rosemary O'Grady favours the Michigan model. (For the latter, see Appendix II, this volume.)

¹⁷ [1976] A.C. 182.

¹⁸ A member of W.E.L. (Victoria), Julie Dahlitz, has written papers relating to this issue. See also discussion New South Wales Department of the Attorney-General and of Justice, Criminal Law Review Division, *Report on Rape and Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.).

POLICE AND COMMUNITY ISSUES

'[After the rape] Val took her for vd tests and a general physical. There was nothing wrong with her health. Chris went everywhere with Val, because she would neither go out nor stay alone ... The two women could do nothing. They would, on occasion, turn on TV at night, but within a minute or two there would appear a commercial, a line, a scene, a snatch of dialogue that was intolerable and without looking at each other, one of them would get up and turn it off. When Val tried to read, she would get through a few lines, then throw, literally throw the book against the wall. They could not even play music. Chris growled about Beethoven. 'Daddy music' she kept muttering. The entire world seemed polluted ...'

Marilyn French, *The Women's Room*
(1977), at p. 578

ERADICATING RAPE - A RADICAL CALL FOR REFORM

Joan Coxsedge

On 31st October, 1979 in the Upper House of the Victorian Parliament the following motion was moved:

'That there be a Select Committee of 8 members appointed to inquire into and report upon all aspects of rape in Victoria; the Committee to have power to send for persons, papers and records; three to be a quorum.'

In moving that motion, I was concerned that as a matter of urgency, government should take positive action to adequately protect Victorian women against the increasing threat of rape. An important first step would be that of the government supporting the call for a Select Committee to investigate all aspects of rape. If the government failed to support the proposition, it would be failing not only the women of Victoria but also all persons in the State.

Rape is a social problem which cannot simply be abolished by increasing the police force and by imposing higher penalties for the few rapists who are brought to court. It is clear that a whole range of measures can be undertaken by the Government to improve the current situation.

Lack of Accurate Statistical Information

The social aspects of rape are important and should be discussed, because without this background knowledge attempts at legislative improvement can be meaningless and even counter-productive. Rape is not merely a matter of known statistics, although these are important. So much of what is important is not numbers, but people. Statistics can give a totally false picture. Thus, the Annual Report of the Victoria Police for the year 1978 provides that rapes reported to the police have actually decreased in the years between 1976 to 1978, successively from 341 to 312 to 235.

On their own admission,² police act as a giant filter for rape complaints and only bother to record those cases which in their judgment reach stringent legal requirements. Police figures are therefore grossly misleading. They do not represent the true trend of rape in

M.L.C., Parliament of Victoria.

societies.

A member of the Victorian Police Force has been quoted as stating that rape is an increasing threat to all women.³ Other information obtained from a senior police source show an alarming increase of rape. During the recent period of 18 September to 27 September from locations as far apart as Bayswater and Werribee, more than one rape a day was reported to police. These official police rate figures are even more misleading because they conceal the fact that most rapes are unreported and unreported rapes are increasing. At present, an even larger proportion of rape victims is not prepared to speak up. Both the increase in rape* and the growing feeling of powerlessness in women regarding rape are an indictment on society and government.

It has recently been said:

'Not only is society sick when it permits this crime to take place - there must be something wrong if innocent victims fell unable to report the offence to police for fear of further insult, more trauma, and even greater rapes.'⁴

No doubt this statement was made in reference to psychological rape. Similarly a police officer recently wrote that her greatest area of concern was the lack of reports from rape victims. During a murder investigation at Burnie when an eight year old girl was sexually assaulted and murdered, a staggering number of women reported having been sexually attacked but had failed to complain because of the stigma associated with that offence. The police officer concluded by saying that this surely is an awful indictment of our system of justice.

Two women academics, one the drafter of the Women's Electoral Lobby Bill on rape, one a lecturer in sociology, point out that rape continues to be one of the most underreported of serious crimes.⁵ Amongst more complex reasons women fear, quite correctly, that under the current antiquated legislation they will be put on trial if they complain to police and go to court.

According to one sociologist,⁶ in both the United States of America and Australia there is substantial evidence from women's groups that regardless of the exact proportions, much more rape occurs in the community than is ever reported to the police. Thus, the Health Commission of New South Wales has projected for the year 1980 a minimum figure of 2,000 rapes is expected in that state. This figure is based on the number of rapes that have occurred so far in 1979.

* It is difficult to determine whether there is indeed an increase in crimes of sexual assault, or whether the community generally is becoming more aware of the problem, due to efforts of the feminist movement in general and in particular the work of the rape crisis centres. Also on this issue, see John Willis, "Rape Reform - Missing the Point?" (1980) *Legal Service Bulletin* (forthcoming). (Editor's note.)

It is extremely difficult to obtain local information on rape statistics. In the United States it is not. Of the U.S.A. situation it has been said:

'The obscurity of rape in print exists in marked contrast to the frequency of rape in reality, because forcible rape is the most frequently committed violent crime committed in America today. According to the Federal Bureau of Investigation and independent criminologists, reported rapes must be multiplied by at least a factor of 10 to compensate for the fact that most rapes are not reported.'⁷

Persons consulted who are working in this area in Australia agreed with the figure of approximately one rape for every 10 committed. Thus arises the situation where 1/10 of rapes are being reported to police and of those rapes that are reported only a small proportion end in the courts, and an even smaller proportion leads to a conviction. From this may be conjectured that barely one rape in one hundred leads to a conviction of a rapist.*

Yet it is intolerable that such an estimate should be based on conjecture. An indictment on the government is the total absence of any attempt to gather more reliable figures on the real incidence of rape in Victoria. Work that has been done in this area, as far as can be determined, appears to have been done by private individuals with access to very limited information.

Public Attitudes toward Rape

It is important to remember that rape does not occur in a political or social vacuum. The reality of rape in our society is disguise and distorted with a series of interwoven myths that relate to the definition and incidence of rape - who rapes, who is raped, where, and the supposed difference between male and female sexuality. In one area alone, such as adequate sex education and counselling in schools, the government could do something positive to counteract these myths and prejudices. The Government has failed dismally to do so.

Despite changing sexual attitudes and behaviour, women over 60 years of age, girls under 14 years of age, accredited virgins such as nuns, and indisputably faithful wives are considered pure. All women who do not fall within those categories are considered impure and are therefore not necessarily treated with respect. Many myths are based

* For an indication of rapes reported to police and the significantly lesser number of convictions, see Western Australian figures in Lee Henry, "Hospital Care for Victims of Sexual Assault", this volume. (Editor's note.)

on the religious concept that female sexuality is inherently evil, and subconsciously many men and women blame the female victim of any act of rape.

If the Government is to make any serious attempt to improve the deteriorating situation regarding rape, it must recognise the need to counter public attitudes toward rape by all means at its disposal, particularly in the education system. After all, anti-social conditioning starts at an early age, and must therefore be corrected as soon as possible. There is no doubt the media have a lot to answer for in their handling of the crime of rape generally, but perhaps that requires separate investigation.

A few examples of popular mythology nearly always manifest themselves when a woman is raped.

Where was she at the time? There is an implication that no woman should ever be alone and yet many rapes take place where the woman is with friends.

A woman is safest at home. This is simply not true. There are many cases where a rapist breaks into a woman's home. Nor does it take into account the high percentage of rapes occurring within the family. Incest occurs across the entire spectrum of society and, according to statistics from Australia and other countries, it is a relatively common occurrence. As well, the myth ignores the incidence of rape within marriage.

How was she dressed? Another assumption is that a woman's clothes provoke the rapist. The reality is that the woman could be wearing a hessian sack and still she would not be immune to the possibility of rape.

Provocation is another myth. It is sometimes said, 'the woman asked for it'. Most men invariably like women to look a little provocative, and yet turn around and use the image of women as sexual objects as a legitimate excuse to rape.

Some changes are occurring in Victoria, but in many court cases the woman must still endure humiliating and unnecessary enquiry into her sexual habits, whereas the rapist is not asked any questions about his sexual habits. It is every woman's right to form sexual associations as she sees fit. The fact that some women do this more freely does not mean that they are fair game. After all, a mugger caught taking a man's wallet is not likely to escape conviction by pointing out to the judge that the victim was known to be generous in giving away money and yet this is precisely the argument used in court to excuse the crime of rape.

The argument goes that the more sexual freedom a woman has enjoyed in the past, the less culpable her attacker. Again, it has been said:

'...a woman who has defied conventional sexual standards is considered promiscuous, and, as a result, cannot be trusted if she claims to have been raped.'

This attitude is widespread throughout the community and, indeed, throughout the entire criminal justice system. Prostitutes are the most rape-prone and least believed class of women in this respect.

Another myth is that rape is an isolated crime of sexual perversion. Experience shows otherwise. Rape is one of the most common, if not the most common, forms of violent crime.

Rape is a crime of impulse for sexual gratification.

This myth is exposed by the Royal Commission on Human Relationships:

'There is a substantial lack of understanding about rape in our community. Rape is often seen to be a sexual act rather than a violent one. The offender is perceived as giving vent to his uncontrollable sexual lust in a way that cannot wholly be condemned. Similarly, the victim is seen to be less of a victim and more of a partner in an act which is essentially sexual in nature. The situation described is only one aspect of rape cases. Most rape cases involve some degree of aggression and violence. This supports the view that rape is not merely an expression of the offender's sexual desires but is an aggressive act frequently aimed at degrading and humiliating the victim.'

A distinction is not being made between sexual intercourse and rape. Rape is the total degradation of the woman and denies her the right of her own self determination. Rape is sexual intercourse against a woman's will and not, as the law states, without consent. This again shows that the law needs radical change in concept and in detail.

Another myth is that nice men are not rapists; that rapists are simply psychopathic perverts; semi-human animals. This myth protects men in general. It enables male dominated courts to subject the occasional rapist, who is clumsy enough to get caught, to extreme penalties.

In a substantial survey¹⁰ of reported rapes in Philadelphia police files, it has been stated:

'These studies indicate that sex offenders do not constitute the unique clinical or psychopathological type nor are they as a group invariably more disturbed than the control group to which they were compared.'

Similarly a parole officer working with rapists in a Californian jail has been quoted as saying:

'Those men were the most normal men there. They had a lot of hangups but they were the same hangups as men walking the street.'¹²

The reality is that rapists are husbands, fathers, fellow workers, employers, acquaintances, neighbours and friends. Similarly, any woman of any age, appearance, marital status or social class can be raped. Rapists do not discriminate.

Another canon in the apologetics of rape is that if it were not for learned, social controls, all men would rape, but in truth rape is not universal to the human species. Moreover studies of rape in our culture reveal that, far from being impulsive behaviour, most rape is planned. Far from the social control of rape being learned, comparisons with other cultures lead one to suspect that, in our society, it is rape itself that is learned. This same culture that expects aggression from the male, expects passivity from the female, which leads to another piece of mythology - that is that woman like to be treated with violence.#

It is assumed by many that women like playing a passive masochistic role; that women derive pleasure out of being beaten up before they are raped. One thing must be made crystal clear: we women do not fantasise about violence in rape in the way many males assume. Just like men, we wish to avoid serious injury and death.

Unfortunately, whatever the motivation, male sexuality and violence in our culture seem to be inseparable. We have James Bond who alternatively whips out his revolver and his prick, and, although there is no known connection between the schools of gun-fighting and love-making, we are left with the distinct impression that passivism is specifically effeminate.# The fantasies so many men think that women have about rape are simply their own projections about the nature of female sexuality. As one journalist and author puts it:

'Unless the rape victim is very young, very old, a virgin, or has incurred severe physical injuries,¹³ she is not automatically seen as a victim.'

Just think of the number of jokes and stories about rape that occur in any Australian public bar and that should render anyone wary about the alleged public concern about rape. The prevailing folklore amongst many men that women say 'No' when they really mean 'Yes', leads to a belief that women just want to be persuaded and their protestations need not be taken too seriously. That is the part of a common social formula guaranteed to increase premeditated rape.

Reacting to Rape - The Victim's Dilemma

When confronted with rape we are faced with another dilemma: What should a woman do? The report of the *Royal Commission on Human*

See note at conclusion re attribution.

Relationships highlights this dilemma.¹⁴ Opinions vary enormously as to whether a woman confronted with a sexual aggressor should submit to the attack or try to prevent it. If she does the latter, she may be subjected to more violence. Yet the law and public opinion is that, faced with the prospect of rape, a woman has a duty to defend her honour even at great risk to her physical safety.

If a woman submits without a struggle, she might later find it hard to convince the police that her complaint of rape is worthy of their attention and, later still, to convince a jury that she did not consent. If a woman remains calm, unbruised, does not show acute distress or delays reporting the attack, she is often considered to be deserving of the treatment. The scars and traumas of a rape attack can last for years, even for a lifetime, and yet, another quirk of the law decrees by precedent that evidence of a girl's mental state, 'distressed anxious and has been crying', noted in a medical examination 12 to 16 hours after an alleged rape, is inadmissible as evidence because too much time has elapsed. What an absurdity!

Two women who have worked extensively in the field stressed in their rape study¹⁵ that women who appear calm in the initial post-rape interview, particularly if this is late at night, may be that way because they are exhausted. Yet, from all around Australia, one hears the same story. Society demands that the rape victim exhibit all the classic signs of a struggle.* Her clothes must be torn; she must have black eyes; she must have scratches; she must have bruises; she must be beaten and battered. This community attitude is certainly reflected in police attitudes. Therefore, if a female is successful in a rape complaint, she is successful not necessarily because she has been raped but because she has been beaten and battered. The fact that accusations of rape are rejected by police because the victim is not incoherent and badly bruised, further strengthens the myth that women cry rape to get revenge.

What are the consequences of the acceptance of the myth that women are to blame for the crime of rape? Rape and the fear of rape affect women in many profound ways. Women do not have the freedom of the streets that men have. A virtual curfew exists for women. Women have to be careful and consider the dangers of hitch-hiking, walking and using public transport. Like any colonised group, women's activities and movements are severely restricted. Women are virtual prisoners

*See, for example *R v Hinton* [1961] Qd.R. 17; *R v Hay* [1968] Qd.R.459. '...where consent is an issue the trial judge should direct the jury that they should carefully scrutinize the evidence in respect of the following questions: (1) Is the girl virtuous? (2) did she scream or call for help? (3) did her body or clothing show any mark or tear indicating resistance to force? Negative answers to these questions carry a strong presumption that her testimony is false or feigned'. (Editor's note.)

in their own society, in a society where they make up fifty percent of the population.

In a sense rape is the ultimate punishment for steps taken, no matter how slightly, beyond her designed role, and such a criterion is so arbitrary that basically rape becomes punishment simply for being female. It is the most decisive reminder of a woman's second class citizenship, and the surest assertion of male supremacy. Honourable members might ask themselves: Why is it that women are the ones who are restricted in their movements when it is men who do the raping? A satisfactory answer is never forthcoming to that question.

Changing Attitudes and Procedures Concerning Rape

What can be done right now? A woman who has been through the trauma of rape needs sympathetic and sensitive treatment. She is emotionally vulnerable, and questioning by the police in an insensitive way can have a profound effect on her own emotional recovery and on the course of the enquiry into the rape itself. Clearly a major area of concern is not that of legislative action but reform of police and medical procedures following the initial reporting of the offence.

For a brief time earlier this year when there was a spate of rapes in the eastern suburbs, the Victoria Police Force formed a rape squad, which has since been disbanded. The Victorian police run a week-long course for selected police officers. Although it is called the Sexual Offences Investigation Course, it appears to be inadequate. Thus, as a first pragmatic step, the Victoria Police should undertake a thorough enquiry into all aspects of its recording, investigation, and procedural policies in relation to rape victims. Other measures that might reasonable be undertaken:

1. Special police squads should be established consisting of equal numbers of men and women of each rank to deal with sexual offences, including rape, in the main population centres.
2. Police questioning of rape victims should be kept to a minimum until the victim has had such medical examination and treatment as is necessary, and should not be conducted in a hostile fashion.
3. Members of the squad should be given special training in psychology and crisis intervention.

As far as hospital procedures are concerned, by and large nurses and doctors are described by many rape victims as insensitive and callous in their attitude and behaviour towards the victims of sexual assault. A woman who has just been raped needs help and sympathy, but at the present time the medical examination she must undergo, if there is to be a police enquiry, is geared more to the collection of evidence than to offering her any medical *care*. In the worst situations

in Victoria, the rape victim must undergo examination in a crowded, understaffed and overworked casualty section of a public hospital, possibly after a long wait for treatment and after a lengthy interview with police. It is unfortunately not unusual for medical staff to make snide remarks. Thus the woman is faced with police, doctors, nurses and casualty staff each trying to obtain information without bothering to discover how she is feeling as a human being.

There is a total concentration on the physical aspects of rape without any reference to emotional or social consequences. Rape victims have informed me that they felt as if they were the accused and they had done something wrong. Many persons working in the area of rape try to do the best they can, but they are seriously hampered by a lack of facilities and personnel.*

Given our social climate, it is not surprising that many women turn to other women and not the public authorities to unburden themselves about their personal sexual and emotional conflicts resulting from rape. In this situation it is most unfortunate, to put it mildly, to see a gradual disappearance of women's centres, rape crisis organisations, the erosion of public funding, and in some instances, overt government hostility. Regardless of what innovations occur in the police force or hospitals as to the handling of rape victims, the fact must be faced that there will be many women who will not directly report rape to governmental authorities. In such cases, organised women's groups offer the only viable alternatives to victims of rape who wish to share with other women the torment of the violent sexual attack, but ironically, at a time when rape crisis centres appear to be most urgently needed, they are under threat both politically and financially.**

The rape crisis centre set up by volunteers in Melbourne some years ago is obviously close to folding completely. Apart from the Sexual Assault Clinic in the Queen Victoria Hospital which is government funded and is certainly doing a worthwhile job, to the best of my knowledge, Geelong has the only other rape crisis centre in the entire State of Victoria. That centre receives no funding at all. This is a disgraceful situation which has arisen as a result of a total lack of concern shown to the rape victim.

Is it any wonder that it has been said that the care of rape victims in the State of Victoria is distinguished only by its inadequacy. As a result of their research, Cordner and Schneider concluded:

'A public hospital should initiate, or the Health Department should organise, in liaison with police and police surgeons, an assessment

*For an attempt to change hospital procedures, see Lee Henry, *op.cit.* this volume. (Editor's note.)

** On the question of care in the community by rape crisis centres, see Meredith Carter and Roslyn Harris, "Women Against Rape : Community Care for Victims of Rape", this volume. (Editor's note.)

and referral service for rape victims. The rape victim must be seen as a whole person, not just as a medical or legal entity. This will necessarily involve considerable cooperation and communication between involved disciplines. Given that our data can only be suggestive, there is an obvious requirement for further research, particularly with regard to the needs of the rape victim in the absence of such information. Any service established will need to be of sufficient flexibility to meet the requirements of individual women, rather than being based upon stereotype conceptions of the rape victim.'

Just what the short and long-term psychological effects upon rape victims might be has been very poorly documented in Victoria. According to a police surgeon with the Victoria Police, a review of public health journals from January 1957 through to April 1966 did not contain one article on rape.¹⁷ None of the medical literature described community health or medical services for immediate care or follow up of victims for continuing care.¹⁸

With counselling, the initial interview is of great importance. Timing, especially seeing the victim immediately after the attack, is critical. Telephone counselling also offers much to the rape victim. It gives quick access to help, providing the victim with an option on whether or not she accepts counselling offered.

As for court procedures, having been through the mill immediately after the rape, the victim is then faced with the nightmare of prolonged court proceedings. In one incident, a young woman who was pack raped was required to give the same evidence seven times, each time being grilled as to her own sexual history, despite her having sustained severe injuries in the course of the rape. As has been pointed out,¹⁹ lawyers frequently treat the procedures like a game of chess, without concern for the trauma of the victim.

It is salutary to note that as long ago as July 1975, a general meeting of the Women's Electoral Lobby (Victoria) produced the following statement:

'The law regarding rape is the product of social conditions during the past few centuries in England. It pre-dates women's suffrage, property rights ... and rests on the assumption that women are quasi-chattels with very limited judgments and volition. At the time, a woman was thought to be either a loose woman or a respectable woman and it was this and the man's honest belief as to her status in this regard which formed the crux of evidence in a rape trial.'

As a result of a long line of precedents, evidence in rape trials has been admissible which is irrelevant to both the character of the witness and the facts of the particular case. These anachronisms are not needed for the defence of the innocent accused but they are often used unscrupulously to confuse and mislead the jury and to intimidate the victim.'

So bad is the current situation that only one of more than twelve Victorian policewomen interviewed by the Victoria Police surgeon would recommend to a rape victim that she should report the rape officially.

Here, there is obviously, an enormous area for legal improvement. There is no shortage of sound suggestion as to what can be done, and in this regard paragraphs 10 to 19 of the Royal Commission's Report on Human Relationships are required reading.

Is Law Reform Enough?

Law reform is not enough to eradicate from our society the problem of sexual attack, nor those problems associated with it. Even in the area of law reform, problems arise :

'A summary of the moves to reform the law of rape in Australia presents a picture of great activity with few constructive results. The spate of legislation which has followed either recommendations of commissions or initiatives within the legal bureaucracy of State Governments has made the law of rape even more confusing and potentially inequitable than it was prior to the "reform". To illustrate, there are now, in law, three different definitions of rape in Australia - the common law, the South Australian and the Victorian variations. The New South Wales Report proposes another variant. It is clearly arguable that reform of the substantive law is necessary but without some centralization the result has been duplication of activity and a confused national picture.

The reports are, with the exception of the Human Relations Commission Report (which, ironically, did not have a special brief to consider rape reform), excessively narrow and legalistic in their approach - concentrating on precedural reform without thorough investigation, from all perspectives, of all the problems involved.

One cannot entirely blame the Commissions for this. The South Australian Report opens, for example, with a comment on the paucity of submissions to it

and wonders whether the issue is really of such burning public concern, or does it reflect the degree of publicity given to the project? The research findings of the Victorian body were considerable, if the footnoting is any guide, but the effect of this reading does not seem to have produced any comprehensive recommendations and, for that, one can blame the reference to the Commission. Most questions of a general nature, where alluded to at all, are by way of aside or footnote, because they do not come within the terms of reference.

No Commissions, again apart from the Human Relations Commission, took verbal evidence. In fact in New South Wales and South Australia the Reports were produced by a Departmental enquiry which meant that the public were not consulted in the initial stages at all. In New South Wales the Attorney-General's Criminal Law Review Division did establish a Consultative Committee but the Report is clearly stated to be the work and opinions of the Director, a lawyer, which have been modified only slightly by virtue of his consultation with a body also made up almost exclusively of lawyers and police.

In other States no Report, even on Rape, let alone sexual offences generally, appeared to discuss or justify the legislation currently being produced. One example illustrates the unfortunate result. The problem of the admissibility of a victim's past sexual history has now, to date, produced five different legislative solutions, all basically trying to "define" what has been possible with the common law for one hundred and fifty years.

It seems a pity that the whole range of sexual injury is an area which has needed law reform for a considerable time, should be dealt with in such a piecemeal fashion. Most of the State legislation preceded publication of the Human Relations Commission Report. There is little hope that the whole matter will be reconsidered in a broader context. Certainly an approach made up of narrow references to Commissioners or done in an ad hoc way by Attorneys-General and their staffs cannot produce the kind of law which reflects community needs in this area. One wonders, too, why Governments think lawyers are the best people to plan law reform. One would argue that their skills are more relevant to drafting than considering substantive issues. They are certainly not the only body of professionals whose opinions

would be relevant in this area of the law.

In the United States, by contrast, a statute has been sponsored in Congress (the Rape Prevention and Control Act) designed to fund community groups dealing with rape, study existing rape laws, study the causes of rape and develop techniques for personnel handling rape cases.

The crucial problem, say commentators in the United States, in combating the problem of rape in the community, is to have reliable statistics in order to project action for the future, to detect changing patterns and incidence of offences.

Statistics and conclusions become unreliable where there is no uniformity of rape laws. A common call then is for standardization of the legal definition of rape and procedures so that reliable evidence about sexual offences can be collected to confirm opinions and dispel myths. It is ironic that, in Australia, after a four-year period of activity in the area we have moved entirely the other way. We have a whole range of written suggestions, piecemeal reforms and no continuing programme to evaluate what little has been done. One would hope that the Women's Unit in the Federal Structure might take up the work tentatively begun by the Human Relations Commission and prepare a sexual injury code for Australia. It could hardly be more expensive in terms of time and money (as measured by results) than the current efforts in the area.'²⁰

Conclusion

In *The Other Side of Rape*²¹ it was said :

'Rape may or may not be either a conscious act of male oppression or a chauvinist plot to colonise all women. It is, though, a damning indictment of our values that white males have permeated throughout our culture since Cook landed in Botany Bay.'

While this characterizes the present reality - at least the State of Victoria, there is no reason why we should accept it as eternal truth. On the contrary, immediate steps can and must be taken by governments to improve the situation.

Rape is not a party political problem. It is not something that affects the Labor Party, the Liberal Party or the National Party. It is a problem affecting our whole society. The increase of rape in Australia is not an isolated phenomenon, but is part and parcel of the increasing violence permeating the entirety of our society.

In such a society, where both men and women have been conditioned to accept the macho male as an ideal, attempts at legal correction of rape in isolation can only be a band-aid solution. And as the economic crisis deepens, pressures to conform are intensified. The general political swing to the Right includes attempts to force women back into a more passive role and for ordinary people to feel politically powerless. Males are then in a position to violently vent their frustrations on women in the classic pattern of divide and rule.

But public campaigns on the issue of rape can at least help to lift people's awareness and make them conscious of how their personal relationships have been and are being assaulted by prevailing attitudes, and by the way the system manipulates these attitudes. And for the sake of the women already raped, those who are being subjected to repeated acts of rape, and for those who will be raped, we must find ways of improving the current situation.

Sexual activity should be the very opposite of violent activity. Yet the same violent old men who dominate the higher echelons of our power structure are the same violent old men who were engaged in the rape of Vietnam, in the rape of black people and indeed, of the very earth on which we live. They not only use a hyphenated term of sex-and-violence, but promote in the media and in legislation a picture which regards violence and war as normal ... and gentle sex as unnatural. #

No simple reforms can eliminate rape, because rape is not an unrelated act that can be eradicated from patriarchy without eradicating patriarchy itself. But an attack on rape as a way of life is at least an attack on our way of life as a whole.

See note re attribution at conclusion.

FOOTNOTES

- 1 See *Hansard*, Legislative Council, Victoria, 31st October 1979, at p. 973 *et. seq.*
- 2 See Paul R. Wilson, *The Other Side of Rape* (1976, University of Queensland Press, Brisbane, Qld.)
- 3 See *The Sun* 29 September, 1979; *The Age* 1 October, 1979.
- 4 Dr. Peter Bush, police surgeon with Victoria Police Force; see Peter Bush, *Rape in Australia* (1977, Sun Books, Melbourne, Victoria).
- 5 Dr. Jocelyne A. Scutt, Research Criminologist at the Australian Institute of Criminology, Canberra, A.C.T. and Ms. Laurice Penfold, Lecturer in Sociology at the University of Sydney, Broadway, New South Wales.
- 6 Paul R. Wilson, *op. cit.*
- 7 See Susan Griffen, "Rape - The All-American Crime" in *Ramparts Magazine* (1974); also published in Susan Griffen, *Rape - The Power of Consciousness* (1979, Harper & Row, New York). The author acknowledges a sincere debt to Susan Griffen for information supplied in parts of this paper.
- 8 Paul R. Wilson, *op. cit.*
- 9 Royal Commission on Human Relationships, *Final Report* vol. 5, chapter 2, "Rape and Society" (1977, Australian Government Printing Service, Canberra, A.C.T.).
- 10 Menachim Amir, *Patterns in Forcible Rape* (1974, University of Chicago Press, Chicago).
- 11 *Ibid.*
- 12 Alan Taylor, Parole Officer cited in Menacham Amir, *op. cit.*
- 13 Anne Summers, journalist and author of *Damned Whores and God's Police* (1976, Penguin Books, Ringwood, Victoria).
- 14 *Final Report*, *op. cit.*
- 15 Anne Wolpert Burgess and Linda Lyttle Holmstrom, *American Journal of Psychiatry* (April, 1976).
- 16 Cordner and Schneider, *Rape : The Effect on the Victim* (1976, U.S.A.); see also Lynda Lyttle Holmstrom and Anne Wolpert Burgess, *The Victim of Rape - Institutional Reactions* (1978, John Wiley & Sons Ltd, U.S.A.).
- 17 See Peter Bush, police surgeon with the Victorian Police.

¹⁸ For a number of procedures recommended by the Royal Commission on Human Relationships, which are worthy of note, see *Final Report, op. cit.*, at p. 232 *et. seq.*

4. All large public hospitals should have a panel of medical practitioners trained in the examination and treatment of rape victims, available to examine rape victims at any time.
5. Such panel should include a sufficient number of women to enable any victim to be examined by a woman doctor if she so requests.
6. Country doctors who might be involved in examination of rape victims should be kept adequately informed of the procedures to be followed and the matters to be investigated.
7. A pamphlet containing guidelines for the medical treatment and management of rape victims should be prepared and made available to all hospitals who may be called upon to deal with rape victims.
8. Appropriate steps should be taken to care for the rape victim's mental health, and also to deal with venereal disease or pregnancy resulting from rape.
9. A pamphlet containing information about medical treatment, counselling and legal services should be prepared and made available for rape victims.

¹⁹ Peter Bush, *op. cit.*

²⁰ Deidre O'Connor, "Rape Law Reform in Australia" (1978) *Criminal Law Journal*, parts I and II.

²¹ Paul R. Wilson, *op. cit.*

The author sincerely acknowledges a debt to the work of Susan Griffen, *Rape - The Power of Consciousness* (1979, Harper and Row, Publishers, N.Y.); particularly to the chapter entitled "Politics", previously published as "Rape - The All-American Crime" in *Ramparts Magazine*, from which some of the above phrases were paraphrased and ideas expanded upon in the Australian context. Those passages marked # must be directly attributed to Susan Griffen.

POLICE ATTITUDES AND PROBLEMS IN RAPE LAW AND RAPE LAW REFORM

C. H. Fogarty[#]

Considering the difficulty a rape victim has in making the police believe her story, participating in a protracted criminal trial, and living with the aftermath, rape is a charge which is not easily made. Despite the stringent proof required in rape cases, many people still believe - and fear - that innocent men will be convicted of rape merely on the concocted story of a vexatious female. The police contend that because of their methodological investigation procedures, that is hardly likely to happen. Instead, it is more likely that because of our traditional attitudes toward this crime, and our outdated criminal justice system, the guilty person will remain free. A woman who is raped and reports it, is doubly victimized, first by her attacker and secondly by society.

Establishing a *Bona Fide* Rape

The crime of rape is a serious one and poses many problems for police. The objective of a rape investigation is first to determine whether a crime has been committed, and once this is ascertained to obtain the necessary evidence to identify, arrest and convict the offender. False allegations add to the investigation problem, although care must be taken to interpret the statistics of false complaints carefully, for they may not be as high as we are led to believe.* Notwithstanding, the police must establish the truthfulness of every complaint and it is in this regard that they have been accused of being uncaring, a criticism which police believe is unfounded.

Specialised Rape Squads

Rape, although a serious high priority crime, is a relatively uncommon one.** Still, pressure groups move to induce police forces to

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* Note that since reforms to laws in the United States have come into effect, false complaints of rape have been noted by police not to exceed the rate of false complaints made in other crimes. In the past, the false complaint rate was set at absurd heights - 50% - 80%, for example. See Virginia Blomer Nordby, "Reforming Rape Laws - The Michigan Model", this volume. (Editor's note.)

**But see results of victimisation studies in Australia, showing the rate of rape to be proportionately like as that in the United States, but the reporting to police rate to be 50% less in Australian than in the U.S.A. See John Braithwaite and David Biles, "Women as Victims of Crime : Some Findings from the First Australian National Crime Victims Survey" (1980) *The Australian Quarterly* (forthcoming). (Editor's note.)

establish specialised units solely to deal with rape. By doing so they indicate their acute lack of understanding of the police function and the constraints imposed by economics and demography upon police operations. Police, except in the large cities, reject the idea and instead seek to improve the training of police to better enable every police officer to compassionately deal with a rape situation. The resultant benefits are obvious.

Law Reform and the Police

Police have no criticism to make about carefully thought-out legislation, believing that law reform is necessary in every rapidly changing society. However, reform implies change for the better, but 'better' is a matter of opinion. The police feel that a greater percentage of law reform is considered by a minority bent on imposing a minority view on the rest of us. Historically, reform has the effect of reducing anxiety without reducing the problem. What happens is that one problem is replaced by another, and police by having to deal with the new law and the dysfunctional consequences arising therefrom, become nothing more than ill-considered whipping posts.

Law Reformers - The Police View

It is generally thought that the law emanating from the many unco-ordinated law reform commissions and committees throughout Australia reflect the view that the members are not sufficiently informed; they have no clear objectives; they seek to change laws not because it is necessary but because it becomes fashionable to do so. If this was not the case, then why has much of our antiquated law escaped their attention?*

The belief among police is that law reformers appear bent on the destruction of law and order. They do not consider the ramifications arising from many of their suggestions, and consequently increase police workloads in unexpected areas. Law reform must, in order to be successful, establish good foundations before attempting to build superstructures. This has not been done.

Rape Crisis Centres and the Police

Unfortunately rape crisis centres have not received the credibility they ought to have been given. In fact, police generally believe rape crisis centres are inhibiting factors in rape investigations. That is, complaints are delayed in their reporting to the police; rape crisis centre workers talk victims out of reporting a rape; centres relay a distinct impression of being anti-police. It is considered in many instances that these centres are staffed by feminist groups who do not know

* For another view of the work of law reform commissions and committees in Australia, see Australian Law Reform Commission, *First Annual Report* (1976); also the quarterly journal *Reform* published by the Australian Law Reform Commission, G.P.O. Box 3708, Sydney 2001, New South Wales. (Editor's note.)

what they are doing.*

The Police and Procedural and Substantive Law

With the exception of South Australia, Australian law reformers have directed attention at procedural rather than substantive law,** and it is perhaps just as well they have done so. When substantive law seeks to intrude into family disputes, for example, when a wife complains of her husband raping her, it is virtually doomed to failure. The lack of conviction rates and general public opinion indicate this.***

Procedural law changes have been suggested with the idea to better control the police. Instead the rules unnecessarily hinder many investigations to the extent that police feel hamstrung to deal effectively with serious crime problems. The police require a lessening of procedural requirements, not a tightening of them. Such lessening would involve, for example :

1. Granting the police power to have a suspect medically examined, even if it is to exclude him or her from investigations, without first being required to arrest and charge that person.
2. Abolition of the right to silence, for it inhibits investigations.
3. Revising the laws of evidence to render it easier to have evidence admitted to the court room : exclusionary rules of evidence excessively favour the accused. Finding facts is relatively simple. Finding them in such a way as to make them admissible is another matter.

* For another view of the work of rape crisis centres, see Ros Harris and Meredith Carter, "Community Care for Victims of Sexual Assault", this volume. It is the view of the Editor that the feminist movement in general and rape crisis centres as part of that movement led to the demystification of rape and to the demand for rape law reform so clearly exhibited at the National Conference on Rape Law Reform, Hobart, Tasmania 28-30th May 1980. On difficulties experienced in the nature of police-rape crisis centre co-operation, see further "Introduction", this volume. (Editor's note.)

** Note, however, the *Report of the Criminal Law Review Division*, Department of the Attorney-General and of Justice (1977) and the *Supplement* to that Report; also *Report of the Royal Commission on Human Relationships* (1977); and *Women's Electoral Lobby Sexual Offences Draft Bill* (first produced in May, 1977) - each of which dealt with the problem of framing new substantive laws on rape and other sexual offences. (Editor's note.)

*** See Helen Coonan, "Rape and Law Reform - Proposals for Reforming the Substantive Law"; and Peter Sallman, "Rape in Marriage and the South Australian Law", this volume. (Editor's note.)

4. Admission of the woman's past sexual history is still discretionary on the part of the judge. This has not changed much despite 'law reform'.
5. Any suggestion that *only* females should interview females is absurd. Many females prefer to be interviewed by a male. *
6. The lack of consideration given to medical practitioners' evidence often serves to render practitioners uneasy about conducting medical examinations of victims.

Discretion and the Role of the Police

The role of the court has been abrogated in respect of the determination of guilt of any person in relation to rape. This discretion now rests with the police. For instance, as a result of the passage of criminal compensation legislation, police have to be practically certain of convictions before a prosecution is launched; then they must fight 'tooth and nail' to sustain a conviction.¹ I do not think this was intended.

In the past, the determination of guilt was left to the court. If laws are changed to categorise the crime of rape into levels of seriousness with a specific sentence for each, police by charging the crime best suited will also become determiners of sentences.**I consider, too, that this would not be the intention of the reformers.

* All resolutions and recommendations passed at various conferences debating the issues since 1975 have emphasised the need for a *real choice* lying in the victim (be s/he male or female) as to the gender of police officer/hospital personnel involved in the case. For a complete review of these resolutions, etc. see Jocelyne A. Scutt, *Domestic Violence in Australia - An Overview of Completed, Current and Projected Research* (1980, Australian Institute of Criminology, Canberra, A.C.T.). (Editor's note.)

** For further comment on this issue, see "Introduction", this volume. (Editor's note.)

FOOTNOTES

- ¹ For an outline of issues related to the granting of criminal compensation, see John E. Willis, "Compensation for Victims of Domestic Violence" in *Violence in the Family* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology, Canberra, A.C.T.) 145-156.

HOSPITAL CARE FOR VICTIMS OF SEXUAL ASSAULT

Lee Henry#

The Sexual Assault Referral Centre (S.A.R.C.) at Sir Charles Gairdner Hospital in Perth is Australia's first hospital based and Western Australia's only sexual assault centre. It was established in January 1976 following the growing concern of feminists and other community groups at the treatment rape victims received from the police, hospitals and legal procedures. The Centre provides a 24 hour, 7 day per week service for any female or male over the age of 12 years who has experienced any form of sexual assault.

Functions of the Centre

1. To provide treatment and care for the physical, emotional and social needs of victims¹ of sexual assault. This treatment and care is available until the resolution of any problem arising from the assault.
2. At the victim's request, to assist the police and Crown Law Department by the collection of relevant data and presentation of evidence.
3. To enhance greater community understanding and involvement in the problems of sexual assault by -
 - a. Promoting the Centre as a reference and referral centre for the community.
 - b. Participating in the education of medical and legal practitioners, police officers, health personnel and other allied professions.
 - c. Providing a support function for those groups actively involved in assisting and protecting victims and potential victims of sexual assault.
 - d. Conducting lectures and discussion groups in schools and community groups.
 - e. Conducting, supporting and encouraging research into the area of sexual assault.

Social Worker, Sexual Assault Referral Centre, Sir Charles Gairdner Hospital, Nedlands, Western Australia.

Location of the Centre

The Centre has no identifiable physical area. It functions out of the Emergency Department and the Social Work Department and has back up from all other hospital departments.

Staffing of the Centre

The Centre is staffed by a team of female counsellors and a panel of female medical practitioners. If a victim wishes to see a male doctor and/or counsellor, this can be arranged.

The counselling staff consists of one full time social worker who trains and co-ordinates the counselling team and counsels all victims referred during the day. This social worker has back up from the Social Work Department. The other counsellors, of which there are four, work on a sessional basis and are on call from their own homes; they cover out of hours rosters. These counsellors do not have professional qualifications; they are chosen from their warmth and caring approach to people, and are given in-service training on crisis intervention and counselling of rape victims.

The medical practitioners² who volunteer for the panel are given special training, especially in the forensic aspects of their work, in working with people who have been sexually assaulted. Each doctor works in other areas of medicine, almost all outside Sir Charles Gairdner Hospital, and is called in when a case presents. The medical team is trained and co-ordinated by the senior doctor on the panel, who holds a one session appointment at the hospital for this purpose.

Funding and Finance

Sir Charles Gairdner Hospital funds the Centre and all staff employed are paid by the hospital. There is no cost to the victim for attending the Centre.

How the Centre Works

There are two methods of contacting the Centre:

1. The best way is to telephone the hospital and ask for the Sexual Assault Referral Centre. During working hours calls will be answered by the Centre's social worker who deals with whatever problem presents. At night and weekends the nursing administrative sister for the Emergency Department receives calls. The sister arranges for the victim to be seen by a doctor and counsellor or passes on the telephone enquiry to the counsellor who then contacts the caller.
2. Second, people can present at the Emergency Department and ask to see someone in the S.A.R.C. However, as the Centre's staff are not always at the hospital, this may mean a half to three-quarters of an hour wait until staff arrive.

Two types of referrals are received by the Centre - referrals related to a past sexual assault and referrals regarding a recent assault. People referred because of a past sexual assault are usually requesting counselling assistance and are seen only by a counsellor.

When a call is received regarding a recent assault (a crisis referral) it is suggested that the victim come immediately to the hospital's Emergency Department or a time convenient to the victim is arranged. Initial contact is always by team approach involving medical practitioner and one counsellor. Thus a relationship is established as quickly as possible with both counsellor and doctor, and a victim only has to outline her story once. Further contact is with the same doctor and counsellor.

Upon arrival at the hospital's Emergency Department, the victim is met by the counsellor and taken to an interview room. A victim is not required to go through normal Emergency Department routine, seeing clerks, nurses, residents, and so on. Doctor and counsellor take care of all hospital procedural requirements and a victim's needs, unless a specialised medical service is required. The aim of this approach is to keep to a minimum a victim's exposure to other people where she has to explain what has happened.

The Centre uses two rooms during contact - an interview room and an examination room opposite each other and in a quiet area of the Emergency Department. Police involvement is discussed at the commencement of the interview as this determines the nature of the medical examination. If the police have not been involved and the assault is recent, then a victim's reason for and against reporting the assault to the police are discussed. The Centre attempts to give victim information and support to enable them to make a more informed decision regarding legal involvement. The final decision is always that of the victim and no persuasion is given in either direction.

The medical examination is then undertaken.

Medical Issues During Initial Contact

1. Physical examination and treatment of any injuries.
2. If a person has or is planning on reporting to the police, medical evidence of the sexual assault is collected.
3. Discussion and treatment of possible pregnancy and venereal disease.

Urgent medical needs take precedence over the forensic examination.

Further medical follow up occurs at varying intervals for up to 12 weeks. The counsellor is always present at medical follow ups, and this provides an opportunity to reinforce the counselling relationship.

The Counselling Service

The aim of counselling contact is to assist victims and families

with any problems occurring as a result of the assault. Assistance may be practical, social, emotional or psychological. The Centre aims not to take on a person's life problems, just those problems related to the sexual assault.

During initial contact the counsellor spends some time alone with the victim, in order to concentrate on the person's immediate emotional and practical concerns. If victim prefers, someone else is invited to be present. Emotional concerns may be -

1. Who will the victim tell about the assault and how?
2. Does the victim have supportive people in her life?
3. Family reactions or problems.
4. Feelings related to having been assaulted.

Practical concerns may be -

1. Safe accommodation.
2. How to cope with fear and insecurity.
3. Understanding of the medical and legal issues.

The Centre provides for victims to shower. New clothing is provided if required and victims will be transported to their accommodation or to Police Headquarters. Should a victim require admission to hospital, either for emotional or physical reasons, care is continued on the ward by the original doctor and counsellor.

Before leaving the Centre, victims are given an information sheet explaining how to contact the Centre, medical issues discussed and/or treated during initial contact, medical follow up is required, and general follow up available, including information on compensation. A victim is always given the doctor's and counsellor's home and work telephone numbers so that or their family can contact either at any time. During initial contact the counsellor always encourages a first follow up within 24 hours. Most people find it very supportive to have someone outside the family with whom they can share their feelings, and who can answer their questions. Families also find this contact of value.

Further follow up is based on needs and requests of the victim and/or their family. If a victim wishes, the counsellor will accompany her to court hearings and other legal consultations. This is considered by the Centre to be an important aspect of the counselling service.

Approach and Philosophy

All contact with the Centre is strictly confidential. No one is contacted about the assault unless this is first discussed with the victim. The victim is registered as having been to the hospital, but the reason is not recorded. Doctors keep their own personal notes which they

use for court proceedings.

Victims of sexual assault are viewed as 'normal' (not sick) persons in crisis who need support and care. The victim often has been through a life threatening experience where she has temporarily lost control of her life. The approach of the Centre is to help her regain that control.

Referrals

The Centre accepts referrals from anyone. Table 1 shows the source and number of referrals seen between October 1978 and March 1980.

Table 1

SOURCE AND NUMBER OF REFERRALS: OCTOBER 1978-MARCH 1980

Referring Source	Number	Percentage (rounded)
Police	111	46
Self	29	12
Relative	23	10
Friend	20	8
Other*	43	18
Not known	13	5
Total	239	99

* Referrals from other social work or counselling services, hospitals, general practitioners, etc.

Police are the major single referring source. However, significant numbers of referrals are received from family, victims and friends. These numbers of referrals are increasing as the Centre becomes known to the community.

Liaison with Police

A good working relationship exists with the Western Australian Police Force. The Criminal Investigation Bureau (C.I.B.) brings victims to the Centre for medical and counselling assistance. A detective sergeant liaises with Centre staff. In cases of complaint against a police officer, the liaison detective is contacted and investigates and deals with the complaint. The reverse also applies. This procedure avoids confrontation between the C.I.B. and the Centre, and has facilitated the development of care and treatment of victims. The liaison detective answers any queries Centre staff may have about cases, discusses any issues of mutual concern and provides legal information for the victim so she can make a more informed decision regarding legal involvement.

Educational Role of the Centre

Community and professional education is an increasing area of involvement for the S.A.R.C. The Centre is involved in educating both uniformed and C.I.B. branches of the Western Australia Police Force about the victim or rape; assistance is given in training of social workers, doctors, nurses and other professionals who may at some time come into contact with a victim of sexual assault. Additionally, lectures and discussion groups are run in schools, with community groups. This educational role is seen as essential because of the major distress experienced by victims, coming from attitudes society has about rape and the rape victim.

Experience of the Centre

Since the Sexual Assault Referral Centre commenced in 1976, it has received 539 referrals. Data from earlier years is rather scanty. In the past 18 months information has been more systematically gathered on cases referred to the Centre. Information is recorded after the interview, not in the presence of the victim. It is based on matters discussed and at no time are victims asked questions in order to complete the questionnaire.

Between October 1978 and March 1980, there have been 252 referrals. Thirteen of these have been false reports from people with psychiatric or social problems, some involving the police, others with whom the police have not been involved. Subsequent discussion is based therefore on 239 cases. Only three cases involved males.

Table 2

AGE DISTRIBUTION OF VICTIMS

Age	Number	Percentage
0 - 12	20	8
12 - 15	50	21
15 - 20	77	32
20 - 30	60	25
30 - 40	18	8
40 - 50	6	3
50 - 60	3	1
60 - 70	3	1
70 - 80	1	.5
80 - 90	0	0
90 - 100	1	.5
Total	239	100.0

The age range is 4 to 92 years with 78% of cases between 12 and 30 years.

Some victims gave more than one reason for presenting to the Centre.

Table 3

REASON FOR PRESENTING TO SEXUAL ASSAULT REFERRAL CENTRE

Reason	Number	Percentage
Rape	150	60
Incest	33	13
Indecent Assault	23	9
Carnal Knowledge	14	6
Anal Intercourse	7	3
Oral Intercourse	5	2
Other*	18	7
Total	250	100

* Physical assault, person not sure if sexually assaulted.

The major complaint is rape 60%, with incest being the next most common at 13%.

In 93 of the 150 cases of rape the police were involved; 83 had informed the police before coming to S.A.R.C. and only 10 victims who reported first to S.A.R.C. subsequently reported to the police.

Table 4

POLICE INVOLVEMENT IN RAPE CASES PRESENTING

	Number	Percentage
Before S.A.R.C.	83	55
After S.A.R.C.	10	7
No Police involvement	51	34
Not known	6	4
Total	150	100

Reasons for a person choosing not to go to the police were also recorded.

Table 5

REASONS FOR NOT REPORTING RAPE TO POLICE (N = 57)

Single Reason	Number	Multiple Reasons	Number
Court	1	Family and Police	1
Police	3	Court and Police	3
Assailant known	7	Family, Court, Police and	
Family	15	other	3
Other*	9	Court, Police and Assailant	3
Not known	6	Family, Court and Police	6

* 'Just wanted to forget it'; 'I don't want to go through anymore'.

In summary the most common reason given for not involving police related to family concerns. Quotations from victims give some idea of the nature of these concerns, for example:

'Mum and Dad always think it is the girl's fault, that she was asking for it'.

'Mum is not well and it would only make her worse'.

'They (parents) have enough problems without this, I don't want them to know'.

Table 6

SUMMARY OF REASONS FOR NOT REPORTING RAPE

Reason Related to	Number	Percentage
Family	25	44
Police	19	33
Court	16	28
Other	12	21
Assailant known	10	18

Family related reasons were the most common single reason given, featuring in 44% of non-reported cases where more than one

reason was given. Only three people cited police related issues as their only reason for not reporting rape. However, one-third of those not reporting rape gave it as one of their reasons. Some of the actual statements illustrate the concerns, for example:

'I have heard that the police give you a really rough time'.

'I am not going to the police, they won't believe me'.

Only one person mentioned the court procedure as her only reason for not reporting rape. However, 28% of victims mentioned it as one of their reasons, for example:

'I am not standing up in front of people and talking about this'.

'I am not going through all that (police and court) for nothing. The guy gets off'.

Low conviction rates were mentioned by many who were put off reporting by anxieties about police and court procedures. The conviction rate in Western Australia bears out this belief. Of the cases reported to the Western Australia Police Force since 1975, only 57% were treated as genuine, 41% were charged and 32% were convicted. Thus conviction occurs in approximately only one-third of all cases of rape noted by police as being reported.

Table 7

CONVICTION RATE OF RAPE OFFENDERS IN WESTERN AUSTRALIA

Police Figures (1975-March 1980)	
	Number
Offences reported to police	532
Treated as genuine	304
Cleared by charge or other means	222
Bureau of Census & Statistics (1975-1979)	
	Number
Charges	240
Convictions Judges' Court	163
Convictions Magistrates' Court	7
Total Convictions	170

The discrepancy between police figures of cases cleared - 222 - and the Bureau of Census and Statistics number of charges - 240 - cannot be

explained but emphasises the need for more detailed and reliable statistics.

'Assailant known' was the third most common single reason given by victims for not reporting rape to police and mentioned by 10 people (18%) as one of their reasons. Feelings expressed on this issue indicated victims did not think they would be believed by family, peer group, police or courts about the assault, because they knew the assailant. In some cases the rapist was a family friend, or victim and assailant had experienced a previous sexual relationship.

Table 8

RELATIONSHIP OF THE OFFENDER TO THE VICTIM

Relationship	Number	Percentage
Relative	4	3
De facto	3	2
Friend	23	15
Boyfriend	3	2
Acquaintance	51	34
Sighted	15	10
Stranger	43	29
Not known	8	5
Total	150	100

In only 29% of cases did the victim say the offender was a complete stranger. In nearly half, the offender was an acquaintance or friend.

The category 'other reasons' was the second most common reason given for not reporting the rape. Twelve people (21%) gave other reasons besides family, police, court, and assailant known, as one of their reasons for not reporting the rape, for example:

'I just want to forget it'.

'I don't want to go through anymore'.

Underlying all reasons given is an expressed feeling of the social stigma which rape and rape victims have in our society. This evolves from the many myths about rape and the rape victims, for example:

'Nice girls don't get raped'.

'The girl must have been asking for it'.

'No one man can rape one woman',

and so on. These attitudes affect everyone in the community and are often held by interviewing police officers, defence and prosecuting lawyers, families and victims. Such attitudes affect actions and interactions with the victim.

The findings of the study³ of 70 unreported rape cases in Brisbane between December 1974 and August 1976 accord with this. There, major reasons for not reporting rape concerned reactions of relatives and the antagonistic response women expected from society at large. Although the rape victim is assaulted physically her autonomy and self-esteem are even more profoundly violated. Rape has a social, physical and emotional impact upon the victim, with both short and long term effects. Immediately after the rape and lasting up to a few weeks, the victim experiences total disruption in her life.

Short Term Effects

1. Physical -

- a. soreness to parts of her body involved in the assault;
- b. disturbance of sleep pattern;
- c. disturbance of eating pattern;
- d. symptoms specific to parts of the body that have been the focus of the attack, for example, vaginal discharge or itching.

2. Emotional -

- a. the victim may experience a wide range of feelings - fear, humiliation, guilt, degradation, self-blame;
- b. mood swings;
- c. continual thoughts about the assault, how could she have prevented the assault, and the like.

Long Term Effects

1. Change in life style - job, residence.
2. Dreams and nightmares.
3. Development of phobias either to circumstances of the rape or characteristic of the assailant.
4. Anxiety about sex.

As stated elsewhere:

'Each rape victim responds to and integrates the experience differently, depending on her age, life situation, circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support'⁴

If a rape victim decides to report the rape, she may be subjected to a

great deal of distress not experienced by the victim who chooses not to report such an assault. This distress is directly related to the legal process, prolonging disruption to a victim's life, already experienced from the rape itself. Legal processes keep the victim's life in suspense, delaying a return to her normal pattern of living and the resolution of feelings associated with the event.

Areas of Distress

1. Firstly, a woman experiences the actual rape and its immediate social, physical and emotional effects.
2. The medical examination is distressing for many as it reminds them of the assault. There is also further anxiety over the possibility of pregnancy and/or venereal disease.
3. Interview by police and making a statement may commence before the medical examination and continue afterwards. Some aspects of distress include:
 - a. Going over and over details of the assault. This may be the first encounter where a victim has to explain what has happened. This is distressing in itself and even more distressing if the investigating officers are rough in their line of questioning. Many detectives are skilled in the art of questioning victims, however, there are those who are not.*
 - b. The number of police officers and detectives involved in the investigation can cause distress. In Perth, a number of changes in personnel involved in the investigation may occur. Up to seven individual investigating officers can be involved, and the victim having to re-tell her story a number of times finds this stressful to say the least.
 - c. Many victims and their families find follow up visits by detectives upsetting, particularly if visits occur at school or place of employment. It is difficult in such circumstances to ensure privacy concerning the rape. Victims can find follow up visits by detectives intimidating, particularly if young and at home alone.
 - d. Many women are upset when informed by the C.I.B. that the assailant will not be charged because of lack of evidence, or that a lesser charge has been made. The victim often feels that the assailant has not been sufficiently punished.
 - e. Additional stress is experienced if the woman has to identify the assailant and/or go to the scene of the crime.
4. Newspaper reports - in Western Australia the woman's name cannot be printed. However, victims have been identified by friends and

* For alternative views of police appreciation of the victim's role, see Ros Harris and Meredith Carter, "Community Care for Victims of Rape", this volume; and Col Fogarty, "Police Attitudes and Problems in Rape and Rape Law Reform", this volume. (Editor's note.)

neighbours because of information appearing in the press; for example, a 16 year old girl had all her friends ring her up enquiring if she was the victim - identified by the newspaper report that the girl had a cut on her face from an accident in a swimming pool.

5. General disruption to life - work and school are disrupted because of time off for questioning, and for preliminary and final court hearings. Maintaining privacy and anonymity in such circumstances is virtually impossible. The legal process also places extra stress on relationships during this time period.
6. Preliminary hearing - although in 1976 there was an amendment to the *Justice Act* introducing the use of a hand-up brief for taking the victim's evidence in committal proceedings, many victims are still subjected to two or more court hearings. This entails seeing the assailant again, going over details of the assault and being subjected to defence lawyer's questioning which is aimed at finding some weakness in the woman or her story. If more than one accused is involved, there may be questioning by a number of lawyers.
7. Distressing aspects of appearance in court include -
 - a. Number of court appearances. In a case involving more than one accused, some younger, some older, than 18 years, the woman may have to give evidence in the Children's Court, Magistrates' and the Supreme Court. This entails subjection to a number of cross examinations.
 - b. Delays in court hearings. The woman may be prepared for court, then the hearing is delayed the night before or on the morning of the actual hearing. The case will then be adjourned until the next Supreme Court sitting. These delays can occur more than once. In one case coming to the notice of the Centre there were two such delays. The final hearing was 10 months after the assault. One can imagine the disruption to her life both emotionally and socially.
 - c. Length of time before the Supreme Court hearing. This is at a minimum of three months, more often this is five to six months and there have been a number of cases up to 10 months before the final hearing.
 - d. Lack of facilities in court can cause distress. In Perth each court has only one waiting room. This is used both by the victim and the accused's family and friends. Comments made can be quite upsetting to the victim.
 - e. Describing the intimate details of the assault in front of an audience.
 - f. Changes in the *Evidence Act* 1976 were designed to prohibit the woman's past sexual history other than with the accused from being introduced.* This was a common method used to discredit

* On the practice in general, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume; and specifically on Western Australia see Lisa Newby, "Rape Victims in Court - The Western Australian Example", this volume. (Editor's note.)

the woman. However, other ways of doing this exist. For instance, a defence lawyer may make comments related to the victim's morals or behaviour, such as:

'Mary you have been married for three years and your child is four years old and you are living with your boyfriend.'

In the case of Sue,

'You were only 17 years old at the time you were drinking.'

The woman often feels unprotected in court and usually feels the hearing is a personal confrontation between herself and the accused. In the witness box a victim will inevitably relive the humiliation and degradation suffered during the offence.

8. Verdict - if an assailant is found not guilty the usual response of the victim is 'everyone will think I am a liar', instead of 'may be there was not enough evidence to convict the assailant'. Whether or not an assailant is found guilty, one very common feeling of the victim is that they are somehow to blame for the assault. This is a result of the many myths surrounding rape. As Wilson states:

'These myths effectively place blame on the victim thereby absolving the rapist from the full culpability of his actions.'⁵

Conclusion

Most victims feel there is more to be lost than gained by the case going to court. Many areas of distress are common to other criminal proceedings.⁶ However, rape differs in that it is an intensely personal attack, involving a person's whole being. It is also a crime that is clouded by so many societal attitudes and prejudices, many of these being based on opinion and emotion rather than fact.* The accused should in no way be denied the right to a fair trial but there are areas in the legal process where the woman's distress can be lessened. Areas of improvement include the training of investigating officers, reduction in delays and time before trial, and improvement of court facilities. Distress may be lessened by restructuring of the law, with the introduction of degrees of sexual assault or degrees of assault.

The staff of the S.A.R.C. agree that there needs to be a shift in emphasis away from the victim's actions and attitudes toward a greater emphasis upon the actions and attitudes of the offender. A combination of administrative changes and restructuring of the law - or either of these approaches - may serve this task.

* See Joan Coxledge, "The Social Aspects of Rape and the Need for Reform", this volume; Marjorie Levis, "The Politics of Rape - The Feminist Perspective", this volume; and Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

FOOTNOTES

- ¹ Throughout this paper the victim is referred to in the feminine because the majority of clients at the Sir Charles Gairdner Sexual Assault Centre are female.
- ² There are at present six medical practitioners on call for the Centre.
- ³ Paul Wilson, *The Other Side of Rape* (1978, University of Queensland Press, Brisbane, Qld.).
- ⁴ M. Notman and C. Nadelson, "The Rape Victim : Psychodynamic Considerations" (1976) 133 (4) *American Journal of Psychiatry* (April).
- ⁵ Paul Wilson, *op. cit.*
- ⁶ See Jocelyne A. Scutt, "The Jury and Court Administration : A Brief Overview of Research" (1980) 120 *Law Society Journal* 119-132.

Meredith Carter and Rosalind Harris #

Disarm All Rapists ...

Behind Every Wolfwhistle there's Always a Rapist ...

Women Unite - Reclaim the Night ...

Put Men on Trial For Rape, Not Women ...

Everyone should notice and digest these slogans. They are designed to remind those whose minds wander that these are the slogans feminists have been yelling for years, and if nothing comes from moves to reform rape laws and reform the world, we will be yelling them for years to come. The slogans may also serve to point out that although almost everyone talks about *the girls* who have been raped, in reality they are talking about *women*. Many women have been raped, and many so-called *boys* have been rapists. Not all rape victims are 17 years of age, and it cannot be stressed enough that most rapists are 'normal' men, exhibiting normal sexist attitudes towards women.

Community Care? for Victims of Sexual Assault

Is it possible to talk of 'community care' for victims of sexual assault? 'Community care' is a strange phrase - because the community has not cared in the past, does not put its money or its time where its mouth is, and gives more abuse than support for those women who have undertaken to care for victims of sexual attacks.

When feminists set up the first rape crisis centres, it was a battle to be taken seriously. Our centres were called 'raping centres' and the question came - 'Is that where you go, when you want to be raped?' or - 'Does rape only happen between 6.00 and 10.00 at night?' The volunteers could keep the centre open only during those hours.

It is also to be remembered that these same women were - and still are - contributing towards the rent, the 'phone bill, gas and electricity, out of their own pockets. Is this the way the community shows its caring attitude towards rape victims?

We are fighting for community change. Currently community care for rape victims can only be a band-aid solution ... if it shows itself at all. We are not a group of 'professionals' and we believe this to be important to our structure. We are a collective. For the uninitiated, this means that nobody in the group has a specific role and there are no particular 'experts'. Our work - like this paper - is a collective effort. Certainly it is difficult to work by consensus, but with ups and

Members of the collective, Melbourne Women Against Rape, Victoria.

downs, *Women Against Rape* has managed to do this.

Funding of Rape Crisis Centres

For four years the *Women Against Rape* operated the only rape crisis centre in Victoria. One whole year of this time was wasted in chasing funding. The first step in this procedure was a submission in December 1974 to the Australian National Advisory Committee for International Women's Year, requesting funding. Our project was considered to fall within existing responsibilities of government departments and was referred to the departments of the Attorney-General, Health, Social Security and Urban and Regional Development. In April of 1975, the Federal Department of Health allocated \$10,227.00 for funding to 17th June 1975.

The grant was to come through the Victorian Hospitals and Charities Commission. The Commission insisted that the *Women Against Rape* must become a legal person and must have a constitution, but the Commission would not give the centre any legal help in this regard. Whilst we were trying to meet their requirements, we were told that our organization did not come within the definition of a benevolent society which was necessary for registration under the *Hospitals and Charities Act*. Following this were many 'phone calls, letters written and to-ing and fro-ing; the Hospitals and Charities Commission was once more contacted with regard to registration. We were told that as far as they were concerned, *Women Against Rape* could register as any type of co-operative.

Four months later, the Commission was reminded of our case. The Commission had no record of the file. In November 1975 we got in touch with Senator Jean Meltzer who prodded Doug Everingham, the then Health Minister in the federal government, as to the whereabouts of the funds.

As a result of the prodding, a meeting was held between the Hospitals and Charities Commission and a member of the Federal Hospitals and Health Services Commission. At this meeting it emerged that the *Women Against Rape* was unacceptable because -

1. It did not have men as members; and
2. It would not accept the co-operative type of constitution which called for directors.

It further emerged at this stage that the Hospitals and Charities Commission had not opened a file on the *Women Against Rape* and were generally most unhelpful.

The representative from Canberra was surprised at how difficult the Hospitals and Charities Commission was being, but hoped that the problems would be solved within a week or two.

Several months later in 1976 an attempt was made to register the *Women Against Rape* pursuant to the *Co-operation Act* as a co-operative. As with most of the women's refuges in Victoria, regarding addresses,¹ we compromised.

It was felt that if some legal status could be achieved, the centre would be in a stronger position to approach the Hospitals and Charities Commission yet again. However, once a constitution was prepared and the required legal documentation completed, the centre was informed it did not come within the Act as its activities were not '... for the benefit of the members'. The Corporate Affairs Commission lacked a finer appreciation of how all women are oppressed by rape.

Finally the *catch 22* came when we were told we would not be registered by the Corporate Affairs Commission anyway, until we were capable of registration within the Hospitals and Charities Commission - who would not register us until we became a legal person. If the reader is lost by this stage - so were we. Imagine the frustration after sweating blood for more than a year over all this, to the detriment of our more important work in the real world. We subsequently decided that we would no longer waste time and energy in such a worthless pursuit and would continue to function as we had since being set up - from our own pockets.

Such a decision meant we were and are denied some of the obvious advantages of funding - we cannot afford a 24 hour telephone service, we cannot afford to provide counselling on a 24 hour basis, we have difficulty in meeting our bills and we have not always had a permanent 'phone number, let alone a permanent address. However we have kept our feminist autonomy, always maintaining the welfare of women to be our paramount concern.

Our experience has shown us that government grants do not come free of strings. It has been tacitly assumed that we are in favour of government funding for rape crisis centres, but if in order to get it we are required to follow guidelines laid down from above, without the knowledge of the real concerns of women, then we would prefer not to have it. We know that this has also been the experience of other feminist groups and rape crisis centres... But then it is naive to expect governments to be keen to support and fund groups militating against the *status quo*.

Police, Police Surgeons and Police Procedures

In looking at police, police surgeons and police procedures, both in terms of difficulties as well as any positive aspects that might be present in these procedures in relation to victims of rape, it is important to acknowledge from the first that police do not function in a vacuum. Each one of us - police officers included - is influenced by prevailing social mores. It is the role of the police to uphold these mores as reflected by the law. Police function in a framework which is by nature suspicious of allegations of criminality. Everyone is innocent until proven guilty of a crime. When it comes to the crime of rape, this must be the case *for them* even more so.

Women Against Rape receive good reports and bad reports of police. Difficulties constantly reported are - refusal to follow up at

least half those rapes that are reported; these are labelled 'unfounded', a label that cannot possibly be warranted.^{2*} What sort of filtering process is going on in Victoria? ** Is it because the women are not presenting to police as hysterical or showing obvious signs of physical injury? If the women are black, not only will they not be listened to, they will be subjected to further harassment and possibly rape. *** We are aware of at least one police station in Melbourne that has developed a reputation for this form of activity.³

Another difficulty facing victims is that the women are frequently not told they can refrain from proceeding at any stage simply by making a statement to the effect that they do not wish to pursue the matter any further. Rather, rape victims are intimidated by the threat of making a false complaint. In fact, in Victoria there have been prosecutions for false complaints of rape. Interestingly, no woman has yet been convicted.⁴

Many women are threatened with the unlikely possibility that if they do not go ahead with the investigation, they are then responsible for allowing a 'psychopath' to be on the loose, thereby increasing the woman's feelings of guilt. Yet this argument about safeguarding other women in the community is absurd, as catching one rapist does not reduce the rapist population; any man can rape and the conditions conducive to this ultimate exploitation of women remain unchanged.

The practice is not unknown for the detectives undertaking the investigation to take 'nice cop' and 'nasty cop' positions. This practice is extremely disconcerting for the woman. *Women Against Rape* do not consider it necessary for police to resort to such machinations to 'get their story'. Again, police do not recognise that women undergoing the intimate and intrusive investigation carried out by police may find it too traumatic to deal with. It is not, in the opinion of *Women Against Rape*, necessary to hold a mini rape trial in a police station to decide the prima facie validity of a woman's case.

* See comments on the change in 'false complaint' assessments in Michigan after the passage of the sexual assault legislation in Virginia Blomer Nordby, "Reform of Rape Laws : The Michigan Experience", this volume. (Editor's note.)

** On this issue, see Joan Coxsedg, "The Social Aspects of Rape and the Need for Reform", this volume. (Editor's note.)

*** On the issue of black women as victims of rape and the prejudices that are revealed in jury trials and in the courtroom generally, see Jocelyne A. Scutt, "Evidence and the Role of the Jury in Trials for Rape", this volume. (Editor's note.)

It is the role of the police to act as upholders of law developed by the various legislative bodies. This cannot be taken as condoning bad police practices. After all, when women have been subjected to polygraph tests they have consistently been shown to be not lying, and police attitudes have thence changed markedly for the better.⁵ However *Women Against Rape* would not advocate introducing polygraph tests into Australia; rather, we trust police can learn from the experiences of other police. *Women Against Rape* have tried to 'educate' police by participating as lecturers in their sexual assault courses - however have struck the proverbial brick wall when the issue arises of believing a woman when she first presents. The rare complaint that truly is false remains in the police mind for ever.

When the issue of public education is in question, police take it upon themselves to make unacceptable statements. In 1979, after two young women were attacked in their own home and one was raped, the assailant fled with his own knife in his groin, put there by his victims. I heard this over the radio on the way to work, and I cheered. This was the first time a media report in Victoria had been carried ... of women fighting back. However the police response in the following week was first, that women should not hitch-hike - although the assault provoking this remark took place in the victims' home; and that women should not go out at night - although 'going out at night' had not led to the particular attack. Then, unbelievably, a Detective-Superintendent Bennett erupted with a gem: Resist by all means - scream, scratch or kick, but do not use violence. Violence begets violence. *Women Against Rape* ask:

Who is doing the begetting?

Women Against Rape ask, How can a police officer expect a woman to combat a violent crime when the burden of proof in the courts is such that in effect a woman must show that she has resisted to the utmost.⁶ The popular image of women will not change until women show their fighting spirit, as did these women. The best method of resisting rape is by being physically strong and mentally able to fight back. That means, women who *do* fight back need back-up, not paternalistic hypocrisy. *Women Against Rape* in this regard advocates self-defence classes for women of all ages. We do not believe self-defence classes will of themselves stop women being raped, but it is an essential step on the way to changing the idea that women are passively 'there' to be taken. Men might think twice.

Finally, the desirability of reporting rape to police is questionable in itself, because the end product of the system, if successful, is a brutalised human being. Rape is an act of domination and gaol is hardly a humanising atmosphere in which to expect improvement in male attitudes toward women. And further, gaoling a few rapists is not going to stop rape in our society. How many men could be convicted of a sexual assault against women? And converseley, could we count the numbers of women who have been victim to sexual assault or degradation? At the Rape Crisis Centre, we believe in leaving the choice to the woman. Women want revenge, but would prefer it to be in their own hands, at the initial stage. It is not conducive to a woman's confidence that she can control her own life when she reports the matter to the police and it is taken completely out of her own hands.

Sexual Assault Referral Units in Hospitals

It is essential to recognise that working in sexual assault clinics in hospitals - in a bureaucratic structure - is a politicising experience for the counsellors, who truly discover the oppressive nature of rape for women. Yet a number of objections to such centres inevitably arise. It is equally essential that these objections be recognised.

The main objection is that the sexual assault centre in Victoria is in a *hospital*.* Hospitals are not a good environment as they deal with the sick. Women who have been raped are not 'sick'; nor is it possible to cure the fact of being raped. Hospitals reinforce the feeling of helplessness generated by rape. It is thought that only professionals can help. The attitude is that if she gets help from these expert professions, which rape crisis centre workers are not, the victim will be alright.

Furthermore, hospitals seem to have a problem in the physical placement of sexual assault clinics. The clinics do not seem to fit in either family psychiatry or obstretic and gynaecology units. Another problem with hospitals is that they discourage a feeling of identity. You are a broken hip, an appendix case, or a rape; and once again, this defeats the purpose of the woman regaining a sense of control over her own life.

In sexual assault clinics, not expecially trained and not always sympathetic nurses, doctors, students and whoever else - have access to the rape victim.** Unfortunately a case has come to the attention of *Women Against Rape* where the examination by a sympathetic female doctor was overridden in the hierarchical structure by a specialist with a gaggle of male students. There is in such a hospital system no way in which it can be ensured that this type of occurrence will not reoccur. It is a mark of the hospital system, not necessarily of the individuals involved.

When the Rape Crisis Centre in Melbourne was operating from the same premises as the Women's Health Collective, such problems did not arise. Unfortunately, the Women's Health Collective in Melbourne is defunct due to lack of funds - a too common tale.

Most women who are raped do not require extensive medical treatment. Given that most rapists are not psychopaths, it is not true that most victims are brutally beaten. Rape victims need VD and pregnancy tests at the time. They need swabs for any semen in the vagina. They need VD and pregnancy tests six weeks after the attack. None of these procedures requires hospitalisation or even hospital treatment. All medical practitioners as part of their normal medical training should be taught how to take evidence necessary for rape cases. But *Women Against Rape* hastens

* Other sexual assault referral clinics, centres or units in the various Australian states are similarly centred in hospitals. For the position in Perth, Western Australia, see Lee Henry, "Hospital Care for Victims of Sexual Assault", this volume. New South Wales has created some six 'Help' centres in hospitals in the metropolitan and outer areas. (Editor's note.)

** For a recounting of the practice in the Perth centre, see Lee Henry, *op. cit.* (Editor's note.)

to point out that any woman is capable of learning how to do these simple tests, with pathology back-up.

In the normal course, medical practitioners training should include forensic medicine and court appearances. Doctors appear reluctant to waste their valuable time in court because of financial loss and fear of embarrassment at being made a fool of by counsel. Doctors might feel more ready to appear in court if they were well-paid for their attendance. *Women Against Rape* would be happy to see more women doctors in this area, caring for victims of rape. It is not beneficial for a woman in a distressed state as a result of an attack by a man to have another man examine her sexually. A medical investigation of rape cannot just be seen as a clinical examination, but can be symbolic to the woman of the violation which has so recently occurred.

Conclusion

In sum, *Women Against Rape* consider rape crisis centres should work in co-ordination with women's health collectives, and not lost in a morass of male-dominated bureaucracy - be it a hospital or a police station. We want a woman to feel she is regaining control over what happens in her life and not lost amid all those services that are designed to take that power away from her.

Women Against Rape will not be satisfied with half-way reform measures. And women against rape everywhere will not easily be satisfied.

Yes Means Yes, No Means No ...

However We Dress, Wherever We Go ...

Rape is About Power, Not Sex

Women Unite and Reclaim the Night

Rape - The End of Every Wolf Whistle

FOOTNOTES

- 1 For an account of the difficulties women's refuges and other collectives have experienced in the matter of being required to give out addresses to governmental departments (which may lead to victims housed at centres being abused if addresses are released or discovered by particular individuals) see *1974-1976 Herstory of the Halfway House* (nd., Women's Liberation Halfway House Collective - Melbourne, Victoria); also note article in *Rouge* (1980).
- 2 On the issue of the false complaint and simple acceptance by some in authority that police calculations as to the number of false complaints, see Victorian Law Reform Commissioner, *Rape (Court procedures and rules of evidence)* (1976, Government Printer, Melbourne, Victoria). It is rarely noted that 'false complaints' in police records frequently cover cases where the victim has declined to continue with an investigation and the like. On this issue, see Jocelyne A. Scutt, "Criminal Investigation and the Rights of Victims of Crime" (forthcoming, *University of Western Australia Law Review*).
- 3 For comments on the issue of false complaints being taken to court as a criminal charge, see Jocelyne A. Scutt, *op. cit.*
- 4 *Ibid.*
- 5 See Virginia Blomer Nordby, "Rape Law Reform : The Michigan Experience", this volume.
- 6 See, for example *R. v. Hinton* [1961] Qd. R. 17; *R. v. Hay* [1968] Qd. R. 459. '... where consent is an issue the trial judge should direct the jury that they should carefully scrutinize the evidence in respect of the following questions : (1) Is the girl virtuous? (2) did she scream or call for help? (3) did her body or clothing show any mark or tear indicating resistance to force? Negative answers to these questions carry a strong presumption that her testimony is false or feigned'. On the issue of what the jury believes - or fails to believe - without signs of struggle, severe damage and the like, see Jocelyne A. Scutt, "The Jury and Evidence in Trials for Rape", this volume.

Women Against Rape

Women Against Rape in Melbourne is a collective that was formed at the end of 1974. Over the years the women who have participated in the group have come from diverse backgrounds. The one thing they have had in common was a need to be politically active against the oppression suffered by women due to rape, and the fear of being raped. The group functions in a supportive manner towards women who have been raped, agitates against the present political, legal and medical treatment of rape and is often called upon by schools and community groups and other bodies for speakers. 'WAR on Rape' is a booklet that has been written by the group.

Women Against Rape Collective

THE POLITICAL ISSUES

Every man I meet wants to protect me. Can't figure out what from.

Mae West

'If a male society rewards aggressive, domineering sexual behaviour, it contains within itself a sexual schizophrenia. For the masculine man is also expected to prove his mettle as a protector of women. To the naive eye, this dichotomy implies that men fall into one of two categories : those who rape and those who protect. In fact, life does not prove so simple ...

In the system of chivalry, men protect women against men. This is not unlike the protection relationship which the mafia established with small businesses in the early part of this century [in the United States]. Indeed, chivalry is an age-old protection racket which depends for its existence on rape. (At this point in our narrative it should come as no surprise that Sir Thomas Malory, creator of that classic tale of chivalry, *The Knights of the Round Table* was himself arrested and found guilty for repeated incidents of rape.)

According to the male mythology which defines and perpetuates rape, it is an animal instinct inherent in the male. The story goes that sometime in our pre-historical past, the male, more hirsute and burly than today's counterparts, roamed about an uncivilized landscape until he found a desirable female. (Oddly enough, this female is *not* pictured as more muscular than the modern woman.) Her mate does not bother with courtship. He simply grabs her by the hair and drags her to the closest cave. Presumably, one of the major advantages of modern civilization for the female has been the civilizing of the male. We call it chivalry.

But women do not get chivalry for free. According to the logic of sexual politics, we too have to civilize our behavior. (Enter chastity. Enter virginity. Enter monogamy.) For the female, civilized behavior means chastity before marriage and faithfulness within it. Chivalrous behavior in the male is supposed to protect that chastity from involuntary defilement. The fly in the ointment of this otherwise peaceful system is the fallen woman. She does not behave. And therefore she does not deserve protection. Or, to use another argument, a major tenet of the same value system : what has once been defiled cannot again be violated. One begins to suspect that it is the behavior of the fallen woman, and not that of the male, that civilization aims to control.

The assumption that a woman who does not respect the double standard deserves whatever she gets (or at the very least "asks for it") operates in the courts today ...'

Susan Griffen, "Rape : The All-American Crime" in
Rape - The Power of Consciousness (1979),
at pp. 9-11

THE POLITICS OF RAPE — A POLITICIAN'S PERSPECTIVE

Carol Treloar[#]

As former Press Secretary and general policy advisor to Peter Duncan, former Attorney-General of South Australia and in that office in 1976, at the time of the reform of the South Australian laws relating to rape and other sexual offences, I was closely involved with the passage of those reforms. My involvement was not with the investigations, recommendations or the report¹ made by her honour Justice Roma Mitchell, but with the political action taken upon them.

I worked with Peter Duncan in co-ordinating and organising the media and support campaign to promote the reforms; as a feminist I injected advice on which reforms were to be implemented and which not; I wrote most of the Attorney-General's speeches, letters to editors, media responses and so on - and, together with the then Women's Advisor to the Premier, Deborah McCulloch, promoted the government's adoption of the provision to criminalise rape-within-marriage - a provision which exceeds in the scope of its sanctions the original Mitchell Committee recommendations.

Despite my involvement in the process towards enactment of those reforms it must be stressed that my comments should in no way be taken as representative of the then South Australian Dunstan Labor government, the South Australian Labor Party, nor of the former Attorney-General. I no longer work for either the South Australian government or the present opposition. While I trust the accuracy of my recollections, this is an entirely independent view.

South Australian Rape Law Reform in Context

In retrospect it is to be regretted that the government did not undertake a review of the law wide enough to allow a total re-conceptualisation or categorisation of the crime of rape, or attempt to bring about a more far-reaching congruence between the nature of the offence and its causes, the politics of its incidence, and the laws relating to it. This, however, was not the Mitchell Committee's brief, and the real political need to act and the need to be seen to be taking action were largely the imperatives of the time.

Journalist, and former Press Secretary to Peter Duncan, M.P.

It is also, in retrospect, regrettable that some of those reforms recommended in 1976 by Justice Mitchell were held over for action at a later date. In particular, the abolition of the right of the accused to make an unsworn statement from the dock should have been, and was intended to be, abolished. That was held over, trusting that legislation arising from the Mitchell Committee's fourth and final report² - a review of the whole of the substantive criminal law - would abolish it. The report was received, and the bills prepared by the Labor government. The government lost office.*

Justice Mitchell also recommended the lowering of the age of consent from 17 years to 16 years, and abolition of the crime of incest. (It must be emphasised that this recommendation related to incest *per se*, not associated crimes.) These recommendations invoked an immediate loud, hostile public reaction - for the wrong reasons, because their import was not properly understood. People thought, wanted to think, or pretended to think that these recommendations, if acted upon, would open the way for mass incestuous practices, would provide a licence for promiscuity. The law, of course, plays a negligible role in regulating these kinds of behaviours; current social mores and inter-familial sexual taboos are the larger determinants. In any case, the churches and their few strident lobbyists shrieked 'horror' at what they saw as a deliberate further erosion of morality and social control in the state.

The conservatism reflected in these reactions is deep-seated in South Australia, and while South Australians responded generously - if timorously - to the progressive social reforming policies of the Dunstan decade, the churches (the protestant churches in particular) had and do have a strong grasp on the public, and the media, throat.

Whilst we, in South Australia, knew that a full range of reforms to our rape laws were necessary and desirable,³ we - at a policy level and despite any actual powers of the law in the matter - knew that as an absolute principle to remove the immunity of persons from prosecution for rape of a spouse was essential.⁴ This decision was firmly based in the political principle not only of equal rights and equal opportunity in life for men and women, but in the right of every person to self-determination, responsibility for and control over their personal lives. Consent to marital sex was every woman's right to determine, in our view. Her body is her own, and hers alone. Equally, her right was the right accorded to every other person in society : the right to the protection of the criminal law if she was the victim of rape - even where the offender is spouse.

* It should be noted that one of the most pressing problems of the dock statement in relation to rape trials may have been resolved in *R. v. De Angelis* (1979) 20 S.A.S.R. where it was held that the word "evidence" in section 34i(2) *Evidence (Amendment) Act 1976* (S.A.) has "... an enlarged meaning so as to include unsworn statements". Accused persons will thus be precluded from making comments as to sexual history of the victim, within the terms of the alleged restrictions existing under the evidence legislation. On whether the "reform" of evidence laws has indeed been a reform, see Rosemary O'Grady, "Victims in Court : The South Australian Evidence Reform", this volume. (Editor's note.)

In accordance with those who refer to the South Australian *Sex Discrimination Act*, and to the amendments to rape laws, and to the law in general as inadequate instruments of social reform, we too knew the limitations of the law and law reform by themselves. Attitudes were what had to be changed; our reforms to the rape laws should not be seen only for what they were, but as part of the far wider general programme of the Dunstan government. At the same time as laws were being framed to outlaw discrimination on grounds of a person's sex or marital status, or discrimination on the grounds of race - a criminal offence in South Australia - educational curricula were being stripped of their sexist content in schools. The problem of teaching the teachers, of course, remains, as it does for 'educating' lawyers, the judiciary, police officers and other administrators of so-called 'justice'. Perhaps, against the ruling forces of the 'hidden persuaders' of western society the Dunstan vision and achievements could be seen as superficial. That judgment must be faced.

The Community Response to South Australian Rape Law Reform

As far as administrative support for the changes to law went, a rape crisis centre was being partially funded by the state and federal governments, and continues to be funded; a sexual assault clinic was established at the Queen Elizabeth Hospital for victims of rape; there is a panel of medical practitioners (including many women practitioners) any one of whom can examine the victim as an alternative to the police surgeon; and I understand that, apart from the existence of the special anti-rape squad, special strands dealing with rape and sexual offences and the plight of the victim have been introduced into police education.

We viewed our reforms of the South Australian rape laws and the process of actualising them, as playing a crucial role in community education, or in modern parlance 'public consciousness raising'. The issue of criminalizing rape-in-marriage was approached with a committed, confrontative *modus operandi*. Politicians rarely have the opportunity of raising the quality and dynamics of human relationships in the public arena. We had already offended the churches, the Festival of Light, many of the legal profession and some (retired) judiciary by daring to exceed her honour Justice Mitchell's recommendation as far as the immunity of husbands went. We took on the media, and their hostile, often ignorant, reaction to the measure. We wrote letters to the editor, we made even more regular appearances than usual on television and radio. We knew that much of the social value of the rape-in-marriage reform lay in the debates, arguments and discussions that follow up public debate - in pubs, in front of television, in buses, in the corner deli, between husbands and wives, between wives and wives, in discussions between men in the workplace, between women in the workplace. I now believe that this process has had some lasting effect. I heard people around Adelaide dredging from the depths of social taboo their experiences of sexual/moral relationships in marriage; talking about their responsibilities within their relationships. Many of those women who found it difficult to talk about with peers or professionals rang us at the Department of the Attorney-General to lend support and tell us of their experiences.

But we also knew that, with information rationed and selected the way it is in our media-monopolized, culturally-imperialized country, issues such as rape and the quality of male/female relationships would pass from the public eye - as we knew it would for us, or for anyone involved in the pragmatic reality of politics. We made the most of the time we had to talk about what we saw as the real causes of rape, and the real solutions, over a period lasting nearly nine months.

One of the most dramatic turns in the public debate of rape-in-marriage was the number of women who came forward with personal testimonies of sexual abuse by their husbands, husbands who had enjoyed immunity from the law and from social sanctions. Two examples I recall are from women then living in a women's refuge. Their testimonies were two of fourteen from women at that refuge; they were published in *The Adelaide Advertiser* following an article by a notorious journalist, whose interview with an unnamed prominent lawyer had temporarily set the tide against the reform. The first read :

'He came home drunk and wanted sex and afterwards he drank some more and wanted it again. I didn't want to, but he did. He used the beer bottle on me when he couldn't do it again ...'

And the second :

'It's either you or her ...'

he drunkenly shouted to his wife. The 'her' was his twelve year old daughter.

The churches - particularly the Lutherans and Anglicans - came out time and again opposing the government's move.⁵ They argued - in a most un-christian and perversely legalistic way - that rape-in-marriage would be difficult, impossible, to prove. They took up as their war-cry that unfortunate phrase from her honour Justice Mitchell's report : that to unequivocally criminalize rape-within-marriage would be 'putting a dangerous weapon into the hands of a vindictive wife'. Yet as has been so forcefully pointed out⁶ women do not cry rape for whim or revenge, and the United States' lie detector tests are hitting the ball back hard into the male court.⁷

We answered the 'difficult to prove' allegation with the reality that rape-in-marriage would be only as hard to prove as any other alleged offence of rape. Further, a vindictive wife would go nowhere in the obstacle course of the justice process, we argued. Meanwhile, the present law was tacitly condoning a free-for-all for vindictive husbands.

We argued repeatedly :

'Those who do not need the rape-in-marriage provision will not use it; those who offer insufficient corroborative evidence cannot use it. Let those who do need it at least be allowed recourse to justice and human dignity ... Marriage, and sexual relations within marriage, ought to be a matter of negotiation from an equal basis, of sensitivity, care and responsibility. A violent or callous husband, who retains the legal status of owning his wife, like a chattel, an object, a piece of property, should not be able to rape her while the law turns a blind eye. Rape-within-marriage is an exceptional circumstance, one where the law has every right to invade the bedroom.'

The criminalisation of rape-in-marriage is not, was not, and cannot in any way be seen as a 'communist/lesbian plot', 'concocted by man-haters' out to 'ensnare the unwary male', by those who 'wish to destroy the institutions of marriage and the family'. It can, if anything - in my view - only help to strengthen and protect marriage and the quality of human relationships if the law clearly recognises human sexuality and human rights within the marriage.

Throughout the process of actualising the rape law reforms there was strong support from welfare organizations, from women's groups, from the feminist movement, from very many men. (What did emerge during the debate, interestingly enough, was that a large number of men seemed not to know or understand the difference between rape - a violent crime of hatred and power inflicting humiliation and degradation on the victim - and mutually consenting sexual intercourse. Their nervousness or blustering hostility gave them the lie!) Even the most conservative groups put their weight behind the South Australian provision: the Young Women's Christian Association, the Country Women's Association, the Marriage Guidance Council, the National Council of Women, for example.

'There is nothing more powerful than an idea whose time has come ...'

they said, a century too late.

The Parliamentary Response to South Australian Rape Law Reform

At the time the rape reforms were implemented, the Dunstan government had a majority of one seat in the House of Assembly. It never held its due control of the Upper House.

At that time - in the mid-70s - the Attorney-General could be the object of an opposition-launched, and failed, vote of no-confidence in Parliament for stating on radio that there '... was one law for the rich, and one for the poor ...'

To most advocates of socially progressive law reform it is a truism to claim there is 'one law for the rich, and one for the poor'. The law as inherited, made and practised, is now clearly understood as a complex, conservative institution of social and political control which protects the *status quo*, and which defends the interests of property and the rights of ownership of those propertied persons in our society.

The law, where men, women and children are concerned, has traditionally protected - conserved - the interests of men. Men have traditionally 'owned' women : a woman, at marriage, is still symbolically 'given away' by her father to her husband ... I could go on.

The law has come some distance since its beginnings, when rape meant simply and conclusively the theft of a father's daughter's virginity, a specialized crime that damaged valuable - of value to the father, that is - goods, before they could reach the marriage market; but, as Brownmiller⁸ writes, '... modern concepts of rape are rooted still in ancient male concepts of property'.⁹

In all states apart from South Australia a woman, once married, relinquishes her right to protection of the criminal law against non-consensual marital sex.¹⁰ When we changed that law in South Australia the questions we asked were these, and they were questions of principle. Why should one specific class of person be denied the protection of the criminal law against an offence which is generally decried and abhorred outside marriage? Why should women, on marriage, lose an essential human right which they in fact had up till the time of marriage? We saw the law, the principle of male ownership and unconditional subservience to possible brutality, as being irrevocably, irretrievably, archaic and inhumane.

Women in Australia, women throughout the world, are subject to the patriarchal organisation of society; to a society where men have organised the dominant political structures and institutions of our lives - education, the law, the nuclear family, and the mass popular culture that promotes and sells them - to operate in, and to preserve, their own interests. Men have organised the Parliament and men have devised the 'democratic' process.

The complexities of the current South Australian rape-in-marriage provisions have been commented upon.¹¹ These complexities arose directly out of Parliamentary pressures and procedures. The bill passed the Lower House with full government support; despite it being a so-called conscience vote. In the Legislative Council three former members of the Liberal Movement indicated they would cross the floor and vote with the government. The Upper House, foolishly as it turned out, rose on the promise of victory when votes would be cast the following day. In the meantime, overnight, those three opposition members were jumped by the churches, and by Party 'thugs' who threatened their future pre-selection.

An additional, amending clause was introduced as a 'qualification' of the absolute principle of criminalising rape-in-marriage. The government accepted this 'compromise' because it was seen as being ultimately meaningless, because we saw it as in no way watering down the principle, or its symbolic value, which would be established in law. Needless to say, this is hardly an ideal attitude toward law-making and the writing of statutes *per se*.

The amendment comprises a series of circumstances or conditions under which a person can be convicted of raping his or her spouse. In *essence* it reads :

'A person shall not be convicted of rape upon a spouse unless the act consisted of an act specifically and seriously intended to humiliate the spouse.' ¹²

We saw every act of rape as an act of humiliation. We failed to see how any judge, magistrate or interpreter of the law could see otherwise. We even saw this amendment as placing, in law, the essence of the act of rape.

The amendment was accepted, as a political compromise, but one which to us had no effect in compromising the principle involved.

Conclusion

An article from *The Clarion*¹³ reveals too clearly where the interpretation of 'justice' is situated in our society; who - and what - is considered to be important and worthy of legal outrage; and who - and what - is taken as of lesser value, less worthy of judicial concern. Australia's longest serving prisoner, just released after 34 years in Yatala Gaol, was originally sentenced to life imprisonment for wounding an AIF officer and cutting off his penis. The officer survived. This man had dared to remove the 'sacred' organ, the 'emblem' of power. Patriarchy is powerful, and paranoically protective of its prowess; and when offended, patriarchy exacts its pound of flesh... in this case, in exchange for a literal one! What, however, do we hear from them about those women victims of rape whose emotional and sexual lives are permanently arrested, damaged, ruined? Very little, I say.

A society of men that smirks at Norman Mailer's pronouncement that '... a little bit of rape is good for a man's soul',¹⁴ yet which at the same time postures about the place condemning rape, is plainly underpinned by hypocrisy. It is hardly surprising, therefore, that these 'double-speak' attitudes towards rape should have been translated into the legal system. We should expect little else. But we want a lot more.

Not until men have to remove rape jokes from their repertoires, 'til they stop feeling able to intrude in public or in private upon women, until they stop seeing women as titbits there for the taking, 'til they stop feeling free to dig each other in the ribs and chortle when called 'male chauvanist pigs', and assume that title with glee; not until *men* begin campaigning against sexism and rape, will women take them seriously. This is the onus that falls on all men for the future.

FOOTNOTES

- ¹ Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report - Rape and Other Sexual Offences* (1976, Government Printer, Adelaide, S.A.).
- ² Criminal Law and Penal Methods Law Reform Committee of South Australia, *Final Report - The Substantive Criminal Law* (1977, Government Printer, Adelaide, S.A.).
- ³ As suggested by Peter Sallman, "Rape in Marriage in South Australia" this volume. On this issue see also Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 *Monash Law Review* 255-277; also Duncan Chappell, "Rape in Marriage - The South Australian Experience" in *Violence in the Family* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology, Canberra, A.C.T.) 137-144.
- ⁴ On this issue, see Jocelyne A. Scutt, "To Love, Honour and Rape with Impunity - Wife as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming).
- ⁵ See Peter Sallman, "Rape in Marriage" (1977) *Legal Service Bulletin* 202-204; John E. Willis, "South Australian Rape Law Reform" (1976) 2 *Legal Service Bulletin* 31; also Duncan Chappell, *op. cit.*
- ⁶ See Virginia Blomer Nordby, "Rape Law Reform - The Michigan Experience" this volume.
- ⁷ *Ibid.*
- ⁸ Susan Brownmiller, *Against Our Will - Men, Women and Rape* (1975, Martin Secker & Warburg Ltd., London).
- ⁹ *Ibid.*
- ¹⁰ See Jocelyne A. Scutt (1977) *op. cit.*
- ¹¹ See Jocelyne A. Scutt (1977) *op. cit.*, at p. 274 *et. seq.*; also Peter Sallman, this volume.
- ¹² s. 73 (5) *Criminal Law Consolidation Act 1935-1976.*
- ¹³ Newspaper put out in Adelaide during the journalist's strike in May 1980.

THE POLITICS OF RAPE — A FEMINIST PERSPECTIVE

Marjorie Levis

Rape is the ultimate act of sexism. Rape is the supreme assertion of masculinity. Rape is the mechanism for the social control of women. Rape is not about sex; rape is about power and violence. The rape of one woman is the rape of all women.

These are the assertions of feminists attempting to come to terms with rape, the role it plays in all women's lives, and its social and political consequences. Feminists have issued a challenge to parents, teachers, theorists, academics, the legal system, politicians, the church and police to come to terms with the reality of rape and the part they have played in socialising women to be raped and men to be rapists.

The women's movement has recognised the need for an alternative approach to rape by setting up rape crisis centres, offering support to any woman who has been raped and enabling her to cope with her experience. Most rape crisis centres receive little government funding, if any. Workers in rape crisis centres have been subjected to scurrilous attacks by some sections of the community. Yet rape crisis centres have raised the consciousness of society about the reality of rape. They identify in a personal and political way with rape victims.

In the Beginning ...

In determining the 'why' of the feminist position and the need for a reassessment of rape as a cultural fact, it is necessary to look at historical attitudes to rape. These are the basis of the myths surrounding rape and consequently the way legal systems and agencies deal with it.

From earliest times when social order was based on retaliatory force, women were unequal. In order to avoid her situation of being natural prey, it was necessary for a woman to seek a protector. Those who assumed the historic burden of her protection - husband, brother, father, clan - put on her a greater burden. They reduced her to the status of chattel. The definition of rape in most states upholds the chattel status of women: that it is carnal knowledge of a woman, *not his wife*, without her consent. The historic price of woman's protection by man against man was her subservience to a moral code invented for man's convenience - chastity and monogamy. A crime committed against her body became a crime against the male estate. Rape was viewed not as a sexual assault, but as a trespass against a man's property. Rape could

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not be envisaged as a matter of female consent or refusal; nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity.

Brownmiller¹ suggests that rape entered the law through the back door - as a property crime of man against man. She describes how, in ancient Babylonian and Mosaic law a bride price was set - 50 pieces of silver - paid to the virgin's father. The theft of the commodity 'virginity' was seen as embezzlement of his daughter's fair price. In Hammurabi's Code, women had no independent status. They were either betrothed virgins or lawfully wedded wives. If a man raped a betrothed virgin his punishment was death and she was held to be guiltless. However, if a married woman was raped, she was held to be equally culpable - both participants were bound and thrown into the river. A husband was permitted to pull his wife from the river and the king could pardon a male offender. The ancient Hebrews, being rather short of rivers, made the punishment of raped married women and the rapists death by stoning.

The ten commandments did not mention rape, though Moses received one commandment about adultery and one about not coveting your neighbour's wife, along with his other property - field, house, ox and ass. On the rape of virgins, certain geographical distinctions were put - if a virgin was raped within the city walls, she was held equally culpable - she could have called for help. If she was raped in the fields, she was held to be guiltless and the rapist was forced to pay her father 50 silver pieces and marry the woman. If she was a betrothed virgin, the rapist was stoned to death because he had committed the double offence of depriving the father of the full bride price and bringing disrepute to the honour of the house. But the good old double standard was raised high when it came to the rape of virgins of another race. In fights between tribes rape was common and where tribes needed to increase their numbers, they raped women from other tribes and made them their legal wives.

Concepts of rape and punishment in early English law are a maze of contradictory approaches reflecting a gradual humanization of the law, but the confusion was not resolved as to whether the crime was a crime against a woman's body or a crime against the man's estate. While early English rape law concentrated on rapes of virgins - and only high born virgins at that - by the thirteenth century rape of married women, dames or damsels, was punishable by death - if the rapist was found guilty, of course - and thereby hangs the greatest dichotomy. Argument continued and still continues about the 'good fame' of the rape victim.

Historical attitudes to virgins and non-virgins must be related at some length because our society continues to suffer the hangover of history in legal and other agencies towards raped virgins, who generally receive much more sympathetic treatment than do non-virgins.

The Myth of Rape

Lots of people are talking about rape today, including us.

The media gives the gory details and if possible interviews the victim from the hospital bed. Sexually titillating rapes occur with great frequency in films, books and pornographic literature. Social scientists ponder the methodological difficulties of finding a way to estimate the real incidence of rape. Conferences are held where experts 'abstract' and theorise on the topic. The church venerates (even to canonisation) women who die defending their virtue. Senior police give fatherly advice to women about the ways they should avoid being raped, and what to do if facing a rapist (a direct contrast to the attitude of the church). And so it goes on - the myths of rape are perpetrated and perpetuated - and no real attempt is made to come to terms with the reality of rape.

All women want to be raped.

No woman can be raped against her will.

She was asking for it.

If you're going to be raped, you might as well enjoy it.

These are the male myths of rape. These are the beliefs that many men hold, and the nature of male power is such that they have managed to convince many women of their validity.

Cloaked in phraseology, the myths of rape appear as cornerstones in most pseudo scientific enquiries into female sexuality. They are quoted by so many 'experts' on the 'sex' offender. They crop up in literature; they are the stuff of dirty jokesters. They deliberately obscure the true nature of rape.

'All women want to be raped' - springs from the acts that men do in the name of their masculinity; their conditioning to be aggressive and the belief that women want rape in the name of their femininity - their conditioning to be passive, their history of subservience as second rate citizens.

Do women want to be raped? Do we crave humiliation, degradation and violation of our bodily integrity? Once the proposition that all women want to be raped is established so, of course, follows - 'no woman can be raped against her will' and 'nice girls don't get raped.'

This myth implies that if a woman's will is strong enough, if she is agile (and moral) enough, she can escape. The fact is that rapists do not enquire how young we are or how old we are; they do not mind age - and we are all vulnerable. The number of rape-murders, women seriously injured by rapists and pack rapes give lie to the proposition that if a woman fights she can resist rape.

'She was asking for it' is the way the rapist shifts the blame from himself to the woman. The fact that women suffer such guilt and are sometimes seriously psychologically disturbed after rape indicates that the myth has succeeded. Most rape victims carry the scars with

them for the remainder of their lives. For young women who have never had a relationship with a man, it often means that any future relationships are ruined for them.

The maxim 'If you're going to be raped, you might as well relax and enjoy it' deliberately makes light of the physical violation of rape, makes a mockery of the insult and discourages resistance.

The Lie of the False Complaint

Rape victims have always been reluctant to report the crime and seek legal justice - because of the shame of public exposure, because of the complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her, because of possible retribution from the assailant (once a woman has been raped, the threat of a return engagement understandably looms large) and because women have been presented with sufficient evidence to come to the realistic conclusion that their accounts are received with harsh cynicism. Despite this, it is still a widely held belief that women consistently make false accusations of rape.

Suddenly in the matter of rape a woman becomes a liar. Are women greater liars than men? Richard Nixon has been called many things ... but never a woman. Everyday in the newspapers we read about men lying - big lies. Everyday books are published about another lie just revealed.

Of course, men do not have the total prerogative on lying - women lie also. For example, 'supporting mother lies to Social Security'. It may be said, and rightly so, that women have never been in positions of power to tell great whoppers - hopefully when women get there we will be more truthful. We certainly are very aware that 'no' means 'no'. False reporting of rape is no greater than false reporting of any other crime. It is the conditioned response of those agencies who come into contact with the rape victim to disbelieve her.²

The use of lie detector tests on rape victims in Michigan has been referred to.³ While the idea is horrendous, it is interesting that such tests have changed the traditional attitude of police about the truthfulness or otherwise of rape victims. Now, police in Michigan recognise that rape complainants are telling the truth.

The Mythical Rapist

The traditional picture of the rapist is:

A monstrous figure - leaping from the bushes - black or of a different race, and of lower socio-economic status ... and if he is not one of the above - definitely drunk.

This is a deliberately distorted picture that denies the normalcy of the rapist.

The picture of the paradigm rapist suggests an uncontrollable sexual urge, yet a large percentage of rapes are premeditated.⁴ There is no evidence to suggest that one race rapes more than another. Nor is rape confined to one class. Convicted rapists are more likely to be from the lower socio-economic group not because of the propensity of that group to rape but because of the nature of our judicial system.

The traditional picture suggests that rapes occur out of doors, by a stranger. Nearly 50% of rapes take place in the home of the victim and 70% of all rapes are committed by men known to the victim.⁵

If the rapist does not fit the 'proper' criteria, he is likely to be seen as 'drunk'. That is, 'ordinary' men rape in exceptional cases only, when under the influence of alcohol. Drunken drivers are held to be responsible for the consequences of their intoxication, drunken rapists are not - or at least, drunkenness renders it more comfortable for society in describing how the act occurred.⁶

Certainly, there is a completely different reaction to rape victims who have been drinking. Women in pubs are there, apparently, because they have the ulterior motive of trying to get a man - plain thirst never drives *them* into a pub. Nor is alcoholic intoxication an excuse for a woman who accepts a lift home, or goes on to a party - she is 'asking for it', even 'wanting it'.

The Reality of Rape

Today, some researchers have spent time in looking at the racial characteristics, the personality and other features of rapists in an attempt to prove the gross abnormality of the traditional view. Such research has shown the rapist to be normal. Indeed the studies show the rapist to be remarkably similar to the average heterosexual male. No doubt it was an average heterosexual male who held the placard at an anti-Iranian demonstration in Washington which read 'Rape an Iranian Woman Today'. If it is the 'normal' male who rapes, we must now ask ourselves what is wrong with the normal male?

New wave feminists in the past 10 years have attempted to understand our own conditioning. Many women now understand conditioning in terms of how it affects our personal lives - in when we marry, in which jobs we choose, which sports and recreation activities we undertake, whether we can carry out the garbage bin and change a light globe, and how our conditioning has made us passive, vulnerable, the natural victim.

No equivalent examination in personal and political terms by men of their own conditioning has yet taken place. The 'normal characteristics' of masculinity are classed as being virile, aggressive, masterful, strong and dominant. It is up to men to analyse their conditioning as women have. When the analysis is complete and understood, the myths will be seen for what they are - camouflage and lies - and rape will be seen as the product of conditioning, not of unchangeable human nature. Hopefully, then, rape and normality will no longer be synonymous.

As long as 'normal male' means 'male who is superior to women' rape will exist.

Conclusion

It is obvious that there is a need for changes in the law relating to rape and in the agencies dealing with rape victims. While these changes will not eradicate rape, they should play an important part in changing community attitudes to rape.

It should be of major concern to us to change the situation for the individual rape victim and hopefully to end such statements as 'I felt I had been raped all over again by the court'; '... if I had known, I wouldn't have reported it'; '... the trial was worse than the rape ...'

While there is an obvious need to change the legal system, rape will still be with us, the fear of it will inhibit our actions and limit our freedom. It will affect the way we dress, the hours we keep, the routes we walk. Women will continue to be raped every day, by strangers, acquaintances, friends, husbands, fathers, uncles ...

As long as sexism exists, while masculinity means aggression, while men refuse to accept their responsibility in coming to terms with their conditioning, rape will exist.

FOOTNOTES

- ¹ Susan Brownmiller, *Against Our Will - Men, Women and Rape* (1975, Martin Secker & Warburg Ltd., England).
- ² Police frequently state that fifty percent-eighty percent of rape complaints coming to them are falsely made. Note that in the Victorian Law Reform Commissioner's Report (*Rape - court procedures and rules of evidence*, Government Printer, Victoria, 1976) this was accepted without any critical analysis whatsoever of the statement by police that a particular rape complaint was 'false'. It is interesting to note that in the United States in jurisdictions where changes to rape laws have taken place and/or attitudinal changes have been a result of agitation for rape law reform and procedural reform, the false complaint rate in rape is currently seen as no higher than the false complaint rate in all other crimes - eg. robbery, theft, etc. For confirmation of this, see Virginia Blomer Nordby, this volume.
- ³ See Virginia Blomer Nordby, this volume.
- ⁴ See Menachim Amir, *Patterns in Forcible Rape* (1974, University of Chicago Press, Chicago).
- ⁵ *Ibid.*
- ⁶ See Jocelyne A. Scutt, "The Alcoholic Imperative : A Sexist Rationalisation of Rape and Domestic Violence" (paper presented to the 2nd Women and Labour Conference, University of Melbourne, May, 1980).

APPENDICES

'Still, the male psyche persists in believing that, protestations and struggles to the contrary, deep inside her mysterious feminine soul, the female victim has wished for her own fate. A young woman who was raped by the husband of a friend said that days after the incident the man returned to her home, pounded on the door and screamed to her, "Jane, Jane. You loved it. You know you loved it."'

Susan Griffen, *Rape - The Power of Consciousness* (1979, Harper & Row, New York, N.Y.), at p. 6

APPENDIX I

This appendix contains -

- (a) Notes for Workshop Participants;
- (b) Results from Workshops as Recorded by Rapporteurs;
- (c) List of Workshop Participants;
- (d) List of Workshop Leaders and Rapporteurs.

NOTE - Workshop participants were included in the various workshops on the basis that each workshop should contain good representation from a broad spectrum of participants in the conference. A conscious effort was made to include in each workshop members from the following groupings -

legal profession - judges, lawyers in practice as solicitors and/or barristers, academic lawyers, feminist lawyers and lawyers in government departments, queens counsel

police officers

women's groups representatives

workers from refuges and rape crisis centres

government departmental representatives - from health commissions, youth and community services, social work departments, attorneys-general, ethnic affairs, women's affairs

law reform commissions

social workers from sexual assault referral centres

community representatives

members of parliament - upper and lower houses

workers from women's health centres

media representatives

NATIONAL CONFERENCE ON RAPE LAW REFORM
 NOTES FOR WORKSHOP PARTICIPANTS

The following is a guide to some of the main questions which participants in the seminar may consider. These are by no means exhaustive. They are listed under the headings of :

1. substantive law;
2. laws of evidence and procedure; and
3. treatment of victims.

Substantive Law

1. Should the word 'rape' be retained? What are the advantages or disadvantages of having some other term introduced?
2. Should the laws concerning sexual offences be 'sex-neutral'?
3. Should a husband be liable to be convicted of rape against his wife?
4. Should there be a penalty of life imprisonment for the most serious offence of sexual assault, or should the penalty be lower?
5. Should there be a 'ladder' of offences of varying seriousness, with descending penalties, with alternative findings available to juries?
6. Would more defendants plead guilty to rape if penalties were lower? Would this be desirable?
7. How significant is the presence of women on juries in sexual assault cases? Are any changes called for in this respect?
8. Should consent be a defence in rape cases? Or should offences be defined so as to remove the question of consent and to concentrate on the offenders actual behaviour? Is this in fact possible?
9. Should males under 14 years be exempt from conviction of rape?
10. Should 'rape' include other forms of physical penetration than penetration of the vagina by the penis?
11. Should the laws concerning sexual assault be extended so that the criminal law covers behaviour constituting 'sexual harassment'? How could this - indeed, could it - be defined?

12. Should courts be closed in cases involving alleged sexual offences? Should there be a discretion about this? If so, who should be entitled to apply? Who should exercise the discretion?
13. Should there be a rule against publication of the names of (or information concerning) victims of sexual assault? Should there be a discretion about this? If so, who should exercise the discretion?

Evidence and Procedure

14. Should a rape victim/witness be required to give evidence in court twice - once at the point of preliminary enquiry, and again at the actual trial?
15. Should the law in New South Wales be changed (in line with other states) so that a victim/witness of sexual assault need not give evidence in court at all if there is a plea of guilty from the beginning?
16. Should a rape victim/witness be subject to cross-examination at all?
17. Is the female witness at a rape trial sufficiently protected in her interests by the presence of a police prosecutor or a Crown prosecutor? Should she be allowed separate representation, or advice and assistance?
18. Should a male defendant at a rape trial be prohibited from asking questions of a victim/witness as to any sexual behaviour on the part of that woman other than related directly to the events in question?
19. Should such questions be permitted in order to attack the victim/witness' credibility - that is to show that she could not be believed on her oath? Or should they be prohibited on that ground because the breadth of a person's sexual experience has no bearing on truthfulness?
20. Should such questions be permitted - as at present - not to show untruthfulness but to show likelihood of consent to the particular behaviour in question?
21. If questions of 'other sexual experience' are to be prohibited, should such prohibition be complete, or subject to the discretion of the court?
22. If questions about 'other sexual experience' are to be disallowed, subject to the discretion of the court, what should the applicant have to show to persuade the judge that certain questions ought to be allowed?

23. Should the fact that a woman complains (or does not complain) at an early opportunity after an alleged offence has occurred, be admissible in evidence? Should such evidence be excluded? Should the judge give the jury any particular direction about this matter?
24. At present in cases involving sexual assault the judge directs the jury to the effect that it *may* convict on the evidence of the victim alone, there being no other evidence - but that the jury should be careful of doing so. Should this type of direction be retained, abolished or varied?

Treatment of Victims

25. Do present police procedures for dealing with allegations of rape in fact result in inconsiderate treatment of rape victims?
26. What changes in police education would improve the handling of allegations of sexual assault?
27. Is the involvement of more women police officers in the investigation of rape offences desirable?
28. Is there a conflict between the police roles of comforting the victim and of rigorously investigating a complaint? If so, what procedures might be evolved to avoid this conflict?
29. Are hospital/medical procedures relating to the investigation of rape adequate? How might they be improved?
30. Does a problem arise of examining gynaecologists going overseas before the date of trial?
31. Should governments be attempting to ensure greater involvement by women doctors in examining victims of sexual assault?
32. Are legislative changes needed to give effect to improvements of the (pre-court hearing) treatment of victims?

WORKSHOP CHAIRPERSONS AND REPORTERSSubstantive Law

	<i>Chairperson</i>	<i>Reporter</i>
<i>Group 1</i>	M. Marstrand	K. Heubel
<i>Group 2</i>	L. O'Keefe	H. l'Orange
<i>Group 3</i>	J. McHugh	R. Baker
<i>Group 4</i>	K. Loder	R. Pearce
<i>Group 5</i>	D. Isaksen	P. Warn
<i>Group 6</i>	S. Sheed	G. Pincus
<i>Group 7</i>	C. Ronalds	J. Hebblethwaite
<i>Group 8</i>	Sir John Minogue	M. Murnane
<i>Group 9</i>	R. Kyburtz	A. Watson
<i>Group 10</i>	L. Patton	H. Finch

Evidence Law

<i>Group 1</i>	W. Court	H. Gerondis
<i>Group 2</i>	A. Katzmann	G. Hay
<i>Group 3</i>	K. Duggan	B. Wertheim
<i>Group 4</i>	J. Blackwood	L. Newby
<i>Group 5</i>	Hon. Justice Legoe	T. Buddin
<i>Group 6</i>	H. Coonan	G. Pincus
<i>Group 7</i>	S. Ross	R. Brett
<i>Group 8</i>	B. Loff	H. Innes
<i>Group 9</i>	R. Heatherington	A. Touriki
<i>Group 10</i>	P. Sallman	P. O'Shane

Community Issues

<i>Group 1</i>	M. Blackwood	K. Heubel
<i>Group 2</i>	G. James	A. Katzman
<i>Group 3</i>	M. Horder	D. Boss-Walker
<i>Group 4</i>	R. Whitrod	K. Fisher
<i>Group 5</i>	Y. Klempfner	T. Bain
<i>Group 6</i>	H. Richardson	R. O'Grady
<i>Group 7</i>	A. Rebgetz	J. Dunsford
<i>Group 8</i>	M. Kille	L. Garton
<i>Group 9</i>	F. Grant	L. Tanner
<i>Group 10</i>	P. Scott	C. Charlesworth

WORKSHOP GROUPSGroup 1

M. Marstrand
 K. Heubel
 W. Court
 H. Gerondis
 M. Blackwood
 S. Worth
 W. Goudie
 M. Grieve
 M. Corich
 V. Norris
 D. Graham
 K. Von Bibra
 B. Taylor
 M. Wicks
 K. Renshaw
 A. Watson
 J. Harland
 J. Cox

Group 2

L. O'Keefe
 H. L'Orange
 G. Hay
 A. Katzman
 G. James
 L. Flanagan
 R. Court
 L. Hayes
 M. Hodgson
 J. Martin
 A. Watt
 L. Norris
 Y. Carnahan
 S. Edmonds
 R. Fullerton
 R. Philpot
 J. Swancott
 W. Cobbold
 W. Cox

Group 3

J. McHugh
 R. Baker
 K. Duggan
 B. Wertheim
 M. Horder
 D. Boss-Walker
 J. Tydde
 L. Henry
 J. Scutt
 C. Fogarty
 R. Joyce
 Annie Kenney Young Women's Refuge
 (2 Participants)
 H. Dodson
 M. Percival
 T. Dobber
 H. Strang
 M. Duckett
 G. Faichney

Group 4

K. Loder
 R. Pearce
 J. Blackwood
 L. Newby
 R. Whitrod
 K. Fisher
 K. Boyer
 B. Roberts
 A. Fox
 V. Rigney
 K. Ramsay
 P. Hurley
 M. Warren
 J. Zykstra
 S. Butler
 P. Bremner
 National Council of Women
 (Launceston)
 J. Mundie
 C. Crothers
 E. Briscoe

WORKSHOP GROUPSGroup 5

D. Isak sen
 P. Warn
 Hon. Justice Legoe
 T. Buddin
 Y. Klempfner
 T. Bain
 J. Crothers
 T. Smith
 Ms. Smith
 K. Ross
 N. Rehfeldt
 L. Skillen
 R. Lawson
 G. Doran
 J. Newton-Broad
 L. Barker
 J. Rajaram
 F. Walker
 P. Flemming

Group 6

S. Sheed
 G. Pincus
 H. Coonan
 H. Richardson
 R. O'Grady
 B. Coombe
 J. Perkins
 A. Steeks
 F. Bladel
 R. Lashbrook
 R. Snashall
 L. Bartlett
 J. Fitzgerald
 B. Myers
 H. Storey
 G. Woods
 S. Bishop
 S. Goodall
 G. Arnold
 V. Eagle

Group 7

C. Ronalds
 J. Hebblethwaite
 S. Ross
 R. Brett
 A. Rebgetz
 J. Dunsford
 J. Piggott
 M. Murray
 L. O'Brien
 T. Smith
 P. Piercy
 C. Treloar
 D. Baylis
 K. O'Gary
 D. Drewitt
 J. Avery
 J. Wright
 R. Harris

Group 8

Sir J. Minogue
 M. Murnane
 B. Loff
 H. Innes
 M. Kille
 L. Garton
 R. Dallow
 I. Kulhanek
 R. Jennings
 B. Lypka
 M. Levis
 F. Gaffy
 Z. Nomen
 D. Swallow
 J. Hamilton
 R. Chugg
 M. Carter
 L. Blackrose

WORKSHOP GROUPSGroup 9

R. Kyburtz
A. Watson
R. Heatherington
A. Touriki
F. Grant
L. Tanner
S. Iles
S. Hyams
B. Rubin
A. Twining
E. Klimhiewicz
H. Church
R. Read
J. Heagney
R. Redhead
L. Fenley
J. Cossedge
Justice Wood

Group 10

L. Patton
H. Finch
P. Sallman
Beth McRae
P. O'Shane
P. Scott
C. Charlesworth
M. Thurstands
M. Perriman
A. Roach
I. Cochrane
R. Leahy
D. Lightfoot
R. Roulston
S. Haertel
B. Martin
S. Morgan
D. Smith
L. Drelcuh
A. Henley

SUBSTANTIVE LAW - GROUP 1

1. No discussion.
2. Law should be sex neutral.
3. Rape can exist as a legal offence within marriage.
4. (a) NOT life imprisonment for the serious offence of sexual assault.
(b) The penalty should be lower.
5. There should be a ladder of offences - 7 in favour
4 against
5 abstentions
6. (a) No.
(b) No.
7. (a) Women and men are equally significant on juries.
(b) Existing barriers to participation of jurors - e.g. childcare should be removed.
8. (a) Consent should be a defence on rape cases and the onus of proof should be on the defence - 9/6 vote.
(b) Not possible to remove consent as an element of the case.
9. Males under 14 years should not be exempt from conviction for rape - unanimous vote.
10. The common law definition of rape should be changed by statute to include other forms of physical penetration than penetration of the vagina by the penis.
11. Not sufficient time to define sexual harassment.
12. (a) Closed courts at preliminary hearing.
(b) Open courts at trial.
(c) There should be the usual discretion which applies in any criminal case.
13. Victims should hold the discretionary right to choose not to have the name published.

SUBSTANTIVE LAW - GROUP 2

1. The word 'rape' should be retained.
2. (a) Laws concerning rape should not be gender-neutral.
(b) The rape of women should be sustained as a separate issue in spite of the need for review of laws relating to male homosexual assaults.
(c) The term 'gender-neutral' is preferred to the term 'sex-neutral'.
(d) Group 2 records that it consciously limits the scope of the crime to ensure that rape is continued to be viewed as a crime of violence against women by men.
3. (a) There be no immunity for any man from the charge of rape.
(b) The removal of any immunity of husbands from a charge of rape.
4. The penalty of life imprisonment should apply for the most serious offence of rape.
5. There be a defined ladder of offences of varying seriousness but that this not be tied to defined penalties.
6. Group 2 is of the view that lower penalties are not desirable and that more defendants would not plead guilty if penalties were lower.
7. Membership of juries should be non-discriminatory.
8. (Not dealt with by Group 2.)
9. Males under 14 years should not be exempt from conviction for rape.
10. Rape should include forms of physical penetration other than penetration of the vagina by the penis, e.g. anal, oral, object penetration.

SUBSTANTIVE LAW - GROUP 3

1. That the word 'rape' not be retained - 12 in favour
 That the word 'rape' be retained - Nil
 Indifferent - 7
2. Yes.
3. That the husband should be liable for rape - 18 in favour
 2 against
4. There should be a maximum of 21 years for the most serious offence
 - 14 in favour
 - 1 against
 But the 21 years maximum should apply to all 'similar' crimes -
 aggravated assault, etc.
5. 17 in favour
 3 against
6. No time to answer.
7. Women should have the same duty and responsibility to serve on
 juries as do men - 20 in favour.
8. If grievous bodily harm occurs immediately prior to, and for the
 purpose of, intercourse, consent is not to be a defence
 - 17 in favour
 - 2 against
9. No.
10. Yes.
11. No time to answer.
12. General agreement that courts should not be closed.
 There should be no discretion - 9 in favour
 11 against
 But if discretion is to be allowed, it should be exercised only on
 the application of 'the victim' or his or her legal representative
 - 14 in favour
 - 1 against
13. There should be a discretionary rule against publication of the
 names of, or information concerning, victims of sexual assaults.

SUBSTANTIVE LAW - GROUP 4

1. Sex offences should be sex-neutral.
2. Marital exclusion should not apply to husband and wife living separately.
3. Husbands and wives should not be immune from prosecution for sexual offences against each other.
4. There should be a graduated series of sexual offences with alternative findings open to juries and an appropriately graduated scale of penalties.
5. Males under 14 years should not have a statutory exemption from rape.
6. Sexual assault should include vaginal, anal and/or oral penetration at least by penis, with a possible extension to some foreign object, though the group envisages difficulties in definition.
7. Sexual harassment is more properly dealt with under anti-discrimination legislation.
8. Under the present jury system women should be eligible for exemption from service on an equal basis to men. The group agrees the present jury system requires closer examination with a view to reform.

SUBSTANTIVE LAW -- GROUP 5

If retain the word 'rape' - how to extend the definition?

1. Majority - retain the word 'rape', but essential to redefine, if possible.
5. Major view that there should be gradations of abuse/assault - but some dissent from this view.
Some dissent on the basis that to have gradations would 'complicate the job of judges'.
2. The law should be sex-neutral.
3. No distinction should be made between marriage partners, de facto partners, etc.

The social as well as legal nature of marriage would be redefined if rape in marriage were to be the subject of prosecution.

Why shouldn't married women be as protected as other people in the community? General agreement that abolishing immunity is appropriate.

1. The term rape is inappropriate. Loss of virginity is no longer so important. Women Against Rape (Western Australia) state 'rape' is an emotive term and should be abolished.

In Victoria the Law Reform Commissioner in his report came to the conclusion that the word 'rape' ought to be retained because rape is proscribed by criminal law as not only a violation of sexual privacy, but as exposing the victim to risk of pregnancy, hence to abortion or the bearing of an unwanted child. This is not so with anal or oral sex. Where there is rape, there is damage to close personal relationships - for example, with parents, children and partners etc. and this damage does not necessarily arise in the case of other forms of sexual assault, or not in the same degree. The word 'rape' is valuable for social conditioning, like 'murder' - if the word 'rape' is 'got rid of', this is throwing away a useful weapon of deterrent value - common law definition of rape is important.

Rape is a particular crime against women - should include anal and oral penetration and use of foreign objects. Also should be noted that there are more male rapes against women than female rapes.

Don't avoid the issue by trying to change the word. This denotes aggression against women. It is necessary to change community attitudes, but this will not alter the incidence of rape.

'Rape' brings in the question of consent. If other words are used, they will come to be recognised in the same way as 'rape' in time.

If the Michigan approach is adopted, 'sexual assault' is more appropriate.

Rape needs to be redefined, but not necessarily through changing the word. Some might imagine if 'rape' is taken off the statute books that the crime is off the books. Some victims, however, do not like the term 'rape' because it is so identifiable and identifies them.

SUBSTANTIVE LAW < GROUP 5

(Cont.)

Should points 1, 2 and 5 be taken together. There should be a gradation of offences, the offences should be sex neutral and the activity should be neutral, as acknowledged in the Michigan legislation. Legislation and the legislature should take responsibility for demarcating serious activities of the kind currently under 'rape' and associated with rape.

Why should it not be 'Rape 1', 'Rape 2', etc.? There would be 1st, 2nd degree rape etc. if the word is retained.

One practising lawyer noted a problem arising if categories are too specific.

Woman's advisor < the word should be retained as commonly understood. Many now see it as encompassing more forms of penetration than that of the vagina.

Sex neutral attitude - general agreement that this should be adopted, but noted the ex Victorian Law Reform Commissioner did not agree. Rape of women should be retained, in that view, for earlier stated reasons. Other activities of like kind should be sex neutral.

The 'unmarriagable' problem of rape amongst migrant communities was noted.

In South Australia it was stated that the word 'rape' is not in the section, but it is in the charge and in the instruction to the jury.

The problem of rape by juveniles, especially between males was noted.

Suggestion - retain the word 'rape' but redefine it more clearly? - as in gradations of offences - say, Rape 1, 2, 3, 4 ???

Should extend penetration definition. Should be gender neutral.

Mention was made of rape and buggery penalties in Victoria and the question asked - are the penalties for these offences identical in that jurisdiction.

SUBSTANTIVE LAW - GROUP 6

1. 'Rape' - is the word more damaging for the victim? No agreement. Most consider it should be abolished. Some consider it should be redefined, but the word retained.
2. Yes. Should be gender-neutral.
3. Rape in marriage - yes, majority (only 1 or 2 against).
4. Life imprisonment? In Tasmania murder convictions seem to result in a stay in prison of 10 years only, in New South Wales of 15 years only. Comment was made as to a Queensland study carried out by Ross Barker.
Comment also made that questions 4 and 5 are interrelated.
5. Should there be a ladder of offences to penalties appropriate to those offences? Should women be given the right to have the role of being involved in plea bargaining in rape or lesser charge? Disparagement as to the problems of plea bargaining. Comment that rape next most serious crime after murder. Not life as major penalty, but the penalty re the crime should be integrated into the sentence structure in each State.

All agreed reform in this area necessary.
6. Yes.
7. No specific jury law re gender. There should be equality of service for all.
8. Consent is relevant to lesser offences. In the most serious aggravated offences - grievous bodily harm - consent is not relevant and should not be relevant.
9. No shield from prosecution for sexual offences for under 14 year olds.
10. Yes.
11. Yes.
12. Open courts generally agreed on, but in certain limited circumstances should be ability for protection of women on the application of victim or prosecution.
13. Yes. No discretion - there should be no publication of any identifying factors.

SUBSTANTIVE LAW - GROUP 7

1. All except one member of the workshop considered the word 'rape' should not be retained. The main advantage was seen as an increase in convictions.
2. Sex or gender-neutral. One member was against acceptance on the ground that buggery and 'rape' by foreign object penetration are sexual offences but not in the same way. Gender-neutral accepted by the majority.
3. The change in the traditional concept of rape as stated was unanimously accepted.
5. Unanimously agreed with. The matter was raised of a single offence with various descending penalties. At least one member felt that a ladder exists already in Victoria, taking into account 'rape with mitigating circumstances'.
9. Unanimously NO!
10. All penile penetration in any female or male orifice (i.e. vagina, anus or mouth) should be classed together - 1 against (wished to retain buggery as a separate offence.

Recommendations - against any inclusion of de facto relationships in rape in marriage discussion.

SUBSTANTIVE LAW - GROUP 8

Rape within marriage - comment that this would suffer as domestic violence generally, in terms of problems with discretion operating in the police force.

Definition of rape - intercourse by threat. Some support for the idea that women are spiteful and should be guarded against. Support for the Michigan rape in marriage stand - separated. But comment made that the parties are separated in Australian law when living under one roof. Rape within marriage is the same as it is for other rape victims. Family law should be extended to protect women from rape. Should conjugal rights exist in marriage?

3. Yes.

The penalty should be like - if there is violence, then it should be sexual assault in the first degree.

Suggestion that in Tasmania three words in the Code should be deleted - 'not his wife'.

Where there is violence and sexual violence - is that rape?

If there was a desire to redefine in this way, then the Code could be amended.

Comment - need a change of attitudes re rape, but we must not change the wonderful family.

A wife should have the same rights as any other woman in the case of rape.

Comment re Victorian new evidence laws - statement that they have succeeded.

Discussion moved on to 5 and 1.

1. Rapist and rape have connotations not only for the offender but for the victim. Rape is too emotive a term. Support for the terms 'sexual assault'.

Suggestion that penalties should not be listed, as would possibly lead to juries compromising.

'Rape' - 3 in favour of retaining.
remainder against, with 3 abstentions.

5. There should be no ladder of offences. Unanimity of opinion.

6. Should we have set penalties - we need a lot more knowledge of the issue of sentencing.

3. Rape within marriage - should be against the law - 8 in favour (women)
- 5 against, but in favour where there is
separation of the parties and assault.

9. Should males under 14 be exempt from prosecution for rape? NO.

2. Should the laws concerning sexual offences be sex-neutral?
Discussion.

SUBSTANTIVE LAW - GROUP 9.

1. Yes, but retain a generic heading along the line of 'sexual assaults'.
2. Yes.
3. Immunity of husbands from prosecution should be abolished - one dissentient only - should be confined to cases where parties are separated.
4. The penalty for the most serious offence should be the same as for the most serious offence (except murder) in the relevant criminal system.
5. A 'ladder' of offences seems to be essential. Care should, however, be taken with the categories of offences that can be dealt with summarily, even by consent.
6. This is not a desirable approach to the problem.
7. Women should have the same liability to serve on juries as men.
8. Consent should be irrelevant at least in the serious cases involving violence. For the category of offences where consent remains relevant, consideration should be given to redefining the term 'consent'.
9. No.
10. Yes.
11. This appears more appropriate for other areas of legislation. It also involves public education and relates more closely to anti-discrimination legislation.
12. There should be a discretion to those courts in all cases, exercisable on the part of judge or magistrate. Prosecutors should apply on behalf of victims.
13. There should be a discretion in the judge or magistrate to prohibit publication of material that would identify victims. Prosecutors should apply on behalf of the victim.

Note - comment that there is a need to redefine sexual penetration along the lines of the Royal Commission recommendation No. 29, but excluding actions done for medical or therapeutical purposes.

SUBSTANTIVE LAW - GROUP 10

1. There was a diversity of opinion here. One advantage was seen in abolishing the word 'rape' - that was that there may well be more convictions at a lesser level. A disadvantage of abolishing the word 'rape' was that 'rape' should be retained as a political statement - that is, that it is a specific crime against women.
2. It should be gender neutral - consensus reached.
3. They should be liable in principle but there should be potential alternative methods of dealing with this situation (re diversionary schemes).
4. We reluctantly agree that life imprisonment should be retained.
5. There was a diversion of opinion on this point.
6. We did not feel that more defendants would plead guilty if the penalty was lower.
7. We did not think the presence of women was significant in the decisions reached by juries. Women should be liable for jury service under the same terms as men BUT child minding facilities should be provided.
8. There was no consensus on this issue. The group expressed a number of points of view.
9. No.
10. No.
11. The group felt the definitional problem was overwhelming here. We could not see any way 'sexual harassment' could be covered in this area.
12. There should be a discretion in the judge to decide whether the courts should be open or closed.
13. There should be a prohibition against publication of names or information concerning victims. There should be no discretion.

EVIDENCE AND PROCEDURE - GROUP 1

14. It is better to have a 'hand-up brief' at committal proceedings. In Victoria this procedure must be used for evidence of the complainant and this is served at least 14 days before the committal. At least five days before the hearing, there may be a request that the witness be called. In nine out of 10 instances the complainant is cross-examined. Only cases of murder do not have this procedure. In all other cases it is used.

In Western Australia the hand-up brief is also accepted - but the complainant is often tested orally. Evidence as disclosed in the statement is often different from what comes out orally. (If not called & can be used in mitigation.)

All agreed evidence at committal proceedings to be given in writing with right of election in accused & by notice in writing within a prescribed time.

15. One participant suggested the magistrate should have a right to see the complainant in every case. The judge should have the right to ask the complainant questions even though this right may not be exercised in every case. It is impossible to judge all law objectively. There may be something in the hand-up brief that the judge wants to clear up. Difference between practical considerations and academic considerations.

Majority agreed with 15.

16. *Unanimous agreement.*

17. Judge has final say & so in practice he or she protects the complainant. Not sufficiently protected by the police prosecutor or Crown prosecutor. (In Victoria, statement made, there is sufficient protection.) *Unanimously NO* to first part of question. A Crown prosecutor may be able to sufficiently protect the victim's interests at the trial if aware of the sexist attitudes which prevail.

In Victoria, there are two people ('rape squad') who select evidence that will go before the magistrate; only concerned with rape cases, so this shows they are looking after those particular interests. Once charged, then goes to 'rape squad' to determine if there is sufficient evidence to warrant the case proceeding.

18. With the defendant, previous history is allowable at the discretion of the judge on application in chambers - suggestion. Guidelines should be set down & reasons for the exercise of the discretion in entering evidence should be given.

Unanimously agreed.

With third parties & acceptable within the same guidelines.

8 in favour; 4 against.

19. Questions should be restricted to any conditions laid down by the judge.
20. In cases where evidence has previously been admitted, judge's discretion only.
21. Subject to the discretion of the Court.
22. That it is relevant and material to the matter in issue.
23. Is relevant evidence, so should be admissible but no comment should be made whether it was an early or late complaint, etc.
24. *All agree* should be abolished but judge must not be deprived of saying it if s/he likes.

EVIDENCE AND PROCEDURE - GROUP 2

14. EVIDENCE BY WITNESS TWICE

Double exposure of the victim should be limited as far as reasonably practicable. Committal proceedings be optional.

15. The law in New South Wales be changed (in line with other states) so that a victim/witness of sexual assault need not give evidence in court at all if there is a plea of guilty from the beginning.

16. SUBJECTION TO CROSS EXAMINATION

Rape victim/witness should be subject to cross examination but Group 2 is concerned at ability of accused to avoid cross examination whilst not necessarily supporting the abolition of the dock statement.

17. SHOULD VICTIM/WITNESS HAVE SEPARATE REPRESENTATION?

NO. However Group 2 suggests that procedures be revised to ensure optimum consultation between the rape victim/witness and the prosecution. Further, the Crown Law Department in each state should be urged to have better liaison with the victim/witness.

18. (a) PRIOR SEXUAL EXPERIENCE WITH THIRD PARTIES

That the law be reformed so that evidence relating to prior sexual experience with third party/ies is prohibited.

VOTE - 6 in favour
4 against

Note - dissentients were worried about blanket prohibition.

(b) PRIOR SEXUAL EXPERIENCE WITH ACCUSED

That the law be reformed so that if the defence counsel wishes to cross examine on prior sexual experience with the accused he or she must obtain leave of the trial judge.

Application for such leave be made in writing.

A voir dire should ensue.

Questions 19 - 24 not dealt with due to time.

EVIDENCE AND PROCEDURE - GROUP 3

14. There should be a prima facie rule that the witness should *not* be called unless the defendant can show compelling reasons of justice why the witness should be called. *CONSENSUS.*

15. Yes. *CONSENSUS.*

16. Yes. *CONSENSUS.*

17. There is a consensus that ideally the Crown prosecutor should be properly educated to carry out this role effectively. Agreed that at present they are not protecting the victim's interests adequately.

Agreed there is great value to the victim having her counsellor or chosen support person present in the court during the period she gives evidence.

18. Prohibition on sexual experience with other persons except for certain specified reasons. These are to show reasons for presence of semen, pregnancy, disease, injury.

Judge should give reasons in writing for making an exception.

6 - in favour

3 - except

3 - fence sitting

19. A person's sexual experience has *no* bearing on truthfulness. *CONSENSUS.*

Questions 20, 21 and 22 - see decision re Question 18.

23. Complaints given in evidence - 2

Complaints covered by ordinary hearsay rule that should apply - 5

24. Corroboration warning should go

6 - in favour

2 - against

EVIDENCE AND PROCEDURE - GROUP 4

- A. The workshop is of the view that in rape trials the right of the accused to make an unsworn statement from the dock should be abolished so that a defendant may be cross examined on his testimony should he choose to give evidence.
- B. The group agreed that the adducing of evidence and cross examination of the complainant/witness as to prior sexual history and sexual character should be limited (e.g. along the lines of the Queensland model), and that the judiciary should be encouraged to use existing procedural rules to their fullest extent to prevent introduction of extraneous and damaging evidence or questioning on such matters.
- C. That the requirement of the judge to direct a jury as to the undesirability of convicting on the basis of the uncorroborated testimony of the complainant/witness should be abolished.
- D. On the question of closed courts or open courts during rape trials - in principle courts remain open, but that the public be excluded while the victim gives evidence and medical evidence is given.

EVIDENCE AND PROCEDURE - GROUP 5

14. No - near unanimity.
15. Yes - unanimous.
16. Yes - unanimous.
17. (a) No - 1 abstention.
(b) Advice and assistance - Yes - 1 abstention.
(c) Separate representation - Yes - 8/5.
18. Yes - 7/5.
19. No - 9/6.
20. No - unanimity.
21. See Question 18.
22. Formula - legislative forum. Michigan proposal favoured.
23. No.
24. Abolition - near unanimity.

EVIDENCE AND PROCEDURE - GROUP 6

14. Some (about half) agreed in principle that victim shouldn't be examined twice in court, the other half stating that the hand-up brief procedure with the accused having the right to call the victim should exist.
16. Yes.
17. We feel that the victim is not necessarily sufficiently protected. Instead of separate representation it was felt that training courses for all court personnel would be desirable and if the relevant aspects of the laws of evidence were reformed.
- 18, 19, 20, 21
Yes, but only with the leave of the court. In relation to third persons there should be very stringent limitations. The exercise of such discretion by the judge should be clearly set out in the legislation.
22. The applicant should show substantial relevance and still have a power in the judge to disallow any questions which may be relevant *BUT* prejudicial.
23. No. - early complaint evidence should not be admissible.
24. Majority agree that it should be abolished altogether. Others suggested that the rule of practice be abolished.

EVIDENCE AND PROCEDURE - GROUP 7

14. Victim ought not to be automatically (i.e. in every case) required to give evidence at the preliminary enquiry - but in fact there is no such requirement at present.
15. *Unanimous* 'yes' to proposition that New South Wales law should be changed.
16. *Unanimous* 'yes' to allowing accused to cross-examine victim.
17. *Unanimous* support for state-provided advice and assistance for victim before, during and after trial. Unanimously against separate representation for victim at the trial. Most group members thought that the prosecutor should see the victim and interview her before the trial.
18. *Unanimous* 'no' to complete prohibition on cross-examination about sexual activity which took place other than at the time of the alleged rape.
19. Questions should be permitted, by leave of the court, about the victim's prior sexual history if such questions in fact tend to show that she is dishonest. However, questions about her history should be prohibited if their purpose is simply to show that she is promiscuous and therefore dishonest. Three dissentients from this, who think that only questions about prior relations with the accused should be permitted, and then only if they are substantially relevant.

EVIDENCE AND PROCEDURE - GROUP 8

Discussed - Prior sexual experience to be banned.

Resolution - No. 18 we agreed with the broad aspects but the word 'male' be deleted and the terms 'other than related directly to the events in question' be at the sole discretion of the judge.

Discussed - No. 17

Resolution - That a victim has the right of her own solicitor over and above the Crown Solicitor.

Discussed - Unsworn statements from dock.

Resolution - *Unanimously* agreed that it should be abolished.

EVIDENCE AND PROCEDURE - GROUP 9

14. No - although present system is unacceptable, we could not come up with an answer other than a hand-up brief with provision for further written evidence to be given. Could not decide on qualifications to be attached to hand-up brief.
15. Question assumption that this does not always take place.
16. Yes.
17. No separate legal representation possible in court but some type of counselling/assistance which gives the victim legal advice, and takes her through the procedure of trial/examination etc. Such counsellor/advisor should liaise with prosecutor, and must be publicly funded.
18. Not if relevant to proceedings but relevance to be determined by judge in chambers.
19. Education of judges in their attitudes. Relevance of evidence is prejudiced by the beliefs of judges.
Prohibition of evidence of sexual relations with 3rd parties.
Jury should be educated in their role and function.
19. No.
20. No.
21. Only if directly relevant and if determined by judge.
AND
22. The relevance to the particular event in question, going to consent.
23. No. Directions to be abolished.
24. The direction should be abolished and the jury should consider the evidence as a whole.

EVIDENCE AND PROCEDURE - GROUP 10

14. No. (*Unanimous.*) (Problems where ; prior inconsistent statements; identity)
 except where 'special reasons' vide South Australian provisions.
 ** Needs and issues of *children* must be considered - no attention has yet been focussed on the problems faced by children involved in sexual offences.
15. No.
16. Yes, at trial.
17. Provided she is allowed the presence of a friend for comfort, and provided the prosecutor or instructing solicitor take the time to advise her of procedures, answer her questions, and 'proof' her properly, she is sufficiently protected and does not require separate representation.
18. Evidence as to immediate past and relevant sexual relationships between victim and accused should be admitted, subject to discretion in judge.
 Otherwise - then see questions 19 to 22.
19. Should be prohibited in accordance with second question posed.
20. Majority in favour of saying no to this question. The division was along sex lines.
21. Answered in 20.
22. Allow - association between parties direct relevance.
 Should not be allowed on basis that knowledge of victim's former behaviour formed basis for A's belief.
23. Such evidence should be excluded. Tasmanian delegates in some difficulty owing to recent complaint corroboration.
24. Almost *unanimous* - abolish.
 Our discussion centred around the questions set out by Greg Woods* and the workshop was most ably moderated by Brian Martin of South Australia who stood in.

** Questions contained this Appendix, *supra*.

TREATMENT OF VICTIMS - GROUP 1

25. Inconsiderate treatment results from attitudes etc. and also from legal system which demands evidence. S.A. police have special training.* Need for this with all police forces. Probably over-zealous police examination has arisen out of historical reasons. Special training in Victoria for women police has improved standard of statements and treatment of victims. Tasmania - officer takes complaint - it is then passed to C.I.B. Works well here.

'Inconsiderate treatment does occur in some cases'

11 agree

2 disagree

26. Question raised as to need for feminist based education programmes. Methods of approaching feminism all important in training programmes. Care of victim has been seen to improve from feminist influence in training.

An immediate and sustained feminist perspective should be offered to police. Use of *women* not girls in discussion noted as being important.

27. Re-wording. What involvement should the police have in the investigation of rape victims?

Investigation at initial stages. Women police officers should be available as a matter of course - except where a male officer is specifically requested. It is seen as desirable that both male and female officers are available in subsequent investigation.

28. A conflict in roles is acknowledged. All agreed on this. Need for intensive questions - to establish the case, on part of police.

Need for 2nd person (rape crisis centre, sexual assault clinics, trained volunteers) to perform role of comfort.

29. Western Australian model seen as useful. Wide variation in standards of hospital/medical procedures from state to state. Tasmania particularly remarked upon. Recommend that information such as W.A. scheme be disseminated to all states.

30. Yes, this problem does arise, particularly in time limits as in Vic & 31
Victoria between committal for trial and trial. Provisions in W.A. for hand-up brief - but difficulties with this too. May be useful to use gynaecologists within government medical service - more fixed in their job positions. Important to reach medical students in their training - to educate caring doctors of both sexes.

* For an account of the S.A. scheme, see Andrew Paterson, "South Australian Crisis Care Unit" and "Crisis Intervention" in *Violence in the Family* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology). (Editor's note.)

TREATMENT OF VICTIMS - GROUP 1

(Cont.)

32. It was felt that we had insufficient evidence to deal with this in detail. But present deficiencies in treatment of victims noted. An investigation should be made into the legislative changes which may be required.

TREATMENT OF VICTIMS - GROUP 2*RECOMMENDATIONS*

1. Medical examinations to be carried out with minimal delay after the complaint is laid.
2. Medical examinations to be carried out, wherever possible, by doctors selected from a panel of trained and sympathetic medical practitioners in urban areas. In rural areas, doctors to be given advice as to suitable procedures to be followed and a paid regional counselling network should be introduced. Follow-up counsellors to be on call.
3. Special procedures should be developed by police to deal with sexual assaults upon children.
4. Victim to have the choice of a male or female doctor.
5. The presence of a relative or friend during the course of the police investigation should be at the option of the victim, regardless of his or her age.
6. A choice of procedures be available to victims so that they have a legal choice particularly from the time of the initial contact. This is aimed at augmenting the work of the police and Crown prosecutors on behalf of the victim.
7. Legal aid should be extended to enable victims to seek independent legal advice as to their rights and the procedures that will be invoked e.g. rights to criminal injuries compensation.
8. Copies of lists of lawyers should be made available to victims at each station and facilities provided for any person who is the subject of questioning to contact a lawyer, should he or she wish to do so.
9. A list of organisations or individuals providing assistance for persons in trouble should be given to victims at each police station, and should an individual so indicate, provision should be made for that individual to contact such organisation or individual (e.g. Aboriginal Legal Service, Legal Referral Centre, Rape Crisis Centre).

TREATMENT OF VICTIMS - GROUP 3

25. An integrated service involving police, welfare agencies, crisis centres. Service lists should be made available so those agencies providing services to rape victims.
26. Initial courses include special training units on the procedure and handling of rape cases. That in-service training courses be made available to all officers.
27. Choice by victim as to who interviews her and that *more* police women should be the goal - to be specially trained.
28. Police - more humanist approach - to explain procedures to victim.
29. Not always. Doctors to be experienced and preferably outside the hospital system. Victim must have priority treatment. There seems to be a need for different kinds of service - community based and provided with suitable support from hospitals, agencies etc.
30. No.
31. Yes.
32. As per previous notes.

TREATMENT OF VICTIMS - GROUP 4

- * Clear conflict between the police role and possible conviction and the victim's personal needs.
- * Police should be encouraged to lessen time of victim's questioning.
- * Where possible the police involve a counselling service as soon as possible and such service continue to be used throughout the experience.
- * Reduce the number of police involved.
- * Police and medical training should include basic empathy training.

The workshop recognises establishing support services in as many centres as possible, along the lines of the Western Australian centre, is essential.**

** For an account of the sexual assault referral centre care in a Western Australian hospital, see Lee Henry, "Hospital Care for Victims of Sexual Assault", this volume. (Editor's note.)

TREATMENT OF VICTIMS - GROUP 5

25. Problems obviously exist in relation to dealing with treatment of rape victims by police. To some extent this depends on the individual policewoman/man and varies from state to state.
26. Police education should include a special segment on rape in early training as well as a continuing education in sexuality and relationships. This should include all representatives of all agencies involved in treatment of rape victims and exposure to their varying points of view about rape.
27. More women must be involved in rape investigations. These women should be specially trained and should be volunteers for this training, rather than allocated to the area. (One dissenter.)
28. Yes, there is conflict. Rape crisis care should be involved in all stages. These centres should be made up of both professional and lay people who have the obvious advantage of having experienced the crime itself.
29. Hospital Procedures. Hospital/medical procedures are not adequate. Health Commissions should send details of procedures and information to doctors so that both needs of women and needs of forensic evidence are met. In states where there are no facilities for victims of sexual assaults, the establishment of these is desperately needed.
30. There is a problem arising out of doctors leaving the country before trials. There are other problems concerning doctors generally, i.e. the involvement of women doctors who volunteer for sexual assault centres - where there is no childcare, etc. Also harassment of doctors in court, lack of payment akin to salary. Recommend that changes in evidence legislation so that doctors could submit affidavits.
31. Yes. Provision should be made for greater funding of sexual assault centres/rape crisis centres so that women are able to be paid adequately and provision is made for childcare etc. Victims should be given the choice of a female doctor.

TREATMENT OF VICTIMS - GROUP 6

25. This question goes to training of police. This is more an issue of personnel than procedures. These latter seem to be necessary except where administered by unempathising personnel. Need for education of police : special training relevant to dealing with victims of sexual assault.
- In United Kingdom junior officers are not permitted to deal with such complaints; nor are male officers if a female officer is available.
- Inarticulate women without support are less likely to get police credulity and action than are articulate, supported women.
- Retraction statements insisted upon by police in the case of victims can lead to miscarriage of justice.
- Some rape victims are denied copies of statements, often do not know their civil rights.
26. Inadequately educated.
Short term - selective personnel practices.
Long term - greater range of education for police; not in isolation.
Police should be paid more.
27. In dealing with victims - yes. Victim should have choice.
In investigation - yes - and *all* areas of police work.
28. Must be conflict in some cases, especially in mode of questioning to ground the case - this can be invalidating to the victim's experience.
Michigan post-legislative survey* supports the notion that if you change the law re police procedures police consciousness is raised.
Role of services to victim can supplement police, co-ordinated approach can make interview much easier for victim.
29. Adequate in Western Australia and New South Wales. Inadequate in non-capital areas and Hobart. Need for victim to have choice of gender of medical staff. Education for personnel involved - there should be *choices* for victim including treatment at rape centres rather than hospitals.
Some statutory *exception* for conspiracy on part of rape not reporting a felony.**

* See Virginia Blomer Nordby, "Reforming Rape Laws - The Michigan Experience", this volume. (Editor's note.)

** The problem being raised here was that of misprision of felony. (Editor's note.)

TREATMENT OF VICTIM ~ GROUP 6

(Cont.)

30. Same as with anyone going overseas. Yes. Supports notion of hospital treatment by salaried staff on file (?)
31. Yes. Victim should have a choice. Governments should increase female quota in medical schools.
32. Yes. Woman's complaining or not complaining should be inadmissible in evidence. This might affect police attitudes to pre-trial procedures. Placing time limit (as in Victoria) on committal in relation to date of charge with exceptions to take account of special circumstances (e.g. accused out of country - extradition proceedings - finding the offender). Balancing freedom of press and rights of victim ~ victim's name to be suppressed in *all* cases. There should be judicial discretion as to closure of court.

TREATMENT OF VICTIMS - GROUP 7

The view was put that we should come up with ideals we would like to see operating in all jurisdictions, despite their individual differences.

- (a) First step : in police standing orders : - that a policewoman should accompany the victim to a health centre for collection of medical evidence after a quick statement (some people felt that these need not be 'government authorised' or 'licenced' or in a hospital setting). The victim is seen by medico/counselling team. Police should not be in on this part. Police take over if and when the time is for the investigation to proceed by the police. The friend/relative/counsellor can be present when initial statement is taken, if victim wants it.

A woman officer should be the one to take the initial statement; there should be a different officer organising the whole enquiry, e.g. forensic people.

Difficulty noted of so many officers being involved - especially if there is a change of shift involved - more police come in on the case and may wish to ask the victim more questions. It is undesirable but we found no real answer.

General Recommendation : Efforts should be made to reduce turnover of police on case.

- (b) Police procedures after that : Contact afterwards - experience shows that bad things happen in the conduct of rape investigations - having a special squad dealing with them, working under experienced leaders would hopefully ameliorate this, eg. appearing at some victim's workplace/school etc. - this is in bad taste.

25. In some instances there are problems so we hope that by proposing this model based on standing orders procedures will be improved.
26. If procedures outlined in standing orders are adopted then police should be educated towards these ends. Note that there should be more communication/education between police and crisis centres. *Continuing* education is essential. Police education is essential as to problems faced by victims etc. either by outside groups or incorporated in the syllabus by lecturers. Placement of policewomen in their training in 'alternative' places, e.g. *Women Against Rape** shelters, refuges etc, would help in this education process.

* For an account of the activities of *Women Against Rape* and related rape crisis centres, women's health centres and like collectives, see Meredith Carter and Rosalind Harris, "Women Against Rape - Care of Victims in the Community", this volume. (Editor's note.)

TREATMENT OF VICTIMS - GROUP 7

(Cont.)

27. The involvement of more policewomen is *essential* providing they have been educated in this area, e.g. put on placement situations. No good putting unsympathetic policewomen in the area.
28. Western Australian model* is fine for metropolitan areas but not for country areas. Another problem is to get medicos to come into the area. Especially women medicos should be involved.
29. Medical staff should be given forensic training and experienced in court and experience should be given in handling sexual assault victims. Preferably a woman gynaecologist should examine victim. In line with aforementioned model. In order to assist medical staff construct a 'kit' telling medicos what to look for.

Note was made of a range of victims who would prefer to see a male doctor, a family doctor etc. - the 'kit' would be most helpful here.

30. Yes - proceedings should be speeded up, would be helpful to all concerned.
31. Dumb question! Not legislative changes needed here, rather procedural.

Our comments are pretty well concerned with victims in metropolitan areas. Others - country, migrants, blacks etc. were not specifically considered by us.

* For an account of the 'Western Australian model' see Lee Henry, "Hospital Care for Victims of Sexual Assault", this volume. (Editor's note.)

TREATMENT OF VICTIMS - GROUP 9

25. Firm police procedures should be introduced to deal with questions of rape, so that full regard is given to the welfare of the victim as well as the detection of the crime and that such procedures should be worked out in conjunction with other interested groups. Police liaison with other support groups essential.
26. Any education programme should be worked out and planned in consultation with other community and support groups, and include education about myths of rape, and with emphasis being placed on welfare of the victim.
27. More policewomen needed in every area of police responsibility, should be reflected in area of rape investigation. Victim should be given a *real* choice of sex of interviewer.
28. Yes, a conflict of interest. Can be minimised by use of outside support groups. At same time, police must maintain responsibility for welfare of the victim.
29. There must be accessible centres, including hospitals, community health centres, women's health centres etc. 'Rape kits' should be developed and made available to all these centres, as well as country doctors and police stations. These kits should include instructions on continuity of evidence, etc. so that they can be presented in legal evidence.
30. Yes.
31. Yes.
32. Yes. See question 14.

TREATMENT OF VICTIMS - GROUP 10

25. In South Australia, Western Australia and Tasmania, where female police officers carry a case through to the end, that is not considered inconsiderate but in other states and territories, it is whether it is due to overwork, etc.

Women's Electoral Lobby *Draft Bill and other recommendations in relation to reform of sexual offences laws and procedures** - recommendations 5 and 6 ("Legislation Dealing with Police Procedures" - accompanied by friend, etc. during questioning; medical attention) - small minority in favour.

Some people considered organisations should be 'scrutinised' by an authority body if W.E.L. proposal 6 (list of helpful organisations to be held at police station)* to be adopted.

26. Should be consciousness-raising education sessions - i.e. talks from Rape Crisis Centres, community awareness.
27. Appropriate officer - either male or female - should be available to the victim, one that the victim chooses (should have the choice).
28. What right do the police have to refuse a friend etc.?
All agree that the victim has a right to have someone with her, preferably not a potential witness.
29. Hospital procedures - W.A. a good model - also, follow up where relevant for bruises, etc.
30. ----
31. A woman's choice.
32. Don't feel we can legislate. In the case of child victims, legislation is required that necessary, protective measures are taken to protect the child victim and to enable other supportive or treatment action to be implemented as appropriate.

* Note that the W.E.L. proposals re attention being given to the rights of victims of crime (and other witnesses) were drawn up having regard to proposals made by the Australian Law Reform Commission in relation to the rights of suspects and accused persons *vis a vis* the police, so that all persons questioned by police would be clearly notified of their rights, and so that police would be clearly aware of their powers. See further on this issue, W.E.L. *Draft bill on sexual offences and Other Recommendations*, Appendix II, this volume. Also Australian Law Reform Commission, *Interim Report - Criminal Investigation* (1975, Australian Government Printing Service, Canberra, A.C.T.). (Editor's note.)

APPENDIX II

This appendix contains -

- (a) Michigan *Criminal Sexual Conduct* Legislation;
- (b) Women's Electoral Lobby *Draft Bill on Sexual Offences* and attached law reform proposals;
- (c) *Recommendations* of Royal Commission on Human Relationships (in relation to rape and other sexual offences).

THE MICHIGAN CRIMINAL SEXUAL CONDUCT ACT

750.520a. *Definitions.* (M.S.A. 28.788(1)).

Sec. 520a As used in sections 520a to 520l.

- (a) "Actor" means a person accused of criminal sexual conduct.
- (b) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.
- (c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.
- (d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anaesthetic, or other substance administered to that person without his or her consent.
- (e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.
- (f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.
- (g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

- (h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.
- (i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

750.520b. *Criminal Sexual Conduct in the First Degree: Felony.*
(M.S.A. 28.788 (2)).

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

- (a) That other person is under 13 years of age.
- (b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
- (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
- (d) The actor is aided or abetted by one or more other persons and either of the following circumstances exists:
 - (i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.
 - (ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).
- (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
- (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

- (i) When the actor overcomes the victim through the actual application of physical force or physical violence
- (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
- (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision "to retaliate" includes threats of physical punishment, kidnapping or extortion.
- (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
- (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.
- (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

750.520c. *Criminal Sexual Conduct in the Second Degree: Felony*
(M.S.A. 28.788 (3)).

Sec. 520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

- (a) That other person is under 18 years of age.
- (b) That other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, or is related by blood or affinity to the fourth degree to the victim, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

- (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
- (d) The actor is aided or abetted by one or more other persons and either of the following circumstances exists:
 - (i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.
 - (ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).
- (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.
- (f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1) (f) (i) to (v).
- (g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

750.520d. *Criminal Sexual Conduct in the Third Degree: Felony*
(M.S.A. 28.788 (4)).

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

- (a) That other person is at least 13 years of age and under 16 years of age.
- (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1) (f) (i) to (v).
- (c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

750.520e. *Criminal Sexual Conduct in the Fourth Degree: Misdemeanour.*
(M.S.A. 28.788 (5)).

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

- (a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1) (f) (i) to (iv).
- (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanour punishable by imprisonment for not more than 2 years, or by a fine of not more than \$500.00, or both.

750.520f. *Second or subsequent offence: Penalty.* (M.S.A. 28.788 (6)).

Sec. 520f. (1) If a person is convicted of a second or subsequent offence under section 520b, 520c, or 520d, the sentence imposed under those sections for the second and subsequent offence shall provide for a mandatory minimum sentence of at least 5 years.

(2) For the purposes of this section, an offence is considered a second or subsequent offence if, prior to conviction of the second or subsequent offence, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offence including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offence.

750.520g. *Assault with intent to commit criminal sexual conduct: Felony.*
(M.S.A. 28.788 (7)).

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

750.520h. *Corroboration of victim's testimony not required.* (M.S.A. 28.788 (8)).

Sec. 520h. The testimony of a victim need not be corroborated in prosecution under sections 520b to 520g.

750.520i. *Resistance by victim not required.* (M.S.A. 28.788 (9)).

Sec. 520i. A victim need not resist the actor in prosecution under sections 520b to 520g.

750.520j. *Evidence of victim's sexual conduct.* (M.S.A. 28.788 (10)).

Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under sub-section (1).

750.520k. *Suppression of names and details.* (M.S.A. 28.788 (11)).

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate before

whom any person is brought on a charge of having committed an offence under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offence be suppressed until such time as the actor is arraigned on the information, the charge is dismissed or the case is otherwise concluded, whichever occurs first.

750.5201. *Sexual Assault on Legal Spouse.* (M.S.A. 28.788 (12)).

Sec. 5201. A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.

Saving Clause.

Section 2.

All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.

Repeal.

Section 3.

Sections 85, 333, 336, 339, 340, 341, 342 and 520 of Act No. 328 of the Public Acts of 1931, being sections 750.85, 750.333, 750.336, 750.339, 750.340, 750.341, 750.342, and 750.520 of the Compiled Laws of 1970 and section 83 of Chapter 7 of the Act No. 175 of the Public Acts of 1927, being section 767.82 of the Compiled Laws of 1970, are repealed.

Effective Date.

Section 4.

This amendatory act shall take effect 1st November, 1974.
Approved 12th August, 1974.



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WOMEN'S ELECTORAL LOBBY : SEXUAL OFFENCES LAW REFORM GROUP

W.E.L. DRAFT BILL AND OTHER RECOMMENDATIONS ON SEXUAL OFFENCES
 (Superseding Draft Bill of August 1977; plus addenda of July 1978.)

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INTRODUCTION

Following is an amended version of the original Women's Electoral Lobby Draft Bill on Sexual Offences and other recommendations on sexual offences law reform of August 1977. Additions to the Draft of May 1978 are also included, being a draft of the provisions in the style of the *Crimes Act* 1900 (N.S.W.). The Bill is drafted for the purpose of amending current rape laws which fail effectively to deal with sexual offences, both from the viewpoint of the accused and the victim, as well as taking into account the rights of society as a whole.

The Bill is drafted with a view to making laws relating to sexual offences more effective than is currently the case, and also in order that our laws may be intelligible and easily understood by all persons they are intended to govern.

SEXUAL OFFENCES DRAFT BILL1. Definitions (s. 4 *Crimes Act*)

'grievous bodily harm' includes any permanent or serious disfiguring of the person

'grievous mental harm' includes any serious mental anguish or permanent psychological damage to the person

'emotionally incapable' means that a person is by reason of immaturity incapable of appraising his or her conduct

'intimate parts' includes the primary genital area, groin, inner thighs, buttocks, or breasts

'kissing' means the act of using the lips in a forcible touch or contact

'mentally incapacitated' means that a person is, or is rendered, temporarily or permanently incapable of appraising his or her conduct

'physically helpless' means that a person is unconscious, asleep or for any other reason is physically unable to communicate unwillingness to an act

'sexual act' includes the intentional touching of the victim's intimate of sexual parts, the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts, or kissing, or defaecation or micturition where these acts involve contact with the victim's body, and includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification

'sexual intercourse' means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the accused's body or any object manipulated by the accused into the genital or anal openings of the victim's body, except where this manipulation is for medical purposes which are ethically acceptable. The emission of semen is not required.

'sexual parts' includes the genitals, primary genital area, and breasts

'unlawful sexual act' includes any sexual act which is carried out without the full and free consent of any one of the parties

'unlawful sexual intercourse' includes any act of sexual intercourse which is carried out without the full and free consent of any one of the parties

2. There shall be no presumption of law that any person is by reason of age, sex or marital status incapable of being prosecuted for sexual assault under this Amendment.
3. Sections 62-78F (inclusive) *Crimes Act* 1900 (N.S.W.) are hereby repealed.
4. Sexual Assault

There will be four degrees of sexual assault:

- (a) aggravated sexual assault, grade one
(aggravated sexual assault involving penetration)

PENALTY: 14 years imprisonment maximum

- (b) aggravated sexual assault, grade two
(aggravated sexual assault)

PENALTY: 10 years imprisonment maximum

- (c) sexual assault, grade one
(sexual assault involving penetration)

PENALTY: 5 years imprisonment maximum

- (d) sexual assault, grade two
(sexual assault)

PENALTY: 2 years imprisonment maximum

5. Aggravated sexual assault, grade one

- (a) A person who subjects another person to an act of unlawful sexual intercourse causing grievous bodily harm to that other person will be guilty of aggravated sexual assault, grade one.

- (b) A person who subjects another person to an act of unlawful sexual intercourse causing grievous mental harm to that other person will be guilty of aggravated sexual assault, grade one.

- (c) A person who subjects another person to an act of unlawful sexual intercourse and who threatens to injure that person with a dangerous weapon will be guilty of aggravated sexual assault, grade one.

PENALTY: The penalty for aggravated sexual assault, grade one, will be a maximum of fourteen years imprisonment.

6. Aggravated sexual assault, grade two

- (a) A person who subjects another person to an unlawful sexual act causing grievous bodily harm to that other person will be guilty of aggravated sexual assault, grade two.

grievous mental harm to that other person, or who threatens to injure that other person with a dangerous weapon,

involving penetration

shall be guilty of aggravated sexual assault and shall be liable to penal servitude for fourteen years.

6. s. 63. Whosoever -

subjects another person to an unlawful sexual act causing grievous bodily harm or grievous mental harm to that other person, or who threatens to injure that other person with a dangerous weapon,

Aggravated Sexual assault

shall be guilty of aggravated sexual assault and shall be liable to penal servitude for ten years.

7. s. 64. Whosoever -

subjects another person to unlawful sexual intercourse,

Sexual assault involving penetration

shall be guilty of sexual assault and shall be liable to penal servitude for five years.

8. s. 65. Whosoever -

subjects another person to an unlawful sexual act,

Sexual assault

shall be guilty of sexual assault and shall be liable to penal servitude for two years.

9. Lack of Consent

The unlawful nature of the sexual intercourse or the sexual act will be evidenced by, but is not limited to, the sexual intercourse or the sexual act occurring under any one or more of the following circumstances:

- i. when the accused overcomes the victim through the actual application of physical force or violence, or by sudden attack.
- ii. when the accused coerces the victim to submit by threatening to use force, violence, or physical strength on the victim.
- iii. when the accused coerces the victim to submit by threatening to use violence on a companion of the victim.
- iv. when the accused coerces the victim to submit by threatening future punishment to the victim, or any other person. Future punishment as used in this subsection includes threats of future physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion, or public

humiliation or disgrace.

- v. when the accused, without prior knowledge or consent of the victim, administers to or has knowledge of someone else administering to the victim any intoxicating substance, drug or anaesthetic, which mentally incapacitates the victim.
- vi. when the accused by words or acts induces the victim to submit in the belief that the person undertaking the act of sexual intercourse or the sexual act is some other person.
- vii. when the accused by words or acts induces the victim to submit in the belief that the act of sexual intercourse or the sexual act is some other act.
- viii. when the accused is in a position of authority, or professional or other trust over the victim, and exploits this position to induce the victim to submit.
- ix. when the victim is physically helpless to resist, or is mentally incapacitated or emotionally incapable of understanding the nature and character of the act or its implications.
- x. when the victim submits under circumstances involving kidnapping, false imprisonment or forcible confinement or extortion.

RULES OF EVIDENCE AND PROCEDURE

1. Evidence and Procedure

- (a) All rules of evidence and procedure applicable generally to crimes of assault under the *Crimes Act* 1900 (N.S.W.) will be applicable to the crime of sexual assault, unless it is stated otherwise in this Amendment.
- (b) Prior to the introduction of sexual history evidence, the accused must seek leave from the judge sitting in chambers. Such application must be accompanied by a statement outlining relevance of the evidence to a material fact of the crime charged.
- (c) If the judge considers the statement sufficient, a hearing must be held in the absence of the jury to determine whether the evidence is admissible.
- (d) At the conclusion of the hearing, the judge must issue an order stating the findings and the evidence that may be admitted.

2. Explanatory Note

In the original proposed Amendments to sexual offences law, the suggestion was made that the above rules should be introduced in

conjunction with rules restricting the issues that could be considered relevant in terms of sexual history evidence. (These rules appear below.) The approach now taken is to provide a 'trial procedure' in order to determine whether, if such a procedure were to be introduced, current rules of evidence would be operated properly in the courtroom. Unfortunately trials at present appear on many occasions to be proceeded with on the basis of a perfunctory adherence to current rules of evidence. This problem may be aggravated by procedures in the past that have allowed all manner of irrelevant evidence to be admitted in the trial of a rape case. It may also be aggravated by tactics of some counsel in entering evidence on a 'surprise' basis, so that it is difficult for the judge, during the course of the trial, to determine its relevance. The procedure outlined above will give the judge a real opportunity for proper consideration of the relevance and admissibility of evidence.

It is suggested that such a procedure, with no formalised guidelines for judges (see rules below), should be brought in *only* in conjunction with a monitoring practice - that is, a body should be set up to monitor the operation of the procedural rules in order to determine whether sexual history evidence is not brought into the arena where it is not relevant to a material fact. If it is found that the procedures do not alleviate current problems, then the below outlined guidelines should be introduced.

Further, it is implicit in the procedural rules that the determination of relevance by the judge should become a part of the trial record, so that if it is considered that irrelevant evidence is admitted, an appeal may be lodged under s. 5D *Criminal Procedure Act* (N.S.W.).

3. Guidelines*

To be introduced in the event of the Procedural Rules (above at p.271) being found to be ineffective - see Explanatory Note at p. 271 above.

5. Opinion evidence relating to the chastity or unchastity of the victim and evidence of the sexual reputation of the victim will not be admissible as evidence of the credibility of the victim in any prosecution under this Amendment.

* These rules of evidence and procedure are drafted on the basis that upon introduction of the Draft Bill into law the Government will direct an education campaign to be undertaken to inform the public of the nature of the law relating to sexual offences and the evidentiary rules which are applicable. Seminars must be funded by the Government for members of the judiciary, and members of the legal profession (including prosecutors and defenders as well as lawyers in private practice) as well as for police. Further, at all times the Government Printer must keep on hand a sufficient number of copies of the legislation so that all persons seeking to inform themselves of the law may have an opportunity to secure a copy of the legislation.

6. Evidence of the existence of any sexual history of the victim will be inadmissible where the crime charged is of aggravated sexual assault involving penetration and/or aggravated sexual assault under this Amendment.
7. Evidence of the existence of a sexual relationship between the accused and the victim will be admissible only where the crime charged is sexual assault involving penetration and/or sexual assault under this Amendment, and in any case only where the consent of the victim is in issue, and where that evidence can be shown to be directly relevant to a fact in issue.
8. Evidence of prior consensual sexual intercourse or prior consensual sexual acts between the victim and any person other than the accused shall not be admitted into evidence in any prosecution under this Amendment, except where the crime charged is of sexual assault involving penetration and/or sexual assault, and in any case only where evidence of specific instances of sexual intercourse or sexual acts are required to show the origin of semen, pregnancy, disease or injury.

GENERAL AMENDMENTS AND INCORPORATIONS TO EXISTING LAW*

The following should be adopted as reforms of the general criminal law. The need for such reforms has become evident through study of the sexual offences sphere, however, it is to be emphasised that in no way are these reforms solely connected with the need for reform in sexual offence laws.

1. Committal Proceedings: For All Crimes Under the *Crimes Act* as amended

In committal proceedings, the evidence of all witnesses should be taken and presented in writing, unless on application by the accused the court considers the presence of any witness is imperative for compelling reasons of justice.

2. Anonymity of Accused and Victim: For All Crimes Under the *Crimes Act* as amended

Any newspaper, radio, television or other media reports of criminal

* The Women's Electoral Lobby has continually stressed that there is a need for certain changes in the law to take place *across the board*, not only in relation to sexual offences. The following recommendations - including those recommendations relating to legislation dealing with police procedures (see page 274 below) - are of a general nature and are not intended to be included as a part of the 'Sexual Offences Draft Bill'. Nonetheless it is to be made clear that without the incorporation of the following general reforms into the law, changes in laws relating to sexual offences will be frustrated in their aim. In the final analysis W.E.L. sees sexual offences law reform as a catalyst for the much needed reform of other areas of our criminal justice process.

proceedings must not contain names or other information which would tend to identify the accused or victim of any crime, until such time as a determination of guilt or innocence is made by a court, or the accused is otherwise discharged, or the court considers the publication of such name or information should, for compelling reasons of justice, be published.

LEGISLATION DEALING WITH POLICE PROCEDURES

1. The following procedures should apply to ALL PERSONS who are the subject of police questioning or interrogation - witnesses, victims, accuseds, suspects and any other persons questioned by the police.
2. No person shall be treated with inhumanity or disrespect for human dignity. No person shall, whilst the subject of police questioning, be subjected to cruel, inhuman or degrading treatment.
3. Persons wishing to be accompanied by a relative or friend during questioning, or who wish to contact a relative or friend whilst undergoing questioning, should be extended facilities to enable them to do so. EXCEPT that where a police officer honestly believes, on reasonable grounds, that it is necessary, for the purpose of preventing the clear obstruction of justice, to prevent the person concerned from communicating with the relative or friend requested, no obligation to contact such relative or friend will arise. In such a case, a record must be kept of the request and the decision not to contact, and reasons for not contacting must be clearly stated on the record; the person questioned must be informed of the decision and the reasons for it.
4. Reasonable steps should be taken by police to secure, forthwith, medical attention for any person who is the subject of questioning and who indicated a wish for treatment for illness or injury, or the police officer should reasonably be aware of such necessity. A list of police surgeons who may attend should be presented to any person questioned, and where it is reasonably practicable, that person's choice of surgeon should be respected.
5. A list of lawyers should be displayed at each police station and facilities provided for any person who is the subject of questioning to contact a lawyer, should he or she wish to do so.
6. A list of organisations or individuals providing assistance for persons in trouble should be kept at each police station, and should an individual so indicate, provision should be made for that individual to contact such organisation or individual. (E.g. Aboriginal Legal Service, Legal Referral Centre, Rape Crisis Centre.)
7. Where persons questioned are not fluent in English, every effort should be made to secure the services of an interpreter.
8. Every person shall, as soon as is practicable after making a statement which is recorded, and before leaving the place of questioning, be handed a copy of that statement. To fulfil this requirement,

statements should be made in duplicate as a matter of course, or where photocopying facilities are available, these may be utilised.

POLICE - GENERAL RECOMMENDATIONS*

1. Reassessment of the qualities to be looked for in law enforcement officers should immediately be undertaken, with a view to drawing up standards relevant to the work of law enforcement officers of the present-day.
2. Limitations on recruitment along sex-lines should be abolished.
3. Recruitment of police surgeons should be encouraged.
4. Recruitment of persons skilled in forensic science should be encouraged, so that where such methods are pertinent to the investigation and solution of offences, they are always available and made use of.
5. Discriminatory patterns of assignment to posts and promotion within the force should be abolished. Promotion should be based on ability and capability of doing the job to be undertaken.
6. Police should mandatorily have training in psychology and treatment of victims of crime.
7. Judo and similar forms of self-defence should be taught to all law enforcement officers.

GENERAL CONSIDERATIONS

1. Rules of Evidence and Procedure

The guidelines contained in this draft are drafted on the basis that if it is found necessary (see Explanatory Notes on p.271/2) to introduce them, then the Government will direct an educational campaign to be undertaken to inform the public and members of the legal profession and the judiciary of the nature of the law relating to sexual offences and the evidentiary rules which will be applicable. Further, at all times the Government Printer will keep on hand a sufficient number of copies of the legislation so that all persons seeking to inform themselves of the law may have an opportunity to secure a copy of the legislation.

* Again, the Women's Electoral Lobby emphasises the need for changes in administrative practices of police recruitment, etc., in order that reform of the laws relating to sexual offences will not be frustrated. These General Recommendations are also included with the overall intention of alleviating discriminatory practices existing in our society, practices which ultimately foster those attitudes which lead to the commission of oppressive acts, including the commission of sexual offences.

2. Sentencing

W.E.L. is concerned with current sentencing procedures and policies. The policies as evidence in terms contained in the current *Crimes Act* have not undergone review at least since the Act came into force. W.E.L. is of the view that sentencing policy demands immediate attention from the legislature. Further, it is W.E.L.'s view that more merit is to be found in setting appropriate penalties for all crimes; ensuring that the set penalty is appropriate to the particular crime charged; grading offences so that the penalty has some relationship to the harm caused and to the acts of the offender. It is also essential in this regard to study research carried out in the United States and England where the view is now being put that the so called rehabilitative ideal of punishment is in its present form simply a means of deceiving both prisoners and public. To this end, the practices currently followed in terms of parole should also be subjected to scrutiny ... with a clear view to reform.

3. Legislation Dealing with Police Procedures

The Government should at once commence to draw up and implement legislation clearly setting out the rights of those persons who are the subject of police questioning. These rights are too important to be left in the procedural or administrative forum. The rights, duties and obligations of all members of the public and members of the police force should be in legislative form (as set out at page 274 of this document) so that all members of the community (that is, members of the public and members of the police force) may know their rights and duties. When passed such legislation should be easily accessible to the public and to members of the police force, and to this end the Government Printer must at all times keep on hand a sufficient number of copies of the legislation so that all persons seeking to inform themselves of the law may have an opportunity to secure a copy of the legislation.

4. Police - General Recommendations

The problem of sexual offences - and indeed many other current social problems - may result at least in part from generally discriminatory attitudes or the shoring up of prejudicial attitudes. Reform of the law alone will not alleviate the problem. Reforms eliminating discrimination in the work force will go some way toward eradicating the attitudes which are responsible for the commission in our current society of certain criminal acts.

5. Jury Reform

One of the greatest difficulties in the area of sexual offences law reform arises in terms of general social attitudes, or the shoring up of prejudicial attitudes. W.E.L. urges the Government to institute a study into the operation of the jury system in order that ways of involving public, through the system, more efficiently and effectively can be found. W.E.L. supports the inclusion in adjudication within the legal system of all members of the public - and as few exemptions

as possible should be allowed. Further, there would be a benefit in creating child care facilities within court buildings in order that a particular sector of the public - mothers with young children - should no longer be precluded by reason of practicalities from taking on their responsibilities in the jury sphere. In regard to courts generally, court administration should be the subject of study so that resources - e.g. jurypersons - may more effectively be used.

6. Education of the Legal Profession and Judiciary

Any reform of the law will be negated unless members of the legal profession and the judiciary keep themselves informed of new laws and of the philosophy underlying new laws. It is to be hoped that the current enquiry into the legal profession in New South Wales may give clear direction as to the means, methods and mechanisms for ensuring that members of the profession and the judiciary are able to keep abreast of law reform matters generally.

7. Compensation to Victims of Crime

Suggestions have been made that the current upward maximum of compensation to victims of crime should be increased to \$20,000 or at least to a sum above that at which it currently stands (\$4,000 - 1978). W.E.L. considers that an increase of this nature is not what is required. Rather, it should be questioned why a scale of injury compensation along the lines of the scales used in Worker's Compensation legislation cannot be adopted as the mechanism for deciding upon compensation claims where it is criminal injury that has resulted in damage to individuals. Further the scale should be revisable in relation to inflation rates. Clearly, should a flat upward limit of \$20,000 be fixed upon with no guidelines as to how this sum is to be proportioned in relation to harm suffered awards may be variable at the decision of the judge involved in the case; additionally inflation will lead to a constantly recurring dissatisfaction with the state of criminal injuries compensation legislation. It might also be added that if it is possible to draw up legislation of the compensation-kind for those who engage in sport and are injured (sport is a consensual activity) there is no excuse for failing to draw up similar legislation where injury results from activity over which the victim has no control.

RECOMMENDATIONS — ROYAL COMMISSION ON HUMAN RELATIONSHIPS[#]

The following are our recommendations for this part. The detailed suggestions for substantive changes in the law which are made in chapter 18 of this part are intended to be suggestions rather than recommendations.

We recommend that:

1. Special police squads should be established consisting of equal numbers of men and women of each rank to deal with sexual offences, including rape, in the main population centres.
2. Police questioning of rape victims should be kept to a minimum until the victim has had such medical examination and treatment as is necessary, and should not be conducted in a hostile fashion.
3. Members of the squad should be given special training in psychology and crisis intervention.
4. All large public hospitals should have a panel of doctors, trained in the examination and treatment of rape victims, available to examine rape victims at any time.
5. Such panels should include a sufficient number of women to enable any victim to be examined by a woman doctor if she so requests.
6. Country doctors who might be involved in the examination of rape victims should be kept adequately informed of the procedures to be followed and the matters to be investigated.
7. A pamphlet containing guidelines for the medical treatment and management of rape victims should be prepared and made available to all hospitals and to all doctors who may be called on to deal with rape victims.
8. Appropriate steps should be taken to care for the rape victim's mental health, and also to deal with venereal disease or pregnancy resulting from rape.
9. A pamphlet containing information about medical treatment, counselling and legal services should be prepared and made available to rape victims.
10. Legislation should be passed providing that, in all cases where it is part of the Crown case to prove that sexual penetration was either effected or attempted, the evidence of any medical practitioner relating to medical matters may be given by the production of his or her report unless the Crown or the defence apply for the practitioner to attend and give evidence, in person.

Final Report vol. 5 (1977, Australian Government Printing Service, Canberra, A.C.T.) pp. 232-236.

11. Legislation should be passed providing that, at committal proceedings for any offence in which it is part of the Crown case to prove that sexual penetration was effected or attempted, the evidence of the victim should be given by the production of her appropriately verified statement.

12. The presiding magistrate may order, upon application by the prosecution or the defence, that the victim should attend and give oral evidence, but only if special circumstances are shown to justify the making of such an order.

13. Where the evidence of the victim is given by the production of her statement, the defence should be supplied with copies of all statements made by her to the police.

14. If the victim does attend and give oral evidence, only the parties and their representatives, essential court staff and police officers should remain in court during her evidence, except with the leave of the presiding magistrate on special circumstances being shown.

15. Legislation should be passed providing that the victim in a trial in which consent is in issue should be cross-examined relating to her prior sexual acts only on leave being granted by the trial judge.

16. Such leave should be granted only where the evidence sought to be introduced is so closely relevant to the issues before the court that it would be unfair to the accused to exclude it, and, in any case, only in the following situations:

- (a) where the prior sexual acts are alleged to have taken place between the victim and the accused;
- (b) where the prior sexual acts were part of a pattern of behaviour which was strikingly similar to her alleged behaviour at or about the time of the alleged offence; or
- (c) where evidence of the prior sexual acts is relevant to explain the source or origin of semen, pregnancy or disease.

17. Any such application should be made in the absence of the jury.

18. In no circumstances should evidence be adduced as to the victim's sexual reputation or moral character, whether by way of cross-examination or otherwise.

19. No cross-examination as to the victim's prior sexual history should be allowed at committal proceedings.

20. If the Crown or the victim raises the issue of her own sexual experience, or lack of it, the accused should be entitled to refute such evidence by cross-examining her and/or by introducing evidence of specific acts of the victim.

21. Legislation should be passed providing that, unless a complaint in a sexual case is admissible under the general rules of evidence, evidence of such complaint should no longer be admissible.
22. The requirement that the trial judge give a corroboration warning in sexual cases should be abolished.
23. Legislation should be passed providing that all juries sitting on cases involving allegations that sexual penetration was either effected or attempted should consist of at least four men and four women.
24. The publication of any material which might identify the victim of sexual offences should be prohibited.
25. Judges and magistrates should have a discretion to order that any part of the evidence in trials or committal proceedings for sexual offences should not be published.
26. Provision should be made in the ACT and Northern Territory along the lines of the Victorian *Criminal Injuries Compensation Act 1972* providing for a maximum amount of \$20 000 to be payable to victims of crime whether or not a conviction is recorded.
27. The existing offence of rape should be abolished and should be replaced by a series of offences, along the lines suggested in chapter 18 of this part, and consent should be irrelevant in relation to offences involving the use of violence, threats, false pretences or drugs.
28. There should be no immunity between spouses in relation to offences involving the use of violence, threats, false pretences or drugs, and, in relation to offences to which consent is a defence, there should be no immunity between spouses who are living separately and apart.
29. Sexual penetration should be defined to include all forms of vaginal, anal and oral intercourse, including the insertion of foreign objects into the victim's anal or vaginal cavities.
30. The presumption that boys under the age of 14 are incapable of having sexual intercourse should be abolished.
31. In relation to the more serious sexual assaults involving the use of violence, threats, false pretences or drugs, there should be no distinction in law between cases where sexual penetration was effected and those where it was attempted.
32. In relation to the less serious sexual assaults, where there is no allegation of violence, threats, false pretences or drugs, the offence of attempted rape should be abolished and replaced with the summary offence of indecent assault.
33. Subject to special rules as to parents, guardians, teachers and others *in loco parentis*, the age of consent of both males and females should be 15.
34. No person should be convicted of statutory rape on a male or female aged between 13 and 15 years if that person is less than 5 years older than the said male or female.

35. All charges of statutory rape relating to sexual intercourse alleged to have taken place between the defendant and a person over the age of 13 should be tried summarily.
36. A 6-month limitation period should apply to all cases mentioned in recommendation 35 hereof.
37. The age of consent to indecent assault should be 15.
38. No person should be convicted of indecently assaulting a male or female aged between 13 and 15 years if the alleged assault is consented to and that person is less than 8 years older than the said male or female.
39. The age of consent to sexual intercourse should be 17 in relation to a person's schoolteacher.
40. In relation to children under 10 years of age a special offence, carrying penalties equivalent to the most serious rape offences, should be complete upon proof only of sexual penetration.
41. The offence of 'attempted carnal knowledge' should be abolished, and all sexual assaults on young children in which penetration is not effected, and which do not fall within any of the categories of aggravated sexual assault, should be treated as 'indecent assault', triable summarily.
42. All complaints of sexual offences involving children under 15 (or under 17 if the offender is the child's mother, sister, parent, adoptive parent, foster parent, step-parent, guardian or schoolteacher, or is the de facto husband or wife of the child's mother or father) which are reported to and accepted by the police should be reported by the police to a child protection service.
43. A child protection service should provide a social worker to work with the child and its family, to provide assistance as recommended in Part V in cases of parental abuse, and, if necessary, to represent and assist the child through the process of the courts.
44. A special tribunal should be established presided over by a judge, to determine applications that, in the interest of the child victim of sexual offences, no prosecution should lie against the alleged offender, or any existing prosecutions should be discontinued.
45. The tribunal should conduct its proceedings in camera, and should receive only written evidence and submissions.
46. Application should be made to the tribunal by the parents or by a social worker appointed by the child protection service. The police should place a report before the tribunal and reply to the application. The tribunal should have power to call for welfare reports.

47. Subject to appropriate safeguards as to the position of the alleged offender, an application should operate as a stay of all criminal proceedings against him in relation to the alleged offence.

48. Any application to the tribunal should be made prior to the completion of proceedings in the Magistrate's Court (if the offence is an indictable one) or prior to the taking of the victim's evidence in the Magistrate's Court (if the offence is a summary one).

49. The tribunal should have power to recommend that no proceedings should be instituted against the alleged offender, or that any existing proceedings should be discontinued, or to refuse the applications.

50. If the child victim of sexual offences is required to attend and give evidence during committal proceedings, the child's social worker should be permitted to remain in court. The magistrate should have power to order that the defendant remain outside court during the taking of the child's evidence, provided his lawyer is present in court.

51. Before the trial of any person for a sexual offence involving a child victim, a conference should be held between the trial judge, the Crown prosecutor, defence counsel and the child's social worker with the purpose of agreeing on a method of minimising the child's role in the subsequent proceedings.

52. The trial judge should have power to make the following orders.

- (a) that during the proceedings or any part of them, the wearing of wigs and gowns by the judge and counsel should be dispensed with;
- (b) that the child's evidence should be taken in the judge's chambers or some other place outside the court, in the presence of the jury;
- (c) that the public should be excluded from the court during the taking of the child's evidence;
- (d) that the evidence of the child should be taken in the absence of the accused, provided the latter's counsel is present.

53. Prior to the hearing of any summary offence, being a sexual offence involving a child victim, a similar conference to that proposed in recommendation 51 should be held between the magistrate, the police prosecutor, defence counsel or the defendant and the child's social worker.

54. During the hearing of any summary offence, being a sexual offence involving a child victim, the magistrate should have the same powers as referred to in recommendation 52.

55. Existing provisions making it an offence to have carnal knowledge with an idiot or imbecile should be repealed, and replaced by a provision prohibiting intercourse with a person who is known by the

offender to be unable to understand the nature and consequences of the act.

56. Existing criminal prohibitions against incestuous behaviour should be repealed.

57. The age of consent in relation to sexual intercourse and indecent assault should be 17 if the other party is more than 5 years older than the victim and is the victim's brother, sister, parent, stepparent or guardian, or is the de facto husband or wife of his or her mother or father.

APPENDIX III

This appendix contains an outline of the programme from the National Conference on Rape Law Reform, Hobart 28-30th May, 1980.

Background notes on contributors to this volume are included.

NATIONAL CONFERENCE ON RAPE LAW REFORM

28th-30th May 1980

Arts Lecture Theatre
University of Tasmania, Sandy Bay, Hobart
Tasmania

P R O G R A M M E

Day 1, Wednesday 28th May

A.M.

10.00-11.15 Registration and refreshments (morning tea and coffee)

11.30 Mr. J. Bruce Piggott, C.B.E., Chairperson, Law Reform
Commission of Tasmania
introducing

The Hon. Neil L.C. Batt, M.H.A., Deputy Premier of
Tasmania, Treasurer,
Minister for Finance, and
Minister for Forests,

to open the Conference.

Chairperson - The Attorney-General for New South Wales,
and Minister for Justice,
The Hon. Mr. Frank J. Walker, M.L.A.

11.45 Keynote Speech

Dr. Virginia Blomer Nordby,
University of Michigan

"The Michigan Sexual Assault Law
: An Analysis and Evaluation"

12.45 Lunch

P.M.

2.30 Chairperson - Mr. John Blackwood, Dean of the Faculty of
Law, The University of Tasmania

Panel : Mr. Peter Sallman, La Trobe University,
Victoria

Ms. Joan Coxsedg, M.L.C., Victoria

Mr. Arthur Watson, Department of the
Attorney-General of
Australia

(each to speak for 10-15 minutes)

3.15 Discussion

3.45 Afternoon tea

4.00 Discussion

5.00 Close

5.30-7.00 Ministerial Reception Government House

Day 3, Friday 30th May

A.M.

- 9.00 Chairperson - Ms. Pam Rutledge, N.S.W. Health Commission
Detective Sergeant Colin Fogarty, Tasmania Police -
"Police Attitudes and Problems in Rape Law and
Rape Law Reform"
- 9.30 Questions, Points of clarification
- 9.45 Ms. Lee Henry, Social Worker, Sir Charles Gairdner
Hospital, Western Australia -
"Hospital Care for Victims of Sexual Assault"
- 10.15 Questions, Points of clarification
- 10.30 Ms. Ros Harris and Ms. Meredith Carter, Women
Against Rape, Victoria
"Community Care for Victims of Sexual Assault"
- 11.00 Questions, Points of clarification
- 11.15 Morning coffee
- 11.30 WORKSHOPS -
Approximately 10-15 members in each, with workshop leader and
rapporteur. Resolutions, if sufficient consensus, to be form-
ulated by leader or rapporteur in each workshop for final
plenary session.
Subject - Police/Hospital Procedures and Community Care for
Victims of Sexual Assault
- 1.00 Lunch
- P.M.
- 2.00 Chairperson - Mr. Roger C. Jennings, Q.C., Solicitor-General
of Tasmania
Ms. Carol Treloar, former Press Secretary to Mr.
Peter Duncan, M.P., South Australia -
"The Politics of Rape - A Politician's
Perspective"
- 2.20 Ms. Marjorie Levis, Women's Electoral Lobby,
Tasmania -
"The Politics of Rape - A Feminist Perspective"
- 2.45 Questions, Points of clarification
- 3.00 Afternoon tea
- 3.15 PLENARY SESSION
Chairperson - Mr. J. Bruce Piggott, C.B.E., Chairperson,
Law Reform Commission of Tasmania
- RESOLUTIONS
- 5.30 Close

NOTES ON CONTRIBUTORSMEREDITH CARTER

Meredith Carter is a feminist and works with *Women Against Rape* in Melbourne.

HELEN COONAN

A feminist lawyer, Helen Coonan graduated Bachelor of Arts (Sydney) and Bachelor of Laws (Sydney), before being admitted to practice as a Solicitor of the Supreme Court of New South Wales and the High Court of Australia. She is founding partner of the Sydney legal firm Coonan & Hughes, and is currently engaged in private practice.

W. J. E. COX, Q.C.

William John Ellis Cox, Q.C., B.A., LL.B. (Tasmania) was admitted to practice in the Supreme Court of Tasmania in 1960. From 1961-1976 he engaged in private practise as a partner in the firm of Dobson, Mitchell & Allport. W. J. E. Cox was President of the Tasmanian Bar Association from 1972-1974 and President of the Tasmanian Medico-Legal Society from 1973-1974. From 1976-1977 he held the appointment of Magistrate in Hobart, was appointed Queen's Counsel in 1978, and since 1977 has been Crown Advocate for Tasmania.

JOAN COXSEGE

Joan Coxsege is presently President of the Status of Women Policy Committee and of the Anti-Uranium Committee of the Victorian Branch of the Australian Labor Party; she is also a member of the Civil Rights Policy Committee of the Party. In 1979 Joan Coxsege was elected to the Legislative Council of the Victorian Parliament, to serve a six year term as member for Melbourne West Province. Her major concerns in the Parliament relate to representing the migrant and working class women from her constituency. Prior to being elected, Joan Coxsege worked as a professional artist, exhibiting her work around Australia. Her last major professional commission was from the Builders Labourers Federation, under which she drew their 'green bans' buildings in various capital cities of Australia. She was also commissioned to draw the Victorian Australian Labor Party headquarters, an historic facade of four old terrace houses situated in Drummond Street, Carlton.

COLIN H. FOGARTY

Colin H. Fogarty is Detective 1/G Sergeant with the Tasmania Police. He holds a **Bachelor of Arts** degree. He studied at the University of Cambridge Institute of Criminology, being awarded the degree of Master of Philosophy. Colin Fogarty is A.F.A.I.M. and M.A.I.E.S. and is currently extensively involved in police training programmes in Tasmania.

LEE HENRY

After obtaining a degree in Social Work from the Western Australian Institute of Technology in 1975, Lee Henry became part-time worker at the Sexual Assault Referral Centre in the Sir Charles Gairdner Hospital in Nedlands, Western Australia. She has been full-time at the Centre for the past two years. Being the only Social Worker in the Centre, she is co-ordinator of the counselling service.

ROSALIND HARRIS

A feminist, Rosalind Harris works with *Women Against Rape* in Melbourne.

MARJORIE LEVIS

After graduating with a B.A. from the University of Tasmania, Marjorie Levis taught in primary and secondary schools for some ten years. She has been active in the women's movement for many years, and was instrumental in setting up the Hobart Women's shelter. Marjorie Levis is a member of the Women's Electoral Lobby, Women Against Rape, and Secretary of the Tarooma Primary School Parents and Friends Association. She is a member of the Tasmanian Advisory Committee on Homeless Persons and in this capacity undertook a research study involving travelling around the state, of homeless women in Tasmania. Her major concerns at present are those of rape law reform, the introduction of anti-discrimination legislation into Tasmania and at Commonwealth level, and issues relating to women's health, particularly in the provision of autonomous women's health centres. Marjorie Levis has two children.

LIZA NEWBY

Liza Newby is lecturer in criminal law and criminology at the University of Western Australia Law School. She holds a Bachelor of Laws and a Masters degree in criminology. Liza Newby is a member of the Advisory Consultative Committee on Child Abuse and convenor of a subcommittee of the Advisory Committee looking at the legal aspects of the sexual abuse of children. She has an ongoing interest in legal aspects of feminism, particularly women's involvement with the criminal justice system as victims or offenders.

VIRGINIA BLOMER NORDBY

Virginia Blomer Nordby was awarded a J.D. at Stanford University in California in 1954 and B.A. with Distinction at that University in 1951. She is recipient of many Awards and Honours, including the Susan B. Anthony Award from the University of Michigan Law School Women Lawyers for work on behalf of women, an International Women's Year Committee Award for 'outstanding personal and professional contributions to the goals of equality, development and peace', and an award for reforming the Michigan rape law. (She was principal drafter of the legislation.) She is presently Director of Affirmative Action Programmes in the Office of the President of the University of Michigan. From 1973-1978 Virginia Nordby lectured in Women and the Law at that University and was earlier research assistant to Professor Paul G. Kauper, specialising in constitutional issues involving church-state relations. She is a member of the State Bar of California and of many other Commissions, Boards, Committees and Organisations, and in particular is a member of the Governor of Michigan's Status of Women Commission, heading a committee involved in conforming Michigan state laws with the terms of the *Equal Rights Amendment*. She is married and has four children.

ROSEMARY O'GRADY

Holding a B.A. (Hons) degree from the University of Adelaide, Rosemary O'Grady is currently a social researcher and writer, re-training in law. She has worked on the staffs of the South Australian Housing trust, the Royal Commission on Human Relationships (Sydney), and the South Australian government Departments of Community Welfare and Community Development. In 1974 Rosemary O'Grady was editor of *On Dit* and *Gemeinschaft*, and from 1973-1975 was a member of the Union Council of the University of Adelaide. She is fluent in French, Italian and Pitjantjatjara. She is a member of the Australian Journalists' Association, Women's Liberation and the South Australian Council for Civil Liberties. Rosemary O'Grady has been a volunteer counsellor for the Rape Crisis Centre and has been active in other fields within the women's movement.

BELINDA POWELL

Lindy Powell completed her Law Degree at the University of Adelaide in 1972. She was admitted to the South Australian Bar at the close of 1973 and during 1974 was associate to the Honourable Justice Mitchell of the South Australian Supreme Court. In 1975 she joined the firm of Johnstone, Withers, McCusker & Co and has since then been practising as a barrister and solicitor. She specialises as a barrister in the criminal law field.

PETER SALLMANN

Graduating LL.B. from the University of Melbourne in 1972, Peter Sallmann completed articles with Galbally and O'Bryan, Solicitors and was admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria in 1973. He undertook further studies in the United States and in England, completing a Master of Science, Administration of Criminal Justice (M.S.A.J.) at the American University, Washington D.C. in 1974 and a Master of Philosophy (Criminology) at the University of Cambridge in 1979. Peter Sallmann is currently lecturer in the Legal Studies Department at La Trobe University teaching courses in Criminal Law, Criminology and Criminal Justice, having eclectic interests within the field. He is Assistant Editor of the *Australian and New Zealand Journal of Criminology* and has recently completed, together with Professor Duncan Chappell of Simon Fraser University, a major study of the operation and effect of the 'rape in marriage' provision of the South Australian legislation. He is Victorian Representative on the Executive of the Australian and New Zealand Society of Criminology and Member, Victorian Council for Civil Liberties and Society of Labor Lawyers.

JOCELYNNE A. SCUTT

After graduating LL.B. from the University of Western Australia, Jocelynn A. Scutt completed a Master of Laws and Diploma of Jurisprudence at the University of Sydney. She has studied extensively in the areas of criminal law and constitutional law, completing an LL.M. degree and SJD at the University of Michigan, Ann Arbor, and a Diploma of Legal Studies from the University of Cambridge (Girton College). She was Research Scholar at the Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg, Western Germany from 1975-1976, where she studied laws relating to sexual offences and alternatives to imprisonment. She is active in the feminist movement in Sydney and Canberra.

CAROL TRELOAR

Currently a journalist with the Australian *Financial Review* in South Australia and a script consultant with the South Australian Film Corporation, Carol Treloar holds a B.A. (Hons.) from the University of Sydney. She was Teaching Fellow with the Department of English at that University from 1973-1975 and was Press Secretary and policy advisor to the Hon. Peter Duncan, LL.B., then Attorney-General, Minister for Prices and Consumer Affairs, later Minister of Health and Minister for Corporate Affairs in the South Australian Government from 1975-1979. Carol Treloar is a feminist and initiated, in particular, the provision in South Australia's reform of the law of rape relating to rape within marriage, this reform exceeding in its application the proposal of the Mitchell Committee. She piloted the publicity campaign accompanying passage of the bill through the South Australian Parliament in 1976.

ARTHUR R. M. WATSON

A graduate of the University of Melbourne in Arts and Law, Arthur Watson is a government lawyer of long-standing. In more recent times he was for nine years Senior Crown Prosecutor in the Australian Capital Territory and has, since early 1970, been employed in the head office of the Attorney-General's Department in Canberra. As Senior Assistant Secretary, Criminal Law Branch, his primary concern has been the administration and reform of the criminal law of the Commonwealth and the Territories. He is a Foundation Member of the Australian Academy of Forensic Sciences. He also led Australian delegations on air law (Montreal Convention 1971) and on extradition negotiations both in Australia and in Europe.

APPENDIX IV

This appendix contains a select bibliography on rape law and rape law reform. In a small number of cases, articles from Britain or the United States are included as appropriate to be taken into account in any discussion of the Australian law.

A more comprehensive bibliography of sources from countries in addition to Australia may be obtained from the Australian Institute of Criminology J.M. Barry Memorial Library.

BIBLIOGRAPHY

- Australian Law Reform Commission, *Interim Report - Criminal Investigation* (1975, Australian Government Printing Service, Canberra, A.C.T.)
- Ross Barber, *An Investigation into Rape and Attempted Rape in Queensland* (1973, University of Queensland, St. Lucia, Queensland)
- Ross Barber, *Judge and Jury Attitudes to Rape, Rapists and Their Victims* (1973, University of Queensland, St. Lucia, Queensland)
- Ross Barber, "Prostitution and the Increase in Conviction of Rape in Queensland" (1969) 2 *Australian and New Zealand Journal of Criminology* 169
- Ross Barber, *Rape and Other Sexual Offences in Queensland : An Historical and Behavioural Analysis* (Thesis, University of Queensland, St. Lucia, Qld, n.d.)
- Ross Barber, "Rape as a Capital Offence in Nineteenth Century Queensland" (1975) 21 (1) *Australian Journal of Politics and History* 31-41
- Peter J. Bush, *Rape in Australia* (1977, Sun Books, Melbourne, Victoria)
- David Biles, "Minor Sexual Offences in Australia : A Research Note" (1979) 12 (1) *Australian and New Zealand Journal of Criminology* 33
- John Braithwaite and David Biles, "Women as Victims of Crime : Some Findings from the First Australian National Crime Victims Survey" (1980) *The Australian Quarterly* (forthcoming)
- Terry Buddin, "Revision of Sexual Offences Legislation : A Code for N.S.W.?" (1977) 2 (2) *University of New South Wales Law Journal* 117
- Peter Burgoyne, *Recidivism Among Rapists* (research study undertaken on Criminology Research Council Grant - Department of Community Welfare, Melbourne, Victoria, 1980)
- Meredith Carter and Rosalind Harris, "Women Against Rape - Community Care for Victims of Sexual Assault" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, 1980)
- Duncan Chappell, "Cross Cultural Research on Forcible Rape" (1976) 4 (3) *International Journal of Criminology and Penology* 295
- Duncan Chappell, "Investigating Rape - A New Approach" (1980) 5 (1) *Legal Service Bulletin* 19
- Duncan Chappell, "Rape : Changing the law (and attitudes...?)" (1977) 2 (9) *Legal Service Bulletin* 302
- Duncan Chappell, "Rape in Marriage : The South Australian Experience" in *Violence in the Family* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology, Canberra, A.C.T.) 137

- Comment, "The Necessary Intent in Rape" (1977) 8 *Sydney Law Review* 196
- Helen Coonan, "Rape Law Reform - Proposals for Reforming the Substantive Law" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980) 37
- Helen Coonan, "Reform of the Investigation and Trial of Rape" in *Papers from the 2nd Symposium on Law and Justice in the Australian Capital Territory* (1977, Symposium Papers, Australian National University, Canberra, A.C.T.)
- W. J. E. Cox, "Law Reform and Rape under the Tasmanian Criminal Code" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980) 49
- Joan Coxsedg, "The Social Aspects of Rape and the Need for Reform" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- Criminal Law Review Division, Department of the Attorney-General and of Justice, N.S.W., *Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.)
- Criminal Law Review Division, Department of the Attorney-General and of Justice, N.S.W., *Supplement to Report on Rape and Various Other Sexual Offences* (1977, Government Printer, Sydney, N.S.W.)
- S.M. Cordner, C.G. Ainley and M.A. Schneider, "Rape and Rapists in Victoria" (1979) 12 (1) *Australian and New Zealand Journal of Criminology* 41
- Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report - Rape and Other Sexual Offences* (1976, Government Printer, Adelaide, South Australia)
- Criminal Law and Penal Methods Reform Committee of South Australia, *Third Report - Rules of Evidence and Court Procedure* (1974, Government Printer, Adelaide, South Australia)
- E.M. Curley, "Excusing Rape" (1976) 5 (4) *Philosophy and Public Affairs* 325-360
- Current Comment, "Reform of the Law of Rape" (1976) 50 (12) *Australian Law Journal* 605
- I.R. Davis, "Character Evidence in Rape Cases" (1976) *New Zealand Law Journal* 178
- Department of the Premier of New South Wales, *Care for Victims of Sexual Offences - Report of the Inter-departmental Task-force* (1978, Department of the Premier, Sydney, New South Wales)
- John Dixon, "Reform of Sexual Offences - Canadian Proposals" (1979) *Legal Service Bulletin* 116

- Patricia Farrant, "A Service for Victims of Rape and Sexual Assault" (1979) 32 (3) *Australian Social Work* 25
- H. C. Field, "Forcible Rape : An Updated Bibliography" (1977) 68 *Journal of Criminal Law* 149
- Colin Fogarty, "Police Attitudes and Problems in Rape Law and Rape Law Reform" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- Andrew Fraser, "Feminism and Marital Rape" (1977) 46 *Arena* 14
- Ellen Goodman, "The Victim of Rape : What Progress?" (1979) 14 (1) *Australian Journal of Social Issues* 21
- Lee Henry, "Hospital Care for Victims of Sexual Assault" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- R. Hines, "Rape and Femininity" (1976) 2 (2) *Hecate* 23
- E. Hodgen, et. al. "The Offence of Rape in Victoria" (1972) 5 *Australian and New Zealand Journal of Criminology* 225
- B. Hogget, "Rape - As Amended" (1977) 121 *Solicitors Journal* (January 28th) 59
- Amirah Inglis, '*Not a White Woman Safe*' - *Sexual Anxiety and Politics in Port Moresby 1920-1934* (1974, A.N.U. Press, Canberra, A.C.T.)
- Rosalind Innes, "'What She Needs is a Good Fuck' : Rape and Femininity" (1976) 11 (2) *Hecate* 23
- Anwar Khan, "Reform of Rape Law" (1977) 2 (10) *Legal Service Bulletin* 399
- Jon Kleinig, "Consent as a Defence in Criminal Law" (1979) 65 (3) *Archiv-für Rechts-und Sozial-philosophie (A.R.S.P.)* 329
- Jon Kleinig, "The Ethics of Consent" (unpublished paper, School of History, Philosophy and Politics, Macquarie University, West Ryde New South Wales)
- Chris Koh, "Consent and Responsibility in Sex Offences" (1969) *Criminal Law Review* 81
- Legislative Note, "Michigan's New Criminal Sexual Conduct Law" (1974) 8 *University of Michigan Journal of Law Reform* 207
- Marjorie Levis, "The Politics of Rape - A Feminist Perspective" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australia Institute of Criminology, Canberra, A.C.T., 1980)

- N. Morris and G. Turner, "Two Problems of the Law of Rape" (1956) 2 *University of Queensland Law Review* 247
- Bonnie Myers, "The Care and Treatment at Royal Prince Alfred of Victims of Sexual Assault" (1978) *Royal Prince Alfred Newsletter* (Spring Issue, September) 11
- Liza Newby, "Rape Victims in Court - The Western Australian Experience" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- John E. Newton, "Factors Affecting Sentencing in Rape Cases" (1976, Australian Institute of Criminology, Canberra, A.C.T.)
- Virginia Blomer Nordby, "New Sexual Conduct Law" (1975) 19 *Law Quad Notes* 3
- Virginia Blomer Nordby, "Reforming Rape Laws - The Michigan Experience" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- Deidre O'Connor, "Rape Law Reform" (1977) 1 *Criminal Law Journal* 305
- Deidre O'Connor, "Rape Law Reform - Part II" (1978) 2 *Criminal Law Journal* 115
- Rosemary O'Grady and Belinda Powell, "Rape Victims in Court - The South Australian Experience" (paper presented to the National Conference on Rape Law Reform, Hobart, Tasmania 28-30th May, 1980)
- L. O'Hanlon, "The Terrible Trauma of Rape" (1976) 107 *Reader's Digest* (July, 1976) 126
- D. Overduin, "Rape in Marriage" (1976) 8 *Forum* (September-November) 5
- John Oxley-Oxland, "Presumption of Impotence : The American Experience" (1977) 10 *Comparative and International Law Journal of Southern Africa* 150
- Carol Pateman, "Women and Consent" (paper presented to the Conference for Political Thought, New College, Oxford, January 4-6th, 1979)
- Nancy Peck, "Getting Off On Rape" (1975) 1 (2) *Hecate* 35
- Laurice Penfold, "Rape - The Need for Reform" (1979) 56 (4) *Current Affairs Bulletin* (September, 1979) 24
- Ivan Potas, *Sentencing Sex Offenders in New South Wales* (1977, Australian Institute of Criminology, Canberra, A.C.T.)
- Ivan Potas, *Sentencing Violent Offenders in New South Wales* (1980, Law Book Company, Sydney, New South Wales)
- Queensland Select Committee Report on Crimes of Violence* (1969, Government Printer, Brisbane, Qld)

- Report of the Working Party on Territorial Criminal Law* (1975, Australian Government Printing Service, Canberra, A.C.T.)
- Royal Commission on Human Relationships, "Rape and Other Sexual Offences" in *Final Report* vol. 5, Part 4 (1977, Australian Government Printing Service, Canberra, A.C.T.) 159
- D. J. Russell, "The Necessary Intent in Rape" (1977) 8 *Sydney Law Review* 196
- Diana H. Russell and N. Van de Ven (editors), *The Proceedings of the International Tribunal on Crimes Against Women* (1976, Les Femmes Publishers, California, U.S.A.)
- Susan Ryan, "Royal Commission on Human Relationships in the Commonwealth of Australia" in *Parliamentary Debates, Senate Daily Hansard* (Thursday, 9th March, 1978) 512
- Peter Sallmann, "Rape in Marriage" (1977) 2 (6) *Legal Service Bulletin* 202
- Peter Sallman, "Rape in Marriage in South Australia" (1976) 1 (4) *Victimology* 600
- Peter Sallmann, "Rape in Marriage and the South Australian Law" in *Rape Law Reform* (Jocelyne A. Scutt, editor, 1980, Australian Institute of Criminology, Canberra, A.C.T.)
- Peter Sallmann and Duncan Chappell, "Rape Law Reform in South Australia" (unpublished paper from Criminology Research Council grant, Australian Institute of Criminology, 1980)
- M.A. Schenider and S.M. Cordner, "Role Responsibility Versus Role Confusion : Implications for the Care of the Rape Victim" (1980) 13 (2) *Australian and New Zealand Journal of Criminology* 103
- B. Scholz, "Profile of a Gang Rape" in *Delinquency in Australia* (1977, University of Queensland Press, St. Lucia Qld.)
- Jocelyne A. Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 (12) *Australian Law Journal* 817
- Jocelyne A. Scutt, "The Australian Aftermath of *D.P.P. v. Morgan*" (1977) 25 (9) *Chitty's Law Journal* 289
- Jocelyne A. Scutt, "Consent in Rape : The Problem of the Marriage Contract" (1977) 3 (4) *Monash University Law Review* 255
- Jocelyne A. Scutt, "Consent Versus Submission : Threats and the Element of Fear in Rape" (1977) 13 (1) *University of Western Australia Law Review* 52

- Jocelynn A. Scutt, "A Disturbing Case of Consent in Rape" (1976) 159 *Journal of Criminal Law* 206; (1976) 160 *Journal of Criminal Law* 271
- Jocelynn A. Scutt, "The Economics of Sex : Women in Service" (1979) 51 (1) *The Australian Quarterly* 32
- Jocelynn A. Scutt, "Evidence and the Role of the Jury in Trials for Rape" in *Rape Law Reform* (Jocelynn A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T.) 89
- Jocelynn A. Scutt, "Fraudulent Impersonation and Consent in Rape" (1975) 9 *University of Queensland Law Journal* 59
- Jocelynn A. Scutt, "To Love, Honour and Rape with Impunity - Wife as Victim of Rape and the Criminal Law" in *The Victim in International Perspective* (forthcoming)
- Jocelynn A. Scutt, "Reforming the Law of Rape : The Michigan Example" (1976) 50 (12) *Australian Law Journal* 615
- Jocelynn A. Scutt, "Reforming the Law of Rape : Common Law and Continental Directions" (1977) 13 *Comparative and International Law Journal of Southern Africa* 1
- Jocelynn A. Scutt, "Sexism and Psychology : An Analysis of the 'Scientific' Basis of the Corroboration Rule in Rape" (1979) 5 (1) *Hecate* 35
- Jocelynn A. Scutt, "Sexuality and Sexual Offences : The Role of Police, Courts, Public and Victim" in *Papers from the 1st Women and Labour Conference* vol. 4 (1978, Macquarie University, West Ryde, New South Wales) 10
- Jocelynn A. Scutt, "The Standard of Consent in Rape" (1976) 20 (2) *New Zealand Law Journal* 462
- Jocelynn A. Scutt, *Substantive and Evidentiary Issues of Consent in Rape* (S.J.D. Thesis, University of Michigan, 1978)
- Jocelynn A. Scutt, editor, *Violence in the Family* (1980, Australian Institute of Criminology, Canberra, A.C.T.)
- Jocelynn A. Scutt, "Violence in the Family : A Review of Political, Social and Legal Supports" in *Living Together* (1980, A.N.U. Centre for Continuing Education, Canberra, A.C.T.) 223
- Geoff Sharp, "Women, Culture and Politics" (1977) 47/48 *Arena* 1
- Michael Singer, "Perspective on Incest as Child Abuse" (1979) 12 (1) *Australian and New Zealand Journal of Criminology* 3
- H. Snelling, "What is Non-Consent (in Rape)?" in *Rape Victimology* (L. Schultz, editor, 1975)
- Sally Speed, *Rape : Discussion Paper for Changes to the Western Australian Criminal Code* (1977, Australian Women Against Rape, Perth, Western Australia)

- Tasmanian Law Reform Commission, *Report and Recommendations on the Law and Practice Relating to Corroboration with Particular Reference to the Evidence of Treason, Bigamy, Perjury, Forgery, Child Witnesses, Victims in Sex Cases, and Accomplices* (Report No. 21, 1978, Government Printer, Hobart, Tasmania)
- Tasmanian Law Reform Commission, *Report on Reducing the Harassment and Embarrassment of Victims in Rape Cases* (1976, Government Printer, Hobart, Tasmania)
- Barbara Toner, *The Facts of Rape* (1977)
- Carol Treloar, "The Politics of Rape - A Politician's Perspective" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T., 1980)
- Victorian Law Reform Commission, *Report No. 5 - Rape Prosecutions (Court procedures and rules of evidence)* (1976, Government Printer, Melbourne, Victoria)
- Louis Waller, "Victims on Trial - Prosecutions for Rape" (1977) 1 *South African Journal of Criminal Law and Criminology* 147
- Arthur Watson, "Reform of the Law of the Australian Capital Territory Relating to Rape and Other Sexual Offences" in *Rape Law Reform* (Jocelyne A. Scutt, editor, Australian Institute of Criminology, Canberra, A.C.T. 1980)
- R. Watson and H. Purnell, *Criminal Law in New South Wales* (1971, Law Book Company, Sydney, New South Wales)
- Mark Weinberg, "The Consequences of Failure to Object to Inadmissible Evidence in Criminal Cases" (1978) 11 *Melbourne University Law Review* 408
- G. Williams, "Corroboration - Sexual Cases" (1962) *Criminal Law Review* 663
- G. Williams, "Evidential Burdens on the Defence" (1977) 127 *New Law Journal* 182
- G. Williams, "The Evidential Burden : Some Common Misapprehensions" (1977) 127 *New Law Journal* 156
- John E. Willis, "Sexual Offences Law in South Australia" (1976) 2 (2) *Legal Service Bulletin* 42
- Paul Wilson, *The Other Side of Rape* (1978, University of Queensland Press, St. Lucia, Qld.)
- Paul Wilson, "Victims of Rape - The Social Context of Degredation" in *The Australian Criminal Justice System* (1977, Butterworths, Sydney, N.S.W., 2nd edition); also in (1976) 9 (4) *Australian and New Zealand Journal of Criminology* 249

Greg Woods, "Pack Rape in Sydney" (1969). 2 *Australian and New Zealand Journal of Criminology* 105-119

Greg Woods, "Rape Law Reform - The New South Wales' Proposals" (paper presented to the National Conference on Rape Law Reform, Hobart, Tasmania 28-30th May, 1980)

Women's Electoral Lobby, Sydney, *Report and Draft Bill on Sexual Offences Law Reform* (1977, W.E.L. Sydney, 32 Grosvenor Street, Sydney, New South Wales)

Women's Electoral Lobby, Sydney, *Draft Bill on Sexual Offences - incorporating amendments of August, 1978 and other proposals for reform* (1978, W.E.L. Sydney, 32 Grosvenor Street, Sydney, New South Wales)

'But I honestly wish that things were different. I wish I could live in a society where women were *truly* free, where male supremacy seemed so perverse as to be totally unimaginable, where the kind of masculine sickness that still shapes my personality didn't exist. I wish I could live in a society where all of us here really could be friends, and respect one another, and be apart or together as any of us saw fit. I wish that I could live in a society where a Women's Student Union wasn't under pressure to include a male speaker on its program, where a speaking program *of women only* and *for women only* was considered fully legitimate and appropriate and beautiful.

I know all of these things are very far off, but I hope that they're possible someday. Too many men have ruined too many women's lives already. I've seen more than enough, and I've done more than enough, and I want it to stop ...'

Bob Lamm, "Learning from Women"
(1976) 2 (2) *Morning Due : A Journal of
Men Against Sexism*

A feminist perspective of crimes of violence against women reveals the sexism implicit in research and in common attitudes toward violence against women. Far from being 'unnatural' or 'abnormal', aggression directed against women is a natural outcome of our socialisation - of women being socialised into accepting passive and submissive roles, of men being socialised into taking on roles that are dominant and aggressive. Rape and domestic violence inexorably occur when the parties have been programmed into interacting in a passive-aggressive, dominant-submissive diad in male-female relations, and particularly in regard to sexual relations.

... if the aim is to eliminate domestic violence and rape from our society, clearly what must be concentrated upon are the methods by which we socialise men and women, boys and girls into patterns promoting violence as a way of life. Rather than concentrating upon the 'abnormal', we would do better to apply resources toward altering the stereotypical roles that are viewed as 'normal' in a social structure that promotes violence against women.