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RAPE STUDY

Vol. 1

A DISCUSSION OF LAW AND PRACTICE

by

Warren Young

**A study directed by
Mel Smith and Warren Young
and undertaken by the
Department of Justice
and the
Institute of Criminology.**

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Loh, 1980; Loh, 1981; Nordby, 1980) have indicated that, despite beliefs to the contrary, new laws are in practice not living up to the expectations of those who promoted them. The Michigan and the New South Wales statutes, for instance, have been criticised by the judiciary, researchers and others for both their hasty and ill-considered drafting, and their unintended and undesirable effects in practice. It is thus imperative that any reform to the substantive and procedural law on rape in New Zealand stems from a proper understanding of the present system, its objectives, and the rape victim's experience of it. This study, with its related research, endeavours to do this.

Most traditional studies of the offence of rape, as with most other areas of crime, have been offender-oriented and have thus concentrated upon the causes of the crime and the means by which the incidence of the crime might be reduced. These considerations were outside the scope of this study. We were charged instead with examining the effect of rape upon the victim and the response of the criminal justice system to a rape incident. Much overseas literature has emphasised the needs of victims and has indicated that the traditional criminal justice system has been inadequate in meeting these needs. The task of this study was thus to test the applicability of these sorts of findings to New Zealand.

We make no apology for this focus upon the victim rather than the offender, because the alleged problems and issues in the present system, against which the major criticism has been directed, are those which affect the victim. We must stress, however, that the research did not commence with any preconceived notion that the police or court processes unnecessarily victimise the rape complainant. Nor have we overlooked the rights and interests of suspects and defendants in rape cases. It must be remembered that many rape complaints cannot be confirmed by independent evidence; and not all defendants are necessarily guilty. The victim's right to the protection of the law must be weighed against an accused's right to defend himself against a charge of rape. Any attempt to mitigate the ordeal of the rape victim, therefore, must consider the extent to which that might increase the chances of convicting innocent people. In the final analysis, any reform in this field must strike a proper balance between these conflicting interests.

The second type of change has been less radical, in that it has retained some of the basic ingredients of the existing offence of rape, but has modified the definition by increasing its scope and creating different degrees of the offence according to its gravity. This approach is exemplified by the New South Wales Crimes (Sexual Assault) Amendment Act 1981 and by the legislation of several American states (for example, the Washington Criminal Code 1976). The New South Wales legislation, like the Michigan statute, abolished the offence of rape and replaced it with four grades of sexual assault. The third and fourth grades, however, corresponded with the previous offences of rape and indecent assault respectively. The first two more serious degrees of sexual assault were designed to cover rape situations which also involve the infliction of grievous bodily harm, or the infliction or threat with a weapon of actual bodily harm.

The third form of change has involved substantial procedural reform, and has usually accompanied some change to the substantive law. It has included efforts to protect the privacy of the complainant, restrictions upon the admissibility of evidence about the complainant's prior sexual history, and changes to the law on corroboration. Some of these reforms (e.g., automatic suppression of the complainant's identity) have already been effected in New Zealand.

The fourth type of change has endeavoured to improve victim support services, by providing better facilities and financial support for counselling, medical examinations and follow-up support. Apart from the development of a number of voluntary organisations to offer counselling to rape victims, a range of government-funded sexual assault clinics have been established. Again, New South Wales and various American states serve as models for this type of development.

Most of these reforms seem to have been derived more from an ideological commitment to an improvement in the status of women than from an adequate appraisal of deficiencies in current law and practice. Unfortunately, therefore, they have lacked a proper research base. Furthermore, despite the enormous efforts which have been invested in the promotion of law reform by women's groups and others, there has been a signal failure to evaluate the extent to which reforms have in fact better served the interests of justice and ameliorated the plight of the victim. The rare attempts at evaluation which have occurred (Chappell, 1982;

CHAPTER 1

RAPE LAW REFORM IN NEW ZEALAND

1.1 INTRODUCTION

There is perhaps more public awareness now than ever before of the problem of rape in the community, and also of both the trauma of the rape experience and the ordeal confronting a rape victim whose complaint is processed through the criminal justice system. This increased awareness is partly because of an increase in the volume of reported rapes and attempted rapes in recent years (from 268 in 1975 to 396 in 1981), but more significantly because rape has become a symbol of sexism in society and of unhealthy social attitudes towards women in general. This has prompted an enormous volume of literature, both academic and popular, and has produced a flurry of legislative activity throughout the common law world.

In the last decade, at least 40 American states have modified existing statutes or passed new statutes on rape. Many Australian states have followed suit, and in Canada sexual assault legislation replacing the old rape laws has recently been enacted by the Federal Government. In England and Wales there has been piecemeal procedural reform since 1976, and in 1980 the Criminal Law Revision Committee produced a Working Paper on Sexual Offences (including rape), which has been under public discussion for the last two years.

These changes have taken four main forms. The first has involved a radical departure from the traditional definition of the offence in favour of new sexual assault legislation. The Michigan Criminal Sexual Conduct Statute 1974, which was the first comprehensive reform of rape legislation and has served as the model for at least 12 other statutes, still best represents this approach. It abolished the crime of rape and replaced it with four degrees of criminal sexual conduct. These were defined according to specified aggravating circumstances and the presence or absence of sexual penetration and contact. The aggravating circumstances that distinguished first and second degree criminal sexual conduct from third and fourth degree criminal sexual conduct included such factors as the age of the victim, and whether or not additional physical injury had been inflicted.

extremely difficult and sensitive area and under severe pressure occasioned by the time constraints imposed on the directors of the study. Those who undertook the field research with victims bore a very heavy burden in this regard. The people involved are identified in the research reports themselves. In addition, we thank Mr Graheam Simpson for supervising much of the research, and Mr Neil Cameron, Senior Lecturer, Law Faculty, Victoria University of Wellington and Dr Jane Bradbury and Dr Michael Stace of the Institute of Criminology for assisting with and commenting on the drafts of this Report.

Finally, our thanks to the staff in the Department of Justice who assisted in the printing and layout of this substantial publication. They, too, worked under considerable pressure to meet the necessary deadlines.

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PREFACE

Following considerable public disquiet of what was seen to be an increasing incidence of rape and concern for the consequences to victims, the Minister of Justice directed the Department of Justice and the Institute of Criminology at Victoria University of Wellington to undertake a study of the problem. The terms of reference for the study are attached as an Appendix. We were appointed to direct the study.

An almost total absence of information about the New Zealand situation required us to set up a number of preliminary research projects. The consequent reports are published in a separate volume. We have called on much of the information which emerged from these projects, but our analysis and conclusions in this Report are our own.

The subject is complex, and often arouses considerable emotion and prejudice. This has made the task even more difficult and demanding. In accordance with the terms of reference, we have been primarily concerned to explore the rape complainant's perception and experience of criminal justice procedures, and to consider whether law or practice should be modified to accommodate any special problems encountered by rape complainants. The form of the Report is designed to provide a base and a vehicle for wide public debate in New Zealand. We believe that for the first time many of the issues have been identified, pulled together and analysed. Consequently, we have been able to provide conclusions, ideas and alternatives which may now be argued and considered by the wider community.

Many people have contributed to this study. The research reports mention those who have made substantial contributions. These people are far too numerous to name here, but we acknowledge our grateful thanks. We must, however, refer particularly to the victims of rape and sexual assault who participated in this study. Without their co-operation it would have lacked realism. The researchers themselves must also be given our very special thanks. They have worked in an

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A study was also made of victim support services throughout the country, including the operation of Rape Crisis Centres and Women's Refuges, the development of the HELP Centre in Auckland, the role of the medical profession and Hospital Board social workers, and the support and involvement of other professional and counselling organisations. In the time available, this project did not yield sufficient information to warrant a separate research report.

As well as these research projects, we also sought the views of a wide variety of individuals and groups, in relation to both current practice and proposed reforms. Questionnaires were sent to the judiciary and to a number of Crown Prosecutors and defence counsel (see Research Report 4); and further detailed comments were made at a later stage by three other Judges of the High Court. We received detailed submissions from Rape Crisis Centres in Auckland, Wellington, Christchurch, Palmerston North and Whangarei, and we also had the benefit of the views of many others who responded to the invitation of the Minister of Justice to contact him on this matter. We also interviewed many who work with victim support groups, and we canvassed the views of a number of police officers about proposed reforms to law and practice. Finally, together with the Advisory Committee on Women's Affairs and the Mental Health Foundation, we helped to arrange a Symposium on Rape in Wellington in September 1982, at which a number of papers were presented and discussed in depth. This Symposium brought together a wide variety of individuals with an interest in the problem and exposed a number of issues of common concern.

Finally, since we were considering proposals for law reform, we examined in detail a number of overseas statutes which we thought best represented the recent approaches which have been taken to the offence. The proposed or actual statutes we have most often referred to are those of Canada (1982), Michigan (1974), New South Wales (1981), Victoria (1980), and the Australian Women's Electoral Lobby Draft Bill (1976). Because of the interest in the New South Wales legislation which has been evident in New Zealand, we have paid particular attention to the purpose and effect of that statute. In doing so, we have drawn upon the knowledge and insights we obtained when we visited Sydney in June 1982 and discussed the new legislation with its principal architect, Dr Greg Woods, and with police officers, Supreme Court judges, researchers, the Health Commission, the Women's Co-ordination Unit of the Premier's Department and a number of other women's groups.

The full study, which was as thorough and wide-ranging as time permitted, comprised a number of different but related research projects, the reports of which form Volume II of this study. The first project (Research Report 1) involved interviews with 50 women who stated that they had been the unwilling victims of a forced sexual experience and believed that they had been raped. We had neither the time nor the resources to undertake a full victim survey. In any case, given the fact that a large number of rapes probably go unreported, a representative victim survey would have been extremely difficult to undertake. Our small survey, which really involved the compilation of 50 case studies, was used to elucidate the experience of the rape victim and the problems she encountered in her dealings with the criminal justice system. The case studies included a range of victims: some had never reported the offence; some had reported it but no prosecution had ensued; and some had experienced the court process. We cannot say that the experience and perceptions of these victims are representative of all victims, but only that they express some of the wide range of feelings and difficulties which victims confront.

The second area of research (Research Report 2) involved a study of the police processing of rape complaints. For this purpose we had access to 173 complaint files of rape and 47 complaint files of attempted rape, being virtually all the police files of complaints in these categories which were made during 1981 and closed by the time of data collection in mid-1982. In addition, we interviewed 20 police officers at Police Headquarters and in the Police Districts of Auckland, Wellington, Christchurch and Rotorua, in order to supplement the information obtained from the police files.

Thirdly, we studied every trial file throughout New Zealand where an indictment for rape had been laid in 1980 and 1981, including files which merely involved sentencing in the High Court (see Research Report 3). The total number of court files received from the High Court for analysis was 83. The files enabled us to study not only the outcome of trials in court, but also the methods of examination and cross-examination, and the operation of the Evidence Amendment Act 1977. In order to obtain a greater understanding of trials in rape cases, researchers also attended several court trials both at the preliminary hearing stage and the jury stage.

We must acknowledge that we have not been able to ascertain or present the views of all groups who are interested in this issue. Nor have we been able to examine in detail all of the resources that exist in the community to offer support to rape victims. We are indebted, though, to the large number of organisations and individuals who did assist us, and who responded to our questionnaires despite the many pressures upon them.

In this Report, we hope that we have reflected accurately and fairly the range of issues and opinions which have been presented to us. Although the rhetoric of reformers might indicate that solutions are both obvious and easy, it has become evident to us that the issues are complex and multifaceted. If we have been able to clarify the issues involved, so that there may be an informed debate on the desirability of various legislative and administrative reforms, then this study will have achieved its purpose.

1.2 THE PROBLEM IN PERSPECTIVE

It has been a common theme, both in the literature and in the efforts of overseas jurisdictions to reform the rape laws, that the criminal justice process is heavily and unfairly weighted against the rape complainant and in favour of the accused, and that this is due to the fact that false assumptions and myths underpin not only social attitudes to the offence but also the response of the criminal justice system itself to a complaint of rape. It is said that there are a number of entrenched assumptions about the kind of people who commit rape and the kind of people who get raped, and that there are other myths about the significance of the act of rape itself and its consequences. These assumptions are alleged to be derogatory of women and biased against them. Rape trials have also been described as a "man's trial" but a "woman's tribulation", and rape laws as reflecting a "deep distrust of the female accuser" (Berger, 1977).

These assumptions, and the treatment the victim may receive from the police and court process, thus combine to discourage her from reporting the offence, and in effect put her on trial when she does report it. For instance, Camille Le Grand (1973), in a critical article on the operation of rape laws in the U.S. before the recent spate of legislative reform there, argued :

The structure of the laws, enforcement, and prosecution are all based on untested assumptions about the incidence of the crime, the motivation of the criminal, and the psychology of the victim. As a result, the laws do not effectively deter rape: police enforcement of complaints is inadequate, and judicial treatment of defendants is over solicitous. Thus rape laws are not designed, nor do they function to protect a woman's interest in physical integrity. Indeed, rather than protecting women, the rape laws might actually be a disability for them, since they reinforce traditional attitudes about social and sexual roles. Although societal attitudes no doubt are responsible for the present construction of rape laws, it is also true that this construction serves to reinforce those attitudes.

The more common beliefs which are being referred to by such critics include the following :

- Rape is impossible.
- Women want to be raped or secretly fantasise about being raped.

- Women who have been raped have usually provoked it or in other ways "asked for it".
- Women, especially if they are promiscuous or of dubious sexual morality, frequently make false complaints of rape.
- A woman who has really been raped will have physically resisted, screamed and tried to escape, and she will usually have some physical injuries.
- A woman who has been raped will tell someone about it at the first available opportunity and will usually report it promptly to the police.
- Rape is caused by lust or sexual frustration.

Overseas research and our own research in New Zealand, have clearly established that most, if not all, of these beliefs are false. Their perpetuation is extremely damaging, and may not only exacerbate the already painful ordeal of the rape victim but also reduce the chances that offenders will be prosecuted and convicted. We have not attempted in this study to assess present public attitudes towards the offence of rape, and we therefore do not know the extent to which such myths still exist. Even so, it was apparent that many of the false assumptions which have come under attack from women's groups and others still influence the practices and beliefs of some of those working within the system. For example, there still seems to be some residual belief in the validity of Lord Hale's dictum, dating from the 17th century, that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent". In a questionnaire to participants at the recent Rape Symposium in Wellington, we asked whether or not they agreed with a modified version of this dictum, that "rape is an accusation easily to be made and hard to be defended". Over half of the men at the Symposium, the vast majority of whom worked within the criminal justice system, agreed or strongly agreed with this statement. In the responses to our questionnaire to the judiciary and the legal profession (Research Report 4), the view that rape is easy to allege and difficult to refute was also cited as one of the special difficulties confronting an accused in rape trials; and of the 11 summings-up to the jury by judges which we examined, 10 contained some type of reference to

Lord Hale's dictum. It is disturbing that these beliefs should persist despite the fact that, as we shall see, they run directly counter to the available statistics on rape and related offences.

More significantly, the defences raised in court in our study of files of rape trials (Research Report 3) often seemed to rely on traditional perspectives, and sometimes obvious myths, about rape which have been the subject of widespread criticism in recent years. For example, defence counsel sometimes suggested in their line of questioning that it is very difficult, if not impossible, for a single accused to commit rape without assistance; that a complainant who does not complain immediately is probably unreliable; or that the complainant had behaved in a manner or worn clothing that was sexually provocative, thus inviting the act that she had complained of. Presumably such defences are designed to appeal to what are perceived to be prevailing jury attitudes. If so, they illustrate the fact that some deeply engrained myths still affect society's response to rape.

Implicit in the allegation that the criminal justice system is unfairly weighted in favour of the accused is the notion that the chances that a rapist will be prosecuted and convicted are unacceptably low. It has been argued that, by comparison with other offences, a very small proportion of rape offences are reported to the police; that of those which are reported, only a minority result in prosecution; and that the acquittal rate in respect of those cases which do reach court is too high. This is a claim which deserves critical and careful appraisal, since it forms the basis on which much of the current debate is conducted.

It has been suggested to us in a paper by two Judges of the High Court that the published statistics in New Zealand may not substantiate the belief that the acquittal rate is markedly higher than that for other indictable offences. The majority of judges and lawyers in the questionnaire survey (Research Report 4) also stated that, in their view, discharges and acquittals in rape trials were "about the same as in other trials". Certainly it is true that an examination of the conviction rates of distinct persons tried on indictment in the years 1972 to 1981 reveals a difference of only 3.2% between the conviction rate of offenders charged with rape or attempted rape and the conviction rate of all offenders charged with indictable offences (68.2% compared with 71.4%). Indeed, in some years over this period (for instance, 1977 and 1979) the conviction rate for rape and attempted rape was

substantially higher than that for other indictable offences. These statistics by themselves would seem to signify, as the two judges commented, "that any differential in conviction rates is too small in itself to justify the conclusion that the present law and practice governing the trial of persons appearing on indictment for these charges significantly favours the defence".

However, the overall conviction rates of distinct persons indicted for indictable offences may be misleading as a means of comparison in two respects. First, the conviction rates for rape are being compared with a set of statistics which both incorporate rape and also include other offences with very disparate characteristics. This may disguise and depress any differences between rape and other offences. It seems to us more helpful to compare the conviction rates for rape with those for other specific offences against the person. Secondly, conviction rates in respect of any offences must be seen within the context of reporting and prosecution practices, and these may disclose a rather different picture.

Our knowledge of the rate of reporting of rape and other offences in this country is very limited and necessarily based upon speculation. On the basis of various overseas victim studies, and two or three more limited surveys in New Zealand, it has been estimated (see Research Report 1) that about one in five offences of rape may be reported. It is plausible to assume that many of those that go unreported are rapes committed by de facto husbands, relatives, boyfriends or other friends or acquaintances, and these would frequently be hard to prove in court. We have virtually no reliable information on the extent to which, for example, stranger rapes go unreported. Nevertheless, it can be stated with some confidence that rape is a far more common phenomenon than the statistics of reported offences would indicate, and that it is part of a much more extensive and perhaps more worrying hidden figure of sexual abuse generally, including incest. It does not follow from this, of course, that rape is reported proportionately less often than other offences against the person; and other overseas studies (e.g., Sparks et al, 1977; U.S. Department of Justice Bureau of Justice Statistics, 1981) indicate that a large number of violent and property offences of all types may never be reported to the police, although we do not know how far this applies in New Zealand.

The figures for rates of prosecution are more accurate, although still far from perfect. In Table 1 the outcome of complaints of rape and attempted rape is compared with that of other selected offences against the person with relatively high clearance rates.

Table 1 The disposal of specific reported offences against the person

(a) 1972

	<u>Rape</u> <u>Att. Rape</u>		<u>Injury, wounding</u> <u>Agg. injury and</u> <u>wounding</u>		<u>Robbery</u>		<u>Agg. robbery</u>	
	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs
Reported ⁽¹⁾	220		38		274		29	
Prosecuted	74	34	34	89	100	36	21	72
Cleared other means	3	1	1	3	3	1	2	7
No offence disclosed	101	46	0	0	36	13	1	3

(b) 1975

	<u>Rape</u> <u>Att. Rape</u>		<u>Injury, wounding</u> <u>Agg. injury and</u> <u>wounding</u>		<u>Robbery</u>		<u>Agg. robbery</u>	
	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs
Reported ⁽¹⁾	268		38		94		179	
Prosecuted	111	41	31	82	67	71	174	97
Cleared other means	4	1	1	3	4	4	1	1
No offence disclosed	108	40	2	5	6	6	2	1

(c) 1978

	<u>Rape</u> <u>Att. Rape</u>		<u>Injury, wounding</u> <u>Agg. injury and</u> <u>wounding</u>		<u>Robbery</u>		<u>Agg. robbery</u>	
	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs
Reported ⁽¹⁾	297		94		147		240	
Prosecuted	153	52	67	71	77	52	122	51
Cleared other means	13	4	4	4	9	6	20	8
No offence disclosed	124	42	6	6	28	19	37	15

(d) 1981

	<u>Rape</u> <u>Att. Rape</u>		<u>Injury, wounding</u> <u>Agg. injury and</u> <u>wounding</u>		<u>Robbery</u>		<u>Agg. robbery</u>	
	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs	No.	% of reptd offs
Reported ⁽¹⁾	396		179		240		234	
Prosecuted	141	36	174	97	122	51	185	79
Cleared other means	37	9	1	1	20	8	7	3
No offence disclosed	177	45	2	1	37	15	34	15

This Table highlights a significant feature of the police processing of rape complaints: the very large number which are cleared as "no offence disclosed" (45% in 1981) and the relatively small proportion (other than in comparison with robbery) which result in prosecution (36% in 1981). Indeed, it is interesting to note that the only other offences in the Police Statistics which show a higher proportion of complaints deemed to be "no offence disclosed" than rape in 1981 were incest⁽²⁾ (56%), abduction (53%), and one or two other minor categories such as miscellaneous offences against justice and criminal libel. The national average of complaints cleared as not disclosing an offence was only 12.68% in 1981. There is some statistical evidence, therefore, to support the claim that a complaint of rape to the police is far more likely to be cleared as "no offence disclosed", and somewhat less likely to result in prosecution, than most other offences against the person.

Similarly, as indicated by Table 2, statistics showing the outcome of rape trials between 1972 and 1981 lend some credence to the view that the chances of an acquittal are higher for this offence than for other specific offences against the person.

- (1) The discrepancy between the total number of reported offences and the total number of offences prosecuted, cleared by other means or recorded as "no offence disclosed", does not necessarily represent uncleared offences. The figures denoting how an offence was disposed of may include offences reported in previous years. Further, the data base at this stage could be offences as well as offenders.
- (2) It may be significant that incest is frequently an offence of a similar nature to rape, and indeed in some cases could be charged as rape.

Table 2Outcome of Indictments of Distinct Persons 1972 - 1981

	<u>Indicted</u> ⁽³⁾	<u>Convicted - by plea or verdict of guilty</u> (4)		<u>Discharged or acquitted</u>	
	<u>No.</u>	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
Rape					
Attempted Rape	640	437	68	202	32
Wounding					
Injuring	442	343	78	97	22
Disabling with intent					
Robbery	72	63	87	9	13
Aggravated Robbery	376	336	89	33	9

Chi - square = 73.69, significant, 3df, p 0.05

While the difference is not great, it is statistically significant.

It should be recognised, of course, that the prosecution and conviction rates are derived from different figures, since the former is a proportion of offences reported, while the latter is a proportion of distinct persons charged. However, taking all the data together, it is a reasonable estimate that the chances that a rapist will actually be caught and convicted may be as low as 4%, a figure which is probably much lower than that applying to most other serious offences of violence.

Such statistics clearly raise a number of issues which require explanation and discussion. However, they do not in themselves prove that the system is unfairly weighted in favour of suspects and defendants, nor that complainants receive a raw deal. In fact, such statistics may be very misleading, since they fail to take into account the special difficulties which, many suggest, confront the police in establishing the identity and guilt of particular types of offenders. There was certainly no general agreement amongst those whose views we canvassed that the

(3) Includes those awaiting trial.

(4) Includes those persons found insane.

system is unfairly weighted in favour of suspects and defendants. Many judges, lawyers, police officers and others familiar with the operation of the system, saw the peculiar problems associated with rape trials as largely unavoidable. Nevertheless, there was widespread consensus that the trial process is more traumatic for the rape complainant than for other types of complainants, and that some reforms are necessary to mitigate the ordeal to which rape complainants are subjected in the criminal justice process. For instance, all women's groups whose views we received saw the need for basic and far-reaching reform of this process, and for the provision of more adequate and comprehensive victim support. A total of 14 out of the 19 High Court judges, and 20 of the 32 Crown Prosecutors and defence counsel, who responded to our questionnaire (Research Report 4) also thought that some measure of reform was called for.

1.3 THE EXISTING LAW

In New Zealand, the criminal law is codified, that is, it is defined in statute. Rape is defined in s.128 of the Crimes Act 1961 as follows:

- (1) Rape is the act of a male person having sexual intercourse with a woman or girl -
 - (a) without her consent; or
 - (b) with consent extorted by fear of bodily harm or by threats; or
 - (c) with consent extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of or grievous bodily injury to a third person; or
 - (d) with consent obtained by personating her husband; or
 - (e) with consent obtained by a false and fraudulent representation as to the nature and quality of the act.
- (2) Everyone who commits rape is liable to imprisonment for a term not exceeding 14 years.
- (3) Notwithstanding anything in subsection (1) of this section, no man shall be convicted of rape in respect of intercourse with his wife, unless at the time of the intercourse he and his wife were living apart in separate residences.

There are several features of this definition of rape which require special mention. First, the definition of the offence itself would appear to modify the traditional common law definition of rape in one important respect. Whereas the latter required that consent be vitiated by force, fear or fraud, the offence in New Zealand is probably not limited to such circumstances. It is arguable that the presence or absence of consent under subsection 1(a) is a question of fact; and the use of force, fear or fraud is merely a factor which should be taken into account in deciding whether or not consent was given.

Because it must be proved that the complainant did not consent to intercourse, or consented under one of the circumstances listed, it is therefore inevitable and necessary that any rape trial must focus on the complainant's actions and state of mind.

A further important ingredient of the offence relates to the accused's intention. The prosecution must not only prove beyond reasonable doubt that the complainant did not consent, but must also prove beyond reasonable doubt that the accused intended to have intercourse without her consent, or perhaps was reckless as to whether or not she was consenting. An honest belief by the accused that the complainant was consenting may therefore provide a defence to the charge. This is, however, an area in which, despite the fact that the definition of the offence is enshrined in statute, considerable uncertainty exists.

Thirdly, the definition of the offence is clearly intended to exclude the act of inducing sexual intercourse under the pretence of marriage: that is covered by a separate offence under s.137 of the Crimes Act 1961. Similarly, it excludes any type of fraud other than that relating to the nature and quality of the act or the impersonation of a husband.

Section 128(3), which provides for a limited form of spousal immunity, was amended by the Family Proceedings Act 1980 to exclude spousal immunity where the parties are living apart in separate residences. This not only greatly simplified the law, but narrowed the immunity, which previously applied to all acts of intercourse between a husband and wife unless at the time the wife was separated from the husband under a decree nisi of divorce or nullity, a decree of judicial separation, or a separation order. This significant narrowing of the immunity in 1980 attracted little attention in Parliament or elsewhere at the time. It should be noted that the immunity does not apply to de facto relationships.

Section 127 provides that sexual intercourse is complete upon penetration. Full penetration is not required, and unlike the original common law offence of rape, there need not be any emission of semen. This provision has been interpreted to mean that the offence comes into existence upon penetration, but it does not necessarily cease at that point. It is thus possible for a woman to be raped where she withdraws her consent during the act of intercourse itself (R. v Kaitamaki)⁽⁵⁾.

Section 127 further provides that no person by reason of his age shall be incapable of intercourse, thus overturning the conclusive presumption which operated at common law that no boy under 14 was capable of having intercourse.

(5) [1980] 1 N.Z.L.R. 59).

The Procedure

Rape is a serious offence which is punishable by a maximum of 14 years' imprisonment. As such, it may only be charged on indictment. The effect of this is that if the accused pleads not guilty the offence will always be tried before a judge and a jury in the High Court. If he pleads guilty before reaching the High Court, he must always be committed to the High Court for sentence.

As with all offences that proceed to trial by jury, there must be a preliminary hearing in the District Court to determine whether the prosecution has sufficient evidence to warrant putting the case before a jury. At this hearing, the prosecution will present all its evidence orally or, with the consent of the defence, either partly or entirely by written statement. Witnesses giving evidence orally are liable to be cross-examined on it. At the preliminary hearing, the accused will not usually give evidence or call any evidence on his own behalf. Justices of the Peace usually preside over preliminary hearings and will decide on the basis of the evidence presented whether or not there is a case to answer. If there is, the accused will be committed to the High Court for trial before a jury.

At the preliminary hearing, a police officer will usually conduct the prosecution. Following this hearing, the file will be handed over to the Crown Prosecutor, who will decide on the basis of the evidence given what counts to lay on indictment, and will conduct the prosecution thereafter.

The conduct of rape trials must be interpreted and understood in the light of the adversary system, upon which a New Zealand criminal trial is based. In that system, where a defendant denies the charge the court's duty is to act as an independent and neutral referee, weighing up the evidence presented by both sides and determining whether the prosecution has proved the charge beyond any reasonable doubt. In the case of a jury trial, the judge's task is firstly to ensure that the case is conducted properly and fairly and that the evidence which is presented is relevant and admissible, and secondly to explain to the jury the rules of law that apply to the case. It is the task of the jury to determine the facts of the case from the evidence received in the trial, and to arrive at a verdict. Within the adversary system, neither the judge nor the jury plays any part in the preparation or

presentation of evidence to the court, and neither is concerned to ensure that the evidence of one side or the other is complete. That is the responsibility of the police and the Crown Prosecutor on the one hand, and the defendant or his counsel on the other. It follows that if the judge and jury are to be able to discharge their functions adequately, both prosecution and defence must be given full opportunity to present their case and (subject to certain privileges presently available to the accused, such as the right to silence) to test the truthfulness and consistency of the opposing side's allegations. In a rape trial, therefore, a crucial element in the assessment of the evidence of both sides will be the evidence-in-chief and the cross-examination of the complainant.

There are four particular procedural and evidentiary rules which apply solely or primarily to sexual offence cases. First, the judge is required to warn the jury that it is dangerous to convict unless the complainant's evidence in respect of each ingredient of the offence is corroborated by independent evidence. The judge is required to explain to the jury what is sufficient to constitute corroboration, and must give the warning to the jury whether or not sufficient corroborative evidence is, in his view, available.

Secondly, there is a complex evidentiary rule which allows, as an exception to the usual rules on admissibility, evidence to be given of a complaint to any person by the complainant if it was made at the first available opportunity after the offence occurred.

Thirdly, there is a particular rule, introduced by the Evidence Amendment Act 1977, that evidence may not be given, and the complainant may not be cross-examined, about her prior sexual history with any person other than the accused without the prior leave of the court.

Fourthly, under s.45C of the Criminal Justice Act 1954 (as amended in 1980) the name of the complainant in sexual offence cases, or any other particulars likely to lead to her identification, may not be published unless the complainant is of or over the age of 16 years and the court specifically permits such publication.

It should be noted that these rules single out sexual offences as a special case in rather different ways. One of the rules, that relating to corroboration, is intended to provide extra protection for the accused against the possibility of wrongful

conviction. The recent complaint rule allows the admissibility of evidence which could be regarded as favourable to the prosecution, but may operate to disadvantage the complainant unless the complaint was made at the first available opportunity. The remaining two rules, which were introduced in 1977 and 1980 respectively, have both been designed to provide special protection to the complainant.

The creation of special evidentiary and procedural rules to govern the conduct of trials in relation to some offences but not others is obviously a matter needing some justification as a matter of principle. It would generally be agreed that neither prosecution nor defence should be given any special advantage or singled out for special protection in the case of some offences but not others unless there are clearly identifiable reasons for doing so.

1.4 THE PURPOSES AND LIMITATIONS OF LAW REFORM

It is of paramount importance that any effort to change existing law and practice should be based not only on a thorough understanding of the existing system, but also on a clear identification of the objectives of such reform. As we have made clear, the impetus for rape law reform has stemmed primarily from the belief that more needs to be done to assist the victim of rape. However, it has also derived from a number of other concerns: the rise in the incidence of reported rapes; a relatively low conviction rate; and a decrease in the length of prison sentences imposed for rape. It is to be expected, therefore, that the objectives of those pressing for reform are complex and varied. Broadly, however, they may be divided into those of a symbolic nature and those which are primarily instrumental. These are not discrete categories, since symbolic changes may have an indirect influence upon the criminal justice system's response to a rape complaint.

Symbolic Objectives. Those objectives having a symbolic component try to use legal and procedural reform to express a particular attitude towards the offence, the victim and the offender, and thus to effect some change in social attitudes. For instance, of those who attended the recent Symposium on Rape in Wellington, the vast majority identified one of the objectives of rape law reform as being to change people's beliefs about the offence of rape, with 40% believing it to be the most important objective.

There can be little doubt that historically rape laws were formulated on the basis that rape was a violation of men's property rights in women, rather than a violation of a woman's integrity and self-worth, and that the application of such laws reflected patriarchal and sexist attitudes which are unacceptable in today's society. Of course, this does not necessarily mean that the content and application of these laws reflect such attitudes today. Nevertheless, a principal objective of law reform has been to express the view that the traditional definitions and enforcement of the law of rape have been based upon false and often sexist premises. In particular, a focal point of feminist theory has been an insistence that rape is a violent rather than a sexual offence - an act of power, hostility and domination - and that the present law does not adequately reflect this. For example, the Australian Royal Commission on Human Relationships (1977) stated :

We question the basis of rape laws. We believe that the act of intercourse should not be singled out as the illegal act. Intercourse without consent is certainly a violation of the person which the law must condemn and punish. However, rape often involves much more than a mere absence of consent. The violence and threats of violence, by means of which intercourse is procured, are themselves antisocial and unlawful. We think the law should be changed to emphasise these unlawful means, rather than the non-consensual intercourse itself, and so shift attention away from the victim and onto her assailant.

The Commission conceded that some rapes may be primarily sexual acts, which arise because a man and a woman interpret differently a relationship with some sexual element. It argued, however, that such cases represent only one aspect of rape, and a minority of such offences at that. The bulk of rape cases incorporate some overt violence or threats of violence.

Most of the alterations to the substantive law in overseas jurisdictions have thus been designed to emphasise the violent rather than the sexual component of rape, and to give symbolic expression to the fact that the offence is not a sexual aberration but an act of violent assault on women. It has been the hope of reformers that such symbolic changes will diminish the myths and stigma which both surround the offence of rape and further victimise the rape complainant.

Rape law reform, particularly in the procedural and evidentiary area, has also provided the vehicle through which women have insisted that their rights and their autonomy - in this context, particularly their right to choose whether, when and with whom to have sexual intercourse - must be fully protected by criminal justice agencies. Regardless of the efficacy of the changes made, they have symbolised a growing recognition of women's rights and implicitly expressed the feeling that offences against women must be viewed more seriously.

Although it has been suggested (e.g., Chappell, 1982) that one of the most important attainments of overseas reform would appear to have been symbolic rather than substantive, there are limits upon the extent to which the criminal law can be used to attack community attitudes in this way. In particular, within the present adversary system there may be the potential for injustice to the accused, and the distortion of some of the basic principles of that system. Indeed, this was a concern which was evident in some of the views we received from the judiciary and the legal profession (see, for example, Research Report 4). Furthermore, it is

perhaps unduly optimistic to believe that new laws alone can effect any real change in deep-seated social attitudes about sex roles and sexual behaviour, at least in the short term. At most, changes to the law, and the public debate which those changes may initiate, can only help to create a better climate in which to effect proper public education and the provision of adequate victim support.

Instrumental Objectives. Objectives of law reform which are predominantly instrumental in character comprise those which are intended to have a direct influence on the scope and operation of the criminal justice system. There are at least three goals falling within this category.

First, some proposed reform to the substantive legislation is intended to broaden the ambit of rape laws, for example, by equating anal and oral intercourse with vaginal intercourse and by removing the immunity from prosecution for rape which husbands enjoyed both at common law and in New Zealand by statute. Apart from the removal of the spousal immunity, this type of reform would not criminalise acts which are at present legal but merely place them within different offence categories (for example, rape rather than indecent assault), and thereby make convicted offenders liable to different maximum penalties.

Secondly, some law reform is designed to alter reporting, prosecution and conviction rates. It is hoped that a greater proportion of victims will report offences to the police, that a relaxation of evidentiary and procedural rules and improvements in police training will result in a higher number of prosecutions, and that of those prosecuted a greater percentage will be convicted. Certainty of conviction will thus be increased, and the deterrent value of the process will be enhanced. At the recent Rape Symposium in Wellington, a large majority of participants saw these as appropriate objectives of law reform, although not the most important.

Finally, changes to law and practice have been promoted and designed to protect the victim from what is believed to be unwarranted victimisation by the legal process itself. There is, of course, little that the law can do to prevent feelings of guilt and shame which are caused by family and friends, or to overcome the suspicion and ostracism which the victim may encounter in the community at large. Proponents of reform wish to ensure, however, that the legal process takes all possible steps to

protect the complainant's privacy and integrity, so far as these are consistent with the conduct of a fair investigation and trial. They also wish to promote proper community education in this area, and to establish more comprehensive and adequate victim support services.

Our research indicates that some of those with instrumental objectives in mind may be expecting too much of law reform. For example, it is unlikely that reforms to the law and to legal practices will have any significant impact upon the reporting rate. Several of the main reasons for not reporting the offence to the police, put forward by both the victims we interviewed and those interviewed in other major studies, related to the psychological state of the victim, in particular feelings of guilt and shame (see Research Report 1). Such reasons had little to do with fear of police, court or legal processes, and more to do with basic social attitudes (as perceived by the victim). The victims were also generally ignorant of legal rules, and their apprehension about the criminal justice process derived from their general perception of likely police attitudes or the difficulties they would have in substantiating their complaint in court. It may not be realistic, then, to expect that legal and procedural reform in itself will achieve any significant increase in reporting. Instead, a gradual shift in public attitudes, encouraged by symbolic changes to the law, is more likely to increase a victim's incentive to report the offence. In any case, it may be that many of the cases which are now unreported would be extremely difficult to prove in court, even under reformed procedures; and it is arguable that if more cases were reported, this would merely lower even further the prosecution and conviction rate, and would put an even greater number of women through what they would inevitably find a humiliating experience.

Equally, it appears from the small amount of overseas research that new rape laws in other jurisdictions have had minimal impact on prosecution and conviction rates. Chappell (1977, 1982) found after the passing of the Michigan legislation that it was "business as usual" for prosecutors despite the presence of the new law. Indeed, there was a widespread lack of understanding of the new law and a failure to implement it as intended. Loh (1980, 1981) also found little change in overall conviction rates as a result of the new Washington legislation. Although the conviction rate for rape increased, this was at the expense of a corresponding decline in convictions for related offences: "the increase in the rape win rate simply reflect[ed] a change in labelling of the conviction" (1981, p.37).

We should therefore be wary about expecting any reform of law and procedure to have any significant impact upon the incidence and control of rape in the community. Indeed, it is arguable that only a wholesale shift away from the adversary system of criminal justice would really achieve most of the instrumental goals sought, and few have advocated as drastic a measure as that. A more realistic expectation might be a limited improvement in the treatment of victims in the court and police processes. Law reform itself, however, must not be pursued in isolation. We encountered some apprehension both from Rape Crisis Centres and from other participants at the Rape Symposium, that a programme of legislative reform will be enacted without any other effective commitment to public education or victim support. In their view, unless such a commitment is made, there is little likelihood that law reform will either help the victims and potential victims of rape or receive the support of many women's groups in this country.

CHAPTER 2

AN OVERVIEW OF RAPE

2.1 THE RAPE EXPERIENCE

From the interviews with rape victims (Research Report 1), we identified a number of recurring themes which indicate how women feel about and respond to the experience of being raped. These reactions are perhaps not widely recognised nor understood. Yet they have an important influence upon the type of support the victim requires, her willingness to report the offence, and her feelings about the police and courts if she does report it. A brief account of her feelings about and reactions to the rape is therefore necessary as a background to any assessment of current law and practice.

The following victim's account, written in Auckland in 1982, encapsulates many of the main themes:

Five months ago I was raped. A man broke into our house through a partly open window, while I was in bed, asleep.

When I awoke that night with this man beside me, kissing me - I thought it was a dream, or a joke - I could not believe this was happening to me.

I felt angry, yet totally helpless.

Angry at this man who dared to do this to me.

Angry at my husband for leaving me alone, without telling me. Angry with myself for letting this happen.

When it was over I felt physically ill and helpless. I got myself together enough to go next door to find my husband. When someone said they would phone the police, I said no. I felt so humiliated and didn't want to go through it all again. I also felt, this man hadn't killed me or badly hurt me, and I feared he may come back and use the knife he said he had.

The police were called, and arrived quickly. I was taken to the station and then to the HELP Centre, where I was examined and had a shower, as hot as I could stand - I felt so dirty and could smell this man on me. We went back to the station to make the statement.

By now I was in control of myself again, the sick, hopeless feeling had passed and I was calm, too calm. I realised later this was my reaction to the shock.

It was the next day before it hit me again and that sick, useless feeling came back. I felt so dirty and used.

I couldn't face any of my friends or relations. I couldn't talk to anyone without bursting into tears.

The only way I could talk to people was to have my husband explain what had happened first.

Julie, from the HELP Centre, was a great help to me, explaining that most women go through this. She has been a great help to me through this whole ordeal, I don't know if I would have made it without her help.

Six weeks after the rape, was the depositions hearing. After hearing all the evidence against him, I felt sure he would plead guilty. He didn't. My stomach was churning. I felt so ill. I kept telling myself it's my own fault. I didn't fight back enough.

It was three months until the next hearing, in the High Court. In that time, I started to come to grips with myself. I put on the weight I lost in the first week. I started to have sex again, with my husband though I wasn't very happy about it a lot of the time. I even started to talk to people "who didn't know" - like walking into a shop or talking to someone at the bus-stop. Catching a bus was always an ordeal, so was walking down the street alone, or being left alone at night.

On 11th ... - nearly five months later, the High Court. I had worked myself up into a real state. I was a nervous wreck. I was lucky. He pleaded guilty. No cross-examination. No giving evidence again. No more doubt.

I felt a great weight had been lifted off me. I just couldn't believe it. The relief.

Now I can get on with my life, but where was I, five months ago, before all this happened? I have changed so much in this time. My friends seem to have changed. Life will never be the same, ever again, for me.

The police have been terrific, never did I feel my word was questioned. The officer on the night was marvellous. I couldn't have asked for a nicer or more sympathetic person, male or female.

Looking back, the court procedure was the change I would like to see.

Five months seemed a long time to be going through this hell and I was lucky. Many have to endure the humiliation of cross-examination.

People tell me rapists don't get sentenced heavy enough. I don't know, he hasn't come up for sentencing yet. But, what punishment do you give a person who degrades another human's life so much?

The feelings which this particular victim reported were typical of those experienced by the other women who were interviewed. They frequently recounted that they had felt degraded, humiliated, disgusted and dirty. In addition, many of the women experienced difficulty in relating to people after the rape and were often fearful for their personal safety for a long period of time.

The severe shock and stress reactions which rape victims experience have been termed the 'rape trauma syndrome'⁽¹⁾. The syndrome, which is manifested by behavioural, somatic and psychological reactions, is generally seen to involve an acute phase which is experienced immediately after the rape event, and a much longer period of reorganisation whereby the victim tries to cope with her experience.

The victim interview study confirmed the existence of a rape trauma syndrome. We found that three stages of reaction could be identified: an acute phase, an adjustment phase and a long-term integration phase.

The acute phase is the shock reaction experienced during and immediately following the attack and is similar to the emotional states felt by people who have been suddenly bereaved, or involved in a serious accident. The adjustment phase is an intermediate phase in which the initial shock reactions outwardly subside but still continue, manifesting themselves in less obvious ways. In the final phase of the syndrome, the integration phase, the victim undergoes a healing process in which the rape experience is accommodated and absorbed into her life. The process may take months or even years, and some victims who were interviewed had not yet come to terms with the experience. Although the reactions of some victims were less extreme than others, nearly all of them experienced these three stages of reaction in some form.

(i) The Acute Phase

Victims, with hindsight, described their behaviour during the acute phase as being atypical. They felt that at the time they had been completely disoriented and incapable of rational action. They mentioned feelings of guilt, shame, anxiety, fear, anger, powerlessness, humiliation, embarrassment, disbelief, disgust and desire for revenge. In addition, many women reported that they had experienced physical reactions such as vomiting and shaking.

(1) Burgess and Holmstrom, 1974.

Some of the women found it very difficult to describe their feelings and some found it a deeply upsetting experience even to try to remember the incident in detail:

It's not easy to describe this. I must have been in a state of shock or fear. I was calm then hysterical.

Nearly all the victims recounted a feeling of total disbelief that rape was happening to them, and some coped with the attack by mentally cutting themselves off from the situation:

I went into a state of shock. I couldn't believe this was happening. It's hard to describe the state of shock I was in - almost breath-taking - a total disbelief. I went kind of slow. I must have blacked out.

I can't remember very clearly now. I was shocked that he was doing this to me as he was my friend. I couldn't really believe it. I was scared. I tried to cut myself off from the situation. As I couldn't resist physically, I somehow tried to mentally.

All the victims said that they were scared or terrified at the time, and many believed that they were going to die. Most recalled that the attack had induced a state of shock which rendered them incapable of resisting during the rape. Some did try to resist, but were either overpowered or threatened with physical violence, sometimes with knives. In some cases injuries resulted from attempts at resistance, while others either were too frightened to resist or feared that resistance would make matters worse:

I was fearful of my life. I didn't know whether he had a knife and I couldn't breathe. When I stopped resisting, I didn't feel better but I thought I might live.

At the time I was angry that someone could overpower me. I also thought I should be able to fight. I'm physically fairly strong but I was angry that I couldn't resist him. He was very strong.

Although a variety of emotions and reactions were experienced immediately after the rape, the most common feeling was still severe shock:

Afterwards I was in a state of shock. I cuddled my son so that I could feel human warmth and tenderness. I went to the phone but the cord was cut. I didn't cry. I was in a daze. I hunted for a friend's letter and for the photo of another friend. I read the letter over and over. I thought, so this is rape, I've been raped.

This state of shock was frequently combined with other emotions such as disgust or anger:

I was physically shocked, physically sick. I felt dirty, used, degraded. I felt very guilty. I was afraid my father would find out.

I was shocked and hurt, physically and mentally ... I could have killed them.

I felt I could have got a gun and shot him.

Feelings of humiliation, shame and guilt were frequently mentioned:

I felt humiliation and angry because at the same time he said he was in love with me, but he could do this to me.

I thought it was my fault.

I was more angry with myself - that I'd been so stupid. I hated it but when you are concerned for a person you can't hate them.

The victims also related the ways in which they had reacted after the rape. As a result of their state of severe shock, many had felt unable to do anything for some time afterwards:

I just sat there and didn't know what to do. When you're scared you don't do anything, your reactions are slow. I blocked it off. I didn't think of taking off immediately and I was scared of them catching me. I couldn't believe I'd been raped - that fact only occurred to me some time after.

I lay there for a good hour after he left, then got up and had a shower. I stayed under it for about half an hour, then started to prepare myself for everybody else in the house who was going to come home. I didn't feel angry. I felt some sort of pity toward him. I wondered why it happened to me. There must be something wrong with me.

Others were just anxious to get away from the scene of the rape:

My first reaction was to get away and come home and just be by myself.

Some women reported that they had been physically sick after the attack:

I started being physically sick. Later I was furious. It outraged me completely. It was totally unacceptable. I found it hard to believe it had happened. How could it happen to me? It was worse than the first time because I trusted him.

I vomited and was retching. I walked home and just sat down. There was nobody home. I wasn't going to tell anybody. I almost decided that it hadn't happened. I didn't think or talk about it consciously. I went numb and blocked it out.

The feelings of contamination which some victims experienced made them shower or wash compulsively, and their shame, guilt or embarrassment made them afraid to tell anybody what had just happened.

It is in this acute phase that victims may have to consider the question whether or not to report the attack to the police. If the matter is reported, the victim will probably still be experiencing acute rape trauma symptoms when initially interviewed by the police. In this vulnerable state, decision-making is difficult and the victim is unlikely to behave in a rational manner. Her ability to recall events consistently and accurately will be impaired. Her behaviour may range from extreme calm to hysteria. It may be, as some police officers mentioned to us, that a victim who is calm and collected will be viewed with more suspicion than one who is obviously distressed. If so, this may indicate that there is generally insufficient recognition of the various victim reactions to rape which we have described.

(ii) The Adjustment Phase

The second stage of trauma encompasses those reactions which follow the initial heightened responses of the acute phase. Once again, the reactions of those victims who were interviewed in this study varied and included feelings of extreme fear, guilt, shame and loss of self-esteem and confidence. Fear that the rapist would return and seek retaliation was common, with the women frequently reporting that they were now frightened of being alone. Some women moved house afterwards, some got people to stay with them, whilst others obtained dogs or took some other action by way of self-defence:

I thought about suicide and didn't want to live. I lost a stone in weight. Now I wake up easily and I take sleeping pills so that I can sleep. I don't know how I coped for the first few nights at the flat after the rape. I don't like being alone. I moved as a result of the rape - early in the morning. I'm still afraid because the rapist knows where I work. I feel bitter about not being able to live alone. I had thought my home was secure. The windows were really difficult to open. I'm angry that my lifestyle has changed so much. I've changed my hair - it used to be long before. I didn't want people to recognise me. I feel physically sick and I don't want to eat - I don't feel like eating. The

rapist said I had big boobs so I took off weight. I feel unhappy at work but I'm still there because I don't know what else to do. I haven't got any new friends, certainly not men friends. Men are capable of rape. I can't envisage any sexual relations with a man.

I just wanted to forget it all - just wanted to be on my own for a while. I didn't want to see anybody. I wouldn't go down to the shops at all. I am worried he might get me when he gets out. My big fear is what is going to happen when he gets out.

Rape has increased my paranoia and restrained my freedom ... I feel scared all the time and angry about this ... It shakes one's confidence. It rips shit out of your confidence. I had to be forced to take a job. I couldn't make the effort and I was afraid. Men don't realise this.

Many victims spoke about the effect of the rape upon their sexual identity and sexual activity, and reported that their relationships with friends, boyfriends, husbands, authority figures and men generally were impaired:

I always cherished virginity and I lost it. I have, I think naturally, longed for marriage but this would probably be harder now that I am not a virgin. It has often been on my mind.

After the rape I experienced a long period of promiscuous behaviour - looking for affection I suppose. I don't think I had a good self-image. The more I went to bed with guys, the worse I felt. I drank a lot also. I'm still struggling with feelings about self-worth and about my self-image ... I feel I am slowly getting somewhere. It is difficult to know what influences are responsible for this. The sexuality and gender thing is very important. I couldn't work out my own need and desires ... Women need to know the ultimate isn't going to bed with someone and that men don't have all the guns. Women should take the initiative in this as in other things.

For some victims, the dominant emotion was one of extreme anger and hatred for the rapist:

I've never hated anyone in my life before. It is awful now to actually hate somebody. I see him as sub-human. That's how I cope with him. I really want to track him down and kill him. I think he's some kind of animal. To actually want someone to die [is terrible]. I don't know why he did it. It's unresolved because he isn't being punished.

For victims whose complaint of rape results in a prosecution, this adjustment phase will probably coincide with their involvement in the court process. Although the victim might outwardly appear to be coping with her experience, the comments we received indicated that the trauma continues, albeit in a less obvious but nevertheless realistic way. Thus during this period of adjustment, when the victim is trying to come to terms with the experience, she might wish to change her mind

about proceeding with the complaint, find difficulty in coping with officials, attempt to play down or deny the rape experience, or be excessively sensitive to suggestions that her statements lack credibility.

(iii) The Integration Phase

In this longer term phase the victim learns to accommodate her rape experience. The length of this healing process is dependent on the immediacy or appropriateness of the support which the victim receives, and to a lesser extent on her personality and state of health.

Coming to terms with the rape experience was described by one victim as "a very long haul". Some women became involved in activities to help them cope, whilst others still felt unready to look outward. Several women were as yet unable to have any satisfactory relationships with men, and a number said that their fears were always close to the surface:

After being raped, the fact that men were wanting sex, planning it and talking about it, really freaked me out. Even my husband's needs do. He is my second husband ... so I'm not naive or inexperienced. I know I need psychological help but my psychologist hasn't helped me with my sexual problems. I haven't talked to her about this as much as I have with you. It has taken me months to work out what is hurting me.

I felt bitter towards my husband for not giving up his night job and leaving me alone. I hated being left alone. I felt our marriage could go. We did nothing but scream at one another. There was a terrific strain on our marriage. Sexually, I am still uptight and I don't know where to go. We had to shift and as a consequence faced additional financial difficulties. I thought sometimes of doing something bad to myself. It has taken 9-10 months for me to believe he won't come back. I changed my clothing and style of dress. There's no more black tights now.

You have to come to terms with the fact that there is no justice. If he had gone free [my husband] said he would have shot him. His reaction is that a stranger had invaded his privacy. We both need psychiatric help. Our parents were no help. They can't face the fact of rape. It would be helpful if a social worker saw parents and could make them understand.

Things started coming right between us when [my husband] changed jobs and we moved. I was still being clingy though and this must be very difficult for him.

You gradually get over the feeling you don't want anyone to know and feeling like a walking freak. We used to go to my parents for dinner on Sundays. I don't want to go now. My parents ... didn't help and they didn't try to understand. I find this hard to accept.

It cannot be stressed too strongly that rape is a degrading and humiliating experience for the victim. The victims who spoke about the nature of rape did not comment on the physical violence which accompanied it. Instead, it was the violence of the act itself and its mental and emotional consequences which they chose to discuss and which they found most destructive and crippling. Some victims complained that the emphasis given by the police and the court to their bruising and other injuries diverted attention from the violence of the act per se.

The women surveyed in this study saw the sexual connotations of rape as especially humiliating and degrading, since it invaded their deepest sense of privacy and involved a mental and emotional anguish which persisted long after the physical effects faded.

Rape is an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values, and generating fear. In short, rape involves considerable human cost to the victim.

2.2 THE CIRCUMSTANCES OF RAPE

Rape takes place in a wide variety of circumstances and situations. Our data tend to confirm that there is no such thing as a "typical" rape. Nevertheless, certain characteristics are more common than others.

The following information about rape situations has been compiled from three sources. The first was the 50 victim interviews undertaken as part of this study (Research Report 1). The second source was the 145 complaints to the police in 1981 which we examined and which were not excluded as unfounded (Research Report 2). Data obtained from the study of 83 court files dealing with rape trials in 1980 and 1981 provided the third information source (Research Report 3).

Apart from the interviews with victims who did not report their rape, the data base for this study was rapes which had come to official attention. As we discussed earlier, a large number of rapes are not reported to the police, and a larger proportion do not result in a prosecution. We thus cannot generalise about the characteristics of all rapes, as we do not know the extent to which reported rapes

represent all rapes. However, the focus of this study is the law in practice, as it relates to victims who come to official notice. Our main concern for the purposes of this Report, therefore, is the characteristics of those rapes with which the police and the courts have to deal.

(i) The Characteristics of Victims

Both the victim study and the police files revealed that just over half of the rape complainants were aged between 17 and 24 years. Thus it was this age group which appeared to be particularly at risk. However, the ages of the complainants varied considerably, indicating that all women may be potential victims: just under a quarter of the complainants in the police files were aged 16 years or under, the youngest was five years old and the oldest was aged 87 years.

Single women featured prominently as victims, although this was probably principally a reflection of the victims' ages. Similarly, the occupational status of victims reflected the prominence of the younger age group, as many were school-pupils. Even so, the victims covered a broad range of occupational groupings, with the unemployed, those in unskilled occupations and housewives or solo mothers being particularly prominent.

In those cases where ethnic origin was noted, the police files showed that just under two-thirds of the victims were Caucasian. However, a higher proportion were of Maori origin than would be expected on a national population basis (22%). This may, in part, have been a reflection of their occupational status, the haphazard manner in which the police sometimes determine their race, and the irregularity with which this is noted on the file.

(ii) Relationship between Victim and Assailant

Each of the studies showed that the largest single group of assailants were strangers to the victim (50% in the victim interview study; 33% in the study of police files; and 28% in the study of court files). The second most common type of offender in all these studies was an acquaintance of the victim; and in the large majority of cases coming to official notice the victim knew her assailant, sometimes intimately and sometimes merely by sight.

(iii) The Rape Event

The majority of rapes involved just one assailant, but about a quarter of the complainants were raped by multiple assailants, sometimes numbering up to ten. In fact, more assailants were involved in multiple rapes than in single rapes.

Almost two-thirds of reported rapes occurred late at night or in the small hours of the morning, and usually on Fridays, Saturdays and Sundays. Thus, in this respect, rapes do not differ markedly from other crimes of violence (Bradbury, 1982). The rapes took place in a wide variety of locations. Only about a third of those we examined occurred in a public place. The majority of offences were committed in the home of the victim or the assailant, or in a car, with the victim's home being the most frequently reported location. This was no doubt due to the fact that the assailant was often known to the victim, although some attacks were certainly committed by a stranger who broke into her home. It should not, of course, be assumed that women are necessarily more at risk at home than elsewhere, since they probably spend more time there.

In about two-thirds of the attacks, the victim succumbed to the rape after the assailant had applied physical force. In another 20% of the attacks submission was obtained by the threat or use of a weapon. Although physical force was commonly applied to overcome the victim's resistance, serious physical injuries were infrequent. The police and court files frequently referred to grabbing and pushing, and the injuries incurred, if any, consisted of bruising and minor abrasions. The great majority of victims either were not injured, or suffered physical injuries which did not require medical treatment.

Most of the attacks consisted solely of vaginal intercourse. Nevertheless, in as many as a third of them, some other sexual assault was committed. This most often took the form of cunnilingus or fellatio. Infrequently, the assailant committed anal intercourse or inserted some other part of his body or some other object into the victim's vagina.

CHAPTER 3

THE POLICE PROCESSING OF RAPE COMPLAINTS

3.1 INTRODUCTION

The police are usually the first official agency with which rape complainants will come into contact after the offence. The police will also determine the initial outcome of a complaint of rape, since they must initially decide whether or not the complaint is genuine and whether or not there is sufficient evidence to disclose an offence. They must thus decide whether to initiate inquiries and to arrest and prosecute a suspect. If the police take no action, then the complaint proceeds no further. It is not surprising, therefore, that critics of the present system have been concerned about the way in which rape complaints are handled by the police. It is sometimes alleged that they are unsympathetic and insensitive in their treatment of a rape complainant; that they are unduly sceptical about the validity of rape complaints and the credibility of many complainants; and that they may blame the victim for the offence (for example, in the case of a prostitute or woman of dubious sexual mores), and therefore be unwilling to undertake a proper investigation. In these respects it is often suggested that police conduct is informed more by popular myths and stereotypes about rape than by a real understanding of the facts and nature of rape, and that as a result the police tend to operate by "rules of thumb" which focus on the complainant's credibility and character rather than upon the suspect (Edwards, 1981).

The overseas research literature is not entirely consistent in discussing police procedures in this area. On the one hand, some research in England, the United States and Australia has been highly critical of police practices (e.g., Wilson, 1978; Galton, 1975; Edwards, 1981). On the other hand, other research (e.g., Sanders, 1980) has suggested that the police are often the most supportive and understanding of all the agencies with which the victim comes into contact. In any case, of course, it is important to remember that the New Zealand Police differ in structure, organisation and personnel from overseas police forces, and it would be wrong to assume that the practices of overseas police are necessarily followed in New Zealand.

Nevertheless, it was apparent to us that many women in New Zealand do have a poor image of police methods of investigation in this area. For example, of the women in the victim interview study who had not reported their rape to the police, some cited the anticipated police response as one of their reasons for failing to report. They were uncertain or fearful of the police reaction, they were frightened of the police, they expected not to be believed, or they thought that the police would be unsympathetic and treat them poorly. These perceptions were based on their past encounters with police officers, socially or in other ways, and upon their general views of police attitudes and stereotypes about rape. Rape Crisis Centres also expressed their concern about police procedures, and the Auckland Rape Crisis Centre gave as one of the common reasons for not reporting rape "a fear of unsympathetic and/or disbelieving reactions from the police".

During the course of this research, we collected a comprehensive array of data about the police processing of rape complaints and victims' perceptions of police practices. These derived principally from the victim interview survey, from the study of police files and from interviews with 20 police officers. The victims resided in the greater Auckland area, Wellington and Christchurch. The police officers who were interviewed worked principally in these three districts, but interviews were also conducted with officers from Rotorua and from Police Headquarters in Wellington. The police files we studied covered the whole country. Although our material, therefore, is weighted in favour of the three main centres, it is by no means confined to them. In any event, the majority of reported rapes occur within these three metropolitan areas.

3.2 REPORTING A COMPLAINT OF RAPE

The police can investigate a complaint of rape only if they have been informed of it and have the initial co-operation of the victim⁽¹⁾. Although it might be easy to assume that contacting the police would be the victim's immediate reaction to the offence, this is generally not so. In the first place, as we have already pointed out, the majority of offences (perhaps as many as four out of five) are not reported to the police at all. There are a variety of reasons for this large non-reporting rate, which are discussed in more detail in Research Report 1. They include the victim's feelings of guilt, shame or embarrassment; her fear of the police response and legal procedures; her fear of rejection by family or friends; and her unwillingness to bear the social stigma of being identified as a rape victim. In cases where the victim knows the offender well - for example, offences committed by a father, male relative, workmate or de facto husband - she may also be inhibited from reporting by the effect which prosecution and conviction would have upon him or his family and her relationship with them. Indeed, for this and other reasons it was suggested to us that women should be able to advise the police informally of the occurrence of a rape (both for statistical purposes and so that the police have some information about the offender in case he reoffends), without being required to lodge a formal complaint which may result in prosecution.

Even when the victim does report the offence, she usually will not do so immediately. In the vast majority of cases in the police files we studied, more than an hour elapsed before the police were told of the alleged offence. Moreover, this usually occurred only after the victim had discussed the matter with another person, usually a relative or friend. In only 29 (17%) of the 173 rape complaint files we studied did the complainant report the offence to the police on her own initiative and without prior discussion with another person. The remainder were made by a third party or by the victim after consultation with another person. A substantial

- (1) The terms "victim" and "complainant" are used interchangeably in this and the next chapter for the purposes of convenience. The term "victim" is not intended to denote that all complaints to the police are genuine.

number of these (28%) were reported by relatives or friends, while 21% were reported by neighbours, strangers or others. In some of these cases, it was apparent that the complaint was laid entirely on the initiative of the party who reported the rape and, on occasion, without even the victim's knowledge.

Victims also did not necessarily mention the rape promptly to another person. Of the 160 rape complainants for which information was available, 56 (35%) immediately told another person, 50 (31%) informed another person within one hour of the rape, a further 50 (31%) within 24 hours and the balance of 4 (3%) waited at least 24 hours before mentioning the offence to anyone. Although a delay in telling someone about the offence, and in reporting it, made the complaint more difficult to investigate, there was no evidence to suggest that it was more likely to be false.

Because so many complaints were made by, or after a victim's discussion with, family or friends, it sometimes transpired that victims were not entirely willing to co-operate with the police and fairly quickly decided that they did not wish to proceed with the complaint. Of those complaints that were withdrawn in the police study, about half fell into this category. In a small number of cases the "victim" denied altogether that a rape had occurred. For example, one complaint was made by an ambulance driver who was taking a female hit-and-run victim to hospital and deduced that her injuries had resulted from a rape or an attempted rape. Despite her protestations that she did not remember having been raped, the police persisted in treating the complaint as a genuine rape until investigations some days later confirmed that it was not.

Complaints which are later withdrawn or are thought to be false, therefore, are often mistaken reports which originate from overzealous relatives, friends or even strangers.

3.3 THE POLICE RESPONSE TO A RAPE COMPLAINT

Rape is generally regarded by the police as a serious offence, the investigation of which warrants extensive resources equivalent to those allocated to other serious offences against the person such as murder, kidnapping and armed robbery. Their actual response to a rape complaint, however, will vary considerably, depending upon the circumstances of the complaint and the way in which it comes to police notice⁽²⁾. If the complainant has washed and changed her clothes in the meantime, then the police are first likely to concentrate upon determining the veracity of the complaint and taking a statement from the complainant, before they allocate any further resources to the investigation. Similarly, if the complaint is being made against a relative or friend whose name and whereabouts are known, and there are minimal injuries, then the inquiry might be conducted by no more than one or two police officers. If there are significant injuries, however, the police may assign a large team of detectives to search the scene, locate a suspect, and conduct other general inquiries.

When the police receive a complaint of rape shortly after the event, the woman will be asked not to change her clothes nor to wash, and to remain where she is until the police arrive. The first unit to respond to the call will sometimes be uniformed officers. Such officers will usually summon a detective or detectives from the Criminal Investigation Branch. The complainant will be asked for initial details about the attack and the assailant, so that appropriate resources may be promptly dispersed to locate the assailant (if appropriate), and to preserve any forensic evidence at the scene of the offence. The complainant will then probably be taken to a police station for a full written statement and a medical examination. While this is happening, other detectives may be undertaking a search of the scene of the crime. Further, the police may wish to take a statement from the person to whom the complainant first made the complaint, and from other potential witnesses.

(2) A more detailed account of police procedures is given in Research Report 1 and Research Report 2.

A complainant's initial encounter with the police is likely to be an arduous one, since she will often be confronted by seven to eight hours of questioning and medical examination before she can return home. In some cases, the police will also visit her at home the next day to follow up details and to collect further evidence. This may have a considerable impact upon her employment and, in general, upon an otherwise ordered lifestyle.

3.4 UNFOUNDED COMPLAINTS

As was noted in Chapter 1, one of the unusual features of police statistics on rape complaints is the high proportion (45% in 1981) which are closed as "no offence disclosed". This type of statistic has sometimes been used as a basis for the criticism that the police are too inclined to disbelieve rape complainants and decide that a complaint is false.

In fact, we found the police classification of complaints in this respect to be unsatisfactory and misleading. Files which are closed as disclosing no offence include not only unfounded and withdrawn complaints, but also those in which there is insufficient evidence either to determine whether or not the complaint is genuine, or to prosecute a suspect who has been located. Some of the concern about the police processing of rape complaints therefore arises from a literal reading of what is actually a statistical artefact. The large number of complaints filed as "no offence disclosed" does reflect the difficulties the police have in obtaining sufficient evidence to substantiate many complaints of rape, but does not accurately portray the proportion of complaints which are believed by the police to be unfounded and dismissed as such.

In December 1982, Police Headquarters issued a circular to all police districts reminding officers that complaints should not be cleared as "no offence disclosed" when there is insufficient evidence on which to base a prosecution. However, it is unlikely that this will have a marked impact upon present police practices. In cases where there is insufficient evidence to proceed, the only alternative under the present computerised classification system is to record offences as uncleared. Given that police efficiency tends to be measured by clearance rates - that is, the extent to which crimes reported to the police are cleared by arrest and prosecution, a caution or a finding of "no offence disclosed" - it is probably unrealistic to expect police officers to classify as "uncleared", cases in which there is an identified suspect but insufficient evidence to take action. It is just as unrealistic to expect them to do this when they are uncertain whether the complaint is genuine or not.

The Advisory Committee On Women's Affairs and the Wellington Rape Crisis Centre submitted to us that the present police classification is inadequate, and in particular that the withdrawal of a complaint should not carry with it a presumption that the complaint is false. They suggested that the current police classification of closed files be reviewed and made more detailed. It seems that their criticisms could be met by the creation, at least, of separate categories, firstly for "withdrawn complaints", and secondly for complaints where there is "insufficient evidence to proceed".

In our study of police files, we tried to estimate the number of complaints which appeared on the information available to us to be unfounded. Before we determined that a complaint was fabricated, we required an acknowledgement on the file to that effect from the complainant or independent evidence to support the police opinion. (For a more detailed discussion of this, see Research Report 2). On this basis, we decided that a minimum of 28 rape files and five attempted rape files (16% and 9% of all the complaint files respectively) were unfounded complaints. In addition, one or two of the 34 complaints which were withdrawn were considered to be unfounded.

Several reasons for the making of an unfounded complaint emerged from the files :

1. As indicated earlier, the most common reason was the fact that the complaint was made by or at the insistence of a third person, and not on the initiative of the alleged victim. Indeed, there were 13 such cases where the alleged victim denied altogether that rape or attempted rape had occurred; and in two further cases the complainant quickly admitted when interviewed by the police that intercourse had been consensual. These complaints were not false, in the sense of being malicious or deliberately fabricated. Rather, they usually stemmed from a mistaken interpretation of circumstances or events by others.
2. In five cases, all the complainants were aged 17 or under, and rape was alleged because of a concern about a parent's reaction, often their father, to some behaviour. Two of these complainants were charged with making a false complaint.

3. In three cases, the complainant had a history of psychiatric illness which led the police, after further inquiries, to decide that the complaint was false. The nature of the evidence strongly supported the police conclusion.
4. In two cases, the complainant and a male friend were unexpectedly discovered in compromising circumstances. It seems that in her embarrassment and surprise the woman alleged rape, which she acknowledged within a relatively short time to be false.
5. Two apparently false complaints were made by women because they were under considerable emotional stress, stemming from marital discord.
6. Finally, one unfounded complaint involved an allegation of rape against a husband with whom the complainant was living. Although this might have constituted indecent assault, it was incapable legally of amounting to rape.

In addition to these complaints which seemed to us to be unfounded, there were a further 39 rape and 7 attempted rape complaints which we classified as possibly true/possibly false. In a number of these cases the police believed the complaint to be false or at least expressed serious reservations about its genuineness. We could not determine the extent to which their opinions in these cases were justified, and we therefore do not know whether or not they were too readily inclined to label a complaint false.

The police officers we interviewed usually mentioned the problem of unfounded complaints. They differed enormously in their estimate of the frequency with which such complaints were made, some believing that they were very frequent (as high as one in two), and others saying that they were "very rare". This variation in opinion is scarcely surprising, since detectives have virtually no means of gauging the national pattern of unfounded complaints, and may well assess the frequency of such complaints on the basis of their own limited, and possibly atypical experience. The problem is that, as some police officers admitted, they may be cautious or sceptical in their initial investigation because of their perception of the frequency of false complaints; and a police officer who believes that one-half or one-third of rape complaints are unfounded may establish a self-fulfilling prophecy in which his "experience" is reinforced by his own response to, and handling of, such complaints.

3.5 VICTIMS' GENERAL PERCEPTIONS OF THE POLICE

In the victim interview study, those victims who had reported the offence to the police were asked to give their impressions of police attitudes and the police response to their complaint. Their responses varied a great deal, ranging from glowing praise to severe criticism. Overall, their positive and negative responses were fairly evenly balanced. In fact, only two women had predominantly negative perceptions of the police. Most felt that they had generally received "a good deal", as one woman put it, and that at least some of the police officers they had encountered had been helpful and sympathetic. They particularly appreciated detectives who were understanding and supportive, and who not only did their job properly but were also kind and thoughtful. Some officers, for example, arranged for the victim's clothing to be laundered, provided her with cigarettes, coffee, etc., or took the time and trouble to explain to her what was going on (routine matters to the police but alien and daunting for the victim).

The negative comments of the victims focused upon four main areas of police practice. First, many of them gained the impression at some stage of the investigation that their complaint was treated with scepticism or disbelief, and they found this one of the most upsetting features of their encounter with the police. They felt that they had to convince the police of the veracity of their story, and that the police were "testing" them. Certain aspects of the police interview, such as questions about their personal life or queries about slight anomalies in their story, made them feel vulnerable, as if they themselves were on trial and needed to justify themselves. Occasionally a detective directly raised the possibility that the complainant was not telling the truth. This tended to sour an otherwise good police-victim relationship.

Secondly, many victims commented that some police officers lacked the personality, experience and sensitivity to handle a rape complaint properly: they were too young, they did not understand the complainant's feelings, and they were incapable of establishing any rapport with her. The fact that police officers varied in their skill at dealing with rape complaints, of course, is only to be expected in a large police force, particularly in view of the comparative infrequency of rape enquiries. The police themselves acknowledge that there are some detectives who are far better suited to this type of investigation than others.

The third complaint from some rape victims was that the police sometimes seemed to be too busy with their own investigation to have proper regard for the victim's feelings. For example, they disclosed details of the case to the media, so that the victim could be identified by those who knew her, without telling her or seeking her permission. In one case, this occurred before the victim had had an opportunity to inform her parents about it. There were also instances where, to the victim's acute embarrassment, the police turned up unexpectedly at her residence or work-place. One victim further complained that the police searched her flat without giving her an explanation. There were probably good reasons for this from the point of view of the police investigation. Yet it made the victim feel merely a cog in the criminal justice machine. As one victim described it, she felt like she "was a pawn in the police hands for them to win their case, rather than the person to whom it had all happened".

Finally, some victims commented that the police did not liaise with them properly or give them an adequate explanation of various police and criminal justice procedures. Although most victims were given reasonable assistance and told what to expect in court, some felt that they got no help at all. They did not know who to deal with, they found it difficult to contact the detectives whose names they knew, and they therefore could not prepare properly for their court appearance.

Each of these negative comments from victims raise important issues about police procedure which require more detailed consideration and are therefore covered in the following sections.

3.6 CREDIBILITY AND THE ISSUE OF CONSENT

It was obvious not only from the victim interviews but also from the police files that many complaints were initially treated by the police with suspicion or caution. Many complainants were therefore bound to get the impression that they were disbelieved.

It is sometimes said (e.g., Scutt, 1976) that the complainant must completely convince the police that a rape has occurred before they will take action, and that where there are no aggravating factors, such as bleeding, severe abrasions or broken bones, the police will rarely if ever prosecute. The data we collected in the New Zealand context did not support this view. Of the 52 prosecuted rape cases in the police study, ten complainants suffered no injuries at all, and a further 33 had minor injuries that did not require medical treatment. Furthermore, in at least eight of these cases the police prosecuted, even although they had some doubts about the case and knew that their evidence was equivocal at best. Similarly, in the study of court files, 34 (41.4%) of complaints had no injuries at all, and in 18 of these cases at least one defendant was convicted.

Nevertheless, many police officers were clearly more sceptical about cases which lacked independent evidence (such as injuries, ripped clothing, etc.) from which the genuineness of the complaint could be assessed. As some police officers pointed out in interview, such cases, of necessity, depend heavily upon the apparent veracity and consistency of the complainant's account. Rapes seldom occur in the presence of uninvolved witnesses, and the police will frequently be confronted by a direct conflict between the complainant's and the suspect's accounts, with minimal evidence to corroborate either one. This is particularly so where lack of consent, rather than identity or the fact of intercourse, is in dispute. It is perhaps significant that many of the 46 police files of rape or attempted rape which we classified as possibly true/possibly false complaints, hinged upon the issue of consent.

In these cases, the police seemed to assess the complaints, and to determine their course of action, partly on the basis of what they called a "sixth sense" or "gut feeling" derived from their experience, and partly by reference to factors primarily relating to the complainant. These included the appearance and state of her clothing, her injuries, her general demeanour, her degree of co-operation, her

previous relationship with the suspect, her general sexual behaviour, the consistency of her story, and the time gap between the incident and her reporting it to others and to the police. Sometimes the police confessed to having doubts about the veracity of the complaint, and closed the file, without having located or interviewed any suspect at all. They thus reached their conclusion almost entirely by reference to the background, character and personal appearance of the complainant, and the circumstances under which she made her complaint.

The complainant's apparent credibility is relevant to the police for two reasons. First, the police have legal concerns, that is, before initiating a prosecution they must determine both that the complaint is genuine and that there is enough evidence available to establish a *prima facie* case. Secondly, they must also take into account practical considerations which will affect the likelihood of a successful prosecution. They recognise that, in practice, evidence to corroborate the complainant's account is almost essential for the purposes of prosecution, and that, because of the circumstances in which many alleged offences occur, overwhelming corroborative evidence is seldom available. The less the corroborative evidence, the more the prosecution must rely upon the complainant's account to prove its case. Even if they consider the complaint is genuine, therefore, the police feel that they must assess, for practical reasons, whether the complainant is likely to make a credible witness in court. In many cases, particularly when the suspect maintains that the complainant consented, such practical concerns are likely to assume greater importance than legal concerns.

It was apparent, from the files and from our interviews, that the police themselves do not always distinguish between such legal and practical concerns. For instance, in interview, some detectives seemed confused about the relevance of the complainant's prior sexual behaviour. Some thought that her character, both sexual and non-sexual, was an indication of her general reliability, and that a promiscuous woman was more likely to make a false complaint, although they were unable to explain why this should be so. Others were more concerned about the extent to which a complainant's general character and sexual mores would affect how credible she would appear as a witness in court. Many police officers, however, failed to differentiate between these two issues.

There are, of course, good reasons why the police should ask a complainant about her sexual behaviour, at least in the immediate past, since recent consensual sexual intercourse might affect the validity of forensic evidence. More generally, it is necessary for the police to be forewarned of the sexual character of the complainant in case this should later be raised, directly or indirectly, by the defence⁽³⁾.

However, some police officers seemed to use the evidential difficulties which might arise from such factors as a way of judging the genuineness of the complaint itself. They were thus inclined to assess the veracity of the complainant according to their view of possible jury attitudes and the likely outcome of a prosecution in court. Consequently, the amount of evidence required to convince them that a rape had occurred might have been higher than that needed to establish a *prima facie* case.

The genuineness of the complaint on the one hand, and evidential difficulties on the other, are of course related considerations. However, a failure to distinguish between them might have undesirable consequences. First, it might affect the approach which a detective or team of detectives takes to the investigation itself - for example, the manner in which they proceed, the number of people they interview and the type of questions they ask. Secondly, and more importantly, any tendency by the police to prejudge the veracity of the complaint or to treat it with unwarranted scepticism in the initial stages, could upset or embitter the victim or increase her feelings of anger and frustration.

(3) Despite the Evidence Amendment Act 1977, indirect evidence of the complainant's sexual character may occasionally be given. In any case, the defence may seek the judge's leave under the Act to adduce such evidence directly.

3.7 POLICE EXPERIENCE AND TRAINING

Rape investigations are almost invariably undertaken by members of the Criminal Investigation Branch (C.I.B.), who will nearly always be male. In the main centres, the detectives whom a complainant will encounter will often have considerable experience in conducting rape inquiries, and will sometimes be members of a squad which concentrates upon interpersonal violence and sexual offences. Sometimes, however, they may be dealt with by detectives who have just begun their training with the C.I.B., and who will therefore be inexperienced in dealing with such complaints. In rural areas, it is probable that the detectives will be older and more generally experienced, but because of the infrequency of rape complaints in these areas, they may have conducted only a few such inquiries. Further, in the urban areas, the police will have considerable resources available by way of manpower and technical expertise, which will not be so readily available in rural areas. A detective's experience, and the resources available to him, will therefore differ widely both within and between areas.

It is sometimes suggested in the literature that special sexual assault squads ought to be established to ensure that victims deal with detectives who are properly trained in such matters. The Auckland, Wellington, Christchurch and Whangarei Rape Crisis Centres all recommended the establishment of special police squads in the main centres in New Zealand to deal with sexual assaults, and the introduction of special and exacting training for members of these units (which should also include women wherever possible) to enable them to understand and support victims of sexual violence. Some overseas jurisdictions, particularly in the United States, have already established such squads⁽⁴⁾, while others have effected more limited specialisation. South Australia, for instance, has used specialist women police officers to deal with many aspects of each rape investigation. Their duties have included accompanying the complainant through the investigation, counselling her and explaining all aspects of the inquiry to her.

(4) For descriptions of such squads, see Battelle Law and Justice Study Centre (1977) and Sanders (1980).

The police in New Zealand point out that, as a practical consideration, insufficient offences occur in any area to justify a specialist sexual assault squad. In Wellington and Christchurch, there is a central squad which deals with rapes, together with other violent crime. In Auckland, the C.I.B. is largely decentralised, and rape complaints are handled by the general squad based at various police stations. Even if a central specialist squad were created to cover the greater Auckland area, it is the police view that the number of complaints would still not justify the resources required to provide 24-hour coverage by such a squad. The police view in this respect is confirmed by a report from the Law Enforcement Assistance Administration in the U.S. (1975), which suggested that at least 200 complaints per annum are necessary before a special rape squad becomes viable. In the greater Auckland area, the number of complaints per annum totals no more than 80 or 90. In all other centres, of course, the number of complaints is far lower.

Rape Crisis Centres have also recommended that in country areas trained police women be assigned to sexual assault cases, and that complainants in all areas should have the option of being interviewed by a female police officer. Some of the victims who were interviewed were not particularly concerned that the person taking their statement or questioning them had been a male detective. It was also evident from the interviews with police officers that most detectives did not regard it as essential, or even necessarily desirable, to use female police officers to interview rape complainants, although some indicated that they would use them if they were available. However, other victims who were interviewed found it embarrassing to talk to a male detective, saying that they would have found a female police officer far easier to talk to, especially about the details of the rape itself. From the victim's perspective, therefore, there is considerable force in the submission that more use should be made of policewomen in such cases.

It should be pointed out, however, that this might be difficult to implement, given the present structure of the police. In most areas there are no female detectives, and on some shifts there may be no female police officers on duty at all. There might also be disadvantages in having complainants interviewed by women who are not trained in C.I.B. work. Nevertheless, despite the administrative difficulties, this is an area where a victim's feelings need to receive more consideration.

The one area in which both the police and others, such as Rape Crisis Centres, saw the need for improvement was police training. The Wellington Rape Crisis Centre submitted that there should be special training for police officers who are dealing with the victims of sexual violence, and that this should be co-ordinated with on-going care programmes provided by Rape Crisis Centres. Training would need to cover the trauma of rape, attitudes about rape and rape victims, and sensitive interviewing techniques. The detectives whom we interviewed themselves thought that police officers were sometimes not sufficiently understanding of the effects of the rape trauma upon a complainant, especially in the first 24 hours or so after the offence. They noted that, because they needed to proceed with their inquiries urgently, they could easily overlook the feelings of the complainant. For instance, they might omit to offer her the opportunity to clean herself up and have a wash after the medical examination.

It is fair to state that the police are already taking active steps to improve their training in this area. There is also an increasing realisation that an approach which includes an understanding of the devastating effects of the rape experience can be incorporated into police procedures without hampering the successful conclusion of an inquiry. The police training programme, revised in 1981 and issued in August 1982, includes a paper on interview techniques with rape victims (Rape - Notes on Interviewing : Lesson Note 1). The paper points out that rape is a frightening experience for women and that victims react in a variety of ways, any of which may be appropriate for the individual woman. Police officers are urged not to be initially judgmental about these reactions, nor to ask questions which may be interpreted as blaming the victim: "the police officer's primary task at this junction is to support the victim, not to put her on the stand" (para. 7).

The paper also notes the conflict between the need for the police to gather evidence speedily and efficiently in an endeavour to solve the crime, and the needs of the victim experiencing the trauma of rape. The following approach is recommended :

The most important thing a police officer can do is to help the woman regain a sense of control over her life and the events that occur therein. One way this can be done is for the Police, whilst retaining actual control over the proceedings, to allow the woman to feel that she too is dictating the exercise of the investigation. Put another way, the Police can afford to abdicate some of

the attitudes of control to the woman whilst retaining actual control. The distinction lies in style rather than substance. This stance can be conveyed in many ways:

- drop a directive stance in favour of a consultative one ;
- fully explain your reasons for all questions, actions, etc. ;
- ask for her co-operation ;
- use plain, non-technical language instead of jargon ;
- adopt a friendly and guiding role ;
- treat her as an important member of the investigating team and keep her fully informed of events, etc.

This type of approach will encourage her to feel positive and co-operative to the investigation and prosecution. It will also lessen any further feelings of having lost control of her life (para. 1).

Although it appears from the victim interviews and the interviews with police officers that not all detectives follow these guidelines at present, the police are taking active steps to improve their practice, and in a few areas, such as Wellington, are involving victim support groups in their training programme.

3.8 POLICE LIAISON WITH THE COMPLAINANT

The police were asked in interview whether they explained the court process to the complainant, and at what stage they did so. Their answers revealed a difference in practice. Others said that the complainant was told before her statement was taken, but in a diplomatic way so that she would not be discouraged from making a complaint. Others said that they would mention it during the interview, in order to explain why particular questions were asked. Some said that they explained the court process after the statement had been taken, and that, in effect, they gave the complainant an opportunity to withdraw her complaint. Some said that the complainant would not be told about the court process until each stage of that process was reached. Finally, some said that it depended upon the circumstances of each complaint.

The victims who were interviewed agreed that different police officers provided varying amounts of information about the criminal justice process. Some said that they found it difficult to absorb the information at the initial interview, but appreciated an explanation of the process a day or two later. Others said that they would have preferred a written account which they could have studied in their own time (a practice which is now adopted by the New South Wales Police). Generally, the more detailed the explanations that were given, the better the complainants felt.

It is obviously desirable that the complainant be as aware as possible of the details of the court procedure, and that she have effective contact with the police at all stages of the investigation and trial processes. This will do much to alleviate her anxiety, and to keep her informed about subsequent procedures. It also has the added advantage of providing her with support during the difficult period between the preliminary hearing and the High Court trial, when some complainants wish to have nothing further to do with the court process.

It will be clear from what we have said already that, although some complainants may be given adequate information, there is still room for improvement. After the complainant's statement is taken, the police do make efforts to appoint one officer to liaise with her for the duration of the inquiry and trial. However, in practice this does not always work satisfactorily: hence the criticism of one or two victims who were interviewed about the lack of liaison with the police. Of course, it is not

possible to allocate one officer to deal with the complainant right from the beginning because of changes in shifts and the allocation of duties to different squads. Indeed, we learnt of one case where a complainant was seen by six different detectives at various times within the space of two days, after which she withdrew her complaint. This was due entirely to changes in shifts, and to the fact that the investigation of the complaint was allocated to a different squad after the first 24 hours or so.

These operational problems should not prevent the police from being aware of the importance of adequate and effective communication between them and the complainant. If a complainant is successively interviewed by several different detectives who are all strangers to her, then she may well be less willing to co-operate with the investigation and less likely to provide accurate and reliable information. Moreover, if she does not know which detective to contact throughout the trial process, she may well have less opportunity to prepare herself for her ordeal in court.

3.9 THE MEDICAL EXAMINATION

In any case where rape is alleged to have occurred, the medical examination of the complainant is an indispensable part of the collection of evidence. It may provide both proof of penetration and evidence of the degree of external and internal injury to the woman. From the other specimens - such as vaginal swabs, blood and saliva samples, and samples of pubic hair and head hair - that are obtained during the medical examination, the D.S.I.R. may later be able to provide evidence of intercourse, and evidence to link a suspect to the offence. Both the doctor who examines the woman and the D.S.I.R. scientist who conducts the forensic tests, are likely to be called as prosecution witnesses in any subsequent trial. The D.S.I.R. and Chief Police Medical Adviser have together developed a Sexual Assault Kit to ensure that medical examinations are done systematically, and that the appropriate evidence is collected in every case.

The medical examination is conducted by a police surgeon at the police station or doctor's surgery, or occasionally at a hospital. In Auckland, the medical examination may be conducted at the HELP Centre, which is a victim support centre run by a private trust for rape and sexual assault victims.

A few of the detectives we interviewed said that the complainant might be allowed to choose her own doctor, but the general practice was to arrange for a police surgeon to conduct the examination. Police surgeons are doctors in private practice as general practitioners who undertake work for the police on a contractual basis. The police preferred to use these surgeons rather than other doctors, as they are more familiar with the requirements of the Sexual Assault Kit and are aware that they might later be required to give evidence in court. The practice seemed to be to arrange the examination before a statement was taken from the victim, although some police officers mentioned that they might delay the examination for an hour or so if they had doubts about the genuineness of the complaint.

During the course of this research, we encountered several criticisms of medical procedures from victims, police officers and one police surgeon. These criticisms can be summarised as follows :

1. While some victims found the police doctors sympathetic and understanding, others found them cold, business-like and insensitive. One even described the police surgeon as "arrogant, brutal and unthinking".
2. There was criticism, both from some victims and from one woman police officer we interviewed, that police doctors often failed to explain to victims why they were conducting a particular examination or taking certain samples. Many of them also made no effort to explain to victims the relevance of certain questions appearing in the Sexual Assault Kit form - for example, the type of contraception, if any, used by the complainant.
3. Some victims found it upsetting and embarrassing to have a woman police officer present in the room during the medical examination, and did not know why she was there. It appears, too, that some policewomen felt awkward and uncomfortable in this role.
4. Many detectives expected the police surgeon to pass an opinion on the complainant's veracity, primarily on the basis of her medical condition, the nature of her injuries, and her degree of distress. This opinion sometimes influenced the police in reaching a decision on the genuineness of the complaint. In view of the fact that the doctor's opinion is formulated under highly artificial conditions, there are obvious dangers in placing too much reliance upon it.

As well as these specific criticisms, we also encountered a number of more general concerns. A police surgeon practising in Auckland suggested (Daniels, 1982) that medical personnel generally do not receive adequate training to meet the medical and counselling needs of victims of sexual violence, and that the treatment which rape victims receive from both police surgeons and their own general practitioners is unsatisfactory. Certainly there is, under present medical procedures, a virtual absence of follow-up services for the rape victim. Some police surgeons apparently do not even give advice on contraception⁽⁵⁾ or venereal disease, and certainly do

(5) Section 5 of the Contraception, Sterilisation and Abortion Act 1977 actually places a duty on the medical practitioner to do so, unless the complainant expresses a contrary wish.

not tell the victim where she can later go for counselling or support. If they do anything, they are likely merely to refer her to her own general practitioner who will often not be qualified to meet her special needs.

There were also complaints about the lack of female doctors acting as police surgeons, since some victims would certainly prefer to be examined by a woman. Apparently, female doctors are reluctant to apply for appointment as police surgeons, since they do not want to be involved in the range of duties that this would entail. At present the police prefer to use male police surgeons than to call on woman doctors who have not been appointed as police surgeons.

A further general concern is that in some police districts medical examinations are still conducted in rooms in police stations (usually near the cells). These rooms are poorly lit, inadequately furnished and quite unsatisfactory for conducting a medical examination. Such an environment does nothing at all to relieve the tension and anxiety being suffered by a rape victim. The police acknowledge this, and in most areas endeavour to have the examination conducted in the doctor's surgery.

Most of these specific criticisms and more general concerns about current medical procedures appear to have been met by the HELP Centre⁽⁶⁾, which was established in Auckland in 1982 with the full support and participation of both the police and local police surgeons. The Centre provides facilities for the conduct of medical examinations, and victims both from the Auckland Central Police Station and, to a lesser extent, from other police districts in the greater Auckland area are taken to the Centre for that purpose. The roster of doctors for the Centre includes a number of female practitioners. During the examination itself, the victim is accompanied by, and receives support from, the HELP counsellor. No police officer is present. After the medical examination has been completed, complainants are able to shower and receive a fresh change of clothes before returning to the police station. Counselling and follow-up services are also provided for the victim. This is a welcome development, which is unfortunately at present confined to the Auckland area.

(6) The development and work of this Centre will be described in more detail in the next chapter.

CHAPTER 4

VICTIM SUPPORT SERVICES

4.1 INTRODUCTION

In recent years, there has been increasing recognition of the fact that victims of many different types of crime need support and practical assistance which have hitherto been unavailable. Hence the growth in many countries of voluntary victim support services. In New Zealand, such schemes have developed slowly. Voluntary schemes to cater for all victims have only been established in Auckland and very recently in Wellington, and specialist support services for specific types of victims have rarely been available.

Rape is a traumatic experience, as Chapter 2 demonstrated, and the needs of the rape victim are pronounced and long term. She usually suffers major emotional and sexual problems in the aftermath of the offence, which may take her months or even years to overcome. These difficulties are caused both by the nature and effect of the rape itself, and also by the negative social attitudes which often stigmatise the rape victim and add to her problems of adjustment.

Furthermore, if the victim reports the offence, she will probably endure far more anguish in the criminal justice process than most other victims of non-sexual violence. She must try to convince others of the truth of the degrading act upon her person, the details of which are often intimate, humiliating and embarrassing. In doing so, she is forced to recount and relive the experience several times.

Common sense tells us that the quality of support a victim receives, particularly from her family and others who are close to her, will have an important bearing on her ability both to come to terms with the fact that she has been raped and to handle the ordeal of the criminal justice process. This was certainly the experience of the victims who were interviewed. Indeed, the extent to which they received appropriate support was clearly crucial in determining how long they took to adjust to the rape and how well they coped when giving evidence in court.

Most of the victims received help from some source. Although a number of women received their main support from close relatives or boyfriends, this help was often insufficient or inappropriate; and it was significant that a large number were unable, for various reasons, to look to their immediate family at all for any support. It must be a matter of concern, too, that as many as 10 out of 50 reported that they received no assistance from any source whatsoever, and a further two regarded all the support they received as inappropriate for their needs.

It must also be remembered that rape is an experience which affects not only the victim but also her family, friends and other close associates. Husbands, boyfriends and parents may find it difficult to accept that she has been raped; they may tend to blame her for it; or they may simply be unable to understand the psychological impact it has had on her. For example, some of the victims we interviewed did not receive adequate support from husbands or immediate family members simply because those persons also needed support and counselling in order to gain a proper perspective on, and understanding of, the offence and its effect on the victim.

There is strong reason to believe, therefore, that the present levels of support for the rape victim and those associated with her are sometimes woefully inadequate. Of course, it is not merely because of the absence of support services that victims do not receive the assistance they need. Some victims may lack the confidence to approach such services, or may for other reasons be unwilling to do so. However, it is evident that some are simply unaware of the services which are available. It is, in our opinion, imperative that adequate support services be offered to all those who are in need of them.

The main support services provided specifically for the victim of rape and sexual assault are those offered by Rape Crisis Centres, by the HELP Centre in Auckland, and to a lesser extent by Women's Refuge Centres for the victims of marital rape and child sexual abuse. Rape victims who report the offence to the police will also usually be examined by a police surgeon. As we discussed earlier, however, police surgeons conducting a medical examination on behalf of the police will treat any immediate physical injuries and obtain samples required for D.S.I.R. analysis; but they are not paid or equipped, and apparently not usually motivated, to help with the victim's psychological trauma or to offer either advice or treatment about possible pregnancy or venereal disease.

Apart from these services, other support to the victim is patchy and frequently inadequate. Some hospitals, apart from emergency treatment in casualty departments, provide counselling and follow-up care through social workers; and Family Planning Clinics have begun to include victim care in their services. General medical practitioners, social workers and other counsellors may also provide sympathetic support and assistance on an individual level. These are, however, unsystematic or ad hoc services which vary greatly in their quality between areas. In our view the community at large is insufficiently aware of the acute physical and psychological needs of many victims of rape and other types of sexual assault. As a result, there is no special provision for victims in hospitals; no comprehensive crisis management teaching in medical or nursing courses; and no special training for police surgeons.

For this reason, we have concluded that this is an area where there is an urgent need for improvement. In fact, there was virtual unanimity amongst groups whose views we received that the development of an adequate range of properly funded agencies to provide assistance to the victims of sexual assault will do more to ameliorate the plight of the rape victim than any reform of the substantive or procedural law. For example, 15 of the 23 judges and 18 of the 32 lawyers who responded to our questionnaire, identified victim services as one of the three most important areas in need of improvement in dealing with the problem of rape.

It has been suggested (e.g., Daniels, 1982) that Sexual Assault Units, attached to the major hospitals, should be established to provide specialist medical and counselling services for sexual assault victims. Such units have recently been established in New South Wales. They have the advantage of providing a continuous, professional and fully-funded service, and we understand that women's groups in New South Wales feel that some have been a success. Nevertheless, we have doubts whether such units would be appropriate in the New Zealand context for three reasons. First, they would provide services within a clinical environment which some victims might find unsupportive and stigmatising. Secondly, many areas of the country - particularly the smaller provincial centres and rural areas - would continue to go unserved. Thirdly, they would divert financial and other support from the victim support services which are already being established in the voluntary sector. Instead of placing further responsibility upon the hospital boards, it is arguable that these existing services should be developed, extended to all areas and given proper official backing and financial support.

There was general agreement at the Rape Symposium that those groups providing support and counselling services to victims should receive proper funding. One Workshop Group, for example, stated:

We strongly recommend that central Government funding be made available to support at least the basic plant costs and, if possible, the basic staffing costs of organisations such as Rape Crisis Centres, Womens Refuges, Black Women's Centres, Sexual Assault Counselling Centres (e.g. the HELP Centre in Auckland) and other community-based groups currently assisting the victims of rape, incest and family violence. Such funding would provide badly-needed assistance to groups currently operating on public charity and the self-sacrifice of their members, and would provide firm political recognition of the vital services that they - frequently in default of the official agencies - are performing. We would also urge, whenever possible, the provision of local government funding and support for such groups, bearing in mind the fact that the work of many such groups is intimately connected with the general health and wellbeing of the local community.

It may be helpful to provide a brief outline of the structure and function of the two principal services - Rape Crisis Centres and the HELP Centre - so that their full contribution to rape victims and to the community can be understood.

4.2 RAPE CRISIS CENTRES

There are currently nine Rape Crisis Centres operating in New Zealand, and others are in the process of being established. Each is an autonomous organisation, serving local needs and reflecting local influences. Management of the Centre is usually on a collective basis. All Centres are staffed almost entirely by volunteers, many of whom have been victims of rape or other forms of sexual assault. The Auckland and Wellington Centres have employed paid workers on Government temporary work schemes, and the Wellington Rape Crisis Centre presently has one full-time worker whose salary is being paid from a combination of personal donations and small grants from the public sector.

The functions of Rape Crisis Centres are four-fold:

- (a) They provide telephone counselling, sometimes on a 24-hour basis, for victims of rape and sexual assault.
- (b) Some Centres also provide face-to-face counselling.
- (c) For those victims who report the offence to the police, volunteers from a Centre are prepared to accompany a rape victim to the police station and give her support; and if necessary to prepare her for and accompany her through all court proceedings.
- (d) Finally, most Centres attempt some form of community education. For example, the Wellington Rape Crisis Centre has devised an educative programme on rape and sexual assault for secondary schools, which they have presented to many schools in the Wellington area. They have also undertaken public speaking engagements as a means of changing attitudes towards sexual violence.

It will be evident, therefore, that many Rape Crisis Centres are providing a worthwhile service to the community, which will undoubtedly benefit from their continued existence. However, all Centres have had major financial problems. They generally live "from hand to mouth", and are reliant on personal donations and frequent fund-raising efforts. Because they have to devote so much of their energies to fund-raising, they feel with some justification that the effectiveness of

the services they provide to victims is blunted, and they have difficulty in maintaining a continuity of interest and service for their volunteers. If Rape Crisis Centres are to be expected to provide a proper victim support service, therefore adequate funding is in our view essential.

The relationship between Rape Crisis Centres and the police varies between areas. In some Centres, there appears to be a fair degree of suspicion and distrust between the two, and therefore very little direct contact. It should be pointed out, of course, that many Rape Crisis Centre workers have been victims themselves, and may have a negative perception of police or court processes as a result of their own or others' experiences. It is understandable, therefore, that they should feel a degree of suspicion and hostility towards those within the system. Equally, the ideological stance of Rape Crisis Centres is likely to alienate many police officers, who may feel that this stance will be unacceptable to many rape victims.

However, we believe that Rape Crisis Centres can be of use to official agencies, and there is a need for both to work together and to use the resources of the other. It is encouraging to note that Police Headquarters, in a recent circular (No. 1982/34) has recognised the role that Rape Crisis Centres can play, and has emphasised the need for the police to liaise closely with them. In some areas, there is already a good working relationship, with mutual trust and cooperation; and the police have been willing to make use of Rape Crisis Centre workers for training purposes and to refer rape victims in need of immediate support to the Centre.

4.3 THE HELP CENTRE

The HELP Centre for victims of sexual assault was opened in Auckland on 1st June 1982, and is administered by a seven-member trust drawn from the local community. Its aim is to provide a comprehensive medical and psychological service for all those who consider that they have been sexually assaulted, and also to give counselling to the relatives and friends of those victims. A full-time counsellor is employed from 9 a.m. till 5 p.m., and calls outside those hours are intercepted by a 24-hour telephone answering service and relayed to the rostered duty counsellor. The duty counsellors are all professionally trained and are paid by the hour. They receive mileage allowances and night call-out fees. They are also paid to attend a two-hour meeting each week for ongoing training, case discussions and group support.

Victims come to the HELP Centre on their own initiative or they are referred by other agencies such as the Department of Social Welfare, doctors, Family Planning Clinics or the police. All rape victims in the central Auckland area who are required by the police to have a medical examination are brought to the Centre, where there are suitable facilities for that purpose. Most of the surgeons on the Centre's roster are female. During the examination, the victim is accompanied and supported by the duty counsellor, so that no policewoman need be present. After the medical examination, the victim is given fresh clothing and allowed to have a shower. She is also given advice on the possibility of pregnancy and venereal disease and, if necessary, is prescribed treatment.

In addition to immediate crisis counselling, the HELP Centre provides a follow-up counselling service for all victims, including those who have been brought to the Centre by the police. Such victims are contacted the following day, usually by telephone, and offered further support.

As with Rape Crisis Centres, the HELP Centre has been plagued by problems of funding. It received an initial establishment grant of \$5,000 from the Accident Compensation Corporation, and its counsellors are also paid a fixed fee by the Corporation in respect of those referrals who can be shown to be the victims of sexual assault. However, there are substantial additional operating costs which the Centre has difficulty in meeting. It has recently obtained a grant of \$10,000 from the Welfare Services Distribution Committee of the New Zealand Lottery Board to

enable it to maintain its service until the 1983/84 financial year. However, there is still no commitment by any Government Department to continue funding. It must be realised that the HELP Centre provides a valuable service to a number of Government Departments, including Police, Social Welfare, Justice and Health; and this in our view should be recognised in the form of financial support.

4.4 SUPPORT FOR VICTIMS AS COMPLAINANTS

Both victims and those involved in victim support services specifically complained that victims who report the offence to the police and are required to give evidence in court often do not get the immediate support they require to enable them to cope with the process. In Chapter 3, we discussed various aspects of the police processing of rape complaints which victims find upsetting, and in Chapter 7 we shall consider whether the procedural law or practice might be modified to mitigate their ordeal. As we have repeatedly stressed throughout this Report, however, much of that ordeal is an inevitable component of the adversary process.

While the ordeal itself might be unavoidable, the victim must still receive proper support. The statements made by victims and others indicate that at the court stage she is frequently treated merely as a witness for the Crown. The fact that she may also be a victim who has already suffered a great deal as a result of the offence tends to be overlooked. In particular, there were four aspects of current practice which victims and Rape Crisis Centres singled out for criticism and in which specific reforms were proposed.

First, victims are often very distressed and even irrational during the initial police investigation of their complaint. Yet they rarely have the direct support of family or friends during the police interview. We know of cases, in fact, where relatives or friends have been strongly discouraged from accompanying the victim into the interview room. Several therefore suggested to us that victims should be given the opportunity of having a family member or friend present during both their interview by the police and their medical examination. The police might be understandably reluctant to allow this, particularly when they hold serious doubts about the genuineness of the complaint. Yet counsellors at the HELP Centre in Auckland have occasionally been present during the police interview, and believe that in such cases the police have found this to be advantageous. Although an inflexible rule might cause difficulties, there can be no doubt that the presence of a friend or relative would often assist the victim during this period of acute distress.

Secondly, some victims reported feeling isolated during the court process, especially at the High Court stage. They were critical of the fact that prosecuting counsel did not make more contact with them before the trial and did not tell them what to

expect in court. They also felt that the prosecutor failed to give them sufficient protection during cross-examination (for example, by objecting to irrelevant questions), and did not give them the feedback and encouragement they needed. One victim stated that the prosecutor appeared to lack interest in or understanding of her emotional state and her difficulty in coping with an aggressive defence counsel. In general, the victims felt that Crown Prosecutors had an obligation, if not a vested interest, to offer reassurance or at least to see that they did not lack for company during the trial itself, and many of them asserted that the prosecutor failed to fulfil this obligation.

Some of this criticism clearly stems from a misunderstanding of the role of prosecuting counsel and in particular from a belief by some victims that he is their counsel. In fact, of course, the prosecutor is obliged to maintain some degree of detachment, and unlike defence counsel, cannot appear to be partisan. In this sense, the prosecutor experiences some role conflict. He may not wish, for instance, to object to a line of cross-examination by defence counsel, even though it is irrelevant, for fear of indicating to the jury that he has something to hide. Yet the victim often feels upset that he has not objected and therefore has not given her the protection she requires. It is unfortunate that many victims were not told of the role of the prosecutor and therefore appeared to be under some misapprehension.

Of the 18 lawyers responding to our questionnaire who had acted as prosecutors in rape trials, 11 said that they usually interviewed the complainant once before she gave her evidence, and that in most cases this was on the same day as the court hearing. Their usual purpose in doing so, they said, was to introduce themselves and to explain court procedures, especially how the victim's examination and cross-examination were likely to be conducted. It is of concern, however, that seven said that they did not usually interview the complainant at all before she gave evidence.

From the comments we received, it seems that the main reason for this failure to make contact with the victim is that Crown Prosecutors expect the police to be primarily responsible for providing the complainant with the information, guidance and support she needs. Indeed, the vast majority of prosecutors who responded to our questionnaire did not think that there was any more they could do to minimise the complainant's ordeal during the preliminary hearing or the trial.

It is certainly true that the police have closer contact with the complainant than anyone else within the system. However, as we pointed out in Chapter 3, the support offered by individual police officers is not always satisfactory; and in any event it is reassuring for the complainant to meet the prosecutor personally and to receive some explanation from him about the course of events. A recent memorandum to Crown Prosecutors from the Solicitor-General stated that prosecuting counsel must accept some responsibility for forewarning victims of trial procedures and for indicating to them the questions which they will be asked in evidence-in-chief. It is to be hoped that Crown Prosecutors will consistently fulfil this responsibility.

A frequent suggestion of rape law reformers, which was endorsed by some victims who were interviewed in this study, is that rape victims should be able to have independent legal representation in court to protect their interests and provide them with the support which they currently feel is lacking. Virtually all the judges and lawyers who responded to our questionnaire, however, were opposed to any form of representation, whether legal or non-legal, for the victim during the trial itself. Some pointed out that this would be very costly (either for the victim or for a legal aid scheme), and that it would be likely to interrupt the smooth flow of the prosecution case and to reduce the chances of a conviction. In any case, in our view it is the responsibility of the trial judge rather than any legal representative to exercise control over the trial and to ensure that the victim is treated considerately and is not subjected to improper or irrelevant questioning.

A majority of the respondents to our questionnaire, on the other hand, favoured the provision of adequate advice and assistance to the victim from a member of a support group as a means of mitigating her ordeal in court. One judge even suggested that "a friend of court or policewoman should sit with her or beside her when giving evidence". The presence of a member of a support group at the trial (although not in the witness box) is already possible, and if support services were to become more readily available, it is a practice which could and should increase.

A third aspect of the court process to which victims objected was the waiting room facilities, and in particular the fact that before court and during adjournments they were sometimes required to share the waiting room with the defendant's family and friends. They stated that this caused them embarrassment and left them open to

the risk of harassment. In our view, this should be rectified by the provision of separate waiting areas and accompaniment for the victim during adjournments.

Finally, some victims also reported that they were required to stand throughout their testimony, often for hours. One victim with a painful varicose vein condition had to stand despite her request to sit down.

Of course, it may be difficult for victims in some courts to be seen if they are sitting in the witness box, and they may also be too far away from the microphone to be heard properly. However, these are matters which could easily be remedied at little cost.

4.5 FINANCIAL COMPENSATION

A rape victim often suffers financial loss as well as mental anguish. Her psychological state may prevent her from continuing with her employment. In addition, she may feel the need to move home, to instal alarms or to take other steps to protect her personal safety.

Since rape constitutes a personal injury by accident under the Accident Compensation Act 1982, a victim is entitled to earnings-related compensation and also to compensation for medical expenses. She is also entitled under s.79 to a lump sum payment for loss of enjoyment of life, or pain and mental suffering. In order to be eligible for compensation, she must satisfy the Accident Compensation Corporation that an offence has been committed. She may not have to report the matter to the police, but she would certainly need to provide a medical report and probably a psychiatric report as well. Compensation for pain and mental suffering is not paid out until the condition has stabilised or until two years after the offence, whichever is the earlier. Despite the fact that many rape victims would be eligible for compensation, the number of claims is in fact very small. We are informed by the Accident Compensation Corporation that during 1981 there were only three cases in which compensation was paid. The sums for which the victims were compensated were \$31, \$617 and \$694. In view of the number of rapes reported annually to the police, it is surprising that only three legitimate claims should be made. Moreover, it is worth noting that according to the Abortion Supervisory Committee 56 abortions were approved on the grounds of rape in 1981. Since the psychiatric grounds for abortion would usually also constitute eligibility for compensation for pain and suffering, the disparity between these two figures is startling.

Our interviews with both victims and police officers indicate that many victims are simply not aware, and are not advised, of their eligibility for compensation. This is unfortunate, because the obvious financial loss which some victims suffer could be alleviated by payment of the compensation to which they are already entitled. We believe, therefore, that there should be a better procedure for ensuring that victims are advised of their entitlement in this regard.

CHAPTER 5

THE SUBSTANTIVE LAW : CONSENT

5.1 INTRODUCTION

The central ingredient of the offence of rape, as presently defined in s.128 of the Crimes Act 1961, is the requirement that the victim did not consent or consented because of fear of violence or threats. Rape may also be committed if the victim's consent is induced by impersonation of her husband, or by fraud as to the nature and quality of the act. Although not unknown, these latter grounds do not often form the basis of a prosecution. In the vast majority of cases, the victim's lack of consent renders criminal what is otherwise normal and habitual human behaviour.

It is the frequency with which consent is put in issue that makes rape trials different from those dealing with other offences against the person. Consent, while legally relevant in other types of assaults, is, we can safely assume, raised much less frequently.

In a rape trial, consent is relevant in two ways. First, there is the factual question of whether the complainant did or did not consent. Secondly, if it is found that she did not, there is the issue of whether the accused nevertheless believed that she did.

These issues were the crucial substantive question in a majority of rape trials we studied. Of the 79 defended cases in the court file study, consent was the principal defence in 49 of them and a subsidiary defence in a further nine. It thus featured as an issue in 58 out of 79 cases (73%). The next most common defence was identity, which by comparison was raised in only 18 cases (23%). In the victim interview study, the majority of those victims who had been cross-examined in court also perceived that consent was the major line of defence. Unfortunately, since we did not have access to defence counsel's closing addresses in either of these projects, we cannot say with certainty whether the defence related to the complainant's consent, to the accused's belief in her consent, or to a combination of both.

Because the general question of consent arises more frequently in rape trials, it follows that the state of mind of the complainant is more critical to the question of whether or not the offence has taken place, than in the case of almost any other crime. In order to be satisfied that the offence has occurred, a jury must undertake the difficult and highly subjective task of assessing the complainant's state of mind, usually in the absence of any independent witnesses to the event itself.

This does not mean, of course, that there is an exclusive focus upon the complainant's credibility, her actions and her account of the alleged event. Any proper judgment of whether or not one person consented to the actions of another can only be made by reference to the actions of both parties and to the surrounding circumstances and social context. In a rape trial, this will include consideration of any evidence that the accused used physical force or otherwise coerced the complainant into submission. It will also depend upon the prior relationship between the complainant and the accused, since this may be part of the chain of events leading to the act of intercourse complained of.

Nevertheless, it is undoubtedly true that the complainant's evidence does come under very close scrutiny whenever consent is in issue. The judges and lawyers who responded to our questionnaire were divided on the question of whether or not rape trials emphasised the complainant's behaviour more than the accused's behaviour. However, a majority did acknowledge that cross-examination of the complainant was frequently more prolonged and insistent in rape trials than in trials for other offences against the person. They pointed out that this was necessary to establish the facts, especially if consent was in issue. As we have already said, our research indicates that it is an issue in almost 75% of rape trials.

If a complainant alleges rape and the possibility that she consented is raised, the accused's defence will by definition become an attack on her. In the victim interview study, most of the victims said that they felt that their credibility was being impugned in cross-examination. Sometimes defence counsel had questioned them in such a way as to make them appear confused and inconsistent. At other times they were accused of being sexually provocative, of having invited intercourse, or of lying in their evidence. In the court files, the main areas of questioning by defence counsel showed a similar pattern. For example, the

complainant was frequently questioned about the extent to which she had resisted or struggled; whether she had helped the accused by assisting him to take off her clothes; whether she had behaved in a manner or had worn clothing that was sexually provocative; whether she had been consuming drugs or alcohol; and what she did after the alleged offence. Although most of these issues may have been relevant to the matter of consent, or the accused's belief in it, they were, nonetheless, unpleasant questions for the complainants; and it is not surprising that they should have felt that they were on trial.

This is, of course, in the nature of the adversary system, and is not confined to rape cases. The trial is a battle, and not a gentle, considerate search for the truth. In most defended cases, the credibility of one or more prosecution witnesses will be called into question, as indeed will the credibility of the defendant and other defence witnesses. It is an inevitable consequence of the circumstances of most rapes that the main prosecution witness who comes under attack will be the complainant.

The judge and jury, in assessing the presence or absence of consent, may also be influenced by their perception of traditional sex roles, which dictate that the male is generally expected to initiate and to dominate in consensual sexual intercourse. Hence, if the woman struggles only slightly, that might be interpreted as token resistance or coyness, rather than as evidence of her lack of consent; and if she gives no outward manifestation of her lack of consent (and, as we indicated in Chapter 2, many victims who were interviewed stated that they submitted without resistance because they were frozen with fear or shock), then that may also be taken as evidence of her consent. In such cases, even if the woman is believed, the accused's story that he thought she was consenting will appear more credible, and may also seem more reasonable. Yet if the woman does resist strongly, she may suffer additional physical injuries. She is thus in a "no-win" situation.

Because of the centrality of the consent issue and its direct relevance to the complainant's ordeal in the rape trial, it is one aspect of the law which, critics allege, works unfairly against the complainant and in favour of the accused. We received a number of submissions to the effect that it is at present too easy for the accused to rely upon consent in his defence, that essentially irrelevant evidence about the complainant is frequently adduced by the defence in order to suggest that

the complainant consented, and that the end result is that many complainants feel that the blame is placed upon them. It should be emphasised that when the accused has relied upon consent for his defence, an acquittal does not necessarily indicate that the complainant is disbelieved or thought to be lying: it simply means, in law, that the jury had a reasonable doubt, albeit perhaps only a slight one, about some aspect of the prosecution case. Nevertheless, it is understandable that a complainant might interpret an acquittal as a verdict against her. As Newby (1980) has suggested, the intricacies of rules about the burden of proof will probably mean little to her at that time: she will experience the verdict as a vindication of the accused's assertions and as a public humiliation of her. It has therefore been proposed to us that the substantive law should be reformed to reduce the importance of consent. We have studied some of the various overseas models which have ostensibly been designed to achieve this. In order to evaluate the case for reform, however, it is important to understand the present position both at common law and under the New Zealand legislation.

5.2 THE COMMON LAW

The common law definition of rape originally required that sexual intercourse with the victim occur against her will⁽²⁾. Furthermore, the words "against her will" were generally interpreted to necessitate the use or the threat of force by the offender and some degree of active resistance by the victim. This definition, however, was gradually extended throughout the 19th century. It was recognised, for example, that intercourse with a sleeping woman⁽³⁾, or a woman so affected by drink that she was incapable of consenting or dissenting⁽⁴⁾, could constitute rape; and it was later established that impersonation of a husband⁽⁵⁾ or fraud as to the nature or quality of the act⁽⁶⁾ could also vitiate consent.

During the first half of the 20th century, the English cases were not entirely consistent in the legal standard they adopted. However, they progressively moved away from the "against the will" test and hence, in theory, placed less emphasis on the need to show force or active resistance, and more frequently adopted the test of whether or not the intercourse was without the victim's consent. However, this test created difficulties, for it was plain that only certain types of threat, inducement or fraud could be permitted to negate consent. The woman who allowed intercourse in order to obtain food for her starving child may not have been "consenting" any more than the woman who permitted intercourse to prevent physical injury to herself, but only the second was regarded by the common law as having been raped. When such questions did arise, the courts tended to rationalise their decision by drawing a distinction between consent and mere submission. In the words of Coleridge J:⁽⁷⁾

There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent.

(2) e.g. Lord Hale, Pleas of the Crown, Volume 1, p.627.

(3) R v. Mayers (1872) 12 Cox C.C.311.

(4) R v. Camplin (1845) 1 Cox C.C.220.

(5) Section 3 of the Criminal Law Amendment Act 1885 (U.K.).

(6) R v. Flattery (1877) 2 Q.B.D. 410, R v. Williams [1923] 1 K.B.340.

(7) R v. Day (1842) 9 Car & P. 722.

The distinction being drawn here is a purely semantic one, and judges have wisely refrained from elaborating on Coleridge's dictum. Whether one describes the victims in the examples above as "consenting" or "submitting" is a matter for individual choice. What is clear is that it was only in the second example that there was no effective consent at common law. Hence, in spite of a general acceptance of the "consent" standard, it is uncertain how far this extended beyond the nullification of consent by fear of physical force or fraud as to the nature of the act.

Furthermore, some commentators have argued that even where threats of violence were involved, the common law did not live up to its own rhetoric on consent. Rather, it still insisted on physical resistance and the forceful overbearing of the complainant's will. Scutt (1976, pp.463-464) for instance, stated:

Assertions that the important issue in a prosecution for rape is non-consent rather than active repulsion have in many cases tended to be quietly overlooked in the search for evidence of struggle by the woman, struggle being regarded as (necessary) factual evidence of non-consent, and often a lack of this factual evidence leading to the assumption that consent must have been given. Indeed, the framing of some judgments leads rapidly to the belief that the "without consent" construction is limited to cases of fraud or complete helplessness on the part of the woman - unconsciousness, total mental incapacity; where the woman is in full control of her faculties the "against her will" standard interpreted as denoting, to the full extent of her possible powers of resistance, appears once more to receive approval.

While it is doubtful whether even the 19th century cases actually support such a sweeping generalisation, it is nevertheless true that in practice common law judges tended to place great weight on physical resistance, and that cases depending on threats or fraud alone faced considerable difficulties.

5.3 THE NEW ZEALAND LEGAL POSITION

It is arguable that s.128 of the Crimes Act 1961 is merely declaratory of the common law and therefore incorporates all its ambiguities. However, the better view is probably that it modifies the common law. The crux of the matter is the meaning of "without her consent" under s.128(1)(a)⁽⁸⁾. On ordinary principles of statutory interpretation it would seem that this separate sub-section is intended to have a wider meaning than lack of consent induced by force, threats of force or fraud, and hence that intercourse obtained by various other means may be rape.

Some support for this is to be found in the recent, and perhaps rather neglected, decision of the English⁽⁹⁾ Court of Appeal in R v. Olugboja⁽¹⁰⁾. In that case, the defendant had intercourse with the complainant, aged 16, at the bungalow of his co-accused. The complainant and her friend had been induced to the bungalow by a trick. Once there, the complainant had been raped by the co-accused in the car outside. She then entered the house and the defendant told her that he was going "to fuck" her. She told him that she had already been raped by the defendant's friend and wanted to be left alone. He told her to take her trousers off and she complied. He then pushed her on to the settee and had intercourse with her. She did not struggle or resist, and she did not scream or cry for help. She did struggle when she thought after penetration that the defendant was going to ejaculate inside her, and at that stage he withdrew. He later took her home, where she made a complaint to her mother about the co-accused. However, she did not tell her mother about the defendant's rape, nor did she mention it in the first instance to the police or the police doctor. Eventually the co-accused told the police that the defendant had also had intercourse with the complainant, and the complainant then admitted that this was so, saying that it had been against her will. It was accepted, therefore, that the defendant had not used physical force, apart from pushing the complainant onto the settee; that he had not uttered threats of violence; that the girl had removed her own trousers; and that she had submitted without struggling, screaming, or otherwise resisting.

(8) Other parts of the section are also uncertain - for example, presumably "threats" in sub-section 1(b) should be construed as threats of violence, but we cannot be sure.

(9) Section 1 of the Sexual Offences (Amendment) Act 1976 in England and Wales has codified the law on rape in that jurisdiction.

(10) [1981] 3 W.L.R. 585.

In his summing up to the jury, the judge said that the test was simply whether, in the light of the surrounding circumstances, there were constraints operating on the complainant's mind so that she was not consenting to the act of intercourse. The defendant was convicted by a majority of 11 to 1, and sentenced to 30 months' imprisonment.

The Court of Appeal, in dismissing his appeal, held that the absence of consent had to receive a wider meaning than mere submission through force, fear or fraud. The Court continued:

(The jury) should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission ... In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to, and comments on, the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it ... we think an appropriate direction to the jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw ... Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

The Court went on to point out that there were a number of factors in this case which fully justified the jury's verdict. The complainant had been tricked into going to the bungalow in the first place. She had already been raped. She was crying and frightened. She saw the co-accused dragging her friend into the bedroom. Although the defendant did not use or threaten force, he made it clear that he was determined to have sexual intercourse and would keep her at the bungalow against her will until she submitted. These combined factors were quite sufficient, in the Court's view, to negate consent.

It is difficult to say whether Olugboja would be followed by the courts in New Zealand. If it were, then clearly consent could be vitiated without threats of violence, and whether or not it was in a particular case would be a matter to be left to the jury, with appropriate directions from the trial judge. On the face of it, this would open up a very wide field indeed, with the possibility that all sorts of threats and inducements would be perceived by juries to be so overwhelming in the circumstances as to negative consent. There are good arguments for and against such an approach.

On the one hand, because consent is a common word covering a variety of subjective states of mind, any attempt to attach a more specific legal meaning to it is likely to be arbitrary and difficult to apply. It is perhaps for this reason that a strong feeling came through in some of the views we received from the judiciary and legal profession, that absence of consent should never be legally presumed by reference to external "objective" evidence, but should remain a question of fact. Implicitly, therefore, such respondents opted for the status quo, despite its attendant vagueness.

On the other hand, the vagueness of the present law has led some writers to argue that the legal community "has yet to develop a principled standard that reflects the interests protected by the criminalisation of rape" (Harris, 1976, p.645). This reflects the major problem with the Olugboja approach: a crucial ingredient of rape remains a shifting and uncertain standard which will be interpreted and applied differently according to the perceptions and biases of individual judges and jurors.

The argument is surely that the nature of the pressures, intimidation or threats which should be treated as vitiating consent is a matter of policy, not merely a question of fact. It is hence a decision for Parliament rather than a judge and jury.

The difficulty can be illustrated by reference to some hypothetical situations. What is the position, for instance, where an employer induces a woman to have intercourse by threatening to terminate her employment if she does not; or (as in an unreported case referred to by counsel in Olugboja) where a police constable threatens to report a woman for an offence unless she has intercourse with him? The English Criminal Law Revision Committee (1980) was clearly of the opinion that

such acts do not constitute rape, but are covered by a lesser offence under s.2 of the English Sexual Offences Act 1956. Yet the Court in Olugboja took the contrary view that consent might in some circumstances be vitiated by such threats. For instance, it seems that whether or not there would be sufficient intimidation to remove the woman's freedom of choice in the examples given above, might depend upon the importance of her employment to her or the seriousness of the offence to be reported.

Similarly, the position in relation to threats or intimidation directed at persons other than the woman herself is unclear. Under s.128(1)(c) of the New Zealand Crimes Act, rape is committed if consent is extorted by fear, on reasonable grounds, that the refusal of consent would result in the death of, or grievous bodily harm to, a third person. By inference, this would appear to exclude lesser threats - for example, a threat to inflict actual bodily harm on a woman's children, or a threat to give incriminating information to the police about her husband or children. Under the more general provisions in s.128(1)(a) and (b), however, such threats might be sufficient to negative consent.

In summary, the present law is unsatisfactory. We do not know whether the common law requires that a fully comprehending adult woman must submit through force, fear or fraud. If it does, we do not know whether that applies in New Zealand, and in any case it would be regarded by many as unduly restrictive. On the other hand, if the Olugboja approach represents the law in New Zealand, then that is vague and unhelpful as a legal standard, since it leaves what is a policy decision to juries in individual cases.

5.4 CONSENT BY FRAUD

When the consent of a woman to sexual intercourse is obtained by fraud, the New Zealand legislation simply follows the common law. Thus consent obtained through the impersonation of a husband, or a false and fraudulent representation as to the nature and quality of the act, will be sufficient to constitute rape, but consent obtained by other types of fraud will not. This aspect of the present law has recently been reconsidered by the English Criminal Law Revision Committee (1980). The majority of that Committee proposed that it should cease to be rape where the victim's consent is obtained through fraud of any description. Provided that the woman has consented to the act of intercourse itself, the defendant should not be liable to conviction for rape, but should be charged with the lesser offence of "procuring a woman by false pretences" (an offence which does not at present exist in New Zealand).

The arguments of the majority, briefly summarised, are as follows:⁽¹¹⁾

1. It is argued that there is no logical reason why one form of fraud should constitute rape, while others should not. For example, it is pointed out that it is not easy to understand why the law should distinguish between the woman who believes that she is having intercourse with her husband, and the woman who believes that she is doing so with her lover; or between a woman who is misled as to the nature of the act, and the homeless young woman with a child who is fraudulently told by a housing official that she will be provided with accommodation if she has sexual intercourse with him.
2. The majority also believe that the distress which the victims of intercourse induced by fraud may suffer is "not really comparable with the fear and shock that often accompanies true rape" (para.24).

It is certainly true that it is difficult to draw the line between some types of fraud and others, and the present distinctions in the law are easy to criticise. Whether or not this is a sufficient reason for removing all types of fraud from the definition of rape is another question. Moreover, in stating that the victims of such fraud may not suffer the fear and shock that accompany "true" rape, the majority are making some questionable assumptions. Temkin (1982, p.403), for instance, argues:

(11) A more detailed review and critique of the committee's proposals can be found in Temkin (1982).

It would be hard to envisage any other reaction (than fear and shock) on the part of the victims in the husband impersonation cases upon discovering that strangers had entered their homes, their beds and their bodies. In the case of rape by fraud as to the nature of the act, since the victim is likely to be a young girl from a sheltered background, the outcome may be particularly grave. The shock and trauma which such a girl will experience upon discovering the truth, the fear of men which this betrayal of trust may engender and the long term psychological damage to her, could well be at least as serious as that which befalls certain other rape victims.

Whether or not this is true is difficult to say, since there is no reliable information available on the psychological reactions of different types of victims. In the absence of such information, policy must be formulated on the basis of hypothesis and speculation.

There was no suggestion by the dissenting members of the Criminal Law Revision Committee that all types of fraud should be included within the definition of rape. As the Committee point out, "few would consider that a young woman had been raped if she consented to sexual intercourse because she believed her seducer when he told her untruthfully that he owned a valuable piece of jewellery which he would give her the next day". The minority of the Committee, therefore, consider that the law in this respect should remain unchanged. They maintain that while there may be sound arguments for not extending the law of rape to other types of fraud, there can be none, other than a desire for legal tidiness, for excluding from the rape law conduct which is now rape.

The existing law in this respect in New Zealand, of course, is less satisfactory, since there is no alternative general offence of inducing a woman to have sexual intercourse by false pretences. If fraud in rape cases continues to be restricted to the nature and quality of the act or impersonation, there may be a case for creating a separate and lesser offence to cover some other situations such as abuse of authority.

5.5 LEGISLATIVE SOLUTIONS

A number of different solutions to the problems posed by the need to prove lack of consent have been proposed or enacted in overseas jurisdictions. Plainly we cannot describe all the different shades of language contained in such statutes. All we are able to do is to describe the general thrust of actual or proposed reforms, and to examine their intention and likely effect. We have distinguished four quite separate approaches, each with a rather different intention and emphasis.

1. The first approach is to define the unlawful nature of the sexual act primarily by reference to the actions and behaviour of the offender, rather than the state of mind of the victim. The Michigan Criminal Sexual Conduct Statute 1974, for example, makes no mention of lack of consent at all. Rather, it provides that a person is guilty of criminal sexual conduct if he or she uses force or coercion to engage in sexual penetration or sexual contact, or if the victim is incapable of resisting that penetration or contact. Force or coercion is defined to include, but not to be limited to, any of the following circumstances:
 - (i) When the offender overcomes the victim through the actual application of physical force or physical violence.
 - (ii) When the offender coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the offender has the present ability to execute these threats.
 - (iii) When the offender 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 offender has the ability to execute this threat. The words "to retaliate" include threats of physical punishment, kidnapping or extortion.
 - (iv) When the offender engages in the medical treatment or examination of the victim in a manner or for purposes which are recognised as medically unethical or unacceptable.
 - (v) When the offender, through concealment or by surprise, is able to overcome the victim.

The victim is deemed to be incapable of resisting, thereby obviating the need to prove force or coercion, in three different circumstances:

- (i) Where the victim suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct⁽¹²⁾.
- (ii) Where the victim 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.
- (iii) Where the victim is unconscious, asleep or for any other reason is physically unable to communicate unwillingness to an act.

It will be noted that statutes adopting this approach use the offender's force or coercion as the principal standard of criminalisation. This has led some to claim that "it is clearly no longer necessary for the prosecution to prove non-consent"⁽¹³⁾.

However, it is unrealistic and misleading to believe that the issue of consent can be avoided by this sort of change in the wording of the law. As we said earlier, in order to decide whether the complainant consented, a jury must consider, among other things, any evidence of force or coercion by the accused. Conversely, where the accused denies the use of force or threats, any determination of that question must include consideration of whether or not there is evidence that the complainant consented or co-operated in the activity. In other words, the offender's force or coercion on the one hand, and the victim's lack of consent on the other, are merely opposite sides of the same coin. An offence defined in terms of the former rather than the latter may slightly change the legal emphasis, but it does not alter the basic factual issue of which the jury must be persuaded. As Loh has stated (1981, p.45):

One cannot avoid the issue of consent or pretend it no longer exists because of semantic changes in the law ... As a practical matter the prosecutor must still prove non-consensual intercourse whether this was because of actor's force, victim's resistance, or both. It is the key evidentiary issue around which the trial revolves. The same kinds of evidence ... are used to establish the crime regardless of the statutory formulation and language.

(12) The words "his or her" are used because the offence is genderless. They refer here to the victim's conduct.

(13) Note (1974, p.226.)

Some have suggested that the Michigan approach is unduly complex, and that police and prosecutors have found it confusing and difficult to apply. The list of circumstances which amount to force or coercion is not exhaustive; and the vague and ill-defined nature of the present New Zealand law is therefore perpetuated, at least in some cases. If the intention of the legislation was to eliminate spurious defences based upon the notion of consent, then to this extent it would appear to have failed.

Although the judges and lawyers answering our questionnaire were fairly evenly divided on whether the Michigan model would help in shifting attention away from the complainant's behaviour, a substantial majority did believe that it would do nothing to alleviate the trauma of the trial for her.

2. The second approach is to make the issue of consent completely irrelevant in some situations. The New South Wales Crimes (Sexual Assault) Amendment Act 1981, for example, appears to abolish the need to prove lack of consent if the offender, with intent to have sexual intercourse, maliciously inflicts grievous bodily harm or actual bodily harm, or threatens to inflict actual bodily harm by means of an offensive weapon or instrument. In such circumstances, an offence is committed whether or not the victim consents. In any other case, lack of consent is still an ingredient of the offence.

This type of reform has received some measure of support in this country. Although it would obviously effect a material change to the law, it should be noted that it would apply to only a small minority of cases. Of the 83 cases in the court file study, 34(41%) of complainants had no injuries at all, and a further 35(42.2%) had only minor injuries. No more than 13(15.6%) required medical treatment or hospitalisation. Likewise, the vast majority of cases involved verbal threats or physical force without the presence of a weapon. This is not an argument in itself against the New South Wales legislation, but it is an indication that it could be expected to have a fairly small overall impact on current practice. It was no doubt for this reason that a majority of the judges and lawyers responding to our questionnaire thought that a gradation of offences along the lines of the New South Wales statute would not shift attention away from the complainant's behaviour onto the accused's behaviour to a significant extent, and would not alleviate the trauma of the trial for her.

It should also be realised that cases involving grievous bodily harm, actual bodily harm or threats with a weapon, are those in which consent is least likely to be raised as an issue, and, if raised, is least likely to be successful as a defence.

It is not entirely clear whether consent remains as a defence to the sexual assault category 2 offence - that is, maliciously inflicting actual bodily harm with intent to have sexual intercourse. The commentary on the legislation (Woods, 1981) certainly implies that consent is not a defence. This, however, might have absurd results. For example "actual bodily harm" is traditionally defined very widely (see Adams, 1971, para. 66), and might include rupture of the hymen or bruising caused by love bites ⁽¹⁴⁾, while "maliciously" adds no more than the requirement of intent or subjective recklessness. It surely cannot be the intention of the legislation to penalise consensual sexual intercourse in such circumstances.

The New South Wales approach also poses a problem in those cases where intercourse is accompanied by some element of sadism and masochism. It is quite possible that where intercourse includes some element of violence or threat, this could be inflicted with the full consent, or even at the request, of the "victim". The Australian Royal Commission on Human Relationships (1977, p.204) took the view that this problem was a minor one, since it was difficult to conceive that these cases would ever come before the court, and if they did, the judge could take the unusual circumstances into account when imposing sentence. However, it is debatable whether it is desirable in principle to criminalise such behaviour between fully consenting persons.

(14) It seems that inflicting actual bodily harm, for no good reason is already an offence (see Attorney-General's Reference (No.6 of 1980), [1981] 2AllE.R.1057); but consent would presumably be a good reason for the minimal harm caused by rupture of the hymen.

3. The third reform entails the retention of lack of consent as an ingredient of the offence, but defines certain objective criteria which may constitute evidence that consent was not given. The Draft Bill on Sexual Offences by the Australian Women's Electoral Lobby provides an excellent example of this approach. This Bill defines unlawful sexual intercourse as sexual intercourse "which is carried out without the full and free consent of any one of the parties". It further provides that the unlawful nature of the intercourse is evidenced by, but is not limited to, any of the following ten 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 sub-section 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.

Notwithstanding evidence that any of these circumstances existed, it would still be open to the accused to suggest that the complainant consented. However, there would be an evidential burden upon him in that respect (that is, a burden to adduce some evidence to raise a reasonable doubt as to consent). It is questionable whether this would make much difference to the conduct of a rape trial in practice. In particular, in the typical case, where the complainant alleges that she was forced to have intercourse and the accused maintains that she was a willing party, it is difficult to see how the suggested reform would assist the complainant or reduce the importance of the issue of consent.

Perhaps the main purpose of this type of reform would be to clarify some of the more common situations in which consent will be vitiated, without limiting the absence of consent to those circumstances alone. It would thus provide greater certainty in the law, especially in relation to those areas which are at present unsatisfactory and ill-defined.

The New South Wales Act also attempts to do this in a limited way. Section 61D(3) provides that, without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated,

- (a) a person who consents to sexual intercourse with another person -
 - (i) under a mistaken belief as to the identity of the other person; or
 - (ii) under a mistaken belief that the other person is married to the person,
 shall be deemed not to consent to the sexual intercourse;
- (b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse;
- (c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse;
- (d) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

As a commentary on the new legislation points out (Woods, 1981), these provisions do not contain an exhaustive list of the circumstances which may negate consent to sexual intercourse. Their purpose is to clarify certain aspects of the law of consent to sexual intercourse where uncertainty or difficulty may have arisen in the past.

The difficulty with this general approach is that, despite the fact that it defines the "ordinary" circumstances which will negate consent, it is still open to the jury to find that other circumstances vitiate consent as well. Thus a crucial policy decision, at least in borderline cases, is being left to the judge and jury.

4. The fourth and final general approach to the problem of consent has been to attempt a generalised definition of what constitutes consent itself. In the Tasmanian Criminal Code 1924, for instance, consent is defined as "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 Canadian Criminal Code 1982 also attempts to provide a definition of what consent means. It states that no consent is obtained in any type of assault where the complainant submits or does not resist by reason of,

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Both these statutes do attempt the task of providing a comprehensive definition of what constitutes lack of consent. Unfortunately, criteria such as "fraud" and the "exercise of authority" are exceedingly vague and wide-ranging, and can scarcely be regarded as providing any certainty in the law. If an exhaustive definition is to be of practical utility in resolving the present ambiguities, it should in our view have a more precise and restrictive content.

We received many submissions to the effect that consent in law should mean knowledgeable assent and willing participation, not mere acquiescence or submission. The Palmerston North Rape Crisis Centre, for instance, advocated the consent in law should be used to denote "meaningful and knowledgeable assent, not mere acquiescence". A provision of this nature would probably do little more than restate what is already the law, although it would at least be a positive expression of the fact that a woman's freedom of choice in sexual matters should be respected.

5.6 RECKLESSNESS AND MISTAKE

In addition to the requirement that the act itself be proved, the law generally requires that an accused charged with a serious offence must be proved to have had the intention to do the act which constitutes the offence. In relation to rape, this would be a requirement that the accused intends to have sexual intercourse in the knowledge that the woman is not consenting to it. What is the situation, therefore, where the man is reckless or indifferent as to whether or not she is consenting, or fails to exercise a reasonable care in finding out if she is consenting? And what is the situation if he makes a mistake, and believes she is consenting when she is not? The New Zealand statute at present gives no guidance on these questions.

(i) Recklessness

In D.P.P. v. Morgan ⁽¹⁵⁾, the House of Lords unanimously asserted, albeit obiter dicta, that the required mens rea of rape (that is, the blame-worthy state of mind that must accompany the commission of the act) encompasses not only actual knowledge, but also recklessness. They reached this conclusion on the basis that "if the intention of the accused is to have intercourse nolens volens, that is recklessly and not caring whether the victim be a consenting party or not, that is equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim" (per Lord Hailsham, p.357). The Advisory Group on the Law of Rape (1975) in England and Wales affirmed that the House of Lords, by emphasising that recklessness was sufficient mens rea, had significantly strengthened the law of rape; and the Advisory Group therefore recommended that this principle be put into statutory form. The Government in that country responded quickly by passing the Sexual Offences (Amendment) Act 1976.

There are no reported decisions in New Zealand clarifying the required mens rea under s.128 of the Crimes Act 1961. However, in the summings up to the jury in rape trials which we obtained, the judges often stated that a man must have intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she was consenting. In other words, it would be sufficient for the man to have intercourse, in the words of Lord Edmund-Davies in Morgan, "without caring whether or not she was a consenting party" (p.371). This was certainly also the view of the law taken by the New Zealand Criminal Law Reform Committee (1980), although they did recommend that the principle be enunciated in statute.

(15) [1975] 2 All E.R. 347

Unfortunately, neither the House of Lords in Morgan nor the Criminal Law Reform Committee considered precisely what constitutes recklessness and how it relates to the "defence" of mistaken belief as to consent. Of course, according to ordinary principles of common law, a wilfully blind defendant - a man who consciously proceeds in ignorance because he does not want to know - is deemed to have knowledge. Beyond this, the House of Lords seemed to be using recklessness in the additional, but still limited, sense of conscious or subjective risk-taking - a man who consciously perceives the possibility that the woman is not consenting and unjustifiably takes that foreseen risk.

Whether or not this is the law in New Zealand must be doubted. In a series of recent cases, the House of Lords has overruled earlier decisions on recklessness and has significantly broadened the concept. In the landmark decisions of R. v. Caldwell⁽¹⁶⁾ and R. v. Lawrence⁽¹⁷⁾, the court propounded a novel view of the legal meaning of recklessness, stating that the term encompasses "not only deciding to ignore a risk of harmful consequences resulting from one's act that one has recognised as existing, but also failing to give any thought as to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was" (per Lord Diplock in Caldwell, p.515). This has since been applied to recklessness as to consent in rape cases (R. v. Pigg and R. v. Mohammed Bashir⁽¹⁸⁾). It has also been approved by the Court of Appeal in New Zealand⁽¹⁹⁾ although not as yet in the context of rape. Recklessness thus means something different from indifference, since it would seem impossible to be indifferent to a circumstance the possibility of which has not been envisaged. It is now possible for a man to be convicted of rape merely because he has failed to advert to the obvious possibility, or to consider an obvious risk, that the woman was not consenting.

(16) [1981] 2 W.L.R. 509.

(17) [1981] 2 W.L.R. 524.

(18) [1982] Crim L.R. 446, and [1982] Crim L.R. 687.

(19) R. v. Oldenampsen (16 November 1982), unreported, Court of Appeal, No. 200/82.

This extension to the meaning of recklessness is probably not of great practical significance in rape cases. It will no doubt be in only the rare instance that a man does not consider the possibility that the woman is not consenting, and yet does not actually believe that she is. It is possible, though, to envisage the case of a man who does not even care enough, or think it important enough, to address his mind to the possibility that the woman may not be a willing party. He may, for instance, have a general belief that the woman's wishes in sexual matters are immaterial, so that in a specific instance he does not bother either to enquire or to think about them. An illustration of this can be found in cross-examination of a defendant in one of the trials we considered in the court files:

Prosecutor: Why didn't you ask her if she was prepared to have intercourse with you?

Defendant: It didn't come to my mind.

Prosecutor: Do you appreciate that she is a person who has the right to refuse?

Defendant: No not really.

Such a defendant would no doubt be caught by the Caldwell rule. Previously, if he had been believed, he might possibly have been acquitted' as lacking the requisite mens rea.

The Caldwell and Lawrence decisions have undoubtedly narrowed the distinction between recklessness and negligence. It is still the case, however, that negligence can be distinguished from recklessness, and will not be sufficient to sustain a conviction for rape. A man who has decided that there is no risk that the woman is not consenting, even if he has failed to exercise reasonable care in reaching that conclusion, will be negligent but not reckless: he cannot be judged reckless merely because he has fallen short of the standard of care expected of the "reasonable man".

(ii) Mistake:

A man who mistakenly believes that the woman was consenting will thus not be reckless. A fortiori, he will not have intention to have intercourse without her consent. But what of the man whose belief in this respect, though honest, is not based on reasonable grounds? This was the question that arose in the now famous case of D.P.P. v. Morgan.⁽²⁰⁾ The House of Lords decided, by a majority of three to two, that a defendant cannot be convicted in such circumstances:

(20) [1975] 2 All E.R. 347.

... the question to be answered ... is whether, according to the ordinary use of the English language, a man can be said to have committed rape if he believed the woman was consenting to intercourse and would not have attempted it but for his belief, whatever his grounds for so believing. I do not think that he can (per Lord Cross, p.352).

This decision raised a storm of protest. Feminist groups attacked it as "a rapist's charter" and "a green light for would-be rapists", and there was widespread public concern about its implications. It has since been the subject of continual academic debate. Notwithstanding this, the principle that mistake as to consent in rape cases need only be honest (the Morgan principle) has been accepted by the courts in many common law jurisdictions⁽²¹⁾. A number of law reform agencies and other advisory groups have also considered it, mainly with approval⁽²²⁾.

In New Zealand, the case was referred to the Criminal Law Reform Committee for consideration. Their report (1980) concluded that the mental element in rape is the same in New Zealand as in England. They recommended, however, that for the sake of clarity the Morgan principle should be expressly written into statute.

It is a pity that the Committee did not consider more critically the rationale of the majority decision in Morgan, as it is arguable that the conclusion reached by their Lordships in that case is neither entirely supported by their reasoning nor desirable social policy. Moreover, the approach taken by Lord Cross suggests that if a

(21) e.g. R. v. Brown, South Australia, [1975] 10 S.A.S.R.139; R. v. Maes, Victoria, [1975] V.R.541; R. v. McEwan, New South Wales, [1979] 2 N.S.W.L.R.926; R. v. Pappajohn, Canada (1980) 52 C.C.C.(2d) 481; R. v. Walker, New Zealand, unreported, Court of Appeal No. 133/79. The courts in England and other countries, however, have repeatedly emphasised that the Morgan principle is not of general applicability, and that in relation to at least some other offences mistake has to be reasonable. For a discussion of this, see Cowley (1982).

(22) e.g., Advisory Group on the Law on Rape (1975), Criminal Law and Penal Methods Reform Committee of South Australia (1976), Victorian Law Reform Commission (1976), Tasmanian Law Reform Commission (1976).

statute had made it an offence to have intercourse with a woman who was not consenting to it (as the New Zealand legislation does), then a defendant would only have been able to escape liability if his mistake was a reasonable one. Be that as it may, it is certainly clear that the Morgan principle has been accepted by New Zealand courts, and has been applied regularly by trial judges in directing juries.

Criticism of Morgan has focused principally on the possibility that it might encourage defendants to raise a mistaken belief as to consent on flimsy evidence, and that an accused might therefore be able to escape liability by little more than the mere assertion of a quite unreasonable belief in consent. In truth, this criticism is probably unfounded, as the Criminal Law Reform Committee (1980, p.11) pointed out:

In most cases where the question of mistake is likely to arise the question whether the woman in fact consented will also be in issue. Once the jury find that in fact she did not consent it will usually be an obvious inference that the accused was aware of this, and if the finding of absence of consent has involved rejection of the accused's version of the complainant's conduct any claim of a belief in consent would almost inevitably be rejected as well. This was the position in Morgan, as it was in Walker [a New Zealand Court of Appeal decision affirming Morgan].

The nature of the offence is such that there will rarely be a real possibility of mistake, reasonable or unreasonable. In the exceptional cases where mistake is a live issue reasonable grounds are not an ingredient of the defence but the reasonableness or otherwise of the alleged mistake is an important factor for the jury to consider in deciding whether the accused might in fact have believed the woman consented. Juries are most unlikely to accept that a mistake might have been made if no credible grounds are suggested in evidence. Unfounded and absurd claims of a belief in consent are likely to destroy the credibility of the accused in respect of that and other issues.

It has been suggested (Jeffries, 1982) that, since Morgan, the general issue of consent has been raised more frequently by defendants. It is difficult, however, to understand why this should be so. Consent was presumably the main defence which was raised even before 1975; and there is certainly no evidence to support the suggestion that a defence of mistaken but unreasonable belief in consent has become common. It is bound to be in only the occasional case that the issue can be seriously raised.

The Caldwell decision has obviously placed some limitation upon Morgan. It has even been suggested that since Caldwell and Pigg, "it may be that to plead an honest but unreasonable mistake will now be to admit recklessness" (Cowley, p.206).

It partakes of the objective position because the enquiry is not limited to what was, in fact, in the actor's mind, but includes an enquiry as to what could have been in it, and a judgment about what ought to have been in it. It provides a simple answer to the most powerful claim of unfairness which can be brought against the purely objective position, without risking the overinclusiveness of the purely subjective standard.

A requirement that a mistake be reasonable in this sense would thus not necessarily entail the conviction of an accused of subnormal intelligence who could not reason about his actions in the normal way and hence believed, erroneously and, to an outsider, unreasonably, that the complainant was consenting. It would be a mixture of the subjective and objective positions, similar to that now adopted in relation to a number of defences.

Many of the arguments against requiring that a mistaken belief in consent be reasonable, therefore, seem to proceed on the basis of an unduly restrictive interpretation of what a requirement of reasonableness in this context might mean. There is some force to the argument that a person should not be convicted and punished for a serious offence like rape if he has no capacity or real opportunity to avoid the offence. But a requirement of reasonableness such as that suggested above would certainly provide him with the opportunity to avoid this. It is difficult to see why it should be unfair to require a man to enquire into consent with the degree of care of which he is personally capable, and to make him criminally liable if he does not. This was certainly the view taken by those Rape Crisis Centres who addressed themselves to this question in their submissions to us.

The arguments for and against the Morgan position can be considered by posing five questions⁽²³⁾:

1. Is the defendant who makes an unreasonable mistake about the woman's consent without culpability?
2. Is the criminal law only "just" if it confines itself to punishing those who "feel" culpable, or should it also punish those who could have been fairly expected to avoid the act of wrongdoing?

(23) See Wells (1982)

Plainly, however, this is incorrect. It will no longer necessarily be a defence for the defendant merely to assert that he did not know that the woman was not consenting; but Morgan is still authority for the proposition that it is a defence for him to have the mistaken, albeit unreasonable, belief that she was.

Any understanding of the arguments for and against the position adopted by the House of Lords in Morgan must include some analysis of what is meant by the word "reasonable" in this context. There has certainly been an assumption, both in Morgan and in cases which have followed it, that "a reasonable mistake" is a mistake which would be made by the reasonable man, so that a requirement that mistake must be reasonable would in effect make rape a mere offence of negligence in relation to the element of consent.

This was also the view adopted by the Criminal Law Reform Committee (1980, p.10) in New Zealand:

To amend the law to require reasonable grounds for mistaken belief in consent would mean that an accused was to be judged on what a reasonable man would have been aware of, not on what the accused himself was aware of. This would be contrary to what we regard as a fundamental principle that, in general, criminal intent must be proved when a serious crime is charged. In rape the presence or absence of consent is a central question, for it makes the difference between an innocent act and one of the most serious offences. It would be wrong for a person to be held guilty of the crime if he was ignorant of the crucial fact that the woman did not consent.

This seems, though, to rather mis-state the issue. The requirement of reasonableness in other areas of criminal law has not always imported the "reasonable man" standard in its entirety. As Pickard (1980) has argued, it is quite possible to measure the reasonableness of a defendant's mistake against the background of his relevant characteristics rather than those of the ordinary person. In other words, one can assess "whether or not the belief was reasonably arrived at in the circumstances, given the attitudes and capabilities of the defendant which he cannot be expected to control" (p.79). Such an approach would make allowance for defendants who are not capable of meeting ordinary standards of care: they would merely be held to the standard which they are capable of meeting. Pickard goes on to argue:

This individualised standard is neither "subjective" nor "objective". It partakes of the subjective position because the enquiry that the fact finder must conduct is about the defendant himself, not about some hypothetical ordinary person.

3. Is there a difference in principle between the reckless defendant who does not know that the woman is not consenting, and the negligent defendant who unreasonably believes that she is; and, if so, is this difference sufficient to exculpate the latter altogether?
4. Is it fair that a woman who has been raped should be told that her assailant must go unpunished merely because he believed, without any justification, that she was consenting to sexual intercourse with him?
5. What are the policy reasons for the present distinction between those determinants of culpability in respect of which mistake must be reasonable (such as a defendant's perception of the presence or absence of duress), and those determinants in respect of which honest mistake will suffice?

The approach which should be taken to the issue of a defendant's mistaken belief in consent, therefore, is a complex policy decision. In the final analysis, it must achieve the difficult task of balancing the protection of the victim on the one hand and justice to the individual defendant on the other. In our opinion, there are three separate options available:

1. The recommendations of the Criminal Law Reform Committee (1980) could be adopted by declaratory legislation, which would make it clear that the requisite mens rea for rape would be negated by an honest belief in the woman's consent. An additional provision (such as that appearing in the English and Canadian statutes) could be included, to the effect that the presence or absence of reasonable grounds for a belief in consent is a relevant matter to which the jury should have regard in deciding whether the man in fact had such a belief. For instance, s.244(4) of the Canadian Criminal Code, which applies to all forms of assault, states:

Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of a charge, a judge if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

The Criminal Law Reform Committee was opposed to the inclusion of this type of provision in legislation relating to rape, on the grounds that it is already a general evidentiary principle applicable to all offences to which honest mistake may be a defence.

2. The second option would be to require that a mistaken belief in the woman's consent must be honestly and reasonably⁽²⁴⁾ held. This is the approach taken by the Tasmanian Criminal Code⁽²⁵⁾, and it also appears to be the position in Western Australia⁽²⁶⁾ and Queensland⁽²⁷⁾. It should be noted that the Tasmanian courts have gone further and decided⁽²⁸⁾ that the burden of proving such a reasonable belief rests on the accused on the balance of probabilities.
3. The final option is to create a separate and lesser offence to catch the man who mistakenly but unreasonably believes the woman is consenting. This possibility was considered and rejected by the English Advisory Group on the Law of Rape (1975) and the New Zealand Criminal Law Reform Committee (1980). They considered that it would complicate the task of the judge and jury and would tempt juries to convict of the lesser offence as a compromise, rather than convicting or acquitting of rape itself. They also believed that it would be difficult to formulate a satisfactory definition of "reasonableness" as a test of criminal liability.

(24) "Reasonably" in this context might be defined as what the "reasonable man" would have believed, or it might be given the more restrictive interpretation suggested earlier.

(25) R v. Snow [1962] Tas. S.R.271.

(26) Attorney-General's Reference No. 1 of 1977, [1979] W.A.R.45.

(27) R v. Thomson [1961] Qd. R. 501 at 516

(28) R v. Martin [1963] Tas. S.R. 103.

5.7 THE BURDEN OF PROOF

At present, both the legal and the evidential burden to provide the woman's lack of consent rests upon the prosecution. In other words, the prosecution must show her lack of consent in order to establish a prima facie case. The defendant need not raise the issue of existence of consent, nor call any evidence in relation to it; and unless the prosecution evidence proves her lack of consent beyond reasonable doubt, the defendant must be acquitted. There is a suggestion in recent cases⁽²⁹⁾ that the defendant has an evidential burden where he wishes to rely upon a mistaken belief in the woman's consent as a defence. To discharge this burden, he must produce sufficient evidence to raise this as an issue for consideration by the jury. Once he has done so, however, the prosecution still has a legal burden to prove beyond reasonable doubt that the defendant did not have such a belief.

During this study and at the Rape Symposium in Wellington in 1982, we encountered some criticism of these rules. An extreme example of this was the suggestion that the legal burden of proving the woman's consent should rest with the defence on the balance of probabilities. This would, of course, make every act of sexual intercourse an offence unless the man could prove consent, and for that reason it would no doubt be unacceptable in principle and unworkable in practice⁽³⁰⁾.

A less radical proposal would be to shift the evidential burden onto the accused, thus requiring him to produce some evidence of consent or his belief in it in order for it to be raised as an issue. In this respect, rape would then be placed in the same position as other assaults. Unless there was some evidence to the contrary, lack of consent, and the accused's knowledge or recklessness as to it, would be presumed. This could be achieved by a general evidential provision, applicable either to all offences in which consent may be an issue or simply to the issue of consent in rape, along the following lines⁽³¹⁾:

- (29) See R v. Pappajohn (1980) 52 C.C.C. (2d), 481; and also Lord Diplock in R v. Lawrence [1981] 1 All E.R. at p.982 H-J.
- (30) It would not be so unreasonable to require the accused to prove his mistaken belief in the woman's consent on the balance of probabilities. As we noted earlier, this is in fact the approach taken by the Tasmanian Criminal Code.
- (31) This is a modified version of a draft provision relating to burdens of proof generally in the Criminal Evidence Bill annexed to the Eleventh Report of the Criminal Law Revision Committee (U.K.) (1972).

Where in any proceedings -

- (a) there is insufficient evidence to raise an issue with respect to any matter of consent, that matter shall be taken as proved against the accused: or
- (b) there is evidence which raises an issue with respect to any matter of consent, the court or jury, in determining whether the accused is guilty, shall decide by reference to the whole of the evidence, drawing such inferences as appear proper in the circumstances, whether the prosecution has proved the matter.

The shifting of the evidential burden in this manner would not require the accused to give evidence: it would merely place the onus upon the defence to point to sufficient evidence from any source to put the matter in issue. It could not be expected, therefore, to have any real impact upon current practice, although it might be regarded as having some symbolic significance.

Some would go further and would require the accused to give evidence and to be cross-examined on it, whenever he wished to put the matter of consent in issue. In our study of court files, over 60% of defendants in cases where consent was raised as a defence chose not to give evidence. Critics argue that this is unfair. They believe that the defence should not be able to challenge the veracity of the complainant's assertion that she was not consenting, unless the accused's credibility also comes under scrutiny in the witness box.

This would abrogate the right to silence which has been traditionally enjoyed by the defendant, and therefore raises far wider issues than we are able to deal with in this study. It is worth noting, though, that the judge in his summing up is permitted to comment adversely on an accused's failure to give evidence. We do not have any empirical information on the extent to which judges do so. However, one Crown Prosecutor told us that they did so very rarely, and another, in response to our questionnaire, suggested they should use this discretion more often than they do.

CHAPTER 6

THE SUBSTANTIVE LAW : OTHER ISSUES

6.1 A GRADATION OF OFFENCES

The Crimes Act 1961 contains three major offences to cover the more common types of sexual assault: rape (s.128), attempted rape and assault with intent to rape (s.129), and indecent assault on a woman or girl (s.135). There are also a number of offences, which are less commonly reported, to deal with specific situations. These include conspiracy to induce sexual intercourse (s.136), inducing a woman to have sexual intercourse under the pretence of marriage (s.137), sexual intercourse with a severely subnormal woman or girl (s.138), sodomy (s.142), and various types of homosexual indecency (ss.139-141).

The main thrust of much recent overseas reform of the substantive law has been the creation of different grades of sexual assault, so that the behaviour traditionally covered by the offences of rape and indecent assault has been converted into three or four offences of varying degrees of gravity. This has often enabled several of the less common offences to be repealed at the same time.

Efforts to create a gradation of offences have often been confused with attempts to grapple with the problem of consent, in that a gradation may make the presence or absence of consent irrelevant to the more serious offences in the hierarchy. This, however, is not a necessary feature of the gradation approach, and it is important that the arguments for and against such an approach not be confused with the issue of consent. Another incidental feature of the gradation model in most statutes has been the deletion of the word "rape" and the widening of the definition of "sexual intercourse". These reforms, too, will be discussed separately.

There are essentially three different gradation models which can be identified in the various overseas statutes:

1. where the presence or absence of intercourse (however that be defined) remains one of the central factors distinguishing the various categories of offence;
2. where intercourse remains part of the definition of some of the offences, but is of secondary importance in determining their seriousness;
3. where intercourse is no longer an ingredient of the offence at all.

Model 1. The first model is the most frequent. It can be found in the Victorian Crimes (Sexual Offences) Act 1980, the Michigan Criminal Sexual Conduct Act 1974, the Australian Women's Electoral Lobby Draft Bill 1976 and the Washington Code 1975. Within the hierarchy of offences which these statutes establish, the level of seriousness is measured on two dimensions:

- whether sexual intercourse or merely some form of indecent assault occurs;
- whether specified aggravating circumstances accompany the assault.

The Victorian Statute creates four offences of aggravated rape, rape, indecent assault with aggravating circumstances and indecent assault. Aggravating circumstances exist if the offender causes serious personal violence to the victim or another person; if he has an offensive weapon; if he does an act which is likely seriously and substantially to degrade or humiliate the victim; if another person aids or abets him; or if he has a previous conviction for indecent assault or rape.

Similarly, the Michigan legislation provides for four grades of criminal sexual conduct: sexual penetration in any of seven aggravating circumstances; sexual conduct in similar aggravating circumstances; sexual penetration in any of three lesser circumstances including using force or coercion; and sexual contact in either of two lesser circumstances. The aggravating circumstances which comprise the first two categories of offence are:

- the age of the victim (relevant only when the victim was under 16);

- the victim's relationship with the offender;
- whether penetration occurred under circumstances involving the commission of any other offence;
- the presence of aiders or abettors;
- the use of a weapon;
- whether personal injury was inflicted.

In these statutes, the violent and sexual aspects of the various offences appear to be given approximately equal weight. In the Victoria statute, for instance, rape and aggravated indecent assault carry the same maximum penalty of ten years' imprisonment, while in Michigan the second and third grades of criminal sexual conduct carry the same maximum penalty of 15 years' imprisonment.

Model 2. The second model, where intercourse remains part of the definition of some of the offences but is of only secondary importance, is exemplified by the New South Wales Crimes (Sexual Assault) Amendment Act 1981. This contains a hierarchy of four offences as follows:

1. Grievous Bodily Harm with Intent - the malicious infliction of grievous bodily harm on a person with intent to have sexual intercourse with that person or another (carrying a maximum penalty of 20 years imprisonment);
2. Actual Bodily Harm with Intent - the malicious infliction of actual bodily harm on a person, or a threat to inflict actual bodily harm by means of an offensive weapon or instrument, with intent to have sexual intercourse with that person or another (carrying a maximum of 12 years' imprisonment);
3. Sexual Intercourse without Consent - sexual intercourse with another person without that person's consent (carrying a maximum of seven years' imprisonment⁽¹⁾);

(1) Unless the victim is under 16 years of age, in which case the maxima under the third and fourth categories are ten and six years' imprisonment respectively.

4. Indecent Assault - assault on another person accompanied by an act of indecency upon or in the presence of that person (carrying a maximum of four years imprisonment⁽¹⁾).

The fact of intercourse is an ingredient of the third offence - sexual intercourse without consent - but the other three categories of offence do not require proof of penetration. For example, an offender who, as in one case in New South Wales in 1982⁽²⁾, inflicts bruises on the legs and arms of the complainant with the clear intention of having intercourse with her, but fails in his endeavour to do so, will be guilty of actual bodily harm with intent, which carries a substantially higher maximum penalty than non-consensual sexual intercourse itself. The major factor by which the seriousness of these offences under the New South Wales statute is gauged, therefore, is the degree of injury inflicted or threatened, rather than the nature or extent of sexual contact⁽³⁾.

Model 3. The third type of gradation is to be found in the Canadian Criminal Code Amendment Act 1982. This legislation contains no reference to intercourse or penetration at all, and thus completely abolishes the distinction between rape and indecent assault. Instead, it is made an offence to commit "sexual assault". Although the Code includes a definition of assault (s.244.1), it does not attempt to clarify when this may amount to a "sexual assault".

There are three degrees of sexual assault:

- (a) a person who merely commits sexual assault, without more, is liable to ten years' imprisonment;
- (b) a person who, in committing a sexual assault, causes bodily harm to the victim, carries or uses a weapon, threatens to cause bodily harm to any other person, or is a party to the offence with anyone else, is liable to imprisonment for 14 years;

- (1) Unless the victim is under 16 years of age, in which case the maxima under the third and fourth categories are ten and six years' imprisonment respectively.
- (2) R v. Main (28 October 1982), unreported, Supreme Court of New South Wales, No.56/1982.
- (3) By way of comparison, in New Zealand the crime of rape carries a maximum sentence of 14 years' imprisonment, while indecent assault carries a maximum of seven years'.

- (c) a person who commits aggravated sexual assault by wounding, maiming, disfiguring or endangering the life of the victim is liable to imprisonment for life.

The Canadians, therefore, in drawing a distinction in the substantive law between degrees of gravity of offence, have opted to place almost exclusive emphasis upon the degree of violence or physical injury involved.

Although the models adopted by different jurisdictions have varied, the principal objectives of those who have promoted a gradation of sexual offences have been broadly similar. The arguments they have used to justify a more detailed hierarchy of offences are as follows:

1. The existing law places too much emphasis upon the sexual rather than the violent component of the offence. The key distinction between rape and other sexual offences such as indecent assault hinges on whether or not there was penetration of the woman's vagina. This encourages the erroneous view that rape is primarily an act of sexual passion, rather than a crime of aggression which frequently causes serious physical or mental harm. It also means that the seriousness of the charge is unable to be tailored to the degree of violence threatened or inflicted. A gradation of offences would enable the law to rank sexual assaults in the same way as it presently ranks other assaults.
2. The present offences of rape and indecent assault cover a broad range of behaviour with high maximum penalties and little control of judicial discretion in sentencing. This contributes to unjustified disparity in sentencing, and fails to give sufficient guidance to the judiciary on the factors by which the seriousness of sexual misconduct should be measured.
3. A hierarchy of offences, with lower maximum penalties for the less serious offences, would encourage higher reporting and prosecution rates. Before the reform to the New South Wales legislation, for instance, it was argued that women were frequently reluctant to complain of rape, or could be easily persuaded to withdraw a complaint, because the offender would then be liable to a maximum penalty to life imprisonment.

4. Lower maximum penalties would encourage defendants to plead guilty, and would remove some of the reluctance of juries to convict them, in more minor fact situations.

During this study, we collected a considerable amount of information and comment relevant to the question of the creation of a more detailed ladder of offences. In particular, we undertook a fairly detailed examination of the purposes behind, and the impact of, the recent New South Wales legislation. Even though this legislation has only been in operation for a short time, it does, we believe, illustrate a number of difficulties inherent in the gradation model. These and other more general objections culled from our research can be summarised as follows:

1. The stress upon the violent rather than the sexual component of the offence in determining its seriousness, especially in the New South Wales and Canadian models, is not in keeping with the way in which most victims described their rape experience in this study. They saw it as an act of extreme humiliation and degradation which was qualitatively different from other types of assaults. Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself was not accorded the centrality it deserved. Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved, would therefore seem to be at odds with the perception of many victims. As the Auckland Rape Crisis Centre pointed out, it would punish "the associated physical violence and still ignore the violence of the rape".

This aspect of the New South Wales legislation has repeatedly brought trenchant criticism along the same lines from some of their Supreme Court judges. They have taken the view that the new legislation has placed an unwarranted emphasis on the means used to obtain intercourse, while paying too little attention to the act of intercourse itself. For instance, Hunt J. stated:⁽⁴⁾

(4) R v. Smith (22 October 1982), unreported, Supreme Court of New South Wales, No.105/1982.

There can be no doubt ... that the threat of a knife or other offensive weapon is a serious matter to be taken into account as an aggravated feature of sexual assault which has been induced by that threat ... but it does seem strange that the maximum sentence for the threat is 12 years whilst that for the sexual intercourse ... is only seven years ... The rationale for this new Act, we are told, is that the primary emphasis should now be placed upon the violence factor in sexual assaults rather than upon the element of sexual contact. But the disparity in those two maximum sentences strikes me as an unwarranted down-grading of the humiliation and the degrading aspects of sexual assault.

2. A similar criticism, at least of the overseas gradation models we studied, is that they attempt to fetter judicial discretion by the arbitrary selection of a limited number of lesser aggravating factors, and in doing so ignore other factors which are equally as important. To deem rape aggravated if it is accompanied, say, by the infliction of grievous bodily harm is perhaps defensible. To do so if the victim is under 16 but not over 70, or if there is a threat of violence with a weapon but not a fist, is far more arguable and is likely to produce anomalous results.

This has been a consequence of the New South Wales legislation which has also drawn adverse comment from their Supreme Court judiciary. For example, to be guilty of actual bodily harm with intent, an offender must threaten to inflict actual bodily harm with an offensive weapon or instrument. It is argued that this is no more serious than, for instance, choking or strangulation with hands or clothing, threatening to kill without an offensive weapon, or overpowering the victim with the help of a number of other men. The selection of one particular aggravating factor to the exclusion of others in this way cannot be justified in logic or common sense. To quote Hunt J. again:⁽⁵⁾

There have ... been demonstrated already in other cases a number of serious anomalies in this new legislation. But that perhaps is only to be expected when the Legislature removes a general discretion given to the sentencing judge and replaces it with the strait-jacket of cast iron categories which has now been imposed.

3. The third objection to the gradation model is that due recognition could easily be given under the existing offence structure to the degree of violence involved, by the simple expedient of laying additional charges. There is

(5) ibid.

apparently some variation in practice throughout the country in the extent to which additional counts are presently laid; but in the court file study, more than 25% of trials involved charges of violence or threatened violence as well as rape - for example, grievous bodily harm, injuring with intent, aggravated assault, threatening to kill, and assault. The Auckland and Palmerston North Rape Crisis Centres suggested that the appropriate way to recognise the additional violence used in many rape cases is to lay separate charges for any accompanying physical violence, kidnapping, administering of drugs or disablement. They thought it important, however, that assault (by which they presumably meant actual bodily harm) be defined in the law to include the kinds of harm that often flow from rape - extreme mental anguish, pregnancy, venereal disease and loss or impairment of a sexual or reproductive organ.

It is relevant to note that several judges in New South Wales have interpreted their new legislation as requiring the laying of multiple charges, so that if an offender, as part of the same incident, inflicts actual bodily harm and has intercourse with a woman, he is to be charged with offences under both the second and third grades of sexual assault⁽⁶⁾. In fact, in some cases offenders have been charged and convicted of the offences in both of these categories⁽⁷⁾. Even so, such an interpretation, as one judge said, is liable "to produce a ridiculous result in the usual situation". For instance, an offender who threatened to inflict actual bodily harm with a weapon (without actually doing so) would be liable to a maximum penalty of 12 years imprisonment, while for the sexual intercourse induced by that threat he would be liable to a maximum of only seven years¹.

Whether this interpretation of the New South Wales statute is right or wrong (and there is some judicial difference of opinion), it was clearly not the intention of the architects of the legislation (see Woods, 1981), and it demonstrates the uncertainty and ambiguity inherent in the New South Wales approach.

- (6) See Street C.J. in *R v. Smith* (11 November 1982), unreported, Court of Criminal Appeal, No's. 115/1982 and 144/1982; also *R v. Taber* (27 October 1982), unreported, Supreme Court of New South Wales, No. 98/1982; and *R v. Main* (28 October 1982), unreported, Supreme Court of New South Wales, No. 56/1982.
- (7) *R v. Taber* (27 October 1982), unreported, Supreme Court of New South Wales, No. 98/1982.

4. This leads on to a further criticism, which is that a ladder of offences, at least as contained in the New South Wales and Michigan statutes, would make trials unnecessarily complex. Moreover, it is generally true that the greater the number of offences from which prosecutors and juries can choose, the more difficult it becomes for a judge to sum up to the jury. This increases the likelihood of a mistrial, which can only increase rather than decrease the victim's ordeal.
5. A fifth potential problem with the gradation model is that it might encourage juries to bring in guilty verdicts to offences in the lesser categories as a compromise. This was in fact one of the reasons why some police officers told us that they (and Crown Prosecutors) were reluctant to lay multiple charges, or to include alternative counts in the indictment.
6. A gradation, by the same token, might result in an increase in plea bargaining, a practice which is generally acknowledged to be undesirable and which is still relatively rare in New Zealand (Stace, 1983).

Some of these objections obviously apply more to some models than others, and whether or not they are sufficient to override the arguments in favour of this type of reform is a matter of opinion. The various individuals and groups whose views we received were divided about whether or not a more detailed ladder of offences was desirable. A few women's groups (for example, two Rape Crisis Centres and a Women's Refuge Centre), commended the New South Wales model. However, as we have pointed out, other groups had reservations, and the weight of opinion from the police, judiciary and legal profession was that such reforms would achieve little of value for the complainant.

6.2 GENDER NEUTRALITY AND THE DEFINITION OF SEXUAL INTERCOURSE

At present, the law in New Zealand confines rape to the penetration of the vagina by the penis. Cases of sexual assault in which other forms of penetration occur must be dealt with as indecent assault or some other sexual offence and attract lesser penalties.

Most overseas statutes have substantially modified this traditional stance by widening the definition of sexual intercourse and making it gender-neutral. Canada has abolished all reference to intercourse and has created degrees of sexual assault which obviously apply to both sexes. Other statutes, however, have been more specific. The New South Wales legislation, for instance, defines sexual intercourse as:

- (a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by -

- (i) any part of the body of another person; or
 - (ii) an object manipulated by another person,

except where the penetration is carried out for proper medical purposes;

- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;
- (c) cunnilingus; or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

This is also the approach taken by the Victorian and Michigan statutes. In those jurisdictions, therefore, intercourse extends to anal penetration, fellatio, cunnilingus and the insertion into the vagina or anus of objects such as bottles or hands; and these offences may be committed by a man or woman upon a man or woman. The Michigan statute sensibly substitutes the words "sexual penetration" for "sexual intercourse".

South Australia, under the Criminal Law Consolidation Amendment Act 1976, has taken a more restrictive view, and has defined intercourse to include only vaginal, oral and anal penetration by the penis, thus continuing to confine the term to male offenders.

There was widespread consensus among victims, victim support groups and other women's groups in this country that the definition of intercourse should follow the New South Wales approach. There was also a measure of support for a broadened definition from more than half the judges and lawyers who responded to our questionnaire.

The reasons given in support of this type of reform were as follows:

1. There is no distinction in the basic nature of the offence between penetration by the penis or by some other object. Nor is there any basic difference between penetration of the vagina or of the mouth or anus. Cunnilingus and fellatio, for example, often accompany rape⁽⁸⁾, and are seen by victims to be similar to penial penetration of their vagina. They see all these acts as a fundamental attack on their body and integrity. Some of the victims we interviewed found forced oral sex particularly revolting - in some cases more so than vaginal intercourse.
2. The use of the penis as a "weapon" in rape is qualitatively no different from the use of a bottle or a hand. The latter may cause just as much or more physical and mental injury, and should be subject to the same maximum penalty. It is wrong to describe such acts as "indecent assault", since that term covers a host of relatively minor forms of sexual misconduct.
3. There should be no difference in law between non-consensual homosexual assault, which may involve penetration of the anus or mouth, and non-consensual heterosexual assault. The sex of the assailant or victim is largely immaterial to the essential nature of the activity, which is the violation of the right to sexual choice. (This argument leads to the view that all non-consensual offences of sexual assault in the Crimes Act 1961 should also be made gender-neutral).
4. Present offences in the Crimes Act 1961 draw no distinction between consensual and non-consensual homosexual "rape". The latter is merely covered by the sections dealing with sodomy and indecency between males, and this is unsatisfactory.

(8) See Research Report 3.

There appear to be three main objections raised to the proposal that the definition of intercourse should be widened and made genderless:

1. The first is simply the view that the term "rape" has a widely understood and accepted meaning which should be retained. As the Advisory Group on the Law of Rape (1975, para 80), and the Criminal Law Revision Committee (1980, para 45) in England and Wales asserted:

The concept of rape, as a distinct form of criminal misconduct, is well established in popular thought and corresponds to a distinctive form of wrongdoing.

The precise nature of this argument is unclear. The law in other areas has not always felt constrained by the popular usage of words: if it did, then the limitations on law reform would be obvious. Moreover, we cannot be certain that the majority of the public do subscribe to the definition of "rape" imposed by law: "homosexual rape", after all, is a common enough term. Nor can we be sure that they would wish the ambit of the law of rape to be confined to penetration of the vagina by the penis. In any case, the objection raised may be an argument for abandoning the word "rape" if the definition of intercourse were expanded, but it can scarcely provide a reason in itself for retaining the present legal distinction between one form of penetration and another.

2. The second objection, again stated by the Criminal Law Revision Committee (1980, para 45), is that a distinguishing characteristic of rape is the risk of pregnancy. It is, however, difficult to see why the possibility of pregnancy should distinguish one offence from another; and certainly it cannot be maintained that protection from pregnancy is at the heart of the law of rape.
3. The final, and perhaps most forceful, objection is that the act of non-consensual sexual intercourse (that is, penetration of the vagina by the penis) is qualitatively different from other types of penetration, and that this distinction should therefore be recognised in the substantive law. As one High Court judge stated to us:

Changing [rape] so that it can be included in some such crime as aggravated sexual assault diminishes its gravity, in my view, in the eyes of the ordinary person. It is not just a sexual assault upon a woman but a

violent invasion of her person and her integrity. It is also the degrading of something which, at least to a good number of people, represents the ultimate and outward expression of love between two people by treating it as some kind of animal activity which can be taken when the man wishes to take it.

He proposed instead that the present definition of rape be retained, but that a separate offence of aggravated sexual assault (with the same maximum penalty as rape) be created to cover other forms of penetration. Some other judges, however, wished to retain the status quo, but to increase the maximum penalty for indecent assault (which is at present 7 years' imprisonment).

6.3 RETENTION OR DELETION OF WORD "RAPE"

Some statutes, particularly those which have substantially broadened the definition of intercourse, have also, as a corollary, abolished the word "rape". Canada and New South Wales have replaced it with the term "sexual assault", and Michigan with "criminal sexual conduct". Other states - such as Victoria, South Australia and Washington - have retained the word "rape", even although it has been defined to include other types of penetration.

The arguments for and against the retention of the term are not clearcut, and it is not surprising that many of those whose views we obtained were ambivalent on this issue. On the one hand, there was some support for the proposal to delete the word "rape" from the law - partly because of the desire to place more emphasis upon the assaultive nature of the act, but more importantly because the term itself is seen to blame and degrade the victim. As the Law Reform Commission of Canada (1978, p.12) argued, it is a term which "attaches a profound moral stigma to the victims and expresses an essentially irrational folklore about them". "Sexual assault" is a more neutral term, which involves far less public stigma and about which victims might be less likely to feel shame and degradation.

On the other hand, although the strong emotional reaction which the word "rape" evokes probably does stigmatise the victim, it also has the effect of stigmatising the offender as well. It is possible, therefore, that a conviction for rape attaches a more negative label to the offender than would a conviction for sexual assault, and that there would therefore be some advantages in retaining the term, even if its definition were extended.

In any case, it would be complacent to believe that a change in words will result in any positive change in social attitudes. As the Auckland Rape Crisis Centre cogently put it:

... in countries where the rape law has been changed to sexual assault, the word rape is still used in Court, in Police interviews and media reports. It is our experience that as new words are coined to replace words which have become loaded with negative attitudes towards women, they too lose their neutrality and become tainted by these attitudes. It is the attitudes that must be changed rather than the words ...

Changing the name of the crime would contribute to mystification about its real nature and deny a major part of its significance.

6.4 THE SPOUSAL IMMUNITY

There has long been a rule in common law jurisdictions exempting husbands from liability for rape if they have had non-consensual intercourse with their wives. In New Zealand until 1980, this took the form of an immunity in all circumstances unless the husband and wife were separated under a decree nisi of divorce or nullity, a decree of judicial separation or a separation order. The Family Proceedings Act 1980, which amended s.128(3) Crimes Act 1961, narrowed the immunity, so that it applies only where the husband and wife are living in the same residence at the time of the non-consensual intercourse.

The spousal immunity (or, as it is sometimes called, the marital rape exemption) has been severely criticised, particularly over the last decade, since it militates against a married woman's right to freedom of sexual choice. The arguments for and against the immunity have been rehearsed in numerous articles and official reports⁽⁹⁾, and have often generated considerable heat and controversy.

Virtually all the women and women's groups who communicated their views to us during the course of this study were agreed that the immunity should be abolished altogether. There were also numerous calls to this effect at a seminar on Sexual Violence held by the Legal Research Foundation in Auckland in August 1982, and at the Rape Symposium in Wellington in September 1982. Of the judges and lawyers who responded to our questionnaire, a clear majority thought that the immunity should be narrowed or abolished: only 15 out of 55 respondents advocated that it be retained in its present form.

We have carefully studied the various arguments in favour of the continuation of the present limited spousal immunity, and find none of them to be convincing or supported by the evidence. The common law rule itself seems to have had its origins in the notion that, under the marriage contract, the wife gives her implied consent to sexual intercourse whenever her husband should demand it, and that she cannot revoke this consent while the marriage continues. Whatever the historical

(9) For example, see Criminal Law and Penal Methods Reform Committee of South Australia (1976); Criminal Law Revision Committee (1980); Law Reform Commission of Canada (1978); Scutt (1977); Lim (1982); and Warner (1981).

accuracy of this notion, it is obviously untenable in the present day. It is unreasonable and contrary to commonsense to infer that a wife, by marrying her husband, intends to make herself available to him for the purposes of intercourse whenever he wishes. Moreover, under existing law she can withdraw her implied consent to cohabitation at any time, and if her husband thereafter forcibly detains her he can be prosecuted for doing so. Why, then, should she not also be able to revoke any implied consent she has given to intercourse?

Another justification for the immunity appears to stem from muddled and vague notions about the sanctity of marriage, the inviolability of the family, and the privacy of the marriage bedroom. It is argued that a law prohibiting rape in marriage would be destructive to the institution of marriage; that the interference of the criminal law might hinder a possible reconciliation between the husband and wife; that charges would be fabricated by vengeful or malicious wives; and that difficulties of proof would make the law unenforceable. For example, three of the judges who were opposed to the abolition of the exemption in New Zealand noted that the law has no place in the marital bedroom. The Criminal Law and Penal Methods Reform Committee of South Australia (1976, p.14) also stated that "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 the vindictive wife and an additional strain upon the marital relationship".

These arguments are fundamentally flawed, since they completely ignore the fact that the law already invades the marriage bedroom in a number of ways to protect persons and property. In New Zealand even consensual anal intercourse between husband and wife is an offence. Furthermore, a husband who has non-consensual intercourse with his wife can be charged with assault or indecent assault. There is a suggestion in one English case⁽¹⁰⁾ that he will only be guilty of assault if he uses additional force beyond that inherent in the act of intercourse itself. However, since the immunity in New Zealand is statutory and not based on any common law notion of contractual consent, it is almost certain that this case would not be

(10) R v. Miller [1954] 2 Q.B.282.

followed here. The courts would not presume consent in a charge of assault for the purposes of sexual intercourse if the wife had not in fact been a willing party. It is therefore unrealistic to argue that a law prohibiting rape in marriage will destroy the institution of marriage, when the law already proscribes such behaviour by means of other lesser offences. In law (although perhaps not in practice), it is incorrect to state that a husband can rape his wife with impunity; and it is not easy to see why arguments about the sanctity of marriage should reduce what would otherwise be an offence of rape to a lesser offence of indecent assault or assault.

The experience of overseas jurisdictions which do not have the marital rape exemption also indicates that the fear of fabricated charges or indiscriminate prosecution by wives is without foundation. In Scandinavian countries, which have been without a marital rape exemption for many years, the prosecution of husbands is a rare occurrence. In South Australia which partially abolished the exemption in 1976, the police had by 1980 received only 13 reports of rape in marriage, and of these only two had gone to trial⁽¹¹⁾.

It is true, of course, that the general inclusion of non-consensual marital intercourse within rape laws would pose considerable evidentiary difficulties. It would not, however, be impossible to obtain convictions; and difficulties in enforcement does not prevent the law in other areas from proscribing behaviour which is generally regarded as unacceptable. There is a value in providing a symbolic expression of society's disapproval, and the law should not turn a blind eye to injurious acts merely because they are difficult to prove.

Another argument which has occasionally been put forward to justify the marital rape exemption is that the harm resulting from marital rapes is less severe than that caused by other rapes, and that it is therefore right that they should be subject only to the lesser sanctions attaching to assault and indecent assault. If this reasoning were accepted, it should surely also apply to rapes by a de facto husband, a boyfriend, or any other acquaintance with which the victim has had a sexual relationship. In any event, there is little evidence to support the view that the

(11) See Chappell and Sallmann (1980) and Chappell (1980).

harm from marital rape is necessarily less severe than that caused to other victims. For the seven victims of marital rape who were interviewed at length, in this study, rape was a symptom of a violent and unhappy relationship which extended over a long period of time. Although these victims were accustomed to violence, therefore, they nonetheless reported experiencing real and severe physical and mental anguish, including feelings of terror, helplessness, shame and degradation.

In conclusion, it seems to us that there are no real arguments of logic or principle to justify the present immunity. There are, conversely, positive arguments for abolishing it. The present position gives the appearance of failing to protect the personal integrity of a wife, or to treat her on an equal footing with other women. It possibly encourages or perpetuates the view that the wife should be dependent upon and submissive to her husband. Moreover, although the criminal law may not usually be the best way of handling domestic violence whether sexual or otherwise, it is surely one way, and perhaps in some situations it is the only effective way, to do so.

Despite the recent spate of legislative reform, the response to the criticisms of the spousal immunity has been limited and cautious. The statutory approach to marital rape now varies greatly between one jurisdiction and another. At least seven different approaches can be isolated:

1. The legislation of several American states is very restrictive and requires the existence of a decree of divorce before the immunity is removed⁽¹²⁾.
2. Michigan and Victoria have adopted the same basic approach as New Zealand did in 1980. Victoria requires that the parties be living separately and apart, while Michigan requires both that the parties be living apart and that one of them has filed for maintenance or divorce. In at least nine other American states the immunity is restricted in a similar way⁽¹³⁾.

(12) For instance, Washington, Alabama, Illinois, Kansas and Texas.

(13) For example, Colorado, Maine and Pennsylvania.

3. The South Australian legislation, which is very much a compromise⁽¹⁴⁾, appears implicitly to promote the view that overt physical violence in marriage is more unacceptable than forcible sex.

It therefore states the immunity in the following terms:

Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with -

- (a) assault occasioning actual bodily harm or threat of such an assault upon the spouse;
 - (b) an act of gross indecency, or threat of such an act, against the spouse;
 - (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;
 - or
 - (d) threat of the commission of a criminal act against any person.
4. The argument that there should be equality between married and unmarried women in the law of rape has had an unexpected consequence in some jurisdictions in the United States: 13 states have actually expanded the immunity to embrace unmarried as well as married cohabitants⁽¹⁵⁾.
 5. In Sweden and Denmark, although there is no marital rape exemption, a lighter maximum penalty is provided where the woman has previously had a lasting sexual relationship with the offender.
 6. The Criminal Law Revision Committee (1980) in England and Wales proposed that the marital rape exemption should be abolished, but that a prerequisite for prosecution should be the consent of the Director of Public Prosecutions.

(14) For a description of the passage of this legislation, see Sallmann (1977). For an account of its difficulties, see Lim (1982, pp.37-42) and Scutt (1977, pp.277-284).

(15) These are Alabama, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Montana, North Dakota, Pennsylvania, Texas and West Virginia.

They recommended this restriction on the grounds that family law should provide the main protection against marital misconduct. An equivalent provision in New Zealand would require the consent of the Solicitor-General, and would have the effect of preventing wives, unlike others, from bringing private prosecutions.

7. Finally, there are a number of jurisdictions which have now abolished the marital rape exemption altogether. These include New South Wales, California and Canada.

CHAPTER 7THE TRIAL PROCESS7.1 THE COMPLAINANT'S EVIDENCE

This study has found that the trial process is generally a traumatic experience for the rape complainant. Not only is she required to recount the details of the alleged incident at least twice in open court (at the preliminary hearing and at the jury trial), but she will usually also be subject to a distressing and lengthy cross-examination by defence counsel on both occasions. If there is a "hung jury", as there were on ten occasions out of 64 in the court file study, then she will probably have to repeat her evidence at a further trial. If there are multiple defendants who are represented by more than one counsel, then each counsel may exercise his right to cross-examine her separately: in the court files complainants were cross-examined by more than one counsel in 16 of the 64 trials.

It is hardly surprising, therefore, that the victims who were interviewed found the experience of giving evidence in court negative and destructive. Three said that they considered the ordeal to be even worse than the rape itself, and one likened it to being crucified. Undoubtedly the court proceedings added to and prolonged the psychological stress they had suffered as a result of the rape itself.

In any adversary trial where the accused denies the complainant's allegations, the complainant is bound to find testifying a harrowing experience. This will particularly be the case where the accused is challenging the complainant's credibility, as he must have a right to do. As we emphasised earlier, therefore, much of the distress caused to a rape complainant by the criminal justice process is probably unavoidable. For instance, some victims complained about the fact that they had to be in the courtroom at the same time as the 'rapist', and that they might even be cross-examined by him personally (as happened at the preliminary hearing in two of the court files studied). They proposed that the accused should not be present in court while they were giving their evidence. Of course, it may be possible and perhaps desirable, especially in the case of a child complainant, to

ensure that the accused is not in her line of vision while she is giving evidence; but it is difficult to see how an accused can exercise his right to test and challenge the prosecution case if he is excluded from court altogether, or if he does not have the right to act on his own behalf.

The victims who were interviewed also found many of the tactics and questions of defence counsel upsetting and insulting (Research Report 1). They particularly resented the fact that their character was impugned and their credibility was called into question. Again, as we pointed out in Chapter 5, this is an inherent feature of the adversary system. It is certainly proper to control or exclude lines of questioning which are irrelevant to the complainant's credibility, but it would defeat the whole object of the process to prevent any challenge to her credibility.

However, this should not be an excuse for complacency. The interviews with victims and the study of court files exposed three particular aspects of the trial process which caused victims distress: the public nature of the proceedings; the means by which their evidence was recorded; and the type of questions put to them by defence counsel, particularly at the preliminary hearing. In our view, these are areas where some measure of reform would appear to be called for.

7.2 THE PUBLIC NATURE OF COURT PROCEEDINGS

Court proceedings, both at the preliminary hearing and at jury trial, are generally open to the public as well as the news media, and details of the evidence adduced in court can usually be published. The courtroom is thus deliberately designed to be a public arena in which the complainant's right to privacy (like that of the unconvicted defendant) is subordinated to the demands of open justice.

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

The main legal provision designed to protect the rape complainant's privacy in court proceedings is s.45C Criminal Justice Act 1954 (as amended in 1980), which provides that in any report relating to court proceedings in sexual offence cases, the name of the person upon whom the offence is alleged to have been committed, or any name or particular likely to lead to the identification of that person, shall not be published unless that person is of or over the age of 16 years and the court by order permits such publication. Judging from the comments of the judiciary and legal profession, this provision has been of some help to complainants, and an order permitting publication is only rarely, if ever, made. In the study of court files, there were no orders authorising publication of the complainant's name or other identifying particulars.

This recent reform, however, would appear to have done little to dispel the dissatisfaction of victims with the public nature of the proceedings. We received several suggestions as to how the position might be further improved:

1. Many victims proposed that there should be further protection of their identity. In particular, they objected to the fact that they were often asked in their evidence-in-chief to give not only their full name but also their address and place of employment. One victim expressed the fear that the defendant, having been made aware of her address, would be able to locate her and attack her again. The reason why complainants are usually requested to give their full address is not clear. Almost all the judges who responded to our questionnaire thought that it was not necessary for this to be stated publicly in court. One judge who said it was necessary gave as his reason that criminal trials should be in open court and that the accused is entitled to know full particulars of the complainant. This scarcely seems a valid argument, since the accused is surely only entitled to know particulars which are material to the charge.

2. Some (e.g., Stone, 1982) have suggested that there might be greater control over the publication of evidence in proceedings involving sexual offences. There are already provisions to enable the District Court at the preliminary hearing (under s.156(2) Summary Proceedings Act 1957) and the High Court (under s.375(2) Crimes Act 1961) to forbid the publication of any evidence where this is in the interests of justice or public morality or of the reputation of the victim. However, this power is rarely used, and no such order was made in any of the court files studied. The media also frequently give more publicity to the preliminary hearing than to the trial itself; and, as we shall see, the cross-examination of the complainant at the preliminary hearing is often less strictly controlled than during the trial.

It is arguable, therefore, that there should be more stringent control over the publication of proceedings, especially where it relates to the complainant's evidence at the preliminary hearing. For instance, publication could be forbidden unless specifically authorised by the court in the interests of justice. Of course, the issue of whether or not the media should be allowed to report court proceedings raises complex issues of principle which go beyond the scope of this study; and, as the Law Reform Commission of Canada (1978, p.36) pointed out, "in sex offence trials, more perhaps than in any other trials, the conflict of interest between the public's right to know and the victim's right to privacy becomes hard to resolve". Nevertheless, it seems to us that there is

room for greater protection of the complainant's privacy and for the prevention of sensational and harmful publicity, particularly at the preliminary hearing stage. It is worth noting that as far back as 1967, the Criminal Justice Act in England and Wales prohibited publication of any of the evidence given at preliminary hearings of all offences, except where the accused wanted a report to be published.

3. There were also suggestions, both at the Rape Symposium and in submissions to us from Rape Crisis Centres, that the court should be closed while the complainant is giving her evidence. Again, the court already has the power under s.156(1) Summary Proceedings Act 1957 and s.375(1) Crimes Act 1961 to exclude all or any persons from the court for the whole or any part of the proceedings if the interests of justice or public morality or the reputation of the victim require it.⁽¹⁾ It is probable that there is some resistance from the judiciary and legal profession to the use of this power: the vast majority of judges and lawyers who responded to our questionnaire did not think that the complainant's evidence should be taken in camera, even at depositions. It is therefore used only rarely - in the court files which were studied, only once at a preliminary hearing (in the case of a complainant under 16 years old), and on no occasion during a High Court trial. We think that this is unfortunate, since the exclusion of persons other than those directly involved in the case would be of some psychological assistance to the complainant in sex offence cases. There is a case to be made for strengthening the law in this respect, so that the court is closed to the public during the complainant's evidence unless the court, for special reasons, orders otherwise. This need not seriously infringe the demands of public justice if accredited news media reporters are still allowed to be present.

(1) This power cannot be used to exclude the complainant or defendant, any barrister or solicitor, or any accredited news media reporter.

7.3 THE RECORDING OF EVIDENCE

The problems faced by a complainant in giving her evidence are magnified by the means by which evidence is recorded in New Zealand. At the preliminary hearing and the High Court trial, all evidence is transcribed directly onto a typewriter, and witnesses are therefore required to speak at an unnaturally slow speed so that the typist can keep up with them. The victims who were interviewed objected to this, and one even stated that it was the most trying aspect of the whole court process. Some judges and lawyers also complained of the inadequacy of the present system, and one lawyer called for a sound recording system so that the typing skill of the Judge's associate does not control the pace of the evidence.

The present method is undoubtedly cumbersome, since "people simply do not speak naturally at typewriter speed" (Stone, 1982). This inevitably adds to the difficulties faced by a nervous and inarticulate witness, and it is exacerbated by the fact that, at least in some courts, there is inadequate amplification so that witnesses must speak unusually slowly and unusually loudly.

This issue was discussed at great length by the Royal Commission on the Courts (1978, paras.809-844). Several options for improving a system were considered, but despite this no major change has yet taken place.

7.4 CROSS-EXAMINATION OF THE COMPLAINANT: THE EFFECT OF THE EVIDENCE AMENDMENT ACT 1977

We have already stressed that cross-examination of complainants in court frequently takes the form of direct or indirect attacks on their character and credibility, and that this is an inevitable feature of an adversary system. Within the basic framework of that system, it is essential to allow the accused to ask any question relevant to the charge or to the veracity of the complainant's allegation.

In the past, the major objection to defence tactics in rape cases was the emphasis frequently placed upon the complainant's prior sexual history and her general propensity in sexual matters. The law of evidence treated her past sexual activity as relevant to her credibility (or her "credit"), even when it had no direct bearing upon the alleged incident itself. Hence evidence was admissible that she was promiscuous, that she had a dubious sexual reputation, or merely that she was known to have had intercourse outside of marriage. Moreover, for some curious reason such evidence was not regarded as involving an imputation on the complainant's character, and therefore did not expose the accused to cross-examination as to his character and previous convictions. The assumption underlying this rule of evidence - that the chastity or promiscuity of a rape complainant could affect her veracity as a witness - was highly questionable, although perhaps explicable in terms of the myths informing judicial attitudes to the offence of rape at the time.⁽²⁾ Since it lacked the support of any empirical evidence, it is not surprising that the rule eventually began to meet with vehement criticism.

The perceived unfairness of this type of cross-examination eventually resulted in statutory attempts in a number of jurisdictions to restrict the right of defence counsel to cross-examine on this matter. New Zealand, Canada, England and several Australian and American states have all introduced such legislation, although it is notable for the lack of uniformity in its terminology.

The New Zealand legislation took the form of a 1977 amendment to the Evidence Act 1908. Section 23A of that Act now provides:

- (2) For a recent example of the acceptance and perpetuation of these myths, see Victorian Law Reform Commissioner, (1976).

1.
2. In any criminal proceedings in which a person is charged with a rape offence or is to be sentenced for a rape offence, no evidence shall be given, and no question shall be put to a witness, relating to -
 - (a) The sexual experience of the complainant with any person other than the accused; or
 - (b) The reputation of the complainant in sexual matters

- except by leave of the Judge.
3. The Judge shall not grant leave under subsection (2) of this section, unless he is satisfied that the evidence to be given or the question to be put is of such direct relevance to -
 - (a) Facts in issue in the proceedings; or
 - (b) The issue of the appropriate sentence, -

as the case may require, that to exclude it would be contrary to the interests of justice:

Provided that any such evidence or question shall not be regarded as being of such direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

4. Notwithstanding subsection (2) of this section, leave shall not be required -
 - (a) To the giving of evidence or the putting of a question for the purpose of contradicting or rebutting evidence given by any witness, or given by any witness in answer to a question, relating, in either case, to -
 - (i) The sexual experience of the complainant with any person other than the accused; or
 - (ii) The reputation of the complainant in sexual matters; or
 - (b) Where the accused is charged as a party, and cannot be convicted unless it is shown that a person other than the accused committed a rape offence against the complainant, to the giving of evidence or the putting of a question relating to the sexual experience of the complainant with that other person.

The broad effect of this Amendment is that evidence about sexual history, whether adduced by prosecution or defence, is not admissible except by leave of the Judge, unless it relates to the complainant's sexual experience with the accused or is for one of the purposes listed in sub-section (4). The Judge's discretion to grant leave is limited by sub-section (3), and particularly the proviso therein.

In the study of court files, we were able to undertake some assessment of the effect of this Amendment. The results of this are fully presented elsewhere (Research Report 3). At this point, therefore, we will merely note the main findings, which may be summarised as follows:

1. At the preliminary hearing, applications under s.23A for leave to cross-examine the complainant on her prior sexual history were only rarely made, and in only one case was an application granted. Despite this, reference to the complainant's prior sexual history during the preliminary hearing, especially in cross-examination by defence counsel, was found in a number of cases: in 7 out of 71 hearings there were direct references by defence counsel to the complainant's previous sexual behaviour, and in a further three cases there were indirect references which were not disallowed. One of these indirect references, for instance, took the form of the following question:

Is it correct Miss ... that you have a bad conduct report from the Navy for being found in Men's Quarters?

The complainant was required to answer such direct or indirect questions in every case, and in only one instance did the prosecutor raise an objection.

These types of questions were admittedly infrequent. Moreover, in two cases similar questions were asked in the High Court trial after a successful application for leave under s.23A, thus indicating that the questions at the preliminary hearing may have been justifiable. Nevertheless, there was some indication that the Evidence Amendment Act 1977 has not precluded the possibility of irrelevant cross-examination at the preliminary hearing about the complainant's prior sexual history, and may not always provide the protection for the complainant which it was designed to do.

Perhaps the main reason for this is the view, subscribed to by many Justices of the Peace and stated in their Manual, that it is not their task to determine whether evidence is admissible, since they do not have the legal knowledge or training to do so. They should rather merely note objections on the record and leave decisions about the exclusion of evidence to the High Court Judge at trial. Consequently, since 65 out of 71 hearings were presided over by two Justices of the Peace rather than a District Court Judge, evidence and questions which may eventually have been deemed inadmissible at trial were nevertheless allowed at the preliminary hearing. We observed that defence counsel occasionally took advantage of this by asking questions about the complainant's general character which had no apparent relevance to the facts in issue, and which could only be seen as harassment of her.

2. Our study disclosed a rather different picture at the High Court trial. Direct questions by defence counsel to the complainant about her prior sexual history, in the absence of any application under s.23A of the Evidence Act, were very rare, and in all but one case were disallowed by the Judge before the complainant answered. In only two other cases were there indirect questions permitted which were obviously designed to elicit information about sexual behaviour. Occasionally the complainant or another witness commented on some aspect of her prior sexual behaviour, although in answer to a question which was apparently not seeking this information.
3. As might be expected, applications for leave under s.23A were rather more common at the High Court trial than at the preliminary hearing. Nevertheless, they were still granted only infrequently. It was not usually possible for us to discover from the files whether any application had been made and refused; but in only six out of 64 trials were applications for leave granted, all relating to the complainant's cross-examination.
4. In one case, the Judge allowed questions which were designed to show that someone other than the accused was responsible for the presence of semen in the complainant's vagina. In another, he allowed questions about the source of love-bites on the 13-year-old complainant's breasts and neck. In the other 4 cases, the reasons why the application had been granted were unclear: the court file merely noted that the questions were relevant to the facts in issue or allowed the accused a proper defence which would otherwise be denied to him.

In general, the data we have point to the fact that the Evidence Amendment Act 1977 is operating as it was intended. The judges and lawyers who responded to our questionnaire were almost unanimous in the view that it has decreased the amount of cross-examination about prior sexual history and has reduced the complainant's distress. Most also believed that it has not caused any greater injustice to the accused and that it has not placed any greater emphasis upon the character or reputation of the complainant in non-sexual matters.

On the evidence available to us, it also appears that the New Zealand legislation is operating more effectively than any of its overseas counterparts;⁽³⁾ and that judges and counsel here are acting more in accordance with the spirit of the legislation than elsewhere. Detailed cross-examination about the complainant's prior sexual history has thus become the exception rather than the rule.

However, our research in this area indicates that there are four matters deserving further consideration. First, despite the fact that unauthorised cross-examination of the complainant on her prior sexual history was rare, the issue was nevertheless raised in some way during prosecution or defence evidence in just over half the cases without any application for leave having been granted. Most of these references appeared to arise naturally in the course of evidence and were probably unavoidable. A few references, however, seemed to subvert the purpose of s.23A and were more questionable. For instance, occasionally the accused's opinion of the sexual reputation or general sexual propensity of the complainant was included in his statement to the police, and was therefore read out in court.

Secondly, the evidence which is adduced at the preliminary hearing is far less stringently controlled than at the jury trial; and as a result the complainant is perhaps more likely to be subject to a distressing cross-examination about her sexual and non-sexual character which is of marginal or no relevance to the facts in issue. Although this did not arise in many cases, it occurred often enough to be significant; and raises general issues about the conduct and control of preliminary hearings which we will consider later.

Thirdly, no clear principles governing the exercise of the judge's discretion under s.23A appear to have evolved. Although some judges gave reasons for granting applications in specific cases, they did not lay down any principles of general applicability. As far as we know, the section has been considered only once by the

(3) For research into the operation of the English legislation, see Adler (1982); and for critical discussions of the South Australian and Western Australian statutes, see Eyre (1981), McNamara (1981), Newby (1980) and O'Grady and Powell (1980).

Court of Appeal in a case⁽⁴⁾ where, while upholding the trial judge's decision to exclude evidence of prior sexual activity, the Court did not lay down any guidelines for the general exercise of the discretion.

Some might argue that this is unfortunate, since the section itself leaves the Judge with a wide discretion and little indication as to how it should be used.

One or two overseas statutes attempt to provide more specific and restrictive controls over the exercise of judicial discretion to allow evidence of prior sexual history; but they demonstrate that there are difficulties in doing so. For example, the Michigan Statute provides as follows:

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 520 b to 520 g 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.

The Canadian Criminal Code Amendment Act 1982 has a similar, although slightly broader, provision:

In proceedings in respect of an offence under sections 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless:

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

(4) R v. Bills (11 September 1981), unreported, Court of Appeal, No.42/81.

The adoption of this type of provision would undoubtedly limit further the extent to which evidence of prior sexual history is admissible. There is a danger, however, that it would disallow evidence which might in particular circumstances be relevant to an accused's defence. Certainly the vast majority of judges and lawyers whose views we received did not believe that the New Zealand legislation should be strengthened in this way. Only two judges thought that the legislation should be more specific: one out of concern for the complainant, and the other because he thought clearer guidelines for the exercise of the discretion would aid its effectiveness. Most victims and women's groups were also reasonably satisfied with the present legislation (although some thought that the admission of evidence of prior sexual activity with the accused should require the leave of the Judge as well). But if the legislation itself is not to be tightened, then it is to be hoped that the judges themselves will develop general but flexible principles to ensure some consistency of practice.

Finally, the proviso to s.23A(3) is ambiguous. For instance, what is the position where the complainant's general sexual reputation is the basis of the defendant's allegation that he honestly but mistakenly believed that she was consenting? It is arguable that the proviso would preclude evidence of her reputation altogether in these circumstances, even though it might form the basis of a perfectly legitimate defence under the present law. Yet it is by no means certain that it would be interpreted in this fashion by judges. Since the effect of the proviso is to remove the judge's discretion altogether, it is unfortunate that its precise intent is not made clear.

7.5 THE CORROBORATION WARNING

In general the evidence of a single witness, if believed, is sufficient to prove any issue relevant to the guilt of the accused. There are certain cases, however, where corroboration is required by statute; and there are other cases in respect of which the courts have held that the judge must give a warning to the jury that it is dangerous to act upon the evidence of a particular witness unless that evidence is corroborated.

The classes of cases where such a warning is required are those involving the evidence of:

- (i) accomplices;
- (ii) children; and
- (iii) complainants in cases of sexual offences.

Although the requirement to give the corroborative warning started as a rule of practice, it has now become a rigid and complex rule of law in New Zealand. If the jury have been wrongly instructed as to what could be corroboration, and if it is possible that they might have reached a different decision if correctly instructed, the Court of Appeal must allow an appeal against conviction by the defendant and order a new trial⁽⁵⁾.

In cases where the corroboration warning is required, the judge must direct the jury that it is dangerous to convict on the complainant's uncorroborated evidence; but he should still stress that a lack of corroboration is not decisive and that the jury may still convict despite the absence of corroboration if they are satisfied that it is safe to do so in the particular case.

In explaining what is meant by corroboration, judges usually adopt some variation on the dictum of Lord Reading C.J. in R v. Baskerville:⁽⁶⁾

... corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

(5) R v. Arnold [1980] 2 N.Z.L.R.111

(6) [1916] 2 K.B. 658, 667

It follows from this that witnesses cannot corroborate their own evidence. In particular, a previous statement (including the complaint itself) by the person whose testimony requires corroboration does not amount to corroboration⁽⁷⁾. Although evidence of the complainant's distressed physical condition may be capable of amounting to corroboration⁽⁸⁾, it will only be so in very special circumstances; and the jury must be made to understand that evidence of a complainant's distress must be truly independent of her allegation⁽⁹⁾. There must also be no possibility that the distress is due to a cause not supporting the allegation⁽¹⁰⁾.

The mere failure of an accused to give evidence is not ever capable of amounting to corroboration of any evidence given by the prosecution. However, if the accused chooses to give evidence, then his testimony may sometimes be sufficient to corroborate the case against him. For example, in R v. Rossi⁽¹¹⁾ it was held that the accused's explanation that he had "innocently" fondled the child could be treated as corroboration of her testimony to the effect that he had indecently assaulted her. The fact that the accused has given evidence which is not accepted by the court and is therefore regarded as false, may sometimes corroborate evidence given by other witnesses against him. To do so, the untruth must be deliberate and the facts denied be sufficiently material. For example, in R v. Collings⁽¹²⁾ the Court of Appeal held that:

Where, as here, the question of lies, whether as corroboration or otherwise, arises the need for special care in the direction of the jury has been emphasised ... Statements by a defendant when and only when proved to be lies by other evidence independent of the complainant or their own inherent improbability, may be corroborative if they are attributable to a sense of guilt ... But there are often other explanations for lies such as fear of facing an unjust accusation of guilt if suspicious circumstances are admitted ... Before instructing a jury that they may treat a lie (if such they find it to be) as corroborating either the commission of the crime or the identity of the criminal, a judge must hold that it can reasonably be regarded as more than merely consistent with either the truth or untruth of [her] testimony.

(7) R v. Whitehead [1929] 1 K.B. 99

(8) R v. Redpath (1962) 46 Cr.App.R.34

(9) R v. Cain (1977), unreported, Court of Appeal, No.129/77

(10) R v. Poa [1979] 2 N.Z.L.R.378

(11) (1918) 13 Cr. App. Rep.158

(12) [1976] 2 N.Z.L.R.104

Finally, as Moller J pointed out in R v. Arnold⁽¹³⁾, corroborative evidence need not all come from the one witness:

It may come from several witnesses. You may get from one corroboration that the crime took place; you may well get from another corroboration that it was the man who was charged who did it.

The requirement of a corroboration warning in some cases is the result of a belief that particular types of witness are inherently likely to be unreliable. Thus accomplices are thought not only to be tainted by their involvement in the offence but also to have every reason for wanting to shift the accusation from themselves to their co-accused. In rape cases the genesis of the requirement can be seen in the type of thinking that lies behind Lord Hale's notorious dictum, quoted earlier (p.8), that rape is an offence which is easy to allege but difficult to refute. Certainly there is a wealth of legal and medical opinion, stretching back for centuries, to the effect that there is a special danger of deliberately false charges in sexual offence cases arising from such things as sexual neurosis, jealousy, fantasy, spite or shame

(14) Thus the Victorian Law Reform Commissioner (1976) who recommended the retention of the corroboration rule could state that:

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

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

It is significant that this conclusion, as the quote makes clear, relies primarily upon the anecdotes and personal opinions of various legal authorities. The empirical evidence in our study, however, tends to demonstrate the reverse: that rape is not a charge easily to be made, and that a complaint to the police is usually made at considerable personal cost to the complainant. Further, the interviews with victims indicate that there are many compelling reasons why some victims either do not

(13) [1980] 2 N.Z.L.R.111

(14) for example, Columbia Law Review Note (1967), Criminal Law Revision Committee (1972, 1980), Glanville Williams (1978).

make a complaint or later wish to withdraw it. Equally, our study of police files did not disclose any evidence to justify the conclusion that there are significant numbers of false complaints motivated by jealousy, spite, or fantasy (Research Report 2). The complaints which did appear to be false were often made by third persons and were usually perceived very quickly by the police to be unfounded.

There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing. First, the rule encourages the false assumption, which is insulting and derogatory to women, that women "are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it" (Temkin, 1982, p. 417).

A second and related criticism is that the need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest to the jury, as one judge said to us, "that every complainant should be viewed with suspicion". There may be many cases where such suspicion is unfounded. For example, there are some prosecution cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the jury hear before they retire to consider their verdict is the warning that it would be dangerous for them to convict. It seems to us that this is likely to carry undue weight with the jury, although our study has not enabled us to obtain any direct evidence to substantiate this. We can, however, refer to an example given by one Crown Prosecutor (Stone, 1982), which seems to us to express the argument well:

One can have a case where the complainant has been an impressive witness whose evidence has been given fully and fairly; she may have been proved to have made a complaint to her mother or friend immediately after her return home in a shocked or tearful state; the accused may have made statements to the Police which it can be shown are untrue; there may be medical and scientific evidence consistent with force being used on the complainant. None of this, however, would amount to corroboration and the jury retires to consider its verdict with the solemn warning about the dangers of convicting ringing in its ears. The qualification that they may convict if they think fit notwithstanding the warning, tends to become lost in the mass of words which are required to give effect to the warning itself.

Thirdly, the form of the warning - to the effect that it is dangerous for the jury to convict on the complainant's uncorroborated evidence, but that they may do so if they are satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore is likely to confuse the jury. Certainly it was the view of a large majority of judges who responded to our questionnaire that the warning often confuses the jury. One even commented that "the standard formula is in my limited experience almost impossible to express in a manner that is logically satisfying, as well as comprehensible as well as correct".

A fourth objection is that the corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them. A requirement that the jury be told that they should not convict unless they are convinced of the truth of the complainant's evidence is merely reiterating the standard of proof to which they should adhere in all cases anyway. In effect, the judge in sexual offence cases must give a special exhortation to the jury to do precisely what they are already required to do. This, in the words of one judge, may "tend to cloud their perception of the truth in cases where they fully believe the complainant's story", and thus may unduly prejudice the jury in favour of the accused.

Finally, the technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be even more difficult for a jury to understand. Errors in judge's summings up on corroboration therefore result in a disturbing number of mistrials in rape cases : 3 defendants in 1979 and 1980 appealed on this ground alone⁽¹⁵⁾. It is interesting to note that one trial judge in responding to our questionnaire attributed the difficulties in summing up to the fact that the Court of Appeal has confused the corroboration principles, while a Court of Appeal judge stated that trial judges have tended to strain to find evidence capable of being corroboration and have therefore not always followed the suggestions of the Court of Appeal. This difference of opinion is no doubt an illustration of the difficulties inherent in the rule itself. Certainly the Court of Appeal has recognised that a trial judge in determining whether a particular piece of evidence may be corroborative "walks a tightrope"⁽¹⁶⁾, in that opinions are notoriously apt to differ.

(15) R v Matiu and Sadler, R v Arnold

(16) R v Matiu and Sadler

For all these reasons, there was general agreement amongst those with whom we consulted that the corroboration rule was in need of reform. Most judges and prosecuting counsel thought that it had become too rigid and formalised, and some called for a wider review of the rule in relation to accomplices as well as complainants in sexual offence cases. Indeed, the only real opposition to substantial modification of the existing rule came from the defence counsel who responded to our questionnaire. They felt that the removal of the rule would increase the chances of convicting innocent people and remove a vital safeguard for the accused.

Although there was recognition of the need for reform, there were a variety of opinions on the form which that should take. A number of different options emerged:

1. Some saw the need to retain the corroboration rule in its present form only for child complainants, on the grounds that their evidence is more susceptible to exaggeration, invention or distortion. The New South Wales legislation preserves the rule for child complainants, and the Criminal Law Revision Committee in England and Wales (1972, 1980) recommended that the present corroboration warning still be required in the case of a sexual offence against a child under 14. Two New Zealand High Court judges in their submissions to us endorsed this approach, although preferring that the age limit be reduced to 12.

It should be noted that the assumptions underlying the suggestion that there should be a special rule for child complainants are questionable. Goodman and Michelli (1981), in a summary of recent research in this area, point out that, while children are suggestible, adults are probably equally so, and that there is no evidence that children distort the truth more frequently than adults do. They recognise that the courtroom proceedings themselves may have more of an impact on a child than on an adult, but they conclude that, given reasonably supportive treatment in court, "we have no reason to believe that their [children's] testimony is not as valid and fair to the defendant as other kinds of courtroom evidence that must be weighed up by judges and juries" (p.95). Some might go further and agree that in some circumstances child witnesses may be more honest and more perceptive than adults and therefore more able to be relied upon.

2. Apart from any special provision for child complainants, a conservative suggestion, recommended by the Criminal Law Revision Committee (1972, 1980) and supported by at least three High Court judges in this country, is that the rule be modified to require the judge, instead of warning the jury that it is dangerous to convict, to point out the "special need for caution" in the case of complainants whose evidence is not corroborated. The purpose of this suggestion is to weaken the warning and to make it less stereotyped and inflexible than at present.

This limited reform would clearly do little to meet most of the objections to the existing rule. In particular, it still depends for its justification on the view that a complainant in a sexual offence case is less likely to be trustworthy than a complainant in other cases, and that it is not uncommon for false allegations to be made which the accused will find difficult to refute. By continuing to add a further exhortation in sexual offence cases to the normal direction on the standard of proof, it may still confuse and mislead the jury.

3. A further and more fundamental reform would involve the abolition of the corroboration rule altogether, so that sexual offences would be treated in the same way as almost all other offences. This would leave judges with a discretion to warn the jury of the special need for care in deciding whether to rely on any particular piece of evidence if the circumstances of the witness or the nature of the evidence required this. This is essentially the approach in New South Wales, where s.405C(2) Crimes (Sexual Assault) Amendment Act 1981 provides:

On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.

It will be evident that the effect of this provision is to remove the requirement of the corroboration warning, although leaving the Judge with the discretion to comment where he thinks it appropriate. If the corroborating evidence is in fact flimsy, then judges will presumably be inclined to give some type of

warning; but if there is substantial corroborating evidence, or there is other evidence which strengthens the prosecution case, then he may merely give the required direction on the standard of proof.

Of the judges who responded to our questionnaire, 21 out of 23 believed that if the present requirement were replaced with a discretion, the normal rules on the burden and standard of proof would provide sufficient protection for the accused. In surprising contrast, of the lawyers answering the questionnaire, only eight (all prosecutors) favoured changing to the discretionary rule, while 22 did not. All but one of the defence counsel believed that a discretionary power would not provide sufficient protection for the accused.

4. A further possible avenue of reform can be found in the recent Canadian legislation, which seems to remove from the Judge any discretion to give a warning at all. Section 246.4 of the Criminal Code Amendment Act 1982 provides:

Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

The effect of this legislation would seem to be that sexual offences are still singled out as a special category in that judges have a discretion to give a warning in relation to most other offences, but have no such power in any sexual offence. The intention is presumably to stop judges using their discretion to give a warning in sexual offence cases as a matter of course. It is questionable, however, whether this is sufficient reason for such a rigid rule, since it might prevent the Judge from giving a timely and necessary warning in the circumstances of a particular case.

7.6 THE RECENT COMPLAINT RULE

In general, a previous statement by a witness made in the absence of the accused is not admissible either as evidence of the facts contained in the statement or as evidence to show the consistency of the witness' subsequent account. On a charge of rape and other sexual offences, however, both the fact that a complaint to any person was made by the complainant shortly after the alleged offence, and the particulars of that complaint, are admissible as evidence of the consistency of her story. The admission of such evidence thus constitutes an exception to the rule that a witness' prior consistent statements are inadmissible. It is not, however, an exception to the hearsay rule. That rule prohibits any evidence of prior statements by a witness which is designed to show the truth of the facts contained in them. Accordingly, evidence of a fresh complaint cannot be used to show the truth of the facts upon which the complaint is based and cannot be corroborative of the complainant's subsequent testimony.

Just as a recent complaint cannot be used to prove the truth of the facts contained in it, so the absence of a complaint is not able to prove the accused's story or to show that the complainant consented⁽¹⁷⁾. It can, however, be used to cast doubts upon the complainant's credibility and to buttress the accused's defence.

There are limits to the admissibility of a complaint. First, the complaint must have been made at the first reasonable opportunity by the complainant. What is the "first reasonable opportunity" for the victim of a sexual offence depends on the particular circumstances of the case. It is for the Judge to determine whether the complaint was made as speedily as could reasonably be expected and therefore is admissible⁽¹⁸⁾. Complaints made on the day following the alleged offence have been rejected on some occasions⁽¹⁹⁾, while on others a complaint made after the first week has been admitted⁽²⁰⁾.

(17) Kilby v. R. (1973) 129 C.L.R. 460

(18) R v Cummings [1948] 1 All E.R. 551

(19) e.g. R v. Rush (1896) 60 J.P. 777

(20) R. v. Hedges (1909) 3 Cr. App. Rep. 262.

Second, to be admissible the complaint must have been voluntary and not in response to leading or suggestive questions⁽²¹⁾.

The recent complaint rule was widely criticised by most of the non-lawyers whose views we received, and was also one aspect of the law which many at the Rape Symposium thought to be in need of reform. Yet it was supported by nearly all the judges and lawyers who responded to our questionnaire.

It is fair to point out that much of this difference of opinion probably arises from a misunderstanding of the nature of the rule. For instance, it sometimes seems to be interpreted, quite wrongly, as requiring a judge to warn a jury about the need for a recent complaint⁽²²⁾.

It is also evident to us that there is a confusion between two quite separate and distinct criticisms of the rule. The first criticism relates to the fact that a recent complaint may be used as evidence of the consistency of the complainant's story, but may not be used as corroboration of its veracity. Some argue that it is quite unrealistic to expect the jury to use evidence for one purpose, but to erase it from their minds for another. They also point out that it is illogical to say that, on the one hand, the prosecution cannot use a recent complaint as corroboration of the complainant's story, but that, on the other hand, the defence can use the absence of an early complaint to cast doubts upon the veracity of her account.

The essence of this criticism, of course, is that the rule allowing evidence of a complaint at all, contrary to the usual rules of evidence, will actually work to the advantage of the prosecution, since the jury may well ignore the legal distinction and wrongly treat the evidence as corroboration. For this reason, amongst others, most judges and lawyers did not see any real need for change. They pointed out that the concern of critics is about the high number of acquittals rather than convictions; that, even if from a legal viewpoint the jury give more weight to the evidence than it should, there is no evidence that this is unfair to the accused; and that there is "no reason why evidence which has for so long been thought of as being of assistance and logically relevant should now be discarded".

(21) R. v. Osborne [1905] 1 K.B. 551

(22) See, for example, Legal Research Foundation, (1982, p.6)

Others would argue, however, that the illogical and confusing application of the rule is unsatisfactory and that some reform is called for. This could be done in two ways. First, a statutory exception to the hearsay rule could be created, so that complaints could be used for any purpose - that is, both as evidence of the consistency of the complainant's story and as corroborative evidence of the facts complained of. Secondly, evidence of complaints could be disallowed altogether. This second course has been the one adopted by South Australia under the Evidence Act Amendment Act 1976 and by Canada in the Criminal Code Amendment Act 1982. Although this does not prevent cross-examination of the complainant on the time of the complaint, it disallows direct evidence of the complaint or its contents. It thus places sexual offences on the same footing as other non-sexual assaults.

The second objection to the existing rule is of a different nature altogether, and relates to the fact that the rule draws a distinction between complaints according to whether or not they were made at the first reasonable opportunity after the event. There is criticism not only because the contents of a late complaint are not admissible in evidence, but also because defence counsel can use the absence of an early complaint in cross-examination in an attempt to challenge the complainant's credibility. When consent is the principal defence, defence counsel are especially likely to focus upon the absence of an early complaint (see Research Report 3).

There are many reasons, of course, why a genuine victim may delay mentioning the offence to anyone, and some of these reasons may be subtle, difficult to articulate and perhaps not even understood by the victim herself. We have already described in Chapter 2 how the shock which some victims experience prevents any rational behaviour. They immediately find it difficult to mention the rape to anyone after the event and may temporarily withdraw into themselves. However, it must be realised that the present law does not suggest that a late complaint is a false complaint. It merely provides, in effect, that a complaint at the first reasonable opportunity adds the weight of consistency to the complainant's story. The real issue is whether the time of the complaint should be regarded as having any bearing upon the issue of credibility at all. Unfortunately, our research has not provided enough data either to support or to refute the contention that an early complaint is more likely to be a genuine one, and the validity of any distinction between early and late complaints is therefore purely a matter of opinion.

If this second criticism of the recent complaint rule is accepted, then there are three ways in which it might be met:

1. Evidence of both early and late complaints could be admitted as an exception to the normal rules of evidence without any differentiation between them.
2. If, as suggested earlier, evidence of both early and late complaints was made inadmissible, then a further rule could be introduced preventing the asking of any questions at all about the time of the complaint, either in evidence-in-chief or in cross-examination. Since the time and the circumstances of a complaint, either to another person or to the police, are proper matters for cross-examination in relation to other offences, this would again require that sexual offences be treated as a special case.
3. The existing rules of evidence could be left untouched, but a Judge could be required in appropriate cases to give a warning that there may be reasons for the absence of an early complaint. This is the solution adopted in the New South Wales legislation, s.405B(2) of which provides:

Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the Judge shall -

- (a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and
- (b) inform the jury that there may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

Again, this would require that sexual offences be treated as special cases, since such a warning is not required in relation to other offences.

In summary, therefore, the existing rule might be modified by either disallowing evidence of complaint altogether, with or without restricting the right to cross-examine on the time of the complaint, or by allowing such evidence as an exception to the hearsay rule as well as the rule against prior consistent statements. In the latter case, the distinction between complaints according to the time at which they were made might be abolished, or it might be retained with a warning as required by the New South Wales legislation.

7.7 THE PRELIMINARY HEARING

In a rape case, the jury trial takes place in the High Court, and before that a preliminary hearing is held in the District Court. The function of the preliminary hearing is to ensure that no defendant is obliged to face trial for a serious offence unless the prosecution can make out a prima facie case, that is, produce sufficient evidence, if believed, to enable a reasonable jury to convict him. If a prima facie case is established, then the accused is committed for trial.

The preliminary hearing is not designed to give the defence the opportunity to rehearse their cross-examination of prosecution witnesses; ⁽²³⁾ and the prosecution cannot be compelled to call the complainant or to present her evidence if it has sufficient evidence to establish a prima facie case without doing so. In rape cases, however, it will usually be difficult to establish a prima facie case in the absence of the complainant's evidence, and in all the court files studied for this research, the complainant was required to give oral or written evidence.

The preliminary hearing thus plainly increases the ordeal of the rape complainant. For most it simply means the added stress of another public rehearsal of the intimate and often painful details of their experience. For some, the fact that the hearing is presided over by Justices of the Peace (as it was in 65 of the 71 cases in the court files study) may make things worse: as we have already indicated, the lack of control exercised by Justices of the Peace over defence counsel may make the complainant's experience appreciably more harrowing than the actual jury trial.

Under s.173A Summary Proceedings Act 1957, which was inserted in 1976 following a recommendation in a Report of the Criminal Law Reform Committee (1974), the evidence of any witness at a preliminary hearing may be presented in court by written statement if the defence consents. However, it appears that in most cases the use of this provision is confined to the evidence of non-contentious witnesses. As might be expected, therefore, the rape complainant is usually still required to

(23) See R. v. Epping and Harlow Justices, ex parte Massara, [1973] 1 All E.R. 1011

give her evidence orally and be cross-examined on it. For example, in 63(89%) of the 71 preliminary hearings studied, the complainant gave oral evidence, and in 52(83%) of these she was cross-examined by defence counsel. Sometimes the cross-examination was prolonged and intensive: in one extreme case, the complainant was cross-examined by three defence lawyers for three-and-a-half hours.

Our data do not enable us to determine whether it was the prosecution or the defence who compelled rape complainants to give oral evidence, although the comments we received from various sources indicate that it is probably a combination of both. Sometimes police or prosecuting counsel wish to have a complainant's evidence given orally at the preliminary hearing, so that they can give her a "trial run" to get her accustomed to court procedure. Occasionally, too, they wish to find out how she performs in the witness box and whether she "comes up to brief". Some Crown Prosecutors have also pointed out that written statements tendered in evidence are not always satisfactory. They are usually constructed from records of interviews of, and earlier statements by, the witness, and are in a highly condensed form. When this is expanded upon by the witness at trial, apparent discrepancies may emerge between the written, and oral evidence which provides an avenue for cross-examination. Some prosecutors feel that there is less likelihood of such discrepancies if the witness gives oral evidence in the first instance. We have also been told that one Crown Prosecutor believes the use of oral evidence, as opposed to written statements, may hasten the ultimate disposal of cases, because oral evidence enables the defence to appreciate the strength of the prosecution case and thus may encourage guilty pleas at the conclusion of the preliminary hearing.

Equally, however, unless a plea of guilty is anticipated at the conclusion of a preliminary hearing, defence counsel will usually take the opportunity to assess the complainant's character and to test her vulnerability under cross-examination, so that they can work out the most appropriate strategy for the trial itself. Moreover, counsel are unlikely to consent to the presentation of written evidence from any possibly contentious witness in any type of case unless they have considered its precise contents in advance. This sometimes causes difficulties. For instance, we understand that in at least one centre defence counsel have been known to indicate that they will consider agreeing to the admission of evidence in written form, but after receiving copies of the proposed statement for consideration they have refused

to agree and have later cross-examined the witness on that statement. Understandably, that has led police to refuse to give copies of statements in advance, so that the possibility of written evidence being tendered is precluded.

We have considered a number of proposals for the reform of the depositions procedure in order to alleviate the complainant's ordeal. One victim suggested that the preliminary hearing should be abolished altogether, but we found little support for that proposal, since the preliminary hearing is thought to provide an important safeguard for the accused. In some cases, incidentally, it may also encourage guilty pleas by revealing the strength of the prosecution evidence, thus saving the expense and time of a jury trial altogether.

Two other less radical proposals were also made. The first was that, in the case of serious charges like rape where difficult decisions often have to be made about the admissibility of evidence, District Court Judges rather than Justices of the Peace should preside over the hearing. This was a proposal with which lawyers and non-lawyers alike were largely in agreement. One High Court Judge even went so far as to state:

Depositions heard by Justices is the area of greatest weakness in rape trials. Lack of knowledge and lack of proper control over conduct of proceedings by Justices causes more distress to the complainant than any other aspect of trial procedure.

The second proposal was that written rather than oral evidence from all witnesses, including the complainant, should become the norm rather than the exception. Following a recommendation of the Criminal Law and Penal Methods Reform Committee (1976), this is now the position in South Australia by virtue of the Justices Act Amendment Act 1976. That Act prohibits the calling of the complainant in sexual cases unless the presiding magistrate is satisfied that there are special reasons why he or she should attend. There is no reason, of course, why such a reform should be restricted to sexual offences alone. Indeed, it is difficult to find a justification for this distinction between complainants in sexual cases and those in other cases: if written evidence can satisfy the court that a prima facie case exists in respect of a rape charge, then surely it should be able to do so in relation to any other charge.

The proposal that written evidence should become the norm for all witnesses at the preliminary hearing provoked a sharp divergence in the opinions we received from lawyers and non-lawyers. Many of those at the Rape Symposium who were not judges or practising lawyers favoured a change in the law along these lines, whereas only one judge and one lawyer responding to our questionnaire favoured the South Australian approach, most preferring to retain the status quo. This is perhaps not surprising, because, as we have already pointed out, the personal appearance of the complainant at the preliminary hearing may have advantages for both prosecution and defence. For the prosecution, oral evidence may be more reliable and comprehensive than written evidence and may encourage earlier guilty pleas. For the defence, the personal appearance of the complainant provides an opportunity for cross-examination before the trial itself. These considerations, however, must be weighed against the additional anxiety caused to the complainant by her personal appearance, and the financial cost of holding the preliminary hearing.

The South Australian Criminal Law and Penal Methods Reform Committee (1976) and the Australian Royal Commission on Human Relationships (1977) also recommended that, wherever a complainant's evidence is submitted in written form, the defence should also be supplied with copies of all statements made by her to the police. This recommendation has not been implemented in Australia. Under present New Zealand law the defence has no right of access to such statements, although they would obviously be valuable for the purposes of cross-examination if they revealed inconsistencies or highlighted gaps in the complainant's account of the facts. There would clearly be difficulties in allowing such access, given the circumstances under which police interviewing of victims take place. In any case, we think that this issue is outside the scope of this study, since it raises the whole question of criminal discovery which has already been referred by the Minister of Justice to the Criminal Law Reform Committee for consideration.

7.8 DELAYS BEFORE TRIAL

A further complaint from some victims is the delay which occurs between the time of the complaint to the police and the completion of the High Court trial. This is, of course, a problem which partly flows from the need for a preliminary hearing, and applies to all offences which are being tried by jury.

In the court file study, an average of 2 to 3 months elapsed between the time of the offence and the preliminary hearing, and a further 3 to 4 months between the preliminary hearing and the conclusion of the case. Occasionally the delay was much greater, the longest time recorded between the offence and the conclusion of the case being nearly two years. In some cases, a long delay was inevitable, since a suspect was not located immediately, or a new trial was required because the jury could not agree on a verdict. Nevertheless, there were sometimes other delays which could not be attributed to such obvious causes. For example, one case in Auckland took ten months to reach trial after the arrest of the suspect, and there was a gap of six months between the preliminary hearing and the commencement of the trial. In another case in Hamilton, there was a gap of over nine months between arrest and trial, and nearly six months between the preliminary hearing and trial⁽²⁴⁾. Any lengthy delay, whatever its cause, is bound to prolong a rape victim's suffering and anxiety, since she must keep the experience to the forefront of her mind, and thus continue to remember and relive it, until the conclusion of the case. It may also jeopardise the continued co-operation of the complainant and thus reduce the chances of obtaining a conviction.

It was suggested to us, therefore, that rape trials should be given priority and brought on for hearing as soon as possible. For instance, this has been done in Victoria by an amendment to the Crimes Act 1958 (s.359A), which requires that rape trials be commenced within three months of the accused's committal from the preliminary hearing. Rape is thus treated as a special case because of the heightened trauma suffered by complainants in such cases. Whether this is sufficient reason to single out rape trials in this way is more questionable, since

(24) Throughout this time, two defendants were held in custody, although both were eventually convicted.

there are factors in other cases - such as the availability of witnesses - which may sometimes make them equally deserving of an early hearing. There have certainly been efforts in recent years in New Zealand to minimise the delays before criminal jury trials, especially for defendants remanded in custody. In our view, court administrators should always ensure that the scheduling of trials takes into account any special factors associated with the case, including the nature of the offence and the impact of any delay upon the complainant, other prosecution witnesses and the defendant. If this were done, there would be no reason for legislation to distinguish between sexual offence trials and other trials.

7.9 THE COMPOSITION OF JURIES

There has been some criticism of the composition of juries in rape cases, on the grounds that although rape can only be committed by a man upon a woman, juries are usually composed principally of men. Of the trials in the court files where information was available, 47 out of 55 had seven or more males on the jury, and five were all-male juries.

Recent changes to the system of empanelling juries brought about by the Juries Act 1981 (see Research Report 3) may have changed this, but criticisms of the composition of juries have persisted, and one recent case in Christchurch in which a defendant was acquitted by an all-male jury provoked particular consternation. Interestingly, while most judges and lawyers responding to our questionnaire stated that prosecution and defence do not select juries in rape cases on the basis of sex, a substantial minority of lawyers (40%) did think that defence counsel try to avoid women jurors.

The English Advisory Group on the Law of Rape (1975), the Australian Royal Commission on Human Relationships (1977) and the Tasmanian Law Reform Commission (1976) all recommended that the law should be changed to ensure that at least four men and four women serve on a jury dealing with sexual offences. Their reason for doing so was that "in rape (as, no doubt, in many other sexual cases to a greater or lesser degree) a proper balance of the views of both sexes is of importance, indeed we feel of paramount importance, in reaching a proper view about the attitude of the man and of the woman." (Advisory Group On The Law of Rape, 1975, para 187).

Two High Court Judges in a written submission to us made a similar comment in the following terms:

Cases of rape or other forms of sexual assault on women depend primarily upon the assessment of the character and credibility of the female complainant except in those rare cases where there is substantial corroboration. We are very doubtful whether a predominantly male jury is likely to reach as accurate or as balanced a conclusion as one which is composed more or less equally of men and women.

Some of the American literature points to predominance of men on juries as a factor for low conviction rates, but none that we have seen contains any statistical basis for this. It would be possible to undertake a statistical study to see whether the sexual composition of juries bears any relationship to the

verdict reached. We think this exercise would be worth undertaking. If, but only if, a significant correlation is established, consideration may need to be given to some provision ensuring that the predominance of males and females shall not exceed 7 to 5. This would of course involve considering whether or not the right to a jury of one's peers involves retention of the right to select a jury wholly or substantially of one sex.

It is worth noting that one study in South Australia (Criminal law and Penal Methods Reform Committee, 1976, pp.53-54) comparing the sex composition of juries with verdicts in rape trials from 1966 to 1975, showed no significant difference between predominantly male and predominantly female juries. The vast majority of judges and lawyers who responded to our questionnaire also thought that there was no difference between men and women jurors in the likelihood of acquittal.

Any proposal that there should be a particular proportion of both sexes on a jury raises wider issues than we are able to deal with in this study, since it would reject the traditional principle that the random selection of jurors is the best method of obtaining impartial and representative juries. We certainly think that it is a proposal which should not be accepted without careful and critical scrutiny. After all, if juries are to be truly representative in terms of sex, why should they not also be representative of ethnic minority groups and socioeconomic groups? It is perhaps desirable that the compilation of the jury list be as impartial and as representative as possible; but if the selection of the jury itself is to be impartial and to have a better distribution of the sexes, then it seems to us that this might be better achieved by a review of the right of prosecutors to stand jurors aside and the right of prosecuting and defending counsel to peremptory challenges.

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