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SEXUAL ASSAULT LAW REFORM IN THE 1980s: TO WHERE FROM NOW?

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SYDNEY UNIVERSITY LAW SCHOOL

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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

SEXUAL ASSAULT LAW REFORM IN THE 1980s: TO WHERE FROM NOW?

Convenors: Dr Sandra Egger, Premier's Department
Chief Superintendent Peter Sweeny, Police Prosecuting Branch, Police Department N.S.W.

CHAIRMAN:
The Honourable Sir Laurence Street, Chief Justice of New South Wales

18 March 1987
State Office Block, Sydney

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FOREWORD

Professor Richard Harding
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New South Wales has been one of the pioneers in sexual assault law reform, not just within Australia but also internationally. It is particularly appropriate, therefore, that this seminar should have been held to take stock of progress and to begin charting future needs. For, as was pointed out in the L'Orange/Egger paper, "law reform is not a 'once and for all' exercise. There is a demonstrated need for continued vigilance in the monitoring of the operation of the law."

The papers canvassed two main areas—sexual abuse involving adults and child sexual abuse. These tended to be discussed discretely, rather than as related though distinct aspects of a single continuum. If a link did emerge it was that of concern for the victim. The question of how best to refine further legal procedures so as to protect victims from trauma associated with the processes of investigation and court trials thus emerged prominently.

As so often happens in such discussions, this concern for the victim manifested itself to some extent as anger against offenders, or putative offenders, as a class, and dismay about the supposed shortcomings of the legal system. Some ideas were put forward which, if adopted, would tend to distort or erode the presumption of innocence. This is a trap into which feminists, particularly but not exclusively, tend to fall in their understandable revulsion against certain kinds of male behaviour as the layers of prejudice and disbelief which have hitherto concealed them are peeled away. Let me give some examples.

First, the L'Orange/Egger paper, in analysing conviction rates since the passage of the 1981 legislation, exhibited this propensity. Their paper is an overwhelming demonstration of the success of the 1981 law reform package. Reports have increased, police acceptance of those reports as a basis for investigation has increased, guilty pleas have increased, the acquittal rate in contested cases has decreased, the humiliating corroboration warning has been dramatically curtailed, evidence of sexual experience of the victim is now admitted only exceptionally. In summary, the conviction rate is now a little higher than that in other serious offences against the person. It is an impressive achievement, cogently demonstrated. Yet, even so, the authors raise the question whether the rate is 'acceptable'. Whilst properly and carefully pointing out that such a question is beyond the scope of their paper, they do nevertheless seem to indicate their own view:

> Furthermore, the extent to which juries acquit persons accused of sexual assault is not just a question of criminal law and procedure. Jury decisions are also a reflection of society's views about women, sexuality and relationships. Acquittals are to some degree a reflection of a much broader problem of confusion, prejudice and repressive attitudes towards sexuality in society. Claims that 'rape victims don't act like that' and 'she asked for it' are not just constructions of the defence counsel expounded without constraint in the criminal trial. They actively draw upon existing stereotypes and attitudes in the community. (page 28)

This passage, taken in conjunction with their earlier view that 'often the victim is still tried and found guilty' amounts to an attack upon jury competence in this area. The jury is still the most reliable and visible safeguard of fairness in the criminal justice system. There are many interest groups who attack it for precisely this reason. Feminists, and everyone else who is repelled by the sexual victimisation of women, should ponder the wisdom of aligning themselves, however guardedly or obliquely, with such persons.

Another example concerns the debate at the seminar on the unsworn statement. Clearly, this was a lively bone of contention. The L'Orange/Egger paper put the debate into its full procedural and philosophical context, that this statement represents the only occasion in a criminal trial when a witness has the opportunity to tell a story in his or her own words. Accordingly, they raised the question whether the whole question of criminal procedure should not be reviewed from the point of view of enabling more witnesses, particularly victims, to have such an opportunity, though not necessarily of course by way of an unsworn statement. In a sense, the debate raised later by Byrne concerning the videotaping of interviews with alleged victims of child sexual abuse is an aspect of this same concern, though it was, of course, raised for quite different motives. Unfortunately, some of the contributors from the floor became extremely emotive, one suggesting for example that 'it stinks' and that at the very least the right to make such a statement should be abolished in relation to cases involving a sexual assault. Woods, Q.C., put the matter in an appropriate context by pointing out that 'it is wrong . . . to put forward in the interests of law reform views which are excessively emotional based upon the wrong theory that most rapists are escaping.' (page 79)

A final example concerned the evidence of children. In Thornthwaite's written paper, the view was expressed that "it is a world-wide fact that children do not tell lies in relation to sexual abuse that has been committed upon them by a person in authority." (page 63) When this view was questioned from the floor, Ms. Nixon, on behalf of Thornthwaite, defended it. It is, of course, the building block upon which to construct especially protective rules for receiving the evidence of child victims. What did not emerge sufficiently during the seminar, however, is the extent to which this is an article of faith rather than of empirical fact. Moreover, the evidence for a contrary view was not mentioned at all. As to the first point, the most authoritative recent article on the matter (McCord, "Expert Psychological Evidence about Child Complainants in Sexual Abuse Cases," 77 *Journal of Criminal Law and Criminology*) rather lamely states:

> . . . there is every reason to believe that false reports of child sexual abuse are very rare. Although it is probably impossible to verify this observation empirically, as a matter of common sense and human experience it must be true. Most people simply do not make false crime reports.

Yet available Australian material throwing a different perspective on to the matter (Wilson, "False Complaints by Children of Sexual Abuse," April 1986 *Legal Service Bulletin*) could have been cited. Included in that article is reference to a telling Western Australian case in which a schoolteacher successfully sued a teenage female student for defamation arising out of a complaint of sexual abuse. It is facile and potentially dangerous to construct a legal edifice upon the notion that all children are innocent and ingenuous. Such a process could only occur in the sort of pro-victim, anti-offender climate of

opinion currently prevailing in this area—a climate which could endanger the presumption of innocence and the checks and balances which traditionally form part of our rules of criminal procedure to give substance to that presumption.

I have already indicated that, apart from the blemish I identified, the L'Orange/Egger paper was a superb overview of the effects of the law reform package passed in 1981. It is a model of the sort of evaluation which should, ideally, follow upon major social reforms in the area of criminal justice policy. We know where we were trying to go; we can see to what extent we are getting there. Their message, I believe, is a cause for real satisfaction. The fine tuning measures they suggest are certainly worthy of careful consideration.

No less impressive is Byrne's overview of the 1985 legislative package relating to child sexual abuse and the means of dealing with it. The five statutes are complex and interlinking, but amount to a determined effort to create a scheme which will encourage reporting, minimise traumas at the investigation and trial stages for the child, and maintain the presumption of innocence. In some ways, the most interesting aspect of the package is that of post-charge, pre-trial diversion of suitable offenders. The aim is to preserve preservable family units where the offender is redeemable, and the philosophy focuses more on the social pathology of this offence than on the wickedness of the offender. Of course, a relatively small proportion of such situations and offenders will be suitable for such disposition. It emerged, in response to a question from the floor, that New South Wales is to commence the pilot scheme in mid-1987. This is a radical initiative and deserves evaluation of the calibre which the 1981 sexual assault law reform package has received. Interestingly, South Australia seems likely, assuming it follows the recommendation of its Child Sexual Abuse Task Force which reported late in 1986, to await any such evaluation before adopting a similar scheme.

This seminar was clearly as informative and provocative as are most of those held by the Sydney University Institute of Criminology. The series of publications based upon such proceedings is now firmly established as one of the primary resources of Australian criminology. In this respect, the high scholarly standard of this collection of papers will add to our understanding in a most perplexing and contentious area of social policy.

ADULT VICTIMS OF SEXUAL ASSAULT: AN EVALUATION OF THE REFORMS*

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Dr Sandra Egger, Premier's Department, N.S.W.

Introduction

In 1981 major changes to the law of sexual assault were introduced in New South Wales. The ambitious scope of these reforms is clear from the Parliamentary debate:

> This is an historic measure and one of the most important reforms this Government has ever presented to this Parliament. The object of the principal bill—the Crimes (Sexual Assault) Amendment Bill—is to remedy major defects in the law relating to rape and sexual assault.
>
> These reforms are designed to protect the victims of rape from further victimization under the legal process; to encourage rape victims to report offences to the authorities; to facilitate the administration of justice and the conviction of guilty offenders; at the same time, to preserve the rights of the accused; and to serve an educative function in further changing community attitudes to sexual assault.[1]

The aim of the present paper is to assess the changes brought about by the reforms and to re-assess the reform goals themselves six years later.

The 1970's represented a decade of awareness, optimism and activism for women. The political nature of crimes of violence against women was increasingly recognised and many feminist organisations focussed on rape law reform as a key objective. The late 1970's and early 1980's saw reforms to the laws of rape introduced in many different jurisdictions all over the world.[2] The New South Wales reforms were the most extensive and radical reforms undertaken in Australia at the time. The question we seek to address is whether the optimism of the period was justified. Was rape law reform an appropriate political strategy for women's groups to adopt? Does the law now adequately meet the goals of protection, punishment, prevention and education? Are rape victims treated in a more humane and just fashion by the legal process?

The N.S.W. Reforms

Under the sweeping amendments contained in the *Crimes (Sexual Assault) Amendment Act*, 1981, the common law offence of rape was abolished and replaced with a series of sexual assault offences of differing degrees of seriousness. The single maximum penalty of penal servitude for life was replaced by a series of penalties of 20, 12 and 7 years for the 3 graduated categories of sexual assault.

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* The opinions expressed in this paper are those of the authors and do not necessarily reflect the views of the New South Wales Government.

[1] N.S.W. *Hansard*, Legislative Assembly, 18th March, 1981.

[2] Reforms were enacted in Canada, the U.S.A., England and in the Australian States of Western Australia, Victoria, South Australia, Tasmania and New South Wales.

The offences of sexual assault category 1 and category 2 involve actual violence, or a threat of violence with a weapon and there is no requirement that lack of consent be proved. The violence or threat may be directed towards a third person who is present or nearby.

Sexual assault category (s. 61D) requires proof of lack of consent. The circumstances which vitiate consent are described in s. 61D (3). 'Threats or terror' capable of vitiating consent may be directed to the victim or to third parties. Mistake as to the identity of the other person or mistake as to the fact of marriage both vitiate consent under s.61D (3) (a). The circumstances capable of vitiating consent are not exhaustively listed in the statute and thus the common law principles continue to govern other types of circumstances which vitiate consent.

The mental requirements for sexual assault category 3 are substantially the same as the requirements at common law. The offence requires knowledge of lack of consent or subjective recklessness. The test is essentially that articulated in *Morgan*[3] and the defence of honest mistake applies.

The justification for these changes was that—

- the common law 'rape offence unduly emphasized the sexual component as distinct from the violence component';
- 'the term rape involved an unacceptable stigma for victims';
- the primary emphasis should be changed 'from consent to sexual penetration or intercourse';
- 'there should be a graduation of offences of sexual assault with distinct ranges of penalties rather that one major offence of rape with a virtually unlimited penalty range'.[4]

A statutory definition of sexual intercourse was also provided in the reforms which was significantly wider than the common law concept of penetration. It is also gender neutral. Sexual assault for the purposes of s. 61B, C, & D, includes vaginal intercourse, and intercourse, fellatio, cunnilingus, the insertion of objects and parts of the body into the anus or vagina and the continuation of sexual intercourse. The primary justification for these changes was that such acts may render the victim 'much more seriously injured, physically and psychologically that a female into whose vagina a penis is inserted without consent.[5]

The reforms also significantly restricted the cross-examination of victims about prior sexual behaviour. Unlike some previous attempts to deal with the problem of offensive and irrelevant cross-examination of the complainant's character and reputation by reference to prior sexual behaviour, the New South Wales reforms did not seek to retain a general discretion for the admission of such evidence.[6] The approach adopted in New South Wales was to provide a blanket prohibition coupled with specifically defined exceptions.

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[3] *D.P.P.* v *Morgan & Others* (1975) **61** Cr. App. R., p. 136.

[4] Woods G. D. *Sexual Assault Law Reforms in N.S.W.: A commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act, 1981,* Dept. of Attorney-General & Justice, Sydney, p. 12.

[5] Woods, *ibid,* p. 9.

[6] General prohibitions were enacted in 1976 in England and in South Australia: the *Sexual Offences (Amendment) Act,* 1976; The *Evidence Act* 1929–1976 (S.A.).

s. 409B (2) provides a complete prohibition on the admission of evidence relating to the sexual reputation of the complainant. s. 409B (3)–(8) prohibits evidence of prior sexual behaviour unless it falls within one of the situations described in subsections (a) to (f). The legislation narrowly defines these evidentiary gates. The limitations provided in s. 409B & C also apply to the unsworn statement.

The major justification for these restrictions was 'to overcome the problem that the defence in a rape trial is commonly conducted not merely by legitimately testing genuinely relevant allegations but by blackening the character and reputation of the complainant in respect of sexual behaviour unconnected with the alleged crime'.[7]

Under the new law the common law immunity for males under 14 years of age and for husbands was abolished. The law of recent complaint was also modified. Where delay or absence of complaint is raised s. 405B requires that the jury be warned that this does not indicate false complaint and that such delays may occur for 'good reasons'. These modifications recognised the reluctance of many victims to report sexual assault[8] and were designed to ensure that 'genuine victims should not be deterred from coming forward and reporting offences'.[9]

s. 405C abolished the compulsory corroboration warning. Under the new discretionary provision 'the judge will not be compelled to utilize the traditional formula of denigration which identifies women as especially untrustworthy.[10]

The Scope of the Reforms

In general terms, the most significant and ambitious changes to the law involved the replacement of the single rape offence with a series of sexual assault offences emphasizing the violent rather than the sexual component of the act, the broadening of the definition of sexual intercourse, and the strict limitations on the admission of sworn and unsworn evidence of prior sexual behaviour and reputation.

To the extent that other contentious issues were tackled, the reforms may be viewed as tinkering around the edges rather than drastically altering the substance of the law. The thorny problems of consent and the mental requirements of the offences were largely ignored in relation to sexual assault category 3, the most common offence.[11]

One possible hypothesis is that the offences involving actual or threatened violence would be more numerous and thus the problems in relation to consent would operate only in a small number of cases. Empirical evidence suggests the reverse.[12] The majority of sexual assaults do no involve the infliction of serious

[7] Woods, *op. cit.* p. 31.
[8] Young., *Rape Study Vol. I, A Discussion of Law & Practice.* Dept. of Justice and the Institute of Criminology, New Zealand, 1983.
Scott D. & Hewitt L. 'Short term adjustment to rape and the utilization of a sexual assault counselling service.' *A & N. Z. Journal of Criminology* 1983, **16,** p. 93.
[9] Woods, *op. cit.* p. 26.
[10] Woods *op. cit.* p. 28.
[11] Warner K. 'The Mental Element and Consent under the New Rape Laws', *Criminal Law Journal,* 1983. 7. p. 245.
[12] Scott & Hewitt *op. cit.* (*see* footnote 8).

bodily harm or threats with weapons. Furthermore, proof of lack of consent in cases involving violence or threats is clearly less onerous for the Crown to establish. It is precisely in a sexual assault where there is no overt violence or threat with an offensive weapon that the problems in relation to lack of consent and the accused's state of mind create the greatest difficulties.

Thus although the 1981 reforms courageously tackled the issues of violence, the type of sexual act, and the treatment of victims in court, there were also significant issues not addressed.

The Operation of the Law

In assessing the operation of the amendments extensive use was made of the excellent work of the New South Wales Bureau of Crime Statistics and Research.[13] The Bureau evaluation study of the new sexual assault laws was conducted at the request of the Attorney General. The study examined transcripts of all rape and sexual assault (categories 1 to 3) offences entering committal in two separate 18 month time periods. The first time period involved all cases charged with rape or attempted rape under the s. 63 and s. 65 of the *Crimes Act,* 1900. The second time period involved all cases charged with sexual assault categories 1 to 3 or attempt under s. 61B, 61C, 61D, or 61F, of the *Crimes (Sexual Assault) Amendment Act,* 1981.

In the present paper the New South Wales amendments are evaluated in relation to a set of broad principles which have been regarded by many commentators as appropriate aims for the law of rape.[14]

1. *The Symbolic and Educational Functions of the Criminal Law*

The symbolic role of the criminal law is often stressed by women's organisations in relation to rape, domestic violence, and pornography.[15] The criminal law in morally condemning certain types of behaviour and attributing moral blameworthiness to persons committing such acts plays an important role in shaping community attitudes. The moral dimensions of the criminal law serve to reinforce and influence community attitudes.

The areas of criminal law of most concern in feminist analyses are those involving violence against women, sexual violence against women, and attitudes

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[13] N.S.W. Bureau of Crime Statistics & Research. *Interim Report 1: Crimes (Sexual Assault) Amendment Act,* 1981. 1985.
N.S.W. Bureau of Crime Statistics & Research. *Interim Report 2: Sexual Assault—Court Outcome, 1985*
N.S.W. Bureau of Crime Statistics & Research, *Interim Report 3: Court Procedures,* 1987.

[14] Law Reform Commission of Victoria, *Discussion Paper No. 2, Rape & Allied Offences, 1986. Report of the Advisory Group on the Law of Rape* (The Heilbron Committee) H.M.S.O. Cmnd 6352 London 1975.
Pickard T. 'Culpable Mistakes & Rape: Relating Mens Rea to the Crime'. 1980. **30**, *University of Toronto Law Journal,* p. 75.
Wells C., 'Swatting the Subjective Bug' *Crim. L. R.* 1982 p. 209.
Naffin N. *In Inquiry into the Substantive Law of Rape,* 1984 Women's Advisor's Office, Dept. of Premier, Adelaide.
Tempkin J. 'Towards a Modern Law of Rape' (1982) **45** *Modern Law Review* p. 399.

[15] Report of the N.S.W. Task Force on Domestic Violence, 1981. Wilson E., *What is to be done about Violence against Women,* Penguin, 1983.
Edwards S., *Female Sexuality and the Law,* Martin Robertson, 1981.

towards women's sexuality as portrayed in pornographic publications. It is generally held that the criminal law has a valuable role to play in changing attitudes towards sexuality and in changing relationships between men and women by clearly and strongly condemning unacceptable behaviour.[16]

In the context of the New South Wales amendments it is difficult to determine if any broader social changes have been generated by a change in the law. However, it may be assumed that at the very least, the changes to the law may influence the attitudes of rape victims and the attitudes of those involved in the administration of criminal justice. It may be expected that under the new law more victims would be prepared to report to the police in the knowledge that the legal process has been modified, and that the police would be more prepared to accept reported rapes.

Table 1 presents the number of offences reported to the police in New South Wales and the number of offences accepted by the police in the period from 1972 to 1986.[17] The number of offences reported to the police nearly trebled in this period (1972: 342; 1986: 961). A comparison of 1980 (the last full year of the old law) and 1982 (the first full year of the new law) indicates an increase of 23 per cent in the number of offences reported to the police.

Whilst such findings are promising, the possibility of a real increase in the incidence of sexual assault in the same period cannot be discounted and thus the findings are equivocal.

The increasing acceptance of reports of sexual assaults by the police also shows a marked change in the last 15 years. Fewer reports were rejected as false complaints. In 1972, 56.1 per cent of reports were accepted by the police. In 1986, 81.8 per cent of reports were accepted by the police. The trends over the last decade has been a gradual increase and thus it is unlikely that the law alone is responsible for the greater degree of acceptance. The establishment of sexual assault centres in hospitals,[18] community education campaigns, additional police training on sexual assault, and a generally improved awareness of sexual assault in the community may also have contributed to the greater degree of willingness on the part of the police to accept more reports as genuine. However, it is at least a plausible conclusion that the reforms to the law have played some role in these changes. The greatest change occurred between 1980 and 1982 at the time the new laws were introduced.

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[16] Law Reform Commission of Victoria (1986) *op. cit.* (*see* footnote 14).
Naffin (1984) *op. cit.*
Wells (1982) *op. cit.*

[17] New South Wales Police Statistics, 1972–1986.

[18] N.S.W. Bureau of Crime Statistics & Research, *Interim Report 1, op. cit.* (*see* footnote 13).

TABLE 1

Sexual Assault Offences[1] Reported to the Police and Offences Accepted by the Police 1972 to 1986

Year	*No. Reported*	*No. Accepted*	*% Accepted*
1972	342	192	56.1
1973	366	191	52.2
1974	383	252	65.8
1975	416	269	64.7
1976	423	292	69.0
1977	477	344	72.1
1978	514	369	71.2
1979	565	355	62.8
1980	615	387	62.9
1981[2]	578	402	69.5
1982	758	641	84.6
1983	842	738	87.6
1984	863	739	85.6
1985	784	632	80.6
1986	931	762	81.8

[1] This includes all rape and attempt rape offences until 14th July, 1981 and all sexual assaults categories 1, 2 and 3 and attempt subsequent to this date.

[2] The new laws came into effect on 14th July, 1981.

The more fundamental questions of whether there have been changes in attitudes towards female sexuality and changes in relationships between men and women is more difficult to answer. The relationship between the law and political and social attitudes is one of mutual influence and at the same time independence.[19] Such broad social and political changes are likely to take time and may be manifested in a variety of ways.

Some writers have tended to overrely on the symbolic function of the law and assume that law reform is:

> 'intrinsically a transfomer of action' and that a 'change in legislation will generate a corresponding change in social behaviour'.[20]

As argued by Brown[21] it cannot be assumed that legislative change in itself will necessarily deliver the desired effects. At the very least it must be accompanied by open and public debate, education, changes in administrative and institutional policies and practices, and reforms aimed at improving the social and economic status of women. Legislative reforms should seek to ensure that repressive ideologies are not reflected and recreated in the law, but cannot alone guarantee social transformation.

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[19] Smart C., *The Ties That Bind*, London, Rutledge, 1984.

[20] Cornish A., 'Public Drunkenness in N.S.W.: From Criminality to Welfare', *A.N.Z.J. of Criminology*, 1985, **18**, p. 73.

[21] Brown D., 'The Politics of Reform' in Richardson M., Ronals C., and Zdenkovski G. (eds), *The Criminal Injustice System Vol. 2*, Photo Press, Sydney, 1987.

2. *The Protection of Victims of Rape from Further Victimization by the Legal Process*

The treatment of victims of sexual assault by the legal process has been a key issue in recent times. The humiliation and distress experienced by victims during the trial has been described in many studies.[22] It is often claimed that the victim feels as though she, not the accused, is on trial. An examination of the evidentiary rules and procedures traditionally operating in rape trials provides strong support for these claims. The victim's character and previous sexual life are often subject to close and offensive cross-examination. She is frequently protrayed as promiscuous and untruthful.

Any delay in reporting the offence is often portrayed by the defence as evidence of fabrication, despite the many studies demonstrating the complex factors which mitigate against immediate disclosure.[23] Finally in many jurisdictions the jury is warned that it is 'dangerous to convict' on the words of the victim alone. She is again portrayed as being particularly prone to lying.

The most significant of the New South Wales reforms were those directed at alleviating the personal trauma experienced by victims during the trial.

2.1 Delay in Complaint

S. 405B (2) requires that where absence or delay in complaint is raised the judge shall warn the jury that this does not necessarily indicate that the allegation was false and that there may have been 'good reasons' for the hesitation.

The Bureau study found that delay in complaint was raised in 44.9% of cases heard under the amendments and 38.8% of cases heard under the previous law[24]. The data on the s. 405B warning was unfortunately incomplete: the judge's summing up was not available in slightly more than one third of the cases where delay was raised. The statutory warning was not given in 3 of the cases where delay was raised. Further analysis of the operation of the warning is prevented by the high number of cases where the summing up was not available.

However, a recent judgement in the Court of Criminal Appeal has raised the question of the proper relationship between s. 405B and the common law direction[25]. The court held that in addition to giving the s. 405B direction, the judge should as a general rule continue to direct the jury that the absence or delay in complaint be taken into account in evaluating the evidence of the complaint and in determining whether to believe the complaint. The question is whether this effectively waters down the s. 405B requirement.

Should legislative direction be given to indicate that the s. 405B warning expressly excludes the common law direction as articulated in *R* v *Kilby*[26] or is it appropriate that both directions be given?

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[22] Adler Z., 'Rape—The Intention of Parliament and the Practice of the Courts', *Modern Law Review*, 1982. **45**, p. 667.
Dumaresq D., Rape—Sexuality in the Law. *MJ*/1981. N5 &6. p. 41.

[23] Toner B., *The Facts of Rape*, Hutchinson. London. 1979.

[24] N.S.W. Bureau of Crime Statistics & Research, *Interim Report 3 op. cit.* (*see* footnote 13).

[25] *R* v *Davies*. (1985) 3 N.S.W. Law Reports, p. 277.

[26] *Kilby* v *The Queen* (1973) **129** CLR 460.

2.2 Corroboration

The 1981 amendments abolished the requirement that the corroboration warning ('unsafe to convict') be given in sexual assault trials. The new warning is now discretionary. The Bureau study found that the corroboration warning was not given in the majority of cases tried under the new law (71.5%).

2.3 Evidentiary Restriction on Sexual Reputation and Experience

The study by the Bureau of Crime Statistics and Research found that the evidentiary restrictions in s. 409B and C significantly reduced the number of cases in which evidence of the complainant's sexual past was raised and admitted in court proceedings.

2.3.1 Sexual Reputation

An absolute prohibition against evidence of sexual reputation is provided in s. 409B (2) of the *Crimes (Sexual Assault) Amendment Act,* 1981. **Table 2** presents the proportion of cases where such evidence was admitted at committal in cases heard under the 1981 amendments as compared to the previous law.

TABLE 2.

Sexual reputation admitted in evidence at committal.

	cases heard under the 1981 Amendments		*cases heard under the previous law*	
	N.	%	N.	%
Not admitted	209	92.8	165	86.4
Admitted	16[1]	7.1	26[2]	13.6

[1] In one additional case reputation was raised but rejected by the court.

[2] In two additional cases reputation was raised but rejected by the court.

In 16 cases heard under the 1981 amendments sexual reputation was admitted (7.1%), despite the total prohibition. Seven were references to prostitution and nine to reputation for promiscuity.

Table 3 presents the proportion of cases, where evidence of sexual reputation was admitted at trial.

TABLE 3.

Sexual reputation admitted in evidence at trial

	cases heard under the 1981 Amendments		*cases heard under the previous law*	
	N.	%	N.	%
Not admitted	74	93.6	73	93.5
Admitted	5[1]	6.3	5	6.5

[1] In two additional cases reputation was raised in the record of interview but deleted.

In 5 cases heard under the 1981 amendments, reputation evidence was admitted (6.3%). Three were references to prostitution and two were references to promiscuity.

The findings are of interest in a number of respects. Firstly, it appears that evidence of reputation (what others believe regarding sexual character) was not frequently raised even before the reforms to the law[27]. However all the references to reputation under the previous law were references to promiscuity. There were no references to prostitution.

Secondly despite the absolute prohibition imposed by s. 409B (2) reputation evidence was admitted, even in the higher courts.

At trial the study found that reputation was admitted in 3 of 5 cases via the record of interview. It appears greater caution may be necessary to edit such documents prior to admission at trial. The admission of evidence relating to reputation of promiscuity is clearly in contravention of the legislation. The prostitution references are more complex since in the majority of cases the sexual assault arose in circumstances involving a commercial sexual transaction. The exclusion of such information may not be possible because of its relevance to the circumstances leading up to and the commission of the offence. Legislative amendment may be desirable to specify an exception under these narrow circumstances.

The Bureau of Crime Statistics & Research report comments on the failure of the amendments to provide a statutory definition of reputation. They cite as problems the vagueness of the concept, the exclusion of reputation of chastity, and the exclusion of reputation evidence even if it is the 'lynch pin' of the Crown or defence case[28].

Apart from the prostitution problem already raised, the courts do not appear to have had difficulty with the concept of reputation. No evidence is presented of the courts misunderstanding reputation or querying its meaning. The main problem appears to be that in a small number of cases the courts are not mindful of the prohibition.

Futhermore, the exclusion of reputation of chastity and reputation generally, even if the 'lynch pin' of the case, is considered to be proper: it has no bearing on whether a women has been sexually assaulted or not on this occasion.

2.3.2 Sexual Experience

Under the 1981 amendments, evidence of sexual experience is inadmissible except under the exceptions provided in s. 409B (3) (a) to (f) and s. 409B (5). The approach taken by the New South Wales legislation was to specify the circumstances which must be satisfied before admission. In brief, these are—

s. 409B (3) (a)—sexual activity (or a lack of) at the time of the offence. ("a connected set of circumstances");

s. 409B (3) (b)—evidence relating to an existing or recent relationship;

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[27] The Bureau report asserts that the literature on the subject suggests that reputation was a standard or frequent defence. This may be questioned. Both Woods and others refer to both sexual experience and reputation as common defences but do not assign relative frequencies. Most of the debate has been on experience.

[28] Bureau of Crime Statistics & Research, *Interim Report 3 op. cit.*

Section 409B (3) (c)—

where the accused denies intercourse took place and the evidence is relevant to the presence of semen, injury, disease, or pregnancy;

Section 409B (3) (d)—

where there is evidence of a disease in the accused (or victim) and its absence in the victim (or conversely, the accused);

Section 409B (3) (e)—

where the victim only alleged sexual assault after the discovery of pregnancy or disease;

Section 409B (3) (f) and section 409B (5)—

where the prosecution alleges that the complainant has or has not had previous sexual experience.

This approach may be contrasted with the English approach where no attempt was made to specify the circumstances where such evidence can be admitted. The principles regulating admission in the English law are those of relevance, unfairness to the defendant, and whether it goes merely to credit or to an issue in the trial.[29]

Table 4 presents the proportion of cases where sexual experience was raised and admitted in evidence at committal.

TABLE 4

Evidence of Sexual Experience at Committal

	cases heard under the 1981 Amendments		*cases heard under the previous law*	
	N.	%	N.	%
Sexual experience raised	75	33.2	126	65.7
Sexual experience not raised	151	66.8	66	34.3
		100.0		100.0
Sexual experience raised and admitted	70	93.3	126	100.0
Sexual experience raised and not admitted	5	6.7	—	—
		100.0		100.0

[29] *R* v *Lawrence* (1977) *Crim. L.R.* p. 492.
R v *Viola* (1982) 1 W.L.R.. 1138.

Under committals heard under the previous law, prior sexual experience was raised and admitted in 65.7% of all cases (N = 126). In committals heard under the amendments, sexual experience was raised in 33.2% of cases (N = 75) and admitted in 31.0% of cases (N = 70). Although the results demonstrate a significant drop in the proportion of cases where sexual experience was admitted after the 1981 amendments there was still a substantial proportion where such evidence was admitted. Furthermore, in over half of these cases no application was made to the magistrate for leave to introduce the evidence and no argument was made as to how the evidence was admissible under the exceptions provided in s. 409B. A further problem identified in the Bureau study at committal was the elasticity of the concept of recent or existing relationship (s. 409B (3) (b)). It varied between 1 week and 6 years. The absence of any direction by appellate courts on the meaning of this subsection is a matter of some concern.

At trial the findings were similar. **Table 5** describes the proportion of cases where evidence of prior sexual experience was raised and/or admitted.

TABLE 5

Evidence of Sexual Experience at Trial

	cases heard under the 1981 Amendments		*cases heard under the previous law*	
	N.	%	N.	%
Sexual experience raised	32	40.6	53	68.0
Sexual experience not raised	47	59.4	25	32.0
		100.0		100.0
Sexual experience raised and admitted	26	81.2	52	98.1
Sexual experience raised and not admitted	6	18.8	1	1.0

In trials heard under the previous law, prior sexual experience was raised and admitted in evidence in 66.6% of cases (N = 52). In trials heard under the amendments, sexual experience was raised in 40.6% of cases (N = 32) and admitted in 32.9% of cases (N = 26).

TABLE 6

The Operation of the Exceptions in the Higher Courts

exception	N.
Existing/recent relationship	12
Sexual intercourse contested	8
Prosecution argues experience or no experience	12
Sexual activity at time of offence	3
Not according to the exceptions	4

(Note: there were multiple reasons in some cases hence the total is greater than the number of cases.)

The range of time periods included in the concept of recent relationship varied between 1 week and in excess of 12 weeks. The desirability of judicial comment on this concept is again demonstrated. The results thus indicate that in a small number of cases (N = 4) the evidence appears to have been improperly admitted.

In general the operation of the prohibition and exceptions appears to have reduced the admission of sexual experience, and narrowed the scope of the material and its use. However the Bureau concluded that 'a wider scope than was perhaps intended by legislature has been given to some of its provisions . . .' and 'that much of the evidence of sexual experience accepted by the local courts would be inadmissible in a higher court'.[30]

These findings suggest that careful consideration should be given to the need for further legislative clarification of the exceptions. It is of interest that in 6 years of operation there is virtually no case law on the operation of these evidentiary provisions. This may be contrasted with the English provisions where there is quite a substantial body of case law on the meaning of s. 2. Perhaps attention should be given by the prosecuting authorities to the need to appeal in cases where the exception is applied in an excessively broad manner. The need for the prosecuting authorities to object to the improper admission of such evidence was also demonstrated, particularly at committal. Consideration should also be given to the means whereby the proper scope of the provisions can be conveyed to magistrates.

The New South Wales amendments thus represent one of the more successful procedural reforms in the law of sexual assault. Prior sexual experience is not raised in the majority of trials and the personal trauma for the victim is thus lessened.

[30] Bureau of Crime Statistics & Research, *Interim Report 3, op. cit.*

However, it may be desirable to further extend the application of the provisions of s. 409B. In a trial for an offence other than a prescribed sexual offence the provisions do not apply. This may create problems where the offence charged is for example, s. 112 of the *Crimes Act* 1900 (break and enter with intent to commit a felony) and the felony is a sexual assault. The victim under these circumstances may be subject to cross-examination on prior sexual behaviour.

In general, it appears that the legislative specification of evidentiary 'gates' has been more successful than the provision of a general judicial discretion. Although the Michigan laws provide clearly defined evidentiary gates, their operation and effectiveness has been questioned because of the likelihood that they unduly infringe the defendant's sixth amendment right of confrontation.[31] Such constitutional conflicts do not arise in New South Wales and the legislative restrictions have not been read down in this way.

It has been suggested that in jurisdictions where a general discretion is provided, leave to cross-examine on prior sexual history is readily granted.[32] In England, the *Sexual Offences (Amendment) Act* 1976 gives the judge discretion whether or not to admit evidence of the complainant's sexual experience. It does not provide guidelines for the exercise of the discretion. Section 2 provides that leave to examine or cross-examine should be granted by the judge 'if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'.

Adler found in a study of the Central Criminal Court in London that applications for leave to introduce evidence of prior sexual experience were made on behalf of 40 per cent of defendants. Three-quarters of the applications were wholly or partly successful and so resulted in the introduction of some evidence of prior sexual experience. Thus in approximately one-third of all cases prior sexual history was admitted at the request of the defence. In an unspecified number, sexual experience was introduced by the defence counsel without first applying for leave or by the judge. The total number of cases where prior sexual experience was admitted is not given but Adler concluded that 'the majority of trials proceeded as previously'.

According to Adler, applications for leave argued that prior sexual experience was relevant to the complainant's credibility, to issues in the trial other than consent, and, in 80 per cent of cases, to consent.

The applications based on consent were most often concerned with whether the complainant was a virgin or whether she had certain sexual proclivities (e.g., intercourse with several partners, intercourse with 'coloured men'). The

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[31] Dreisig, W. P. 'Criminal Law—Sexual Offences—A Critical Analysis of Michigan's Criminal Sexual Conduct Act', *Wayne Law Review*, 1976, 23, p. 203.

[32] Adler, Z. *op. cit.* (*see* footnote 22).
McNamara, P. 'Cross-examination of the complainant in a trial for rape', *Criminal Law Journal*, 1981, 5, p. 25.

difficulties faced by judges in applying s. 2 was discussed in *R. v. Viola* but the court declined to lay down any guidelines. *Viola's* case did however lay down a series of questions that the judge should ask himself:

> Are the questions relevant according to the ordinary rules of evidence?
>
> If yes, are the questions merely seeking to establish that the complainant should not be believed because of her sexual experience?
>
> If yes, they should be excluded in exceptional cases.
>
> If no, are the questions relevant to an issue in the trial, e.g., consent?
>
> If yes, they should be admitted.

It has been argued that these questions do not provide adequate guidelines and thus:

> the principles established in nineteenth century case law are to a large extent still governing the implementation of the 1976 Act.[33]

Opposing points of view have been put by others.[34] The English Criminal Law Review Committee concluded after discussion with judges and members of the criminal bar that there were no grounds for concern on the operation of the discretionary provisions.[35] They referred to the requirement that such evidence is only admissible if relevant to an issue in the trial in the light of the way the case is being run. This does not adequately recognise the fundamental challenge being made to traditional concepts of sexuality reproduced in the rape trial. Women's groups are questioning the concept of relevance, the way in which cases are run and the value judgments traditionally applied by the legal process.

The view that prior sexual experience is relevant to the issue of consent as re-affirmed in *R. v. Viola* is a continuing matter of concern. It reconstructs in the rape trial a passive view of female sexuality in contrast to the "normal" active view of male sexuality. Strong sexual passion is accepted as normal and appropriate for the male accused, where as an absence or strictly circumscribed form of sexuality is required for the victim.

> At no point do the proceedings assume a man's intent to have sexual intercourse is wrong; what is in question is whether he intended intercourse with the wrong partner.[36]

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[33] Adler, Z. *op. cit.*, p.675.

[34] Elliott, D. W. Rape Complainant's Sexual Experience with Third Parties, *Crim. L.R.*, 1984, p. 4.

[35] Criminal Law Revision Committee, Fifteenth Report (Chairman, Rt Hon. Lord Justice Lawton), *Sexual Offences* H.M.S.O., *Cmnd.*, 9213, 1984.

[36] Dumaresq, D., 1981. *op. cit.*, p. 53 (*see* footnote 22).

In contrast, it is assumed that if a woman has had sexual intercourse outside a defined sphere of permissible operation (e.g., marriage) then this has a direct bearing on the issue of consent on this occasion. The concerns of the women's groups remain: only the particular event in question should be relevant.

The New South Wales reforms tackled this by only permitting cross examination on prior sexual experience under certain circumstances. The new law thus narrows the concept of relevance: sexual experience is relevant to consent only under the circumstances outlined in s. 409B. This is preferable to the position where the relevance of prior sexual experience to consent is at large, as under the English law.

The 1981 reforms did not however tackle the other court practices which degrade and humiliate the victim. Conservative and repressive attitudes towards women's sexuality are still strongly reflected in other ways. The question of consent is still muddied by the attempt to portray the victim as a woman of loose morals who 'asked for it' by her dress (e.g., too short), her actions (e.g., hitching a lift), her words (e.g., she attempted to engage the accused in conversation) and her alcohol or drug consumption. Her bodily reactions to the assault may be probed in minute detail in the trial. Often the victim is still tried and found guilty.

Her crime is of conduct unbecoming a rape victim, although such conduct may be acceptable and encouraged in other situations. For example, the clothing or rather the absence of clothing of page 3 girls is regarded as a positive image of sexuality for the afternoon papers, but a negative or impermissible image for the rape victim. Women's groups have been critical of both images.[37]

> The discourse of rape does construct a specific sexuality, within its own area, that is different for men and women and which produces both rape victim and rapist.[38]

In addressing the sexuality arising from the discourse of rape, the most common demand is for restrictions on the type of cross-examination allowed in court. The New South Wales amendments have met this demand in relation to prior sexual history but have not restricted the other ways in which repressive attitudes towards women's sexuality are reproduced in the court. The question awaiting consideration is whether further restrictions on cross-examination should be pursued or, whether such stereotypes of women's sexuality should be challenged more directly in other ways, both in the court and in the society at large.

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[37] Rickford, F., 'The Dark Side of the Sun', *Marxism Today*, 1986, May, p. 28.

[38] Dumaresq, D. *op. cit.*, p. 41.

3. *The Conviction and Punishment of Guilty Offenders*

Despite the empirical evidence suggesting that prevention and rehabilitation are rarely achieved by the criminal justice system, the conviction and punishment of wrongdoers remains a proper goal of rape law. As argued by the Victorian Law Reform Commission:

> Even if the community cannot rely on the legal system to eradicate sexual offences it can at least rely on it to do justice when accused persons are convicted.[39]

Low conviction rates for rape have long been a matter of concern for women's groups. There have been numerous studies pointing to the relatively low conviction rate for rape.[40] The results from the Bureau study demonstrate a higher committal and conviction rate under the amendments.[41] Fewer cases charged under the 1981 amendments lapsed at committal (18.4 per cent) than under the previous law (25.3 per cent). The overall conviction rate was also higher for cases charged under the 1981 amendments (82.7 per cent) than previously (70.3 per cent). Furthermore, the conviction rate under the amendments is now comparable to that of other serious offences against the person: murder 82.3 per cent, major assault 80.7 per cent, all sexual offences 85.6 per cent.

The increased conviction rate is a product of two factors: an increase in guilty pleas and a reduction in the percentage of acquittals. Firstly, there was an increase of 10.2 per cent in the percentage of cases where a plea of guilty was entered. Under the previous law 46.2 per cent of cases involved a plea of guilty compared to 56.4 per cent under the amendments. Secondly, there was a decline of 14.2 per cent in the acquittal rate under the new law. Of the cases where a plea of not guilty was entered, 40.9 per cent were acquitted under the 1981 amendments compared with 55.1 per cent under the previous law. Thus the findings of the Bureau study demonstrate an increase in convictions, an increase in guilty pleas and a decrease in acquittals under the *Crimes (Sexual Assault) Amendment Act,* 1981 as compared to the *Crimes Act,* 1900.

The sentencing of convicted offenders has been discussed extensively in the public debate surrounding rape law reform. The New South Wales reforms have been criticised for having the lowest maximum penalty in Australia for sexual intercourse without consent.[42] The Bureau study demonstrated a higher imprisonment rate under the 1981 amendments than under the previous law. Eighteen per cent of distinct offenders received non-custodial sentences after the changes to the law compared with 30 per cent previously.

Furthermore, offenders sentenced under the 1981 amendments to imprisonment more often received sentences in the 'middle range periods of imprisonment, between 3 and 5 years,' (19.3 per cent compared to 10.0 per cent). Non-parole periods were however, generally shorter for offenders sentenced under the 1981 amendments than under the previous law.

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[39] Law Reform Commission of Victoria (1986). *op. cit.* (*see* footnote 14), p. 4.

[40] Naffin. (1984), *op. cit.*. (*see* footnote 14)
Law Reform Commission of Victoria (1986) *op. cit.*
Chappell D., the Impact of Rape Legislation Reform, *International Journal of Women's Studies* 1984, 7, p. 1.

[41] N.S.W. Bureau of Crime Statistics and Research, *Interim Report 2, op. cit.*

[42] Naffin *op. cit.*

The increase in the conviction rate under the 1981 amendments is a finding of some interest. There are obviously a number of factors which have contributed to the change. The provision of a series of offences instead of a single offence with a maximum of life is likely to have encouraged some accused persons to plead guilty. The evidentiary restrictions and the reforms to the corroboration warning may have resulted in a 'fairer' trial in some cases. There are many other plausible explanations. However the issue of whether the conviction and punishment of guilty offenders is now at an 'acceptable' level is a difficult question. It involves an assessment of the proper balance between the rights of the accused and the conviction of the guilty. It raises questions beyond the scope of the present paper.

Furthermore, the extent to which juries acquit persons accused of sexual assault is not just a question of criminal law and procedure. Jury decisions are also a reflection of society's views about women, sexuality and relationships.[43] Acquittals are to some degree a reflection of a much broader problem of confusion, prejudice and repressive attitudes towards sexuality in society. Claims that 'rape victims don't act like that' and 'she asked for it' are not just constructions of the defence counsel expounded without restraint in the criminal trial. They actively draw on existing stereotypes and attitudes in the community.

4. *The Protection of the Sexual Integrity of the Individual*

The law should also aim to protect the individual against non-consensual sexual violation. In doing so there should be an approximate correspondence between the seriousness of the violation and the legal consequences. Acts which involve a serious sexual violation should be recognised and punished more severely than those where the violation is of a less serious nature. The New South Wales amendments tackled this problem in several ways. Firstly, the role of violence is emphasised as of primary importance by the introduction of a series of sexual assaults with different penalties. Secondly, by expanding the definition of sexual intercourse, acts which had previously been regarded as less serious and hence classified as indecent assaults are now to be treated by the law as of comparable seriousness to vaginal penetration by the penis. Finally, by the abolition of status immunity for husbands and males under 14 years, acts which had previously been exempt from criminal liability are now regarded as serious sexual assaults.

The question at issue is whether the New South Wales law now more appropriately reflects wider community views in the assignment of liability and punishment to the crime of sexual assault. Although in the period under the study there were only 2 cases which involved estranged husbands and no cases involving males under 14 years. There appears little doubt that the abolition of the immunities was justified. The prior existence of a certain type of a relationship or the relative youthfulness of the accused should not mean that

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[43] Callinan S., 'Jury of her peers.', *Legal Services Bulletin* August 1984, p. 166.

the law assumes such acts are consensual, or impossible.[44] The expanded definition of sexual intercourse predictably resulted in a wider range of acts charged under the 1981 amendments.

TABLE 7
The Physical Circumstances

Types of Penetration	*cases heard under the 1981 Amendments*		*cases heard under the previous law*	
	N.	%	N.	%
Penis/Vagina	94	50.5	118	81.4
Penis/Anus	11	6.0	0	..
Penis/Mouth	19	10.2	0	..
Tongue/Vagina	4	2.2	1	0.06
Finger/Vagina	6	3.2	1	0.06
No penetration	52	27.9	25	17.2
Total	186	100.0	145	100.0

Table 7 shows that acts other than the common law acts of penis/vagina penetration accounted for 21.6 per cent of charges under categories 1 to 3 or attempt under the 1981 amendments.

Again, there can be little doubt that the seriousness of the violation is more appropriately reflected in the law by the widening of the definition. The effect of the replacement of the single offence of rape with a series of sexual assault offences is a complex issue. As stated previously it may have contributed to an increase in guilty pleas. An increase in the proportion of guilty pleas was also found in the first year of operation of the Michigan reforms.[45]

However sexual assaults with actual or threatened violence remain in the minority. The Bureau study found that 50 per cent of cases heard in the higher courts under the amendments were charged with sexual assault category 3 (s. 61D). Approximately one third of cases were charged for the offences involving in actual or threatened violence. (s. 61B and s. 61C : 31.8%). Thus the single largest category of sexual assault offences remains sexual intercourse without consent where actual violence or threat with a weapon is alleged.

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[44] Cunliffe proposes many problems which technically may arise with the abolition of rape the immunity relating to rape in marriage. None have yet eventuated. He also argues that it is not enough for prosecutorial discretion to weed out cases which may be technical assaults under the law. He argues that this should be accomplished by the statute. This ignores the role played by discretion at all levels in the criminal justice system. The victims 'discretion' to regard the act as an offence and complain, the discretion at committal, during the course of the trial, sentencing discretion and the discretionary choices underlying all 'judge made' laws.
Cunliffe J., 'Consent and Sexual Offences Law Reform in N.S.W.' *Criminal Law Journal*,1984, 8, p. 271.

[45] Dreisig *op. cit.* (*see* footnote 31).

The New South Wales amendments have been criticised as emphasizing the violence of the assault at the expense of other equally serious aggravating factors. The Naffin report points out that there other equally serious factors in aggravation. These include the number of offenders (the pack rape), the age of the victim, and circumstances of gross humiliation.[46] The difficulty faced in such 'fine tuning' of the law is that there is not a simple one to one correspondence between liability, punishment and damage to the victim. The criminal law although recognising the harm suffered by the victim as a relevant consideration in attaching blame and punishment, must of necessity also consider other factors: the moral culpability of the accused, his state of mind, the need for both deterrence and rehabilitation, the community standards and the protection of the public.

In many ways the pack rape clearly demonstrates the tension between these various considerations. The pack rape is a horrendous experience for the victim and the damage suffered is often great, both physically and psychologically. On the other hand the culpability of the accused is in many ways less than that of the planned, single sexual assault. Research studies show that pack rapes often involve younger offenders who may not pre-meditate the offence but whose judgment is affected by the situation and the peer group pressure.[47]

Whilst such factors do not excuse the behaviour or suggest exemption from liability and punishment, the culpability of the accused for the act of pack rape may be less than that of the pre-meditated and deliberate act of a single rapist. At the present time such factors are taken into account at sentence, where the judge has a wide discretion to weigh all the circumstances.

The question posed often by Naffin and other commentators is whether factors other than violence should be isolated to form the basis of a separate offence with an increased penalty or should such factors remain for consideration in the 'melting pot' of the sentencing process? Empirical evidence on whether factors such as the pack rape are adequately taken into account in sentencing would assist in the resolution of this issue.

The introduction of a series of sexual assaults of varying degree of seriousness has also been accompanied by a debate on the proper relationship between the offences. In a given set of circumstances, do the categories of sexual assault represent a mutually exclusive ladder of offences requiring a choice to be made as to which offence is appropriate? Or do they represent a non-exclusive, complementary set of offences such that in cases involving sexual intercourse without consent the basic offence of s. 61D may be accompanied by either s. 61B or C according to the harm inflicted or threatened?

This issue was settled in *Smith's*[48] case where it was held that the offences involving actual or threatened violence are additional offences, cumulative upon s. 61D. It was further held that in sentencing for an offence under s. 61B or s. 61C it would not be open for a judge to hold against the offender that he had

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[46] Naffin., *op. cit.*

[47] Woods G. D., 'Some Statistics relating to indivual & pack rape', *Proceedings of the Institute of Criminology, No. 6,* Sexual Offences Against Females (1969 N.S.W. Government Printer), pp. 9–26.

[48] *R v Smith* (1982) 2 N.S.W. Law Reports p. 569.

also committed an offence under s. 61D unless specifically charged and convicted. The decision has been interpreted as a direction that where there is evidence of sexual intercourse without consent as well as injuries, category 3 should be charged as well as category 1 or 2.[49]

The decision has also been criticized in so far as it denies the judge in sentencing a category 1 or 2 offence the discretion to punish more severely a completed act of intercourse unless charged.[50] Such a criticism fails to recognise that the maximum penalties for the offences involving actual or threatened violence were set at a substantially higher level than sexual intercourse without consent.

Although arising out of the one set of circumstances, the presence of the violence or threats elevates the offence to a more serious category with a higher maximum penalty. The creation of separate offences out of the individual components in a single set of circumstances and the practice of separately charging each should not be undertaken lightly. In Australia sentences are most often concurrent but cumulative sentences are frequently handed down in other jurisdictions.

The potential for difficulties in this area was envisaged by the legislature in the 1981 amendments. s 442A provides that if a person is convicted under s. 61B and 61C or s. 61D the judge should take into account the fact that they arose substantially out of the one set of circumstances. The relationship between the basic offence of sexual intercourse without consent and the 'violent offences' (s. 61B and C) is an issue worthy of further study.

There has also been a debate surrounding those reforms such as New South Wales, which have emphasised the violent at the expense of the sexual component. Many commentators have criticised the changed emphasis, quite properly stressing that it is the lack of consent which defines the act of rape irrespective of whether and how much violence is inflicted.[51] In practice neither New South Wales nor Michigan have eliminated the sexual component or removed 'consent' from the law. At the most, violence, may be viewed as an aggravating factor which elevates the maximum available penalty in both jurisdictions.

The Areas Not Tackled by the New South Wales Reforms

Three contentious areas that the New South Wales reforms did not modify in any substantial way were the areas of consent, the mental element and the unsworn statement

1. *Consent*

The most commonly charged offence under the 1981 amendments is s. 61D, sexual intercourse without consent. Absence of consent is an ingredient of the offence and the common law principles supplement the amendments contained

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[49] Cunliffe, *op. cit.*
[50] N.S.W. Sexual Assault Committee, *Proposal for review*, 1986.
[51] Wilson, *op. cit* (*see* footnote 15)
Dumaresq, *op. cit.*
Naffin, *op. cit.*

in s. 61D (3) (a) concerning the vitiation of consent by threats of terror and mistake. The problem of consent is an especially difficult one for the law. It requires a judgment to be made of the state of mind of the victim immediately before the sexual act: was she merely acquiescing or submitting because of force, fear, fraud, threat or some other serious pressure.

> ..... 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.[52]

The New South Wales amendments did not greatly extend the range of circumstances or pressures sufficient to negative consent. Threats or terror have been generally interpreted as threats of physical violence. The amendments extended such threats to third parties. Under s. 61D (3) (a) (1) mistaken belief as to the identity of the person vitiates consent. This largely restates the common law. The common law is extended in s. 61D (3) (a) (2): the Papadimitropoulos situation mistake as to the fact of marriage is sufficient to vitiate consent.[52a]

There has been considerable debate on the issue of consent. On the one hand many commentators have argued that 'without consent' should be restricted to situations where consent is obtained by fraud or threats of force. On the other hand, there has been an increasing call for the law to recognise that freedom of choice must be protected by recognising other forms of coercion which preclude effective consent.

The arguments for retaining the existing restrictions are that further extension would make the law too 'vague',[53] 'broaden the law to an unacceptable degree'[54] and that the law should be confined to the situation where the 'sexual choice is eliminated' and not extended to where the choice may be merely 'unpalatable'.[55]

The arguments for an extension of the circumstances which vitiate consent point to the fact that there are many different types of sexual coercion, but only a limited few are punished.[56] Physical coercion may not be the most harmful to the victim. Burgess & Holstrom presented an empirically derived typology of rape which illustrates the wide range of situations where consent is vitiated by coercion of different kinds.[57] Furthermore it is argued that the existing limits as to what constitutes coercion are artificial and unjustified and do not adequately protect freedom of sexual choice.

Statutory reforms to the common law have adopted a number of different approaches. The Michigan reforms and the New South Wales reforms tackled the problem by eliminating consent as an element of the offence. In both cases, however, consent emerged in other ways. In Michigan it is available as a defence

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[52] Law Reform Commission of Victoria p. 12.

[52a] *Papadimitropoulos v R* (1957) 98 C.L.R. 249.

[53] Howard C., *Criminal Law*, Law Book Co., 1982.

[54] Criminal Law Revision Committee, Fifteenth Report, *op. cit.*

[55] Tempkin J., 'Towards a Modern Law of Rape' (1982) **45** *Modern Law Review.*, p. 406.

[56] Clark L. M. G. & Lewis D. J., *Rape: The Price of Coercive Sexuality.* The Women's Press, Toronto, 1977.

[57] Burgess A & Holstrom L., 'Rape Trauma Syndrome,' *American Journal of Psychiatry*, 1974, 9 p. 981.

to the accused.[58] In New South Wales consent is not an element of the offence in Sexual Assault categories 1 and 2 but remains an element of s. 61D, the most common sexual assault offence.[59]

Another approach has been to specify in the statute the circumstances which vitiate consent. The New South Wales amendments also adopted this approach in a limited way by listing a small non-exhaustive set of circumstances. A more detailed list was suggested by Naffin in South Australia. A further approach characterised by the provision of a broad, general list of circumstances has been adopted in Tasmania, Western Australia and Canada. All preserve the reference to force, threats, and fraud as negativing consent.

The generality of the statutory forms in the latter reforms appears likely to result in the courts recognizing a wider range of circumstances capable of negativing consent.[60] Whether this has happened is not clear at this point. It has also been suggested that the reforms may have the undesirable effect of putting more scrutiny on victims and their motivation than the common law.[61]

The Victorian Law Reform Commission recently came down in favour of the general approach. They cited the Western Australian approach as a suitable starting point where consent is defined as free and voluntary and the circumstances capable of vitiating consent are listed as 'force, threat, intimidation, deception or fraudulent means'.[62] The Victorian Law Reform Commission would add to this list 'coercion and harassment'.

The interpretation and operation of these statutory forms is yet to be observed but may result in either:

— the law of rape being extended to cover situations where a false promise of a fur coat is made;[63]

— absolutely no change because the courts continue to apply the restrictive common law principles.

It is to be hoped that the actual interpretation will fall somewhere between these extremes. Both the case for law reform and the direction for reform requires further study.

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[58] Marsh J. C., Geist A., & Caplan N. *Rape & The Limits of Law Reform*, Autumn House, Boston, 1982.

[59] Some commentators argue that consent may still be relevant in sexual assault categories 1 & 2: Cunliffe *op. cit.*

[60] On the other hand Scutt argues that the general provisions do not go as far as the N.S.W. provisions: Scutt J. A., 'Sexual Assault and the Australian Criminal Justice System' in Chappell D. & Wilson P *The Australian Criminal Justice System*, Butterworth, 1986, p. 57.

[61] Cunliffe. *op. cit.*

[62] s. 8 *Amendment (Sexual Assaults) Act*, 1985.

[63] Cunliffe *op. cit.*

2. *The Mental Element*

There has been extensive debate concerning the subjective test of belief of consent.[64] Morgan's case re-affirmed the subjective test: an honest belief in consent on the part of the accused does not satisfy the requirements for criminal liability. Those who favour an objective test argue that the belief should also be based on reasonable grounds.[65]

> The debate is thus a classic one about a key philosophical aspect of the criminal law.[66]

The criminal law over many centuries has moved in emphasis from a concern with the external act to a primary concern with the mind of the accused.[67] Murder and manslaughter provide one of the most clear examples of these developments in legal doctrine: an increasing concern to restrict the responsibility for murder to the narrowest most subjectively responsible, morally blameworthy state of mind.[68] The contemporary legal doctrine of mens rea is based on the assumption that that a blameworthy state of mind is required.[69] The criminal law assumes that people have the power to choose whether to do criminal acts or not, and that the few who choose to do such an act are responsible for the resulting evil.[70]

The call for an objective or reasonable test of belief in consent is thus a call for a fundamental change in principles.[71] The arguments for such a change are concerned with the role of the law in ensuring that proper care is taken in establishing that a person is consenting to sexual intercourse and in protecting sexual choice.[72] The standard of care should be reasonable and the effect of the change would be to create 'greater explicitness in sexual contexts'.[73]

Another argument has been put by Naffin: the mental element requirements are responsible for the low conviction rate in rape trials. No empirical evidence is provided for this assertion and it may be questioned whether such a fundamental change is justified on these grounds alone.[74]

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[64] *D. P. P.* v *Morgan and Others op. cit.* (*see* footnote 3)

[65] There has also been a debate on subjective foresight in recklessness. See:
Goode M., 'The Mental Element of Rape, the Naffin report and Other Questions: A defence of the Common Law,' *Criminal Law Journal*, 1985, 9, p. 17.

[66] Law Reform Commission of Victoria *op. cit.* p. 33.

[67] Wells *op. cit.* (*see* footnote 14) disputes that the subjective principle of mens rea actually accords with criminal culpability and queries whether it is always desirable.

[68] Dixon O., 'The Development of the Law of Homicide' 1935–36', **9** *Australian Law Journal Supplement*, p. 64.

[69] Smith J. C., & Hogan B., *Criminal Law*:, London Butterworth, 1983.

[70] Smith & Hogan.

[71] Cowley D., 'The Retreat from Morgan', *Crim. L. R.* 1982, p. 198.
Report of the Advisory Group on the Law of Rape, op. cit. (*see* footnote 14).

[72] Tempkin J., 'The Limits of Reckless Rape.', *Crim. L.R.* 1983, p. 5.
Wells *op. cit.*

[73] Pickard *op. cit.* (*see* footnote 14) p. 77.

[74] Sutton disputes these assertions on empirical grounds.
Sutton A. & Koschnisicky N. 'The Case for Empirical studies', *Legal Services Bulletin*, 1984, **9**, p. 162.

Reform proposals suggested by Naffin involve a shifting of the onus of proof in various ways from the Crown to the accused. Describing her most radical proposal which would create an affirmative defence of honest and reasonable mistake, Naffin states:

> Not only does it require the accused to give an account of himself and convince the jury of his belief in consent, but it also obliges him to persuade the jury of the reasonableness of that belief.[75]

This proposal goes much further than the other reform proposals and clearly offends some of the fundamental principles of the criminal law.[76] At the very least all the reform proposals are concerned with the establishment of an offence of rape by negligence. Opposition to such changes has been as vocal and entrenched as the calls for change[77] and as yet none of the common law jurisdictions in Australia, or England has moved in this direction. New Zealand has recently introduced a reasonableness requirement. The code states of Queensland, Tasmania and Western Australia require that the defence of honest mistake be reasonable.

It has been suggested by Cowley that some of the concern with the subjective test arises from the misapprehension that the accused only has to make a bald assertion of belief rather than adduce evidence of a reasonable belief.[78] In practice, the evidentiary burden imposed by the subjective test requires the accused to adduce some reasonable evidence of belief, although the belief is not required to be reasonable.

This evidentiary requirement has a statutory footing in England. Consideration should perhaps be given to amending the New South Wales provisions along the lines of the English provision to clarify this requirement.

3. *The Unsworn Statement*

A final issue of public concern has been that of the unsworn statement. The arguments underlying the calls for abolition of the unsworn statement are summarised by Scutt:

> Women's groups . . . complain that the victim witness in such a case is subjected to rigorous cross-examination often of a probing kind designed to destroy the women's credibility and standing, whilst the defendant is free to make whatever statements he chooses without fear of cross-examination. Women's groups complain that the character of the victim witness can be besmirched by the defendant in his unsworn statement, yet his character is not called into question.[79]

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[75] Naffin, *op. cit.*, p. 49.

[76] Goode, *op. cit.* (see footnote 65).

Smith, J. C., 'Rethinking the Defence of Mistake' *Ox. J.L.S.*, 1982, 2, p. 429.

Williams, G., 'Recklessness Redefined,' *C.L.J.* 1981, 40, p. 252.

Goode, *op. cit.*

Royal Commission on Human Relationships, *Final Report* (1977) A.G.P.S., Canberra

[77] Cowley, *op. cit.*

[78] Law Reform Commission of Victoria, *Report No. 2, Unsworn Statement in Criminal Trials*, September 1985. Minority report presented by Scutt, J. A., p. 28.

Retention of the unsworn statement, with or without modification has been supported, on the other hand, by others. The Victorian Law Reform Commission, the Australian Law Reform Commission and the New South Wales Law Reform Commission have recently recommended retention.

The arguments in favour of retention point out that the majority of criminal defendants are from educationally and economically deprived backgrounds. Such people are seriously disadvantaged in the criminal trial and may be 'unable to do themselves any justice if cross-examined.'[80] The unsworn statement enables them to take part in the trial without the risk of prejudice and injustice. Furthermore the claims that the right is unfair because it applies only to the accused do not adequately consider the fact that the accused is the only person liable to suffer conviction and punishment.

The 'unfairness' ground was tackled by the University of New South Wales law teachers in their submission to the New South Wales Law Reform Commission.[81] They point out that debate on the appropriate balance between defence and prosecution is not very helpful and in any case the balance is not in favour of the accused.

> Criminal justice in principle places the onus of proof on the prosecution and provides the accused with the right to a trial and a presumption of innocence. But it operates in practice on the assumption that for the vast majority these rights must be merely empty rhetoric.[82]

The law teachers maintain that the right to make an unsworn statement is one of the very few genuine rights enjoyed by the criminal defendant. They recommend however that the restrictions on the mention of prior sexual behaviour imposed by s. 490C on the unsworn statement are appropriate and should be strictly enforced by the courts. An interesting point made by these authors and not sufficiently explored in any of the reform proposals on the unsworn statement is that the real 'problems' are the current rules of evidence and the question and answer method of eliciting of in-court evidence which distort or preclude the accurate recall or reporting of events. The unsworn statement represents the only opportunity in the criminal trial for defendants to 'tell their own story in their own words'. It represents the only opportunity for an accused to directly participate in his own defence.

If such a procedure is felt to be unfair to victims of sexual assault then perhaps the direction for the future should be to consider ways in which the victim may have a similar opportunity, rather than deprive accused persons of the right. Consideration should also be given to more carefully regulating the type of statements made in the unsworn statement.

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[80] Law Reform Commission of Victoria, *ibid*, p. 22.

[81] Law Teachers, University of N.S.W. Law School, *Unsworn Statement of Accused Persons*, Unpublished submission to N.S.W. Law Reform Commission, August, 1985.

[82] McBarnet, D., *Conviction*, MacMillan, London, 1981, p. 78.

Scutt questioned whether the abolition of the unsworn statement would make any difference to the concerns raised by women's groups.[83] Abolition of the unsworn statement does not mean that the accused will be cross-examined:

> He may remain silent while the woman victim continues to be harshly treated through cross-examination.

Scutt points that stringent and destructive cross-examination selectively disadvantages people in certain categories (women, blacks, people of non-English speaking backgrounds) irrespective of whether they are the victim or the accused. The restrictions imposed in s. 490B may thus represent an important first step in tackling the problems described in the cross-examination of witnesses.

The existing restrictions on the unsworn statement in New South Wales also address some of the concerns of the critics. Section 490B & C prohibit mention of the victim's prior sexual behaviour in both evidence and the unsworn statement. If the accused raises his own character in the unsworn statement then the prosecuting authorities are able to tender evidence of character.[84] In the Bureau study there were examples of where the defendant clearly contributed to his own conviction by raising his character in the unsworn statement. The prosecuting authorities were permitted to tender antecedents which included prior convictions for sexual assault.[85]

The difficulty faced in reform proposals is how to preserve and extend the opportunity provided by the unsworn statement for the parties to "tell their story in their own words" without the artificial restraints imposed by the legal process, whilst at the same time using the legal rules to restrict the possible abuses.

Conclusion

In conclusion, some general themes seem to emerge from this review of rape law reform.

Firstly, although the New South Wales reforms have been successful in tackling many of the problems identified in the vast literature on rape, there are still areas where previously identified problems continue and new problems have emerged. This suggests that law reform is not a 'once and for all' exercise. There is a demonstrated need for continued vigilance in the monitoring of the operation of the law.

Secondly, the underlying theme of much rape law reform is the challenge being made to the repressive and passive views of female sexuality reproduced in the discourse on rape.[86] Although the reform proposals reviewed in the present paper raise many diverse and technical legal problems, the primary objective of the reforms has been to change the way in which the law defines and responds to the rape victim. Female sexuality as reproduced in the rape

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[83] Scutt, *op. cit.* (*see* footnote 60).

[84] *R.* v. *Stalder* (1981) **2**, N.S.W. Law Reports, p. 9.

[85] Bureau of Crime Statistics and Research personal communication.

[86] Dumaresq, *op. cit.* (*see* footnote 22).

trial is passive and chaste. The law in many ways denies female sexuality. The victim is required to either conform to this ideal or be classified as an agent provocateur: a seductress, a prostitute, or an hysterical or vengeful false accuser.[87] The concern of the women's movement has been to challenge these boundaries of permissible sexual behaviour and to restore to women control over their own sexuality.[88]

> [Rape] is a violation of a woman's autonomy and a negation of her independence.[89]

Traditionally, the law of rape has operated in a way which has reinforced the negation of a woman's autonomy and independence in the sexual sphere.

Finally, the limits of law reform should be recognised. The law does not exist in a cultural and political vacuum. The legal construction of the rapist and the rape victim actively draws upon broader community attitudes and stereotypes. Transformation of attitudes and the relations between men and women requires broad economic and social changes in society.[90]

> The legal system we have expresses the class-divided, racist and sexist nature of our society, and campaigns to change the law, while valuable and indeed essential, have to recognise that the system is unlikely to be radically altered until society as a whole changes.[91]

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[87] Edwards, *op. cit.* (*see* footnote 15).

[88] Dumaresq, *op. cit.*

[89] Wilson, *op. cit.*, p. 78 (*see* footnote 15).

[90] Weekes, J., *Sexuality*, Ellis Horwood, 1986.
Coward, R., *Patriarchal Precedents*, Routledge & Keegan, 1983.

[91] Wilson, *op. cit.*, p. 229.

CHILD SEXUAL ASSAULT—LAW REFORM PAST AND FUTURE

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The History Prior to 1984

It is not so long ago that the plight of abused children was absolutely ignored. It has been said that the first recorded case of child abuse in the United States of America in which official action was taken to help a child victim occurred in New York in 1874. A young girl who had been regularly mistreated by her parents was removed from her home after a group of church workers successfully intervened on her behalf by appealing to the Society for the Prevention of Cruelty to Animals.[1] In the area of sexual assault of children, much progress has been made and particularly in the very recent past. The conclusion of this paper is that there is a great deal more that can be done, but that this is an area in which our legislators should tread very carefully.

When the first New South Wales *Crimes Act* was drafted in 1883, it contained relatively few specific provisions relating to sexual offences against children.[2] It was an offence punishable by death to have carnal knowledge of a female under the age of 10 years.[3] Carnal knowledge with a female aged between 10 and 14 was punishable by a maximum of penal servitude for 10 years. It was also expressly provided that offences of carnal knowledge committed by a schoolmaster or a father against a female under the age of 16 would be punishable by a maximum of penal servitude for 14 years. The other relevant section provided that indecent assaults upon a girl under the age of 14 years would be punishable by a maximum penalty of penal servitude for five years.

It was not until 1924 that the specific offence of incest was established by the *Crimes Act.*[4] At the same time, the age at which consent became relevant in those offences mentioned above was raised from 14 years to 16 years. It is also important to note that it was not until 1974 that a provision was introduced into the *Crimes Act*[5] making it an offence punishable by a maximum of imprisonment for two years to commit an act of indecency with a female under the age of 16 years. A similar provision relating to offences committed with males had been established in 1955.[6]

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[1] T. M. Lewis, Commissioner of Police (Qld) 'Child Abuse: Is Police Involvement Necessary' (1985) *Australian Crime Prevention Council*, Vol. 7, No. 5, p. 3.

[2] (1883) 46 Victoria No. 17, ss. 41—44.

[3] (1883) 47 Victoria No. 17, s. 41. See later *Crimes Act* 1900, s. 67 as amended by *Crimes (Amendment) Act* 1955.

[4] *Crimes Act* 1900 s. 78A.

[5] *Crimes Act* 1900 s. 76A, repealed and replaced by *Crimes Act* 1900 s. 61E(2).

[6] *Crimes Act* 1900 s. 81A.

There are some important rules of criminal procedure which must also be taken into account in order to get a complete picture of the approach taken to the prosecution of child sexual assault cases before the recent amendments:

* The rules providing for the evidence of children to be received under oath were restrictive and concentrated on the child's appreciation that telling lies would be punished by divine retribution.[7]
* The law provided that a trial judge must give the jury a specific warning about the danger of convicting where there is no corroboration of a complaint of sexual assault. It also required that a similar warning be given in relation to the evidence of children. Where the case involved an allegation by a child of a sexual offence, the warning was therefore required on two grounds. Indeed, the *Crimes Act* expressly provided that there could not be a conviction for a sexual offence based on unsworn evidence of a child unless there was some corroboration.[8]

There is no suggestion that any special procedures were used in the prosecution of offences involving the sexual abuse of children. As recently as 1969 the late Sir Harold Snelling, Q.C., then Solicitor–General, made the point that the procedure involved in prosecuting the charge of a sexual offence committed against a young person, should be altered in an attempt to avoid and minimise the traumatic consequences for the child. He observed that because of the absence of corroboration of the child's story, it would often happen that the jury would either be directed to acquit or having received the usual warning, would be 'virtually certain' to acquit. Even if there was a conviction, because many cases involved people who have previous good character, they would be 'virtually certain' to receive a bond from the sentencing judge. He also noted that some offences of this nature are committed by persons who are mentally ill.[9] These factors probably contributed to making the area of child sexual assault one of those in which the discretion to prosecute the case was often exercised in favour of abandoning the prosecution.

In 1977 the Royal Commission on Human Relationships recommended, amongst other things, that the procedure in child sexual assault cases should be changed by establishing a special tribunal to decide whether or not a criminal prosecution is desirable in cases of sexual offences involving child victims and that trial procedures where these cases involve young people should be altered so as to minimise the risk of occasioning distress to children who are required to give evidence.[10]

The Royal Commission recommended that incest should cease to be an offence but suggested that where the accused person and his or her partner are members of the same family, the age of consent for the offences of unlawful sexual intercourse and indecent assault should be 17. For the purpose of this rule it was proposed that 'members of the same family' should include adoptive

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[7] See now *Oaths (Children) Amendment Act* 1985.

[8] *Crimes Act* 1900 s. 418, repealed by *Crimes (Child Assault) Amendment Act* 1985 s. 5(6).

[9] H. R. Snelling, Q.C., 'Sexual Offences involving Female Children' in *Proceedings of the Institute of Criminology*, No. 6, Sexual Offences against Females (N.S.W. Government Printer 1969) pp. 61—69.

[10] Royal Commission on Human Relationships *Report* (1977) p. 217.

parents, guardians, foster-parents, step-parents and *de facto* husbands and wives. It was also suggested that where the accused person and his or her partner are related as brother and sister, the recommended age of consent should not apply if the age difference between the parties is no more than five years.[11]

In New South Wales no action was taken to implement the proposals made by the Royal Commission on Human Relationships. The important changes made in the 1981 legislation, which has been referred to in detail in another paper given at this seminar, did not specifically address the special situation of children and the benefit of these reforms was not extended to child sexual assault cases.

There followed two important reports in the United Kingdom which canvassed the question of whether the law relating to sexual assaults against children should be extended to cover offences committed by people in a position of authority. The Scottish Law Commission recommended in 1981 that if any person over the age of 16 is in a position of trust or authority in relation to a child under the age of 16 *and* is a member of the same household, it should be an offence for that person to have sexual intercourse with the child.[12]

In 1984 the Criminal Law Revision Committee in England recommended that there should be a separate offence of unlawful sexual intercourse with a stepchild created but recommended against a more general offence of unlawful sexual intercourse between a child and a person in a position of trust or authority.[13] A further important aspect of the Committee's recommendations was that prosecution for offences in the nature of incest should be conditional upon obtaining the consent of the Director of Public Prosecutions.[14] This feature of prosecutions for offences of incest had already been established in New South Wales at the time the offence was introduced in 1924.[15]

The Criminal Law Revision Committee maintained that the primary reason for retaining the offence of incest is for the protection of the young and vulnerable against sexual exploitation. The Committee argued that apart from the impact upon the individual victim, one of the harmful consequences of incest was the violation of the role of the family.

> A child who suffers abuse at the hand of a stranger can expect comfort and protection from his or her family; incest victims often have no one to whom to turn. Those who should support have been the cause of the suffering.[16]

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[11] *ibid*

[12] Scotland, Law Commission 'The Law of Incest in Scotland' (Cmnd 8422) (HMSO Edinburgh, 1981).

[13] Criminal Law Revision Committee *15th Report: Sexual Offences* (H.M.S.O., London, 1984).

[14] *ibid.*

[15] *Crimes Act* 1900, s. 78F. See also *Crimes Act* 1900, s. 78T (2) relating to homosexual offences.

[16] Criminal Law Revision Committee, note 13 at p. 66.

Fisse has criticised the Criminal Law Revision Committee's proposals on the scope and definition of incest related offences.[17] He points to three major shortcomings:

1. the range of relationships covered is not sufficiently wide to give full protection to all children at risk of sexual abuse from adults in a position of authority or control over them;
2. the age of consent for brother-sister incest is, at 21, high; and
3. the range of incestuous conduct proscribed is confined to sexual intercourse yet other forms of sexual conduct can also be the subject of serious abuse or exploitation.

In New South Wales, the law and procedure regarding the prosecution of child sexual assault cases had been unchanged for many years. Landmark reforms had been implemented in the area of sexual assaults involving adults. Various proposals for reform had been made, both here and overseas, but none had been acted upon.

It was against this background that the New South Wales Government Task Force on Child Sexual Assault was established by the Premier, Mr Neville Wran, Q.C., on 25 June 1984.

1984–1985: The Work of the Task Force

The terms of reference given to the Child Sexual Assault Task Force required it, amongst the things, to:

(iv) Examine N.S.W. laws relevant to the sexual assault of children and make appropriate recommendations consistent with the maintenance of the existing rights of suspects and accused persons relating to—

(a) reporting of child sexual assault;

(b) investigative procedures upon reporting of child sexual assault;

(c) the substantive and procedural law relating to prosecution, trial and disposition of cases of child sexual assault.

The Task Force met a number of times to determine the areas of concern which its report would examine and in respect of which it intended to make recommendations. So far as its work on the law and legal procedures was concerned, the Task Force concentrated its attention upon the following topics:

* mandatory reporting of suspected cases of sexual assault;
* the conduct of medical examinations and the need for the consent of the child;
* the right of private citizens to launch a criminal prosecution for the sexual assault of children;

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[17] B. Fisse 'Incest: A Critique of the English Criminal Law Revision Committee's 15th Report (1984)' in *Proceedings of the Institute of Criminology*, No. 61, Incest (N.S.W. Government Printer, 1984), p. 11.

* the discretion to prosecute offences of child sexual assault and the respective roles of agencies such as the police, the Crown law authorities, the Department of Youth and Community Services and other agencies representing the interests of the alleged victim;
* the need for specially qualified prosecutors to conduct child sexual assault prosecutions;
* the use of electronic equipment to record statements made by children alleged to be victims of sexual assault;
* the use of electronic recordings in court proceedings;
* priority in the listing of cases;
* the venue of trials and of committal proceedings;
* the courtroom environment and in particular the question of whether the accused person and his or her alleged victim should be separated;
* education of children as to court procedures;
* making sure that victims are aware of their rights;
* conducting proceedings in closed court;
* the use of a "support person" to accompany the alleged victim in court;
* prohibition against publication of information which would identify the victim;
* the compellability of a spouse to give evidence in the trial of his or her spouse;
* the law relating to the taking of an oath or affirmation by a child witness;
* corroboration of the evidence of a child;
* evidence of prior sexual experience and reputation;
* warnings to the jury regarding delay in the making of a complaint;
* the categories of offences;
* alternatives to the criminal justice system for the prosecution of cases of child sexual assault.

A community consultation paper publicly released in September 1984 and a vast range of submissions was received. The submissions came from organisations with firsthand experience of the facts of child sexual assault from the four perspectives with which the Task Force was primarily concerned. Firstly, community education, secondly, services and procedures for victims, thirdly, training of personnel and, fourthly, law and legal procedures. Additional conferences were held with representatives of many of the organisations who made submissions.

In the area of law and procedure related to child sexual assault, the following were involved in conferences with members of the Task Force:

* Sir Laurence Street, Chief Justice of New South Wales and his Honour Judge Staunton, C.B.E., Q.C., Chief Judge of the District Court;

* Crown Prosecutors and officers of the Solicitor for Public Prosecutions;
* Public Defenders and officers of the Legal Aid Commission of New South Wales;
* representatives of both branches of the legal profession through the Law Society and the Bar Association.

The objectives of the Task Force could be broadly summarised to include the following:

* bearing in mind the apparent gross under reporting of sexual offences involving children, to increase the incidence of reporting;
* to increase public awareness, including the awareness of potential child victims, of the crime of child sexual assault with a view to its prevention;
* to increase, and improve the standard of, the assistance available to victims of child sexual assault, including the provision of support and counselling;
* to co-ordinate the work of the various agencies involved in this area in order to develop a consistent policy with emphasis on the needs and interests of the child;
* to improve the procedures followed in the investigation and prosecution of offences of child sexual assault.

The report of the Task Force was published in March 1985 and among its 65 recommendations were 23 which proposed amendments to the relevant law and procedure. So far as I am aware, all but one of these recommendations has been acted upon although not all have been implemented at the time of preparing this paper. The most important step in the implementation of the Task Force recommendations was taken on 12 November 1985 when a series of five separate items of legislation was introduced into the Parliament. The outstanding features of the legislation are:

1. Crimes (Child Assault) Amendment Act

* The Act introduces a new range of sexual offences against children which, with one notable exception, apply equally to make and female children.[18]
* The Act generally abandons the use of the term carnal knowledge for offences involving children and replaces it with the definition of 'sexual intercourse' introduced by the 1981 amendments, that is to include acts of oral sexual connection and digital penetration.[19]
* The Act introduces the concept of 'a person in authority' and provides that where an offence is committed by such a person against a child then the maximum penalty available upon conviction should be, in some cases, greater than that for offenders who do not have such a relationship with the victim.[20]

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[18] see 'Homosexual Anomalies' at 32–33 below.
[19] *Crimes Act* 1900 s. 61A.
[20] *Crimes Act* 1900 s. 61A (5); 61D (1A) and 61E (1A) and (2A).

* The Act abolishes the previous requirement that an accused person could not be convicted on the unsworn evidence of a child without some evidence corroborating that testimony.[21]
* The Act brings sexual offences involving children into line with offences involving adults by providing firstly, that a trial judge may give the jury a direction that the fact that a complaint is not made for some time after the offence does not of itself suggest that the complaint is false and secondly, that there should be restrictions upon examination of a child regarding his or her prior sexual experience.[22]
* The Act provides that a spouse is, subject to some minor exceptions, made a compellable witness in the trial of his or her spouse on a charge of assaulting a child, either sexually or otherwise.[23]
* Under the Act, the publication of information which may identify a child involved in a sexual assault case can be prohibited irrespective of the wishes of the accused person.[24]
* The Act provides that where proceedings are conducted in closed court, a 'support person' should be permitted to be present in the interests of the child.[25]

This legislation came into force on 23 March 1986.

2. *Community Welfare (Child Assault) Amendment Act*

* The Act establishes an obligation for various categories of people to report suspected cases of sexual abuse of children.[26] The Task Froce recommended that the following groups be included in this category:
  - teachers;
  - physiotherapists;
  - counsellors for schools and family courts;
  - child care workers;
  - social workers;
  - psychologists;
  - speech therapists;
  - nurses; and
  - police.

3. *Oaths (Children) Amendment Act*

* This legislation provides that the testimony of a child may be received in court proceedings where the person authorised to administer the oath is satisfied that the child;
  (i) is sufficiently intelligent to justify receiving his or her evidence;
  (ii) understands the duty of speaking the truth; and the child promises 'to tell the truth at all times'.[27]

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[21] The previous requirement was contained in *Crimes Act* 1900 s. 481. see note 8.
[22] *Crimes Act* 1900 ss. 405B, 409A.
[23] *Crimes Act* 1900 s. 407AA.
[24] *Crimes Act* 1900 s. 578.
[25] *Crimes Act* 1900 s. 77A.
[26] *Community Welfare (Child Assault) Amendment Act* 1985 s. 4 (1) inserting a new s. 102 in the principal Act.
[27] *Oaths (Children) Amendment Act* 1985 s. 3 (2) inserting new ss. 32–35 in the principal Act and a tenth schedule setting out the form of the declaration.

4. Evidence (Children) Amendment Act

* This legislation provides that the trial judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused person on the uncorroborated evidence of a child. The trial judge may, however, give such a waring if it is considered appropriate in the circumstances of the case.[28]

5. Pre-Trial Diversion of Offenders Act

* This legislation establishes a scheme under which a person accused of the sexual assault of a child may be permitted to participate in a specified treatment programme instead of being subjected to a conventional criminal prosecution.
* The decision as to whether an accused person is a suitable candidate for the pre-trial diversion programme will be made by the authortiy responsible for the prosecution of a child sexual assault offences before the commencement of committal proceedings.
* The availability of the programme is subject to the accused person pleading guilty at the committal proceedings and adhering to that plea on his or her appearance before the Supreme Court or the District Court.[29]
* It is likely that the availability of the pre-trial diversion programme will be limited and that those expressly excluded by guidelines to be formulated will include people who have prior convictions for sexual assault, people charged with offences against children who are not previously known to them.[30]
* The accused person will be required to make an undertaking before the Supreme Court or the District Court to participate in the treatment programme but may at any time during the currency of the programme elect not to continue with it in which case the normal process of prosecution will be commenced.[31]
* Where a person accused of a child sexual assault offence complies with the undertaking made and the requirements made of him or her by legislation, no further proceedings shall be taken against that person in respect of the offence. For all practical purposes the accused person will avoid having a conviction or sentence recorded.[32]

In addition to these legislative enactments, some important administrative steps have been taken to alleviate the plight of victims of child sexual assault and to improve the efficiency of criminal procedure in this area. The Department of the Attorney General has adopted a policy of giving priority to the listing of cases involving charges of child sexual assault second only to that given to proceedings involving persons in custody.[33] This is a significant development. The delays in the hearing of criminal cases, particularly where

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[28] *Evidence (Children) Amendment Act* 1985 s. 3 inserting a s. 42A in the principal Act.
[29] *Pre-trial Diversion of Offences Act* 1985 s. 17.
[30] New South Wales Child Sexual Assault Task Force *Report* (1985) at 117-122.
[31] *Pre-trial Diversion of Offenders Act* 1985 ss. 23, 25.
[32] *Pre-trial Diversion of Offenders Act* 1985 ss. 23, 30.
[33] New South Wales Law Reform Commission *Procedure from Charge to Trial: Specific Problems and Proposals* (DP 14/2, 1987) para 8.11 at 343.

the accused person is released on bail, were identified by the Task Force as being one of the major factors causing unnecessary and avoidable aggravation to the victims of child sexual assault.

In addition, the prosecution of offences of child sexual assault has been reorganised.[34] A separate unit has been established within the office of the Solicitor for Public Prosecutions with the exclusive responsibility for child sexual assault cases. The practice known as 'vertical' prosecution is followed. This involves the case being conducted by a single officer of the Solicitor for Public Prosecutions virtually from the time the charge is laid. That officer will personally conduct the prosecution case at committal proceedings and will instruct the Crown Prosecutor if there is a subsequent trial. The important reasons for introducing this practice are firstly that from the point of view of the child victim, there is one person who is responsible for the conduct of the case from the time it is instituted until its conclusion. This enables a relationship of trust and confidence to develop. Secondly, involving a specialised solicitor in the early stages of the prosecution will mean that the preparation of the case for trial can be accelerated, thereby reducing the time during which the matter is awaiting hearing in the courts.

The Task Force considered whether the right of a private citizen to prosecute an offence of child sexual assault should be preserved. The issue arose in the course of the very detailed consideration which was given to the implementation of a prosecuting policy which would require special precautions to be taken before such a prosecution could be launched. It was felt that the agency responsible should be required to take into account the best interests of the child victim before making the decision to prosecute. At one stage it was considered that to permit an individual citizen to launch a prosecution would defeat the purpose of the specialist prosecuting agency and run contrary to the principles on which the recommendation to establish it was based. This idea was canvassed in the community consultation paper but was met with strong criticism. Ultimately it was considered that as a matter of principle the right of the individual citizen to prosecute should be preserved for all criminal cases and that it was not legitimate to make an exception in the case of child sexual assault.[35] It should be noted, however, that the right of a private citizen to launch a prosecution for a homosexual offence allegedly involving a person under 18 is subject to consent of the Attorney General being obtained.[36] There is no equivalent provision for any other offence of child sexual assault.

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[34] I am grateful to Megan Latham, Officer in Charge, Child Sexual Assault Unit in the Solicitor for Public Prosecutions for the information contained in this paragraph.

[35] New South Wales Law Reform Commission *Procedure from Charge to Trial: A General Proposal for Reform* (DP 13, 1986) para 8. See also New South Wales Law Reform Commission *Procedure from Charge to Trial. Specific Problems and Proposals* (DP 14/2, 1987) paras 12. 49-12. 55 at 535-539; see also Australian Law Reform Commission *Standing in Public Interest Litigation* (ALRC 27, 1985) at 182-209.

[36] *Crimes Act* 1900, s. 78T (2).

The Current Position

The current offences and penalties related to child sexual assault are set out below. The term 'sexual intercourse' is used in the broad sense defined in the 1981 legislation.[37]

TABLE 1

Current Child Sexual Assault Offences
Non-Consensual Offences

	age	*maximum penalty*	*if person in authority*
s. 61B sexual intercourse with GBH	under 18	20	20
s. 61C sexual intercourse with ABH or weapon	under 18	12	12
s. 61D sexual intercourse	under 18	7	7
s. 61D sexual intercourse	under 16	10	12

TABLE 2

Current Child Sexual Assault Offences
Where Consent is Not Relevant

	age	*maximum penalty*	*if person in authority*
s. 61E (1) (1A) indecent assault	under 16	4	6
s. 61E (2) (2A) act indecency	under 16	2	4
s. 66A sexual intercourse child	under 10	20	20
s. 66C sexual intercourse child	10 or over under 16	8	10
s. 78H homosexual intercourse child	under 10	Life	Life
s. 78K homosexual intercourse child	10 or over under 18	10	10
s. 73D teacher father/step-father	16	8	8
s. 78A incest	16 or over under 18	7	7

This classification of offences is confusing and inconsistent. There are many instances of various acts being capable of prosecution under two or sometimes three different sections. Some offences are drafted too narrowly, others cover too broad a range of prohibited activities. There is no guidance given to sentencing judges regarding the factors which should be regarded as aggravating or mitigating the seriousness of an offence. There is also what some people may regard as a serious problem arising from the fact that the provisions relating to homosexual offences differ in important respects from other offences.

The material set out in the previous section largely describes the current law and procedure relating to child sexual assault. It should be added, however, that since the 1985 amendments, practitioners experienced in this field have not encountered serious difficulties in the prosecution of these offences which could be attributed to the changes then made.[38] A special division of the

[37] *Crimes Act* 1900 s. 61A.

[38] see note 34.

Solicitor for Public Prosecutions has been established and since July 1986 has been responsible for the conduct of committal proceedings in child sexual assault cases. In those cases which can be dealt with by a magistrate in the local court if the accused person consents to that course, the solicitor will have the carriage of the matter whilst it is before the court. If the matter is heard in the higher courts, the solicitor who conducted the committal will continue to be involved in the case as it proceeds to trial and will instruct a Crown Prosecutor at the trial itself.

Although the implementation of this scheme has meant that police prosecutors no longer conduct committal proceedings on behalf of the prosecution in cases of child sexual assault, the role of the police is naturally closely linked with that of the prosecutor. In the prosecution of crimes of this kind the establishment of a specialist unit within the police force, namely, the Juvenile Services Bureau, and a specialist unit within the Solicitor for Public Prosecutions, ensures that the relationship between the police and the prosecuting authority will be a close and continuing one. The prosecuting authority has adopted a policy of requiring the brief to be given to them no more than 21 days after the accused person has been charged. After examining the brief, the prosecuting authority is in a position to determine what charges, if any, should be laid. It can give advice as to the need or desirability for further evidence to be obtained or for other charges to be laid. The prosecuting authority has also adopted a policy of serving the trial brief for the prosecution upon the legal representative of the accused person as soon as it is available.

These developments represent a refreshing approach to making the conduct of criminal prosecutions in this State more efficient. Where early contact is made between the investigating police and the prosecuting authority, a more efficient system of prosecution results. There is consequently far less trauma and inconvenience for the child victim. A case which has no prospect of success can be abandoned at a very early stage and cases which might otherwise have been lost can be maintained through the timely advice provided by the prosecuting authority. The early disclosure of the prosecution case to the defence has already resulted in the benefit of reducing the disputes that occur at the committal proceedings and this has limited the extent of cross-examination to which a child victim is subjected.

In New South Wales a child victim is almost always required to give evidence at the committal proceedings unless the accused person pleads guilty before the local court.[39] The experience of those who are frequently involved in child sexual assault cases is that the style of cross-examination of lawyers who represent accused people, not surprisingly, varies considerably and will naturally depend upon the circumstances of the particular case. The impression of one prominent solicitor in this field is that since the involvement of the specialist unit in the Solicitor for Public Prosecutions, there has been a concerted effort to reduce the degree of hostility and intimidation which has sometimes been permitted in the past. Similarly, the approach taken by magistrates towards controlling hostile and intimidatory cross-examination varies considerably and no generalisation can safely be made.

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[39] *Justices Act* 1902, s. 51A. See also s. 48 outlining a system of 'paper committals' which may also relieve the victim of the distress of giving evidence at committal proceedings.

It should also be remembered that it is a well known and legitimate tactical approach for a lawyer to take a much harsher (some might say 'a more searching') approach towards a witness at committal proceedings than would be taken at the actual trial before a jury. In front of the jury there is always the risk that an attempt to intimidate a witness, particularly a child, will sway the emotion of the jury in favour of the child and against the cause being promoted by the defence lawyer.

Steps have already been taken to implement the pre-trial diversion scheme. A location has been selected and the training of personnel has commenced. Experience to date suggests that once this scheme is fully operational, it will have an appreciable effect on the number of people accused of offences of this kind who plead guilty. It is not uncommon, even at this stage, for the Solicitor for Public Prosecutions to be asked on behalf of accused people whether the scheme is in operation.

Reforms for the Future

1. Videotaping the Statements of Victims

When a child makes a complaint of sexual assault, the usual procedure involves the child having to tell a wide range of people of the intimate details of the assault.[40] After making the original complaint, the child may be required to relate the same version of events to a police officer, a doctor, a social worker, representatives of the Department of Youth and Community Services, the prosecutor appearing in court, and perhaps a solicitor if the child makes an application for compensation and at a later stage there may be the need for interviews with counsellors from the Family Court and lawyers appearing in those proceedings. Apart from all this, the child must suffer the ordeal of giving evidence in a criminal court, firstly, at the committal proceedings and, secondly, at the actual trial before a judge and jury.

The goal of protecting the child victim from the ordeal of repeatedly having to recount details of a sexual assault and protecting the child victim from the ordeal of court proceedings is a desirable one and there is a clear need to examine alternative procedures.

The techniques used to obtain relevant evidence in child sexual assault cases can be improved by the use of videotaping equipment. the advantages of having a videotaped record of the child's statement in relation to the offence are:

* the use of videotape allows the child's evidence to be preserved whilst recollection of the events in question is still fresh;
* it would spare the child witness the ordeal of having to recount the facts on a number of occasions;
* the videotape recording is a valuable aid to both the prosecution and the defence in the preparation of a case for trial;

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[40] See generally Paul Byrne 'The Child Victim in Criminal Court Proceedings' in National Conference on Child Abuse, *Proceedings of the Australian Institute of Criminology No. 14* (1986), p. 131.

* the use of the videotape recording will, in many cases, convince an accused person of the fact that the child has made a complaint and encourage an admission of guilt and the consequent avoidance of distress for all those concerned in the trial process;
* from the point of view of the accused person, the videotape recording can be used to check whether the child's version of events was unfairly prompted by improper questioning;
* if the interview is conducted by a properly trained examiner, a complete record of relevant material in admissible form may be obtained.

Videotape evidence has been used in courts in a number of States in America.[41] So far as I am aware, it has not been used in Australia.

2. Reducing the Intimidation of the Court Proceedings

The right of the accused person to be confronted by his or her accuser has traditionally been regarded as one of the fundamental rights of an accused person. In the case of a child victim who alleges a sexual assault, the accused person will often be either related or well known to the victim. In these circumstances particularly, the right of an adult accused person to confront an alleged child victim is regarded by some as being tantamount to a right to intimidate the witness. In the United States, the right of an accused person to be confronted by his or her accusers is guaranteed by the Constitution. However, there are statutes which authorise the examination of a child witness by live closed-circuit television outside the physical presence of the accused person. This is permitted where the court is satisfied that the child is a vulnerable witness and that placing the child and the accused person in the same room is likely to cause the child severe mental or emotional harm.[42]

It has been said that the right to confrontation clause was included in the Constitution to prevent evidence or affidavits being sworn against an accused person without giving that person the opportunity of testing the recollection and conscience of the witness and to compel the witness to stand face to face with the jury in order that the jury may determine by his or her demeanour in the witness box and the manner in which the testimony is given, whether the witness is worthy of belief.[43] In upholding the validity of a statute which provides for hearing child victims on closed-circuit television, the Superior Court of the State of New Jersey observed that:

> it is accepted as a fact that only a modest erosion of the clause, if any, will take place. The child, through the use of video, will not be obliged to see the defendant or to be exposed to the usual courtroom atmosphere. Nevertheless, the defendant as well at the judge, the jury, and the spectators, will see and hear her clearly. Adequate opportunity for cross-examination will be provided. This is enough to satisfy the demands of the confrontation clause. If it is not, it represents a deserved exception. It is more that Wigmore would require. Everything but

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[41] United States Department of Justice, National Institute of Justice 'Prosecution of Child Sexual Abuse: Innovations in Practice' in *Research in Brief* November 1985.

[42] See the judgment of Mr Justice Bernstein in *The People of the State of New York v Albert Algarin* (5 February 1986) in which various authorites on this topic are collected. I am grateful to Rod Howie, Director, Criminal Law Review Division, for drawing my attention to this case.

[43] *Mattox v United States* 156 US 237 at 242–243 (1895).

> 'eyeball-to-eyeball' confrontation will be provided. No case has held eye contact to be a requirement. It is not demanded when a witness 'confronts' a defendant in a courtroom. No court rule requires eye contract and courtroom distances sometimes make contact impossible.[44]

The closed-circuit television system has also been upheld by the Supreme Court of the State of New York which held that the essential elements sought to be guaranteed by the confrontation provision are preserved.[45] The opportunity of the accused person, the judge and the jury to observe the demeanour of the witness is not impeded. The procedure also enables the right to cross-examination and it impresses upon the witness the seriousness of the question at issue. Since the closed-circuit television procedure provides substantial compliance with the purpose of the confrontation requirement, it does not violate the Constitutional right of the accused person to confront the witness. It must be acknowledged that other courts have taken a different approach by holding that the Constitutional provision required that there be face to face contact between the witness and the accused person.[46] The resolution of this conflict will have to wait for an authoritative decision on the question by the United States Supreme Court.

In England, legislation has recently been passed permitting the evidence of a witness under the age of 14 to be given in court proceedings through a live video link.[47] This system enables children who are alleged to be victims of sexual assault to give evidence in an environment which is generally free of intimidation but which is sufficiently formal to impress upon the child the seriousness of the exercise. The child victim is not required to confront the accused person in court. The accused person, the judge and the jury can see the child give evidence on a television screen in the courtroom, The child is questioned in a different location in the presence of a 'supporting' adult. The accused person cannot be seen by the child although the child will see on a television screen lawyers and perhaps the judge who may ask questions. The systems which are to be installed in English courtrooms would cost about $100,000 each.[48] The likely prejudice caused to an accused person by procedures of this kind are their greatest drawback. If such a procedure is to be considered here, my own view is that it should be used in all cases and not restricted to those where the child is considered to be at risk. The fact that the procedure is a standard one should reduce the prejudicial impact its use may otherwise have.

3. Inducements to a Plea of Guilty

The pre-trial diversion scheme which has been referred to above is clearly an inducement to a person accused of the sexual assault of a child to plead guilty and thereby save the child the distressing and damaging experience of having to give evidence in court and be subject to cross-examination.

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[44] *State v Shepard* 484 A 2d 1330 at 1342–42 (1984).

[45] The cases quoted in *Algarin*, note 42, include *Kansas City v McCoy* 525 SW 2d at 339; *People v Moran* 39 Cal App 3rd 398 at 410 (1974).

[46] *Hochheiser v Superior Court* 161 Cal App 3d 777 (1984); *Reynolds v Superior Court* 12 Cal App 3d 834 at 837 (1974); *United States v Benfield* 593 F 2d at 821.

[47] Criminal Justice Bill 1986 (UK) s21.

[48] "Minx Heralds the End to 'Molester's Charter'." *The Australian*, Tuesday 24 February 1987.

There are additional means of encouraging pleas of guilty. The first involves a practice which is used in England and has come to be described as permitting the trial judge to give a 'sentence indication'.[49] This involves the Crown and the legal representatives of the accused person asking the judge before the trial what the likely penalty would be in the event that the accused person were convicted. The judge is entitled to say, after considering the relevant facts of the offence and the circumstances of the accused person, what he or she considers the appropriate penalty to be. This is not done by giving a specific estimate but more by the indication that a particular type of sentence appears to be appropriate. For example, the judge may indicate that a gaol sentence is or is not likely to be imposed.

The primary concern of people accused of child sexual assault is their fear of the likely penalty to be imposed in the event of a conviction. If accused people were aware of the likely penalty instead of speculating about it, then it would enable a much more informed decision as to plea and would probably result in more pleas of guilty being entered.[50]

There is also the question of the 'discount' to be given to accused people who plead guilty. This has been debated at some length and one prominent judge has suggested that there should in effect be a 'flat rate discount' of 25% for people who plead guilty.[51] The courts in New South Wales have generally recognised that it is legitimate to take into account the fact of a plea of guilty in reducing the penalty that would otherwise be imposed. This is done on the ground that a plea of guilty, particularly in the case of sexual offences, spares the victim the ordeal of giving evidence.[52] In my view, the fact that a accused person pleads guilty must be taken into account in his or her favour on the question of sentence, but it would not be workable to determine the amount of discount by legislative decree. That must depend on the particular circumstances of each case and the motivation of the individual offender.

Procedures designed to induce a plea of guilty have been properly criticised on the ground that they may be so attractive to an accused person that they result in innocent people pleading guilty. This is always a risk and one which must be carefully watched. My own view is that in the case of offences of child sexual assault, the risk that an innocent person may plead guilty in order to obtain a favourable penalty or disposition of the case is less serious than with other criminal offences.

4. Amending the Laws of Evidence

One of the most difficult problems with the prosecution of child sexual assault cases is the inability of the child to recall the event in question at the trial. This is a particular concern with very young children because the rules of evidence do not enable the out of court testimony which they have provided to be given at the trial. The current position in New South Wales, where there

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[49] See generally New South Wales Law Reform Commission *Procedure from Charge to Trial: Specific Problems and Proposals* (DP 14/2 1987) at Chapter 11.

[50] Hampel G. (Mr Justice) 'Plea Bargaining—A Judge's Involvement' (1985) 59 *Law Institute Journal* 1305.

[51] New South Wales Law Reform Commission, note 49, para 11.12 at 462-463.

[52] *R v Nicholls and Bushby* (Unreported, Court of Criminal Appeal, New South Wales, 21 September 1978 per Cross J).

are very long delays between the time of arrest and trial, exaggerates the difficulty experienced in presenting this evidence before a court. Lapses in memory are more likely to occur because of the time between the offence and the trial.

The reason why earlier testimony given out of court cannot be admitted at the trial because it breaches the rule against the admission of hearsay evidence. There are, however, many exceptions to the rule against hearsay which allow for the admission of otherwise inadmissible evidence. It could be argued that there should be an additional exception created so that when a child gives evidence that an earlier recording of his or her statements was made, then the earlier statement should be received as evidence.[53]

In sexual assault cases there is already one well known exception to the rule against hearsay which holds that evidence of complaint is admissible to show the consistency and therefore support the credit of the person who gives evidence of being sexually assaulted.[54]

There does not seem to me to be any argument of logic or fairness which could prevent the statement of a child which has been recorded on videotape equipment being admissible in later court proceedings. This general rule should be subject to certain conditions, namely that the statement was reasonably contemporaneous with the event in question and was not induced by suggestion. It is also necessary in the interests of fairness that the admissibility of the videotape recording should be conditional upon the child being called as a witness and being liable to cross-examination.

This proposal is consistent with the general line of reasoning adopted by the Australian Law Reform Commission when it tentatively recommended that if hearsay evidence is the best evidence available and can be shown to have reasonable guarantees of reliabililty, it should be admissible.[55] This proposal would permit hearsay evidence to be received if it was made when the facts were 'fresh' in the memory of the child making it.

5. The Abolition of Committal Proceedings

The New South Wales Law Reform Commission has recently published a Discussion Paper dealing with that part of the criminal process between the time an accused person is charged with an offence until the time of the trial of that offence. We have proposed that the current procedure should be changed by abolishing committal proceedings and replacing them with a different procedure which would achieve all of the legitimate objectives of committal proceedings but in a more efficient manner.[56] The major advantage of the proposed procedure should be to dramatically reduce the time taken to bring criminal cases to trial.

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[53] See J. T. Morgan 'The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases' (1984) 21 *Georgia State Bar Journal* No. 2 at 50.

[54] See generally Watson and Purnell *Criminal Law in New South Wales—Indictable Offences Volume* 1 para 2620.

[55] Australian Law Reform Commission Interim Report *Evidence* (ALRC 26, 1985) para 683.

[56] See generally New South Wales Law Reform Commission *Procudure from Charge to Trial: A General Proposal for Reform* (DP 13, 1986); *Procedure from Charge to Trial: Specific Problems and Proposals* (DP 14, 1987).

One of the consequences of the abolition of committal proceeding would be that people who are said to be the alleged victims of criminal offences would, in most cases, only have to give evidence at the trial. Although this has not been put forward as a major argument in favour of the abolition of committal proceedings, it is a factor which should probably be weighed in the balance as a beneficial feature of the proposed system.

6. Defence of Proximate Age.

It has been noted that in New South Wales there is no defence based on the relative similarity in age between an alleged offender and a 'victim' of child sexual assault. In both South Australia[57] and Victoria[58] there is a defence based on the proximity in age of the parties. This is consistent with the recommendation made by the Royal Commission on Human Relationships.[59]

Under the current law in New South Wales, a 16, 17 or 18 year old male who has consenting sexual intercourse with a female aged even a few day short of 16 years, commits an offence which is punishable by a maximum term of imprisonment of eight years.[60] This is obviously a manifestly unfair situation which does nothing but bring the criminal law into disrepute. Although this offence would rarely be prosecuted and would never be met with a penalty such as that which is available to the courts, where a potential injustice arising from the terms of the legislation is patently clear, it should be removed. For that reason alone the 'defence' based on the proximate ages of the accused person and the 'victim' should be introduced. The primary purpose of child sexual assault laws should be to prevent the exploitation of the young, not to permit the prosecution of people who are innocent of any criminal wrongdoing.

7. Homosexual Anomalies

It was noted earlier that there was one 'notable' exception to the sexual assault laws which generally treated offences against males and females in an equal way. The exception is the fact that the age of consent in cases of sexual activity between males and females is 16 years whereas the age of consent of sexual acts between males is 18.[61] In my view, this distinction is difficult to explain. There does not seem to be any valid reason why the general principle against discrimination should not be applied in this area. The tables produced above also outline the differences in penalty applying to homosexual offences.[62] These differences do not appear to be justified and on their face appear to be unintended.

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[57] See South Australian Criminal Law and Penal Methods Reform Committee Special Report *Rape and Other Sexual Offences* (1976) at 19-23.

[58] *Crimes Act* 1985 (Vic) s. 48 (4) (b)

[59] Royal Commission on Human Relationships *Report* (1977) at 222-226.

[60] *Crimes Act* 1900 s. 66C.

[61] *Crimes Act* 1900 s. 78K.

[62] Compare *Crimes Act* 1900 s. 66C with *Crimes Act* 1900 s. 78K and *Crimes Act* 1900 ss. 66A and 78HG, ss. 73A-78N.

8. Penalty Guidelines on Offences of Wide Definition

It has also been noted earlier that some offences which carry specific maximum terms of imprisonment upon conviction cover a wide range of prohibited activities. In my view, it would be desirable if some indication were provided by the legislation to identify matters of aggravation and mitigation so far as offences of child sexual assault are concerned.

9. Reorganisation and Reclassification of Offences

The current laws which establish offences of child sexual assault, and for that matter the laws which establish offences of sexual assault generally, are in a confused and inconsistent state as a result of three major items of amending legislation being introduced in 1981, 1984 and 1985 respectively. This has meant that various acts can be charged under different sections carrying different penalties. Apart from this overlapping, it has resulted in some measure of inconsistency in expression and in the application of principle.

It might also fairly be said that the various amendments have created a maze of legislative enactments which are difficult to find your way through. I should say immediately that the people responsible for drafting the legislation cannot be criticised for this since there has been so little time left to them to achieve their difficult task. It seems to me that the legislation creating offences of sexual assault can be greatly simplified and that it can be expressed in terms which do not require any special training to understand. At the same time, this process of simplification should achieve the desirable objectives of removing duplication and inconsistency of principle.[63]

10. Offences in Company

Among its countless attractive features, there is one aspect of the 1981 sexual assault amendments which has always concerned me. It has not been remedied by any of the subsequent legislation dealing with sexual assault, and it applies therefore equally to adults and children as it does to males and females. This is the fact that offences of sexual assault committed in company are not treated as being a more serious category of sexual assault. The law recognises that sexual assaults which inflict grievious bodily harm are the most serious category of offence.[64] Those which inflict actual bodily harm or in which there is a weapon used are the next most serious category[65] and those which do not have either of these features fall into the general category.[66]

In my view, an offence of sexual assault which is committed in company with one or more others, and this will cover offences commonly referred to as 'pack rape', should be in a more serious category and able to be met by a higher penalty than is available for the general offence of sexual assault. Legislation relating to the offence of robbery equates the use of a weapon with the commission of the crime in company.[67] I think that the same principle can

[63] See generally Law Reform Commission of Canada *Towards a Codification of Canadian Law* (Study Paper, 1976); *Codification of the Criminal Law: A Report to the Law Commission*, Law Commission Report No. 1430 (HMSO London 1985).

[64] *Crimes Act* 1900 s. 61B carrying a maximum penalty of 20 years' gaol.

[65] *Crimes Act* 1900 s. 61C carrying a maximum penalty of 12 years' gaol.

[66] *Crimes Act* 1900 s. 61D carrying a maximum penalty of seven years' gaol.

[67] *Crimes Act* 1900 s. 97 "Whosoever, being armed with an offence weapon, or instrument, or being in company with another person. . . ".

legitimately be applied to sexual assault offences. This would mean that the maximum penalty available to a person convicted of a 'pack rape' would be 12 years instead of seven years.

11. Accelerated Prosecution

In its recent Discussion Paper on procedure between charge and trial the New South Wales Law Reform Commission has recommended that there should be time limits placed on the prosecution of criminal offences.[68] In the context of offences of sexual assault against children, these proposals would, if implemented, mean that if an accused person is held in custody the trial of the offence must commence within six months of the time of that person's arrest. Where the accused person is on bail, the trial of the offence must commence within 18 months of the arrest. If both these time limits were met, it would result in a considerable reduction in the delays currently experienced by people awaiting trial. These delays are not only of concern to the accused person. Unreasonable delays naturally prolong the trauma caused by having to keep in mind incidents and events which witnesses would rather forget.

It is encouraging to note that the specialist unit of the Solicitor for Public Prosecutions has already taken steps to make sure that the delay in the hearing of child sexual assault cases is reduced so far as possible and that this policy is complemented by that adopted by the Solicitor for Public Prosecutions which gives priority to child sexual assault cases second only to that accorded to the trial of accused people who are held in custody.

12. Victim Issues: Reasons for No Bill, Involvement in 'Plea Bargaining'

These are matters of a relatively minor nature within the overall scheme of the criminal justice system, but they are significant matters so far as individual victims are concerned. For too long the practice of abandoning prosecutions has been allowed to take place without due regard being paid to the right of the alleged victim to know why this action has been taken. Naturally there will be some cases in which reasons cannot be given, but as a general rule, it seems to me that the victim should be one of the first people to know why the prosecution of a particular case has been discontinued.[69]

So far as 'plea bargaining' is concerned, prosecuting authorities do, from time to time, consider the likely impact of a trial upon the prosecution witnesses as a factor to be taken into account in determining whether or not to accept an approach made by or on behalf of the accused person to plead guilty to a lesser charge or in some other way to apparently reduce the seriousness of the offence for which he or she is convicted or the likely penalty to be imposed. The 'interests of the victim' is a factor which looms large in considering whether or not to prosecute in cases of child sexual assault.

The New South Wales Law Reform Commission's proposal in this area is that if the interests of the victim are to be taken into account, then it is essential that the victim or a person who is representing the interests of the victim,

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[68] See generally New South Wales Law Reform Commission *Procedure from Charge to Trial: Specific Problems and Proposals* (DP 14/1, 1987) at Chapter 3.

[69] *Id* at Chapter 10. See also New South Wales Task Force on Services for Victims of Crime (1987) *Report and Recommendations* p.p. 117-118.

should in fact be consulted and the attitude of the victim to the conduct of the trial known before making such a decision.[70] As a general rule, the prosecuting authority should also explain to victims why any form of agreement may have been reached with the accused person and the reasons why that decision has been made.

13. Judicial Controls on Cross-Examination

The 1981 amendments introduced specific controls over the manner of cross-examination of complaints in sexual assault cases. Similar rules have been introduced for the trial of offences of child sexual assault. It is apparent from studies conducted by the Bureau of Crime Statistics and Research that the application of these controls by judges and magistrates conducting trials and committal proceedings is inconsistent and has, in some cases, failed to achieve what are seen to be objectives of the legislation.[71]

It is, naturally, difficult to impose standards of judicial conduct by legislation. It does appear necessary, however, to make some additional attempt to ensure that the examination of witnesses in child sexual assault cases does not go beyond the legitimate boundaries of either specific legislation or the general requirement of ethical conduct.

14. Anatomical Dolls

One of the difficulties faced by children when giving evidence in a sexual assault case is their inability to express themselves in terms which are acceptable as proof in a court. The requirements of proof in child sexual assault cases may be quite precise and involve concepts which are completely foreign to the understanding or experience of a young child. Apart from problems of comprehension, there is a significant problem that a child, particularly in the company of adults in a formal and in some senses hostile atmosphere, will be unable to say what has happened because of a sense of embarrassment or fear.

The use of anatomically correct dolls has been tested in America and has shown that children are able to explain what has happened to them in a much more realistic way when taken from their point of view, but in a manner which can nevertheless be very easily understood and perhaps better appreciated by the adults who are involved in deciding the issues which arise in the case.

15. The Right of a Private Citizen to Prosecute

The writing on the subject of child sexual assault continually emphasises how traumatic the experience of a criminal trial is upon a young child who claims to have been sexually assaulted. In many cases commentators frequently argue that the experience of the trial is far more damaging than the impact of the sexual assault itself. It is, for these reasons, that very careful steps have been taken to ensure that the decision to prosecute is not made without taking into account the interests of the child. This is not to say that a trial which does have a damaging effect on a child should never be commenced. It is simply an

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[70] New South Wales Law Reform Commission *Procedure from Charge to Trial: Specific Problems and Proposals* (DP 14/2, 1987) at Chapter 11.

[71] New South Wales Bureau of Crime Statistics and Research *Interim Report No. 3—Court Procedures* January 1987, pp. 1–3 and 71.

acknowledgment that one of the factors to be taken into account in determining whether or not to continue a prosecution is the likely impact of the court proceedings upon the child in question.

In this regard, the prosecuting authority is now required, as a matter of policy, to consult with the Department of Youth and Community Services to determine what is in fact in the best interests of each individual child who may be involved in a prosecution of sexual assault.[72]

The question which must be considered is whether this elaborate scheme ensuring that prosecutions are not launched without due regard being paid to the interests of the child can be wiped away by the exercise by a private individual of the right to prosecute. In the context of child sexual assault, this may happen if a parent is dissatisfied with the decision of the prosecuting authority not to prosecute and then decides to launch the prosecution privately.

The right of the individual to prosecute is an important safeguard against the perceived incompetence of public prosecuting authorities, but it should not be capable of being exercised in a manner which is either malicious or oppressive.[73] Whilst the courts will have the ultimate control over the use of the power to prosecute and a person wrongly accused may have a remedy in a civil action for malicious prosecution, there will be some cases where serious harm may be done to an otherwise innocent person by bringing the matter before the court in the first place. The victim of a child sexual assault is such a person and in order to afford sufficient protection against this occurring, I would suggest that in all cases of sexual assault involving young people, the prosecution should not proceed without the consent of the Attorney General. This has already been recognised in relation to the prosecution of homosexual offences involving people under 18.[74] In my view, it should be made a general provision in cases of child sexual assault.

The recent establishment of the Office of the Director of Public Prosecutions and the specific power available to the Director to take over prosecutions which have been launched by another person and either continue them or terminate them is a power which could be used in this area to prevent potentially damaging prosecutions being continued.[75]

The matters referred to above are submitted for consideration as possible directions which the reform of the law and legal procedures relating to child sexual assault might take. Since most of them require further examination, they should not be implemented until their likely impact has been carefully considered.

At the beginning of this paper the point was made that child sexual assault is an area in which our legislators should tread carefully. A great deal has recently been done and it is now probably time to examine how those changes are working in practice. We have to discover whether the reforms already

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[72] Child Sexual Assault Task Force *Report* (1985) p. 91–92.

[73] see note 35.

[74] see note 36.

[75] *Director of Public Prosecutions Act* 1986 s. 9.

achieved, coupled with the extensive publicity given to this topic, have been effective either in reducing the incidence of child sexual assault or in the prosecution of offenders.

It is important that the community should remain concerned about child abuse but it is more important that there should not be panic and overreaction. There is a possibility that too much over-emotional publicity will do more damage than anything else. The suggestion that parents, in particular, are potential sexual assailants, however valid it may be in some cases, may be more than most children are psychologically equipped to deal with.[76] The war against child molesters is a good idea but not if its first casualty is the innocence of children.

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[76] G. Williams "War Declared on Child Molesters" *The Sydney Morning Herald.* 11 April 1985. p. 1.

THE PROBLEMS OF INVESTIGATION

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History of Juvenile Services Bureau

The Minister for Police and Emergency Services announced that the State Government has embarked on an all-out campaign against child abuse and juvenile crime. The Minister also approved the formation of the Juvenile Services Bureau, Criminal Investigation Branch, to spearhead the campaign. To form that Bureau, the Juvenile Crime Squad and the Child Mistreatment Unit were combined to form a 'strike force'. The Bureau commenced on the 19th August, 1985.

The Juvenile Services Bureau is under the command of a Detective Inspector and apart from the central unit at the Criminal Investigation Branch, there are decentralised units at Cambelltown, Penrith, Bankstown, Chatswood, Newcastle, Lismore, Dubbo and Wollongong.

Objectives of Juvenile Services Bureau.

- Investigation of allegations of sexual molestation and exploitation of children, including child pornography and child prostitution.
- Investigation of most crime committed by children.
- Maintain a proactive approach towards child mistreatment and juvenile crime.
- Protection and welfare of children.
- Co-ordinate and monitor police responses in connection with allegations of sexual molestation, exploitation and physical abuse committed upon children which have been reported by other Government Departments.
- Monitor the implementation of Child Protection Programmes.
- Co-ordinate the investigation of all unusual reports of missing children.
- Maintain suitable records of all absconders.
- Co-ordinate with all other Government Departments and other agencies in the welfare and protection of children.

Trends after twelve months Operation

In the twelve months period a definite trend has appeared. We have received a total of 1640 notifications. Out of those 1210 are related to sexual exploitation of children whilst the remaining 430 are children who have been physically abused by family members.

These figures indicate that the bureau has become a complete reactive unit and therefore we are unable to meet all of our objectives. The problem of juvenile crime and missing children cannot be investigated by this Bureau. That problem is left to other police to investigate during the normal course of their duties.

We at the Bureau would like to think that we could become more proactive and make a frontline attack upon juvenile crime and missing children.

Comparison between New South Wales and Queensland.

An interesting trend has appeared in this State. The sex of children coming to notice in the 1640 notifications is 36% male and 64% female. In Queensland a study of 400 notifications indicated a fairly equal relationship with 53% female and 46% male. The age distribution in both studies indicates an alarming trend in the number of children coming to notice up to the age of five and then gradually reducing to the age of 11 when there is a sharp reduction for the adolescent years. In both states no less than seventy-one percent of sexual abuse cases are aged under 11.

The Police and The Law

Having established that the greater proportion of child abuse involves victims under the age of 11, we must then look at the past and available laws that police have at their disposal to investigate crimes, arrest offenders and finally, and I think the most important; the health and welfare of the victim.

Prior to the 23rd March, 1986, police in a greater proportion of the cases investigated laid charges under the following sections of the *Crimes Act* 1900.

Sections 61A (1), (2), (3) and (4): Sexual intercourse, categories (1), (2), (3) and (4).
Section 67: Carnal knowledge of girl under 10
Section 71: Carnal knowledge of girl under 16 over 10
Section 73: Carnal knowledge of girl under 10 by school teacher or father etc.
Section 74: Carnal knowledge of girl under 16 over 10 by school teacher or father etc.

On the 23rd March, 1986, new amendments were introduced into the *Crimes Act* which abolished ss. 67, 71, 73 and 74. They were the sections that this Bureau mainly used to place offenders before the courts.

It would be true to say that most of our charges were laid under s. 71 of the *Crimes Act* which was carnal knowledge of a girl under 16 years and over ten years. That section carried a penalty of penal servitude for ten years. Most of our convictions were obtained under that section and of course the offenders were sentenced by virtue of that same section. Section 66C (1) was introduced in its place and carried a penalty of only eight years. It was felt at this Bureau that an injustice to the victim had occurred by lowering the penalty. Carnal knowledge of a girl by her father, step-father or teacher carried a penalty of fourteen years penal servitude. This offence has increased alarmingly during the past twelve to eighteen months, however, s. 66C (2) (a) and (b) only carries a penalty of penal servitude for ten years. We are obtaining more convictions and the penalties are becoming lower.

The main problem in proving any child abuse matter that is before the courts is the age of the victim and to a lesser degree medical evidence. As previously stated most complainants are under the age of 11 and usually there is some time between the commission of the offence and medical examination.

Section 405B (b) of the *Crimes Act*, now states

> . . . a judge on the trial of a person for child sexual assault offence *may* in an appropriate case, but will no longer be required to, warn the jury of the danger of convicting the accused on the uncorroborated evidence of the victim . . .

It must be appreciated that most of the victims have lived in fear for a number of years. Obtaining corroboration is extremely difficult and we must rely upon a child appearing in an open court and describing in detail acts that have been committed upon her or him, usually by some person whom they loved and trusted. Even though s. 405B (b) of the *Crimes Act* is now in existence, judges are exercising their discretionary powers and warn nearly all juries that it is unsafe to convict on the uncorroborated evidence of a child.

It is a world wide fact that children do not tell lies in relation to sexual abuse that has been committed upon them by a person in authority. We have found that once the child has decided to tell someone the truth and they have received expert counselling, they will clearly and concisely tell their story. They do not color it, nor do they expand on any facts. Their recall is excellent and once they feel that they are receiving help they will open up their hearts to those who are now giving that help.

Another danger is the pressure placed upon the child not to give evidence at court. That pressure usually comes from within the family and nothing can be done to change that fact. Section 407AA of the *Crimes Act* attempted to ease that pressure by making spouses compellable to give evidence in some child assault offences. Once again judges are using their discretionary powers and are excusing spouses from giving evidence.

A serious side issue has appeared in the notification of child abuse matters. As a matter of routine, most of the child abuse matters that come to the notice of police, come from the Department of Youth and Community Services. Those officers are well trained and have great empathy with the victims of child abuse. However s. 148B of the *Child Welfare Act* 1939 stated amongst other things:

s. 148B (1) In this section—

(2) Any person who forms the belief upon reasonable grounds that a child—

(a) has been assaulted or

(b) is a neglected child within the meaning of Part XIV may—

(c) notify the Director of his belief and the grounds therefor either orally or in writing; or

(d) cause the Director to be so notified.

(3) A prescribed person who, in the course of practising his profession, calling or vocation, or in exercising the functions of his office, as the case may be, has reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed shall—

(a) notify the Director of the name or a description of the child and those grounds either orally or in writing; or

(b) cause the Director to be so notified, promptly after those grounds arise.

(5) Where the Director has been notified under subsection (2) or (3), he shall—

(a) promptly cause an investigation to be made into the matters notified to him; and

(b) if he is satisfied that the child in respect of whom he was notified may have been assaulted, ill-treated or exposed, take such action as he believes appropriate which MAY include reporting those matters to a constable of police.

This section is a matter of concern for police as we are aware of a large number of criminal matters that have come to the notice of the Department of Youth and Community Services and because of some people interpreting s. 148B, in that they do not have to report matters to the police, offenders are not being dealt with according to law.

Another by-product of this lack of reporting is that the victim has no power to claim criminal compensation for the crimes that have been committed upon them.

Conclusion

We at the Juvenile Services Bureau feel that they should be consulted before changes to legislation pertaining to juveniles and sexual offences are made. We are only too well aware of the offences being committed upon children and the various Acts and Sections that are best suited to obtain convictions at court. There must also be changes made to other Acts of Parliament so that serious child abuse matters are brought to notice. I feel that all victims must receive compensation for the crimes that have been committed upon them. We realize that we are not in the position to be able to arrest every person; that is not the answer. The victim is, and will always remain, our main concern.

PRESENTATION OF PAPER

Senior Constable Christine Nixon
Commissioner's Policy Unit,
Police Department, N.S.W.

First of all I would like to apologise that Detective Sergeant Thornthwaite is not here. He was taken ill this afternoon so I have been asked to deliver the paper. The first occasion I saw it was this afternoon so I decided that if it was suitable I would speak to his paper and then add some matters of my own to expand on what he was saying in his paper.

There are two sections in what I wish to say: One is to deal with adult sexual abuse and the other is to deal with child sexual abuse. Obviously the New South Wales Police Department has a fairly strong involvement with both areas. I will first of all deal with child sexual abuse to follow on from Mr Byrne's comments.

The Police Department became involved in child sexual abuse and dealing with it in about 1978. We obviously dealt with some isolated incidents prior to that, but at that stage the administration of our organisation recognised that child abuse was becoming a major problem, and we were becoming more and more aware of incidences of child sexual abuse occurring. It took a while for the political forces to recognise that there needed to be reforms in this area, and I think that the New South Wales Police can claim some credit for encouraging people to see the problems involved in children who were sexually abused.

We have in this State the Juvenile Services Bureau which is the main arm of the New South Wales Police dealing with child sexual abuse. It was established as it is now in 1985 specifically to look at a number of issues, and its charter and recent statistics are set out on pages 61–62 of Detective Sergeant Thornthwaite's paper.

Mr Thornthwaite made the point that in Queensland it is about fifty-fifty males and females reporting sexual abuse. Talking to the Juvenile Services Bureau this afternoon it seems to be that the trend is towards more young boys reported with sexual abuse cases in relation to them.

I think that the Juvenile Services Bureau has obviously been involved in legislative reform and legislative change that we are reasonably confident it is commencing to work. It will take quite some time. The majority of matters that they deal with are charges that are laid under s. 66C (i) for children under ten, and s. 61D and E for children over that age, but I think it would be dishonest of me to say otherwise than that we still do have problems, major problems in investigating child sexual abuse. Let me just canvass what some of those are; Mr Byrne has canvassed some of them and I would like to support him in the comments that he has made.

First of all we have a major problem in dealing with the conflict of interests between a child who claims to be sexually abused and the parent. That is the major area that we deal with—children being abused by people that they know.

The conflict of interest is that if we wish to interview a child, under section 81C we have to gain permission of the parent. We have some difficulties in that regard, but we try and work through that process but in investigation it is a problem. We have suggested, and I would suggest, as Mr Byrne has, that a *guardian ad litem* type system, or some freeing up of the process of the Bureau being allowed to interview children would be an advantage in our investigation of these crimes.

The second issue has been referred to as children not being believed. I acknowledge there has been increased acceptance of children who are believed in these cases, but the situation is very slow to improve in courts. Many of our police officers are under enormous stress when trying to present cases before a court that appears to them not to acknowledge that the child can be telling the truth. There are also people within our organisation and others who still seem to believe, the myth I think, that children lie. It comes about by saying: "Well, they recanted. They changed their minds". That is often brought about by a large number of other matters, not necessarily the fact that the child has told a lie in the first place. As a society we have to acknowledge that fact more and more. It took some time to acknowledge that women did not lie in the main about sexual abuse so it will take us quite some time to acknowledge that children also do not lie.

One of the major problems that we have is the pressures on children not to go ahead: pressures by families, pressures by relatives, normal pressures that they do not go ahead with the matter. And when you are five or six years old those pressures are enormous.

Another problem is that of time delays. Again I recognise that we have improved, but as investigators police officers have great difficulties in trying to get matters before a court. Some of the delays involved can be two and a half years—that is the longest we have had so far. At present, for a four day hearing it is approximately seven months before you can get before a court. For a five year old these are quite intolerable delays.

One of the matters again Mr Byrne mentioned was *ex officio* indictments. That may be the way to do away with committal hearings; to allow children to give their evidence once only and to try and decrease the delays in the court system. Perhaps another way is to construct some special courts to overcome the whole time delay problem and the difficulties for children appearing in court. Many young police officers say to me: "Have you been to a court lately? Have you seen how awesome it can sometimes be giving evidence in those courtroom situations?". How much more awesome is it for a four or five or six year old if they actually get that far to give evidence. We have done very little to improve the courtroom situation in this State.

Another problem is the forensic evidence. We as investigators have difficulty in trying to substantiate cases using forensic evidence for obvious reasons. If they have gone on for some time there is often no forensic evidence available. We believe that there is sometimes a lack of people who are proficient and able to give forensic evidence on our behalf. It is often required, and it is one of the ways that we can substantiate a case. Perhaps we should look at other ways of substantiating a victim's complaint. For instance, whilst I was overseas recently I noted the use of expert witnesses; people who attest that that child has symptoms that are consistent with being sexually abused. That maybe one of the ways we can take some pressure off the forensic investigation.

The final area for comment is interviewing the victims. I freely admit that we do not have enough people in the New South Wales police skilled in the area of dealing with and interviewing children. Additional police resources would help. Dual interviews with YACS or other community professionals, video taping (as suggested by Mr Byrne and certainly suggested in the United States) may help us to reduce that trauma and improve that situation.

Let me say that I think we have done an enormous amount in trying to deal with children who are sexually abused, but let me also say that I think we have a substantial way to go.

Let me turn now to adult sexual abuse. Again investigation in this area was established quite some time ago and a substantial number of police officers have been involved, particularly female police officers. At one stage, ten or fifteen years ago, when I first joined the New South Wales police, the people who dealt with it were female officers who were trained to take statements and, in fact, it was mostly the task that we had. What has happened since then is that there has been a recognition that the Police Department needed support in trying to present cases on sexual assault. That occurred when legislation and procedures began to be changed in 1978 and 1979. 1981, of course, saw the implementation of new legislation designed to improve that situation. It also saw a number of other bodies such as the Health Commission, become involved and find appropriate facilities to collect forensic evidence and to provide support. I went to a co-ordinators' meeting where I was impressed to see co-ordinators from sixty Sexual Assault Centres from all over the State. I can recall the days when there was about one hospital only where you could take a victim of sexual assault. We have come a substantial distance but not as yet far enough.

I think in regard to police training we have tried to improve that situation. We presently have twelve people specifically assigned to deal with sexual assault. They deal with serial matters or serious sexual assaults. There obviously are not enough of them to be able to go to all sexual assault matters. Some people may say that perhaps there should be 100 police assigned to that area. We have certainly thought about that process. Sexual assault is something that occurs over this entire State. We have opted to take the action of improving our response altogether, not just with a few police, but with as many police as possible to deal with sexual assault.

We are improving in the increase in the number of people, who when they report offences, the police will choose to believe that that offence is true. It is an attitude change that has to go on amongst police officers and within society. The police force reflects the attitudes of society. That attitude must be improving if we are accepting more complaints, as appears by from the statistics in the paper by Helen L'Orange and Sandra Egger.

Let me conclude by saying I would hope that a trend where child sexual abuse starts to gain more prominence that adult sexual assault does not continue I think both issues are equally prominent and we have an awfully long distance to go in both matters.

DISCUSSION PAPER

John Parrell, LL.M., Magistrate

Significant procedural changes through the 1981 *Crimes Amendment* and the 1985 *Oaths Amendment Acts* were respectively—

(1) the restriction on cross-examination of female complainants (in the interests of humanity and the encouragement of complaints). (Hansard 18.3.81 LA N. K. Wran); and

(2) The sanction of unsworn statements by victims of tender years.

The former represented a fundamental breach of the rationale of an adversary system, i.e.:

(a) cross-examination is the best tool ever designed to ascertain truth; and

(b) to deny the testing by cross-examination of evidence, was a denial of natural justice.

Both these amendments touch the general question of abolition of the dock statement.

In the former case (1981) the change fell short of earlier and concurrent proposals that the benefit of a dock statement be denied to an accused in the subject sexual areas. Perhaps it was considered too close to the eleventh hour defection which prevented total abolition in 1974. But the total acceptance and subsumption of the 1981 changes ought now to encourage legislators to go the full distance. Victims will never be satisfied and indeed the positive objectives set out by the Premier in 1981 will never be activated until the accused is restricted either to silence or cross-examination (like the victim).

The latter case (child victims) presents an even more compelling case for denial of the statement NOT subject to cross-examination. How does one explain to a member of the public (lawyer or not) that it is fair and just that a ten year old child need not be sworn because he or she is too young to understand but will nevertheless be subject to what could be a lengthy gruelling and even damaging cross-examination whilst the accused an adult, who may understand, (he may be a lawyer!) may also NOT be sworn but notwithstanding will NOT be subject to cross-examination? A currently informed public would probably shout "Fraud!".

Both logic and justice demand abolition of dock statements not subject to cross-examination in these areas.

Maggie Smythe, Women's Health Unit, N.S.W. Health Department.

There are a number of comments I would like to make.

One is regarding an area which I think has been omitted but has been of concern to me for a number of years, that is the whole position for developmentally disabled children and adults trying to give evidence in courts and have their cases heard in court. I know of a number of situations where cases have not been taken up because of that. It is an issue that I think needs to be addressed.

The other comments that I would like to make are regarding the child sexual assault paper of Paul Byrne. In general I think I would agree with most of the things that he has raised. One of the issues that I think is important in looking at is the use of video tapes. My experience with children has been that sometimes initially they do not tell you everything, and my concern is that if we video a statement early on and then have what may be perceived as inconsistencies later, that that may be used against the child.

I think the idea of using closed circuit television within courts is a very good one and could be used in lots of cases. I would support that.

Helen L'Orange

On the point about us needing to look again at provisions in relation to developmentally disabled, I have noted that down to go on the agendas of both the Sexual Assault Committee and Child Protection Council.

Professor Kim Oates, Paediatrician, Children's Hospital Camperdown.

I wish to make a brief comment about some recent research that we finished this week on child sexual assault, and then ask a question of Mr Byrne.

We have just finished an in-depth study of 49 sexually abused children and the parts of the study relevant to this meeting are the cases which went to court. Twenty one of the 49 cases went to court.

One of the things we looked at was delays. It was pleasing that twelve of those 21 cases were in fact heard within two weeks but five of them waited over six months. I certainly take Christine Nixon's point that those delays for a child who is developmentally maturing and changing, and whose perceptions are changing, are extremely difficult for that child to cope with.

Of the 21 that went to court only six children were asked to give evidence, and there was a distinct correlation with whether the offender was legally represented and whether the child was asked to give evidence. In nine cases the offender was legally represented, and in five of those cases the child was asked to give evidence. In the other twelve cases the offender had no representation and only one child was asked to give evidence. I think we can anticipate that as more offenders become legally represented (as is their right), more children will be asked to give evidence.

The other thing we looked at was to ask the parents their views of how the children were soon after the court hearing and how they were two and a half years later when we reviewed them and studied them. There was a very high incidence of parents reporting the children being upset and disturbed after the court hearing, and, in fact, a high incidence of them still being disturbed two and a half years later. When we looked at school performance and personality tests on the children we found that those children whose cases had been to court were doing worse at school and had more disturbances. Now, this does not mean that the court hearing caused that—it might have been that the worst cases went to court, but I think it gives some food for thought about the problems courts cause in some of these cases.

I would like to make another comment and then ask a question about pre-trial diversion.

As people know the majority of child sexual assault is within the home and I guess the commonest form is father/daughter incest, or a young girl and some male in the family. As people have pointed out the child is really in an absolutely powerless position. The child is not usually forced into this but coerced into it, and coerced by a variety of threats. The threats can include, and I am talking about a child of four or six who is amenable to these sort of threats: "If you don't comply I will kill you" or "If you don't comply I will kill your mother" or ". . . take away your pets" or ". . . take all your toys" or "You will all have to go and live in a tent". Little four and six year olds believe this sort of thing, and what happens to the child is that the child believes she has the power to hold the family together by complying and also feels she has the power to destroy the family be revealing this information. That is a pretty awesome responsibility for a young child. What caused our group concern is that when the child does reveal the abuse a whole lot of unpleasant events may be set in train for the child—events which have to be set in train but perhaps, as the legal reforms pointed out, could be improved. Sometimes the father's threats do come true because he goes to gaol, leaving the family without income and a drop in standard of living.

From my research and reading in the area, pre-trial diversion seems one of the most important things that can be achieved to stop some of these unpleasant events from happening. I have known that it has been in the wind for some time. I would really like to know *when* it is likely to happen. There are a lot of things that have to be achieved before pre-trial diversion can happen. There have got to be people who can treat the offenders. There has got to be a whole system set in train. We know it is coming. It would be helpful to know when it is going to be.

Paul Byrne

The statistics that you gave then about the incidence of children having to appear in court were interesting. You said that of the 49 children in your study 21 of them went to court and only six gave evidence. I think the very significant thing that that revealed is, unless I am wrong about it, that in the other 15 cases the accused person must have pleaded 'guilty'. If the accused person had pleaded 'not guilty' the child must go to court to say what happened to him or her.

The other material that you put forward in your presentation supports the contention that the most important thing that can be done in this area is to encourage, as far as is reasonably possible, people who are guilty to plead 'guilty'. This is supported by your comments about the disturbance of the court hearing upon the child and it having a far reaching impact even years later upon the child's performance at school and so on. The pre-trial diversion scheme is predicated on people pleading guilty. It has no application to people who do not plead guilty.

Some of those other things that I mentioned in my paper are designed to encourage people to plead guilty. My own experience in appearing for a number of accused people in cases of this kind is that if they can be shown in some way that the child is prepared to come to court to say what happened they will acknowledge their guilt. Most of them take the approach of saying "My child would never say that about me. I don't believe that it was ever said". If you had a video tape recording of the child's statement and were able to show it to the accused person I think in many cases that would result in pleas of guilty being entered and then the child, of course, not having to give evidence. In those cases that you referred to, 21 going to court and only six children giving evidence, I do not think the important thing is whether or not the accused person is represented. The important thing is whether or not the accused person pleaded. 'guilty'. Probably in most of those cases where the accused person pleaded 'not guilty' he was also represented—the important factor is the plea of 'not guilty' rather than representation.

Helen L'Orange

In regard to pre-trial diversion the Attorney-General and the Minister for Health and Minister for Youth and Community Services have now concurred about the nature of the treatment programme. The service will be based at Westmead. It will be starting about mid 1987.

Gillian Calvert, Acting Executive Officer, Child Protection Council.

I have some comments to make on the police paper.

In relation to your statistics of 1640 notifications that you received, how many did you charge?

Christine Nixon

I am sorry, I do not know.

Gillian Calvert

Of those 1640 notifications you quote the statistics as 36 per cent males and 64 per cent females being victims. I take it that that, in fact, includes both physical assault and sexual assault?

Christine Nixon

That's victims.

Gillian Calvert

In a sense your figures could be perhaps skewed. The statistics that are available from Youth and Community Services indicate that there is a difference in gender between the different forms of abuse. You are more likely to get an equal number of males and females with physical assault cases, if anything boys are slightly over represented with physical assault cases whereas with sexual assault cases girls are significantly over represented in the statistics. So I would wonder whether those statistics are in fact skewed by the lack of differentation of the types of abuse against children.

Christine Nixon

Let me say they might be, but I am going on the matters that the Police Department hears of. There may be matters that Youth and Community Services choose not to bring to the police attention, and those are the matters that you are talking about.

Gillian Calvert

I just think that you need to consider that your statistics, in fact, include both types of assault, both sexual assault and physical assault.

I guess similarly with the issue of age. Physical assault tends to occur when a child is much younger, and tends to be reported when a child is younger, whereas sexual assault while it occurs when the child is younger often does not get reported until they are older. Again I think that sort of clarification needs to be made.

Similarly when Jim Thornthwaite talks about judges' exercising their discretion with s. 405B (b) and 407A (a) do you have any statistical basis for that or is it an impression?

Christine Nixon

I think they are impressions.

Gillian Calvert

Finally on the page 64 you talk about YACS not referring cases to the police. As I understand it, it is policy within the Department of Youth and Community Services to involve police in these matters, and training certainly supports that policy. Training that I have been involved in with the Department encourages Youth and Community Services officers to consult very early on with police so that a joint investigation can take place as far as possible.

Christine Nixon

Yes, I understand that policy within Youth and Community Services does encourage that, but again our impression is that there are certain areas that do not get reported. And I think that that was the point that was being made there. Obviously it will decrease I would think as policy and training increase.

Gillian Calvert

You call for the Juvenile Services Bureau to be consulted but you were represented on the Child Sexual Assault Task Force and you have representation on The N.S.W. Child Protection Council and we will, of course, continue to involve your department to the fullest extent.

Christine Nixon

I certainly understand and acknowledge that's the case. We have been very much involved.

David Williams, Office of the Minister for Corrective Services.

I was interested to note the references that were made in the address to the use of *guardian ad litem* in England. I am very aware that the *guardian ad litem* is used extensively in care proceedings in England, and to an increasing extent is being used in criminal proceedings in English courts—more and more in criminal proceedings where children are not being called to give evidence and where the evidence that is given by a *guardian ad litem* and/or employee of the local authority social services department is accepted as evidence in criminal proceedings.

Clearly there are evidential problems with that about the way that evidence is gathered and presented to the court, but increasingly courts and social services departments in England are accepting that court proceedings, both criminal and care proceedings, are a further form of abuse of a child who has already suffered an extreme form of abuse. It is interesting to keep in mind whether that is possible in Australian courts, both civil and criminal.

With regard to the general issue of the abuse of children is the issue that comes up once an offender is up for sentencing, particularly where there is a high probability of a perpetrator receiving a heavy gaol sentence, a full-time gaol sentence. I recently heard of a case where a child became extremely emotionally disturbed when she heard of the possibility of her father, who had perpetrated sexual offences against her over a period of seven years, going to gaol for a number of years. At the conclusion of the proceedings where her father received a periodic detention sentence the girl's emotional disturbance immediately ceased, and according to both the Health Department and the Youth and Community Services Department officials who were involved with her that was directly related to the sentence given by the judge. I think that that a further form of abuse against the child should be considered both by courts in general and by judges when considering sentencing alternatives.

Chairman

Could I just ask, Mr Williams, in that case you mentioned of the seven-year period of abuse and the periodic detention sentence was there some condition imposed about the accused keeping away from the child? Was he allowed to go on living in the same home?

Do you know what the detail was there? That is really a very traumatic aspect of sentencing: the knowledge that on the one hand it is going to break up the home, and on the other hand, the awareness that you cannot leave them living in the same home again.

David Williams

The girl was very aware in this case that by raising the issue of the sexual offence that had occurred over a period of seven years had already broken up the family home, had split up the relationship between the mother and the father. The father has been forced to leave home prior to the criminal proceedings being initiated. There was a recommendation by the judge, although not an order, that he should not contact the victim or the family, and that after the expiry of his periodic detention sentence to use the channel of Youth and Community Services and the Health Department Sexual Assault Unit in attempting to initiate contact, if that was what he wanted. The periodic detention sentence was for a period of two years so presumably would not be able to undertake that for that time.

Chairman

One aspect of Mr Byrne's paper upon which varying views might be held is the strain and the trauma of the court hearing. It is bound up, of course, in the fact that we prosecute sex offences, as we prosecute all other crimes, by the adversarial process. The European court process does not involve the same degree of trauma to the witnesses and particularly to the victim. I wonder whether there are any views held on that. As we all know, where there has been an alleged sex offence, the victim has had to go through the full details during the police investigation. Then, some months later when she has been probably trying to blot it out of her consciousness, she has got to re-live it all and undergo cross-examination in the committal proceedings. Again some months later she has once more got to call it all back vividly to mind and give evidence at the trial. And even that is not necessarily the end: if it turns out that there has been some defect in the trial resulting in a successful appeal, the appeal court faces the very difficult decision of whether the accused should be put on trial again in the full awareness of thus re-awakening the horror for the victim when she had thought everything had finished. This involves the balancing of community expectations that an alleged wrongdoer should go free when he may richly deserve punishment on the one hand, and on the other hand the realisation that, at a point of time when the victim thinks it is all in the past and is probably making substantial progress in getting it out of her mind, she is going to have to go through it again. I pose the question—is our adversary system the best means for bringing sex offenders to book? I should add that I ask that provocatively in the hope of stimulating discussion and not with the intention of indicating that I hold any view to that effect.

Glenn Bartley, Barrister

My comments are not quite in answer to the question raised by the Chief Justice of whether there should be a continental inquisitorial system as against the adversary system we have here, but I do wish to deal with some other aspects of his comments.

While we do retain the adversary system, and I suspect that we will for many decades, if not centuries, to come, adult sexual assault victims still have a very traumatic ordeal to go through, despite the reforms of the early 1980s dealt with in the first paper. After the crime, the victim has got to briefly tell the first civilians she sees what happened, be taken to some police officers, briefly explain what happened, and then be taken to a female police officer or

a detective for a short interview. She then goes off to the hospital where there is often a long wait for the social worker and doctor. After discussing a number of matters in considerable depth with the social worker, there follows a forensic examination by the doctor. Then the victim goes back to the police station and makes a long statement to the policewoman which can take several hours. She may not get any sleep on the night of the assault, she may have to go back to the scene to assist the police investigation, she may have to identify the offender. She may have to give evidence in committal proceedings (in a very uninviting environment in front of the offender). The same occurs at the trial. If the first trial is aborted, or as the Chief Justice said a new trial is ordered, the same occurs again. Having appeared in compensation applications for a number of sexual assault victims, in my experience by the time of the trial the victim has usually lost contact with the social worker whom she met at the hospital on the night of the offence. Usually victims have no support person at the trial. Yet they may be cross-examined by several counsel if there has been a pack rape. If the defence consent it may be suggested that she consented to the lot and had a happy time with the whole six of them. There may be days of cross-examining her by all defence counsel, yet at the end the accused may make dock statements and may be immune from cross-examination. No victim will ever be convinced that they should be allowed to make dock statements when she went through such a prolonged and humiliating ordeal in cross-examination.

Even when a rapist pleads guilty there is still trauma, even under the comparatively improved position compared with the 1970s. All too often, in my observation, the Crown authorities seem to treat a rape victim as a disposable resource to be used or discarded as thought fit. They have not been told how the case is progressing. They are only rung up a few weeks before the trial after a very long period may have elapsed since the committal proceedings. They are given cursory explanations if there are adjournments. They should be kept informed about the progress of a prosecution right through until the end. If there is a plea of guilty they might not be told. They might find out by accident later on that the case was disposed of a year ago. In my submission, most of these problems are experienced by all victims of violent crime but a lot of them are highlighted in the area of prosecutions for sexual assault.

Crime victims should be involved in plea bargaining. If there are discussions about breaking down charges, then the victim should be consulted. I am *not* suggesting victims should have a right of veto but, as has been observed by others, they deserve a higher level of recognition from the system. They are more than a disposable prosecution resource. Some victims may wish to be relieved of the ordeal of a trial by way of some guilty pleas to lesser charges. Others may be outraged and want to bat on. They are not given a say at the moment and they should be. It is often galling for rape victims that the defence and the Crown can do a deal behind closed doors. The rapist is represented but the victim is not. There is urgent need for reform in that area.

On a plea of guilty, it seems to be the practice for the Crown representative, often a solicitor from the Public Prosecutions Office, not to cross-examine to any substantial extent the rapist on sentence. He gets in the box. He grunts out a few words of contrition that he is advised to utter by his counsel, he blames it all on alcohol, marijuana, and in one case in which I appeared, a 'Mad Max' movie. None of that is challenged. How the court can have a balanced picture about the genuineness of the purported contrition and

mitigating factors is beyond me when the solicitors from the Public Prosecutions Office do not get up and substantially cross-examine on sentence. Rape victims who observe that happening are appalled. The rapist turns up very well dressed, he always loved his mother, he drank to much alcohol on the night, he has woken up to himself, he is going to reform, and how about a bond? And little is done to test that evidence. It is about time, in my submission, that Crown representatives stand up on sentence, even if they just got the file two minutes before, and test some of that evidence.

In a case in which I later appeared for an adult female rape victim in her compensation application, the Crown asked a few desultory questions. The evidence on sentence went on for days. The rapist was one of a number of offenders some of whom committed ancillary offences on the husband of the victim. At the end of that a Griffith's bond was imposed on the fellow who pleaded guilty to sexual intercourse without consent. The Court of Criminal Appeal later said there were strong subjective factors but sent it back for the imposition of a custodial sentence, and a short custodial sentence was imposed. The victim's husband said to me soon after the first instance hearing giving a bond to the rapist, that he and his wife were disgusted, they felt like dirt, they felt the system had let them down. Now that is a common theme expressed, perhaps usually less strongly, by victims of sexual assault and their relatives when the whole precess is over.

If I might finish on a controversial note, I suggest that the question of a dock statements being made by persons accused of sexual assault still needs to be reconsidered. It is important that victims of sexual assault have as much incentive as possible to report what has happened to them and to bring their violators to justice so that the community can be protected, but often the system does not give them much incentive. It appears to rape victims and to those who are close to them that it is extremely unevenhanded, particularly in a case of pack rape where the defence is consent and the victim may for days on end in cross-examination. Yet from the safety of 'coward's castle', as it has been called, they can impugn her in their dock statements and not be tested on them. If not generally, then in cases of sexual assault, in my submission the question of enabling accused persons charged with those offences to continue to make dock statements needs to be further examined.

For the arguments favouring retention of the right to make a dock statement in the first paper, there was no empirical evidence provided. I concede that my remarks suggesting abolition are lacking empirical evidence too, but what I do know is that, having appeared for quite a number of sexual assault victims, they think it stinks and such feelings and perceptions are a deterrent to reporting and batting on with prosecution and assisting the Crown.

So while there has been substantial improvement as outlined in the first paper, I would suggest there is still further scope to alleviate the lot of a sexual assault victim in her long journey through the criminal investigation and trial process.

Paul Byrne

I must say that I agree with you in some of the comments that you have made, particularly what you said about the need to keep the victims of offences informed. Generally the witnesses who are involved in any prosecution should be kept informed of the way in which it is going.

In my paper I have mentioned two particular things which should be done and which may have been done of late but certainly have not been traditionally done. The first is that where there is a decision not to prosecute, a 'No Bill', the prosecuting authorites should, unless there is some compelling reason not to, tell the victim the reason for directing that No Bill be filed to the victim.

The second point you mentioned is the subject of plea bargaining. Victims should be consulted in relation to those sorts of arrangements where there is negotiation between the prosecution and the accused person as to the charges that will ultimately be brought in court and the pleas that will be made.

In relation to the subject of 'dock statement', I must say that I appreciate your experience in appearing for victims of sexual assault offences but my own view is that the unsworn statement, as it should properly be called, has a legitimate role in the criminal trial. I think much of the opposition that is raised against the unsworn statement is based on a fundamental misconception as to what a criminal trial is. Too many people, particularly in the area of sexual assault, regard the criminal trial as a contest between the victim and the accused person. It is not a contest between the victim and the accused person. It is a contest between the prosecution and the accused person and it is not designed to determine who has the better case. It is designed to determine whether or not the accused person is guilty. I think the unsworn statement has the legitimate role to play in that process.

It is interesting to note that there are three major law reform agencies who have examined this subject within the last three years. The New South Wales Law Reform Commission unanimously recommended that unsworn statements should be retained. The Victorian Law Reform Commission of eight members recommended by a majority of six to two that the accused person should attain the right to give unsworn evidence. The Australian Law Reform Commission has been examining the general subject of evidence for something like six years. As far as I know, it unanimously recommended that the right of an accused person to give an unsworn statement in a criminal court should be retained. So the issue has been very closely examined by a wide range of groups over relatively recent times bearing in mind all the publicity that has been given to unsworn statements and particularly the role they play in sexual assault cases. Each of those groups has come down, I think it is fair to say, very firmly in favour of retaining unsworn statements.

The reports of all those agencies are of course public and available, and it is not for me to now go into the reasons why we reached the decisions we did at the Commission where I work, but I think it is important to note that there was a unanimous vote of approval.

Dr G D Woods QC

I must say I agree with a lot of what Glenn Bartley said with respect to the question to the victim of a sexual assault being, as it were, left in a state of uncertainty with respect to what is happening as the process goes through.

That problem was precisely why the new system, as it is beginning to operate, involves a continuity of the prosecution solicitor from the very earliest point right through precisely so that the occasional phone call can be made. There can be a particular person to whom a telephone call can be made by the victim for the purpose of ascertaining what is happening. I think, to some extent, that has already been addressed.

With respect to the question of plea bargaining, it is certainly true that people who are complaining of being the victims of assault (and in reality are the victims of assaults) are sometimes angry that the prosecuting authorities, having charged a person with (say) a category 2 and a category 3 sexual assault, will on the door of the court break it down and accept a plea of guilty to a category 3 sexual assault in full discharge of the indictment. Well, all one can say about that is that one appreciates the anger but it is also true that the prosecution has an independent role to play. It would be very wrong if the prosecution processes of the State were put in the hands directly of those who who are the victims and, indeed, although the right to be informed is an important right, I think there are not many rape victims who would actually wish to have a distinct role placed formally upon them by way of making a decision with respect to the precise level of the charge that should be utilised as the basis of the acceptance of a plea of guilty.

There are a lot of considerations that go into that. It is true there is often hurly burly in the courts. It is often true that less care is taken about decisions (or appears to be taken about decisions) than one might, in a paradisical situation, desire. But none the less, by and large, prosecutors do think carefully about the acceptance of pleas. I agree however that there ought to be a process of informing, at least—but as to it being consultation, ('advise and consent' in the American terminology) I do not agree.

I appear frequently for the defence in these sorts of cases and Glen Bartley appears frequently by way of making applications for compensation by victims, so we may tend to take on the colours of those we represent. But I must say that I think his description of the way the accused person who is convicted deals with his contrition in evidence is a bit coloured. 'He grunts out a few words of contrition'. Well it is true that many of the people who roll through the criminal courts do not have the same eloquence that Mr Bartley has. That is why a particular profession has to be established so that we can make speeches for accused persons, but I think that the terminology 'grunts out a few words of contrition' is a bit rough. And indeed accused persons are often better dressed in court than they were on the night of the alleged offence—but then again, so is the victim.

In terms of the penalties he said "After a few words of contrition are grunted out the next question is 'How about a bond?' ". Well, if he looks at the sentencing for sexual assault, he will see that it is *not* the common pattern to get a bond for sexual assault. The fact is most convicted persons get sent to

gaol. Most people who are charged get convicted, most people plead guilty, and do not put the victim through the trauma of trial and the giving of evidence. It is wrong to put forward, in the interests of law reform, views which are excessively emotional, based upon the wrong theory that most rapists are escaping. The facts are that most who come before the court plead guilty, and most of those who plead 'not guilty' get convicted, despite the fact that they utilise the procedural mechanisms attacked by Glenn Bartley and by others: i.e. the dock statement or the unsworn statement. The fact is that despite all the pains and traumas of being the victim of a sexual assault, one thing that happens is that at the end of it, you do not go to gaol, whereas the fellow who is charged with the offence has that risk. There is a presumption of innocence, it is a very important presumption. And another right which the accused person has is the right to stand up in court and make an unsworn statement. Mr Bartley is out of date in saying that that statement permits him to impugn the victim. It is out of date in this sense—he is limited now under the amendments of 1981 in the sense that he cannot impugn her sexual background. He cannot attack from the dock without fear of recrimination, he cannot attack her sexual reputation, he cannot say she has been sleeping around with Tom, Dick and Harry. All those outmoded techniques of defence which were addressed in the reforms of 1981 are no longer available to him. He can of course stand up and say "I didn't do it". He can say "She consented" and he can say that she was drunk, or there were other reasons he can think of why she was telling lies. He does all those things. The jury considers it, and normally they convict him anyway. I respect the attitude of those who at this seminar represent various womens' groups, and there are many, obviously, who have that sort of particular interest as I have—the interest basically of representing criminally accused people.

The last seven or eight years in this State have seen a concerted, rational effort on the part of many interest groups to come to grips with these problems and to develop proper law reforms. I hope that the issues raised in these Proceedings will be taken up. I am much persuaded to the view that the notion of video taping a statement of the child victim of an assault and using that as *prima facie* evidence in chief. I think that that is a very attractive notion. Ultimately I think the child or the adult has to be confronted in court, has to be subjected to cross-examination, but as to children I see considerable merit in the idea—subject to the point that Maggie Smythe makes: that there is the difficulty that first of all the child may not tell the whole story and the child's evidence may thereupon later be criticised in court for not having represented the whole story. Maybe the way around that is just to make that an option that is available to the prosecution—to have the video tape done at the beginning under conditions where not only the child is seen in camera range, but also anybody else in the room who is with the child. The entire conversation would be video taped so that any questions that are asked of the child are recorded and are there for the jury to look at eventually. If it turns out subsequently that that encompasses substantially the child's evidence in chief, then the prosecution could use that. It would be a fairly intimidating thing for any defence counsel to see such a video tape, because you know that if the child 'gets the evidence out' in court, by and large your client is going to be convicted. One of the great stumbling blocks, of course, is that the child often cannot 'get the evidence out', cannot confront the intimidating atmosphere, and the prosecution just fails at the outset—the defence counsel makes a submission that there is no case to answer, and he asks for a directed verdict of not guilty and he gets it. So that approach, if it were optional to the prosecution would not be perfect but I think would be an improvement over current procedures.

However, I take the view that that evidence having been put before the jury, the child will ulitmately have to be available for cross-examination on it, subject to the very much more sensitive atmosphere these days. Despite criticisms, things are in fact much more sensitive now in terms of cross-examination than they were ten or twenty years ago. The judges certainly, and many magistrates, are sensitive to the notion that child victims should not be bullied.

Helen L'Orange

First of all I would like to say that I do consider the comments made by Mr Bartley as being very important and I will ensure that the matters that he has raised are taken into account in the forthcoming review.

I think that the points made about the process still being traumatic for victims appearing as witnesses are generally valid but I would say that the Sexual Assault Committee and the Child Protection Council have been making strenuous efforts through community education and through the production of booklets such as *Going to Court* to educate victims and to assist them in understanding the process and their rights to resources.

It is not my experience that victims lose contact with their support person at the trial stage and I would like to talk to you later about examples of that. The New South Wales Government has put a lot of money into the provision of services for victims of sexual assault, both adults and children. The law provides for the presence of a child's support person in court even when the court is closed. There has been a vast improvement in support for victims during the court processes in the past few years.

In our paper on p. 37 we did indicate that we felt that there certainly needs to be more careful regulation of the type of comments made in the unsworn statement. In other parts of the paper we talked about further clarification of the s. 409 (B) exceptions which takes up matters that concern you. I think, too, the problem of eliminating repressive attitudes to womens' sexuality through perhaps an extra s. 409 (B) provision, and, of course, through action in society at large is a factor in the sorts of experiences that victims are still having in court cases.

I am very disturbed to hear that from your experience victims still think the whole process stinks. I had hoped that the improvement to date would have made it less traumatic, but I acknowledged that there is a way to go.

Jenny Earle, Executive Officer of the Sexual Assault Committee

I just wanted to say one or two things both as Executive Officer of the Sexual Assault Committee and more particularly as a member of the Services for Victims of Crime Task Force which reported last month, because that Report has not been mentioned. It did take up a lot of the issues that have not been raised, particularly about improving and speeding up the courts procedures for victims and the importance of keeping victims informed. I wanted to make sure that everyone here was aware of the existence of that Report and its availability from the Department of the Attorney-General. The Attorney-

General is very keen to have a response from the wider community to the recommendations made in that Report so I would urge people to obtain it if they are interested in following it up.

That Report was perhaps the only Report produced in New South Wales that recommended the abolition of the unsworn statement. The Report is obviously advocating on behalf of victims of all crimes but it does have focus, as the result of efforts of some of the members of that Task Force, on the needs of sexual assault and domestic violence victims and it was through that concern that the recommendation for the abolition of the unsworn statement was made.

I think the issue of publicity and the effect that that has on victims should be mentioned. It is something that the Sexual Assault Committee is taking up but we need to be aware of the effect that adverse publicity about sexual assault trials has on the willingness of victims to report in the first place. There should be greater sensitivity on the part of prosecutors, magistrates, and judges to the importance of respecting the privacy of sexual assault victims including willingness to close the courts and to make orders suppressing the publication of evidence when necessary. In the case of prosecutors we are talking about a sensitivity to the availabiltiy of those orders and willingness to consult with victims as to whether or not they want such orders made.

And finally I just want to point out that there has been some talk about the gender of victims of these crimes but very little mention of the gender of the offenders nearly all of whom, of course, are men.

Bronwyn Cosgrove, Law Student.

I am ignorant of what has been happening in Australia the last eight years because I lived in the United States but I cannot let go unchecked the remark made by Dr Woods.

I wish to correct something which I think arises from a gross insensitivity which he displayed and which strengthens the points made by the previous Barrister who has defended rape victims.

I am referring to his comment that the victim does not face the possibility of a prison term, and his juxtaposition of the word 'victim' so close to the word 'goal' was so blatant. I am sure that people here are aware that they, the victims, are already condemned to a prison in their own mind. I cannot imagine that there are many people here who do not understand what I mean when I say this, but I know that in the community there are those who cannot imagine the prison that somebody lives in when they know that there are people who have much greater strength than they have, or who, whether they feel permitted by society or not, can choose to subject them to a humiliation which still is considered by most people a normal act, when in fact it is a violation. For you to imagine this violation you have to imagine something out of 'Deliverance' where an offensive male subjects you to great humiliation and fear for your own life, but it is greater than that because there is a fear accompanied by the rape of women which men who are raped cannot have—namely of pregnancy. You may dismiss that because for some women abortion is a simple remedy, and men who dismiss that lightly are again ignorant of something that is very

profound. Having talked with many women, and being part of a women's group in the United States, I know that even in the case of a rape if a women is pregnant an abortion is no easy solution.

I understand you speak out of interest for men who may be falsely accused and that for them it is a nightmare but let me assure you that remarks like yours do not give people faith that, in fact, we are making huge steps forward.

H. F. Purnell, Q.C.

I am a Barrister having more than 30 years experience. Many of you would not have such experience. I have done nearly 20 years for the Crown and nearly 20 years for the defence so I think I am qualified to make a few pertinent remarks.

My trepidation in speaking is linked to the fact that in 1978 when I was the Senior Public Defender for this State certain womens' groups organised a very big seminar at the Wentworth Hotel. They were looking for somebody who was said to know something about the criminal law and as Senior Public Defender I was approached. I understand that Vin Wallace, Q.C., who was the Senior Crown Prosecutor was also approached. When I was told that he had been approached I suggested that it would be more appropriate that he appear rather than me and they said: "Oh no, we do not think so". If ever a person was trapped I was on that occasion. That is one reason I am having something to say here, because the interesting thing is that as far as I am concerned, this audience has displayed an equanimity, a sensibility, and an awareness that really was not in evidence on that other occasion. All I was asked to do, and you will forgive me for reminiscing, was to put the law as it was. There were various people there who were putting the proposition of course that the 1978 amendments should come into force. There were some very prominent women speakers but I no sooner stood up and put the law when I was told to sit down in very unseemly terms. I was told by one woman, who jumped to her feet (and I know you will excuse me for saying this but I regard it very seriously) and said that I was a 'sexist, racist, animal bastard.' All I was doing was putting the law because I had been asked to do so on that occasion.

This is a very, very serious subject. There is no question about that. It is an emotive subject. You young people are to be commended for the interest that you take in it. I know that womens' groups round the world have found this particular topic a source of great trouble and a source of great interest and properly so, but there is a lot of nonsense talked about the crime of rape, and there are a lot of opinions which are quite inconsistent.

I note here today, and I am not being critical, but just putting to you an overview, that some of the distinguished speakers on the platform are talking about the crime of *rape*. In 1978 if one had dared to mention the word 'rape' one would not only have been abused but probably would have been ejected from that particular seminar. 'Sexual assault' was the proper term.

I recently heard on the radio a wellspoken lady making a complaint that the trouble with the modern view with regard to rape, and she used the word rape, was that too many people were talking about physical violence. They had forgotten that *rape was a sexual offence*. That was a matter, of course, that was raised by way of complaint with considerable heat in 1978.

I mention these matters because it illustrates that we have to be careful in the attitudes that we display in regard to this subject.

There can be no question, as I put in 1978, that the large majority of people who are charged with rape are convicted of rape. I am not speaking from lack of experience but I am speaking from the hard solid position of one who has appeared in many of these cases. I was shouted down on that occasion: that was nonsense; that was piffle; that the people walked out of court in great numbers; it was not the truth. The percentage of convictions then was something of the order of 80%.

The changes that have been made, I think with reflection, are good changes. One mellows with time, however what I suggested in 1978 has come to pass, namely, that if you introduce three categories of rape people will plead guilty to category 3. That is precisely what has happened and in numerous cases it has meant that the penalty of seven years is much less than people would have received previously.

There is a lot of nonsense talked about the sentences that have been handed out for rape over the years. You may not realise that there are a number of people in gaol still serving sentences from years gone by. They are in the order of 18 to 20 years and it is a little difficult to take when people think everybody gets a bond or a comparativley minor sentence. I am not saying those people did not deserve it. They were diabolical cases.

For instance, in 1961 or thereabouts when I was on the Crown side there were half a dozen young men charged with a terrible rape case called the 'Wetherill Park Rape Case'. It had some similarities to the infamous 'Mount Rennie case' of the 1920s. Those young men who were involved deserved little sympathy. It was a diabolical case and with one exception they were sentenced to life imprisonment. Most of them were only 18 years of age and some of them had no convictions at all. I will always remember one young man who had been a booking clerk at Fairfield railway station. He had no convictions at all and he was sentenced to life as was his brother.

I know that the Bureau of Crime Statistics and Research have distributed a paper today about punishment. I was recently reading Tony Vinson's book, *Wilful Obstruction,* which gives an overview of the situation in prisons in this State and he pointed out, amongst other things, that in Holland in 1980 there were no people currently serving a sentence in excess of three years for rape.

Be that as it may, can I just say objectively arising from what has been said at this seminar that I would like to support the proposition, it is an old old shibboleth I know, that the dock statement should not be abandoned. It would be wrong to revise the law and introduce evidence on oath by accused persons only in cases of sexual crime and still retain the dock statement for other offences.

I also say that my views have changed over the years but slightly with regard to the ordeal that is suffered by victims. Not that I ever had any doubt that victims did suffer a considerable ordeal in the witness box. I think the power of cross-examination can be overdone on occasions. We do know that

in a period in the 1960s and '70s certain counsel seemed to be carried away with their own importance and some of the attacks that were made on victims in my view were unnecessary. No doubt they were in accordance with instructions, but they certainly should have been tempered with a lot more discretion than they were. I think that position has changed and changed considerably, and we are indebted to those who framed the 1978 and 1981 amendments, including Dr Woods who was one of the architects of the 1981 amendments. You cannot have a position where the accused cannot get a fair trial, but those amendments have restricted some of the undesirable cross examination. I commend that, but I would not be in favour of any further extensions amounting to a denial of the rights of the accused.

In conclusion can I say after a lot of experience in criminal courts, a period in excess of 30 years is a long time, I do not remember any case in which I have appeared either for the Crown or the defence where it could be truthfully said that responsible counsel have exceeded the barriers of propriety in dealing with children, and I am speaking of *small children.* A large number of the offenders charged with sex offences against children have pleaded guilty over the years and continue to plead guilty. It is a terrible thing for a child. There is no question about that. It is a sad thing. I think that restriction on the number of appearances by such children by any process that can be done with care, with accuracy, with fairness, should be pursued. Paul Byrne's idea of tape recording the statement of complaint is an excellent idea in these cases.

Anne Risley, Senior Law Reform Officer, Australian Law Reform Commission.

I want to correct a conclusion that was drawn by the Director of the Women's Unit, Ms Helen L'Orange, in her paper on the results of the Bureau of Crime Statistics and Research's monitoring of the effects of the 1981 amending legislation on sexual assault. Ms L'Orange's paper concludes that the findings of the Bureau study demonstrate an increase in convictions, an increase in guilty pleas and a decrease in acquittals under the *Crimes (Sexual Assault) Amendment Act,* 1981 as compared to the *Crimes Act,* 1900. On its face this is true. But once disaggregate the Bureau's data according to the three categories of sexual assault and the picture is quite different.

I refer to an issue of the Law Reform Commission's Journal *Reform* in which there was a review of the Bureau's second interim Report. The conclusion drawn by the reviewer of that Report was that as between rape, that is the pre-1981 common law offence and its statutory replacement under s. 61 (d), has been *no* significant change in the levels of pre-trial lapsing in relation to s. 61 (d) offence. There has been *no* significant change in the not guilty pleas, and *no* significant change in relation to acquittals. In relation to conviction rates for s. 61 (d) the measure the Bureau used was the conviction rate for other serious crimes. For example, murder trials in 1983 in New South Wales produced a conviction rate of 83.3%. In relation to s. 61 (d) offences however, if you allow for the convictions for lesser offences then under s. 61 (d) you have got a real conviction rate of 68.8%. It is a significant result. In my opinion the data in the body of the Bureau's second interim Report has made the work of the Bureau very worthwhile. The conclusion in that Report belies the strong indications in that data that there has, in fact, been no change for what we used to call rape in relation to things like pre-trial lapsing, not guilty pleas, acquittals,

and convictions. That is a very significant result and you will not find it expressed in the chapter headed "Conclusions" in the Bureau's report no more than Ms L'Orange has expressed it here today on page 27 of her paper which has probably no doubt been directly drawn from the "Conclusions" chapter of the Second Report. The point was made as it is made in the Bureau's report and also by Helen L'Orange that the most commonly charged offences under the new amendments is s. 61 (d). The Bureau's second Report shows, at least when carefully read, that the problem site is s. 61 (d). Helen L'Orange has pointed out that there is still work to be done in this area. I agree, but I add that we must start from the truth and from there we can progress.

Dr Sandra Egger

I am not sure that I fully understood the technical argument that you are making. The problem is that in any evaluation study of this nature the universe of offences has changed in several respects. For example, you are dealing with an expanded definition of sexual intercourse so that previously many offences which may have been charged under the law of indecent assault for example, or under the relevant sections of the *Crimes Act* which cover homosexual offences, are now capable of being charged under the sexual assault categories 1 to 3. You are dealing with a totally different universe so comparisons are a little bit difficult. You have to say "Well, notwithstanding that I will take the old universe and the new universe as the defining populations". I think your argument is that if you take category 1 offences and the category 2 offences out of the new law you are able to compare category 3 and rape. The problem is then how do you take offences which would now be classified as category 1 or 2 out of the old law to make that comparison valid?

Ann Riseley

I am relying on the data that was in the body of the Bureau's Second Report. I would remind you that the premises that you are drawing are relied on in Helen L'Orange's paper and in the concluding chapter of the Second Report. If you pursue that line of reasoning you equally invite discredit on the Bureau's and Ms L'Orange's conclusion.

Dr Sandra Egger

Yes. It is very technical. I would like to sit down with you at some stage and run through the arguments. I think we would probably lose everyone now, and perhaps bore everyone to tears but I do think it is an interesting point and I would like to explore it.*

Chairman

It is commonly said that there are now three categories of sexual intercourse without consent: categories 1, 2, and 3. That in fact is not what the legislation provides. There is only one offence of sexual intercourse without consent and that is category 3. Categories 1, and 2 are threats, aggravated circumstances associated with intended sexual intercourse consent, but neither category 1, nor category 2 requires an act of sexual intercourse, in order to constitute the offence. They are aggravating antecedent offences which may be

* see Appendix on p. 88 for a more detailed reply from Dr Egger.

committed in association with the only statutory offence of sexual intercourse without consent—that is the category 3. That is not commonly appreciated. There is often talk of three categories of seriousness of sexual intercourse without consent but that is quite in the teeth of what the legislation provides, and that, of course, is another factor which can tend to cloud statistical debate. That needs to be kept very much clearly in mind.

Charles Goldberg, Solicitor

Let me preface my remarks by indicating that my experience has normally been appearing on behalf of persons charged with offences and I cannot say much to Mr Bartley except to indicate that all of us here would no doubt have sympathy with any victim of a sexual assault.

Having said that I am astounded at the suggestion that a victim should be party to determining what course of action should be adopted by courts or by the prosecution in relation to carrying out the court process in respect of any person who is charged with a criminal offence, because it goes without saying that the ordinary lay person who would not have the experience to understand the significance of the evidence that would be read by the prosecution. In those circumstances it would mean that a prosecutor was handing over his function, the job that he is being paid to do, to the person who has complained of an offence being perpetrated on him or her. That would be unconscionable and for that very reason any such victims should not be party to any determination whether it be by plea bargaining or by application made by counsel or solicitor on behalf of the person who has been brought before the court.

I would also like to put a question to Constable Nixon in relation to Detective Sergeant Thornthwaite's paper. I quibble with the concept on page 63 of the statement:

> It is a world wide fact that children do not tell lies in relation to sexual abuse that has been committed upon them by a person in authority.

I would like to know where you get some form of authority to make such a statement which would suggest that at all times any child who makes a complaint should be taken as being a person furnishing the Gospel truth—that no query should be put in relation to such a complaint? I think most of us who have had any experience in court would appreciate the number of times where the young (and when I say young children I include those who are in the puberty stages or just post puberty) will frequently make complaints in respect of persons who are quite close to them for the very reason that the parent or uncle or friend has refused to furnish them with something that they require or want. Perhaps you could indicate, if you are competent to do so, where Sergeant Thornthwaite got the material to make such a statement.

In relation to the matters raised by Mr Bartley about sympathy for the victim, I am very conscious of the number of times that I have seen persons who have made complaint subsequently go to press, particularly where a person who has been charged has been acquitted, using the newspaper as a means to ventilate their grievance. In those circumstances it seems strange to hear from certain people who have spoken at this seminar that with the stigma that used

to be attached to the old charge of rape before the 1981 amendment people are still keen to come before the papers. It probably also reinforces my suggestion in relation to the parties who, for want of a better term, are described as the 'victims', having any determination or role in the decision as to what sort of plea might be taken.

In relation to Mr Purnell's statement as to the changes I might reiterate that it has indeed been quite open and quite noticeable that counsel and solicitors today do not tend to attack young children. The very reason is that you are not going to get anywhere if you do, apart from the feelings that every person who appears in court just does not do it.

Might I suggest that when a person is charged that the statements be furnished in a period of not less than seven days (in respect of sexual offences relating to young children) because obviously if a sexual charge is being laid in respect of a young person then that means that the statement should be available. Secondly, might it not be possible, and I know this is a problem for administration (Mr Byrne might assist here) to ensure that all such charges are brought before the court and early dates be made for the hearing. What I am suggesting is expedition of all sexual assault matters. Finally might I also suggest that in relation to matters that come before the higher courts (Dr Oates was not conscious that he was talking about committal proceedings in relation to sexual cases), that those matters again be expedited. If that was done there is no doubt that the trauma that is envisaged or that is visited upon any victims might be mitigated or lessened.

Constable Christine Nixon

I think that Detective Sergeant Thornthwaite's statement is very well supported, but perhaps for emphasis he has chosen to say *all.* Evidence has come from studies in the Henry Kemp Centre in Denver, for instance, in 98% of the cases where children claim these issues have later found to be true. I certainly, in other forums, have advocated the fact that children in the overwhelming majority of cases do not lie, and Detective Sergeant Thornthwaite has made the point here for emphasis. For that minimal percentage where they do lie, the trauma and harm done to those children on that basis of a minimal unsubstantiated percentage is a problem that has to be overcome, and to take it up as you have is an example of exactly the problem we have. Very few people want to look at the statistics and look at the facts that in the overwhelming majority children do not lie when they report these incidents.

Chairman

I should like to acknowledge the leadership that we have had from the paper writers this evening. They presented different points of view. The discussion then seemed to pass over to members of the Bar. It is not without interest that there is now a new class of professional representative, that is to say the lawyer, who is concerned with victims. I think that we must all recognize that the community is swinging towards a realization of the plight of the victim. I do not for a moment lose sight of the fact that the criminal justice system must operate with full fairness to the accused person, but for so long in the past the victim has been little more than a witness. I think it is a heartening trend to see the developing community awareness of the victim's position not just in the area of sex offences but across the whole spectrum of crime.

APPENDIX

Dr Sandra Egger

The conclusions drawn by Ms. Riseley in the discussion period and by the author of an article in the Australian Law Reform Commission's Journal, *Reform* (July 1986, No. 43, p. 142) are incorrect.

It is asserted that s. 61D of the *Crimes (Sexual Assault) Amendment Act,* 1981 is the 'statutory replacement' for rape (s. 63 of the Crimes Act, 1900) and that when these two sections are compared there are 'no significant change(s) in the levels of pre-trial lapsing, not guilty pleas, acquittals' and 'convictions'.

Firstly the comparison is not the 'right' or even the most appropriate comparison to make in assessing the changes associated with the introduction of the new law. Section 61D is not the statutory replacement for rape. The former offence of rape include offences now classified under s. 61B, s. 61C and s. 61D. The differences between rape and s. 61D are as great as the similarities. The category rape is comprised of offences which involve actual penis-vagina penetration and *includes* cases where the penetration is accompanied by grievous bodily harm (or the threat) or actual bodily harm (or the threat with a weapon). The category of s. 61D is comprised of offences which involve penis-vagina penetration, anal intercourse, fellatio, cunnilingus, the insertion of objects or parts of the body into the anus or vagina, or the continuation of sexual intercourse and does *not include* cases where bodily harm (grievous or actual) is inflicted or threatened. The latter are usually charged under s. 61B or s. 61C although s. 61D may be charged as well (*R v Smith,* [1982] *N.S.W. Law Reports,* 569).

Section 61D and rape represent different but overlapping sets of acts. The extent of overlap cannot be ascertained from the Bureau Report but it may be quite small given that only 54.9% of the total offence population studied under the 1981 amendments was charged under s. 61D and only 50.5% of this total population of cases involved penis-vagina penetration.

Secondly, even if the comparisons are made according to Ms. Riseley's criteria it is not correct to say that 'there has in fact been no change'. **Table 1** compares the 'old' law and the 'new' law.

TABLE 1

	rape		*s. 61D*		*total population: previous law*		*total population: 1981 amendments*	
	N	%	N	%	N	%	N	%
Lapsing before Trial	44	28.2	26	20.8	49	25.3	42	18.4
Plea of not guilty	69	71.1	46	51.7	78	53.8	81	43.5
Conviction	58	59.8	69	74.2	102	70.3	154	82.8
Percentage of not guilty pleas acquitted	39	56.6	24	52.2	43	55.1	33	40.7

Section 61D differs from rape in the percentage of cases lapsing before trial (20.8% vs 28.2%), not guilty pleas (51.7% vs 71.1%), acquittals (52.2% vs 56.6%), and convictions (74.2% vs 59.8%).

Thirdly, it is claimed that these differences are not 'significant'. Such a conclusion is unwarranted given that no tests of statistical significance were reported by either the Bureau or Ms. Riseley, and incorrect. A series of chi-square analyses on each of these variables reveals the following—

1. The difference between s. 61D and rape in the proportion of cases lapsing before trial was not significant ($X2 = 1.66$ N.S.).
2. The difference between s. 61D and rape in the proportion of cases pleading guilty was significant ($X2 = 6.64$, $p < 0.01$).
3. The difference between s. 61D and rape in the proportion of cases convicted was significant ($X2 = 3.875$ $p < 0.05$).
4. The difference between s. 61D and rape in the proportion of cases acquitted where a plea of guilty was entered was not significant ($X2 = 0.21$ N.S.).

Thus, there were significantly more guilty pleas entered and significantly more convictions under s. 61D than under rape.

If the intention in making these assertions was simply to point out that even under the new law, the prosecution of sexual assault offences is more difficult where there is no evidence of actual or threatened violence then it should be expressed in these terms. The argument is not further advanced by claims that only certain comparisons are 'right' and represent the 'truth'.

Finally, the proper test of the changes brought about by the amendments is the comparison between rape (and attempt rape) under the old law, and between s. 61B, s. 61C and s. 61 (and attempts) under the 1981 amendments, as reported by the Bureau. Research of this nature cannot remove the influence exerted by the legal system in analyzing, constructing and classifying certain acts as criminal offences.

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