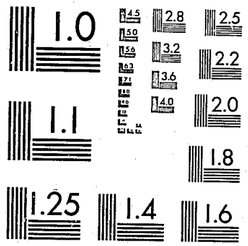

National Institute of Justice
United States Department of Justice
Washington, D.C. 20531

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SUBMISSIONS TO THE MINISTER OF JUSTICE ON THE RAPE STUDY

An analysis

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Justice

Preface

In March 1982, in response to increasing public concern about the incidence of rape and in particular the plight of victims, the Minister of Justice, Hon J.K. McLay, directed that a rape study be undertaken. A study was done by the Department of Justice in collaboration with the Institute of Criminology, Victoria University, Wellington. The findings were published as two volumes.

Volume 1, Rape Study: A Discussion of Law and Practice, by Warren Young, discusses and relates the findings of the research reports to law and practice in New Zealand and to rape law reform in some jurisdictions overseas. Volume 2, Rape Study: Research Reports, contains the four research reports -

- The Victim Survey;
- Rape Complaints and the Police;
- 1980 and 1981 Court Files;
- Results of Questionnaires to the Judiciary and Lawyers

When releasing Volume 1 in March 1983 the Minister of Justice called for submissions on it. 111 responses were received from individuals and a wide range of organisations. This report is an account of the analysis of the submissions and its publication concludes the formal study of the experience of rape victims.

The submissions were analysed by Jonathan Petterson, an advisory officer of the Planning and Development Division.

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1. Background

On 28 February 1983 the Minister of Justice released volume one of a study on rape carried out by the Department of Justice and the Victoria University Institute of Criminology. In doing so he called for submissions on the issues raised by the study. 111 submissions were received. This report attempts to identify the principal concerns of those who made submissions and summarise the views expressed on how to best improve the law on rape and the way the criminal justice system deals with complaints of rape.

A list of persons and organisations who made submissions is an Appendix to this report.

2. General Introduction and Summary

Submissions were received from a wide range of organisations, groups and individuals. A large number (38) are from women's organisations. There are also submissions from church bodies, voluntary welfare organisations and branches of political parties, as well as from the Police, the Federation of Justices' Associations and the Law Society. Individual lawyers have also made submissions. The majority of submissions by individuals are from women (32) although there are also a number from men (18).

The views expressed in submissions are diverse, but on most issues there is a clear majority viewpoint, if not a consensus. It is of course important to note that these submissions do not constitute a representative sample of views in the community, in the way that an opinion poll would, but rather they represent the

opinions of those persons and organisations with a strong interest in the subject. That said, it is also important to note that many of these organisations have large memberships that, taken together, cover a wide spectrum of New Zealand society, and especially of New Zealand women.

There is a large measure of consensus among submissions on the general point that existing police and criminal justice system procedures for dealing with rape cases can cause unnecessary distress to the victim of the offence (although a few submissions, such as those concerned solely with penalties for offenders, do not refer to this issue). All but a few submissions also ask for changes of some description to the law.

Most of the submissions received agree with conclusions reached in the Rape Study and many quote directly from the study in making recommendations. There is some criticism of the study for not having dealt with certain issues in any depth, such as the causes of rape, but most commend its victim-centred approach. A few submissions however criticise the study for drifting away from this perspective and giving undue weight to existing legal conventions, such as the adversary system of court procedure. Some also see too great an emphasis in the study on the danger of unfounded complaints. Others of course take quite a contrary view and maintain that suggestions mooted in the study would undermine the right of a defendant to a fair trial.

There are several issues on which there is sharp disagreement among those making submissions. Notable among these is that of "spousal immunity" to a charge of rape, which is both attacked and defended in strong terms, although the great majority of opinions expressed on this point favour abolition of the present immunity.

On other issues there is broad agreement that a problem exists (such as the distress caused to complainants during cross-examination in court) but a wide variety of proposals are

put forward to improve the situation, ranging from relatively simple matters of administrative procedure to wholesale changes in the law and the system of criminal justice.

The layout of this analysis broadly follows the pattern in Volume One of the Rape Study, as most recommendations and comments made by submissions fall readily into one or other of the sections in the study. An additional chapter has been added however to include some matters mentioned in submissions which were not concerns of the Rape Study itself.

3. Police Processing of Complaints

49 submissions make some comment or recommendation concerning the way in which police deal with rape complaints. Among these the dominant concern is to lessen the extent to which the process involved in making a complaint is an ordeal for the complainant. This is both an end in itself and also a means of improving the report rate for the crime. A number of submissions make statements such as: "Police practices are part of the reasons that women report rape so seldom" (67) or "many women due to their perceptions and past experiences of the police, are not willing to come forward to report a rape". (80) A variety of suggestions are made for improving this situation, those most mentioned being additional police training, assigning more policewomen to work on rape cases and improving procedures for the medical examination.

Police Training

33 submissions comment on police training and suggest, for example, that training should enable police officers to "understand the different factors and special stress inherent in the crime of rape" (60) (such as the "rape trauma syndrome" mentioned in the rape study). A number of submissions say that experienced officers, as well as new recruits, should receive training in the handling of rape cases. Some say that training

should aim at ensuring that police attitudes to rape victims are not influenced by "mythical" beliefs about rape. There are suggestions that workers from victim support groups be involved in police training programmes.

All those mentioning this topic believe that police officers dealing with rape complainants should be more sensitive to and sympathetic with the needs of women who have been raped. The general feeling is that complainants in rape cases have special needs and that normal police procedures for dealing with complainants in criminal cases do not adequately meet these needs. As one submission says: "rape victims are at best given no more consideration than other complainants." (75)

Use of Policewomen

For many of those making submissions one means of ensuring that rape complainants get a more sympathetic hearing from the police is to assign more policewomen to deal with these cases. 25 submissions ask that this be done, a typical recommendation being that "complainants in all areas should have the option of being interviewed by a female police officer." (16) With reference to the practical difficulties involved in making this option available (i.e. a lack of suitably trained policewomen) several submissions propose that affirmative action be taken to recruit more women to the police force, to promote more to senior positions and to assign more to detective work. One submission (98) suggests that more Maori women in particular need to be assigned to rape investigations in appropriate areas.

A submission which describes procedures for dealing with rape cases in Los Angeles notes that "The Los Angeles Police Department has recently been required by court order to hire more women until female officers constitute 20% of the sworn personnel". Another submission (32) proposes that just such a mandatory provision should apply to police numbers in New Zealand.

The Medical Examination

34 submissions express opinions on ways of improving the medical examination which rape complainants undergo. Many of these suggest that greater use should be made of women doctors to carry out the examination, or that complainants should be permitted to choose the doctor they wish to be examined by. Not all are so categorical as the submission stating that "Only women police doctors should be summoned when a medical examination of a woman is required," (32) but various criticisms are made of the present system, such as that many police surgeons are not suited to carrying out examinations of rape victims, and that this type of procedure requires a different attitude and set of skills than the usual work of a police surgeon. There are also criticisms of the physical surroundings in which examinations may take place and one submission suggests that the place of the examination as well as the doctor should be of the complainant's choosing. (96) Others speak of the desirability of examinations being carried out promptly so that the victim can be given an opportunity to clean up and change her clothes as soon as possible.

A number of submissions suggest that doctors who are called to examine rape complainants should have had special training "to meet the medical and counselling needs of victims of sexual violence". (16) Some express concern that police surgeons should ensure that victims of rape receive appropriate information and advice on contraception and venereal disease as well as referring them to to suitable sources of follow-up counselling.

A solution to the problem of a lack of women police surgeons is suggested by one submission as being "that women doctors be allowed to become police surgeons for the purpose of rape victim examinations without being obliged to perform other police examinations". (95)

Two submissions say that women should be able to obtain a second medical opinion in addition to that of the police surgeon and that this should have equal weight as evidence.

Various submissions refer to the way in which the HELP centre in Auckland arranges for medical examinations to be given by "sympathetic" doctors in more congenial surroundings than a police station as a model for procedures of this nature.

Classification of Complaints by Outcome of Investigation

A number of submissions state that the present categorisation of many complaints under the heading "no offence disclosed" in police statistics is inappropriate. Suggestions for new categories to replace or supplement this heading include "insufficient evidence to proceed", "complaint withdrawn", "erroneous complaint by third party" and "unfounded complaint".

Interviewing

Several submissions suggest that police should "make the initial interview [with a complainant] a short one, limited to discovering the essential details of the case; e.g. a description of the alleged assailant. The taking of a full statement could be deferred until the complainant was better able to cope with the situation'. (46) Another submission notes that often "Statements are taken when a woman is in a state of severe shock". (85)

A suggestion concerning follow-up interviews is that these should be by appointment and police should not arrive unannounced at the complainant's home or workplace, thus causing her unnecessary embarrassment.

Some submissions also criticise police for the type of question they ask in interviews. Interviewers are said to place too much emphasis on the character of the complainant and often give the impression that they do not believe her story. One person who made a complaint of rape to the police wrote "I was asked over and over again if I was lying, my friends were questioned for hours

over my 'reputation'". A number of submissions suggest that the police should take a supportive attitude and always proceed on the assumption that the complainant is genuine until it is proven otherwise.

Laying Charges

Several submissions express concern as to the degree of control that the police have over whether a prosecution is taken against an alleged offender: "... the police have far too much discretionary power in deciding the validity of a woman's complaint". (85) One submission suggests that "Any victim should be able to lay a charge of rape" and "It should be up to the court to decide whether or not there is a case." (At present private prosecutions for rape require the permission of the Attorney General).

Seven submissions adopt the proposal that women should be able to report a rape to the police without laying a charge, both for statistical purposes and "so police have a file on accused should he offend in the future." (70)

Liaison with the Complainant

Various submissions refer to a need for the police to provide complainants with more information about the law and the criminal justice system. Some suggest that this information should be provided in written form to all rape complainants as a matter of course. Some also ask that the police do more to inform rape victims of the forms of assistance (such as accident compensation) and support available to them. "Each complainant should be provided with written information and full oral explanation of the legal process, the roles of individuals with whom the complainant will come into contact, support services available to her and her entitlement to Accident Compensation". (53) The suggestion that a single police officer be appointed "contact person" for the complainant throughout the investigation and any subsequent trial process is made a number of times.

Co-operation with Victim Support Services

Some submissions recommended that the police do more to cooperate with victim support services, calling them in to help victims at the earliest opportunity, and making use of their facilities in arranging medical examinations where this is possible.

One organisation, not itself involved in victim support work, recommends that "The police, on investigating a rape complaint should be required to immediately contact the nearest Rape Support Organisation so that a trained member of this organisation can be present to support and assist the rape victim during interrogation, medical examination, and later as requested." (32)

A number of submissions share the view that "rape complainants should be allowed to have a companion of their own choosing throughout police questioning and the medical examination". (19) This companion might be a member of a rape crisis group, a relative, or simply a friend.

Rape Squads

Although the Rape Study noted that the view of the police was that the number of rapes reported did not justify the setting up of specialised "rape squads" or "sexual assault units", even in main centres, some submissions contend that this should nevertheless be done. One argues that "women would be far more likely to report rape if they were certain they would receive considerate treatment" (23) and that therefore the argument against such specialised police units on grounds of inadequate workload is not valid. The main advantage of such units is seen as being that rape complainants would be dealt with by officers (preferably including women) with experience and understanding of this type of offence, as well as special training.

4. Victim Support Services

56 submissions comment on the role of victim support services and the great majority of these endorse the work of the existing voluntary services such as rape crisis centres and the HELP Centre in Auckland. There is strong support for government funding of these centres, although a small number of submissions do not favour this and would prefer any public funding of victim support services to be through government agencies or more "established" voluntary bodies.

Voluntary Services

41 submissions specifically recommend some form of government funding for these services, many of these adding that such funding should not in any way affect the autonomy of the voluntary organisations concerned. One submission suggests that support services for rape victims should be financed from fines revenue, as is done in California.

Others propose that funding to rape crisis centres should also extend to educative programmes run by such centres.

Several submissions see a need for counselling and support services to be available not only to victims themselves, but also to their families.

One submission, while supporting the "expansion of rape crisis and help centres" also says "there should be opportunities for all support staff in these centres to receive appropriate training in counselling'. (60) The same submission also refers to the need for "longer term counselling" as well as "immediate crisis support" and suggests that there are "a number of agencies in the community" that might provide "in depth counselling". Another submission also maintains that "there should be some guarantee that [rape crisis centres] have staff with some qualifications." (24)

Several submissions make some form of adverse comment on rape crisis centres or suggest that victim support should be the responsibility of "established counselling services" (41) rather than the centres. Two submissions refer to "ideological" elements in the approach taken by rape crisis centres which they are unhappy about. (91)

Public Services - the A.C.C.

One submission raises the possibility that the Department of Social Welfare should be involved in the support of rape victims "as a matter of routine". (63) Such support might take the form of providing information on Accident Compensation entitlement, or referral to a rape crisis centre where this is available. "In other cases it might be necessary for the welfare officer to give support at least until the trial was completed". (63)

Twenty-three submissions refer to the role of the Accident Compensation Corporation. Many of these make statements such as "better means of informing rape victims of their entitlement to compensation under the Accident Compensation Act 1982 are required". (83) Suggestions for achieving this include that the police should provide such information, perhaps as part of a general information sheet for rape complainants, or that the A.C.C. itself should "produce a leaflet advising rape victims of their rights". (46)

Several submissions suggest that the amount of financial compensation available to victims should be greater than at present. There are also proposals that the offender should contribute to such compensation, either directly or indirectly (as for example by making payments to the state for the remainder of his working life).

Some submissions recommend that the A.C.C. should finance victim support services in whole or part, either by direct subsidies to the services or by paying for services provided to individual victims through organisations such as the HELP centre. e.g."...the Accident Compensation Corporation should pay the Help Foundation for all cases of sexual abuse." (18)

Another suggestion is that "actual bodily harm" as defined in the Accident Compensation Act should have a broader meaning, so as to include long-term psychological effects of rape. (110)

5. The Substantive Law-Consent

A total of 52 submissions make some comment on the issue of consent, its definition in law and the means by which it can be proved or disproved in a rape trial.

33 submissions call for revision of the law to either shift the emphasis from the complainant's consent, or lack of consent, to the accused's actions, define situations in which consent should not be an issue, or "define certain objective criteria to constitute evidence that consent was not given." (81) These cover a wide range of possibilities. The element of physical force or threats thereof is referred to, but most of these submissions also give examples of other types of situation which they maintain the law should recognise as excluding the possibility of a defence of consent or as evidence against such a defence. Some would include "the exercise of authority" (as by an employer or a husband) as "a factor which negates consent." (51) Others suggest that fraud, blackmail and the age of the victim (e.g. where under 16) should also be such factors.

Various references are made to reformed laws in other jurisdictions, including the Michigan, Canadian and New South Wales laws referred to in Chapter 5.5 of the Rape Study. Some submissions endorse the model of the Australian Women's

Electoral Lobby Draft Bill on Sexual Offences and its list of ten circumstances which would be evidence of unlawful sexual intercourse.

One submission refers to recent research in the U.S.A. on the impact of rape law reform in Michigan. This research is said to show that in Michigan following the 1974 reforms "convictions for criminal sexual conduct in the first degree (rape) increased substantially, and prosecutors' chances of achieving convictions improved." Also, "It was considered that victims did not receive such derisive and discourteous treatment as formerly and that their experience in court was less traumatizing than prior to the legislation but nevertheless still difficult ... the victim's character and credibility remained the central focus of the case." This submission's view that at least some of the objectives of the Michigan reforms were achieved differs in emphasis from that of "the rape study", that "new rape laws in other jurisdictions have had minimal impact on prosecution and conviction rates." The submission agrees however that the warning not to expect too much of law reform "is very necessary."

Some submissions call for a definition of consent to be included in the law, so that it is clearly understood to mean "knowledgeable assent and willing participation." (67) Many stress the difference betwen consent and acquiescence and one suggests that the law use the term "active" consent. (20) One submission however opposes any attempt to change the law as to what may constitute consent on the grounds that "such solutions as are suggested would be restrictive and would add nothing to our existing law." It also "suggests that in practice [consent] is not a difficult concept and should remain purely a decision for the jury as a matter of fact in the particular case." (83)

Another aspect of this issue which attracted comment from 17 submissions was whether "mistaken but honest belief in consent" should be a defence to a charge of rape and in what circumstances. Some believe that it should never be a sufficient

defence and state, for example, that "it is a man's responsibility to actively ensure a woman is consenting freely and with full knowledge of the act." (84) A majority of submissions on this subject however call for some "clearer definition" (39) in law of "mistaken belief" or specify conditions in which such a defence should be allowable, such as that "the mistake ... must be honest and reasonable and the burden of proving the reasonable belief should lie with the accused on the balance of probabilities" (51), as is the position in Tasmania. One submission calls for "an objective test" (66) of the reasonableness of the accused's belief in consent. Not all would take this restrictive approach and one submission maintains that the law should simply adopt the recommendation of the Criminal Law Reform Committee in 1980 that "an honest belief in the woman's consent" is equivalent to a lack of intent to commit the offence, and therefore a sufficient defence, without any qualification as to the "reasonableness" of the belief. (83)

The question of the burden of proof is referred to in 29 submissions, only one of which specifically states that there should be no change to the status quo in this respect, on the grounds that "there should be no departure from the basic concepts of criminal justice for one particular crime." (83)

Other submissions argue that no new departure would be involved as there is already a burden of proof on defendants in drug offence cases where the possession of certain quantities of drugs is deemed to be for the purpose of supply. Others maintain that in any case there are sufficient grounds to make rape an exception to the general rule in this respect.

Those asking for some change in the law cover a variety of options. The majority support the view expressed on p102 of the Rape Study, that there should be an "evidential burden on the accused ... requiring him to produce some evidence of consent or his belief in it in order for it to be raised as an issue".

A number however reject this reform on the grounds that as the study itself says "It could not be expected to have any real impact upon current practice, although it might be regarded as having some symbolic significance."

One submission perhaps sums up the view of several in saying that "Women have had enough of 'symbolic gestures' - we'd like a bit of real change now." (87) This submission and 10 others consider that "the burden of proof of consent should lie with the accused." (76)

An intermediate position is taken by some others, which suggest that as well as being required to produce evidence of consent or his belief in it an accused raising the issue of consent should also be "required to give evidence himself and to be cross-examined on it." (51)

A total of 13 submissions say that the accused's right to remain silent should be removed in the case of charges of rape, some, but not all of these specifying that this should only be done where consent is a defence. One submission justifies such a change by saying that "It is all too easy for the accused to defend a charge on the basis of attacking the Crown's ... case without having to be be put under the stress of cross-examination. As it is necessary for the complainant to suffer the ordeal of cross-examination, so also should it be necessary for the defendant." (60)

Others say that the importance of consent in rape cases, where lack of consent is part of the definition of the crime, makes this a special type of offence, requiring special treatment by the law. One suggestion for such special treatment is that where a plea of consent is to be entered this should be revealed to the prosecution in advance of the High Court trial along with details of "facts and circumstances relied upon by the defence." (103) The trial judge would rule, before the jury was empanelled, as to

whether the evidence presented by the defence was sufficient to permit a prima facie plea of consent. If the trial proceeded with consent as a defence then the accused would be obliged to give evidence and be subject to cross-examination. One submission defends the right of the accused to remain silent, but considers that "judges should be encouraged to use the discretion vested in them" by the law to comment more frequently on the failure of an accused person to give evidence. It notes that "an accused often sits quietly dressed uncharacteristically in a good suit with his family and children approaching him at adjournments in an obvious way. This creates an impression on the jury. On the other hand, the complainant comes into the court only for the time she is required to give evidence. She is alone and faces detailed and sometimes hostile questioning. To comment on the accused's failure to give evidence would go some way to correct the balance." (83)

6. The Substantive Law - Other Issues

Spousal Immunity

Most submissions make some comment or recommendation concerning some aspect of the law apart from consent. The topic most mentioned among all submissions is that of "spousal immunity" to prosecution for rape; that is the provision under S.128(3) of the Crimes Act 1961 that "no man shall be convicted of rape in respect of his intercourse with his wife", (unless they are "living apart in separate residences").

66 submissions refer to this subject, 57 of them asking for the immunity to be removed and the other 9 requesting that the present law be retained although one of these considers that there should be some legal provision so that marriage does not "assume sexual rights". Of the submissions opposed to spousal immunity only one considers that there should be a lesser penalty in cases of marital rape. All of the remainder say that the law should draw

no distinction between married and unmarried persons in this area. A typical statement is: "We see no reason why married women should have less legal protection and rights than any other woman". (35) Beyond the concern for equity however there is also a more general criticism of the way in which the law reflects certain attitudes toward marriage: "a significant proportion of New Zealand men still believe that a husband has the right to have intercourse with his wife whenever he feels like it and that he has the right to use force should his wife fail to comply. If this attitude is to be changed then it seems to us that the first step which must be taken is that of removing the legislative support for this belief." (56)

and:

"... the law needs to recognise that a woman is not owned by her husband but also has freedom of sexual choice." (25) The submissions opposing the removal of the spousal immunity do so predominantly because they see this as an attack on the institution of marriage and thus as part of broader social trends which they deplore. As for example in the submission maintaining that removing this immunity would "engender inappropriate attitudes to marriage and married life and the oneness of husband and wife." Other concerns are that charges of rape in marriage would be difficult to prove or that a trial in such a case would be "a traumatic experience for a family if children were involved." (73)

One submission would deal with the inconsistency whereby a man is immune to a charge of raping his legal wife, but may be prosecuted for raping a defacto wife, by extending the immunity to cover defacto relationships as well.

On the point that removal of the immunity in other jurisdictions has not resulted in charges of rape within marriage being made with any frequency, one submission suggests that "the breaking of the immunity was a useless gesture." (73)

The symbolic value of this reform is emphasised by many submissions asking for the immunity to be removed, although several do express a belief that rape within marriage is a real problem and that many women do in fact experience this along with other forms of violent abuse. A submission from an organisation which provides a women's refuge states that the majority of women in a survey of users of their refuge reported that they had been raped by their husbands in the 12 month period before coming to the refuge. (64)

Definition of Intercourse

Other legal issues of concern to a substantial number of persons and organisations making submissions are those concerning the definition of the offence. 39 submissions support reforms to broaden the definition of "intercourse" for the purposes of rape charges beyond that given in S.127 of the Crimes Act 1961, under which "sexual intercourse is complete upon penetration" (of the vagina by the penis). 35 express a view as to whether or not the offence should continue to be defined solely as one carried out by a man against a woman, or extended to cover offences against men (e.g. homosexual rape) and by women against other women or men. 38 refer to the desirability or otherwise of retaining the word "rape" in the legislation. 26 give an opinion of the merits of introducing a gradation of offences to replace the present offences of rape and indecent assault, as in the overseas examples discussed in the rape study.

Those submissions favouring a broader definition of intercourse generally advocate extending this to cover "both oral and anal intercourse, cunniligus and fellatio, and penetration carried out by a hand or object" (46) although not all would include each of those acts in the definition. One suggestion is that the term "intercourse" should be replaced by "sexual penetration", on the grounds that "intercourse" implies mutuality whereas "rape is an act of aggression" (72) One result of broadening the definition

of intercourse would be to reduce the importance of the medical examination as some forms of the offence would not then be verifiable by medical means. Thus, "...the use of a medical examination could be made a purely voluntary matter" (46) in one view.

Gender Neutrality

The question of the nature of the offence of rape is central to the issue of whether the law should be made "gender neutral." Submissions on this subject are fairly evenly divided as to whether or not the crime should continue to be defined purely as an offence by men against women. A small majority consider that it should not. These recommend that the New Zealand law should follow the models of New South Wales and Michigan in this respect, so that it would be "irrelevant whether the act is perpetrated by a male or a female, on a male or a female." Such submissions also tend to support a broadened definition of the physical acts which constitute the offence.

14 submissions oppose any move towards gender neutrality, some on the grounds that "Rape is an expression of men's oppression of women", (55) although others give no specific reason for opposing such a change or merely imply such opposition by offering definitions of rape which refer to it as an act by men against women.

One submission opposes gender neutrality on the grounds that "equating rape with homosexual rape would be at least one step towards repeal in part of the provisions proscribing sodomy," and that "inviting the possibility of prosecution by men against women ... would tend to trivialise what is a most serious offence."

"Rape" or "Sexual Assault"?

Support for the retention of the term "rape" in the law, as opposed to an alternative such as "sexual assault" is on somewhat similar grounds to the opposition to adopting gender neutrality -

that is, the word has a distinctive and broadly understood meaning as an act of "sexual violence" against a woman. To change the name of the offence to, say, "sexual assault" would in the view of many of those making submissions detract from the seriousness of the offence and give undue emphasis to its violent, as opposed to its sexual, element. 31 submissions explicitly oppose any change of name.

One submission does argue that "Rape is an act of violence" and that the offence should be abolished entirely and all attacks on the person, of whatever nature, dealt with under the law on assault. Six other submissions take a less extreme position in calling for the term rape to be replaced by "sexual assault," with maximum penalties in the same range as for rape.

A Gradation of Offences

Most of these 6 submissions also call for the introduction of a gradation of offences following the models of the Canadian, New South Wales or Michigan laws. Others prefer the retention of the word rape in conjunction with such a gradation of offences. In all 8 submissions support a gradation of offences in any form while 18 explicitly oppose this idea.

A common criticism of a gradation of offences in which rape with associated physical violence is regarded more seriously is that "rape without other physical assaults can be as equally traumatic to the victim as rape with physical abuse. Mental anguish is difficult to measure...". (72) Another submission says that "The gradation system ... would seem to give more weight to the means used in effecting rape than the actual act itself." (57) Others feel that "this approach ... does not appear to help the rape victim."

As an alternative to a graduated scale of offences 11 submissions recommend that additional charges should be laid "where additional violence has been used." (85) A number of others suggest the

creation of a new offence entitled "sexual assault" or "sexual harrassment" to cover situations not amounting to rape, or alternatively that the penalty for indecent assault be increased.

One submission supports the creation of a separate and lesser offence to cover "situations such as abuse of authority", but several other submissions strongly oppose such an option. These consider that "This ... punishes the kind of force used to make the woman submit, rather than the man's intent to rape. Subtler forms of threat like abuse of authority leave women just an unable to fight back as threat with a weapon." (67). A similar argument is applied in the case of fraud.

Three submissions mention the provision in s.128(1)(d) of the Crimes Act which defines intercourse obtained by personating a woman's husband as rape. These submissions all consider that this provision is outdated and either say it should be modified to apply to personation of, for example, "any other male person" (67) or that it should be deleted altogether.

Other Sexual Offences

Some submissions make special mention of offences involving young people and propose various reforms in this area. For example one proposal is that the present offences of incest and intercourse with a girl under care or protection be classified as "intra-family rape." (85) Another is that provisions in the Crimes Act for separate offences of intercourse with girls under 12 and between 12 and 16 be replaced by deeming persons less than 12 years old "incapable of consent" (67) for the purposes of a rape charge and introducing a "rebuttable presumption that there was no consent" in cases of intercourse with a person between 12 and 16 years old, where the accused is more than five years older than the complainant.

A similar recommendation is that persons under 16 be "presumed to lack the power of consent, but that the relative ages of the parties be taken into consideration by the court" (25)

Two submissions ask that, in a case where a charge of incest has been laid the accused, rather than the alleged victim, should be removed from the home in the first instance. (29,92)

One submission calls it "unnatural and unjust" (23) that maximum sentences for incest and other sexual offences against persons under 16 years old or "under the care and control of the defendant" are less than that for rape. Another recommends that "these crimes [sexual offences against young people] be regarded as common forms of rape." (33) This submission also calls for a report "similar to the Rape Report" to be commissioned to look at policy, legislation and criminal justice system procedures, and preventive services in relation to sexual molestation and incest.

Penalties

Penalties for rape are mentioned in 20 submissions while several call for special counselling or psychiatric treatment for offenders. Most who write on the subject of penalties feel these should be heavier, or that the law should prescribe a minimum sentence. Several recommend that rapists be castrated:

"...the characteristic qualities in males who are prone to waylay women and children are certainly not ones we want bred into future generations..."

Another suggestion, previously noted in section 4 above, is that offenders be made to contribute to financial compensation for rape victims.

Two submissions recommend that the offence of attempted rape should carry the same maximum penalty as rape itself as "the emotional effect on the victim can be equally damaging." (16)

Review of all Sexual Offences

Finally, there are a number of submissions calling for a general review of the whole sexual offences section of the Crimes Act. Matters suggested for consideration in such a review include gender neutrality for all offences, age restrictions, provisions which some see as anachronistic (including those making homosexual acts between consenting adults an offence), and the general question of the degree to which the law seeks to control individual sexual behaviour. 11 submissions also say that rape is in the wrong part of the Crimes Act. That is they do not consider it a "Crime Against Religion, Morality and Public Welfare", but rather a "Crime Against the Person" and feel therefore that it should be transferred to Part VIII of the Act, which deals with the latter type of offence. One submission specifically opposes such a move.

7. The Trial Process

Among the 65 submissions referring to some aspect of the procedures and rules of evidence in rape trials the specific subjects most mentioned are the public nature of the court proceedings (most ask for measures to give the complainant a greater degree of privacy), the "corroboration warning", the "recent complaint rule" and the question of whether Justices of the Peace or District Court Judges should preside at preliminary hearings in rape cases.

There is considerable concern expressed in submissions to alleviate the distress which can be felt by a complainant as a result of having to give evidence about the details of her experience in open court, with members of the general public and friends of the accused present.

An example of the type of situation that causes such distress is given in one submission, from a complainant in a rape case, which reports that "Friends of the rapists walked into my depositions hearing while I was describing the explicit details of the night, and laughed at me..."

Closure of Court

A frequent suggestion, made by 44 submissions, is that court hearings could be closed to the public as a matter of course in rape trials, or at least more frequently: "... the court should be closed to the public to relieve some of the trauma for the woman." (36) Judges already have the authority to exclude the general public from hearings, as noted on P128 of the Rape Study, and some submissions say that this is sufficient, although the power should be used more frequently.

The great majority of submissions on this subject however wish to see the closure of the court, either in preliminary hearings, or the High Court trial, or at both, made automatic when rape complainants are giving evidence. There is some variation in views on who should be permitted to remain in the court at such a time. Some would say for example that there is "...no need for any members of the public to be present in the Court" (60) and include within this prohibition members of the press, legal profession other than counsel and court staff not involved in the trial. One submission maintains that the defendant should not be present either, but only be represented by his lawyer and be able to hear a recording or see a transcript of the complainant's evidence. (66) Another states that "it is unreasonable to expect [the complainant] to give evidence in front of the rapist" and also says that "the rapist has no right to personally take his own defence" and "personally cross-examine" the complainant (85).

Some consider that journalists should be permitted to remain in court as representatives of the general public to hear, but not report, the complainant's evidence. This is not a general view however and one submission says that "the jury in the High Court trial act as our community representatives" (53).

One submission (71) mentions the way in which Children and Young Person's Courts are closed to the public as a precedent for closing hearings of sexual offence cases.

Publication of evidence is a matter specifically mentioned by 15 submissions, all of which say there should be more control over this in rape cases. There is a divergence of opinion as to how this should be done, with some considering that what is needed is for the judiciary to make more use of their existing powers to prevent publication of proceedings, while others would like to see the law changed so that publication of evidence from rape trials was prohibited unless "specifically authorised by the court ... in the interests of justice" (95). One submission suggests that this should apply particularly to evidence at the preliminary hearing.

An associated concern is that the complainant should not have to state her full name, address and place of work in open court. Nineteen submissions question the need for this on the grounds that the accused and/or his friends and family should not be given information that would enable them to locate and possibly harass the complainant.

A number of submissions also say that the complainant should not have to "confront" the defendant in court, or that "the defendant should not be in her line of sight" (37). A suggestion is that screens should be placed in the courtroom to achieve this.

Written Evidence

26 submissions consider that the complainant should be able, as a normal procedure, to give her evidence at the preliminary hearing in written form. Some suggest that this would not preclude her being cross-examined by defence counsel on material in her statement, although the general intention of these submissions is that the complainant should not have to appear at all at the preliminary hearing. Typical is the recommendation that "oral evidence should only be required in those cases where the written evidence ... is not sufficient to show a prima facie case." (86)

A further suggestion is that "In those cases where oral evidence is required ... a District Court Judge should preside over the preliminary hearing." (108)

The only submission which definitely opposes "an amendment ... which would permit the complainant to give her evidence by way of statement at the preliminary hearing "does so on the grounds that this "would be a basic and serious erosion of an accused's right to a fair trial." This submission points to the seriousness of the penalty for the offence and says it is important for the defence to be able to assess the complainant's evidence "live". Also, it states that "oral evidence can ... differ considerably from that which is contained in a witness's written statement."

On the other hand there is one submission which suggests that the complainant's evidence should be taken in the form of a tape recording made at a police interview and a written statement made shortly afterwards which could be added to by the complainant up to, two weeks after reporting the offence. This taped and written record would be the complainant's sole evidence and she would not have to appear in court at any stage. Nor, for the sake of equity, might the accused. (99)

The "Corroboration Warning"

44 submissions criticise the existing rule requiring judges to warn the jury in a trial for a sexual offence that it is "dangerous" to convict upon the evidence of the complainant unless that evidence is corroborated.

Criticisms are that this rule a) involves complex questions of what may or may not be corroborative evidence, making it "unintelligible to a jury" and tends "to create a confusing and unreal summary" (83) at the end of a trial, and b) discriminates unfairly against rape complainants. Most submissions on this point find it unacceptable that "the complainant in a rape case should be singled out" (63) in this way and consider that the warning is at best "redundant". Some put the matter in stronger terms: "This aspect of the law puts women on a par with children and encourages the derogatory assumption that their word is not to be trusted"; (25) and "No judge should warn the jury that the victim may be lying."

41 submissions recommend that the corroboration warning should be abolished or at least "should be discretionary, not mandatory" (37) which would "bring sexual offences in line with most other offences". Several submissions propose that the warning be replaced with a statement to the jury explaining certain "myths" about rape (such as are described in the Rape Study) and refuting the idea that false complaints of rape are prevalent.

Three submissions favour retaining the warning, but two of these are critical of its present form and propose that the words "dangerous to convict" should not be used but rather that the warning should be of a "special need for caution" in cases of this nature.

The "Recent Complaint" Rule

28 submissions make mention of the "Recent Complaint Rule", that the fact of a complaint being made at "the first reasonable opportunity", and the particulars of that complaint, may be introduced as evidence in a rape case. Most of these submissions take the view that this rule does nothing to assist the complainant (as the complaint cannot be "corroborative evidence") and may in fact disadvantage those rape victims who delay making a complaint. One submission points out that "women will often wait two or three days before reporting a rape ... usually for fear of retaliation." (76) Other submissions mention shock, feelings of embarrassment, and fear of the police or of appearing in court as reasons for delaying a complaint. The fact that in such cases there will not be a "recent complaint" to be introduced as evidence is seen as prejudicial to the prosecution because "under the present law, the sooner a woman reports a rape, the more consistent her story is thought to be". (72)

Two approaches are recommended to correct this situation. That favoured by a majority of submissions on this subject is that "the time of the complaint should have no bearing upon the issue of credibility and ... evidence of both early and late complaints should be admissible without any differentiation between them." (95) Those favouring this course also commonly support the proposal that the judge should "give a warning that there may be a reason for the absence of an early complaint." (78) There is also some support for the New South Wales solution whereby the existing rule is unchanged but the judge can warn the jury that absence of an eary complaint "does not necessarily indicate that an allegation ... is false" and that there may be "good reasons why a victim of sexual assault may hesitate ... or ... refrain from making a complaint". The second type of solution proposed is that neither early nor late complaints be admissible as evidence, that is, that the rule should be abolished altogether. One submission favouring this course criticises the New South Wales law for using the words "not necessarily ... false" as

implying that "it almost certainly is false" (87). The general theme of comments favouring the abolition of the rule is that "it is used against the complainant who ... does not immediately make a complaint to the police".

Two submissions oppose any change to the Recent Complaint Rule as it is presently applied. "The present rules are simple, workable and sensible." (83)

The Role of Justices of the Peace in Preliminary Hearings

33 submissions consider that District Court Judges rather than Justices of the Peace should preside at preliminary hearings in rape cases. The reasons given for this change are that "JPs receive insufficient training to prepare them for the complexities of rape law" (23) and may not exert sufficient control over defence counsel who pursue improper lines of questioning when cross-examining complainants. It is suggested that District Court Judges would provide more protection for the complainant. One submission states that "some counsel have ... used the occasion of a preliminary hearing to ask questions they would not be permitted to ask at a trial ..." (83)

Three submissions oppose change in this matter. One points out that "In any special case ... an application may be made for a District Court Judge to preside", not only by the Crown, but also by the defence. A submission from the Federation of New Zealand Justices' Association disagrees strongly with any suggestion that Justices "lack control over defence counsel", stating that their "Enquiries addressed throughout New Zealand have not revealed one occasion where this has occurred." (90)

The Justices' submission does refer to "past problems" in the area of determining "proper or acceptable evidence" but states that improved training now in progress, along with the selection of Justices with "specialised training" to preside in rape cases will overcome any past shortcomings due to Justices not being fully acquainted with recent legislative changes. It is noted that "at

one stage there was no machinery for the promulgation of changes to both the law and procedures to Justices" and that in the period covered by the research for the rape study "there would have been many Justices who would not have been aware of the amendments [to the Evidence Act] introduced in 1977." The submission states that "the situation is now improving and the executive [of the association] is confident that problems of the sort recounted in the Report will be overcome in the future."

One submission asks that the preliminary hearing be dispensed with altogether in rape cases. (80) Another recommends its replacement through the adoption of the Scottish system of bringing prosecutions under which the public prosecutor (Procurator Fiscal) determines whether a case is to proceed to trial, and if so in which court it will be tried. (39)

Evidence on Sexual History of Complainant

The matter of the degree to which the complainant is subject to questioning on the subject of her previous sexual history is of concern to 26 submissions which ask for measures to further limit such questioning at any stage of the trial process. The present law, as amended in 1977, prohibits the introduction or seeking of evidence on the sexual history of the complainant with any person other than the accused, or on her general reputation in sexual matters (S.23A of the Evidence Act).

Submissions on this point wish that the Evidence Act be "further amended to exclude the victim's previous sexual history with the accused." (71) The principle involved is whether intercourse with the accused on a previous occasion implies consent to intercourse in the future. One submission which says it does not put the matter this way: "...if I have lent or given you money on previous occasions it does not entitle you to go and take money from my wallet." (37)

The only exception to the general prohibition on evidence of sexual history proposed by these submissions is that, mentioned by several, that such evidence "is only relevant where it relates to the source or origin of semen, pregnancy or disease." (84)
A number of submissions object to evidence being introduced as to the general character of the complainant which they see as having "little bearing on the offence". One submission also suggests that "the victim's style of dress should be inadmissible as evidence." (78)

Two submissions call for the repeal of S.23A of the Evidence Act. One does so on the grounds that there should be "no distinction between the evidentiary rules relating to rape and those relating to other criminal offences." (20) This submission maintains that "General rules of evidence allow the cross examination of the witness should s/he impugn the character of any other witness." and "this rule should apply" in rape trials.

The other submission which criticises the amended Evidence Act says that the amendment "prevents a jury from hearing what they would definitely want to know" which it describes as "ordinary information relating to the honesty of the complainant".

Evidence by Other Witnesses

Several submissions discuss the issue of evidence by other witnesses on the state of the complainant or accused at or just after the time of the alleged rape. Two suggest that "statements of those working in [rape crisis] centres ... be used in evidence." Another discusses the case for "expert witnesses" (including rape crisis workers) in general giving evidence on such issues as "rape trauma syndrome", and the reasons "why the woman may not have resisted, why there were no physical injuries, or why she did not report the rape as soon as it was possible."

Courtroom Conditions and Procedures

A number of points are made by submissions regarding matters of courtroom procedures and facilities. 12 submissions say that more should be done by the police and/or the prosecuting counsel to acquaint the complainant with court procedures. A number recommend that the "prosecutor should meet a rape complainant prior to the trial" and that he should for example "ensure that she is familiar with the courtroom and the procedures that she will encounter and ... be aware of any particular concerns she has so that he might reassure her." (83)

Seven submissions propose that the complainant should be able to have her own legal counsel, if not in court, at least for the purpose of advice (paid for from legal aid funds). In justification of this proposal one submission states that "the victim should not be considered a witness for the state but a plaintiff ... in [her] own right" (69)

A number of submissions recommend that rape victims/complainants be able to have a "support person" (relative, friend, policewoman) with her throughout the trial. One submission suggests that such a person "should be able to comment if the prosecutor or judge do not appear to be fulfilling their responsibilities to the complainant." (26)

21 submissions comment adversely on the present system of recording evidence which obliges witnesses to speak at an unnaturally slow pace so that evidence can be transcribed directly by typewriter. The general view is that "Urgent consideration should be given to other forms of recording" (90) such as tape-recording.

There is also criticism of the way in which witnesses are "required to stand for hours and have to give their evidence in uncomfortable physical conditions." (83) Difficulties in seeing or hearing witnesses who are seated "should not be an insurmountable problem."

A number of submissions make the point that there should be separate waiting areas provided in courts for complainants and defendants' friends and family.

One submission asks that, in appropriate cases, the same interpreters should be used at both court hearings and "witnesses" satisfaction with them" should be checked. (80)

Nineteen submissions mention the problem of delays between the preliminary hearing and High Court Trial. Most of these ask that rape trials be given some special priority in scheduling, as is the case in Victoria (p.153, Vol. 1, Rape Study). One submission disagrees however, and states that "people who should be accorded priority of hearing are those who are in custody pending trial."

Juries

There are 18 comments on the issue of male and female representation on juries and whether there should be fixed "quotas" for each sex in cases such as rape. Half of the submissions on this point favour such a quota. e.g: "Juries in rape trials [should] be required to be composed of an equal number of men and women". One submission says that "If anything men should be banned from sitting on juries for rape cases."

In reply to the argument that juries should be selected on random principles one submission states that "the preponderance of males in juries is no great advertisement for the principle of randomness" (37) and that this principle "can be maintained while controlling for sex."

Others, who do not favour a fixed quota, see the answer to the problem as removing or limiting the right of the defence to challenge women jurors and support the suggestion on p.156, Vol I of the rape study for a review of this right.

Two submissions oppose any such change, one maintaining that "any move to control the proportion of the sexes on a jury would be quite wrong" (83). According to this submission there is also a possibiliy that "women tend to acquit more than men." One submission suggests that prospective jurors should be given a "questionnaire to ensure they do not have personal prejudices against women, or preconceptions about rape victims." Another proposes a study to compare conviction rates for juries with woman members against those for all male juries. (72)

The Adversary System and Alternatives

Finally, a number of submissions question the value of retaining the adversary system of trying cases of this nature. One "would advocate an entirely different system of dealing with rape" (80) and calls for "research into possible alternatives to the present system." Another calls for the abolition of the jury system claiming that this "system makes it less likely that rapists will receive their just deserts" as "juries generally" are "such good friends of the accused." This submission favours a "court of inquiry" approach, dispensing with legal counsel as well as the jury, in which the guilt or innocence of the accused would be determined by a judge in consultation with a panel of "experts".

A proposal for dealing with cases of rape within marriage is that this should be dealt with in the family court by amending the Family Proceedings Act accordingly. Whether this procedure was used would be at the option of the complainant who would also under this proposal be able to initiate normal criminal proceedings against the accused. (60) The complainant could not however lay a criminal charge if proceedings under the Family Proceedings Act failed (i.e. the spouse did not respond).
A Family Court hearing could result in counselling or psychiatric help being provided, or a non-molestation order and supervision of the offender, but the penalties available in a criminal case would not apply.

8. Additional Matters

Education

A substantial number of submissions speak of a need for educational programmes for the general public and in schools aimed at changing attitudes to rape and dispelling the "myths" about this offence. Some suggest that such educational programmes could be carried out by rape crisis groups with the aid of government funding, although others see this more as a function for government agencies to carry out.

Some see this issue primarily in the broader context of attitudes to women e.g. "care must be taken at all levels [in the education system] that stereotyped sex roles be not perpetuated" (71). Sex education programmes in schools are also advocated. Others orient their recommendations to the provision of education and information which will directly assist rape victims (e.g. advice on court procedures, information on support organisations) and raise public awareness of the problem and the seriousness of rape as an offence. Two submissions call for self-defence classes in schools.

Causes of Rape

A number of submissions comment on aspects of the causes of rape. One suggestion is that further research and study be carried out in this area and there is criticism of the Rape Study for not addressing the subject.

Several submissions link pornography with the incidence of rape and point to studies which support the existence of such a link, notably the work of Dr John H. Court. One submission describes pornography, in particular that in which violence to women is depicted, as "the ideology of a society which condones rape." (87) This submission calls for censorship of material which "lies about ... women, and incites violent disregard for us as human beings."

Other submissions call for the sexist portrayal of women in "stories, books, pictures,... the media and commerical advertising" (29) and the "trivialization" of rape to be penalised by the law.

The Domestic Purposes Benefit and Children of Rape

A recommendation of three submissions is that a woman should not have to establish paternity in order to qualify for the Domestic Purposes Benefit in cases where she has had a child as a result of rape. The emergency benefit which is at present payable in cases where paternity is not established is less than the D.P.B. and insecure owing to its discretionary nature.

Abortion

Two submissions maintain that there should be an absolute guarantee of a right to an abortion where pregnancy results from rape.

Special Needs

Several submissions make reference to the special needs of minority cultural groups, especially of the Maori people. One suggestion is for a "study on Maori Women's considerations and perspectives [on] the problems of rape and incest." (92)

Training of Justice System Personnel

The issue of training members of the legal profession, judiciary and indeed all persons involved in dealing with cases of rape, is raised in several submissions. For example there is the recommendation that "legal training include content on the nature of rape and the particular problems faced by rape survivors" (26)

One submission raises the possibility that "workshops, or training sessions" be held for criminal justice personnel and police surgeons. It describes such workshops which were held in California when new rape laws were introduced in 1975 and which covered a wide range of topics relevant to this type of offence.

Appendix

Names of persons and organisations who made Submissions	Submission[1] Number
Ashcroft, Mrs C.	
Auckland Council for Civil Liberties, sub-group (per Ms B.H. Carter)	20
Baptist Union of N.Z. (per Rev. S.L. Edgar)	108
Barrington, Ms R.	
Battered Women's Support Group, Christchurch (per Mrs D.E. Church)	56
Bomhof, Miss G.C.	
Boston, Dr G.H.	
Boyes, Mrs M.	
Bremner, Mrs H.	
Brokenshaw, Ms J.	
Bungay, M.A. and McLinden, J.V.B.	
Burgess, K.R.	
Chief District Court Judge, D.J. Sullivan	
Church and Society Commission, National Council of Churches in N.Z. (per Dr A. Brash)	37
Clapham, Mrs J.	
Community Volunteers, Inc. (per Ms R. Ensor)	19
Cooke, J.W.R.	
Courtier, Mrs S.G.	
Courtier, T.	
Credo Society, Inc. (per Mrs B. Faithfull)	91
Davey, Mrs I.J.	
Dick, Mrs C.	
Diocese of Christchurch, Public and Social Affairs Committee (per Mr D. Manning)	53
Elias, Ms S and Goddard, Ms L	
Essex, Mr A.W.	
Farrell, Mr D.M.	
Feminists for Life (per Ms C.M. Purdue)	41
Field, P.E.	

Steele, Miss L.A.
Steenhof, Mrs A.
Stewart, M.C.
Teacher Trainees' Association of N.Z. (per Ms A. Taylor) 105
The Health Alternatives for Women (per Ms D. Bedford) 54
Varga, Ms J.B.
Victoria University of Wellington Women's Action Group
(per Ms C. Lampe) 29
Waikato Women in Education (per Ms C. MacLennan) 82
Walker, Mrs D.E.
Wallwork, Mrs A.R.
Wellington Branch, Clerical Workers Union
(per Ms M. McTavish) 84
Wellington Trades Council, Women's Sub-Committee
(per Ms D. Steele) 51
Wilson, Ms M.A.
Women Against Pornography 87
Women Against Violence Against Women (Wellington) 57
Women and The Law Study Group, Auckland University
Law School 95
Women's Division, Federated Farmers of N.Z.
(per Mrs A.J. Wright) 99
Women's Electoral Lobby, Waikato 32
Women's Refuge Centre Society (per Ms B. Bullard) 64
Woods, B.
YWCA of New Zealand (per Ms E. Sewell) 110
Petition with 32 signatures 49

(1) NOTE: Where submissions from private individuals have been quoted in the analysis these are not attributed.

END