

Northern Territory Law Reform Committee

*Report on the Laws Relating to the
Investigation and Prosecution of Sexual
Assault in the Northern Territory*

NORTHERN TERRITORY LAW REFORM COMMITTEE

17 December 1999

The Honourable Denis G. Burke MLA
Chief Minister
GPO Box 3146
DARWIN NT 0801

Dear Chief Minister and Attorney-General

I have pleasure in presenting to you the Report of the Law Reform Committee following your request that it "inquire into and report on appropriate reform of the laws in relation to the investigation and prosecution of sexual assault in the Northern Territory".

Your letter of 24 March 1999 then set out several sub-headings of particular matters to be considered, and to that you added a further sub-heading by letter of 31 August 1999.

The Law Reform Committee was augmented by a number of other persons nominated by yourself or the Committee. After requesting and receiving submissions from members of the public and governmental and non-governmental organisations, the Law Reform Committee formed a number of sub-committees on the various sub-headings referred to in your correspondence. It also addressed two general and relevant issues inevitably arising out of the matters under consideration, namely the problems occasioned by delay and the need for ongoing public awareness.

I would wish to record my appreciation of the works of the Committee itself and of the sub-committees which reported to the Committee. All this work was done by busy people freely giving up their time and expertise to assist in what we all believe to be a subject of considerable significance for the welfare of the people of the Territory and particularly of the children of the Territory. I should also mention the work done by Mr Kevin Krist, an American law student who came to us through the Public Interest Law Centre of New York University. His time with us expired before this report was completed but it is proper to recognise his contribution of very useful research.

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I would also wish to thank Mr Bryan Elliott of the Attorney-General's Department who most competently acted as the Executive Officer of the project and Ms Helen Wiffen who diligently and cheerfully attended to the typing and arrangement of the material.

Finally my thanks also to the Director of Public Prosecutions of the Northern Territory, Rex Wild QC who has been most helpful and considerate both to me personally and to the Committee.

As is emphasised in the report, there is no magic wand which an Attorney-General need only wave to see problems relating to sexual assault cases disappear immediately. The Committee does however suggest a number of practical measures which, it hopes, may remove or ameliorate the more serious problems.

Yours sincerely

President

**SEXUAL ASSAULT LAW REFORM:
SUBMISSIONS RECEIVED AS AT 8 July 1999**

1. Helen Murray, President
NT Branch, Australian Association of Social Workers
2. Catherine Wauchope, Convenor
Women's Advisory Council
3. Fiona Allison, Solicitor
Top End Women's Legal Service
4. Ruby Gaea House: Darwin Centre Against Rape
5. Esme Tyson, Coordinator
Alice Springs Women's Shelter
6. Dr Sharon McCallum and Associates
Accredited Social Worker
7. Office of Women's Policy, Department of the Chief Minister
8. Rebecca Mather-Brown, Sexual Assault Counsellor
Katherine Family Link
9. Victoria Whetherby and Sue Johnson
for Victims of Crime Assistance League
10. Peter Elliot, JW Lewis and Patrick Loftus
Edmund Barton Chambers
11. Hon Justice Dean Mildren
12. Hugh Bradley, Chief Magistrate
13. Brian C Bates APM
Commissioner of Police
14. Josephine Battadini
Danila Dilba Counselling Service
(NOTE: Omitted from LRC's Summary of Submissions)
15. Dawn Lawrie
Office of NT Anti-Discrimination Commissioner
16. Mr and Mrs John Fitzgerald
17. Alasdair McGregor
Stipendiary Magistrate (Katherine)
18. Crime Victims Advisory Board

MEMBERS OF THE LAW REFORM COMMITTEE

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Mr Dirk de Zwart

Mr Max Horton

Mr Brett Midena

Mr John Hughes

Ms Sally Gearin

Mr Hugh Bradley

Mr Richard Bruxner

Ms Nikolina Babic

Ms Maria Ceresa

Ms Rosemarie Simpson

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Ms Nannette Hunter

Mr John Adams

Mr Matthew Storey

Ms Rosemarie Simpson

Mr Peter Boyce

Ms Debbie Harris

Ms Melanie Little

Ms Sue Cox

Ms Jenne Roberts

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Summary of Recommendations

1. Specific legislation should provide:
 - a) That any complaint of an alleged sexual offence is to be fast-tracked;
 - b) Once a charge of a sexual offence is made it must be listed for committal hearing to commence within three months from the date of the offender being charged;
 - c) Within three months of the completion of committal a trial in the Supreme Court is to commence.
 - d) The legislation should be as strict as possible, making it plain that Parliament considers it mandatory that both prosecution and defence abide by the time rules.
 - e) All possible assistance should be given to courts to enable them to produce procedures for fast tracking which are simple and practicable.
2. That extensions of time for the above rules may be granted by the court in exceptional cases and subject to such strict conditions as the Court may impose
3. That police have adequate resources to treat all such cases as a matter of urgency and priority over other cases.
4. That all screening and other furniture in all courts for vulnerable witnesses be adequate for their purpose and ensure the protection and comfort of such witnesses.
5. That all other necessary equipment for vulnerable witnesses such as microphones and closed circuit television be available in all courts when required and that placing of equipment such as microphones and cameras be such as to be convenient and adequate for the witness.
6. That programs of education and information be prepared and implemented in communities where it appears that the serious nature of sexual assaults and the serious effect of these assaults on the community is not sufficiently understood.
7. That the following amendments be made to the *Evidence Act* and the *Sexual Offences (Evidence and Procedure) Act*:-

- a) The definition of “sexual offence” be extended to include an offence against specified sections of the *Criminal Law Consolidation Act* of the Northern Territory;
 - b) That if it is desired by the defence to contest that a particular person is a “vulnerable witness” within the meaning of the Act and if that submission involves the examination of that person in court, then until the court rules on the submission, that person be treated as a vulnerable witness during the hearing of the submission;
 - c) That where both screening and close-circuit television are available in a court, a vulnerable witness be permitted the choice of whichever he or she preferred.
 - d) That section 21A(2)(c) of the *Evidence Act* be amended so that after the words “relative of friend” the following words appear “or such other person as the witness may request and the court may consider proper in the circumstances”;
 - e) That section 21 A(4) of the *Evidence Act* be amended by deleting the words “the parties” where appearing.
8. That evidence of children previously given on video tape be permitted to stand as evidence-in-chief in all subsequent court proceedings.
 9. That adequate resources and thorough training be provided to enable this measure to be introduced effectively as soon as possible.
 10. That the Attorney-General appoint suitable legal practitioners as “judicial officers” for the purpose of overseeing the video taping the child.
 11. That if the procedure proves successful in the case of children, then video taping of the evidence of adults be considered as an option in the case of sexual assaults.
 12. That there be no further restrictions on the right to call oral evidence from victims of sexual assault or committal provided that all appropriate protections for vulnerable witnesses are available and on call when required.
 13. That a statutory discount for accused persons who indicate a plea of guilty at the committal stage be enacted. Such statutory discount to be up to one third of what would otherwise be an appropriate sentence ultimately imposed for the offence, and that the court in sentencing should publicly state what

discount has been given and the reasons why that specific amount has been given.

14. That legislation similar to the South Australian *Evidence (Confidential Communications) Amendment Act 1999* be enacted in the Northern Territory.
15. That there be no change in the present position in regard to directions as to corroboration.
16. That at present there be no change to s.131A but await further judicial decisions on the section.
17. That an offence be created along the lines of that suggested in Appendix 9 that if a person mistakenly believes that another person is consenting to a sexual act when that other person is not, the person persisting in the act is criminally liable if in the circumstances no reasonable person would have persisted in the act or that his actions were such that no reasonable person would have so acted.
18. The Territory should provide specialist training for prosecutors concerning their role in relation to the victims of sexual assault, particularly children.
19. The purpose of such training should be twofold:
 - I. to ensure those involved in prosecuting sexual offences are appropriately skilled in this area of work, and able present matters before the courts competently and effectively; and
 - II. to ensure those involved in the prosecution of sexual offences are aware of the dynamics and psychological aspects that apply to victims of sexual assault, particularly children.
20. Such training should be structured and delivered with an awareness of the legal limitations placed upon prosecutors and their necessary objectivity in presenting materials before the court.
21. Such training should recognise that the prosecutor cannot replace the support and assistance offered to victims of sexual assault through the Victim Support Unit.
22. The Territory should provide training for all legal and judicial officers aimed at ensuring an awareness of the dynamics and psychological aspects that apply to victims of sexual assault, particularly children. No suggestion, however,

should be made that judges or magistrates are obliged to undertake any such training.

23. Training provided on this issue should be formal and ongoing, in the sense that it is:
 - accredited and delivered by registered training providers; and
 - located within a structured system of professional development.
24. Such training should also allow for the consideration of issues related to victims of sexual assault and the impact of:
 - cultural background;
 - physical ability;
 - intellectual disability; or
 - gender.
25. Training should be delivered in a manner that allows it to be accessed by legal and judicial officers located outside Darwin.
26. Training should be delivered by training providers, who have previous experience in the delivery of training regarding the dynamics and psychological aspects that apply to victims, including child victims of sexual assault, and in the delivery of training to legal and judicial officers.
27. Further consideration should also be given to the introduction of education on these issues into undergraduate and post-graduate legal training.
28. A recommendation regarding the inclusion of education on these issues in undergraduate and post-graduate legal training should be forwarded to the Northern Territory University Faculty of Law.
29. That in considering future appointments to the judiciary or magistracy the Attorney-General may consider inter alia, the potential capacity of any person (whether by training or personality) to understand and appreciate the special problems associated with cases of sexual assault.
30. That there be no change in the wording of the Northern Territory *Sexual Offences (Evidence and Procedure) Act*.
31. That the Government sponsor a vigorous campaign to educate and alert the public to the tragedies and traumas experienced by victims of sexual assault,

particularly children, to the means of identifying such cases and to the necessity to report such cases.

32. That the Office of Women's Policy be asked to co-ordinate with other organisations the appropriate publicity and education.

LAW REFORM COMMITTEE
REPORT ON MATTERS RELATING TO SEXUAL ASSAULTS
DRAFT

INTRODUCTION

The recommendations suggested in this Report are essentially practical. The Law Reform Committee of the Northern Territory was asked by the Attorney-General, The Honourable Denis Burke to “inquire into and report on appropriate reform of the laws in relation to the investigation and prosecution of sexual assault in the Northern Territory”, and various sub-headings were then set out. (Appendix 1). Subsequently, at the request of the Attorney-General, one further sub-heading was added. (Appendix 2).

The Attorney-General asked the Committee “to invite public submissions in writing on the issues listed above and any other matters that the public wish to raise. The invitation should be published appropriately to ensure that the conduct of the inquiry becomes widely known”.

Subsequently advertisements were inserted in the Northern Territory News and Centralian Advocate.

In addition the Committee sought by letter or direct inquiry the views of various people or organisations in the Northern Territory which the Committee believed might be in a position to assist by reason of their day-to-day involvement in matters relevant to the Inquiry.

The Committee also communicated with other Law Reform bodies in Australia asking what, if any, researches had been undertaken in this field by such bodies.

CRITICISMS

Several criticisms were made at the outset of this Inquiry as to the composition of its members.

The first was that it consisted almost solely of lawyers. That is not surprising since the reference by the Attorney-General was to the Law Reform Committee which in fact consists mainly of lawyers. Furthermore, certain questions put to the Committee were of a specifically legal nature requiring proper understanding of legal principles for example the operation of s.131A of the Criminal Code and the operation of the defence of honest and reasonable mistake. Nonetheless, some members of the sub-committees as formed, were not lawyers, and the Attorney-General also appointed two other laypersons to assist the Inquiry. Furthermore some Committee members, though lawyers, were appointed as much for their experience in other fields as for legal expertise, eg the Ombudsman. Finally it has not, in the Committee’s view, detracted from the duty of all members to examine the submissions made from a more general position than merely legal.

The second objection was that certain “defence” lawyers were appointed. That seems to the Committee a very strange objection. The suggestion presumably, was that “defence” lawyers would be obstructive and desirous of preserving the status quo. Even if that were so – and we hasten to say that it was not – it would be an incomplete inquiry if the views of one group of lawyers continually engaged in these matters were not sought. Strangely perhaps, the same objection was not raised to the presence of members of the Director of Public Prosecutions Office although it could equally be claimed that they would have a certain point of view in the other direction. In neither case did any rigid division take place and the views of all these highly experienced people were of great value in examining all sides of the arguments put forward.

Finally, there were some complaints that various groups were not given sufficient time to make submissions. We take leave to be a little impatient with this approach. There will always be those who complain up to the eleventh hour and beyond that “they did not have enough time” and extension to the crack of doom would not suffice for some of these. Nevertheless some adjustments were made for sensible requests. More importantly and relevantly we point to the fact that properly reasoned and detailed submissions were placed before us well within the time allotted and the people making such submissions seemed in no worse or better position than those who complained.

SCOPE OF THE INQUIRY

The scope of the inquiry covers a field which is clearly of interest and concern to all Australian States and Territories, but the Committee regards its task as responding specifically to Northern Territory conditions as revealed by the submissions it has received. Those submissions contain, for the most part, suggestions for reform which are direct, pragmatic and achievable; and the Committee’s recommendations are based on such of those suggestions which the Committee, drawing on the experience of its members, likewise considers direct, pragmatic and achievable.

The Committee makes no apology for concentrating on immediate practical solutions. It has not attempted, and has not the resources, to embark on a deep-seated philosophical, scientific, sociological and psychological study of the vast amount of literature concerning sexual assaults and the social conditions which are claimed, albeit in frequently differing analyses, to give rise to them. Such a study, to be effective, would need to be exhaustive, protracted and something in the nature of a Royal Commission with a battery of Commissioners, expert witnesses, assisting counsel and representation for such bodies as wished to appear. It would also be extremely expensive.

The members of this Committee and those who, though not members, assisted with their expertise in this Inquiry, are all part-time contributors busily engaged in their respective fields and voluntarily giving of their time, which is necessarily limited. The Committee records its appreciation of their willingness and generosity in donating their services and recognition of the able way in which they have done so.

However, the above remarks are not tendered as a complaint or a pre-emptive excuse for any criticisms of this Report. The Committee would, however, submit that it may be more conducive for Parliament to seek achievable ends from a group of people continually engaged in the field than to embark on wider ranging research. The Committee in no way denigrates such research but believes that, if that is sought, it should be a national undertaking, since these problems are common to all jurisdictions.

Nevertheless the Committee believes that such a national inquiry, though useful and important as a nationally public document to emphasise the extent of the problems throughout the Commonwealth, would not discover any further essential issues than are already known and plainly discovered in the submissions presented to this Committee. For the problems are obvious.

DELAY

For instance, it does not require a quinquere of QC's to establish that one of the most serious problems, if not indeed the most serious, is delay in court proceedings. Clearly, the evidence of a child who was seven at the time the event took place may well show discrepancies if that child is aged nine by the time the matter comes to court. Those discrepancies may have nothing to do with the child's honesty but merely arise because a two year or even a one year interval is a vast time for a growing child, and memory may fade or become indistinct, particularly if it is of an episode which is distressing and repulsive to the child.

Nor does it require a succession of psychiatrists, psychologists and social workers to accept the obvious fact that the longer it takes to deal finally with the matter, the more likely it is that the child will suffer severe emotional and psychological damage.

To a lesser, but still significant extent, the same can be said of adult complainants who must live with a shattering experience and be expected to remember in considerable detail an event they would prefer to forget. Nor must it be forgotten that a defendant, if wrongly accused, will also suffer by delay; for the accusation of a sexual offence, particularly against a child, is one which the community regards as horrifying and despicable, and frequently as proven, even before the case is heard.

This question of delay, and the serious problems associated with it, have been stressed in many submissions and, although not specifically a term of reference, the Committee believes that it is so inextricably intertwined with the other terms that it must necessarily come under consideration if this Report is to be of any use to Parliament.

Hence the Committee has put forward some very strong recommendations to ensure “fast-tracking” of cases of this sort. It has been strengthened in this by the recent remarks by the Coroner, Mr Cavanagh S M. (Appendix 3) at page 20 -21 of his findings on 7 October 1999 in a case of youth suicide in which he remarked (inter alia) “ The Alice Springs office of the Director of Public Prosecutions has been actively monitoring (and assisting) this inquiry. I commend its interest. I recommend that the Director make every effort to “fast track” the prosecution of those cases involving young victims of sexual assault especially those cases involving other family members of the victim.” The Coroner noted that one of the stresses contributing to the suicide of this 14 year old girl was, “Her lengthy interaction with the Criminal Justice System as a victim awaiting finalisation of proceedings”.

Mr Wild QC, Director of Public Prosecutions, has made available to the Committee a paper he circulated at a HOPAC (Heads of Prosecuting Agencies Conference) in which he asked whether any jurisdiction had time limits for committal or trial after charges being laid. Although it appears that some jurisdictions had time limits, such limits related to criminal charges generally and, with one exception, did not single out cases of sexual assault for special consideration (Appendix 4). Victoria was the exception.

Section 359A(1) of the *Victorian Crimes Act* does, however, deal with the situation by providing that where a person is committed for certain specified offences (being offences in the nature of sexual assaults) “the trial of the person for the alleged offence shall not be commenced more than three months after the person is directed to be tried or the charge is made (as the case may be)”. (Appendix 5). Section 359A(2) provides that the court may grant an extension of time.

These provisions relate to the prosecution’s duty, but it seems to the Committee that success could only be achieved if all concerned, ie. the police, the prosecution, the defence and the courts were properly organised and directed to deal with “fast tracking” of such cases. Some assistance in this respect can be found in the South Australia and New Zealand provisions which, though designed for all indictable matters, could be a model for rules and procedures for “fast tracking” cases of sexual assault. (Appendix 6 and 7). See also the Western Australian procedures for fast-tracking early pleas of guilty, referred to in the discussion relating to oral evidence on committal.

The Committee emphasises that an experienced parliamentary draftsman should draw up rules and procedure as strictly as possible to ensure that time limits are adhered to and that Parliament’s intention is clearly and unambiguously set out that these cases must not be delayed. Even then the whole process may be jeopardised at an earlier stage if police were not properly resourced to deal with these matters on the basis of urgency. It is recognised that this will not always be possible within any specific time limits because even the most thorough investigation will not necessarily discover sufficient evidence to warrant prosecution immediately and no one would suggest that police should feel under pressure to proceed on insufficient evidence. What is asked is that priority of resource be given to such investigations.

It is, of course, clearly understood by the Committee that to give priority to cases of sexual assault necessarily means that other cases will be relegated further down the list. It may well be said by opponents of these recommendations that other serious charges such as murder, manslaughter or serious assaults may also have drastic effects upon witnesses or defendants if further delayed.

The Committee understands the objections but is convinced that a charge of sexual assault, particularly upon a child, has such special and detrimental effects on children, witnesses and defendants, and is of such concern to the community, as clearly established by the submissions before the Committee, that a strict and severe regime of priority is justified – subject only to judicial discretion in exceptional cases.

RECOMMENDATIONS:

1. Specific legislation should provide:
 - (a) That any complaint of an alleged sexual offence is to be fast-tracked;
 - (b) Once a charge of a sexual offence is made it must be listed for committal hearing to commence within three months from the date of the offender being charged;
 - (c) Within three months of the completion of committal a trial in the Supreme Court is to commence.
 - (d) The legislation should be as strict as possible, making it plain that Parliament considers it mandatory that both prosecution and defence abide by the time rules.
 - (e) All possible assistance should be given to courts to enable them to produce procedures for fast tracking which are simple and practicable.
2. That extensions of time for the above rules may be granted by the court in exceptional cases and subject to such strict conditions as the Court may impose
3. That police have adequate resources to treat all such cases as a matter of urgency and priority over other cases.

NB: Attention is also drawn to recommendation on the subject of Oral Evidence at Committal and which relates to statutory discount for pleas at an early stage of proceedings.

VULNERABLE WITNESSES

(a) Whether the special procedures for ‘vulnerable witnesses’ in Part 11A of the *Evidence Act* are working effectively.

The Committee found considerable unanimity in submissions calling for greater protection for “vulnerable witnesses” as defined in Part II A of the *Evidence Act*.

Although some thought that the procedures were working effectively it seems that even in the larger courts such as Darwin and Alice Springs, some improvements should be made. Mr McGregor SM, although he confines his remarks to courts in the Katherine area which he serves, must surely not be alone in pointing out various practical and technical problems (eg. Lack of a screen, radio “feedback” in close-circuit television and comfortless hearing rooms). (Appendix 8) These problems should have simple solutions and the expense should not be excessive.

The real problem seems to be in the smaller and more remote courts of the Territory.

This does involve difficulties, because the close proximity of witnesses and defendants is almost inevitable.

In some areas, where the complainant or his or her witnesses are confronted by the defendant and a group favouring the defendant, or at least vocally hostile to the proceedings, it becomes extremely difficult to give the protection which should be given.

The Committee has made some recommendations which will involve expense but which the Committee considers necessary to ameliorate the situation. It is, however, recognised that in some aboriginal communities, particularly in small communities, it becomes almost impossible to separate two factions otherwise than during the court proceedings. Yet, to remove the complainant and his or her witnesses from the community may often be impractical and too drastic and often unfair to the complainant.

It is clear to the Committee that a process of education is called for to emphasise the serious nature of sexual assaults and their highly disturbing effect on victims and therefore a positive threat to the welfare of the community itself. It is conceded that this will not be achieved immediately.

Meanwhile, certain small but important amendments should be made to the legislation. The suggested amendments are dictated by difficulties that have arisen in the practical application of the “vulnerable witness” legislation and, in the Committee’s view, do no more than provide some necessary re-adjustments to ensure that the purpose of the legislation, is properly achieved. That purpose is, clearly, to give greater confidence and security to certain specified classes of witnesses who might otherwise be inhibited by giving evidence because of fear or embarrassment caused by the proximity of the defendant in the court.

The first amendment called for is dictated by what appears to be simply an oversight in the legislation.

Section 21A(1)(c) of the *Evidence Act* provides that a vulnerable witness “is a witness who is the alleged victim of a sexual offence to which the proceedings relate”. The definition of a “sexual offence” is one within the meaning of the *Sexual Offences (Evidence and Procedure) Act*.

By section 3 of that Act, “sexual offence” means an offence against:

- (a) sections 128 to 132 (inclusive), 134, 135, 188(2)(k), 192 or 201 of the Criminal Code; or
- (b) section 127 of the Criminal Code, in the circumstances referred to in subsection (2) of the section.

Obviously the definition does not include any equivalent offences in other States or Territories and, more importantly, does not include any offences under the previous law of the Northern Territory.

It is not unknown in sexual offence cases, for the alleged offence to have occurred before the enactment of the Criminal Code.

Once such instance occurred recently before Mr Wallace SM when the defendant was charged with certain alleged indecent assaults contrary to section 65 of the earlier *Criminal Law Consolidation Act*.

Mr Wallace was asked to rule that a witness was a “vulnerable witness”, and entitled to the appropriate protections. Obviously he could not do so by reference to section 3 of the *Sexual Offences (Evidence and Procedure) Act* which relates only to offences under the Code.

On that occasion he was able to find that the witness came within section 21A(1)(d) of the *Evidence Act* in that she was “a witness who is, in the opinion of the Court under a special disability because of the circumstances of the case, or the circumstances of the witness”.

That, however, was a different test from that posed by section 21A(1)(c) and not all witnesses who would otherwise be vulnerable witnesses with the meaning of section 21A(1)(c) would necessarily be such within the meaning of section 21A(1)(d). Yet the intention of the Act seems clearly directed to offer the protection to those who come within the category of victims of a sexual offence. There seems no particular reason why the expression “sexual offence” should be confined to offences under the Criminal Code.

An extension of the definition of “sexual offence” seems appropriate.

Secondly, the legislation is silent as to the presence of the defendant in the sight of the witness when the application that a person be declared a vulnerable witness is made. Very properly, counsel for the defence is entitled to cross-examine the witness if the protection is sought, to determine if he or she comes within that protection. Yet if that is done in the visible presence of the defendant, the aim of the legislation is defeated if the witness is then declared vulnerable. The Committee appreciates that this would happen only very rarely if the first suggested amendment were made, since the witness would then normally come within the category of “an alleged victim of a sexual offence”, but one can envisage some possibilities, eg. If it were sought to apply section 21A(1)(d) or if defence counsel were to submit that the particulars of the charge did not come within the definition of a sexual offence and sought to adduce evidence from the witness to that effect.

The Committee would suggest that, without casting any onus on the defence to disprove the allegation that a witness was a vulnerable witness, the witness should be treated as such during any hearing in the nature of a *voir dire* to determine the question.

Thirdly, there has been at least one occasion when the court itself, and against the wishes of the witness, has determined the form of protection open to a vulnerable witness. There are two alternatives available, namely closed-circuit television or screening. It is submitted that, since the purpose of the legislation is to make the witness, as much as possible, comfortable with the proceedings, it should be made clear that the choice is that of the witness and not the court.

Fourthly, the legislation provides for the presence of a support person if a vulnerable witness requires it. The support person is defined as a “relative or friend”. This may be a little too restricted. The witness may, for instance, have developed confidence and trust in, someone who has acted as a counsellor for the witness, but who might not strictly come within the category of “relative or friend”. Some slight adjustment in phraseology could be made in this direction.

Finally, Mr McGregor SM has pointed to the extreme difficulties inherent in the provision that the support person must be in view of the defendant though the witness should not be. On occasions it appears that this means that the support person cannot sit close to the witness, thus substantially reducing the support that can be given. There seems no reason why the support person should be seen by the defendant provided he or she is seen by the court, the jury and counsel. The Committee refers to the remarks of Mr McGregor SM in this respect:- “My worry with the geometry of compliance with s21(A)(4) is caused by the difficulty of positioning the screen so that defendant and I have full visibility while defendant and witness are mutually concealed. That difficulty is certainly compounded if we have to allow the defendant to see the witness’s friend. And what if the friend thereby sees the defendant? The reality surely is that the relative or friend will commonly be a person who can also feel intimidated by the defendant. If the defendant can see her – it is usually a “him/her” situation – she can normally see him unless we do it with mirrors. Surely it should be enough that the prosecutor and the defendant’s counsel and the court and jury can see the friend.”

None of these amendments would be difficult to enact and they do no more than eliminate certain difficulties, which have occurred in the practical application of the legislation and ensure that the intent of the legislation is more effectively carried out.

RECOMMENDATIONS:

1. That all screening and other furniture in all courts for vulnerable witnesses be adequate for their purpose and ensure the protection and comfort of such witnesses.
 2. That all other necessary equipment for vulnerable witnesses such as microphones and closed circuit television be available in all courts when required and that placing of equipment such as microphones and cameras be such as to be convenient and adequate for the witness.
 3. That programs of education and information be prepared and implemented in communities where it appears that the serious nature of sexual assaults and the serious effect of these assaults on the community is not sufficiently understood.
 4. That the following amendments be made to the *Evidence Act* and the *Sexual Offences (Evidence and Procedure) Act*:
 - (a) The definition of “sexual offence” be extended to include an offence against specified sections of the *Criminal Law Consolidation Act* of the Northern Territory;
 - (b) That if it is desired by the defence to contest that a particular person is a “vulnerable witness” within the meaning of the Act and if that submission involves the examination of that person in court, then until the court rules on the submission, that person be treated as a vulnerable witness during the hearing of the submission;
 - (c) That where both screening and close-circuit television are available in a court, a vulnerable witness be permitted the choice of whichever he or she preferred.
 - (d) That section 21A(2)(c) of the *Evidence Act* be amended so that after the words “relative of friend” the following words appear “or such other person as the witness may request and the court may consider proper in the circumstances”;
 - (e) That section 21 A(4) of the *Evidence Act* be amended by deleting the words “the parties” where appearing.
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VIDEO-TAPING

(b) Whether the Territory should consider the introduction of video-taping of the evidence-in-chief of victims of sexual assault, particularly children.

With one exception the response to this questions was so overwhelming as to make the task of the Committee an easy one. While the Committee is, of course, not bound to follow the majority view, the Committee is itself convinced of the common-sense and practicality of video-taping of the evidence-in-chief of victims of sexual assault, particularly children.

“Particularly children”. To insist that a child repeat evidence several times at different places, on different occasions, to different hearers is placing a great strain on a young mind already traumatised by an experience he or she would rather forget. Add to that the strain brought on by delay and one may almost guarantee psychological damage, perhaps for years. No one can expect a child to pay this price particularly if he or she is the innocent victim.

A video tape of the child’s statement made as soon as possible after the event should be treated thereafter as evidence-in-chief. That does not prevent the child being cross-examined, but it does mean that he or she does not have to repeat the examination-in-chief on each occasion. The prosecution, however, should be permitted to add to the evidence-in-chief thus adduced by the video if the prosecutor considers that necessary in the interests of clarification. An important factor in video-taping is that the court could observe the child as he or she looked at the time of the incident and not some years later

Some have suggested an extension, namely that the very first complaint of the victim to the police should be video-taped to establish her distress immediately after the event, on the basis that, if photos may be taken after an assault to establish the physical condition of the victim, why not a tape of what the victim is saying and how the victim is behaving after the event to establish the emotional effect on the victim.

The problem here would be the difficulty of sifting out inadmissible evidence from these immediate statements. Evidence-in-chief performs that function and may be the safest procedure; but the earlier the better.

A sub-committee on this matter recommends procedures already in force in Victoria and requiring, as in Victoria, specially trained personnel to handle the video-equipment.

The recommendation of the Committee is that as soon as practical after the complaint is made by or on behalf of a child the child be interviewed by a specially trained police officer in the presence of a “judicial officer”, and that interview be in the form proper for evidence-in-chief.

Such an interview should be video-taped and may then be used as evidence-in-chief at all subsequent proceedings, subject to the right of the prosecutor to

lead additional evidence from the witness after the completion of the video-tape and to the right of the defendant or his counsel to cross-examine.

A “judicial officer” for this purpose should be a legal practitioner appointed by the Attorney-General as a suitable person to preside over the interview.

RECOMMENDATIONS:

1. That evidence of children previously given on video tape be permitted to stand as evidence-in-chief in all subsequent court proceedings.
 2. That adequate resources and thorough training be provided to enable this measure to be introduced effectively as soon as possible.
 3. That the Attorney-General appoint suitable legal practitioners as “judicial officers” for the purpose of overseeing the video taping the child.
 4. That if the procedure proves successful in the case of children, then video taping of the evidence of adults be considered as an option in the case of sexual assaults.
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ORAL EVIDENCE

(c) Whether the Territory should consider limiting the right to call oral evidence from victims of sexual assault at committal.

Some submissions sought limits on the right to call oral evidence from victims of sexual assault on committal. The fear was that witnesses, particularly children, could be harassed and subjected to intense and unfair cross-examination. Most members of the Committee have seen the Four Corners program "Double Jeopardy" and it must be said without reservation that the case of a seven year old child being cross-examined for five hours should leave no doubt in the mind of any Australian citizen that something may be horribly wrong in this area of the law.

The sub-committee examining this part of the Attorney-General's reference was satisfied that no such situation has taken place in the Territory and that magistrates were strictly confining cross-examination in such cases.

The present legislation gives magistrates ample power to disallow offensive, harassing or repetitive questioning. See, generally, ss13-16 of the *Evidence Act*. It is notable however that these provisions apply equally to committals and trials. In trials before a jury it would be unlikely that counsel would indulge in intensive and aggressive cross-examination of a child because this course might very well turn the jury against the defence.

That very fact indicates why there might be a temptation to cross-examine far more persistently and strongly in committal proceedings where the tribunal is not the tribunal ultimately deciding the case. It is significant that, in the Four Corners example, counsel who appeared for the defendant at the trial was not the counsel who appeared at the committal; and one can easily accept that the questions asked at the trial were not asked in the same way and in the same manner as in the committal.

Nevertheless it is equally obvious that counsel at the trial had the advantage of selecting from the questions asked at the Committal, those which most favoured the defendant.

Defence Counsel may therefore be entitled to argue that, within the limits of professional propriety, they are entitled and indeed bound to pursue questioning quite intensely. They are defending a person charged with an offence which society regards as abhorrent and who, if convicted, will permanently lose his good name in society, as well as serving the prison sentence which will almost certainly follow.

The conviction of an innocent person in these circumstances would be a tragedy of the most terrible type. One can therefore hardly blame defence counsel for taking advantage of any situation open to him – again within the limits of propriety.

It is necessary to go back to first principles.

A committal is an Inquiry by a judicial officer as to whether a prima facie case has been made out by the prosecution sufficient to commit the defendant for trial. Counsel are therefore entitled to ask questions to ground a submission that no such prima facie case has been made out. Some complaints have been made that lengthy and offensive cross-examination is not confined to the example illustrated in the Four Corners program. It is, however, the view of the Committee that, overall, Territory Magistrates properly and fully control the situation under their present powers. Committal proceedings exist for the purpose of establishing whether or not a prima facie case has been made out by the prosecution and the pursuance in cross-examination of other ends is prohibited. A Magistrate can deal with that situation just as he or she deals with objections or submissions as to relevancy. In each case the magistrate determines the borderline, applying where appropriate the controls laid down s.13-15 of the *Evidence Act*.

Subject to the protection for vulnerable witnesses and the fast-tracking suggested in the earlier recommendations, there remain certain advantages to both sides for the committal proceedings. The sub-committee examining this question considered that an oral committal could be an opportunity to have early pleas indicated and suggest a statutory discount in appropriate cases.

The Committee is not convinced that committal procedures should be abandoned or that the present procedures should be abbreviated. Otherwise the result is likely to be plethora of applications in the nature of a *voir dire* when the trial commences, and this seems to have occurred in States where committal proceedings have been restricted.

On the question of a statutory discount for pleas the sub-committee referred to the Report of the Commonwealth Attorney-General's Working Group on Criminal Trial Procedure, chapter 6.1. (Appendix 9)

The remarks in chapter 6.1 are of considerable significance and particularly relevant to the Northern Territory since a comparison is drawn between the situation here and in Western Australia. Here is the relevant quotation from that part of the report:-

“As mentioned earlier in this report, and as is recognised in numerous authorities, it is of critical importance that the criminal law provide positive encouragement for offenders to plead guilty at the earliest possible opportunity. The significance of encouraging early pleas is dramatically demonstrated in the ABS Report comparing figures in Western Australian and the Northern Territory. In Western Australia 18.3% of defendants entering the higher courts with a not guilty plea changed their plea to guilty while 75.8% did so in the Northern Territory. In Western Australia 55.2% entered the higher court with a plea of guilty compared with 4.5% in the Northern Territory. Those figures provide strong support for the efficacy of the Western Australian Fast Track Procedure which results in a public and significant discount”.

The report goes on to describe the procedures initiated by the *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* of Western Australia, constituting what the Commonwealth Attorney-General's Report described as "a determined attempt to streamline the procedure for dealing with offenders who had no intention of defending a charge and who wished to plead guilty at the earliest opportunity without going through the full formal processes usually required in respect of indictable offences".

The procedure is then described:-

"Upon first appearance before the Magistrate there is a short remand for seven or fourteen days and, upon an indication of a plea of guilty, the Magistrate will direct the prosecution to file with the Clerk and serve on the defendant a Statement of Facts material to the charge. The prosecution is also directed to give notice of any tape or video tape recording of conversations between the defendant and any person in authority. Following service of that statement the defendant is told that a plea to the charge may be entered. If the defendant pleads guilty the Magistrate shall, without convicting the defendant, commit the defendant to a court of competent jurisdiction for sentence. This is almost invariably the District Court.

Immediately the plea has been entered, the Magistrate's bench clerk contacts the Criminal Registry of the District Court by telephone and the defendant is remanded to appear on either a Tuesday or a Friday, as nominated by the Registry, before the General Duties Judge in the District Court at about six weeks from the day the request is made. It is common for the Magistrate to order a pre-sentence report at the time of Committal and this is on file when the defendant appears in the District Court and normally obviates any further remand in order to obtain such reports. The Fast track Judge sits on Tuesdays and Fridays and hears approximately ten pleas in mitigation each day."

This Committee agrees with the views of those who compiled the Commonwealth Attorney-General's Report that "It is an imperative of the Fast Track system that a significant discount for benefit for pleading guilty at an early stage be granted and that such discount be made publicly and clearly visible to the offender".

It may be inadvisable to legislate for a specific amount of discount to apply to all pleas of guilty at an early stage. The multiplicity of circumstances still dictates the importance of judicial discretion. On the other hand the usefulness of the scheme would be at risk if it were not made certain that some discount would be given in every case of an early plea.

The importance of an early plea is of course not only for the accused but for the victim and witnesses and for the courts in the sense of saving of cost and time.

The compromise situation therefore would be legislation to the effect that the court shall in all cases of an early plea of guilty grant a discount of up to, say, one third, of the overall sentence determined by the judge in all the circumstances and, upon sentencing the judge should publicly state what discount has been given and the reasons why that particular discount has been given.

Consideration should also be given to some lesser discount for defendants who plead guilty at some stage after committal, although this may require some form of "sliding scale".

RECOMMENDATIONS:

1. That there be no further restrictions on the right to call oral evidence from victims of sexual assault or committal provided that all appropriate protections for vulnerable witnesses are available and on call when required.
2. That a statutory discount for accused persons who indicate a plea of guilty at the committal stage be enacted. Such statutory discount to be up to one third of what would otherwise be an appropriate sentence ultimately imposed for the offence, and that the court in sentencing should publicly state what discount has been given and the reasons why that specific amount has been given.

COUNSELLORS NOTES

(d) Whether the Territory should consider the introduction of legislation to protect the confidentiality of counsellors' notes in sexual assault proceedings.

This question requires an understanding of just when and how counsellor's notes can become relevant in court proceedings.

Many submissions to the Committee emphasised the serious long-term effects on the victim of a sexual assault. Those effects will, plainly enough, vary according to the nature of the assault and the nature of the victim. Some are more stoic than others. But the question of the long-term effect on the victim should not be of relevance at the trial. Short-term effects such as the behaviour of the alleged victim immediately after the alleged offence may be, because it may go to the question whether there was consent (where consent is relevant) or whether the offence occurred at all. Such evidence may, favour either the prosecution (immediate complaint) or the defence (no immediate complaint), but, because it is recognised that there is an infinite variety of human reaction to a particular incident, the presence or absence of certain events after the incident is only a factor in weighing the whole of the evidence. Courts are now bound to instruct juries according to s.4 (5) of the *Sexual Offences (Evidence and Procedure) Act* which includes, inter alia, a provision that "the judge shall not warn, or suggest in any way to, the jury that the law regards complainants as an unreliable class of witness" and that the judge shall warn the jury that delay in complaint does not necessarily indicate that the allegation is false. The question at the trial is, did the event occur? If the accused is convicted then the long-term effect on the victim becomes relevant in the plea.

The distinction is inherent in many other criminal trials. For instance, in a case of dangerous driving the question must be, has the allegation of dangerous driving been proved? If not, the accused must be acquitted no matter what damage his action has caused. If, however, there is a conviction, the court will then take into account as one factor in sentencing, whether the action of the accused caused minor damage or whether it resulted in the death or serious injury of one or more persons.

In one sense this is illogical. The crime may or may not be proved and, if proved, the circumstances immediately before its commission must necessarily be relevant in sentencing eg. was it one, albeit serious, error of judgment, or was it the culmination of a whole series of blameworthy behaviour such as driving at excessive speed, driving on the wrong side of the road etc. The ultimate result may be strictly irrelevant since one accused may by good fortune be apprehended before he causes damage but another will cause a fatality. Yet both may have shown exactly the same disregard for the safety of others.

The law, however, concedes that this would not be an attitude acceptable to public perception, and sentencing will take into account the damage inflicted. So with other offences including sexual offences.

If then the trial question is whether the offence occurred, and the nature of the damage inflicted is irrelevant to that question, save insofar as it relates to the immediate conduct of the offender, it should follow that evidence should not be heard on trial as to the damage, that is, the long-term effect on the victim. It should also follow that the evidence of counsellors (and by that term is meant any professional persons such as counsellors, psychiatrists, psychologists, social workers etc) should normally be excluded at trial. That in the Committee's view should be the determining principle.

Most submissions, however, emphasised another concern about the reception of counsellor's evidence which the Committee considers proper and important. A counsellor is endeavouring to repair emotional damage caused by a sexual assault. To do this the counsellor must have the confidence of the victim and a full appreciation of the effect of the trauma on the personality of the victim. Many victims are affected by various distressing and confused emotions which in no way mean that the incident did not take place but could be used out of context to cast doubt on the victim's credibility. The victim, believing that what is said to the counsellor may be used in court, may refuse to communicate fully and may become more distressed and put the whole healing process at risk. Counsellors, likewise, fearing that a totally wrong case might be made of their notes, may be inhibited in the taking of notes, and this may affect the treatment given by the counsellor concerned and by that of another counsellor who takes over, relying on the notes.

Yet it is fair to say that there may be rare and special cases where what is told to the counsellor, or the counsellor's own assessment, may prevent an innocent person from being convicted. The victim may freely admit to the counsellor that they made the whole thing up out of spite or to protect themselves from what they regarded as undue harassment, or to enhance their chances in a custody dispute. Or the counsellor may assess the whole case as one of paranoia or something in the nature of "recovered memory" syndrome a condition which is now viewed with grave suspicion by experienced professional people in the field. (See appendix 10)

The difficulty therefore is to try to steer a middle course between full disclosure of counsellor's notes, thereby not only permitting defence counsel to go on a fishing expedition but also to seriously disturb the relationship between counsellor and client; or by suppressing evidence which might be vital for the defence of the accused.

At least one submission suggests that this is a case which requires some special training in a judge to appreciate the psychological factors involved.

The submission from the Top End Women's Legal Service commences with these words:-

"Disclosure of communications between sexual assault counsellors and their clients has enormous detrimental effects. The fact that disclosure is possible if so ordered by a court without doubt has a negative impact upon the relationship between counsellors and sexual assault survivors and, as a consequence, on the criminal justice system more generally".

These sentiments are echoed in other submissions.

Recent legislation in three Australian states indicates an awakened recognition that there should be some form of privilege attached to communications between client and counsellor in cases of alleged sexual assault. Legislation is necessary because no such privilege arises at common law.

The legislation is:

1. The *Evidence Amendment (Confidential Communications) Act 1997* of New South Wales;
2. The *Evidence (Confidential Communications) Act 1998* of Victoria; and
3. The *Evidence (Confidential Communications) Amendment Act 1999* of South Australia.

In introducing the New South Wales Act, the Attorney-General, in the second reading speech before the New South Wales Legislative Council (22 October 1997), said:-

“It goes without saying that a person who has suffered the grave trauma of sexual assault will often be assisted in recovery by seeking counselling. The counselling relationship, built on confidentiality, privacy and trust, enables a victim to explore major issues concerning her sense of safety, privacy and self-esteem. The knowledge that details of a victim’s conversations with her therapist may be used against her in subsequent criminal proceedings can inhibit the counselling process and undermine its efficiency Knowing that a perpetrator has had access to counselling files can further traumatise victims and increase their sense of powerlessness..... The Bill was motivated by the government’s concern to provide protection for confidential communications such as these and, in doing so, to emphasise the public interest in ensuring the confidentiality of such relationships”.

(Quoted in Watson, Blackmore and Hosking – Criminal Law New South Wales 6.1570/1)

The intent of the three acts mentioned above is, as the New South Wales Attorney-General said of the New South Wales legislation:-

“It will provide a rebuttable presumption that evidence of a confidential communication made to a counsellor by a victim of sexual assault should not be admitted in evidence”.

The three Acts are broadly similar. They provide that categories of confidential communications made to counsellors in cases of sexual assault cannot be adduced in evidence except in certain special and specified situations. Those situations are then set out and, although not described in exactly similar terms in the three Acts, it is plain that the court is asked to strike a balance between the public interest in preserving confidentiality and the public interest in avoiding a miscarriage of justice. But before the court undertakes that exercise the applicant must, at least in New South Wales and Victoria, give notice in writing to the court and interested parties (including the

counsellor) of intention to make such an application. In the South Australian Act there is no specific provision for notice to be given but, since the leave of the court must be sought for the application, there is probably no practical difference since the court would undoubtedly require any parties affected by the application to be given an opportunity to appear.

There are various ancillary provisions whereby the court may if it gives leave prohibit publications or dissemination of the evidence or determine that the application be heard in camera.

The effectiveness of these Acts, at least in some parts of their operation, has now been rendered doubtful by the decision of the New South Wales Court of Criminal Appeal in R v Young which judgement was given on 7 July 1999. (Presently unreported)

The judgement of their Honours restricts certain terminology in the New South Wales Act to what is expressly set out therein. The Act provided that a "protected confidence" (as defined) or the contents of a document recording a protected confidence could not be "adduced" in evidence. Their Honours held that expression did not cover production of documents on subpoena. James J (with whom the other judges concurred on this point) accepted the argument of the appellants that "If the words used by the legislature in Division 1 B are interpreted according to their natural ordinary meaning, then they should be interpreted as meaning that sexual assault communications privilege under Division 1 B is limited to the adducing of evidence at a hearing and does not apply to the production of documents on subpoena. There is a well recognised distinction between the adducing of evidence and the production of documents on subpoena." Similarly Spigelman CJ says: "subpoenas in a criminal case must serve a legitimate forensic purpose. Whether or not a document may be adduced in evidence does not exhaust a list of such purposes.

Although from the parliamentary debates it could well have been derived that Parliament intended to cover the production of documents on discovery within the privilege created, the Act had not said so, and the court felt that the result could not reasonably be deduced from the words actually used. Nor could the result be achieved derivatively, for instance as forming a new category of public interest immunity, although Beasley JA dissented on this point.

R v Young would likewise apply to the Victorian legislation which speaks in similar terms to the New South Wales Act of "adducing" evidence.

The South Australian Act, appears to fill the gap discovered by the Court of Criminal Appeal. Section 67(f)(1)(c) provides that:-

"Evidence of a protected communication

(c) is not liable to discovery or any other form of pre-trial disclosure"

In Butterworths – Criminal Law News – of July 1999, Michelle Foster, commenting on the result of R v Young says:-

“Given that at least in the case of (the New South Wales legislation) it seems unlikely that the outcome, namely that the Act does not apply pre-trial, accords with the intention of the legislature, further legislative amendment is very likely”

She then suggests that similar Canadian legislation “could provide a sound model.” She is referring to an enactment of the Canadian legislature being chapter 30 of 1997 – “An Act to amend the Criminal Code (Production of Records in Sexual Offence Proceedings)” (Appendix 12).

Alternatively, the New South Wales and Victorian Acts could be amended in the manner suggested in the annexure to the judgement of James J which imports submissions made to the court on behalf of respondents, the New South Wales Attorney-General and New England Area Health Service.

Essentially, and without quoting all the instances where amendments would be required, this involves adding in words relating to the production of documents after expressions relating to the adducing of evidence.

Thus, and to give one example only, section 126H would then read:

“(1) Evidence is not to be adduced or a document produced in a proceeding if it would disclose:

- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence, unless the court gives leave to adduce or require production of the evidence or document.”

The underlined words are the amendments suggested.

To return therefore to the question asked by the Attorney-General of the Northern Territory in this part, namely whether the Territory should consider the introduction of legislation to protect the confidentiality of counsellors’ notes in sexual assault proceedings?

That question is clearly answered in the affirmative by the submissions to this Committee, which were practically unanimous in requesting protection for such communications.

That position is strengthened by the fact that three States have now passed legislation adopting just such a policy.

If such legislation is sought for the Northern Territory (and in the Committee’s view and for the reasons already set out it should be sought) the legislature has the choice of adopting mutatis mutandis the Canadian pattern, the South Australian pattern, the New South Wales and Victorian patterns (as amended) or to promulgate its own legislation.

In the Committee’s view any of these alternatives would suffice although the South Australian pattern would be preferable as being the most recent and presumably drafted after consideration of the other examples. Furthermore, it

would be preferable to have some uniformity at least with one State and with the State which, for historical reasons, is most closely connected legislatively to the Northern Territory.

The Acts referred to are set out in Appendix 11.

RECOMMENDATIONS

1. That legislation similar to the South Australian *Evidence (Confidential Communications) Amendment Act 1999* be enacted in the Northern Territory.

CORROBORATION WARNINGS

(e) Whether the Territory should consider further restricting the ability to give corroboration warnings in sexual assault proceedings.

An excellent example of how public opinion or perception can be changed is given by the readiness in recent years of all Australian States and Territories to amend a rule of law which had endured for centuries, namely that in a sexual crime a person could not be convicted on the uncorroborated evidence of the complainant. The law regarded women and children as “weaker vessels” whose evidence was consequently suspect on its own. This was consistent with a general view of adult male superiority, perhaps most succinctly described by Tennyson “Man to command and woman to obey. All else confusion”. The philosophy manifested itself in the law which decreed that on marriage the husband became the legal owner of his wife’s property, though, as a corollary (and this not necessarily to the husband’s advantage) he also became responsible for her torts. In other words she was in much the same position as a servant except that a servant could leave and she could not. More pertinent still, as emphasising the concept that she was an inferior being, was the legal doctrine that, if she committed a crime when her husband was present, the husband was *prima facie* responsible because she was deemed to have acted under his coercion. (It was this doctrine which led Mr Bumble in “*Oliver Twist*”, to make the celebrated observation that “the law is a ass”.)

Children had no rights in the household, save the right to be supported and, in extreme cases, the right to be protected from excessively ferocious beatings or murder.

It is not surprising therefore that the evidence of women and children was regarded as of a special and inferior kind and hence requiring corroboration.

A series of Married Women’s Property Acts and the extension of the franchise to women (both measures hotly and vigorously contested into the twentieth century) and more recently, a gradual acceptance that children generally, and absent coercion, are no more prone to lying than adults, has led to the abolition of rules requiring corroboration, and, (although this may be labouring the point), these changes have occurred because of continuous and effective publicity and education by various organisations. Success may not have come as speedily as may have been wished, but such success as has come justifies this Committee’s later recommendations to stimulate public awareness by public education.

Some submissions suggest that abolition of the necessity for corroboration in cases of sexual assault is not enough. Others feel that the present legislation has gone as far as it should go. They point to the provisions of s.4(5) of *The Sexual Offences (Evidence and Procedure) Act* as amended, which provide that a judge “shall not warn or suggest in anyway that the law regards complainants as an unreliable class of witness”, and that, if it is suggested that the complainant delayed in making a complaint, the Judge should warn the jury that this does not necessarily indicate that the complaint is false and that there may be good reasons why a victim of a sexual offence may hesitate in complaining about it. Added to these are the provisions of s.192A of the Criminal Code that

“in a relevant case the Judge shall direct the jury that a person is not to be regarded as having consented to an act of sexual intercourse or to an act of gross indecency only because the person

- a) Did not protest or physically resist;
- b) did not sustain physical injury; or
- c) had on that, or an earlier occasion, consented to
 - i. sexual intercourse; or
 - ii. and act of gross indecency, whether or not of the same type, with the accused.”

This Committee agrees that the law should go no further in this area. The primary difficulty is acknowledged that, in many cases where sexual assault is alleged, there are no other persons present at the time of the alleged offence other than the complainant and the accused. The jury, faced with two conflicting versions by the only two parties present, may often find it difficult to conclude that the offence has been proved beyond reasonable doubt. In other recommendations this Committee has suggested ways which might encourage pleas of guilty, but it cannot justify any legislation which gives some special weight to the evidence of the complainant over the evidence of the accused, or in some way reverses the onus of proof. Such measures may make the cure worse than the disease and lead to unsafe convictions.

Nor does it suggest that s.4(6) should be amended. That subsection reads:-

“(6) Nothing in subsection (5) prevents a Judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice.”

A Judge has a duty to make such a comment if he thinks it proper and there are many cases where the Judge will feel bound “in the interests of justice” to make such a comment. At the most it may be hoped that Judges may be better informed by training to appreciate the special difficulties in these cases, but Judges are appointed to exercise a proper discretion and that must be acknowledged as a proper safeguard for the community.

The Commission also refers to the remarks of Brennan, Dawson and Toohey J J in Langman v R (1980) 16 CLR 79 at 87: “alleged victims of sexual offences no longer form a class of suspect witnesses, but neither do they form a class of especially trustworthy witnesses. Their evidence is subject to comment on credibility in the same way as the evidence of alleged victims in other criminal cases, but to comment only”.

RECOMMENDATION:

1. That there be no change in the present position in regard to directions as to corroboration.

SECTION 131A OF THE CRIMINAL CODE

- (f) **The operation of the offence created in section 131A of the *Criminal Code*, ie maintaining an unlawful relationship of a sexual nature with a child.**

Similarly, but for very different reasons, the Committee does not recommend any amendment or recasting of s.131A of *The Criminal Code*. One submission considered that the provisions of the section were unworkable.

Others felt that the provisions should be retained but with some amendments. The section has only been used on a few occasions, so it is difficult to say whether it has any use as a separate offence or not. Equally, it would seem premature to effect any change without further testing and perhaps further court comment. To effect change at this stage may worsen the situation since one may be legislating in a void.

The section was adopted from Queensland [s229 (B) (1)] of the *Queensland Criminal Code*, and operates only in Queensland and the Northern Territory. It has been the subject of judicial comment in the High Court in the case of KBT v The Queen (1997) 191CLR417.

In that case, however, it could not be said that the High Court disapproved of the section. Their Honours merely emphasised that the jury had to be satisfied that the circumstances enunciated in the section not only had to be shown to have occurred on at least three occasions but that the jury had to be unanimous and had to be satisfied beyond reasonable doubt of each such occasion. (The requirement of unanimity would not apply in the Territory.)

Kirby J, at 431-2 spoke of the danger “that generalised evidence, tendered by the prosecution to establish a s.229B “relationship” will be used by the jury as “propensity” evidence.” He continued:- “Nevertheless Parliament has provided the new offence. Clearly, it has done so to respond to community concern about the problem of child sexual abuse. It is the duty of the courts to give effect to the will of Parliament. But they must do so in a trial process which ensures, so far as they can, fairness to the accused. The obligation of the courts to ensure that a fair trial is had imposes upon judges the duty of explaining the elements of the offence created by s.229B of the Code with precision and accuracy.”

RECOMMENDATION

1. That at present there be no change to s.131A but await further judicial decisions on the section.
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HONEST AND REASONABLE MISTAKE

(g) The operation of the defence of honest and reasonable mistake of fact in sexual assault proceedings.

A number of submissions sought an alteration of the *Criminal Code* in respect of the crime of sexual intercourse with another person without the consent of that other person/s.[192 (3)] and the crime of an act of gross indecency upon another person without the consent of that other person/s.[192(4)].

The alteration sought is on the question of mistake and is no doubt prompted by the decision of the Court of Criminal Appeal in McMaster v The Queen (1994) 4 NTLR92.

In that case Gray A J in a judgement with which the other two judges announced their agreement said, at page 99, "The belief on the accused's part that the woman is consenting need not be a reasonable belief. What the Crown must negative is a genuine belief whether reasonable or not".

His Honour held that s.31 of the *Criminal Code* governed the charge; "In my opinion s.31 produces the result that the prosecution must prove that it was the intention of the accused to assault the complainant without his or her consent".

Section 31 provides that "A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of this conduct".

His Honour's decision was in line with the principle already adopted by the common law.

The leading case is that decided by the House of Lords in DPP v Morgan 1976 AC 182. In that case their Lordships delivered separate judgements but concurring in the general principle which is perhaps, best stated by Lord Hailsham at 215. "The prohibited act is intercourse without consent, the mental element lies in the intent to commit willy-nilly or not caring whether the victim consents or not. A failure to prove this element involves an acquittal because an essential element is lacking, and it matters not that it is lacking because of a belief based on reasonable grounds".

This was followed by the Court of Criminal Appeal in Victoria in Saragossa v R (1984) VR 187 where their Honours held that on a charge of rape the Crown must prove that the accused was aware that the prosecutrix was not consenting, or else realised that she might not be, and determined to have intercourse irrespective of consent. "The reasonableness of a belief that there was consent bears only on whether the accused actually held such a belief".

The court specifically stated that it "should now remove doubtsby making it clear that Morgan's case is to be followed in Victoria". (See also cases set out in Gillies - Criminal Law - 4th Edition {1997} at 601)

What clearly - and understandably - concerns some of those who have made submissions to this Commission is that an accused can thus be acquitted if his belief is honest but unreasonable, or, to put it in a more precise way, as it would be put to a jury:- the Crown must prove beyond reasonable doubt that the accused did not honestly believe that the complainant was consenting even if the circumstances indicated that it may not have been reasonable for the accused to have formed that view. In considering this question the jury would be told to have regard to the subjective state of mind of this particular accused rather than the objective circumstances which might indicate that a reasonable person would not have acted in this way.

Bearing in mind that, in the majority of cases where the question of consent is involved, there are only two persons present, and one swears that there was consent and the other that there was not, and absent of any signs of physical assault other than the act itself, and in the light of the above directions to the jury, it can be easily understood that an acquittal will often be the result. And even if there is a conviction the Court of Appeal may still take the view that the conviction, in all the circumstances, is unsafe.

Those concerned about this state of affairs have suggested that s.32 should apply in cases where the accused suggests that if there was no consent nevertheless he had formed an honest though mistaken belief that there was. The point of this is that s.32 provides that “ A person who does, makes or causes an act, omission or event under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist”.

It can be seen that the important words are “ honest and reasonable”, that is that an honest but unreasonable belief will not avail the defence. (See the suggested amendment in Appendix 13)

Some have suggested that the amendment should go further and place the onus of establishing honest and reasonable belief on the accused (though on the balance of probabilities). The rationale for this is that it should not be for the Crown to negate mistake unless and until that is raised as a specific defence, ie it should not be the Crown's duty to negate it when nothing is said or the suggestion is raised in a void. If the accused wishes to rely on mistake, it is claimed that he should raise sufficient circumstances to establish it as a relevant factor to be considered and show it as such on the balance of probabilities.

There is, however, a very serious objection to the use of s.32 without also applying s.31. The crime must necessarily have the element of intent. The whole basis of it is sexual intercourse or gross indecency with the intention of committing the act without consent or (at least under common law) recklessly not caring whether there is consent or not.

The Crown, under s.31, must negative consent. And an unreasonable mistake is still a mistake, ie something different from that intended. Unreasonableness goes to the circumstances and may show that the so-called "mistake" is not a mistake at all and, being unbelievable, and therefore rejected, strengthens the Crown's case going to intent. As Mildren J puts it in his submission:- "First, although it is not necessary for the mistake to be an unreasonable one, obviously juries are not going to readily infer mistake of fact if the mistake is unreasonable. Secondly, as a matter of jurisprudential logic, it seems to me, at least, that if a person has a mistaken belief about a state of affairs relevant to his mental state it is difficult to see how he could have the relevant mental state required to convict. To take unlawful sexual intercourse as a prime example, if the accused believes that the prosecutrix was consenting, it goes without saying that he or she did not intend to have sexual intercourse with the prosecutrix without his or her consent".

To put it perhaps more crudely, the Criminal Code creates the offence of intentional rape but is silent where the act of intercourse, while not intended to be done without consent, is nevertheless performed in circumstances so gross and offensive to the victim that no reasonable person would have persisted. What is really being sought by submissions which call for amendment to the Code is that this category should now be made an offence. Thus it should be an offence if a person honestly but unreasonably believed that the other person was consenting, though this should be a lesser offence. There is justification for this to prevent acts where the accused has plainly acted in a gross and offensive and uncaring manner in the face of obvious refusal by the victim. Such behaviour must be clearly seen to be inexcusable and blameworthy as creating emotional distress on the victim in circumstances where a reasonable person would clearly see that distress and damage would ensue if he persisted with that conduct.

It must be emphasised that an amendment of this nature is extremely difficult to frame and the Committee must here defer to the expertise of the parliamentary draftsman. Appendix 13 is a suggested draft but that draft may need to be further considered to attain the result.

One other matter should be mentioned here for consideration. That is a suggestion to reverse the trend in the last twenty years to widen the scope of the crime of sexual intercourse without consent, which, despite the rather weasel words of so many sections throughout the States and Territories, is still popularly known as the crime of rape.

Although this Committee has not researched the matter in the sense of conducting some sort of public opinion poll, it believes that it would be generally accepted that, when the ordinary citizen speaks of the crime of "rape", he or she is still confining it to the definition accepted over several hundred years as the act of forcibly inserting the penis into the vagina without the consent of the victim. It may well be correct and accepted by ordinary people to include forcible buggery ie the act of inserting the penis into the anal passage without consent. But we now have fellatio, cunnilingus and insertion of things or other parts of the body into the vagina or anus without consent classified under the same heading. These are undoubtedly serious and appalling actions properly meriting severe penalties but they are not acts

which the ordinary citizen would refer to as “rape”, yet the penalty for these is now the same as rape, namely, imprisonment for life.

This state of things came about because of a laudable desire to punish all forms of sexual assaults severely. But is it possible that juries, knowing that a conviction for something they would not necessarily regard as rape would mean life imprisonment for the offender, might hesitate before convicting? Furthermore, is not this tendency to widen the scope of the offence (and the penalty) somewhat similar to the 17th and 18th century approach of throwing more and more offences into the category of capital offences to emphasise their heinousness? There are degrees of heinousness in sexual offences as in other offences, and failure to recognise this may lead to lack of balance or, in the offender, a philosophy that one might as well be hung for a sheep as for a lamb. The suggestion therefore is made that consideration be given to placing these in the category from whence they originally came, namely indecent assaults. But, true to its pragmatic appreciation that reform, like politics, is the art of the possible, this Committee recognises that the present climate of public opinion may be furiously adverse to anything seeming to reduce liability and therefore punishment for any sexual offence. The suggestion is therefore for consideration only.

RECOMMENDATION:

1. That an offence be created along the lines of that suggested in Appendix 13 that if a person mistakenly believes that another person is consenting to a sexual act when that other person is not, the person persisting in the act is criminally liable if in the circumstances no reasonable person would have persisted in the act or that his actions were such that no reasonable person would have so acted.

SPECIAL TRAINING FOR PROSECUTORS

(h) Whether the Territory should consider providing specialist training for prosecutors concerning their role in relation to the victims of sexual assault, particularly children.

The Attorney-General's question as to whether specialist training for prosecutors be provided concerning their role in relation to victims of sexual assault met with an extremely positive response. All submissions which referred to this matter were adamant that training should be provided. Most submissions, however, stressed that such training should not be limited to prosecutors, but rather to all concerned in the investigation, prosecution and trial of sexual assaults. ie police, prosecutors, defence counsel, court staff, judges and magistrates.

Since it is also sensible to equip people at least to be alerted to the problems, even before they meet them in practice, education of law students and police trainees must necessarily follow. Some of this is occurring; for instance Ruby Gaea Centre provides input into Northern Territory Police Cadet training workshops.

Why is training important? One reason is summed up in a booklet put out by Ruby Gaea House ("The Facts for Rape Survivors") "To testify takes great courage". The victim must obviously (and properly) be prepared to reveal a great deal of intimate personal details and will know that there is a likelihood that his or her behaviour will be examined and questioned. Children may find it even harder to discuss distressing and intimate matters particularly if the allegation is against a member of the family.

Sometimes those investigating or prosecuting an assault case may not realise just how severely emotionally upsetting the incident has been. Preparing the case, if done properly, may take longer, and the confidence of the victim in the prosecutor may be lost if the prosecutor shows impatience or appears unsympathetic or apparently incapable of understanding what the victim has gone through.

It is now more generally recognised that a person alleging a sexual assault is in a different category from other complainants. People who claim to be the victims of theft, fraud, threats or physical assault may still find the experience of making a complaint and the subsequent court appearance vexatious or daunting. Very few people enjoy the experience. But their evidence does not entail a detailed account of invasion of intimate parts of the body coupled often with evidence of acts, which they find degrading and embarrassing to relate.

A person who complains of theft may be asked to do no more than identify the property allegedly stolen and, if he or she can claim to do so, identify the alleged thief. The person claiming to be seriously assaulted will, unless memory is substantially impaired by injuries, be expected to relate the circumstances of the assault. Difficult though these things may sometimes be to a lay person unaccustomed to court procedure, his position is not really comparable to the position of a person alleging a sexual assault.

It is not suggested that allegations of sexual assault should not be properly tested by police investigating the charge or prosecutors presenting it or the court before whom the charge is tried. The provisions for protected witnesses have already been referred to.

What is sought by those who seek training for prosecutors, - and others – is a realisation of the special difficulties in such cases or, to put it another way, such cases should not be treated as “no different from others” so far as witnesses are concerned.

This does seem to be better appreciated now by police and prosecutors and it is sought only to extend the training already in place so that it becomes ingrained in such officials. In this respect, the Committee also notes “Draft Model Guidelines for the Effective Prosecution of Crimes Against Children” presented to the Fourth Annual International Association of Prosecutors Conference held at Beijing from 6-10 September 1999. This document takes into account the views expressed by some 28 members of the International Association of Prosecutors (IAP) including, from Australia, the Director of Public Prosecutions of New South Wales and the Director of Public Prosecutions of the Northern Territory. (Appendix 14)

Virtually all the submissions dealing with this aspect seek to go further and extend training and education to other court officials including defence counsel, judges and magistrates. This has been suggested in other jurisdictions. For instance the Law Reform Commission of Western Australia, in a discussion paper 87 of 1990 observed “There is widespread agreement that most judges and lawyers need some specialised knowledge and skills in order to deal satisfactorily with child witnesses”. Indeed, by appropriate publicity and information such as has already been suggested, it should be brought home to the general public, from whom, of course, juries will be drawn.

It is important that the public understand more fully the trauma which a victim may undergo, and the need for such victims to be encouraged to speak out without fear or embarrassment. Only in this way will they find protection for themselves and, by their actions protect the community. This is not – be it stressed – to reverse the onus of proof and suggest that a person making an allegation of sexual assault should necessarily be believed, but rather to remove the opposite suggestion that a child or adult making such allegations should necessarily be treated with special suspicions, or discouraged from continuing the complaint.

It may be thought to be asking too much of defence counsel to suggest that they undertake some form of training to appreciate the predicament of a complainant in sexual assault cases; but a broader view may be taken that such training may allow defence counsel to better appreciate the case against the client and advise that client accordingly; and if a plea is indicated, to better formulate the plea with such mitigation as the circumstances warrant.

One group of barristers has given a somewhat guarded submission not adverse to training in general. "There can not be any criticism of training people to enable them to better perform their function. It all depends upon what the function is perceived to be, and what the training is intended to achieve".

Training may enable all counsel to better perform their function, particularly in advising. It is of course appreciated that, subject to the rules of legal ethics, defence counsel is bound by his client's instructions, and that is a sacred duty from which he should never waver. But it must be remembered that counsel performs that duty and assists the court as much when his client wishes to plead guilty as when he pleads not guilty, and in the former case prior understanding may especially assist the plea, particularly if the court itself has undertaken some similar training.

As to judges and magistrates, the Committee makes it clear that there can be absolutely no interference with the independence of the judiciary, and no provision should require that a judge or magistrate should undertake such training. Any such provision would be abhorrent. All that the Committee would ask is that judges and magistrates might consider that some more detailed study of the human factors involved in these cases may assist them in this particularly difficult area.

However the Committee does suggest that in considering the appointment of future judges and magistrates the Attorney-General may take into account, as one of the factors to be considered, the suitability of a person to understand and appreciate the special problems relating to complaints in cases of sexual assault.

Although it may not be appropriate to import such a condition into legislation the Committee does draw attention to the provisions of the *Family Law Act*

s 22(2)(b) which specify that a person shall not be appointed a judge unless 'by reason of training, experience and personality that person is a suitable person to deal with matters of family law'".

RECOMMENDATIONS:

1. The Territory should provide specialist training for prosecutors concerning their role in relation to the victims of sexual assault, particularly children.
 2. The purpose of such training should be twofold:
 - I. to ensure those involved in prosecuting sexual offences are appropriately skilled in this area of work, and able present matters before the courts competently and effectively; and
 - II. to ensure those involved in the prosecution of sexual offences are aware of the dynamics and psychological aspects that apply to victims of sexual assault, particularly children.
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3. Such training should be structured and delivered with an awareness of the legal limitations placed upon prosecutors and their necessary objectivity in presenting materials before the court.
 4. Such training should recognise that the prosecutor cannot replace the support and assistance offered to victims of sexual assault through the Victim Support Unit.
 5. The Territory should provide training for all legal and judicial officers aimed at ensuring an awareness of the dynamics and psychological aspects that apply to victims of sexual assault, particularly children. No suggestion, however, should be made that judges or magistrates are obliged to undertake any such training.
 6. Training provided on this issue should be formal and ongoing, in the sense that it is:
 - accredited and delivered by registered training providers; and
 - located within a structured system of professional development.
 7. Such training should also allow for the consideration of issues related to victims of sexual assault and the impact of:
 - cultural background;
 - physical ability;
 - intellectual disability; or
 - gender.
 8. Training should be delivered in a manner that allows it to be accessed by legal and judicial officers located outside Darwin.
 9. Training should be delivered by training providers, who have previous experience in the delivery of training regarding the dynamics and psychological aspects that apply to victims, including child victims of sexual assault, and in the delivery of training to legal and judicial officers.
 10. Further consideration should also be given to the introduction of education on these issues into undergraduate and post-graduate legal training.
 11. A recommendation regarding the inclusion of education on these issues in undergraduate and post-graduate legal training should be forwarded to the Northern Territory University Faculty of Law.
 12. That in considering future appointments to the judiciary or magistracy the Attorney-General may consider inter alia, the potential capacity of any person (whether by training or personality) to understand and appreciate the special problems associated with cases of sexual assault.
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(I) Whether the *Sexual Offences (Evidence and Procedure) Act Northern Territory* should be amended in the light of the review by the New South Wales Law Reform Commission of section 409b of the *Crimes Act 1900 (NSW)*.

On 31 August 1999 the Attorney-General wrote to the President of the Northern Territory Law Reform Committee referring to the Committee, as a separate and additional head of inquiry, whether section 192A of the Criminal Code Northern Territory should be reviewed in the light of the recommendations of the New South Wales Law Reform Committee concerning section 409 of the *Crimes Act 1900 (NSW)*.

The President in reply suggested that it might be appropriate to include an examination of the *Northern Territory Sexual Offences (Evidence and Procedure) Act* since that act was more in line with the New South Wales section 409, both being concerned with evidence, whereas section 192 A of the Northern Territory Code referred to judges directions. The Attorney-General assented to this approach and a sub-committee was then appointed to examine the question.

The correspondence between the Attorney-General and the President is set out in Appendix 2

The Report of the Sub-Committee is as follows:-

Sexual Offences (Evidence and Procedure) Act (NT)

**Ramifications of recent review by New South Wales Law Reform
Committee [NSWLRC] OF S 409b *Crimes Act (NSW)***

Background

The NSWLRC review of section 409B of the NSW *Crimes Act* was prompted by concerns expressed at the High Court level that section 409B “clearly warrant(ed) further consideration by the legislature in light of the experience of its operation” (see report p2).

The review was directed as a provision which operates quite differently from ‘equivalent’ provisions in other Australian jurisdictions, including the NT (section 4, *Sexual Offences (Evidence and Procedure) Act*).

The NSW provision, enacted in the early 1980’s, imposed a “rules based” approach to the admission of evidence of sexual reputation and sexual experience in trials for sexual offences. It rendered evidence of sexual reputation wholly inadmissible and provided that evidence of sexual experience would be inadmissible except in certain identified circumstances.

The restriction against evidence of sexual reputation is common to other Australian jurisdictions (apart from the NT, where such evidence is admissible with leave); however the provisions are less restrictive regarding the admissibility of evidence of sexual experience. Whereas the NSW model *codifies* the circumstances in which sexual experience evidence is admissible (ie by specifying the only exceptions to inadmissibility), the approach elsewhere is to vest in the Court a discretion to admit such evidence in appropriate circumstances.

In the NT, the judicial discretion (which applies equally to the granting of leave to adduce evidence of sexual reputation and of sexual experience) is stated in broad terms – the main restriction being the requirement that the evidence have “substantial relevance” to the issues –section 4(1). What amounts to “substantial relevance” is qualified by subsections 4(2) and (3); however, the discretion is otherwise unfettered.

The report of the NSWLRC records that submissions from interested persons and groups called for a range of changes to section 409B. Some considered the provision too broad in its operation (ie that complainants were still being subjected to obnoxious cross-examination) whereas others felt that the provision was too restrictive (leading, on occasions, to the exclusion of highly relevant and potentially exculpatory evidence). Concerns were also expressed regarding the applicability of the provision to pre-trial examinations and the procedure to be adopted where it was sought to introduce otherwise excluded evidence.

The NSWLRC ultimately recommended that section 409B be substantially amended. The proposed amendments bring the New South Wales position more into line with that elsewhere in Australia – namely, the adoption of a discretion based approach to the admission of evidence of sexual experience. The amendments make clear that the provision applies to committal proceedings and also specify the formalities to be followed if the Court is to be invited to exercise the discretion (the proposed provisions in this regard have equivalents in the NT Act; however the NT’s procedural requirements are much less detailed).

The NSWLRC has advocated a form of wording for section 409B which purports to cast the discretion of the Court in more restricted terms than in the NT. Whereas the NT Act refers to “substantial relevance”, the proposed NSW section speaks of “significant probative value” which “substantially outweighs the danger of prejudice to the proper administration of justice”. In addition, the NSW section requires the Court, in balancing these factors, to take various specified matters into account. Whether, in practice, the discretion under the proposed section 409B will prove any more restrictive than in jurisdictions where it is differently expressed, can only be speculated upon, however, it is noted that the last of the specified matters is “any other factor which the court considers relevant”.

To the extent that the NSWLRC Report recommends the amendment of section 409B to adopt a discretion based approach, it is an endorsement of the approach currently adopted in the NT. To the extent, however, that the model proposed for NSW is more circumscribed than in the NT there may be cause to consider whether section 4 of the *Sexual Offences (Evidence and Procedure) Act* requires refinement.

The Committee agreed with the review of the sub-committee and then considered the question whether the Northern Territory *Sexual Offences (Evidence and Procedure) Act* should be amended.

The sub-committee remarked that “the proposed (NSW) amendments bring the New South Wales position more into line with that elsewhere in Australia”, and “to the extent that the NSWLRC Report recommends the amendment of section 409B to adopt a discretion based approach, it is an endorsement of the approach currently adopted in the Northern Territory”. The difference between the proposed NSW amendment and the Northern Territory Act seems therefore one of degree, the New South Wales Act being somewhat more circumscribed than the Northern Territory Act.

In view of this, the Committee felt that no particular reason appeared to prefer one form of words against another and no convincing argument dictated any amendment as a matter of necessity or convenience.

RECOMMENDATION

1. That there be no change in the wording of the Northern Territory Sexual Offences (Evidence and Procedure) Act.

PUBLICITY AND EDUCATION

The Committee must emphasise – and that quite strongly – that there are no magic solutions. There rarely are in law. A simple illustration can be found in the problem of sentencing. The present day judges or magistrates inherit a mish-mash of philosophies ranging from extreme severity to extreme leniency. They must steer a course between two totally opposed and frequently passionately held views of retribution and deterrence on the one hand and reformation and rehabilitation on the other. From Plato onwards various solutions have been put forward, the proponents of which claim will eliminate crime. None have succeeded.

This is not the place for a discourse on criminology but it is fair to say that no modern criminologist would suggest that crime can be eliminated in the foreseeable future. In crude terms the best that can be hoped for is that improved psychological assessments may make it easier for the courts to distinguish between those who would benefit by measures which would allow them to return as useful members of society (and thereby save society the expense of incarceration), and those who would not.

This is not a counsel of despair because there have been substantial advances through public perception. The early part of the nineteenth century commenced with no less than 160 specific crimes for which the punishment was death in England, and consequently in Australia while English law applied. (See Blackstone – Commentaries – Book IV Chapter 1) The Benthamite reform movement reduced these to a handful and this was achieved by what was, in effect, a public learning process.

The point is therefore worth repeating that in the field of sexual offences as in other fields of crime there are no miracle cures. There is however one very important factor in the present day which, slowly but surely, is making inroads into the incidence of sexual assaults and will continue to do so if recognised and encouraged, and which this Committee strongly recommends for further action.

To make this clear we must first remove a popular notion that in the “good old days” by which presumably is meant two or three generations back, there were far less sexual crimes.

Recent events have given an emphatic denial to that comfortable notion. In the last decade there have been numerous revelations of the treatment of children in various religious and educational institutions. People in their forties, fifties and sixties have come forward with explicit allegations of sexual misconduct against them by adults in authority over them. As a result, a significant number of persons have now been accused and found guilty, or pleaded guilty, so there can be no suggestion that these accusations are the product of imagination or spite. Nor is there reason to believe that many others now dead and beyond the reach of the law were not equally guilty of the crimes charged against them by their erstwhile pupils.

These crimes took place in the 1940's, 1950's and 1960's, the very periods which some people still maintain were periods of protection and safety for children.

The conclusion that must be drawn is that a great number of sexual crimes were committed against children forty or fifty years ago and no doubt before that, which were never reported.

The reason is obvious. There was a far wider acceptance not only of authority but of the incorruptibility of authority in dealing with children. Added to that was a considerable distaste in society to speak of sexual matters and a general belief that the evidence of children was unreliable. Well into the twentieth century writers on criminal law were making the sort of statement which appears for instance in Kenny's - Criminal Law – 15th Edition – 1946 at pages 458 – 459, that a judge should caution the jury that “children are a most untrustworthy class of witness” Hence the rule that a judge must direct a jury to acquit if the only evidence against the accused was the uncorroborated evidence of a child.

Furthermore, presumably then, as now, many sexual assaults were committed by relatives against younger children and the desire to “hush up” any scandal in the family would have been more pronounced than it is today.

In the case of adult females the penalty for reporting a rape was to be subjected to aggressive and often vicious cross-examination before a male Judge and an all-male jury directed to her personal life, her male acquaintances and her standards of morality. If the accused was acquitted, as he frequently was, the prosecutrix was then frequently condemned in her own society as either a liar or a loose woman or both, and it must be remembered that great publicity was given to such cases.

In such circumstances it is remarkable that any women at all came forward, and there can be little doubt, despite the impossibility of finding statistics for a situation where for obvious reasons none could exist, a large proportion of rapes or sexual assaults were never reported.

No one would claim today that the role of a person alleging a sexual assault is easy but it is certainly less arduous and less open to vilification than it was. Some of the recommendations of this Committee are directed to improving further the safeguards and restraints already in place as a result of continuing efforts by various concerned groups to bring to the public and those concerned with the investigation of such offences the realisation that such allegations must be sympathetically and carefully investigated by people properly trained to do so.

The important point to make is that this change of attitude and this greater awareness of something rotten in the State (or Territory) has come about in two ways. First, by a far greater frankness and open discussion of sexuality than would have been dreamed of by our grandparents. (Some may indeed claim that this has gone too far, but we are not here talking about the extremes of pornography, but rather of the general acceptance that parents

and children should communicate freely with one another about matters which would previously have been considered too unpleasant and repulsive to be mentioned, save in whispered, dismissive and shocked tones.)

The second factor has already been mentioned, namely the persistent endeavours of various organisations, often in the face of much scorn and vilification, to bring to the attention of the public the fact that sexual abuse exists to a greater extent than is commonly recognised, that the victims of such abuse suffer severe trauma and emotional distress and have not always been treated with the sympathy and understanding which they need and deserve. As a result of the efforts of these organisations (several of which have made submissions to this Commission) much improvement has occurred, but much more is needed. It should be also noted that the greater tendency to report such crimes does not indicate an increase in those crimes but rather recognition that something previously discouraged and often suppressed is now out in the open. It is indeed possible that the incidence has in fact decreased because the events of the last decade have given greater recognition to the propensity of a small minority of those in authority to commit such crimes, and those in the governing bodies of institutions concerned with the care of children are more alert to the dangers.

In passing it should also be noted that society should not go to the other extreme of a witch-hunt based upon unproved and ultimately wrong theories. Much injustice and family tragedy has occurred in the United States of America as a result of the now discredited "recovered memory" syndrome and the events in the United Kingdom of an equally mistaken theory are now well known. These are, however, exceptions out of the usual pattern of sexual assault and should not be used to resist proper and sensible methods.

Recommendations have been made towards further training of persons involved in the investigation and legal proceedings in this area. The additional recommendation is made here that the Government should of its own motion, (say through the Office of Women's Policy) and by assistance to other specific organisations strongly promote further education, information and discussion among members of the public.

In the opinion of the committee this is vital. Much has been done, but the impetus already given by organisations, such as those who made submissions to this Committee, must be maintained.

There is already a precedent, namely the campaign sponsored by the Government against family violence. It does appear that the campaign has achieved significant success although much more must be done.

Publicity relating to sexual assaults is the paradigm case where no magic wand will solve matters overnight but where, more than any other formula, one can predict a gradual but sure change in public opinion. And one can predict that because of the changes already accomplished. It is the one movement where, perhaps more slowly than one would wish, but inexorably, will guarantee greater and greater safety for our children. For reasons

already given it may be too much to say that sexual abuse of children will be clearly eliminated. But we are confident that the incidence will greatly reduce and the preparedness to recognise and report such cases will greatly increase.

RECOMMENDATIONS:

1. That the Government sponsor a vigorous campaign to educate and alert the public to the tragedies and traumas experienced by victims of sexual assault, particularly children, to the means of identifying such cases and to the necessity to report such cases.
2. That the Office of Women's Policy be asked to co-ordinate with other organisations the appropriate publicity and education.