ACT Law Reform Commission

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Report No 18

# REPORT ON THE LAWS RELATING TO SEXUAL ASSAULT

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# REPORT ON THE LAWS RELATING TO SEXUAL ASSAULT

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## PREFACE

1. On 28 January 1993 the ACT Community Law Reform Committee, as the Commission was then known, was asked to review the laws in force in the Territory in relation to sexual assault and to report on desirable changes to existing laws, practices and procedures.[1] The Committee subsequently embarked upon a wide ranging examination of the relevant issues, an extensive program of consultation and a careful review of the available literature.

2. A lengthy discussion paper was issued in September 1997 canvassing relevant issues and seeking to dispel common misconceptions. The paper also identified various problems and offered a range of alternative proposals for dealing with them. It was intended to facilitate a more informed and constructive debate about the relevant issues.

3. A further discussion paper was issued by the Commission in August 1998 with a more specific legislative focus. It addressed the adequacy of the existing provisions of the *Crimes Act 1900* in its application to the Australian Capital Territory ('the Crimes Act') and suggested a number of changes. The manner in which each offence was defined was considered and the maximum penalties were reviewed. It also discussed the implications of certain procedural and/or evidentiary provisions that currently govern the prosecution of offences of this kind.

4. These papers generated considerable comment. Written submissions were received from some individuals and organisations with particular knowledge and experience of problems encountered in this area and others were consulted verbally.

5. During recent years this area of the law has been the subject of debate and controversy throughout much of the western world. It has received attention from governments, law reform bodies, academics, feminist writers and those involved in providing counselling and support for victims. Consequently, the Commission has been able to draw upon a vast body of literature. In addition, it has had the benefit of informal consultations with police, prosecutors and others involved in the investigation and prosecution of offenders. The Criminal Law Consultative Committee has also made further valuable suggestions.

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[1] A copy of the terms of reference have been incorporated as Appendix A.

6. The present report follows the same general format as the second discussion paper and has a similar legislative focus. In the interests of avoiding unnecessary duplication the analysis of the wider issues contained in the earlier discussion paper has not been reproduced. However, the present proposals for reform should be considered in the context of the issues raised in that paper and the different views and arguments canvassed.

7. The report is divided into six chapters. Chapter 1 is an introductory chapter which refers to some of the concerns expressed about the legal system and seeks to identify some of the conflicting considerations with which the Commission has grappled. Chapter 2 is devoted to a discussion of the nature of the relevant offences created by the *Crimes Act 1900* in its application to the Australian Capital Territory. Other relevant provisions such as those relating to the concept of consent are discussed in chapter 3. Procedural issues are discussed in chapter 4 and evidentiary issues in chapter 5. In each case, the existing law is identified, anomalies or other difficulties highlighted and, where considered appropriate, proposed changes suggested. Chapter 6 briefly makes the point that legislative change can never be sufficient to meet every need and there is a need to address other issues such as the need for adequate funding for counselling services and the provision of court facilities.

8. The Commission gratefully acknowledges the assistance it has received from the many individuals, government agencies and other bodies and organisations, whether informally or by means of written submissions made in response to the discussion papers.[2] The process of consultation has revealed a wide range of concerns including the nature and extent of sexual assault, community attitudes and perceptions, the need for education concerning the impact of sexual assault and the need for greater understanding of why victims might act or not act in a particular manner. Particular concerns have been expressed about the need to understand the vulnerability of children, intellectually handicapped people and those from different cultural backgrounds. Submissions have also been made concerning the need for counselling, support and compensation. Some of these issues fall outside the ambit of the Commission's terms of reference and the report has been substantially confined to an examination of issues relating to the nature of the various offences, appropriate sentences, the rules of evidence and the procedures employed in prosecuting alleged offenders.

[2] A list of those who made written submissions to the Commission has been incorporated as Appendix B. It has not been practicable to provide a list of all of those consulted verbally, some of whom did not wish to be named. However, the Commission is nonetheless grateful for their assistance.

9. It has not been practicable to address all of the points made in each submission separately but all of the views advanced have been considered. In some instances the Commission has adopted suggestions and incorporated them into its own recommendations. In others, it has supported the objective identified in the submission but has been obliged to conclude that the particular measure proposed would be ineffective or create further difficulties. In yet others, it has been apparent that submission reflected some misunderstanding of the existing law or the nature of a proposal for reform. For example, the 1998 discussion paper was greeted by vehement protests about what some people plainly thought was a proposal to remove a privilege relating to the disclosure of counsellors' notes. In fact, there is no such privilege and the Commission was proposing that one should be created.[3]

10. On some issues significant differences of opinion were revealed. For example, some opposed the use of victim impact statements in sexual assault cases on the basis that their use suggested that some victims were more important than others, whilst others supported them on the basis that victims wanted courts to know what they had suffered and/or that they were necessary to reveal the devastating impact of crimes of this nature. Where such major areas of controversy have been identified the Commission has generally attempted to include a summary of the competing arguments.

11. Ultimately the Commission is charged with the duty of forming its own conclusions and offering its own recommendations. The conclusions expressed in the report reflect the considered views of the present members of the Commission formed after carefully weighing those issues and considering the various submissions. However, both the Director of Public Prosecutions and the Chief Executive Officer of the Legal Aid Office have expressed their support for those conclusions. The former is, of course, responsible for the effective prosecution of sexual offences whilst the latter is responsible for ensuring the legal defence of many people charged with such offences. It is pleasing to note that there is substantial agreement from people on both sides as to the appropriateness of the reforms proposed in this report. The Commission commends them to the Assembly.

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[3] See paragraphs 331 et seq.

# 1 INTRODUCTION

12. The prevalence of sexual assault throughout Australia and in other western democracies remains deeply disturbing. Crimes of this nature involve devastating personal violations and cause longstanding emotional damage. The crime has been said to be essentially concerned with power rather than sex. The very act of sexual assault leaves complainants[4] feeling humiliated and debased. Some speak of having been 'defiled' or 'sullied'. Others speak of an invasion not just of the body but of the sense of self or integrity as a person. The offence is often accompanied by abuse and other degrading behaviour and sometimes by gratuitous violence. In an age in which the risk of AIDS and other grave sexually transmitted diseases cannot be discounted, sexual assaults may even be fatal. If complainants are able to survive the assaults without being left with serious physical injuries or disease they will nonetheless be left with a legacy of trauma and fear. They may be afraid of the offenders returning, afraid of further assault whether by them or others and in some cases left in a state of generalised apprehension or foreboding. They may feel that an inescapable pall or shadow has been cast over their lives. Their activities may be constrained by fear of going out alone especially at night and they may be afraid of relationships and sexual intimacy. Some complainants may be left with an all-pervading sense of shame. Those from certain ethnic or cultural backgrounds may find themselves stigmatised and rejected. Whilst it may leave no superficial or obvious marks of injury, sexual assault causes deep wounds and complainants may bear emotional scars for the rest of their lives.

13. The nature and extent of the harm caused by sexual assault lends added emphasis to the need to ensure that the law affirms the basic right to protection from assaults of this kind and provides for the fair but effective prosecution of those who infringe such rights. It also gives rise to an obvious need to ensure that the processes of the law reflect due recognition of the special needs of complainants and avoid causing further unnecessary trauma to those already suffering.

14. The process of consultation confirmed the fact that complainants of sexual assault frequently find their participation in the legal process an alienating experience. Indeed, many feel that it has significantly compounded the trauma they have suffered[5]. Some of the submissions reflected significant scepticism

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[4] The term 'complainant' is used in trials for offences of any kind to avoid any appearance of prejudgment. It means a person upon whom an offence has allegedly been committed even if that person did not actually make a complaint. It has generally been used throughout this report to avoid the need to use cumbersome phrases such as 'victim or alleged victim'.

[5] This feeling was reflected in several submissions and has been documented in numerous articles concerning complainants of sexual assault.

concerning the ability of the legal system to deal with allegations of sexual assault in an informed, sensible and fair manner. This scepticism obviously involves more than mere misgivings about the current state of the law or criminal procedure. It extends to a belief that judges, jurors, magistrates and lawyers are prone to act upon misconceived stereotypical views about sexual assault and the behaviour of complainants and that the law and the legal process both reflect and entrench such views.

15. This lack of confidence in the judicial process, which appears to exist throughout the western world, is a matter of profound concern. People who have been complainants of sexual assault should be entitled to look to the law for justice and protection. The processes they encounter should be as supportive and reassuring as circumstances permit. Practical help and emotional support should be provided. Their rights and options should be clearly explained. Legal proceedings should be conspicuously fair with cases being decided solely on the evidence and without recourse to stereotypical views. Penalties should be adequate to reflect the gravity of the crime. Of course, these have long been recognised as objectives of the criminal justice system and in the past two decades numerous reforms have been implemented in order to make that system more conducive to their attainment. Why then are there still heartfelt expressions of disquiet?

16. As the diversity of submissions demonstrates, there can be no single answer to this question. There is a plethora of issues relating to the nature of the offences created by the *Crimes Act*, the concept of consent, means of proof, prior sexual history, evidence of complaint, corroboration and procedural matters such as obtaining evidence by video link. Nonetheless, the most fundamental concerns seem to relate to the perceived prejudices of judges, lawyers and jurors. This concern has been fuelled by occasional reports of comments by judges or magistrates which appear to have been lamentably sexist or to have reflected an outmoded or discredited view of human relationships. It also reflects the distress frequently caused by cross-examination suggesting that the complainant has lied about what occurred and apparently invoking stereotypical views of the kind so rightly decried. Furthermore, there are no doubt many cases in which complainants have been left feeling hurt and bewildered because although they told the truth the accused was found not guilty. These problems may be compounded by the feeling that they were 'thrown to the wolves' once the trial started and that more should have been done to protect them from further trauma.

17. Neither the reality of these concerns nor the fact that there is a real basis for them can sensibly be doubted. However, it is one thing to acknowledge the validity of the concerns and another to find adequate solutions. Community attitudes have changed over the past few years and most judges now warn juries to put aside any stereotypical views they may have and decide the case without recourse to

prejudice or presupposition. Nonetheless, criminal charges have to be proven beyond reasonable doubt and when there is little more evidence as to the decisive issue in a case than the word of one person against that of another it may be difficult for a jury to be satisfied to that standard. The risk that the guilty will sometimes be acquitted is an inevitable corollary of the criminal justice system.[6] Similarly, whilst the very process of giving evidence can be distressing and complainants frequently find cross-examination quite traumatic, that problem is to some extent unavoidable in proceedings conducted within an adversarial system of justice.[7]

18. Whilst this is well understood in other contexts, acquittals may leave complainants hurt and bewildered. They may be left with feelings of having been further abused by the trial process, rejected by a patriarchal court which did not want to listen or even stigmatised as a scheming liar. Such responses are vividly conveyed by Prof Alison Young who refers to a number of cases in which there had been acquittals and, after alluding to the legend of Philomela described in *The Metamorphoses of Ovid*, concludes that: 'Closing its dirty ears, law is deaf to the accusations of rape, and silences woman, replacing her tongue with the pathos of wordless song, inarticulate sound, non-language, the pain of alterity.'[8] It is important that the feelings underlying such statements be understood and respected. The Commission is acutely aware of the need to consider any reforms in the light of the anguish experienced by complainants by the trial process.

19. However, an alleged offender is not tried by some abstract entity known as 'the law' but by twelve men and women drawn from the community to try the particular case.[9] When the charge is one of sexual assault they usually hear two people, each of whom is a complete stranger to them, give contradictory evidence about an incident that occurred some years before the trial. If they are unable to be satisfied beyond reasonable doubt that one account is true and the other is not then that does not mean that they have closed minds or 'dirty ears'. Of course, jurors

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[6] Of course, there is also a risk of wrongful conviction as the Australian cases of Chamberlain, Splatt, McLeod- Lindsay, Anderson, and others demonstrate. For a discussion of such cases see, *Travesty!*, ed by K. Carrington, M. Dever, R Hogg, J. Bargen & A. Lohrey, Academics for Justice, Macquarie University, Sydney, 1991 and Brown, M., & Wilson, P., *Justice and Nightmares, Successes and Failures of Forensic Science in Australia and New Zealand*, N.S.W. University Press, Sydney, 1992. See also *Report of the Inquiry held under s. 475 of the Crimes Act 1900 into the conviction of Johann Ernst Siegfried Pohl at Central Criminal Court on 2nd November, 1973: Mr Justice McInerny*, Sydney, 1992.

[7] This does not mean, of course, that there should be no constraints on the nature or extent of the cross-examination that should be permitted. See, for example, the discussion at paragraphs 269 to 284.

[8] Alison Young in 'The Waste Land of the Law, The Wordless Song of the Rape Victim', [1998] *Melbourne University Law Review*, Vol 22, at 442.

[9] Most sexual offences are triable on indictment before a jury though some may be dealt with summarily before a Magistrate. See paragraph 261.

may be subject to the same human frailties as other people and the possibility that prejudice may have played some part can never be wholly excluded. However, in most cases the verdict will merely reflect the fact that having conscientiously considered all of the evidence in the case they could not be sure of the guilt of the accused and were constrained to give him or her the benefit of any reasonable doubt.

20. Similar problems are encountered in the prosecution of other offences allegedly committed when only the complainant and accused were present. For example, in 1999/2000, 53% of the charges of non sexual offences against the person and 55% of the charges of sexual offences were found proven.[10] In some cases those charged may have been innocent and in others guilt may not have been proven to the requisite standard but any assumption that acquittals are generally due to prejudice or bias on the part of jurors would be quite unjustified.

21. Any examination of the issues involved in the reform of the relevant law and procedure provides a stark reminder that a perfect system of justice still eludes human ingenuity. Allegations of sexual assault usually arise in circumstances where there are unlikely to be any independent witnesses and the allegations are likely to be vehemently disputed. Where drugs or alcohol were involved there may be issues concerning the reliability of evidence given by even the most apparently truthful witnesses. Perceptions may vary and later memories of those perceptions may vary even more. Furthermore, the jury must act on its own impressions of the witnesses. Hence, it has been said that findings of fact, whether by a judge or a jury, are at best the court's "belief or opinion about someone else's belief or opinion".[11]

22. These problems almost inevitably lead counsel for both sides to ask questions about the events leading up to and immediately following the incident in question and other circumstances that may be relevant. Complainants are likely to be cross-examined about any aspect of their conduct that defence counsel think may cast doubt on their accounts of the incidents. Indeed, the rule in *Browne v Dunn* generally requires counsel to put to a witness any allegations of facts or circumstances by reason of which he or she may later contend that the witness's evidence should not be accepted. This is a rule of fairness intended to give the witness the opportunity to deny the suggestions or otherwise answer the proposed criticism. However, especially in the context of a sexual assault trial, cross-examination suggesting that a complainant has lied on oath is inevitably distressing.

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[10] *Director of Public Prosecutions, Annual Report*, 1999/2000, tables 2 and 3.

[11] Jerome Frank, *Courts on Trial*, Princeton University Press, 1949 at 22.

23. In recent years there have been numerous attempts to reform the law in order to provide some protection for complainants. These have included:

- restrictions on cross-examination about sexual history;
- abrogating the common law rule requiring judges to give directions as to corroboration;
- permitting evidence to be given in camera and/or by means of closed circuit television;
- prohibiting publication of the identities of complainants without their consent; and
- amending the substantive law in various respects.

16. Yet despite the attention which this problem has received from law reform bodies, academics, feminists and others, no wholly adequate means have been found of overcoming this problem in a manner compatible with the conduct of fair and effective trials. An understanding of what is sometimes described as the Locard exchange principle[12] and significant advances in forensic science have enabled more perpetrators to be identified and offences proven than would have been possible in earlier years. Yet it remains true that the outcome of criminal trials is still largely dependent upon the evidence of eye-witnesses and in sexual assault cases this almost invariably means that complainants are required to give evidence.

17. It must be acknowledged that those seeking to review this area of law inevitably encounter profoundly difficult questions. It is not always possible to reconcile competing considerations of public interest and in some areas there are opposing views as to where the balance should lie or even as to whether any balance should be attempted[13]. It must also be acknowledged that there are some problems for which the law can provide no wholly adequate answers. The law cannot provide any real anodyne for the pain of complainants of sexual assault. At best it can seek to punish offenders and compensate complainants. Yet it is a fundamental principle of the criminal law that no person be punished for a crime unless his or her guilt has been proven in a fair trial and there is presently no means of proving the relevant facts without the complainant giving evidence, being cross-

[12] This refers to the process of people leaving behind mute evidence of their presence such as hairs, tiny flakes of skin or bodily fluids and taking away inadvertent souvenirs of things they have touched such as dust, paint flakes or traces of blood.

[13] See for example, Ashworth, A., 'Crime, Community and Creeping Consequentialism' *Criminal Law Review* April 1996, 220-230 at 229. This aspect is also discussed in the submission by Dr Easteal.

examined and hence being exposed to the risk, if not the certainty, of further emotional trauma. Nonetheless, the Commission has sought to find further means of making the law more fair and effective and ameliorating the plight of complainants.

18. Rather than proceed on a piecemeal basis the Commission has attempted to provide a concise analysis of all of the relevant legislative provisions and to review their implications for the prosecution of offences of this character. Such a review has involved a need to ensure that theoretical issues do not obscure more pragmatic considerations. A penal statute such as the *Crimes Act* is intended to provide protection for the community by facilitating the effective prosecution of offenders. It does so by creating specific offences, defining the relevant legal principles and prescribing appropriate penalties. Some submissions put forward proposals which seemed to reflect assumptions that statutes should contain explanations of the philosophy underlying particular provisions, factual examples of how such provisions might apply or general observations about how people might be expected to behave or not behave in particular situations. However, there is an extensive body of jurisprudence governing the interpretation of statutes and the injection of material that might be appropriate in other contexts without regard for that jurisprudence may have unintended consequences. Statements of the kind suggested are sometimes included in explanatory memoranda but they fall outside the normally accepted scope of statutory provisions and their inclusion might be more likely to confuse than clarify.[14]

19. Any reforms should be conducive to, or at least compatible with, the fair and efficient prosecution of alleged offenders. Furthermore, whilst the criminal law necessarily involves principles of general application, legislative provisions should be drafted in terms which will provide sufficient flexibility to avoid injustice when unexpected circumstances are encountered. It has been observed that:

> 'a lawyer must always decide what to do in the circumstances she confronts, not those the system designer imagined she would confront'[15].

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[14] Statutes creating criminal offences are 'strictly construed' and if there is any potential ambiguity the interpretation most favourable to the accused is usually adopted. The inclusion of philosophical statements might result in arguments that other statutory provisions should be read down to the extent necessary to give effect to the philosophical considerations stated and, in turn, to arguments about the nature of the considerations conveyed by the words used in the Act. Similarly, the use of examples might lead to arguments that the more general words of the section should be interpreted by reference to the circumstances posited and that the application of the section should be confined to situations of the same general kind. It might also be observed that whilst examples may assist non-lawyers to understand general concepts they rarely assist courts to determine whether the principle they are intended to illustrate is sufficiently broad to encompass particular circumstances or to resolve other crucial issues of judicial interpretation.

[15] Wilkins, DB., 'Legal Realism for Lawyers' (1990) 104 *Harvard L.Rev.*, 468 at 475-6.

20. Decisions of judges and juries are constrained by law. If the law is too inflexible, injustice may become unavoidable. It is also important to bear in mind that juveniles and mentally dysfunctional people are frequently charged with serious criminal offences and there is a need to ensure that the criminal justice system treats them fairly. Legislative provisions based upon assumptions that people accused of serious criminal offences must have had certain knowledge or understanding may be entirely fair when applied to an adult of normal intelligence but quite unfair when applied to someone with the mental age of a five year old child or a perception of reality distorted by severe mental illness.

21. The incidence of mental illness and drug and alcohol abuse also give rise to incidents attended by seemingly bizarre circumstances. Indeed, courts with criminal jurisdiction frequently deal with cases involving apparently novel or unusual situations. The risk of injustice occurring due to the unintended implications of laws enacted with other situations in mind are sometimes dismissed on the basis that such risks rarely arise and, when they do, can be dealt with by the exercise of judicial discretion or the imposition of lenient penalties. However, for a number of reasons responses of that kind are generally inadequate.

22. First, the prevalence of such cases may be greater than most people would anticipate. The enormous increase in the number of mentally ill people returned to the community rather than being treated in psychiatric hospitals has caused a corresponding increase in the incidence of aberrant behaviour. This has been compounded by the constant escalation in drug abuse. Now that other community 'safety nets' have been substantially removed such people tend to fall into the criminal justice system in disproportionate numbers. They usually come before the courts as defendants but it is not uncommon for mentally ill people to make unjustified and irrational complaints about other people. For example, allegations of treason and other criminal behaviour are from time to time made against ministers and other government leaders on grounds that are entirely spurious. There is no reason to suppose that mentally ill people are incapable of making irrational claims of sexual abuse as well as treason, murder, torture and other serious criminal offences. Furthermore, even perfectly rational people sometimes find themselves in situations that may not have been easily foreseen by a legislature at the time the relevant legal provision was enacted. The prevalence of particular situations may also be affected by changing social mores and customs and these cannot always be predicted.[16]

23. Secondly, significant risk of unfairness to mentally dysfunctional or retarded people or others should not be accepted even if the prevalence of such cases

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[16] For example, few legislatures would have predicted the advent of 'designer' drugs or rave parties, and anticipated their impact upon the sexual mores of young people.

proved to be relatively low. The likelihood of injustice should not be accepted merely because it can be reasonably anticipated that it will occur only rarely. As responses to the wrongful convictions of individuals such as Lindy Chamberlain, 'Ziggy' Pohl and Alexander McLeod-Lindsay tend to confirm, there is a public perception that injustice to even one person charged with a criminal offence is unacceptable.

24. Thirdly, the suggested remedies of judicial discretion and/or lenient sentences do not provide adequate means of redressing the injustice of an inappropriate conviction. There is no judicial discretion to direct an acquittal merely because the judge believes that the person charged should not be convicted for acting as he or she did in the circumstances then prevailing.[17] A criminal conviction may cause enormous shame and embarrassment and ruin a person's career and reputation even if the penalty imposed was unusually lenient.

25. For these reasons penal statutes should be drafted in a manner calculated to ensure not only that those at whom they are directed do not fall through the legislative net but that others are not inadvertently caught in it. Having carried out a comprehensive review of the relevant legislation, the Commission has been obliged to conclude that some of the earlier attempts to reform this area of the law seem to have been successful but others have failed to deliver the advantages apparently anticipated. In some cases the stated objectives have not been achieved and the measures relied upon to achieve them have produced confusion and/or potential for injustice in certain circumstances. In the end result the guilty have not always been well targeted nor the innocent kept out of the line of fire.

26. Such conclusions are bound to cause concern and disappointment to those who had optimistic expectations of the provisions in question. However, neither past optimism nor present regret offer any sound reason for retaining legislative provisions which have proven ineffective. Risks of people being wrongly convicted or acquitted, of complainants having to give evidence again unnecessarily and of confidence in this area of the law being further eroded are all too grave to permit the retention of legislative provisions which are not conducive to fair and efficient trials. Hence, the Commission has sought to examine each provision by reference to such practical considerations as its impact upon the fair and efficient trial of alleged

[17] For example, if it were proven that the accused and the complainant had sexual intercourse whilst she was only 15 years of age there would be no judicial discretion to order an acquittal on the basis that they had been married in accordance with traditional laws of a particular cultural or ethnic group, the complainant was a willing party to the sexual acts in question, she was 30 by the time the matter came to the attention of the authorities, remained committed to the marriage and was vehemently opposed to any prosecution of her husband.

offenders and the prescription of adequate penalties. In doing so it has sought to address the special issues that arise in relation to prosecutions for sexual assaults of various kinds and to take into account the concerns raised in submissions and discussions.

27. Because of their gravity, offences involving sexual assault are usually prosecuted on indictment. The procedures followed are essentially the same as those employed in the prosecution of other very serious criminal offences such as murder or armed robbery and any consideration of this area of the law involves many of the same considerations. Consequently, the Commission has been guided by a number of principles, which might be regarded as being of general application. These include the following:

- Offences should be defined by the statute so that the basis on which a person may be liable for conviction and punishment can be clearly understood and undue technicalities avoided;

- The relevant provisions should together form a consistent legislative scheme adequately covering the whole range of behaviour sought to be prohibited and should provide a consistent range of maximum penalties commensurate with the relative gravity of the varying offences;

- The rules of evidence and procedure should be conducive to trials which are both fair and efficient; and

- The relevant legal principles should be sufficiently clear to be capable of explanation in terms comprehensible to a jury.

28. However, in view of the special considerations that arise in relation to prosecutions for sexual offences and the Commission has been guided by two further principles, namely:

- The trial should be conducted with a view to reducing any risk of prejudgment based on stereotypical views; and

- The rules of evidence and procedure should incorporate such measures as are reasonably available to protect complainants and other vulnerable witnesses from further psychological or emotional damage without jeopardising the essential fairness of the trial.

## 2. OFFENCES UNDER PART 3A of the CRIMES ACT

### *INTRODUCTION*

29. Part 3A of the *Crimes Act*, 1900 is devoted to sexual offences. It creates a series of offences involving:

- sexual assault;
- sexual intercourse without consent;
- sexual intercourse with young people;
- maintaining sexual relationships with young people;
- acts of indecency;
- incest;
- abduction for the purpose of engaging in sexual intercourse; and
- child pornography.

16. It also contains a number of other provisions defining sexual intercourse, providing that consent should be taken to have been "negated" in certain circumstances, abrogating any presumption of incapacity to engage in sexual intercourse due to age, and confirming that the marriage of an offender and complainant offers no bar to conviction. In addition, there are provisions relating to the joinder of offences.

17. This chapter is concerned with the nature of the offences so created and the manner in which they have been defined. A discussion of the other provisions of this Part has generally been left to the next chapter, though issues relating to the definition of various terms including 'sexual intercourse' have been dealt with in the present chapter because of their obvious relevance to the ambit of the offences discussed. Whilst the offences are discussed separately, it has been necessary to examine Part 3A as a whole with a view to determining whether it provides a comprehensive legislative scheme of offences, reflects sound legal policy and is conducive to fair and effective prosecutions.

### *STATUTORY DEFINITIONS*

18. It is obviously important for terms used in the *Crimes Act* to be defined with precision so that the nature of the offences described by reference to them can be clearly understood. The relevant concepts must be clearly explained to juries so that they may make sensible judgments as to whether conduct proven by the evidence falls within their ambit. If the definitions are not sufficiently clear then time may be wasted whilst argument ensues as to the meaning of words or phrases used in the

indictment and if the explanation is inadequate or incorrect then any convictions may be set aside on appeal and new trials ordered.[18] It is plainly undesirable to permit trials to be interrupted by lengthy semantic arguments, to risk verdicts based upon confusion as to the relevant legal principles, or to have complainants being forced to give evidence again after convictions have been set aside upon appeal.

19. The Commission has examined the existing statutory provisions with due care and has concluded that whilst some of the terms may convey the general meaning intended they do not provide a sufficiently precise or appropriate delineation of the concept in question. This problem is particularly acute in relation to the provisions dealing with the concept of consent but also arises to some extent in relation to the terms employed in defining various offences.

### *Sexual intercourse*

20. The concept of `sexual intercourse' has been expanded by the terms of section 92 to mean the following:

> (a) *the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except where that penetration is carried out for a proper medical purpose or is otherwise authorised by law;*
>
> (b) *the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except where that penetration is carried out for a proper medical purpose or is otherwise authorised by law;*
>
> (c) *the introduction of any part of the penis of a person into the mouth of another person;*
>
> (d) *cunnilingus; or*
>
> (e) *the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d).*

21. This expanded definition has the consequence that many sexual acts of a kind which would once have been prosecuted as indecent assaults or acts of indecency may now be prosecuted as sexual intercourse without consent or other offences in which sexual intercourse is an element.

22. It has been suggested that this consequence may tend to inappropriately trivialise or at least derogate from the gravity formerly attached to offences of rape. This suggestion seems to be based upon the view that penile penetration involves a

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[18] See, for example, *R v Clark (* unreported) NSW Court of Criminal Appeal BC 9801258, 17 April 1998.

more serious violation than the other acts stipulated, possibly because it may give rise not only to the risk of pregnancy and venereal disease but AIDS, whilst other assaults of the kind mentioned are unlikely to have the same long term consequences. On the other hand, it has been argued that such a comparison involves an inappropriate preoccupation with physical consequences and that the devastating psychological trauma is at least equally important. It may also be argued that the real gravamen of offences of this kind lies in the abuse of power by wrongfully violating another person's body irrespective of the precise nature of that violation. The nature of the act may, in any event, be considered in relation to the severity of the sentence imposed in relation to such an offence and any consequences such as the contraction of disease may be taken into account as aggravating factors.

23. Having considered these competing arguments, the Commission has concluded that it would be appropriate to maintain the approach presently reflected in section 92 of providing a limited expansion of the concept of sexual intercourse for the purposes of the statute.

24. In particular, whilst paragraph (c) of the definition refers to 'the introduction of any part of the penis of a person into the mouth of another person' it has been suggested that it should extend to any act of fellatio whether or not involving actual penetration of that kind. The Commission recommends that the concept be extended to include any contact between the penis of the offender and the mouth of another person.

***Vagina***

25. The Child at Risk Assessment Unit has suggested that a further definition be provided giving the word 'vagina' a meaning extending to include penetration of the external genitalia. It has been suggested that children often describe penetration of the labia by reference to having been 'touched inside' and such an act appears to cause equal trauma. It can be both difficult and distressing to have a child witness give evidence with a view to distinguishing between penetration of the vagina and penetration of the labia and there is no apparent reason for excluding the latter from the concept of 'sexual intercourse'.

26. The corresponding Victorian legislation contains a provision extending the meaning of the term 'vagina' to embrace both concepts. However, the Commission is of the view that it would be more straight forward to amend the definition of 'sexual intercourse' to include penetration of the labia. It also recommends that any the section should also make it clear that the word 'vagina' includes a surgically constructed vagina.

***Rape***

27. When Part 3A of the Crimes Act was substantially revised in 1985 it was apparently assumed that it was desirable to dispense with the word 'rape' and replace it with the phrase 'sexual intercourse without consent' which, of course, conveyed the same legal meaning. It was presumably thought that a change in terminology might lead to a change in community perceptions. However, complainants almost invariably speak of having been 'raped' rather than describing what has been done to them by the more cumbersome though equally descriptive words of the section. There seems to have been no widespread abandonment of the term within the community generally. Whilst it is true that language may play a part in shaping or maintaining community perceptions, this change in statutory terminology unaccompanied by any corresponding change in general usage does not seem to have had any significant impact upon inappropriate views about sexual assault.

28. Furthermore, there is a countervailing view that any such change has been counter-productive because it has tended to diminish perceptions as to the gravity of the offence. Conversely, the term' rape' may more effectively convey the full horror of the crime and appropriately stigmatise the perpetrator as a 'rapist'. It has also been suggested that the use of the term 'sexual assault' accompanied by gradations of offence based upon the degree of violence may have further downgraded the perceived gravity of rapes unaccompanied by violence of the kind stipulated[19].

29. The term 'sexual penetration without consent' is used in Western Australia and the Model Criminal Code Officers' Committee of the Standing Committee of Attorney's-General ('MCCOC')' has suggested adoption of the term, 'unlawful sexual penetration'. In making that suggestion MCCOC referred to a number of competing arguments but ultimately concluded that 'the phrase provides a concise, accurate and readily understood encapsulation of the offence'.[20] However, this phrase would not always be an accurate description of conduct falling within the extended definition of sexual intercourse contained in section 92, especially if further extended as the Commission has recommended. Whilst it would be possible to provide a statutory definition of sexual penetration which extended the concept to acts involving no penetration at all, the incongruity between that term and

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[19] S Bronitt, Editorial, "The Direction of Rape Law in Australia: Toward a Positive Consent Standard", October 1994, *Criminal Law Journal*, 249 at 249.

[20] Model Criminal Code Officers' Committee of the Standing Committee of Attorney's-General, Chapter 5, Report, 'Sexual Offences Against the Person', May 1999, at 55-65.

non-penetrative acts alleged to constitute the offence might cause confusion and, perhaps, a reluctance by some jurors to convict.

30. The term 'sexual assault' is still used in New South Wales and 'sexual intercourse without consent' is used in the Northern Territory. In other Australian jurisdictions the offence of having sexual intercourse with another person without that person's consent is called 'rape'. The word forms part of the name, 'The Canberra Rape Crisis Centre', is used by others involved in assisting 'rape' complainants and is also commonly employed in academic articles and debate. Indeed, it was used in most of the submissions to the Commission. As previously mentioned, the word is almost invariably used by complainants and it seems inappropriate for them to be repeatedly corrected when the word is so widely understood and in much more common usage than the statutory euphemism currently used in ACT courts.

31. Accordingly, whilst acknowledging that there are divergent opinions which may be strongly held and reasonably based, the Commission accepts that the use of the term 'rape' is an appropriate means of referring to an offence of engaging in sexual intercourse (as defined in section 92) without the other person's consent, knowing that the other person does not consent or being reckless as to whether that other person consents. It is recommended that the term be recognised by the addition of a further statutory definition.

32. The term has been employed throughout this report for convenience and clarity.

### *Other terminology*

33. The Criminal Law Consultative Committee has suggested that the term, ‘act of a sexual nature’, be defined to make it clear it extends to an act of sexual intercourse or an act of indecency. The Commission agrees that it might be useful to have this term defined in this manner.

34. It was also suggested that the term, ‘complainant’, be defined to mean a person upon whom an offence is alleged to have been committed. This term has long been used in criminal trials and its meaning is well understood to lawyers. However, the Commission agrees that it should be defined as suggested.

35. The Commission also considered suggestions that the terms, ‘child’, be defined to mean a person under the age of 13 years, the term, ‘young person, be defined to mean a person under the age of 16 years and that the term ‘person’ be defined to make it clear that it encompassed children and young people as well as adults. However, the term ‘child’ is presently defined in section 4 to mean a person under the age of 18 years and it may be confusing to attribute different meanings to

the same term in different parts of the Act. On the other hand, the term, 'young person' is already defined in sections 92EA, 92NA and 92NB to mean a person under the age of 16 years though in each case the definition applies only to the section in question. It would be preferable to insert such a definition in section 92 so that it would apply to the whole of Part 3A and to repeal the definitions in the other sections providing for more limited applications. The Commission is of the view that a definition of the word 'person' is probably unnecessary but accepts that it would remove any ground for a suggestion that the legislature may intended to use the word in contradistinction to the terms 'child' or 'young person'.

**RECOMMENDATION 1**

The Commission recommends:

(a) that paragraphs (a) and (b) of the definition of 'sexual intercourse' in section 92 be amended in each case by adding a comma and the word 'labia' after the word vagina and before the words 'or anus'.

(b) that the words 'and any contact between the penis of the offender and the mouth of another person' be added to subparagraph (c) of the definition of 'sexual intercourse'.

(c) that the following definitions be added to section 92:

- ***act of a sexual nature*** means sexual intercourse or an act of indecency;
- ***complainant*** means a person upon whom an offence is alleged to have been committed;
- ***person*** includes a child or a young person;
- ***rape*** means an offence under section 92D;
- ***vagina*** includes a surgically constructed vagina; and
- ***young person*** means a person under the age of 16 years.

(d) that sections 92EA, 92NA and 92NB be amended to remove the definition of 'young person' from those sections.

### *SEXUAL ASSAULT AND SEXUAL INTERCOURSE WITHOUT CONSENT*

16. In the Australian Capital Territory the single offence of rape has been replaced with a series of sexual offences. Six of these offences are based upon the infliction or threatened infliction of bodily harm or assault with intent to engage in

sexual intercourse with another person. In each case the maximum penalty is dependent upon the degree of actual or threatened harm and whether the offender was acting in company with others. There are also two offences of sexual intercourse without consent, the second involving the additional element of the offender acting in company with others.

17. These offences are defined in the following sections:

*92A Sexual assault in the first degree*

> *(1) A person who inflicts grievous bodily harm upon another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby is guilty of an offence punishable, on conviction, by imprisonment for 17 years.*
>
> *(2) A person who, acting in company with any other person, inflicts, or assists in inflicting, grievous bodily harm upon a third person with the intent that the first-mentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 20 years."*

*92B Sexual assault in the second degree*

> *(1) A person who inflicts actual bodily harm upon another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.*
>
> *(2) A person who, acting in company with any other person, inflicts, or assists in inflicting, actual bodily harm upon a third person with the intent that the first-mentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 17 years.*

*92C Sexual assault in the third degree*

> *(1) A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, another person with intent to engage in sexual intercourse with that other person, or with a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years.*
>
> *(2) A person who, acting in company with any other person, unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, a third person with the intent that the first-mentioned person, or any person with whom he or she is in company, should engage in sexual intercourse with that third person, or with*

*any other person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 14 years.*

*92D Sexual intercourse without consent*

(*1) A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.*

*(2) A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.*

### *The nature of the offences*

16. The offences created by sections 92A and 92B are constituted by the infliction of bodily harm with the intention of engaging in sexual intercourse and, in the case of the offences created by the second subsection of each section, doing so in company with others. The offences created by section 92C are constituted by unlawful assaults or threats to inflict bodily harm, again with the intention of engaging in sexual intercourse and, in the case of the offences created by the second subsection, again doing so in company with others.

17. In each case the sections have been poorly drafted and it is difficult to determine the ambit of the offences created. It is clearly unnecessary for sexual intercourse to have actually occurred but the sections do not contain any explicit requirement for the alleged offender to have had any intent to engage in sexual intercourse without the other person's consent. Whilst section 92C stipulates that any assault must be unlawful none of the sections stipulate that the infliction of bodily harm must be unlawful.[21] However, since such harm must be inflicted with the intention of engaging in sexual intercourse, the infliction of bodily harm after a person had already been raped, whether in order to deter any complaint or simply as the result of gratuitous violence, would not constitute an offence under any of the sections 92A, 92B or 92C. These matters make it difficult to find some means of construing the sections in a manner consistent with the enactment of a coherent legislative scheme of offences.

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[21] There are many circumstances in which the infliction of actual bodily harm is not unlawful. Obvious examples are injuries inflicted in boxing matches and other sporting contests, injuries caused by acts in reasonable self defence and certain medical and surgical procedures.

### *The suggested attempt to dispense with the issue of consent*

18. It has been suggested that the enactment of offences in these terms was seen as removing the need to prove the absence of consent in sexual assault cases. The point was succinctly made in the submission by the Canberra Rape Crisis Centre and the Women's Legal Centre (ACT and Region):

> (*the) purpose … was to take the focus off the victim's behaviour, and foreclose the opportunity traditionally presented to defendants in rape trials to suggest that something the victim wore, said or did may have been taken as an indication of consent. The trauma that is caused to rape victims by the usual defence to a charge which is to argue that the victim consented, or the defendant believed she did, is now extremely well documented …Removing the issue of consent from the definition of sexual assault was therefore welcomed by many as an improvement to the criminal justice system for women*[22]*.*

19. As previously mentioned, the Commission is acutely aware that the need to give evidence and be cross-examined contributes to the trauma suffered by rape complainants. It is a matter of profound regret that the very system which is intended to provide justice should add to their pain. In recent years this consideration has led to a number of changes to the laws of evidence and procedure including restrictions on cross-examination as to a complainant's previous sexual history and provision for evidence to be given by closed circuit television. Yet, it remains true that rape complainants suffer further trauma as a result of giving evidence and being cross-examined. In this context it is understandable many would have welcomed an apparent opportunity to remove the issue of consent from trials for sexual assault. However, that objective has not been achieved by the enactment of these sections.

20. The approach adopted can be traced back to the final report of the Royal Commission on Human Relationships in 1977 which acknowledged that 'absence of consent is basic to the crime of rape'[23] but argued that there had been too great an emphasis upon that issue. The report included the statement:

> *We believe that the act of intercourse should not be singled out as the illegal act. Intercourse without consent is certainly a violation of the person which the law must condemn and punish. However rape often involves much more than mere absence of consent. The violence and threats of violence, by means of which intercourse is procured, are themselves anti-social and unlawful. We think the law should be changed to emphasise these unlawful means, rather than the non-*

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[22] Submission by the Canberra Rape Crisis Centre and the Women's Legal Centre (ACT and Region) at 21

[23] Royal Commission on Human Relationships, *Final Report*, 1977, AGPS: Canberra, vol 5 at 204.

*consensual intercourse itself, and so shift attention away from the victim and onto her assailant*[24].

21. It is clear that the Royal Commissioners intended that the law should continue to be directed at non-consensual sexual intercourse though they were anxious to secure a shift in focus. This was confirmed by the acknowledgment that there were 'inherent difficulties in *eliminating* the issue of consent' followed by the comment that the Royal Commission did not think that 'these difficulties should stop a necessary shift in the *emphasis* of the law: namely a shift away from a consideration of complainant's actions and attitudes, necessary when consent is in issue, towards a greater *emphasis* upon the actions and intentions of the offender'.[25] Nonetheless, it concluded that:

> *In our view there should be no scope for the defence of consent where sexual acts cause physical injury to the victim … This accords with the common law relating to non-sexual assaults, where consent is available as a defence to minor assaults, but not generally to assaults which cause physical injury. We do not equate unwanted intercourse with a minor assault; intercourse constitutes a much greater intrusion into the individual's freedom and equality*[26].

22. This passage seems to display some confusion of thinking.[27] First, the reference to 'the defence of consent' is misconceived: absence of consent has always been an element of the offence of rape which it is incumbent upon the Crown to prove. Secondly, sexual acts are not necessarily assaults even if injury results. For example, a couple who fall out off a bed whilst making love are not taken to have assaulted each other even if each suffers some minor injury. Thirdly, the assertion that consent is not available as a defence to assaults which cause physical injury is also misconceived: an assault with consent is not an assault at all[28] and the absence of consent is again an element of the offence which it is normally incumbent upon the Crown to prove[29]. Fourthly, the assertion fails to acknowledge that even in cases of assault occasioning bodily harm it will be necessary to prove

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[24] Ibid.

[25] supra at 205.

[26] supra at 230

[27] Ian Cunliffe made the same observation 17 years ago. See"Consent and Sexual Offences Law Reform in New South Wales" (1984) *Criminal Law Journal* 271 at 276.

[28] *R v Schloss & Maguire* (1897) 8 QLJ 21 at 22.

[29] Archbold, 43rd Ed, para 20-124.

the absence of consent in circumstances such as sport where the relevant activity is prima facie lawful[30] and sexual activity between consenting adults is also lawful. Fifthly, the passage refers 'unwanted' intercourse and intercourse constituting intrusion into an individual's freedom and equality and these concepts are plainly suggestive of non-consensual acts.

23. It should be noted that the Royal Commission acknowledged that the framework suggested might apply in relation to acts done 'with the full consent of the so-called victim or even, on occasions, at her request'. However, it expressed the optimistic view that few such cases would come before the courts and said that that those few 'should be left to the trial judge when imposing sentence'.[31] It did not explain why the consent of the 'so called victim' should be seen merely as a mitigating factor or why it thought adults needed to be protected from sexual acts done at their own request. Nor did it apparently consider the fact that in such circumstances the 'so called victim' would be liable to be convicted of the same offence by virtue of being an aider and abettor.[32] More fundamentally, it failed to acknowledge that what was being alleged in substance was aggravated rape[33] and that it was unjust to cast the net so widely that those substantially innocent of such an offence might be caught along with the guilty. Freedom from the stigma of criminal

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[30] It has been suggested that consent may not be a defence because one cannot by consent authorise another person to commit a crime. See, for example, *R v Donovan* (1934) 2 KB 498. However, this proposition seems to beg the question because it presupposes that the consensual causation of actual bodily harm would be a crime. The House of Lords has considered this issue in the context of sado-masochistic incidents of gross cruelty, deciding by a majority of 3 to 2 that absence of consent was immaterial to the offences which involved the infliction of wounds and bodily harm: *R v Brown* (1994) 1 AC 212. However, the judges who supported this conclusion did so on somewhat different bases. Lord Templeton (at 235-6) rejected the contention that acts committed for the consensual achievement of sexual satisfaction should not be a crime by distinguishing between violence which is incidental and violence which is inflicted for the indulgence of cruelty. Lord Jauncey of Tullichettle (at 244-5) concluded that consent was no answer to a charge of assault occasioning actual bodily harm unless the relevant acts fell within 'well known exceptions' such as organised sporting contests or parental chastisement. Lord Lowry (at 255) agreed with both bases and said that he would decline to add sado-masochistic acts to the list of exceptions referred to by Lord Jauncey. None of these approaches is reassuring and given such contemporary practices as body piercing the stated principles might need to be revisited. Furthermore, Lord Templeton's approach would not support the conclusion that consensual sexual acts constitute unlawful assaults if any injury caused was merely incidental.

[31] *R v Brown*, op.cit

[32] See section 345 of the *Crimes Act*, 1900 provides that: 'A person who aids, abets, counsels or procures, or by any act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of an offence under a law of the Territory shall be deemed to have committed that offence and shall be punishable, on conviction, accordingly'.

[33] The impression that the offences were to be akin to aggravated rape or attempted rape is confirmed by the fact that longer maximum sentences have been prescribed than those for sexual intercourse without consent.

conviction for sexual offences and exposure to criminal sanctions should not be dependent upon the absence of complaint or the discretion of a prosecuting agency. As mentioned earlier, legislative provisions creating serious criminal offences should be drafted with sufficient precision to ensure that those who have not been guilty of the misconduct to which the provisions are directed do not fall within their net. Vague references to the possibility of more lenient sentences provide no acceptable alternative to this important principle.

24. An official commentary on similar statutory reforms in New South Wales also reflected some confusion as to what was intended. On the one hand it stated that:

> *Where violence is inflicted … offences should be defined so as to exclude the requirement that the Crown prove, as part of its case, that sexual penetration occurred and that the complainant victim did not consent to it[34].*

25. This statement appeared to suggest that the Crown would need to prove neither the relevant sexual act nor the absence of consent. In that event it would have been difficult to imagine the nature of any offence that might have been charged. However, in the following passage the commentary suggested that both of these elements would have to be proven:

> *Although the law can be structured so as to remove primary emphasis from consent to sexual penetration or intercourse, in most cases that issue will still probably arise. Inevitably the accused must in relation to sexual assault offences (however defined) be able to raise as a defence the argument that the complainant did consent, and if such a suggestion is properly raised, and is relevant to an issue, it must be disproved by the Crown beyond reasonable doubt.[35]*

26. The confusion about whether absence of consent had to be proven was echoed in successive and contradictory decisions of the NSW Court of Criminal Appeal[36]. The relevant sections have since been repealed.

27. Whilst the ACT sections contain no explicit statement to the effect that the accused must have contemplated that the sexual intercourse in question be without the other person's consent such a requirement has been held to be implicit.[37]

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[34] Dr GD Woods, (then Director, Criminal Law Review Committee), *Sexual Assault Law Reform in New South Wales,* 1981 at 12.

[35] Ibid

[36] *R v Lyne* (unreported 24 September 1982) and *R v Smith* (1982) 2 NSWLR 569.

Legislative provisions are sometimes interpreted as being subject to implied limitations when a court forms the view that the legislature could not have intended to cause the consequences that might otherwise ensue, especially if the provisions would otherwise create a risk of absurdity or injustice.[38] Sections 92A, 92B and 92C have apparently been interpreted in this manner. No reasons for the implication of the requirement that the intended sexual intercourse be non-consensual are available but some of the factors may, perhaps, be deduced.

28. The essential problem is that the need to prove the absence or contemplated absence of consent can be removed only by removing any such issue as an element of the offences. None of the sections suggest that whilst such issues need not be proven the offender may be treated as though he had engaged in or intended to engage in sexual intercourse without consent. Yet to remove this element would drastically reduce the seriousness of the offences. An assault may itself constitute an offence and other offences of assault for specified purposes[39] are punishable by heavier penalties, usually because those purposes are themselves illegal and hence lend added criminality to the offender's behaviour. An intent to engage in sexual intercourse may lend enormous gravity to an offence otherwise based upon assault or the infliction of bodily harm if the violent act constituting the assault is intended to facilitate the rape of the complainant. However, it is only the absence of consent that makes the difference between lawful sexual intimacy and unlawful sexual violation.[40] Hence, the fact that a person intended to engage in consensual sexual intercourse could offer no logical basis for concluding that the criminality of any other antecedent conduct should be treated more seriously.

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[37] The Commission has confirmed that Higgins J has held that such a requirement must be implied. The judgment was delivered extemporaneously and no transcription of the reasons for judgment has been located but the ruling was not challenged on appeal.

[38] Lord Wensleydale's so called 'golden rule' is that '… the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther' – *Grey v Pearson* (1857) 6 HLC 61 at 106; 10 ER 1216 at 1234. However this rule is usually seen as more conservative than other suggested approaches to statutory interpretation, such as the 'purposive' approach by which a provision is construed in a manner conducive to the presumed purpose of the legislature or the 'mischief' approach by which a provision is construed in the manner most likely to address the problems which led to its enactment. See, for example, *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; and *Mills v Meeking* (1990) 91 ALR 16 at 30-31.

[39] See, for example, section 22 of the *Crimes Act*.

[40] It has been assumed throughout this report that consent must be a free and voluntary consent rather than acquiescence due to fear or any other form of coercion. See generally the discussion in chapter 3.

29. Of course, proof of violence may provide strong, perhaps even compelling, evidence of an intention to engage in sexual intercourse without consent. However, if the offence charged did not require an absence of consent then its gravity would really depend upon the nature and extent of the violence or the bodily harm thereby inflicted. The relevant act of sexual intercourse would provide a context for the violence but could not make the offence significantly more serious. In many cases the offender would escape with a non-custodial sentence and if a sentence of imprisonment were to be imposed it would not involve any element of punishment for what amounted to an actual or attempted rape.

30. It might be open to the Crown to raise the absence of consent not as an element of the offence but as an aggravating feature. However, if it chose to do so the absence of consent would still have to be proved beyond reasonable doubt. The issue would not have been resolved by the jury's verdict and the complainant might have to give further evidence and be subjected to further cross-examination during sentencing proceedings.

31. Indeed, if lack of consent were not to be an element of these offences then it would be difficult to see any point in the enactment of the relevant sections. Sections 19, 20 and 23 create offences of intentionally or recklessly inflicting grievous or actual bodily harm, and sections 24, 25 and 26 create offences of assault including assaults causing grievous or actual bodily harm. In each case the offence is not dependent upon proof of any particular purpose. The only obvious reason for creating further offences with the additional element of intent to engage in sexual intercourse was that such offences were intended to apply to cases in which the offender had committed violent acts done with the intention of overbearing the will of the complainant to obtain sexual intercourse with him or her. In that event the offences would constitute aggravated forms of rape or attempted rape or at least offences of the same character. It would be difficult to see any sensible reason for the enactment of separate offences requiring proof of intent to engage in sexual intercourse but not lack of consent because consensual sexual intercourse would not be an aggravating factor.

32. There would be no need for any such provisions to cover acts of attempted rape because section 347 provides that a person who attempts to commit an offence against a law of the Territory is guilty of an offence punishable, on conviction as if the attempted offence had been committed. It is difficult to envisage cases in which the infliction of bodily harm with intent to engage in non-consensual sexual intercourse with the complainant would not amount to attempted rape even if that intent had been thwarted[41].

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[41] The nature of an attempt was explained by Murphy J in *Britten v Alpogut* [1987] VR 929 at 938: '(A) t common law a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognised crime and it is proven that at the same time he did an act or acts (which in

33. There would also be many cases in which prosecution for such offences might cause injustice or absurdity. The term "actual bodily harm" means no more than some bodily injury which need be neither permanent nor serious. A small bruise, abrasion, scratch or even causing a "hysterical and nervous condition"[42] may be sufficient to establish an offence under section 92B if inflicted by the accused with the requisite intent. There may be many circumstances in which a very minor bodily injury such as a small scratch or bruise may occur as a result of acts committed with intent to engage in consensual sexual activity. For example:

- a person who scratches a lover's back with fingernails in an attempt to stimulate sexual arousal;
- a person who playfully pinches another with similar intent;
- a couple who engage in bondage or other forms of mild sado-masochistic behaviour for the purpose of mutual sexual stimulation;
- a person who infects his or her partner with a venereal disease even if the partner is aware of the risk and has intercourse with full knowledge of the condition;
- even the rupture of a hymen, a minor cervical tear or some other minor injury of the kind that might be caused by consensual sexual intercourse during a honeymoon would be sufficient to constitute `actual bodily harm';[43]
- similar potential difficulties arise in relation to a range of other consensual heterosexual and homosexual activities[44]; and

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appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and not seen to be merely preparatory to it'. See also *R v Colingridge* (1976) 16 SASR 117 at 118; *DPP v Stonehouse* [1978] AC 55; *R v Alister* (1984) 154 CLR 404 and *R v Holland* (1993) 117 ALR 193.

[42] *R v Miller* [1954] 2 QB 282; 38 Cr App R 1. See also *R v Chan-Fook* (1994) 99 Cr App R 147.

[43] Jennifer Temkin has suggested that the husband should be able to argue that the wife's hymen was not ruptured deliberately with the aim of having sexual intercourse: see *Rape and the Legal Process*, op.cit at 113. However section 92B does not contain any requirement that there be an assault or that actual bodily harm be inflicted deliberately. Recklessness is sufficient: *R v Stokes* (1990) 51 A Crim R 25; *R v Savage* [1992] 1 AC 699. Hence he would be guilty if he adverted to the possibility of rupturing the hymen but nonetheless proceeded and did so with intent to have sexual intercourse with her.

[44] Ian Cunliffe, then Secretary and Director of Research, Australian Law Reform Commission, suggested that under the then existing provisions of the NSW legislation if a couple were relying upon coitus interruptus

- a person who participates in any such conduct could be deemed to have committed the same offence by virtue of his or her role as an aider and abettor.[45]

16. Furthermore, even if some wholly satisfactory means could be found of dispensing with lack of consent as an element of the offences, the issue would be likely to arise as an indirect consequence of the need to prove other elements. Section 56 of the *Evidence Act 1995 (Cth)* provides that evidence relevant to the issues before the court is admissible 'save as otherwise provided in this Act'. The Australian Capital Territory could not validly enact laws disallowing the admission of relevant evidence otherwise admissible under the Commonwealth Act. Counsel for the accused would almost inevitably argue that the complainant's consent to the sexual intercourse was relevant to the likelihood that any assault was committed or bodily harm inflicted. Alternatively, it might be argued that there was no reason to act violently because his or her consent was anticipated. It might also be argued that whilst there was some act of violence, there was no basis for any inference that it was committed with intent to engage in sexual intercourse because any subsequent sexual act occurred with the complainant's consent and was unrelated to the violence. An accused might contend that the injury was sustained accidentally during the course of consensual sexual intercourse or by playful behaviour associated with consensual sexual activity. Doubt that the sexual intercourse was not the product of some antecedent infliction of harm or assault but was consensual would be a relevant and perhaps decisive consideration in relation to a number of issues and evidence of consent could not be excluded.

17. Nor is there any apparent means of circumventing these problems. There is usually nothing unlawful about one adult having sexual intercourse with another unless it occurs without consent.[46] As the Royal Commission on Human Relationships observed, absence of consent is basic to the crime of rape. Any attempt to remove it as an element of the offence would be destructive of the very basis upon which the sexual intercourse may be regarded as a criminal offence or upon which an intention to do so may be regarded as an aggravating feature of an offence. Whilst other elements such as antecedent violence or the youth of the complainant may be relied upon in lieu of lack of consent to constitute an offence,

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for contraception a man who delayed withdrawal from consensual intercourse might commit the same offence. See ‘Consent and Sexual Offences Law Reform in NSW South Wales’ op.cit.

[45] See footnote 25.

[46] Consent is not, of course, a defence to incest and in the defence forces consensual sexual intercourse between adults may sometimes constitute a military offence of ‘fraternising’.

the nature of that offence will be quite different and the penalty will necessarily be determined without regard to the concept of rape.

18. For these reasons the Commission has been forced to conclude that the apparent aim of conducting what would amount in substance to rape trials without the need to prove the absence of consent is ultimately unrealisable.

19. It was presumably for reasons of this kind that the sections were held to be subject to an implied requirement that the intent to engage in sexual intercourse extend to an intention to do so without consent.[47] Whatever the reasons, however, it seems clear that these sections did not effectively remove the issue of consent as anticipated and that there is no effective means of doing so without substantially undermining the gravity of the offences.

***The focus on antecedent violence***

20. A further objection to the manner in which these sections have been drafted lies in the fact that the real gravamen of most of the offences, is not the fact that a person has been sexually violated without consent but the bodily harm or assault which preceded such a violation. In some cases that harm may have been relatively insignificant. A complainant might be disconcerted to find that the essence of the offence with which the accused has been charged is not that he raped her but that he caused her to have a small bruise or to become hysterical. Such a shift in focus might accord with the views of the Royal Commission on Human Relationships,[48] but in cases where any bodily harm has been very minor the conduct of the trials might give rise to an uncomfortable feeling that the prosecution has really missed the point. A complainant may be left wondering whether a slap that left a mark is all that matters or whether anyone really cares that she was then raped.

21. Such a preoccupation with the preceding violence might also mean that cases were likely to be decided upon issues involving fine legal and factual distinctions but which were of little relevance to the real substance of the charge and of little concern to the complainant. For example, a jury might be unable to convict the accused because the evidence did not prove whether a bruise was inflicted 'with intent to engage in sexual intercourse' or whether it was later when the accused was trying to prevent her from calling for help. The former ACT Chief Police Officer referred to significant problems encountered in investigating allegations of sexual assault and suggested that because of the present form of the offences greater emphasis has had to be placed upon the need to prove the necessary degree of violence. He indicated that police supported the ‘collapsing’ of the present series of

[47] See footnote 33.

[48] op.cit.

offences in order to protect the integrity of the offence of sexual intercourse without consent.

22. Of course, pitfalls of this nature may sometimes be avoided by the judicious exercise of prosecutorial discretion and, in practice, comparatively few charges are laid under sections 92A, 92B or 92C. In most cases the charge is in fact one of sexual intercourse without consent.

### *Overlooking other accompanying violence*

23. However, the judicious exercise of prosecutorial discretion could not overcome the obvious deficiency that the language of the sections does not extend to the infliction of bodily harm as an incident of the rape or after the relevant sexual act has been completed. As the legislation stands, the gratuitous infliction of even grievous bodily harm upon an unresisting complainant in the course of a rape could not support a conviction for a more serious sexual offence than sexual intercourse without consent contrary to section 92D and the heavier penalties provided by the other sections would not be available. Indeed, those heavier penalties would be unavailable even if a complainant had been permanently crippled as a result of a savage assault committed during or after the rape due to a desire to deter her from making any complaint or simply as an act of sadistic cruelty.

24. If there are to be offences which impose heavier maximum penalties for sexual assaults involving aggravating features then such penalties should surely apply in circumstances such as these. It is true, of course, that an accused could be charged with two charges, one of rape and one of intentionally or recklessly inflicting grievous bodily harm. However, the law generally requires that 'where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive'[49]. Hence, the effective maximum sentence may be the higher of the sentences prescribed for one or other of these two offences rather than a sentence which truly reflected the overall gravity of what had been done. The most sensible course would be to introduce a provision that will make the heaviest penalties available for the worst cases without regard for whether the injuries were inflicted before, during or after the act of rape.

### *The multiplicity of offences*

25. It is also unclear that a legislative scheme involving such a series of discrete offences is either necessary or desirable. Prosecutions for offences of rape under earlier statutory provisions frequently revealed that the sexual act had been accompanied by violence leading to serious injuries and sometimes revealed that the offender had acted in company with others. However, such aggravating features were not elements of the offence and juries were obliged to return single verdicts of guilty or not guilty. If the accused was convicted the judge would then have to make separate findings as to whether the aggravating features of the offence had been proven. The enactment of a series of discrete offences enabled the Director of Public Prosecutions to lay charges in which particular aggravating features were

[49] D .A. Thomas, *Principles of Sentencing*, 2nd edition, 1979 at 53.

incorporated as elements of the relevant offences and, perhaps, alternative charges lacking those elements. Consequently, juries now determine not only whether the accused is guilty of engaging in sexual intercourse without consent but, if so, whether particular aggravating features identified in the indictment have been proven.

26. It may sometimes be desirable for juries to make findings as to the existence of aggravating features of a crime, especially where such findings may make a substantial difference to the likely sentence. The obvious difficulty lies in the almost unlimited range of aggravating features which may accompany particular offences. Apart from the infliction of harm, sexual offences may have been committed in breach of a relationship of trust, in company with other offenders, with the aid of weapons, or in circumstances involving extreme cruelty or depravity. Furthermore, the offender may have a previous criminal record, be on parole, on bail, be HIV positive or have AIDS or other sexually transmitted diseases. Of course, some offences are accompanied by two or more aggravating features. It would obviously be impracticable to enact separate offences based upon each category of aggravation and the present series of offences does not reflect any apparent attempt to do so. On the other hand, some aggravating features are so grave that a further offence involving a significantly greater maximum penalty is required. However, it is undesirable to subdivide any category of criminal behaviour into any more discrete offences than necessary.

27. Apart from any other objection which may be raised to such a course, the need to prove additional elements will provide further issues for juries and may mean that some cases proceed to contested trials when there may have been guilty pleas to more straightforward charges. This not only involves undue expense and inconvenience but the risk of complainants having to give evidence unnecessarily.

28. The offences provided by sections 92A to 92D inclusive are differentiated by reference to the extent of violence involved and in each section there is a further differentiation based upon whether the offender was acting in company with others. Hence there are now eight offences in lieu of what in earlier years would have been a single offence of rape. Whilst differentiation on the basis of these distinctions may be logically defensible, other aggravating features are not similarly reflected in the structure of this series of sections. Furthermore, the multiplicity of offences cannot be justified on the basis that it provides a diversity of sentences commensurate with the gravity of the offences. Five of the eight are punishable by maximum sentences of either 12 or 14 years imprisonment whilst the other three are punishable by maximum sentences of either 17 or 20 years imprisonment. A similar range of sentences could be provided even if the number of offences was significantly reduced.

29. The Commission believes that the multiplicity of offences gives rise to needless complexity, that the individual offences are poorly targeted and that, far from achieving the advantages intended by the reformers, this series of sections has created confusion and potential injustice.

***Proposals to simplify the law and increase penalties***

30. The Criminal Law Consultative Committee has recommended that in lieu of these eight offences there should be only two: one of rape and one of aggravated rape. This recommendation reflects a concern that the present series of offences are poorly defined, needlessly complex and prone to diverting attention from what should be the decisive issues.

31. The Commission agrees that there should be offences of rape and aggravated rape and recommends that the latter offence apply when the offender has acted in company with another offender or other offenders or has inflicted grievous bodily harm upon the complainant whether before, during or after rape. There should also be provision for an alternative verdict enabling a jury to find an accused person guilty of rape when on a charge of aggravated rape the jury is satisfied that the evidence is sufficient to prove the rape but not the aggravating feature of the infliction of grievous bodily harm.

32. In each case any further aggravating features would be taken into account in sentencing the offenders.

33. The maximum sentence for the existing offence of sexual assault without consent is 12 years imprisonment. The Commission regards this as inadequate and recommends that the maximum sentence for the offence, whether or not described by the word 'rape' as suggested, be increased to 15 years imprisonment. It recommends that the maximum sentence for aggravated rape be fixed at 20 years imprisonment.

34. However, the Commission has concluded that there should also be a third offence of assault with intent to rape. This offence would cover any unusual cases in which an antecedent assault or threat was not sufficiently proximate to amount in law to an attempt to have sexual intercourse without the intended complainant's consent. For example, it would cover a situation in which the assailant intended that the complainant engage in sexual intercourse with him or someone else at another time. A maximum penalty of 15 years imprisonment is also proposed for this offence.

**RECOMMENDATION 2**

The Commission recommends that:

(a) the existing 8 offences be replaced by offences of rape, assault with intent to rape and aggravated rape;

(b) the term 'rape' be defined to mean engaging in sexual intercourse with another person without that person's consent and knowing that that other person does not consent or being reckless as to whether that other person consents;

(c) the maximum sentence for rape and assault with intent to rape be set at 15 years imprisonment;

(d) the offence of aggravated rape be defined to apply when the offender has acted in company with another offender or other offenders or has inflicted grievous bodily harm upon the complainant whether before, during or after rape; and

(e) the maximum sentence for aggravated rape be set at 20 years imprisonment.

***SEXUAL INTERCOURSE WITH A CHILD OR YOUNG PERSON***

16. The provision dealing with sexual intercourse with a young person or a child is contained in section 92E. That section is in the following terms:

> *(1) A person who engages in sexual intercourse with another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 17 years.*
>
> *(2) A person who engages in sexual intercourse with another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 14 years.*
>
> *(3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:*
>
> > *(a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or*
> >
> > *(b) at the time of the alleged offence -*

> *(i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and*
>
> *(ii) the defendant was not more than 2 years older;*
>
> *and that that person consented to the sexual intercourse.*

***Distinctions by reference to ages of offenders and complainants***

17. The Commission believes that it is important to distinguish between two broad categories of people who are prosecuted under this section. Those who fall within the first category are paedophiles. They are often sexual predators who prey upon young children for their own perverted gratification. There may be exceptional cases in which some leniency might be justified by convincing evidence that the conduct was due to a grave psychiatric illness. However, child molestation causes profound suffering and complainants may carry emotional scars throughout their adult life. It will generally be appropriate for very heavy sentences to be imposed on adults who cruelly exploit the trust of children in this manner. Those who fall within the second category are usually teenagers who have a relationship of affection and/or infatuation with another person who is about the same age or only slightly younger. It is plainly inappropriate to approach such cases in the same manner as one might approach cases of paedophilia. There are, of course, offenders who do not fit neatly into either category and the existence of both younger people who molest young children and older people who molest teenagers must be recognised. It must also be acknowledged that even teenagers are sometimes guilty of rape. Nonetheless, justice requires that appropriate distinctions be drawn.

18. The offence under subsection (1) applies only to cases of sexual intercourse with children under 10 years of age. Heavier maximum sentences are available for such offences and the defences provided by subsection (3) are not available. The Commission does not see any reason to depart from the general structure of this offence but believes that the maximum sentence should be set by reference to the worst cases of offences that might reasonably be anticipated. There have recently been a number of highly publicised cases of people who have apparently pursued a course of paedophilia over many years and molested a very large number of children. Many children, especially those who were very young when the offence was committed, may be left with life long physical and emotional disabilities as a result of such exploitation. The maximum sentence prescribed by subsection (1) should be adequate to cater for serial child molesters. The Commission recommends that it be increased to 20 years imprisonment.

### *Distinctions by reference to consent*

19. The position in relation to offences under subsection (2) is quite different. In most jurisdictions when an alleged offender is prosecuted for having sexual intercourse with a young person between 10 and 16 years of age the nature of the offence charged depends upon whether it is alleged that the sexual act occurred without consent. If there is such an allegation then the charge is one of rape and having regard to the age of the complainant heavy penalties are imposed. If there is no such allegation the charge is one of 'carnal knowledge', that is sexual intercourse with a person under the age of consent, and the penalties whilst substantial are comparatively less severe[50]. Furthermore, there is often a provision that enables a jury to return an alternative verdict in relation to an offence of this kind if the alleged offender has been charged with rape but lack of consent is not proven to the requisite standard.

20. This almost universally recognised differentiation between non-consensual and consensual sexual intercourse is of great practical significance in the prosecution of offences against children and young persons for at least two reasons. First, it distinguishes between rapists and those who have had consensual sexual intercourse albeit with someone under 16 years of age. Hence, anyone aware of the conviction may gain some real appreciation of the nature of the criminality involved in the commission of the offence. Secondly, as mentioned earlier, the sentences imposed will be much more severe in cases where a young person has been raped than in cases of consensual sexual intercourse. If only for these reasons, it is appropriate that offences be structured in a manner that enables one to know whether a jury's verdict reflects, in essence, a finding of rape.

21. This differentiation has not been maintained in Part 3A of the *Crimes Act*. On the contrary, the penalty even for an offence under subsection (2) is greater than that prescribed by section 92D for an offence of sexual intercourse without consent. Despite evidence of greater sexual precocity and a drop in the age of puberty the Commission is of the view that the age of consent should remain at 16 and that it should continue to be an offence to have even consensual sexual intercourse with a person under that age. However, it is difficult to understand why the rape of a 14 year old should not constitute a more serious offence than consensual sexual intercourse even with a person of that age.

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[50] For example, in New South Wales section 61I of the *Crimes Act* 1900 provides a maximum penalty of 14 years imprisonment for the offence of sexual intercourse without consent, whilst section 66C provides a maximum penalty of 8 years imprisonment for an offence of having sexual intercourse with a person who is between 10 and 16 years of age, or 10 years imprisonment if the young person was under the authority of the offender at the relevant time.

22. Of course, there is a theoretical argument that, since such a person should be regarded as lacking the legal capacity to consent, the issue is simply irrelevant. However, the Commission is unable to accept this argument. Criminal offences are normally differentiated not only by reference to the type of conduct in question but by reference to its comparative gravity. The conduct of a young boy who has had consensual sexual intercourse with a young girl in the context of a relationship of mutual affection may properly constitute an offence but it is less blameworthy than the conduct of someone who callously rapes a person of that age. The gravity of the offence should also be gauged by reference to its likely impact upon the complainant. There is a vast difference between the emotional impact upon a young teenager who is brutally violated and the emotional response of one who chooses to have sexual intercourse with someone whom he or she loves or to whom he or she is at least sexually attracted. It may be necessary to deny young people under sixteen the right to give an effective consent to sexual activity in order to protect them from the consequences of such decisions but it is neither necessary nor desirable to dismiss their feelings as legally irrelevant.

23. The failure to differentiate between consensual and non-consensual sexual intercourse also gives rise to practical difficulties. A verdict of guilty will not mean that the accused may be sentenced on the basis that sexual intercourse occurred without the consent of the complainant because that issue is not an element of the charge and could not be taken to have been established by the verdict. Yet that is likely to be a crucial issue in the sentencing of the offender. If there is a conviction, the sentencing judge will have to determine whether he or she is satisfied beyond reasonable doubt that lack of consent has been established as an aggravating feature of the offence. Since the jury's verdict will not have revealed any finding on this issue its views will not be known to the judge and the offender might be treated leniently due to the rejection of allegations which the jury accepted or sent to prison as a result of allegations the jury rejected. Even a plea of guilty will leave the issue unresolved. Furthermore, the need to address this issue might conceivably require the complainant to be recalled to give evidence in the sentencing proceedings before the judge and hence exposed to cross-examination for a second time.

24. Any finding that the sexual act occurred without consent will not change the record of the offence for which the offender has been convicted. Hence, an offender who has been, in effect, guilty of rape will have a conviction only for an offence which other jurisdictions would relate to consensual sexual intercourse and his record will be misleading if he is subsequently charged with a criminal offence elsewhere in Australia.

25. There are other unfortunate consequences. In other jurisdictions, if a young person who has made a complaint of rape does not wish to give evidence at trial, the matter is sometimes resolved by a plea of guilty to a lesser offence of carnal knowledge which involves no element of lack of consent. In this territory it is very

difficult to achieve such a result because the 'lesser' offence carries a heavier penalty than rape. This may mean that more complainants are forced to choose between reluctantly giving evidence or accepting that the accused will escape any conviction.

### *The reversal of the onus of proof*

26. Further difficulties arise from the statutory defence contained in subsection (3). In common with comparable statutory provisions in other jurisdictions, this subsection provides a defence if the defendant can prove that at the time the sexual intercourse occurred he or she had believed on reasonable grounds that the young person in question was over the age of 16 years. In the Australian Capital Territory there is an alternative defence where the accused is less that two years older than the other young person. However, in both cases the statutory formulation also requires the accused to prove consent.

27. This reversal of the onus of proof, in effect, deems young people to be guilty of offences carrying a maximum penalty of 14 years imprisonment unless they can prove their innocence. Furthermore, they must do so in relation to an issue that is not even an element of the offences. There may be perceived advantages in this reversal of the onus of proof, but it involves a fundamental departure from one of the most the basic principles of criminal justice that every person is presumed innocent until proven guilty. Furthermore, since most people who engage in sexual intercourse with young people under 16 years of age are likely to be teenagers themselves, it involves denying to juveniles the presumption of innocence enjoyed by adults even in relation to such grave crimes as murder or treason. The Commission does not accept that this denial of a basic legal right to young defendants is justified.

28. The potential for injustice is even further compounded by the fact that the onus of proof shifts according to the actual age of the complainant irrespective of any belief or understanding of the accused that she was or may have been over 16 years of age. As mentioned earlier there is a defence that enables an accused to raise that issue but in doing so the accused is also required to prove consent. The section does not enable an accused to escape from the burden of proving his innocence in relation to the issue of consent by reference to his belief that the complainant was over 16 years of age. Hence, if a young man has sexual intercourse with a young woman whom he believed was over 16 years of age, then the verdict may depend upon whether his belief as to her age was objectively correct. If it was, then he will not be liable to be convicted of any offence unless the prosecution proves beyond any reasonable doubt that she did not consent. On the other hand, if she was under the age of 16 then the onus of proof is reversed and he will liable to be convicted unless he proves that she did consent and that burden of

proof will be imposed upon him even if she had told him that she was over 16 or his belief was otherwise based on reasonable grounds.

29. Furthermore, the relevant provision extends beyond merely reversing the onus of proof. It removes one element of the offence completely. If an adult is charged with having sexual intercourse without consent the Crown must prove beyond reasonable doubt that the accused committed the relevant act knowing that the complainant was not consenting or at least reckless as to whether she was consenting or not. The defence provided by subsection (3) does not even permit that issue to be raised. In seeking to discharge the burden of proof imposed upon him the accused will be unable to rely upon any belief that the young person had been consenting even if the reasonableness of that belief is not disputed.

30. In practice, prosecutors often charge an accused with an offence of sexual intercourse without consent under section 92D if it is alleged that the sexual act in question was without consent. However, that gives rise to the anomaly that a young person may face a lower maximum penalty for having sexual intercourse without consent than for having sexual intercourse with consent. Of course, it is open to the Crown to proceed under section 92E in both types of case. However, since the allegation of non-consent is so important it is often considered appropriate to have the issue determined by a jury and that can only be done by laying a charge under section 92D. Such a course may also be pursued in the interests of fairness. Furthermore, if that is not done the issue will remain unresolved by any verdict of guilty and, as mentioned earlier, it may be necessary to call the complainant to give further evidence and hence expose her to further cross-examination in any sentencing proceedings.

31. Yet, regrettably, even that course does not exclude potential incongruities. Suppose, for example, a young man is charged with one count of sexual intercourse without consent and, in the alternative, one count of an offence under section 92E relating to the same act of sexual intercourse. The jury hears contradictory evidence from the only two people who were present at the time and are ultimately left in some doubt as to which version is true. In that event it would be their duty to find the accused not guilty of the first count because they could not be satisfied beyond reasonable doubt that the sexual act had occurred without consent but guilty of the second on the basis that they could not be satisfied that it had occurred with consent. Similarly, they might be obliged to return differing verdicts on charges relating to two acts of intercourse one week apart because, although the evidence was virtually identical, the complainant's 16th birthday had occurred between them. It is plainly undesirable to require juries to return verdicts which they may well feel are inconsistent and/or unfair.

32. The alternative defence that the complainant was at least 10 years of age and the defendant was not more than two years older can obviously be invoked only

by people who are themselves juveniles and it is again difficult to see why such young people should be denied the presumption of innocence enjoyed by adults. It certainly creates unfortunate incongruities. For example, if a 20 year old person is charged with having sexual intercourse with a 19 year old complainant the Crown bears the onus of proving that she did not consent and if convicted the accused faces a maximum sentence of 12 years imprisonment. On the other hand, if a 16 year old is charged with having sexual intercourse with a 15 year old complainant the accused bears the onus of proving that she did consent and if convicted faces a maximum sentence of 14 years imprisonment.[51]

33. In short, this provision may also create confusion, produce contradictory results and erode public confidence in the law and the administration of criminal justice.

34. For the reasons discussed the Commission has concluded that whilst it is always a serious offence for anyone to engage in sexual intercourse with a young person between the ages of 10 and 16 years of age the law should distinguish between acts of that kind committed with consent and acts committed without consent. Where it is alleged that a person has engaged in sexual intercourse with a young person in this age bracket without consent, the appropriate charge should be one of rape. This would ensure that the gravity of the allegations was reflected in the gravity of the offence, that children and young people were protected from sexual violation and that other young people charged with offences were not inappropriately stripped of the presumption of innocence and other fundamental human rights. It would also ensure that heavy sentences were available for crimes of that nature. Where lack of consent is not alleged the accused should not have to address that issue and the maximum penalty should be considerably less. However, as the Director of Public Prosecutions has pointed out, it should still be sufficient to permit the imposition of heavy sentences in the odd case in which an older person has sexual intercourse with a 13 year old, albeit with her consent.

### *The scope of the defences*

35. As previously mentioned, the defences provided by subsection (3) are presently available only in cases where the relevant sexual act involved a child or young person over 10 years of age. It should be noted that the age in question is not the age of consent. A young person may give a valid consent to sexual intercourse only upon attaining 16 years of age and the Commission does not recommend changing the law in that respect.

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[51] Though such a young person might have the charge dealt with summarily and in that event be exposed to a lesser penalty. See sections 89 to 118, *Children and Young People Act* 1999.

36. MCCOC noted that there was widespread confusion between the age of consent and an age under which no defences of the kind described should have any application. It also noted that there were many different opinions as to the age that was most appropriate for the latter purpose and ultimately refrained from expressing any concluded view on this issue.[52] A similar diversity of views was reflected in submissions to the Commission. Indeed, some respondents argued that there should be no defences of this kind and that the protection afforded to young people by this section should be wholly unqualified.

37. The Commission accepts that there are genuine grounds for concern that the existence of statutory defences should not compromise the principle that sexual intercourse with a person under the age of consent is unacceptable. It is certainly true that the provisions of section 92E should be directed to ensuring the protection of those who are young and vulnerable. However, the law must reflect society's concern for all young people[53] and the Commission does not accept that some can be protected from sexual abuse or exploitation only at the expense of treating others unfairly. Furthermore, in cases of this nature the distinction between offenders and complainants is not always clear and criminal prosecution is not always desirable. For example, but for the defence contained in subsection (3)(b) two mutually infatuated 15 year olds could be prosecuted for having sexual intercourse with each other. The fact that they were having a sexual relationship with each other at that age may well be a matter for concern but there may be more appropriate social responses than their arrest, conviction and imprisonment.

38. Of course, the authorities might well take the view that it would be inappropriate for charges to be laid in such circumstances. However, such a view has not always prevailed. In earlier years when offences of this nature were unqualified and in some jurisdictions rigorously enforced, charges would sometimes be laid against a young boy even if he was younger than the girl with whom he had had a sexual relationship and there was no issue of non-consent. In NSW there was a practice of interviewing girls who had given birth prior to the age of 16 years and 9 months and demanding that they identify the father. One would sometimes see a young couple come to court hand in hand with their baby. If they had been able to marry prior to a defended hearing the 'complainant' might refuse to give evidence on the ground of marital privilege but she would otherwise be forced into the witness box to reluctantly give evidence. In some cases she would be threatened with being charged with contempt of court if she refused to give evidence or perjury if she lied

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[52] See 'the no defence age', Chapter 5, Report, 'Sexual Offences Against the Person', May 1999, at 125-126.

[53] This concern is reflected in the objects and principles referred to in sections 10 to 15 of the *Children and Young People Act* 1999.

to protect her partner. On occasions the desire to protect a 'complainant' from an 'offender' could lead to a new teenage mother being left to look after the baby unaided whilst the new teenage father served his sentence.

39. Ultimately, the view was taken that this was an unnecessarily harmful process and, at least in this jurisdiction, the defence in paragraph (3) (b) of section 92E was enacted. The Commission does not accept that there would be any real utility in returning to the approach taken in earlier years.

40. The impact of the proposed amendment should not be overestimated. At common law there is a presumption that a defendant is not guilty of an offence if he or she had an honest and reasonable belief in a state of facts which, had they existed, would have made the relevant act non-criminal.[54] The defence provided by paragraph (a) merely reflects this presumption and, by expressly applying it to offences under subsection (2), impliedly denies it any application in relation to offences under subsection (1). The defence is usually invoked in cases where consensual sexual intercourse occurred a few weeks or months before the complainant's 16th birthday and a defendant claims that she told him she was already over that age or circumstances such as meeting her in licensed premises or seeing her driving a car led him to form such a belief.

41. The alternative defence provided by paragraph (b) is only available to a defendant who is no more than 2 years older than the complainant. Hence the defence can never be invoked by anyone more than 17 years old.

**RECOMMENDATION 3**

The Commission recommends that:

(a) the offence under subsection (1) remain unqualified by any statutory defence;

(b) the maximum penalty for such offence be increased to 20 years imprisonment;

(c) the maximum penalty for an offence under subsection (2) be set at 12 years; and

(d) the requirement that the defendant prove consent be repealed[55].

***Maintaining a sexual relationship with a young person***

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[54] See, for example, *Proudman v Dayman* (1941) 67 CLR 536 per Dixon J at 540.

[55] For the reasons set out in paragraphs 100 to 115.

16. Section 92EA is in the following terms:

*(1) In this section -*

*`adult' means a person who has attained the age of 18 years;*

*`sexual act' means an act that constitutes an offence under this Part but does not include an act referred to in subsection 92E (2) or 92K (2) if the person who committed the act establishes the matters referred to in subsection 92E (3) or 92K (3), as the case may be, that would be a defence if the person had been charged with an offence against subsection 92E (2) or 92K (2), as the case may be;*

*` young person' means a person who is under the age of 16 years.*

*(2) A person who, being an adult, maintains a sexual relationship with a young person is guilty of an offence.*

*(3) For the purposes of subsection (2), an adult shall be taken to have maintained a sexual relationship with a young person if the adult has engaged in a sexual act in relation to the young person on 3 or more occasions.*

*(4) In proceedings for an offence under subsection (2), evidence of a sexual act is not inadmissible by reason only that it does not disclose the date or the exact circumstances in which the act occurred.*

*(5) Subject to subsection (6), a person who is convicted of an offence under subsection (2) is liable to imprisonment for 7 years.*

*(6) If a person convicted under subsection (2) is found, during the course of the relationship, to have committed another offence under this Part in relation to the young person (whether or not the person has been convicted of that offence), the offence under subsection (2) is punishable by imprisonment -*

*(a) if the other offence is punishable by imprisonment for less than 14 years - for 14 years; or*

*(b) if the other offence is punishable by imprisonment for a period of 14 years or more - for life.*

*(7) Subject to subsection (8), a person may be charged in 1 indictment with an offence under subsection (2) and with another offence under this Part alleged to have been committed by the person during the course of the alleged relationship and may be convicted of and punished for any or all of the offences so charged.*

*(8) Notwithstanding subsection 443 (1), where a person convicted of an offence under subsection (2) is sentenced to a term of imprisonment for that offence and a term of imprisonment for another offence under this Part committed during the course of the relationship, the court shall not direct that those sentences be cumulative.*

*(9) A prosecution for an offence under subsection (2) shall not be commenced except by, or with the consent of, the Director of Public Prosecutions."*

17. This subsection was enacted in an attempt to overcome the difficulties recognised by the High Court of Australia in *S v R*[56]. In that case the accused had been charged with a number of offences of incest, said to have been committed on unnamed dates within specified periods and the complainant gave evidence of numerous acts of sexual intercourse within those periods. As the High Court pointed out, this gave rise to two main problems.

18. First, it was unclear which of the acts of sexual intercourse referred to in the complainant's evidence were said to constitute the offences charged in the indictment. This meant that the conviction for any offence may not have reflected any finding that a particular act constituting such an offence had been proven beyond reasonable doubt. Different jurors might have had different incidents in mind when they agreed upon a verdict in relation to a particular count on the indictment. Some might have had no particular incident in mind but taken a global approach and convicted on the basis that a sufficient number of the allegations must have been true to justify convictions for at least the number of offences charged. This was contrary to the fundamental principle that the facts relied upon as constituting the elements of any criminal charge must be proven beyond reasonable doubt.

19. Secondly, evidence of other acts of sexual intercourse would have been admissible as similar fact evidence and/or as evidence of an inappropriate sexual attraction for the complainant only if that evidence had been of sufficient probative value in relation to the commission of the acts said to have constituted the offences to outweigh any risk of undue prejudice. The court held that, at the very least, it would have been necessary for the trial judge to have made it clear to the jury what acts were said to constitute the offences charged and what acts were relied upon as similar facts. It would then have been necessary to explain the legal significance of the similar fact evidence and how it might be taken into account in the jury's deliberations.

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[56] *S v R* (1989) 168 CLR 266 per Dawson J at 274-278, Toohey J at 279- 283 and Gaudron & McHugh JJ at 283-288 (Brennan J dissenting).

20. In addition, concern was expressed that the lack of specificity might prevent an accused from raising a defence of alibi and, whatever the verdict, make it difficult to apply the principle that a person should not be tried again for the same alleged offence.[57]

21. It is clear from the second reading speech in the Legislative Assembly that *S v R* was perceived as highlighting the difficulty of securing a conviction when the child could not remember precise particulars of each act of sexual abuse. Hence, subsection (4) provides that evidence of a sexual act is not inadmissible merely because it does not disclose the date or exact circumstances in which the act occurred. However, that was not the real problem identified in *S v R*. The High Court did not rule that the date on which and/or circumstances in which a sexual act occurred had to be established with precision nor even finally determine that the evidence had been inadmissible. On the contrary, it indicated that it had decided the matter without determining the admissibility of the evidence and any doubt as to that issue was not due to lack of specificity, but to the fact that much of the evidence related to allegations which were not the subject of any charge. The real problems identified by the High Court were, as mentioned, the need to ensure that the jury knew what act was relied upon by the Crown as constituting each offence charged, what acts were relied upon for other purposes such as similar fact evidence or proof of an inappropriate sexual attraction for the complainant and how evidence of other acts might be taken into account.

22. In practice, the relevant acts can usually be distinguished from one another by reference to some identifiable factor even if the date or exact circumstances cannot be recalled. For example, one may have occurred whilst the family was on holiday at a particular place, another may have occurred in a particular part of the house whilst still another may have involved a different act or occurred during a particular activity. All that is necessary is that particular acts alleged by the Crown can be identified as forming the subject of particular charges and that others can be identified as being relied upon only as similar fact evidence.

23. It cannot be denied that real problems are sometimes encountered in this area, but section 92EA simply does not address them. In fact, an offence under section 92EA may be even more difficult to prove than individual offences such as those with which the High Court had been concerned. The section requires proof beyond reasonable doubt that the accused engaged in a sexual act which would have constituted an offence under Part 3A of the Crimes Act on three or more occasions. If circumstances such as those discussed in *S v R* are encountered it will still be necessary to identify each of the particular sexual acts relied upon by the Crown and prove the commission of each such act beyond reasonable doubt.

[57] The principle is reflected in the defences of autrefois acquit and autrefois convict.

Similar difficulties may arise in distinguishing between the acts relied upon as constituent elements of an offence under the section and other acts said to be relevant on a similar fact or propensity basis. The problems referred to in *S v R* cannot be overcome by requiring the Crown to prove three or more sexual acts rather than one.

24. In theory, of course, there is a distinction between the maintenance of a sexual relationship with a child or young person and particular acts committed during the course of that relationship. However, the High Court has held that the actus reus of the comparable Queensland offence lies in the commission of the sexual acts in relation to the young person on three or more occasions[58]. Hence, the section merely creates an umbrella offence dependent upon proof of three or more constituent criminal acts and the difficulties encountered in *S v R* will continue to be encountered in relation to the proof of each such act.[59]

25. It has been suggested that the comparable Queensland section may have been enacted to provide heavier penalties when three or more sexual acts have been committed upon the same child or young person[60]. However, the ACT provisions governing penalties are also quite illogical. Subsection (5) provides a maximum penalty of 7 years imprisonment. This is absurdly low given that a jury must be satisfied that the accused has committed a sexual act constituting an offence under Part 3A of the Crimes Act on three or more occasions. The maximum penalties presently prescribed for engaging in sexual intercourse with a young person are 17 or 14 years imprisonment depending on the age of the young person concerned whilst the corresponding penalties for committing an act of indecency upon a young person are 12 and 10 years respectively.

26. These sentencing provisions are subject to subsection (6) which provides that if the offender committed ‘another offence under this Part’ in relation to the young person during the course of the relationship then the maximum penalty is dependent upon the penalty described for the other offence. If the other offence is punishable by imprisonment for less than 14 years, the penalty for the offence under section 92EA is increased to 14 years but if that other offence is punishable by imprisonment for a period of 14 years or more then the maximum penalty for the offence under section 92EA is increased to life imprisonment. In the context of an

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[58] *KBT v R* (1997) 149 ALR 693 per Brennan CJ, Toohey, Gaudron & Gummow JJ at 696.

[59] In *R v S* [1999] 2 Qd R 89 the Queensland Court of Criminal Appeal found that the evidence had been sufficient to prove the same three acts to the satisfaction of all jurors but observed that the evidence in that case had been exceptional. Their Honours observed that the corresponding Queensland section would need amendment if it were to perform its intended function.

[60] See *R v Kemp* [1997] 1 Qd R 383 per Davies J at 400.

offence which is, in effect, characterised by the commission of 'three or more' constituent offences of the relevant kind, it is difficult to understand the importance attributed to 'another offence' of that kind.

27. Overall, one offence under section 92E or 92K will expose the offender to a maximum sentence of 10 to 17 years imprisonment, three will result in a discount or 'package deal' involving a maximum aggregate penalty of 7 years, whilst a fourth will increase that aggregate to either 14 years or life imprisonment. However, the fourth sexual act will apparently increase the maximum penalty only if the prosecutor chooses to treat it as 'another offence' rather than as being one of the three 'or more' sexual acts upon which the charge is essentially founded. The standard or 'discount rate' provided by subsection (5) otherwise applies.

28. Subsection (7) permits a person charged with an offence of that kind to also be convicted and punished for discrete offences under Part 3A even though they were committed during the course of the relationship in question. However, it seems that the same offence cannot be based upon one of the three or more acts relied upon to constitute the offence under section 92EA or the offender would be punished twice for the same act[61].

29. It is difficult to avoid the conclusion that the section simply lacks any real utility. Since each of the relevant acts must be proven beyond reasonable doubt and each must constitute another offence under Part 3A, the section does little more than create a new umbrella offence consisting of a series of three or more constituent offences with a discounted aggregate penalty. It will inevitably be less complicated and more efficient to charge the alleged offender with each of those discrete offences. In that event a failure to prove one of the series of acts relied upon would lead to an acquittal only in relation to a discrete charge based upon that act rather than an overall acquittal in relation to a composite charge under section 92EA. It would also be much easier for a jury to understand such an approach.

30. As things stand the section gives the impression of offering advantages that do not in fact exist. This impression was reflected in a number of submissions seeking to support its retention on the basis of perceptions that it did somehow overcome the problems encountered in *S v R* though none of the proponents were able to explain how it could do so.

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[61] *R v GB* (unreported No SCC 72 of 1997 2 December 1998).

31. The Commission is conscious of the fact that MCCOC has also recommended the enactment of a similar provision.[62] Regrettably, however, whilst adverting to possible means of providing sufficient particularity and acknowledging concerns as to possible unfairness, MCCOC did not seem to fully grasp the nature of the problems posed by *S v R*. Its report quoted a passage from the judgment of Dawson J concerning the absence of specificity and mentioned other criticisms including difficulties in relation to similar fact evidence.[63] However, the particular passage quoted did not refer to the fundamental problem that because the particular act said to constitute a particular offence could not be identified a person might be convicted when all jurors were not satisfied that the same act had been proven. Indeed, he might be convicted simply on basis that he was thought to have had a general disposition to commit offences of the kind charged.[64] MCCOC envisaged that each juror would have to be satisfied about the same three acts but did not seem to realise that trebling the number of acts that had to be proven would merely mean that the more substantial problems posed by *S v R* would arise in relation to each of the three acts. The commission intends no criticism of MCCOC. It considered these issues at length and its inability to find adequate solutions merely reflects the intractable nature of the problems.

32. In the only case in which a charge under section 92EA has apparently proceeded to trial, the trial judge observed that the inclusion of a count alleging an offence of this kind had added nothing to the Crown case and had caused unnecessary delay and complication.[65] In fact, the most significant consequence of the enactment of this section seems to have been the creation of confusion and it is

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[62] See 'Persistent sexual abuse of a child', Chapter 5, Report, 'Sexual Offences Against the Person', May 1999, at 132-138.

[63] See page 135.

[64] The passage which the MCCOC report suggest was at page 328 of the judgment may in fact be found at page 275. It was followed by the following statement at page 276: 'The case having proceeded as it did, it is theoretically possible that individual jurors identified different occasions as constituting the relevant offences so that there was no unanimity in relation to their verdict. That, of course, would be unacceptable, but it is more likely that the jury reached their verdict without identifying any particular occasions. Indeed, that is virtually inevitable because no means were afforded the jury whereby they could identify specific occasions. As I have indicated, such a result is tantamount to their having convicted the applicant, not in relation to identifiable offences, but only upon the basis of a general disposition on his part to commit offences of the kind charged.'

[65] R v GB (op cit). The case was somewhat unusual. It had been contended that the complainant had made false accusations due to resentment at the break down of a relationship between his mother and the accused. His mother had previously accused her father of being a serial rapist and the falsity of those allegations had been conclusively established by DNA evidence. The accused was acquitted and in a somewhat startling footnote to the trial, the complainant wrote to him admitting that the allegations had been untrue and apologising for the harm they had caused. Proceedings by the ACT government to recover compensation paid as a result of the false complaints are currently pending.

always dangerous to inject confusion into a criminal trial. It has also been suggested that the introduction of the comparable Queensland offence has increased the risk of unfair trials and miscarriage of justice.[66]

33. The answer to every evidentiary difficulty is not to be found in the enactment of legislation creating new offences. Problems such as those actually encountered in *S v R* can almost always be overcome by a more thorough investigation and the exercise of greater care in the formulation of discrete charges, the "proofing" of witnesses and the conduct of the prosecution case. In any event, as Gaudron and McHugh JJ said in *S v R*: 'Whatever practical difficulties may exist, those difficulties (even if amounting to impossibility) cannot justify a criminal trial attended by such uncertainty that the verdict or verdicts must also be seen as uncertain.'[67] Accordingly, the Commission is of the view that the section should be repealed. The Director of Public Prosecutions supports that view.

34. It would be theoretically possible to draft a new statutory provision that would overcome the legal obligation to specify which acts were relied upon in relation to particular counts in the indictment. However, any such provision would involve a serious incursion into the fundamental principle that each charge must be specified with sufficient precision to enable the jury to know what acts are alleged to constitute the offence and the accused to know what are the allegations he or she has to address. Such imprecision would not only create a risk of verdicts based on generalised feelings that 'where there's smoke there's fire' but prevent the accused from effectively testing the credibility of the allegations or relying upon an alibi.

35. Furthermore, the creation of any offence involving such generalised allegations might give rise to cross-examination as to the complainants' sexual experience. Whilst evidence as to sexual history is normally excluded, suggestions that some other person might have been responsible for the offence with which the accused has been charged must be permitted. If the charge in question were to involve a generalised history of unspecified acts of sexual abuse over an extended period then it is difficult to see how cross-examination as to any sexual conduct during the same period could be excluded.

36. The need for such a provision has certainly not been demonstrated. There has been no suggestion that problems of the kind in fact discussed in *S v R* have prevented the successful prosecution of any offenders in this territory. Indeed, it seems likely that much of the impetus for the enactment of section 92EA stemmed from a misunderstanding of the nature and extent of the problems posed by *S v R*.

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[66] *R v Kemp*, op.cit. per Fitzgerald P, with the agreement of Shepherdson J, at 401.

[67] At 288.

In the absence of any demonstrated need for such a provision, the Commission would be unable to recommend its enactment. There are grounds for fearing that the introduction of some new and largely amorphous offence would create substantial risk of injustice, open the door to inquiries into the sexual history of complainants and offer a ready excuse for inadequate investigations.

**RECOMMENDATION 4**

The Commission recommends that section 92EA be repealed.

### *Acts of Indecency*

37. The provisions dealing with acts of indecency are as follows:

*92F Act of indecency in the first degree*

*A person who inflicts grievous bodily harm upon another person with intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable on conviction, by imprisonment for 15 years."*

*92G Act of indecency in the second degree*

*A person who inflicts actual bodily harm upon another person with intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 12 years."*

*92H Act of indecency in the third degree*

*A person who unlawfully assaults, or threatens to inflict grievous or actual bodily harm upon, another person with intent to commit an act of indecency upon, or in the presence of, that other person, or a third person who is present or nearby, is guilty of an offence punishable, on conviction, by imprisonment for 10 years."*

*92J Act of indecency without consent*

*(1) A person who commits an act of indecency upon, or in the presence of, another person without the consent of that person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 5 years.*

*(2) A person who, acting in company with any other person, commits an act of indecency upon, or in the presence of, another person without the consent of that other person and who knows that that other person does not consent, or who*

*is reckless as to whether that other person consents, to the committing of the act of indecency is guilty of an offence punishable, on conviction, by imprisonment for 7 years.*

38. The term 'act of indecency' is not defined in the Crimes Act and there have been few cases in which the meaning of the term has been considered. However, it appears to refer to any act that offends against the contemporary standards of propriety 'accepted by ordinary, decent minded but not unduly sensitive people'.[68] The House of Lords has observed that whether 'right thinking' people will consider an action indecent will sometime depend upon the purpose for which the act is carried out. Hence, an act carried out for a legitimate medical purpose may not be considered indecent even though a similar act carried out for prurient interest might well be.[69]

39. The sections relating to offences involving acts of indecency follow the same pattern as those dealing with sexual assault and raise much the same issues. However, sexual activity between consenting adults would not normally offend against standards of propriety according to contemporary standards of the Australian community and hence could not constitute an act of indecency.[70] Nonetheless explicit requirements that the act of indecency be committed without consent and with knowledge or recklessness as to that lack of consent are contained in section 92J but not in sections 92F, 92G or 92H. For reasons which have already been discussed in the context of offences relating to sexual intercourse, the Commission does not accept that such a distinction is either necessary or desirable. The offences carry maximum penalties of 5 to 15 years imprisonment and should be defined with due clarity.

40. It is appropriate that the legislative scheme for offences of this kind follow the same pattern as that adopted in relation to rape so that the correlation of elements other than sexual intercourse will facilitate the availability of alternative verdicts. Hence, it is again recommended that the number of offences be reduced to three, an offence of committing an act of indecency without consent, an aggravated form of that offence and assault with intent to commit an act of indecency without consent. The distinguishing features of the aggravated offence would be either acting in company or the infliction of grievous bodily harm immediately before, during or

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[68] *R v Morton* (unreported) [1998] SCACT 8 per Crispin J 24 February 1998.

[69] *R v Court* [1989] 1 AC 28 per Lord Griffiths at 35. The expressions 'respectable person', 'right-minded person' and 'decent-mined person' have also been used: see *Court* (1988) 87 Cr App R 144 at 154; *Harkin* (1989) 38 A Crim R 296 at 300.

[70] In *R v Gillard* [1999] NSWCCA 21, 5 March 1999 at paragraph 62, the NSW Court of Criminal Appeal said that consensual sexual intercourse between husband and wife was obviously not of itself in any way indecent. There is no reason to suppose that the principle would be confined to married couples.

immediately after an act of indecency. Other aggravating features would be taken into account in sentencing.

41. The Commission is of the view that 5 years imprisonment is an insufficient maximum sentence for offences involving the commission of an act of indecency. Such offences may vary widely in nature and gravity. The Commission recommends that the maximum sentence for an act of indecency be increased to 7 years imprisonment and that the maximum sentence for an aggravated act of indecency be set at 15 years imprisonment.

42. The Commission also recommends that there be a third offence of assault with intent to commit an act of indecency without consent. This offence would again cover any unusual cases in which an antecedent assault or threat was not sufficiently proximate to amount in law to an attempt to commit such an act. A maximum penalty of 7 years imprisonment is also proposed for this offence.

**RECOMMENDATION 5**

The Commission recommends that:

(a) the number of offences relating to acts of indecency be reduced to 3. The offences should be:

- act of indecency;
- aggravated act of indecency; and
- assault with intent to commit an act of indecency.

(b) The maximum sentence for acts of indecency and assaults with intent to commit acts of indecency should be 7 years and the maximum sentence for the commission of an aggravated act of indecency should be 15 years.

***Indecent assault upon a child or a young person***

16. The provisions dealing with acts of indecency upon children or young people are contained in section 92K which is in the following terms:

> *(1) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 10 years is guilty of an offence punishable, on conviction, by imprisonment for 12 years.*
>
> *(2) A person who commits an act of indecency upon, or in the presence of, another person who is under the age of 16 years is guilty of an offence punishable, on conviction, by imprisonment for 10 years.*

*(3) It is a defence to a prosecution for an offence under subsection (2) if the defendant establishes that:*

*(a) he or she believed on reasonable grounds that the person upon whom the offence is alleged to have been committed was of or above the age of 16 years; or*

*(b) at the time of the alleged offence -*

*(i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and*

*(ii) the defendant was not more than 2 years older;*

*and that that person consented to the committing of the act of indecency.*

17. Section 92K adopts the same formulation in relation to acts of indecency upon children and young persons as section 92E adopts in relation to engaging in sexual intercourse in relation in relation to young complainants and the same considerations arise.

**RECOMMENDATION 6**

The Commission recommends that section 92K be amended as follows:

(a) that the offence under subsection (1) remain unqualified by any statutory defence;

(b) the maximum penalty for such an offence be increased to 15 years;

(c) the maximum penalty for an offence under subsection (2) be reduced to 6 years[71]; and

(d) that subsection (3) be amended by deleting the words `and that that person consented to the committing of the act of indecency'.

***Incest and Similar Offences***

16. Section 92L is in the following terms:

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[71] This corresponds to the maximum penalty prescribed for comparable offences in NSW by 66A of the Crimes Act

*(1) A person who engages in sexual intercourse with another person, being a person who is under the age of 10 years and who is, to the knowledge of the first-mentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or step-child, is guilty of an offence punishable, on conviction, by imprisonment for 20 years.*

*(2) A person who engages in sexual intercourse with another person, being a person who is under the age of 16 years and who is, to the knowledge of the first-mentioned person, his or her lineal descendant, sister, half-sister, brother, half-brother or step-child, is guilty of an offence punishable, on conviction, by imprisonment for 15 years.*

*(3) A person who engages in sexual intercourse with another person, being a person who is of or above the age of 16 years and who is, to the knowledge of the first-mentioned person, his or her lineal ancestor, lineal descendant, sister, half-sister, brother or half-brother, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.*

*(5)*[72] *A person shall not be convicted of an offence under subsection (2) or (3) if there is evidence that he or she engaged in the act alleged to constitute the offence under the coercion of the person with whom the offence is alleged to have been committed unless that evidence is rebutted by the Crown.*

*(6) A person charged with an offence under this section shall, unless there is evidence to the contrary, be presumed to have known at the time of the alleged offence that he or she and the person with whom the offence is alleged to have been committed were related in the manner charged.*

*(7) In this section, 'step-child', in relation to a person, means a person in relation to whom the first-mentioned person stands in loco parentis*

17. It may be noted that the reference to a `step-child' which appears in subsections (1) and (2) has been omitted from subsection (3). This is obviously intended to protect children from sexual exploitation by step parents but to decriminalise sexual intercourse between a person who is or has been a step parent and a current or former step-child who has now attained the age of sixteen.

18. The former ACT Chief Police Officer suggested that this provision should be amended to include persons performing a parental role at the time of the offence, including aunts and uncles, foster parents and carers. The commission agrees that it would be appropriate to expand the ambit of the offence though at least in some circumstances some of the people suggested as examples might fall within the concept of persons 'in loco parentis'. That phrase refers to a person 'in the place of a parent: instead of a parent: charged, factitiously, with a parent's rights, duties and

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[72] There is no subsection 4

responsibilities'[73]. Such a person must have acted in a manner evincing an intention to put himself or herself in loco parentis and, it has been held, must have assumed the duty of providing for the child's financial needs. Jessel M.R. offered the following description:

> *What is the meaning of a "person in loco parentis"? I cannot do better than refer to the definition of it given by Lord Eldon … Lord Eldon says it is a person, 'meaning to put himself in loco parentis - in the situation of the person described as the lawful father of the child.' Upon that Lord Cottenham observes: 'But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, viz, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making provision for a child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention of such person to assume also the duty of providing for the child.' So that a person in loco parentis means a person taking upon himself the duty of a father to make provision for the child*[74].

19. This definition was offered 120 years ago and in the context of proceedings by a mother to recover monies previously loaned to her son from his estate and a different construction of the phrase might now be adopted in the context of section 92L. Nonetheless, the section should be couched in terms which make it quite clear that criminal liability is not dependent upon the assumption of financial support but the offender's position in the family vis a vis the child. It is the betrayal of trust by a person to whom the child was entitled to look for nurture, protection and innocent affection that makes incest upon a child such a grave offence and in the Commission's view the section should apply to anyone fulfilling a parental role.

**RECOMMENDATION 7**

The Commission recommends that subsection (7) be amended to the following:

(7) In this section, 'step-child', in relation to a person, means a person with whom the first-mentioned person lives and in relation to whom the first mentioned person has assumed a caring role of the kind that would normally be fulfilled by a parent.

***Abduction***

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[73] Black HC., Garner BA., *Black's Law Dictionary: definitions of the terms and phrases of American and English Jurisprudence, ancient and modern*, 5th Edition, 1979, West Publishing Co: St Paul at 708

[74] *Bennett v Bennett* (1879) 10 Ch D 474 at 477-8

16. Section 92M is in the following terms:

> *A person who abducts another person by force or by any other means or who unlawfully detains another person with the intent that the other person should engage in sexual intercourse with the first-mentioned person or with a third person (whether within the Territory or otherwise) is guilty of an offence punishable, on conviction, by imprisonment for 10 years*

17. The maximum sentence of 10 years imprisonment set for this offence seems inadequate by comparison with sections 92B and 92C which relate to the infliction of actual bodily harm or unlawful assaults or threats with intent to engage in sexual intercourse. Those offences carry maximum penalties of 14 and 12 years respectively.

18. Furthermore, section 37 makes it an offence to lead, take, entice away or detain a person with intent to hold that person for ransom "or any other advantage to any person". That offence is punishable by imprisonment for 15 years or 20 years if the complainant suffers grievous bodily harm. The concept of "an advantage" has been widely construed and abducting or detaining another person with a view to engaging in sexual intercourse would appear to fall within this section were it not for the existence of section 92M. However, it may be argued that section 92M displaces section 37 insofar as it might otherwise have extended to offences of this kind by virtue of the *generalibus specialia derogant* rule of statutory construction.[75]

19. The most obvious means of resolving these anomalies is to repeal section 92M. The offence created by that section offers no obvious practical advantages over that created by section 37 and if section 92M were repealed the scope for any argument based upon the *generalibus specialia derogant* rule of statutory construction would be removed. Any conceivable doubt about the application of section 37 could be removed by adding a phrase making it clear that the necessary intent may be to engage in sexual intercourse with any person. If, despite this view, section 92M were to be retained the maximum penalty should be increased to correspond with the penalties imposed by section 37.

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[75] The Latin may be translated into "special things derogate from general". The rule means that provisions dealing with specific situations should normally be treated as derogating from the application of more general rules at least to the extent of any inconsistency.

**RECOMMENDATION 8**

The Commission recommends that:

(a) section 92M be repealed; and
(b) section 37 be amended by adding after the words ‘advantage to any person’ the words ‘including sexual intercourse with the person so detained or any other person’.

### *Child Pornography*

16. Offences of child pornography do not fall clearly within the concept of 'sexual assault' and may appear to be outside the Commission's terms of reference. However, section 92EA defines a "sexual act" to mean an act that constitutes an offence under Part 3A and at face value that would extend to offences involving child pornography. Of course, not every sexual act amounts to an assault but the Commission has taken the view that it is appropriate to extend the review which it was authorised to conduct to those provisions which seek to prevent the sexual exploitation of children and young persons.

17. The relevant sections are as follows:

> *92NA Employment of young persons for pornographic purposes*
>
> *(1) A person who employs or permits the employment, whether for reward or not, of a person who is under the age of 16 years (in this section referred to as the `young person'):*
>
> > *(a) to engage in an act of a sexual nature, or to be in the presence of another person who is engaged in an act of a sexual nature, being an act that would, in the circumstances, offend a reasonable adult person; or*
> >
> > *(b) for the purpose of depicting or otherwise representing, by means of a film, photograph, drawing, audio tape, video tape or any other means, the young person as being engaged in, or as being in the presence of another person engaged in, an act of a sexual nature where the depiction or other representation of the young person in those circumstances would offend a reasonable adult person;*
>
> *is guilty of an offence punishable, on conviction, by imprisonment for 10 years.*
>
> *(2) In subsection (1), `an act of a sexual nature' means sexual intercourse or an act of indecency."*

*92NB Possession of child pornography*

*(1) A person who knowingly has in his or her possession a film, photograph, drawing, audio tape, video tape or any other thing depicting or otherwise representing a young person engaged in, or in the presence of another person engaged in, an act of a sexual nature, being a depiction or representation that would offend a reasonable adult person, is guilty of an offence punishable, on conviction, by imprisonment for 5 years.*

*(2) It is a defence to a prosecution for an offence against subsection (1) that the defendant reasonably believed that the person depicted or otherwise represented as a young person was not under the age of 16 years*

*(3) In this section -*
*young person' means a person who is under the age of 16 years.*

18. The former Chief Police Officer pointed out that subsection (1) unnecessarily confines the concept of child pornography. In particular it requires that the young person depicted be engaged in an act of a sexual nature. Hence, it would not apply to visual representations of the sexual organs or anal region of a young person not engaged in such an act.

19. In many cases the nature of the pose adopted for the photographer might be construed as 'an act of a sexual nature' but there may be circumstances in which such a construction would not be available. For example, the child might be photographed whilst asleep. It is obviously desirable to amend the legislation to ensure that all such cases are covered.

20. However, there may be legitimate reasons for taking photographs of, or otherwise depicting, such areas of the body. For example, textbooks on gynaecology and other areas of physiology or human development might contain such photographs or depictions. There may also be circumstances in which visual representations of the sexual organs or anal region of a particular child might be necessary for some legitimate medical purpose. Furthermore, if a child had been savagely beaten and criminal charges laid against the offender one might expect that the investigating police or welfare officers would ensure that photographs were taken of the bruising even if that was substantially on the buttocks. It is important to ensure that the legislation does not actually restrict the obtaining of relevant evidence and hence hamper prosecutions for offences against.

21. The terms of section 92NB also fail to deal with written material advocating sexual relations with children. The Commission is of the view that possession of such material should be an offence if the possessor intended that it be used to be used to persuade children to submit to acts of paedophilia. However, there is again a need to ensure that any amendment to section 92NB does not prevent the

possession of such material for the purpose of drawing the matter to the attention of the police, investigating the conduct of those who may have prepared or distributed it or some other legitimate purpose. For example, the submission by FSVP[76] enclosed a sample of an internet web page setting out the type of things that paedophiles are said to tell children. It would plainly be inappropriate to criminalise the provision of information to the authorities in circumstances of this kind.

**RECOMMENDATION 9**

The Commission recommends that section 92NB be amended by:

(a) adding after the words 'sexual nature' in subsection (1) the words 'or the sexual organs or anus of a young person'; and

(b) adding to subsection (2) the words 'or that the film, photograph, drawing, audio tape, video tape or thing was in his or her possession for a legitimate medical or educational purpose or for purposes associated with the investigation of possible criminal offences and /or the maintenance of legal proceedings.'

(c) by the addition of the following further subsections:

(3) A person who knowingly has in his or her possession a film, photograph, drawing, audio tape, video tape, document or any other thing with the intention that it be used in an attempt to persuade a young person to engage in an act of a sexual nature is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(4) A person shall be taken to possess such film, photograph, drawing, audio tape, video tape, document or thing with the intention specified in subsection (3) if he or she possesses it with the intention of attempting to persuade a young person to engage in an act of a sexual nature by making any statement or adopting any strategy of a kind suggested in it.

***Other issues relating to paedophilia***

16. Subject to the matters already discussed the substantive law concerning offences of paedophilia would appear to be adequate. However, whilst it is obviously important to ensure that offenders can be effectively prosecuted, it is also important to take any reasonably available measures to minimise the risk of such offences occurring. A number of issues have arisen in relation to the objective of averting the risk of paedophilia.

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[76] Family Support for Victims of Paedophiles (ACT) Inc

17. The issue of known or suspected paedophiles loitering near places frequented by children has been one area of significant concern. Various strategies have been suggested and some have actually been adopted. Regrettably, none appears wholly satisfactory.

18. One strategy has been the compilation and publication of paedophile registers. There may be sound reasons for the authorities to maintain registers of that kind but whilst understanding the concerns that may have led individuals to publish lists of names, the Commission does not believe that the practice is acceptable. Lists of that kind may lead to violence or harassment. Any measures to prevent crime should involve enforcing the law; not subverting it. There are other potential problems. The wrong people could be the subject of such assaults or harassment. The information relied upon could be unreliable, there could be an error in the transposition of names or the name of a person previously convicted of such an offence might remain on the list after the conviction had been set aside on appeal. Furthermore, in any city there are many people with the same names and the publication of even correctly recorded names might well involve destroying the reputation of innocent people and exposing them to inappropriate hostility. A spate of defamation cases would be virtually inevitable unless defaming the innocent were to be authorised by statute and any remedy barred.

19. In any event, the measure would be of limited utility. The information so published would not necessarily enable a school principal to put a name to the face across the road from the school each afternoon. Nor would it authorise the principal or anyone else to remove him.

20. A further strategy has been to make it an offence for a person convicted of certain offences to loiter near places frequented by children without reasonable excuse. Under section 60B of the *Crimes Act 1958* (Vic) it is an offence punishable by imprisonment for one year for a person who has previously been found guilty of certain specified offences to loiter without reasonable excuse in or near a school, kindergarten or child care centre.

21. The Commission is concerned to ensure that the civil liberties of people who may have no criminal intent are not unduly infringed, but believes that there is an overriding need to ensure the protection of children. However, it considers that the Victorian offence is too wide in scope and that it is unlikely to provide an adequate remedy for the type of situation commonly encountered. For example, the section extends to loitering in or near 'a public place within the meaning of the *Vagrancy Act 1966* (Vic) regularly frequented by children and in which children are present at the time of the loitering'. The problem is that this description is almost all embracing. Libraries, parks, and even streets and footpaths could fall within this description.

Such inappropriately wide provisions may either be abused or fall into disuse[77]. It is important to ensure that any provisions of this nature are carefully drafted so that they achieve the protection sought.

22. The Victorian provision is also inadequate because it operates only in relation to people who have been found guilty of offences and contains no mechanism for establishing the identity of people seen loitering. Hence there is no way of establishing whether they have been so convicted.

23. Whilst it may involve some incursion into the usual right to privacy the Commission has concluded that police officers should be authorised to demand the name and address of persons found loitering near schools, kindergartens or child care centres. Police would, of course, be expected to exercise due discretion in deciding whether such a power should be exercised in particular circumstances. Compliance should be compelled by making it an offence to refuse to supply such information or to supply information which is false.

24. The Magistrates Court should also be empowered to grant orders restraining people from loitering in or near schools, kindergartens or child care centres when there are reasonable grounds for suspecting that children might be in danger from such a person. The general power provided by section 197 of the *Magistrates Court Act 1930* requires the court to be satisfied on the balance of probabilities that the person has caused or threatened personal injury or damage to property or has behaved in an offensive or harassing manner. However, a person sitting in a car outside a school, handing out chocolates and offering to drive children home may not fit into any of these categories.

25. It may be necessary to limit the range of people entitled to apply for such an order because people may watch schools for legitimate reasons and there may be circumstances in which those reasons should remain confidential. For example, police surveillance with a view to detecting drug dealing should not be hindered by constant applications, whether made by well meaning but uninformed parents or people with more sinister motives. However, the Commission is of the view that police officers, school principals and those in charge of kindergartens or child care centres should be entitled to seek such orders.

26. Of course the fact that a person has been convicted of an offence under sections 92A to 92NA of the *Crimes Act* would clearly be relevant but the granting of relief would not be dependent upon proof of such a conviction. The other provisions of Part 10 of the *Magistrates Court Act* would also apply to such orders, including the provisions of section 206L which provides maximum penalties for breach of

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[77] Such as the former offences of misprision of felony or consorting with criminals

such orders of 2 years imprisonment for a first offence and 5 years imprisonment for a subsequent offence. Those penalties are, of course, significantly heavier than those provided for an offence under section 60B of the Victorian *Crimes Act*.

27. This proposal should overcome a number of the deficiencies of the Victorian provision. It would provide a means of ascertaining the identity of anyone found loitering near schools in suspicious circumstances, provide a remedy for such behaviour even if the person has no previous convictions and enable any prosecution to proceed on the clear cut basis of breach of a restraining order without recourse to arguments about concepts of reasonableness.

**RECOMMENDATION 10**

The Commission recommends:

(a) that police officers be authorised to demand the name and address of persons found loitering near schools, kindergartens or child care centres;

(b) that it be made an offence either to refuse to supply such information or to supply information which is false in any material particular; and

(c) that section 197 of the *Magistrates Court Act* be amended to authorise the court to grant orders, on the application of police officers, school principals or those in charge of kindergartens or child care centres, restraining people from loitering in or near schools, kindergartens or child care centres when there are reasonable grounds for suspecting that children might be in danger from such a person.

## 3. OTHER RELEVANT PROVISIONS OF THE CRIMES ACT

### *THE CONCEPT OF CONSENT*

16. The concept of consent is not presently defined by the Crimes Act 1900. However, section 92P does provide that consent 'is negated' in certain circumstances. That section is in the following terms:

> *(1) For the purposes of section 92D, paragraph 92E (3) (b), section 92J and paragraph 92K (3) (b) and without limiting the grounds upon which it may be established that consent is negated, the consent of a person to sexual intercourse with another person, or to the committing of an act of indecency by or with another person, is negated if that consent is caused:*
>
> > *(a) by the infliction of violence or force on the person, or on a third person who is present or nearby;*
> >
> > *(b) by a threat to inflict violence or force on a person, or on a third person who is present or nearby;*
> >
> > *(c) by a threat to inflict violence or force on, or to use extortion against, the person or another person;*
> >
> > *(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person;*
> >
> > *(e) by the effect of intoxicating liquor, a drug or an anaesthetic;*
> >
> > *(f) by a mistaken belief as to the identity of that other person;*
> >
> > *(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;*
> >
> > *(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person;*
> >
> > *(i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or*
> >
> > *(j) by the unlawful detention of the person.*
>
> *(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.*

*(3) Where it is established that a person who knows the consent of another person to sexual intercourse or the committing of an act of indecency has been caused by any of the means set out in paragraphs (1) (a) to (j) (inclusive), the person shall be deemed to know that the other person does not consent to the sexual intercourse or the act of indecency, as the case may be.*

16. The concept of consent is of fundamental importance to this area of the law. In earlier years the legality of sexual acts was frequently dependent upon societal judgements about the intrinsic morality of the behaviour in question. Such behaviour was criminalised if perceived to be contrary to biblical commandments or unnatural. Hence, adultery, homosexuality and sodomy were all crimes. The contemporary approach adopted in Australia and most western countries has been to criminalise the commission of sexual acts by and upon adults only if they are committed without the other person's consent.

17. This approach has been sometimes been challenged. Robin West has suggested that women often redefine themselves as 'giving selves' and that consent is little more than a defence against fear borne of a general threat of masculine violence[78]. Catharine MacKinnon has gone further, suggesting that consent has no useful role to play in delineating lawful from unlawful sexual acts because the concept of consent presupposes a choice which women in fact do not have[79]. Whilst not going so far as to suggest that women lack the capacity to choose whether to participate in sexual conduct, Dr Easteal raised somewhat similar concerns in her submission, suggesting that 'the consent/non-consent dichotomy itself may be too narrow to allow for women's experience …'. She referred to coercion in relationships that have at some time involved consensual sexual activity and explained: 'The language and legal interpretation of consent neither correspond with the victims' reality nor capture the range of coercive behaviours such as interpersonal intimidation that involve threats that are not physical (her fear that he will leave her if she refuses) and social expectations.'

18. The American legal philosopher, David Luban, has advocated a somewhat different test, maintaining that the critical issue should not be 'consent' but 'assent'. He has suggested that the basis of an offence of rape could be reformulated as having sexual intercourse with another person 'without making sure that she wanted it'.[80] It is by no means clear that Prof Luban was suggesting that there could be

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[78] West, RL., "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) 3 *Wisconsin Women's Law Journal* 81, at 93-108.

[79] MacKinnon, CA, *Towards a Feminist Theory of the State*, Harvard University Press, Massachusetts: 1989, at 171- 183.

[80] Luban D., 'Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman', (1990) 90 *Columbia L. Rev*. 1004 at 1032-5.

assent only if those in question were motivated by an actual desire for sexual intercourse rather than affection, consideration for the needs of people they loved or even financial gain. However, in suggesting the use of the word 'assent' rather than 'consent' he may have been attempting to articulate a similar concept to that which Dr Easteal and others have described as 'a positive consent standard'. Dr Easteal explained: 'Thus, importantly, if a woman said nothing, it no longer could be interpreted by the court as meaning yes'. Her belief that Victoria is the only jurisdiction in which 'the complainant no longer has to prove that she communicated her lack of consent' is actually quite incorrect. The law in the ACT certainly contains no such requirement, though the absence of a clear legislative statement concerning the nature of consent may contribute to misunderstandings of that kind. In any event, the Commission is in general agreement with Dr Esteal's view that a positive consent standard should be articulated.

19. As presently formulated section 92P offers little real guidance as to what is envisaged by the term 'consent'. It merely provides that, whatever it may be, consent is negated in the circumstances stipulated. Whilst statutory definitions frequently require some qualification, it is generally undesirable to attempt to cast light on the meaning of important terms only by offering explanations in purely negative terms. Such an approach is particularly undesirable in this area of the law because it inevitably tends to shift the focus from the crucial issue of whether there was actual consent to what are, at best, secondary issues, such as the existence of violence or threats. Any provision that refers to consent only by reference to the absence of certain factors is likely to be at best confusing and at worst misleading.

20. Unfortunately, section 92P is not only cast in purely negative terms but fails to articulate even those negative propositions with due clarity. The concept of consent must be explained to a jury in terms that are reasonably comprehensible to people with no legal training and who have varying levels of intelligence and education. Furthermore, consent will often be the decisive issue which will determine whether a person is convicted of one or more very serious offences, punishable by heavy sentences of imprisonment or acquitted and released. The concept must therefore be defined in terms which will be clear and fair not only in common or expected situations but in any circumstances with which a jury may be confronted. Yet any attempt to construe, let alone explain, this section is attended by a number of serious problems.

21. First, the concept of consent being `negated' is potentially confusing. Is it intended to mean that even though there may have been an appearance of consent there will have been no actual consent if the acts or omissions creating such an appearance have been brought about by one of the circumstances set out in the section? Alternatively, is it intended to mean that even if there has been actual consent, that will be 'negated' in the sense that it will be deemed never to have been given, if it was brought about by one of the circumstances mentioned in the section?

Are both meanings embraced by the term? The reference to such matters as force and threats would appear to suggest that the first of these interpretations must be correct because consent must be free and voluntary[81]. On the other hand, the reference to the abuse of a position of trust suggests the latter construction may be correct. It seems to imply that even if there has been a free and voluntary consent, the legal effect of that consent may be in some way impugned by reference to the nature of the relationship which had existed between those concerned. This distinction may be of great significance in certain types of cases.

22. Secondly, the phrase 'caused by' gives rise to difficulties in interpretation. Is it intended to mean the sole cause, the dominant cause, or a contributing factor? Does it require anything more than the so called 'but for' test? The 'but for' test is satisfied if 'but for' one thing something else would not have occurred. Hence, a sunny day may be said to 'cause' someone to go swimming. It is obviously necessary for a jury to understand what impact the relevant factors must have on the consent or apparent consent if this requirement is to be satisfied.

23. Thirdly, problems arise in relation to the manner in which the factors said to negate consent have been defined. For example, it is unclear whether the reference to the 'effect of intoxicating liquor, a drug or an anaesthetic' is intended to mean that the person has been rendered unconscious, that she has become incapable of understanding what is intended or of exercising a free choice, that her judgment has been impaired, or merely that her inhibitions have been lowered. Is it sufficient that but for the effect of the alcohol she might not have been in the mood to consent? The inclusion of the term 'anaesthetic' tends to suggest that some serious interference with her capacity to understand and make a decision is required. However, even that supposition would not dispel every difficulty of interpretation. Is every person who gets drunk and has sexual intercourse with someone else to be taken to have been raped? If both were drunk should each be taken to have raped the other?[82] Of course, it is by no means uncommon for people to get drunk or use narcotic drugs and then to have sexual intercourse. It should not be necessary for police or lawyers to have to guess at the meaning of vaguely worded statutory

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[81] *R v Clark (* unreported) NSW Court of Criminal Appeal BC 9801258, 17 April 1998, per Simpson J at 11.

[82] The offence of sexual intercourse without consent may be committed by males or females and upon males or females. There has already been one case in the Supreme Court in which it has been argued that if a person was so drunk as to be unable to remember engaging in sexual intercourse then she must have been raped. In another case, both participants were so drunk that neither could remember and the fact that sexual intercourse had occurred was established only by the evidence of a friend of the complainant who said that she had walked in to the room whilst the relevant act was in progress. The first case resulted in an acquittal whilst the latter was resolved by the acceptance of a plea to a lesser charge. Having regard to s76E of the Evidence Act 1971(ACT) it would be inappropriate to identify the parties.

provisions or to operate in a state of uncertainty until a case is appealed and a Full Court's hypothesis becomes authoritative.

24. In some cases the overall effect of the provision of section 92P will make it almost impossible to define the boundaries of the offence. For example, the reference to "the abuse of any professional or other relationship of trust" is so vague that it virtually defies interpretation. This provision, which is found only in the ACT, is not confined to professional relationships, such as medical practitioner and patient, teacher and pupil or counsellor and client, in which one person may be thought to be emotionally vulnerable to any potential exploitation by the other. It is expressly extended to 'other' relationships that are undefined save by a reference to the description 'of trust'. It remains a matter of speculation whether this description is intended to apply to such relationships as close friends or lovers. Indeed, a marriage might be described as a relationship of trust. The paragraph also offers no guidance as to what is meant by 'an abuse' of the relationship. It is presumably intended to mean some sort of emotional manipulation or exploitation of the other. In some cases it may be contended that the mere fact that the other person has engaged in sexual activity with a more vulnerable person constitutes abuse. However it is by no means clear that that is what is intended. The section simply does not say. Suppose, for example, a solicitor forms a relationship with a client involving consensual sexual activity. Would that amount to a relevant abuse of the solicitor-client relationship negating consent? If so, then despite the terms of section 92R of the Crimes Act would it make any difference if they married? If not, what would be required to constitute an abuse of the relationship, negating consent and exposing at least one of the participants to the risk of conviction? Would there have to be discrete acts of misconduct directed to overcome the complainant's resistance to engaging in the relevant act of sexual intercourse or could the Crown rely upon more generalised allegations of abuse of the relationship? What is the nature and extent of the conduct that would need to be proved? The section provides no answers to any of these questions.

25. These problems have a cumulative effect with one layer of confusion being added to another. A jury may have to grapple with critical questions of guilt or innocence without really knowing what facts have to be proven to the requisite standard and what significance they may have if they are. Hence, in the example postulated the section would offer little guidance as to the significance of any abusive behaviour they found proven. Should the jury be asked whether in the light of that behaviour they were satisfied that the complainant did not give free and voluntary consent to the sexual act in question or should they be asked whether they were satisfied that any such consent was thereby 'negated'? Should they be asked whether they were satisfied that the behaviour found to be an abuse of the relationship was the sole or dominant cause of any consent, a contributory factor or that consent would not have been given but for such behaviour? Whatever the answers to these questions it is difficult to see how the relevant issues could be

effectively litigated without detailed particulars and evidence of the whole history of the relationship, the personalities of the parties, their background, educational attainments and incidents of behaviour which might cast light on their respective confidence and assertiveness in the relationship.

26. Some of the other factors listed in subsection (1) are so inadequately delineated that findings of guilt could be obtained in wholly inappropriate cases and absurdity could be avoided only by the absence of complaint or the exercise of prosecutorial discretion. For example, if consent is negated if caused by 'a fraudulent misrepresentation of any fact', then the consent of a rock star who has sexual intercourse with a 15 year old may be negated if she assured him that she was over 16. In that event she could be taken to have raped him.

27. Subsection 92P (2) merely states an obvious truism and adds nothing to the concept of consent. Indeed, the statement that a person should not be regarded as consenting 'by reason only' is potentially confusing. It may give rise to a suggestion that if are other unspecified factors together with an absence of physical resistance the person may be 'regarded as consenting'. However, the real issue is simply whether the person actually consented to the sexual act in question; not whether he or she should be regarded as having done so. The potential for confusion is compounded by the fact that, in contrast to the provisions in subsections (1) and (2), this provision applies only to sexual intercourse and not other sexual acts. That may give rise to a further suggestion that a person can be regarded as consenting to an indecent assault by reason only of a failure to resist. There is no justification for the continued intrusion of such imprecise and confusing concepts.

28. Subsection 92P(3) is, of course largely dependent upon subsection (1). It also gives rise to further and obviously unintended complication. Sections 92D and 92J prescribe alternative mental elements of knowledge or recklessness as to consent but the deeming provision in this subsection applies only to knowledge. This may suggest that an accused could be convicted if he had known that her consent had been due to a belief that he was another person but could not be convicted if he had been reckless as to whether she had consented for that reason. This is a further instance of the incongruity and confusion that seems to characterise this section.

29. In short, the section lacks the precision and clarity necessary to enable a trial judge to explain the elements of an offence in a manner that will be sufficiently comprehensible to enable jurors to determine an appropriate verdict. When conviction and imprisonment may follow a decision that the conduct of the accused falls on one side of a conceptual line rather than the other it is of critical importance that the line be drawn clearly and that verdicts are not influenced by confusion. It is also important that attention is not diverted from the real issues in the case to

technical arguments about the meaning of relevant statutory provisions and that there is no unnecessary risk of retrials due to appeals based upon such arguments.

30. Whilst the ambit of particular concepts is sometimes spelled out by a series of provisions intended to cover every conceivable circumstance it would seem impracticable to attempt to define the concept of consent in this manner. The range of circumstances that may be encountered in trials for sexual offences is simply too great for all conceivable issues to be foreseen and pre-determined. There may be a diversity in the nature of the allegations, the circumstances in which they arose, the relationship between the complainants and defendants, and the intellectual development, psychological state, sobriety, knowledge and perception of both. Furthermore, there would be an inevitable potential for injustice if the code was not drawn with sufficient precision to prevent the guilty 'slipping through the cracks' or the innocent wrongly convicted. Consent is best defined by articulating a positive consent standard which can be applied to whatever facts and circumstances are proven.

31. The Commission recommends that section 92P be repealed and consent defined to mean a consent freely and voluntarily given with knowledge of the nature of the act in question and the identity of the other person or persons involved. No further provision is either necessary or desirable.

32. It is true, of course, that there are a multiplicity of circumstances in which a person may be said to have acted unconscionably by engaging in sexual intercourse with someone who was over the age of consent and gave a free and voluntary consent. One obvious example is the seduction of another person's spouse or lover. However, it is generally accepted that the public interest would not be served by criminalising adultery or other acts of disloyalty. Within the infinite range of human behaviour perceptions may differ as to the point at which immoral behaviour should become subject to criminal conviction and punishment. For present purposes the Commission suggests that consensual sexual intercourse between adults should not be regarded as reaching this point even if it may have been unwise for one person to have given that consent or unconscionable for another to have taken advantage of it.[83]

33. Some submissions have included a suggestion that section 92P be retained and a positive definition such as that proposed be simply added. Whilst the Commission understands that some people may see the repeal of the existing provisions as dismantling reforms of the past, the perceived advantages have not

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[83] Similarly, the law should distinguish between rape and sexual harassment. The latter commonly involves a continuing course of conduct for which summary proceedings can offer a more timely but still effective remedy than the drawn out process of committal and trial.

been realised and, as mentioned earlier, they have proven a source of confusion and potential injustice.

34. Some negative provisions could be drafted in a manner likely to avoid further confusion but such a course would serve no useful purpose. They would, at best, state obvious truisms such as consent is not freely and voluntary given if compliance is secured by violence or threats or if the complainant's mental faculties have been so impaired that he or she is unable to exercise a free choice. Furthermore, if not drafted with much greater care than that presently reflected in the language of section 92P they might create further unforeseen problems. For these reasons the Commission does not support the enactment of negative provisions.

**RECOMMENDATION 11**

The Commission recommends that:

The negative and piecemeal approach reflected in section 92P be replaced by a positive consent standard in the following terms:

For the purposes of this Part "consent" should be taken to mean a consent freely and voluntarily given with knowledge of the nature of the act in question and the identity of the other person or persons involved.

***Inducing sexual intercourse by fraudulent representation***

35. Whilst honesty in relationships is obviously desirable, most people would baulk at making it a criminal offence to engage in any duplicity even if with a view to inducing consent to sexual intercourse. There is a vast range of flattery, boasting and hyperbole that might fall within such a wide description but not necessarily warrant criminal prosecution, as in the example of the fifteen year old telling a rock star she was over the age of consent. Nonetheless, it is important to ensure that appropriate criminal sanctions are available in some circumstances where consent is induced by fraudulent misrepresentation. One such situation is where the representation falsely suggests that there is some medical need for the relevant act. Another is where a person has been deceived into believing that there has been a valid ceremony of marriage between the complainant and the accused. Such conduct involves an extraordinary betrayal of trust.

36. In cases of this kind it might be argued that any apparent consent has not been freely and voluntarily given and that the act of engaging in sexual intercourse in

those circumstances could be prosecuted as rape. However, a contrary view has been taken.[84] In any event, the few cases that have been reported suggest that misrepresentations of that kind may tend to arise primarily in the context of particular professional, ethnic or religious groups and there may be some advantage in the enactment of a new section specifically criminalising such behaviour.

**RECOMMENDATION 12**

The Commission proposes the enactment of a new offence in the following terms:

A person who induces another person to have sexual intercourse with that person by fraudulently representing that such act has a legitimate medical purpose or that such persons are lawfully married is guilty of an offence, punishable on conviction by imprisonment for 12 years.

## *THE CONCEPT OF MENS REA*

37. At common law an honest albeit mistaken belief in consent will absolve an accused of criminal responsibility for rape or indecent assault at least in the absence of recklessness. This principle which was established in Morgan's Case[85] has been codified for more than twenty years in England[86]. In the ACT the principle was left substantially unchallenged by subsection 92P(3) and is actually entrenched in the terms of sections 92D and 92J. Nonetheless, there have been repeated criticisms of this area of the law and a number of suggestions for reform have been made.

38. One criticism has been that the law concentrates on the perceptions and understanding of the defendant rather than that of the complainant. This criticism has been vividly expressed in the following passage which was quoted in submissions made to the Commission:

> *Rape law also discriminates implicitly on the basis of sex since it takes the point of view of the rapist, who is, overwhelmingly, male. In a situation where there may be two quite different realities, two totally opposed understandings of an event which cannot be reconciled into a single version of the facts, as it is figured at the*

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[84] *Papadimitropoulos* (1957) 98 CLR 249.

[85] *DPP v Morgan* [1976] AC 182

[86] *Sexual Offences Amendment Act 1976*

*moment, the law simply must determine one truth, and it does this by filtering facts through a value-system which is phallocentric[87].*

39. As mentioned earlier in this report, the Commission is conscious of the concerns expressed by many complainants at the manner in which the criminal justice system deals with allegations of sexual assault. Nonetheless, this statement appears to reflect some misunderstanding both as to the nature of the criminal justice system and as to the basis of criminal responsibility.

40. The observation that there may be two totally opposite understandings of an event is perceptive but the suggestion that the law must determine one truth is misconceived. A jury is not asked to determine truth in the sense of choosing between competing understandings of what occurred. Whether the charge is one of sexual assault or any other type of offence, a jury is required only to determine whether the elements of the offence have been proven beyond reasonable doubt. It determines truth only to that extent. Where it is so satisfied of those elements and returns a verdict of 'guilty' it does so because it has, in essence, accepted the Crown case which almost invariably depends upon the evidence of the complainant. Where it is not so satisfied and returns a verdict of 'not guilty' it does so not because it has accepted one truth or understanding but simply because the evidence was not sufficient to exclude any reasonable doubt as to one or more of the elements of the charge.

41. Those elements invariably include some mental state[88] that the accused must be shown to have had at the time the relevant act was committed. It is a fundamental principle of criminal liability that one should not be exposed to conviction in the absence of mens rea, or what has been described as a 'guilty mind'. In many cases that element will be the decisive issue at the trial. Hence, a person cannot be convicted of murder unless he or she intended to cause the death or was reckless to the probability of doing so. It is only the intention and understanding of the accused that distinguishes murder from accidental death. It is primarily in this sense that the law examines the matter from the viewpoint of the accused[89]. It is not that the interests of the accused are preferred to those of the

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[87] M Davies, 'Taking the Inside Out', in *Sexing the Subject of the Law*, eds N Naffine and R Owen, 1997, Law Book Sydney, at p.30 cited in submission from Dr Easteal.

[88] In this context the reference to a 'mental state' should not be taken to suggest a static mental condition but rather the knowledge, perceptions and intentions of the accused throughout any period during which the relevant act was committed.

[89] In the sentencing phase the perceptions of both victim and offender are important; the former because the trauma which the victim has suffered is a measure of the objective gravity of the crime and the latter because the offender's understanding and intention at the time of the crime is relevant to an evaluation of the level of the offender's subjective responsibility.

complainant or, in the case of murder the deceased and the bereaved family, but rather that his or her mental state is an element of the offence.

42. In the case of sexual intercourse without consent, those elements are the act of sexual intercourse between the defendant and the complainant, the absence of the complainant's consent and the defendant's knowledge or recklessness as to that absence of consent. The first of these elements is a matter of objective fact: did the relevant sexual act between the complainant and the accused occur or not?[90] This element will be the decisive one in cases where it is identity of the offender that is in issue. The second element is a matter of the subjective state of mind of the complainant: did she consent? The third element is a matter of the subjective state of mind of the accused: did he know that the complainant was not consenting or, alternatively, was he reckless as to whether she was consenting? These three elements may, therefore, be regarded as three truths, the objective truth of the commission of the sexual act, the subjective truth of the complainant and the subjective truth of the accused. As previously mentioned, the law seeks to determine these truths only to the extent of making judgments as to whether they have been proven beyond reasonable doubt. The law does not involve any suggestion that these elements should in some way be transmuted into a single truth though, of course, there can ultimately be only one verdict: guilty or not guilty.

43. If the statement that the law determines one truth by 'filtering facts through a value-system which is phallocentric' is based upon the view that the retention of a mental element in sexual offences is discriminatory then this is wholly misconceived. The need to prove the necessary mens rea does not involve discriminating on the basis of gender: it applies whether the accused is male or female and applies across the whole spectrum of serious criminal offences.[91]

44. Even when a serious offence involves no apparent mental element, there is a common law presumption that a defendant will not be guilty if he or she had an honest and reasonable belief in a state of facts which, had they existed, would have made the act innocent.[92] The application of such a presumption could no doubt be

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[90] Though, of course, the jury's determination of this issue may be influenced by subjective impressions of the various witnesses including scientific experts and the evidence they give.

[91] Of course, the comment may merely reflect the view that juries apply such a value system in determining issues of this kind. As previously mentioned, some measure of misogyny and bigotry no doubt remains within any society and there is an inevitable risk that jurors may be influenced by such qualities. However, there is no reason to suppose that jurors are any more prone to prejudice than others within the community from which they are drawn.

[92] *Proudman v Dayman* (1941) 67 CLR 536 op cit note 40.

prevented by statute and at least one of the approaches suggested was that sexual offences should involve strict liability. It was not entirely clear whether this proposal involved merely removing any element of mens rea or whether it was contemplated that an accused would also be denied the opportunity to claim that he had an honest and reasonable exculpatory belief. However, the latter and more extreme approach seems to have been intended.

45. Such a proposal would certainly make it easier to convict the guilty but it would also give rise to significant potential for injustice. For example, if a person went through with, and consummated, an arranged marriage because of threats by her parents or other relatives the other party would be guilty of rape even if he had been unaware of the threats and thought her decision and subsequent conduct had both been voluntary. If a person got into another person's bed and made a sexual advance to him before realising that she was in the wrong room she would be guilty of committing an act of indecency and if he responded he would be guilty of a similar offence. If two people, each so affected by alcohol or drugs as to be incapable of exercising a free and voluntary choice, had sexual intercourse then each would be guilty of raping the other. Other examples could be cited. The proposal could cause injustice in a wide range of circumstances.

46. Alternatively, it was suggested that the law should require that any belief in consent be held on reasonable grounds or, in Dr Easteal's formulation, grounds which were acceptable according to a 'non-gendered' standard and appropriately circumscribed. These propositions reflect an obvious concern that people should not be permitted to escape conviction merely by claiming to have held a belief, no matter how unreasonable, that the complainant was consenting to the sexual act in question. The concern is understandable and the suggested reform is superficially attractive. However, it would run contrary to important principles of the criminal law and give rise to practical problems.

47. The first such problem has already been mentioned: the moral culpability of a person is dependent upon his or her state of mind. It is difficult to justify convicting people of serious crimes if they really did not know some crucial fact and hence did not know that they were doing anything wrong. If an accused genuinely believed that the other person was consenting to the sexual act then a finding of guilt and the imposition of a substantial sentence of imprisonment would need to be justified on some other ground. The formation of belief unsupported by objectively reasonable grounds or grounds deemed acceptable on the basis of a 'non-gendered' standard may demonstrate low intellect, disordered thinking or poor judgment. However, it provides little justification for a conclusion that the accused had a guilty mind warranting conviction for rape. Some submissions seemed to reflect an assumption that lack of awareness could only be attributable to the accused being so heedless of the other person’s feelings and autonomy that he failed to make sure that the other person was consenting. However, an unreasonable belief may have

been wholly or partially attributable to many factors. Apart from bigotry and a heedless disregard for the rights of others, there may be presuppositions or perceptions influenced by particular ethnic, religious or cultural backgrounds, youth, earlier experiences of life, intoxication, mental retardation, psychiatric illness and/or simple stupidity. The moral culpability of the person may vary accordingly. For example, a person with an intellectual disability, should not be convicted and punished merely because he failed to realise what a person without that disability would have readily deduced.

48. Secondly, it might be difficult to establish an objective standard of reasonableness in this context. The manner in which people relate to one another in relation to sexual matters may vary according to many factors. Should the concept of reasonableness vary according to the gender of the accused and his or her age, maturity, intelligence, education, social class, ethnic, or cultural backgrounds, religious beliefs, previous sexual experience, sobriety and other factors? In other areas, issues of this kind are resolved by reference to generally prevailing standards but in this area there may be no such general standards and a moralistic approach might obscure rather than clarify the issue. For example, it is doubtful whether there are some generally accepted community standard as to how one embarks upon sado-masochistic activity or even drunken adultery.

49. Thirdly, conviction for an act done in an honest though unreasonable belief that the other person was consenting to it would provide little justification for the imposition of a substantial sentence. The only real advantage of such a requirement is that it would reduce the scope for false denials of knowledge. However, it is difficult to see how the basic principles of fairness which are fundamental to the criminal law in this country could be reconciled with a provision depriving an accused person of the opportunity of raising an otherwise potentially exculpatory issue merely because of the risk that he might lie about it.

### *Recklessness*

50. Recklessness may be distinguished from negligence on the basis that it usually requires some advertence to the possibility of the relevant consequences.[93] Some submissions contained the suggestion that having regard to the decision in *Morgan's case* the concept of recklessness should be expanded to include attitudes of indifference to whether or not the other person was consenting. It was argued that any person who believes that women need not be consulted as autonomous agents in their sexual relations actually has a culpable state of mind and that this should be sufficient to satisfy the requirement of mens rea. The Commission agrees with this statement and would have supported a change in the law had it been necessary.

[93] Though in cases of murder advertence to the probability of death, or in some jurisdictions at least grievous bodily harm, being caused by the contemplated act is required: see *R v Crabbe* (1985) 58 ALR 417.

However, despite apparently widespread perceptions to the contrary, the principle was acknowledged in *Morgan's case* itself. That is evident from the following passages from three of the judgments in the case:

> *'Rape … imports at least indifference as to the woman's consent';*[94]
>
> *'the man would have the necessary mens rea if he set about having intercourse either against the woman's will or recklessly without caring whether or not she was a consenting party';*[95] *and*
>
> *'the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not'.*[96]

51. The principle that an attitude of indifference to the feelings and wishes of the complainant may amount to recklessness was subsequently recognised in other English cases[97] and the same approach has been adopted in Australia.[98] Perhaps the clearest statement of principle was made by Kirby P, the President of the NSW Court of Appeal, when rejecting the proposition that recklessness in this context required an actual advertence to the possibility that the complainant might not have been consenting:

> *The criminal law, in its important function of controlling behaviour, should promote standards of acceptable consensual sexual behaviour of the community. In a sense this is more important today than in earlier times when many judgments in this area were written. Since the so-called "sexual revolution" in the 1970s perceptions of sexual morality have changed in our society. Sexual intercourse outside marriage is more common. So long as it is between consenting adults (and involves no risk of disease etc) it is none of the law's business… But lack of consent does make it the law's business. Lack of the merest advertence to consent in the case of sexual intercourse is so reckless that it is also the criminal law's business. In this, the law does no more than reflect the community's outrage at the suffering inflicted on victims of sexual violence. To allow accused persons to escape conviction merely because they do not realise the significance of what they have done, where they have completely ignored the requirement of*

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[94] *DPP v Morgan*, op.cit per Lord Cross of Chelsea at 203.

[95] Supra, Per Lord Edmund-Davies at 225

[96] supra, Per Lord Hailsham of St Marlybone at 215. See also at 209.

[97] See, for example, *R v Kimber* [1983] 1 WLR 1118 per Lawton J at 1121, cited with approval in *R v Satnam S* (1983) 78 Cr App R 149 at 154

[98] See for example, *R v Brown* [1975] 10 SASR 139 per Bray CJ at 147; *R v Kitchener* (1992) 29 NSWLR 696; and *R v Tolmie* (1995) 37 NSWLR 660.

> *consent as a prerequisite for sexual interaction, is completely antithetical to the attainment of the goals which the criminal law properly sets for itself in this area.*[99]

52. A further suggestion was that the law should require an accused to have considered and evaluated the possibility that the other person may not have been consenting. In the absence of advertence to the possibility that the complainant may not have been consenting the accused would be taken to have been reckless as to that issue. This suggestion seems to reflect the same concern that men should not be acquitted of rape if they have been indifferent to the issue of consent. In this context it is understandable that a further requirement of this kind be sought. In practice, however, a jury is unlikely to accept that an accused did not realise that the other person had not been consenting only if circumstances were such that the contrary possibility never occurred to him.

53. Issues of mistaken belief are usually raised in other areas of the criminal law. Take the example of a person who walks around a corner, sees two men apparently attempting to drag a screaming young girl into a car and proceeds to punch both of them so that he may pull her from their grasp. It then emerges that all three were playing parts in a drama being filmed for television. In that event the person might be entitled to be acquitted of assault if he struck the men in the belief that he was acting in her defence, even though she was actually in no danger. If in fact he was so sure she was in danger that a contrary possibility never occurred him that would only confirm the fact that he had acted innocently and it would be quite wrong for him to be convicted because of a perceived failure to have considered and evaluated other possibilities.

54. There will be few circumstances that may be relied upon to raise a similarly confident belief in consent but in the rare cases in which an accused could sensibly raise such an assertion it would be unjust to prevent reliance upon it on the basis suggested. On the other hand, recklessness requires only advertence to the possibility that the other person might not have been consenting. Hence, in most cases in which an accused has considered and evaluated that possibility, the very fact that he has done so will be sufficient to demonstrate that he has acted recklessly. The Commission could not recommend any change in the law that might have the effect of making such advertence an exculpatory rather than an incriminating factor.

55. Some writers have suggested that the need to prove recklessness could be overcome by the adoption of a 'communicative' model of consent. This model would involve a presumption that there could be no consent other then one expressly

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[99] *R v Tolmie*, supra.

communicated. Whilst this proposal is attractive it inevitably confronts two apparent difficulties.

56. The first is that it involves confusing form and substance. The critical issue is not whether or how the complainant may have communicated or failed to have communicated her consent but whether she in fact consented. If a complainant has said or done nothing to communicate his or her consent to the other party then that will tend to confirm both the absence of consent and the absence of any basis for a belief in consent. At least in the great majority of trials, little would be gained by attempting to elevate already strong evidentiary factors into independent elements of the offence and in many cases it would only validate and entrench the assault upon the complainant's words and conduct.

57. The second difficulty arises from the way in which people tend to communicate consent. Sexual intimacy between people rarely develops as a result of a sequence of clearly articulated verbal agreements. Suppose, for example, a couple commence to kiss and then become increasingly more intimate with each other as one step leads to another. The escalation may occur without a word being spoken and progress as one person's response to a level of intimacy emboldens the other to move to the next. Whilst it is clear that if one person indicates an unwillingness to proceed further then that decision must be respected, it is less clear how consent might be expected to be communicated if that person is in fact consenting. The answer presumably lies in a range of non verbal and perhaps subtle signals the significance of which might vary according to the nature of the understanding which has developed between them. In this context it is difficult to see how a communicative model of consent could be accommodated to the way people relate to each other or how such a model could be applied. A number of issues would need to be explored. How would consent need to be communicated? If non verbal communication were to be accepted, then how could either the complainant or the accused be expected to recall subtle movements or nuances of expression and intonation when giving evidence perhaps two years later? How frequently would each party be expected to communicate continuing consent? The answers to these questions might depend upon the nature of any relationship that may exist between the accused and the complainant, their age, personalities, background, culture, sexual naivete or experience and the manner in which any previous sexual contact between them has developed. The Commission does not believe that any model of communicative consent would materially assist a jury in determining the critical question of whether there had been an absence of real consent to what occurred between the particular people concerned.

### *Suggestions of rape by negligence*

58. At one stage MCCOC suggested the possibility of an offence of sexual intercourse without consent in which the relevant mental element would not be knowledge or recklessness as to lack of consent but negligence. It was proposed that the maximum penalty would be significantly less than those applicable to other offences involving sexual intercourse without consent. In support of this recommendation the Committee argued that acts of sexual intercourse committed without the consent of the other person caused profound suffering and it was therefore incumbent upon any person contemplating a sexual act to exercise due care to ensure that the other person was in fact consenting. Subject to the qualifications previously mentioned concerning mentally dysfunctional people or very unusual cases the Commission agrees with this statement.

59. As mentioned in the introduction to this paper, sexual acts inflicted upon people without their consent cause great trauma and severe emotional, if not physical, injury. The impact of such offences is long-standing and may even be permanent. Accordingly, it cannot be doubted that a person who intends to engage in sexual activity with another person has a duty to ensure that the other person is consenting to the activity in question. The force of the argument in favour of the creation of such an offence is, therefore, clear. Furthermore, the law already contains offences of causing grievous bodily harm by the commission of a negligent act[100] and as a matter of principle a negligent act resulting in a person engaging in non-consensual sexual intercourse with another person should attract similar criminal liability.

60. However, any proposal to create a new offence necessarily requires due consideration of the extent to which it might affect the prosecution of existing offences or otherwise affect the interests of justice. An offence in which the mental element consists of mere negligence is generally regarded as much less serious than one in which it consists of deliberate intention or recklessness. For example, an offence of causing grievous bodily harm by a negligent act is punishable by a maximum sentence of two years imprisonment,[101] which is the same maximum sentence as that appropriate for common assault,[102] whilst an offence of an offence of intentionally inflicting grievous bodily harm carries a maximum sentence of 15 years imprisonment.[103] This disparity in penalties reflects the essential difference in

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[100] S.25 *Crimes Act 1900*

[101] ibid

[102] S.26 *Crimes Act 1900*

moral culpability between deliberately harming another person and making an honest though negligent mistake which causes unintended harm. If this approach to the comparative gravity of offences were to be maintained in relation to offences of the kind proposed there would be a real likelihood that the majority of people convicted would receive non-custodial sentences. That likelihood would not, of itself, warrant the conclusion that such an offence should not be created. However, the limited benefit of such an offence would need to be balanced against other considerations.

61. There would be very few cases in which sexual acts were committed in circumstances which might fairly be ascribed to negligence rather than actual knowledge or at least recklessness as to the absence of consent. Indeed, it is not easy to envisage circumstances in which such a situation could realistically be expected to occur. Any assertion of belief that the complainant was consenting will usually be tested by cross-examination as to the grounds for that belief. In most cases that will elicit assertions of particular acts and the case will then turn on whether those acts occurred. As a matter of practical reality, an offence based on negligence would almost always be an alternative count to a more serious charge involving actual knowledge or at least recklessness as to consent and that may give rise to a real risk of compromise verdicts or sympathy verdicts, especially if the accused is a first offender. It might also lead to compromises in the form of plea bargains. In any of these events the true gravity of the offender's conduct is likely to be grossly understated.

62. Accordingly, notwithstanding the cogency of the arguments advanced in support of the MCCOC suggestion, there are strong grounds for fearing that the creation of such a charge might significantly undermine the prospects of obtaining convictions in relation to the more serious offences that presently exist. Conversely, there are grounds for fearing that it might lead to some convictions in cases where the evidence did not establish the guilt of the accused beyond reasonable doubt but the jury thought he had behaved badly and was reluctant to see him wholly acquitted.

63. The Commission understands that most, if not all, of the other jurisdictions consulted have rejected this proposal and MCCOC has not included it in the relevant chapter of the proposed Model Criminal Code. Whilst it may be theoretically attractive, the Commission believes that in practice it would cause more problems than it would solve.

64. In fact, whilst issues of this kind have assumed significant prominence in academic literature, it is unlikely that many people are acquitted on this basis. As

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[103] S 19 Crimes Act 1900. In NSW, the nearest counterpart to section 19 is s.35 which creates an offence of maliciously wounding or inflicting grievous bodily harm and that is punishable by a maximum penalty of 7 years penal servitude.

Simon Bronitt has observed the 'interminable controversy over subjective versus objective guilt has hijacked rape law reform' and there are grounds for concluding that the likelihood of acquittal on the ground of mistaken belief in consent are overestimated[104]. Kirby P has gone further, stating that 'the accused may assert unawareness of non-consent in very rare cases'[105]. The reason that such a belief can be asserted only rarely is that the credibility of the relevant assertion may be judged by reference to the absence of any reasonable grounds for the belief. This was acknowledged in Morgan's Case[106]. Furthermore, as mentioned earlier, if the accused were to concede that he had entertained any doubt about the matter or the jury were to conclude that he must have had some such doubt then he could be taken to have adverted to the possibility and hence be convicted on the basis of recklessness. On the other hand, if he were to create the impression that he had not adverted to the possibility because he did not care whether the complainant was consenting or not he could again be convicted on the basis of recklessness. Accordingly, as a matter of practical reality such an issue is unlikely to lead to an acquittal unless the jury can be persuaded that he had such a firm belief in consent that the contrary possibility never occurred to him. That is likely to occur only in most unusual circumstances.

**RECOMMENDATION 13**

The Commission recommends that there be no change to the common law position.

### *NO PRESUMPTION AS TO INCAPACITY DUE TO AGE*

65. Section 92Q provides as follows:

> *(1) For the purposes of this Part, a person shall not, by reason only of his or her age, be presumed to be incapable of engaging in sexual intercourse with another person.*
>
> *(2) Subsection (1) shall not be construed so as to affect the operation of any law relating to the age at which a child can be found guilty of an offence.*

66. The effect of this provision is to abrogate the common law principle that a child under the age of 13 was presumed to be incapable of engaging in sexual

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[104] Bronitt, S., Editorial, "The Direction of Rape Law in Australia: Toward a Positive Consent Standard", 1994 *Criminal Law Journal 249* at 252.

[105] *R v Tolmie*, supra at 669

[106] op.cit at 214

intercourse. It does not, of course, affect the normal rule that a child under a particular age is presumed to be incapable of committing of any offence. In the ACT that age is 8 years.[107]

67. The Commission sees no reason to recommend any change to this provision.

**RECOMMENDATION 14**

The Commission recommends that there be no change to this provision.

### *MARRIAGE NO BAR TO CONVICTION*

68. Section 92R is in the following terms:

> *The fact that a person is married to a person upon whom an offence under section 92D is alleged to have been committed shall be no bar to the conviction of the first-mentioned person for the offence.*

69. The validity of a comparable section in the South Australian *Criminal Law Consolidation Act 1935* was upheld by the High Court of Australia in *R v L*[108]. There had previously been some support for the view that at common law a woman who married was taken to have given an irrevocable consent to sexual intercourse throughout the currency of the marriage[109]. The High Court decision in R v L confirmed that if there had ever been such a principle it had been effectively abrogated by legislation in similar terms to section 92R.

70. The enactment of legislation of this kind was vehemently opposed by many people on the basis that there were strong public policy reasons for insisting that the intimacy of marriage should remain a matter of the utmost privacy and that the law should not intrude into this area of people's lives. On the other hand, proponents of the legislation pointed out that privacy should not be a cover for abuse. The Commission supports the latter view.

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[107] See section 72, *Children and Young Persons Act* 1999.

[108] (1991) 174 CLR 379

[109] Sections 60-63 of the *Matrimonial Causes Ac*t 1959 enabled a husband to obtain an order against a wife restoring his 'conjugal rights'. Section 64 provided that such an order could not be enforced by 'attachment' i.e imprisonment for contempt of court, but a failure to comply with such an order constituted a ground for divorce.

71. It must be conceded that there is a strong argument to the effect that proceedings should not be instituted or maintained in relation to sexual offences within the context of a marriage or long-standing relationship against the wishes of the alleged complainant. However, there may be circumstances in which a complainant may ask for the proceedings to be discontinued as a result of threats or other psychological pressure exerted upon her by the accused. Furthermore, even if the complainant's expressed wishes genuinely reflect her views there may be other reasons such as the risk of physical harm to children of the relationship or evidence that the accused may be a serial offender which would make such a prosecution desirable.

72. The Commission takes the view that the section should not be amended to impose any statutory limitation on the circumstances in which a prosecution could be initiated or continued and that issues of this kind should be left to the responsible exercise of prosecutorial discretion.

**RECOMMENDATION 15**

The Commission recommends that there be no change to this provision.

## *ALTERNATIVE VERDICTS & DESCRIPTION OF OFFENCES*

73. Section 92S contains various provisions enabling a jury which is not satisfied of one of the elements of a more serious charge to return a verdict of guilty in relation to a lesser charge not involving that element. These provisions would appear to be adequate insofar as the present structure of offences are concerned. However, they would need to be reviewed in the context of other changes to the substantive law recommended in this paper.

74. Section 92T provides that in an indictment for an offence under section 92D of sexual intercourse without consent a further count may be added for an offence under section 92J of committing an act of indecency without consent. This provision would appear to be unnecessary but there is no need for its removal.

75. Section 92U provides that in an indictment for an offence under 92J or 92K, which relate to acts of indecency, it shall not be necessary to describe the act constituting the act of indecency with which the accused is charged. This provision may also be unnecessary. However, if it is to remain it should be
extended to any other offences involving acts of indecency. Offences of that nature are presently provided by sections 92G, 92H and 92S though the Commission has recommended that the number of such offences be reduced.

**RECOMMENDATION 16**

The Commission recommends that the operation of the principle in section 92U be extended to all offences involving acts of indecency.

### *SENTENCING*

76. The two most obvious issues concerning sentencing are the determination of appropriate maximum penalties and the use of victim impact statements. The former has been dealt with in the context of the discussion of the particular offences and the latter will be discussed in chapter 5. However, public concern about sentencing plainly extends beyond these specific issues.

77. There is a widespread perception that the sentences actually imposed for criminal offences are generally too lenient. The accuracy of this perception is difficult to evaluate since every case is different and the press reports from which such perceptions are generally formed are often incomplete or inaccurate. Furthermore, some of the examples cited to the Commission were from other jurisdictions. In any event, there is no obvious reasonable alternative to the present system of case by case assessment. Any sentence must ultimately reflect a judgment based upon numerous and sometimes competing considerations. In the ACT these considerations are set out in the *Crimes Act* though in sentencing juveniles courts are also bound by the provisions of the *Children and Young People Act*. Nonetheless, further suggestions were made involving the formulation of sentencing guidelines and judicial education.

78. Sentencing guidelines are to be distinguished from minimum sentences or statutory fetters upon sentencing such as those imposed by the notorious 'Minnesota grid' system of sentencing which require judges to impose sentences falling within stipulated maximum and minimum limits. They involve an indication that offences of a particular kind are likely to attract sentences of a particular level but preserve the discretion of sentencing judge to deal with each case on its merits whilst taking any such guideline into account. This leaves it open to a judge to deal with the odd case in which there is some exceptional circumstance which requires either greater severity or greater leniency than would normally be appropriate.

79. The Commission is not opposed in principle to sentencing guidelines of this kind, but takes the view that they should be set, if at all, by appellate courts providing ranges of sentences that might be expected in relation to commonly recurring combinations of factors. This approach has recently been adopted by the NSW Court of Criminal Appeal though a similar course has previously been followed by a

Full Court of the Federal Court on appeals from the Supreme Court of the ACT.[110] The provision of guideline judgments in this manner may enable greater consistency in sentencing whilst respecting the separation of powers and avoiding undue rigidity.

80. It was also suggested that there should be guidelines consisting of statements about what factors should generally be considered relevant and/or what should generally be regarded as aggravating or mitigating features. As previously mentioned, both the *Crimes Act* and the *Children and Young People Act* contain provisions governing the factors which must be taken into account in sentencing offenders. It may be argued that further factors should be specifically identified though most of those suggested fall within general descriptions already mentioned in the *Crimes Act* such as the seriousness of the offence. Furthermore, it is unlikely that the enactment of provisions containing further generalisations or truisms would materially influence the sentences actually imposed. Offenders must obviously be sentenced for what they did in context of all of the relevant circumstances actually prevailing. An understanding of what is generally true may be important but it can offer no substitute for a case by case assessment of the particular facts established by the evidence.

81. Some of the guidelines suggested would amount to legislative declarations as to the truth of various facts and/or general propositions about the comparative gravity of sexual offences. Suggestions of this kind reflect a basic misunderstanding of the purpose of legislation which is, of course, to create laws. Facts must be established by evidence not legislative decree. Furthermore, few generalisations are true in all cases. For example, it may generally be true that a person who has been raped by a former husband or lover may have suffered as great a trauma as someone who has been raped by a stranger. In such an event the trauma may have been compounded by a profound betrayal of trust. However, that does not mean that a rape by a stranger could never be worse. In some cases rape by a stranger may involve special terrors such as the fear of being murdered or of contracting of AIDS. Much depends upon the circumstances of the particular case.

82. The implications of such guidelines might also be different from that intended by the proponents. To return to the example cited above, the existence of such a guideline might enable the defence to argue that a sentence should not be increased on the ground of the complainant's fear of being killed by a masked and unpredictable stranger because rape by a stranger had been effectively equated with rape by a non-stranger. Furthermore, it is difficult to see what assistance a sentencing judge could derive by advertence to such a theoretical comparison. In any given case the judge is obliged to sentence the offender for the crime which has

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[110] See *Bozo Jurkovic* (1981) A Crim R 215 at 220

been committed; not for another crime which might have been committed by someone else.

83. Some of the submissions about judicial education seemed to assume that judges were free to act upon any specialised knowledge which they may have derived from seminars, conferences or other private sources. In fact judges must generally act upon the evidence adduced in the particular case and any facts which they may 'judicially notice' because they are so well known that any reasonable member of the community may be taken to be aware of them. Judges may take judicial notice of the profound suffering caused by sexual offences but there is otherwise a significant difference between what the judge knows or believes and what has been proven in a particular case. For this reason, whilst judges are generally open to learn more about the type of cases that come before them, it seems unlikely that judicial education could produce significant changes in sentencing patterns. The Commission believes that it may be more productive to ensure that prosecutors have a sound knowledge of the relevant facts so that they may be established in appropriate cases by evidence.

84. Ultimately, attempts to pre-determine the relevance and/or relative importance of matters that may arise in future cases are bound to be at best of dubious utility and at worst a source of injustice. It should be remembered that the Director of Public Prosecutions has a right of appeal against any sentences perceived to be excessively lenient. Hence, if a judge appears to have taken the view that some apparently irrelevant matter was a mitigating factor or to have otherwise acted on an incorrect principle then the issue can be canvassed on appeal in the context of the circumstances of the particular case.

**RECOMMENDATION 17**

The Commission recommends that there no change to the legislative provisions concerning sentences other than by amending maximum penalties as recommended in other sections of this report.

## 4. PROCEDURAL ISSUES

### Evidence by closed-circuit television

85. In the ACT children have been able to give evidence via closed circuit television since 1989 and this privilege was extended to adult complainants of sexual assault offences in 1994[111]. Whilst not all complainants choose to give evidence in this manner, many apparently find the procedure less onerous than being obliged to give evidence in the presence of the accused, a jury and others in the courtroom. However, doubt has been expressed as to whether evidence led in that manner is as effective in proceedings before juries as evidence led in the usual manner.

86. Ultimately, any decision as to the continuing use of closed circuit television must be made within the context of competing considerations. On the one hand, the complainant's appearance on a television screen involves some appearance of artificiality. Generally speaking, the jury may hear what he or she is saying with clarity and may also observe the facial expressions and demeanour of the witness. On the other hand there is a sense in which what they are seeing and hearing is a television program rather than a flesh and blood person reliving a traumatic event in his or her life. The procedure also imposes some restrictions on both examination in chief and cross-examination. For example, if either counsel wish to show the complainant a document there will be an inevitable delay whilst it is taken out of the courtroom to the room in which the witness has been located. There may then be further delay whilst the complainant finds the relevant passage in the document the position of which will have to be described rather than pointed out. In a case in which it is intended to show the complainant a significant number of documents, photographs and/or damaged clothing this can cause significant interruption to the flow of the evidence. Such interruptions may in turn influence the overall impression created by the complainant and the capacity of the jury to form a judgment as to his or her credibility.

87. Differing perceptions have been expressed as to the manner in which these factors may change the forensic balance between the Crown and the defence. For example, prosecutors have expressed some concern that the forensic balance may be tilted in favour of the defence because the evidence may have an appearance of artificiality and a jury may not have the same degree of sympathy for a person whom they see only on a television screen rather than in person. Defence counsel have expressed fears that the mere use of closed circuit television may give the jury the impression that the accused is such a violent man that it is not safe for the

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[111] *Evidence (Closed Circuit) Television (Amendment) Act 1994*

complainant to be in the same courtroom with him or that she was so psychologically brutalised by the incident that the authorities considered it inhumane to require her to be in the same room. Others have pointed out that the traditional right of a defendant to confront his accusers has been effectively eroded. It may be easier to lie or exaggerate when the only other person who knows the truth is not in the room and cannot be seen. Defence counsel also maintain that the loss of immediacy during cross-examination is inimical to their interests in ensuring that the evidence is adequately tested and the jury has the best opportunity of assessing his or her credibility.

88. Despite these competing considerations, there seems little doubt that the use of closed circuit television does significantly ameliorate the trauma of having to give evidence in the more threatening environment of a court room.

89. Furthermore, the emergence of new technology such as video links by satellite or internet provides potential options which may enable the court to avoid the need to bring complainants to court even to give evidence from an adjoining room via closed circuit television. However, those options have not yet been tested and the extent to which their use may be appropriate may depend upon the nature of the facility thereby provided and the exigencies of particular cases. For example, if it were necessary to have a complainant identify signatures, the effectiveness of the technology might depend on the clarity of the image. On the other hand, if she were to be asked to identify clothing she might need to turn it over or unfold it in order to look for distinguishing marks. Similar considerations apply to the evidence of other witnesses such as medical experts.

90. Section 26 of the *Evidence Act 1995* (Cth) is in the following terms:

> *The court may make such orders as it considers just in relation to:*
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> *(a) the way in which witnesses are to be questioned; and*
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> *(b) the production and use of documents and things in connection with the questioning of witnesses; and*
>
> *(c) the order in which parties may question a witness; and*
>
> *(d) the presence and behaviour of any person in connection with the questioning of witnesses.*

91. This provision does not explicitly authorise the use of closed circuit television, video links or other means not involving the physical presence of the witness in the court room and whilst the issue does not seem to have been judicially determined it seems unlikely that such authorisation arises by implication. However, the Commission does not believe that there is anything in the

Commonwealth enactment that would invalidate the relevant ACT provisions or make them unenforceable.

*92.* Having weighed all of the competing considerations the Commission recommends that the present system involving the use of closed-circuit television be retained, but expanded to permit the court to take evidence from witnesses in any manner which it considers appropriate, having regard to the interests of justice, the needs and sensitivities of witnesses and the expense and inconvenience of requiring them to come to court[112]. This will require an amendment to certain provisions of *the Evidence (Closed Circuit Television) (Amendment) Act 1991* or the repeal of that Act and the incorporation of those provisions, appropriately amended, into Part 10A of the *Evidence Act 1971.*

**RECOMMENDATION 18**

The Commission recommends that the current closed circuit television system be augmented by provisions enabling the Court to take evidence in any manner it considers appropriate.

### *Committal Proceedings*

93. The Commission is conscious of the fact that the Department of Justice and Community Safety has instituted a wide ranging review of the conduct of committal proceedings[113] and has no wish to pre-empt its findings or recommendations. Nonetheless, committal proceedings for charges of sexual offences involve special considerations and these have been discussed in some of submissions made in relation to the present reference. Consequently, the Commission has taken the view that it would be appropriate to raise relevant issues and discuss options for reform. However, it accepts that any final decision about the reform of the law governing this procedure should be left in abeyance until the review presently being undertaken has been completed.

94. Committal proceedings are conducted in relation to all charges triable on indictment in the Supreme Court. They are of an administrative rather than judicial character, though they are presided over by a magistrate, involve the taking of evidence on oath or affirmation and an adjudication on legal issues. It has been

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[112] Statutory provisions allowing such flexibility already exist albeit only in relation to civil proceedings. For example, section 34A of the *Administrative Appeals Tribunal Act 1989* provides that the Tribunal may allow a person to participate by telephone, closed circuit television or other forms of communication.

[113] A discussion paper was issued in May 1999.

said that their purpose is to determine whether the evidence discloses a case fit for trial though they in fact serve other purposes of considerable importance.

95. Section 94 of the *Magistrates Court Act 1930* is in the following terms:

> *When all the evidence for the prosecution and the defence has been taken -*
>
> *(a) if the court is of the opinion, having regard to all the evidence before it, that a jury would not convict the defendant of an indictable offence - it shall forthwith order the defendant, if he or she is in custody, to be discharged as to the information then under inquiry; and*
>
> *(b) if the court is not of the opinion referred to in paragraph (a) - it shall commit him or her to take his or her trial for the offence before the Supreme Court, in the meantime either shall by warrant commit him or her to gaol, a lock-up or a remand centre to be there safely kept until the sittings of the Court before which he or she is to be tried, or until he or she is delivered by due course of law or admitted to bail in accordance with the Bail Act 1992."*

96. It is clear that if the prosecution fails to establish a prima facie case then the Magistrate should readily be satisfied that a jury would not convict. Indeed, a jury could not lawfully convict in those circumstances. However, the section also permits a defendant to argue that even if there is a prima facie case the quality of the evidence is so obviously unreliable that no reasonable jury properly instructed would convict. The scope offered for a magistrate to, in effect, pre-judge the matter in this manner is extremely limited. He or she may not discharge the defendant on the basis of a personal assessment that the defendant should be acquitted and magistrates are not generally authorised to speculate about to the weight which a jury might ultimately attach to particular evidence. Nonetheless, there are some circumstances in which there is a prima facie case but the charge is plainly untenable and a magistrate may be satisfied that a reasonable jury would not convict.[114]

97. In some jurisdictions a system of paperless committals has been initiated. There have been a number of reasons for the introduction of this system including the desire to spare complainants from having to give evidence twice. It has been argued that the limited function of a committing magistrate can be fulfilled by reference to statements without cross-examination of the various witnesses.

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[114] For example, the Chairman was counsel in one case in which a magistrate dismissed a charge that a defendant had fraudulently misrepresented that he was a partner in a firm. There was some evidence sufficient to give rise to a prima facie case that this representation was false, but the cogency of that evidence was effectively demolished by the disclosure of Supreme Court declarations confirming that he was in fact a partner.

However, committal proceedings serve other purposes which are not always well understood.

98. In the ACT committal proceedings frequently facilitate the summary disposition of charges that would otherwise be tried on indictment before a jury in the Supreme Court. Section 477 of the Crimes Act provides that a wide range of indictable offences may be tried summarily if the magistrate is satisfied that it is a proper case for disposition in that manner and the defendant consents to that course. Charges alleging some serious sexual offences cannot be dealt with in this manner because section 477 applies only to common law offences or offences punishable by terms of imprisonment not exceeding 14 years in the case of offences relating to money or property or 10 years in any other case. However, charges alleging other sexual offences such as those under sections 92H, 92J, 92K(2), 92L(2), 92M, 92NA and 92NB can be dealt with summarily. The usual practice is for the prosecution to be conducted as committal proceedings until the Crown case has been concluded. The defence counsel is then in a position to advise his or her client as to whether to consent to summary trial and the magistrate is in a position to determine whether it is a proper case for disposition in that manner. As a result of the availability of this procedure a significant number of charges alleging sexual offences are dealt with summarily[115].

99. Committal proceedings also provide an opportunity for the defendant's legal representatives to ascertain the nature and extent of the evidence relied upon by the Crown. It has been argued that this function could be adequately fulfilled by the provision of written statements from each of the potential witnesses. However, those statements may contain only that evidence which tends to favour the prosecution case and defence counsel may understandably wish to ask the witnesses questions about other matters which may favour the defence case. They may also wish to ask questions with a view to testing the reliability and accuracy of the evidence. For example, if a witness says that he saw the defendant enter a building, counsel may wish to explore the basis for the witness's conclusion that the person was in fact the defendant. Was it based upon personal observation? If so, under what circumstances was the observation made? From what distance? In what light? From what vantage point? Had the witness known the accused prior to that sighting? If so, for how long and in what circumstances? If not, what was the basis for the identification? Such questioning has a number of advantages. Most significantly, it enables the weight of the evidence to be assessed. That is important because it enables the magistrate to assess the strength of the evidence and hence make a sensible judgment as to whether he or she could be satisfied that a jury would not convict. However, as previously indicated that is a quite stringent test. There may be circumstances in which the weight of the evidence is such that a

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[115] See for example, *Director of Public Prosecutions Annual Reports* 1997/98, 1998/99 and 1999/2000.

conviction seems unlikely but the magistrate is unable to be affirmatively satisfied that a jury would not convict. It then remains for the Director of Public Prosecutions to decide, in the exercise of his or her discretion, whether to file a bill of indictment.

100. That discretion is normally guided by the principle that a prosecution must be in the public interest and that will normally be the case only if the prospects of obtaining a conviction are at least reasonable. Accordingly, there is a second stage process in which further cases are weeded out on the basis of a pragmatic assessment of the strength of the case in the light of the transcript of the evidence which has been given during the committal proceedings. In the case of charges of sexual assault this assessment is necessary for two reasons. First, legal ethics quite properly preclude the making of grave public allegations against any member of the community unless there is sufficient evidence available to justify the belief that they are well founded. Secondly, it would be irresponsible to expose the complainants of a sexual assault to the further trauma of having to give evidence in a Supreme Court trial if there were no reasonable prospects of obtaining a conviction and the trial was, in substance, a futile exercise.

101. On the other hand, where the committal proceedings reveal that the Crown case is very strong, a corresponding assessment by defence counsel often leads to a plea of guilty in the Supreme Court. This again has the effect of sparing the complainant from the ordeal of giving evidence in front of a jury.

102. Consequently, the conduct of committal proceedings gives rise to at least three possible decisions each of which may avoid the need for a trial in the Supreme Court. If they were to be abolished or their effectiveness substantially eroded by exclusive reliance upon written statements this might well result in a very substantial increase in the number of trials that would have to be conducted. This would have significant implications for the cost of justice but, more importantly, would mean that more complainants were forced to give evidence at trials.

103. In those cases where the trial does proceed the testing of the evidence during the committal proceedings will still play an important part in ensuring that the defence is fully informed of the case which it has to meet and this is important to the fair trial of the matter. Indeed, in some cases in which an additional witness comes to light after the committal proceedings have been completed the courts have ordered that witness to be cross-examined before a judge sometime prior to the commencement of the trial so that the defence may have the advantage of testing his or her evidence by cross-examination before the trial commences.[116] Hence, the adoption of paper committals might involve transferring some of the pre-trial cross-examination from the Magistrates Court to the Supreme Court.

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[116] *R v Basha* (1989) 39 A Crim R 337

104. The importance of committal proceedings has frequently been discounted and they have been regarded as mere administrative filters intended to identify the occasional weak case which would not justify the public expense of a trial. However, the High Court of Australia has made it clear that they are an important part of the criminal justice system:

> *It is now accepted in England and Australia that committal proceedings are an important element of our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. For us to say, as has been suggested, that the courts are concerned only with the conduct of the trial itself, considered quite independently of the committal proceedings, would be to turn our backs on the development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial. To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him whether in terminating the proceedings before trial or at the trial.*[117]

105. Any proposal to reform the manner in which committal proceedings are conducted must be considered within the context of the important functions which they fulfil and the need to ensure that the prospects of a fair trial is not unduly prejudiced. Nonetheless, the present system is sometimes abused and committal proceedings may become inordinately protracted. This involves a significant cost to the community as well as the accused. More importantly, the complainant may be exposed to an unnecessary and harrowing cross-examination. Indeed, in some cases there have been grounds for suspicion that the cross-examiner was endeavouring to make the exercise so distressing that the complainant would be reluctant to give evidence at the trial.

106. For the reasons previously given, the Commission is of the view that a purely 'paper committal' may not be adequate in cases of this nature. It would not facilitate the testing of the evidence in the manner necessary to permit an adequate assessment of the likelihood of obtaining a conviction. Consequently, it is likely that many more cases would go to trial and there would be fewer pleas of guilty. The practice adopted in New South Wales[118] of having witnesses called only if the defendant can establish to the magistrate's satisfaction that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence, is also inadequate. Such a course may mean that the defence is

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[117] *Barton v R* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 100

[118] *Justices Act 1902* (NSW) s48E and s41(10)

required to disclose the nature of its case and that may give rise to legal argument and applications to the Supreme Court to review the magistrate's discretion which in turn may involve unacceptable delays. Experience in other jurisdictions also suggests that cross-examination may be so limited that most of the advantages presently derived from the committal proceedings are lost.

107. However, proceedings of this nature should be more strictly controlled than trials intended to finally resolve the issues in question. There is no apparent reason why the evidence in chief of the complainant and, perhaps, other witnesses should not consist of the statement previously served and the oral evidence confined to cross-examination. Furthermore, the Commission is of the view that the committing magistrate should be given adequate discretion to limit the cross-examination. It should be noted that section 41(1) of the *Evidence Act* 1995 (Cth) already authorises a court to disallow questions asked in cross-examination which are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. In exercising that power the court is enjoined to take into account the age, personality and education of the witness. It is proposed that committing magistrates be given further discretion to limit cross-examination which appears to be unnecessarily lengthy and to prevent cross-examination altogether about matters which are of peripheral relevance or which is otherwise not warranted by the forensic needs of the case.

108. This Commission considers that this proposal offers a reasonable compromise. On one hand, it would ensure that the benefits of the existing system were essentially retained and, on the other, it should limit any waste of time and enable magistrates to intervene to protect complainants and other vulnerable witnesses from being harassed in cross-examination.

**RECOMMENDATION 19**

The Commission recommends that *Magistrates Court Act* to be amended to provide for the following:

(a) the prosecution be required to serve copies of statements of all witnesses upon the solicitors for the defendant prior to any date being set for the hearing of committal proceedings;

(b) the defendant or his solicitors then be required to provide written notification of any witnesses whom they wished to cross-examine during the course of the committal proceedings;

(c) in the event that such notice was not given it be presumed that the committal proceedings would involve nothing more than submissions made on the basis of the documents so served and the hearing time would be allocated accordingly;

(d) thereafter, no cross-examination of any of the Crown witnesses be permitted without leave of the committing magistrate;

(e) where notice was given of an intention to cross-examine a particular witness or witnesses then sufficient time be allocated to permit that cross-examination; and

(f) committing magistrates be given discretion to permit any evidence in cross-examination to be given by closed circuit television or video link and to limit cross-examination which appears to be unnecessarily lengthy and to prevent cross-examination altogether about matters which are of peripheral relevance or which is otherwise not warranted by the forensic needs of the case.

## 5. EVIDENTIARY ISSUES

109. Trials for rape and other sexual offences were formerly attended by a number of evidentiary rules of particular if not unique application to proceedings of that kind. These involved the need for evidence of early complaint to show that the complainant had raised `the hue and cry' at the earliest opportunity, the right of defence counsel to cross-examine the complainant as to any prior sexual history or reputation and the obligation for judges to give directions to juries as to the need for corroboration. Rules of this kind were apparently based upon the view that allegations of that kind were easy to make but difficult to refute and that there was a special need to protect men from false accusations. It was eventually accepted that requirements of this kind were unfairly discriminatory in that they suggested that people complaining of having been sexually assaulted were not to be trusted.

110. It is now generally acknowledged that the law should not reflect any assumption that people complaining of sexual assault are any less reliable than people who claim to have been complainants of other criminal behaviour. It should be a hallmark of the system of justice adopted in this territory that all people are treated equally before the law. However, this insistence upon equality should not be permitted to obscure the need to guard against the risk of pre-judgment based on stereotypical views or to protect complainants from further psychological or emotional damage as a result of having to give evidence in open court. Complainants of sexual assault may be traumatised by the experience of having to publicly recount a uniquely personal violation. The need to give evidence may be unavoidable but any opportunity for ameliorating the emotional impact should receive due consideration.

111. On the other hand, any departure from normal practice should not impinge upon the rights of the accused to an unacceptable degree or otherwise jeopardise the essential fairness of the trial. In some instances it may be necessary to strike a balance between these competing considerations by formulating a general rule but providing a judicial discretion to take another course when demanded by the interests of justice.

112. Both the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1971 (ACT) contain relevant provisions. To the extent of any inconsistency, the provisions of the Commonwealth enactment prevail over those of the Territory enactment, though some provisions of the ACT enactment have been expressly preserved by section 8.[119] However, section 56 of the Commonwealth enactment makes evidence that is

[119] Paragraph 8 (4) (a) of the *Evidence Act* 1995 (Cth) provides that until the day fixed by proclamation under subsection 4 (6) the Act does not affect, inter alia, provisions of the *Evidence Act* 1971 (ACT) that are specified in the regulations. Regulation 4 specifies certain provisions of the ACT Act for the purposes of paragraph 8 (4) (a) of the Commonwealth Act including Part 10A (which deals with evidence in sexual

relevant to the issues before the court admissible 'save as otherwise provided in this Act'. The terms of this section would appear to exclude any exceptions other than those stated in subsequent sections of the Commonwealth Act or preserved by the operation of section 8. Hence, the short answer to any suggestions that the ACT should legislate to make evidence of certain kinds inadmissible at trials for sexual offences is that no law enacted by the Legislative Assembly could have the effect of excluding evidence made admissible by the terms of section 56.

***Complaint***

113. Section 76C of the *Evidence Act* 1971 (ACT) is in the following terms:

> *Any rule of law or practice permitting evidence to be admitted in any proceedings in respect of a sexual offence, being evidence relating to the making of a complaint, or the terms of a complaint, by the complainant, is abolished and no such evidence shall be admitted in any prescribed sexual offence proceedings.*
>
> *Nothing in this section effects the admissibility of evidence in relation to a complaint or the terms of a complaint, by the complainant in prescribed sexual offence proceedings where that evidence is otherwise admissible under any other rule of law or practice.*

114. This provision was apparently one which reflected the view that the rule permitting evidence of complaint was an anachronism based upon the now discredited requirement that a complainant who had been raped must 'raise the hue and cry' at the earliest opportunity. There is now greater understanding of the emotional dynamics that may cause a person who has been sexually assaulted to delay reporting the matter to the authorities. As the concept of the 'hue and cry' had long been abandoned a view emerged that the rationale for the admission of evidence of complaint no longer existed. Furthermore, the directions which a trial judge had been obliged to give in relation to evidence of that kind had been potentially confusing. The evidence was not admitted as proof of the facts alleged but merely to prove that she had made a complaint shortly after the incident which was said to be consistent with her evidence as to those facts.

115. There was some concern that reforms of this nature may have 'backfired'. At least in Canada it was been suggested that the abolition of rules permitting evidence of complaint had not prevented the defence from raising any delay in complaining about the incident in question and that the prosecution had been

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offence proceedings) other than subsections 76F (1) and (3) and 76G 4). Subsections 76F (1) and (3) deals with the issue of corroboration and section 76G(4) relates to evidence of sexual reputation. The significance of these sections having been overridden is mentioned in the discussion concerning those issues.

denied a comparable opportunity of proving that a complaint had been made promptly[120].

116. In any event, the Commonwealth has now introduced a more general provision that enables the admission of evidence of previous representations even in criminal proceedings. Section 66 of the *Evidence Act 1995* (Cth) is in the following terms:

> *(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.*
>
> *(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:*
>
> > *(a) that person; or*
> >
> > *(b) a person who saw, heard or otherwise perceived the representation being made;*
>
> *if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.*

16. Whilst section 76C is one of the provisions expressly preserved by section 8 of the Commonwealth Act, there is no conflict between that section and section 66 of the Commonwealth Act because of the provision in subsection (2) that the ACT section does not effect the admissibility of evidence otherwise admissible under any other rule of law or practice. Section 66 plainly provides such a rule. Hence, it may enable evidence of complaint to be admitted not on the basis of some arcane and anachronistic rule relevant only to sexual offences but on the basis of a principle of general application.[121]

17. A further basis for the admission of evidence of this kind may be found in section 72 of the Commonwealth Act which provides that:

> *The hearsay rule does not apply to evidence of the representation made by a person that was a contemporaneous representation about the person's health, feelings, sensation, intention, knowledge or state of mind.*

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[120] Clarke L., *Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law : Still Searching for Epistemic Equality*, Canadian Advisory Council on the Status of Women, Ottawa, 1993 cited in the submission from Dr Easteal.

[121] See *R v GJ* (unreported) SCC No 43 of 1996, Miles CJ, 3 October 1997; *R v Morton* (unreported) SCACT 8, Crispin J, 24 February 1998; *R v Kirkman* (unreported) [2000] ACTSC 2, Higgins J, 3 February,2000.

18. Once admitted under section 66 or 72 the evidence is not be subject to the limitations that formerly applied to evidence of complaint but is probative of the facts alleged in the representation.[122]

19. It should be noted that sections 135 and 137 give the judge ample discretion to exclude evidence on the basis that it would be unfair to the accused to admit it in the trial.

20. The Commission regards the provisions of the Commonwealth enactment as satisfactory.

21. It has also been suggested that the law should require judges to explain to juries that there may be good reasons for any delay in complaint and/or that such delay does not, of itself, indicate that the allegation is false. On the other hand, Dr Easteal has suggested that compulsory directions appear to be 'counter intuitive' and ultimately unfair to the accused. The Commission agrees with this view. Whilst it is obviously necessary for the relevant legal principles to be explained to a jury, it is generally undesirable to prescribe standard directions as to axioms of human behaviour which must be given in every case. The age, background and temperament of the complainants vary and so do explanations for behaviour including delay. If a woman gives a particular reason for failing to make a contemporaneous complaint an explanation by the judge that 'there may be good reasons' for such failure will be at best patronising and at worst convey the implication that the judge does not believe the reason she has given. An assertion that delay does not, of itself, indicate that the allegation is false may be appropriate but again much will depend upon the circumstances.

22. Dr Easteal has recommended that in cases where there has been a delayed complaint the prosecution should be permitted or perhaps even compelled to lead expert evidence to explain why women delay reporting sexual abuse. This is an interesting suggestion though the Commission believes it would be most unwise to require the prosecution to adduce expert evidence without regard for the nature of the case. The conduct of the prosecution case in a jury trial requires a prosecutor to exercise judgment not only as to what evidence is likely to be admissible but as to what is likely to be effective. In some cases the most effective strategy may involve calling extensive evidence and embarking upon a painstaking and comprehensive examination of the surrounding circumstances. In others it may involve pruning the case to the bare essentials so that case will be shortened and the evidence of the

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[122] Indeed, it has been suggested that section 66 has had the effect of completely reversing the common law rule that evidence of recent complaint would be admissible only to prove the consistency of the complainant's account. It will now be admissible to prove the truth of the facts alleged but not merely to prove such consistency. See *R v Kirkman*, supra.

complainant will be fresh in the jurors' minds when they retire to consider their verdicts. To tie the hands of prosecutors by requiring them to call evidence of a particular kind, even against their better judgment, might well be counter-productive.

23. There is, of course, a wider issue as to whether evidence of that kind would be admissible. The law governing the admissibility of expert evidence has been changed by the enactment of the *Evidence Act 1995* (Cth) the relevant sections of which now provide that:

> *79 If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is based wholly or substantially based on that knowledge.*
>
> *80 Evidence of an opinion is not inadmissible only because it is about:*
>
> *(a) a fact in issue or an ultimate issue; or*
>
> *(b) a matter of common knowledge.*

24. The opinion rule referred to in section 79 provides that evidence of opinion rather than fact is generally inadmissible. Section 80 abrogates common law rules that expert evidence was not admissible if it related to either of the matters referred to in paragraphs (a) and (b). These sections involved a substantial departure from the stringency of the common law principle that expert evidence could be admitted:

> *'whenever the subject matter of inquiry is such that inexperienced people are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to attain a knowledge of it.'* [123]

25. The scope for the admission of expert evidence has now been significantly widened. The current requirements are as follows:

- the evidence must be relevant;
- it must have sufficient probative value to outweigh any danger of unfair prejudice to the accused and/or any potential to mislead or confuse or to result in undue waste of time;[124]

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[123] *Clark v Ryan* (1960) 103 CLR 486 per Dixon CJ at 491.

[124] See ss 135 and 137 *Evidence Act 1995* (Cth)

- the witness must have specialised knowledge based on study, training or experience;

- the opinion expressed must be based wholly or substantially on that knowledge.

26. The most common problems still encountered in relation to expert evidence concern opinions expressed which extend beyond the witness's area of expertise[125] or are based upon factual assumptions not proven.[126]

27. The appropriateness of admitting expert evidence as to the reasons for delay in making a complaint of sexual assault will depend upon a number of factors. First, it must be remembered that the jury is not concerned with the whole range of possible reasons which may cause people falling within the class of complainants of sexual assault to delay complaining. The jury is concerned only with the reasons for any delay by the complainant in reporting the particular sexual assault with which the accused is charged. If she gives evidence that the delay was due to a threat by the accused it does not matter how many other reasons might have led other complainants to delay reporting offences against them. Secondly, whilst expert evidence that other people have delayed reporting similar incidents for similar reasons might lend added credibility to the complainant's account, evidence relevant only to credibility is generally inadmissible.[127] Thirdly, the significance of any delay will depend upon the circumstances of the case including any explanation given by the complainant. Much may also depend upon whether any criticism of her is reliant on delay alone or delay in the context of other acts or omissions said to be significant. Fourthly, if expert evidence were to be admitted as to the usual reasons for delay the experts might well be cross-examined on any aspects of the complainant's conduct which seemed to differ from the norm. Fifthly, once expert evidence is admitted in the prosecution case other experts would no doubt be called to give evidence on behalf of the accused. This might not only lengthen the trials but create a situation in which the complainant's credibility was gauged by reference to the competing opinions of experts and give rise to other unforeseen problems.

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[125] This may mean that some assertions in an otherwise admissible expert report will be excluded. See, for example, *Trust Company of Australia Ltd v Perpetual Trustees WA Ltd* (unreported NSW Supreme Court, 18 September 1996 per McLelland CJ in Eq); *Perpetual Trustee Company v George* (unreported NSW Supreme Court 18 November 1997, revised 1 December 1997 per Einstein J).

[126] Hence evidence of a psychiatrist's opinion may be inadmissible if it is based upon a history of events about which there is no evidence: *R v Hilder* (unreported NSW Court of Criminal Appeal, 10 October 1997).

[127] s102 *Evidence Act 1995* (Cth)

28. At face value, sections 79 and 80 of the *Evidence Act 1995* (Cth) would appear to authorise the admission of expert evidence in appropriate cases. The conditions of admissibility are not unduly onerous and it may be doubted whether there would be any real utility in admitting evidence which did not meet such criteria. In any event, section 79 qualifies a general embargo on the admission of opinion evidence and it would be beyond the legislative power of the ACT to enact further laws authorising the admission of expert evidence on a more liberal basis.

29. Dr Easteal has also raised the possibility of feminist legal interest groups being permitted to intervene in trials to present arguments in answer to the pervasive myths and misconceptions about the 'reasonable rape victim'. The proposal addresses an issue which is obviously of great importance; namely, that juries must put aside any such myths or misconceptions and decide each case upon the evidence of what actually occurred. Feminist legal interest groups would no doubt be well aware of the falsity of such beliefs and equipped to offer convincing refutation.

30. Nonetheless, the Commission is unable to support this proposal. Prosecutions are brought on behalf of the Crown and the legal and ethical duties of prosecutors differ from those of other counsel. As previously mentioned, the conduct of the Crown case requires a prosecutor to exercise judgment in relation to overall strategy. It is a truism that 'too many cooks spoil the broth' and the intrusion of a further legal team representing neither Crown nor accused might cause unpredictable complications. To take but one example, there may be sensitive information which the prosecution might not be at liberty to reveal and uninformed third parties might unwittingly take steps which would lead to the trial miscarrying. In any event, such 'cameo appearances' might well prove counter-productive. The intervention of a second legal team calling evidence and presenting arguments supportive of the complainant might give rise to inconsistencies of approach or otherwise disrupt the presentation of the Crown case in the manner the prosecutor has concluded is likely to be most effective. Juries might also feel that there was something vaguely unfair about having two legal teams apparently trying to secure the conviction of a single accused.

31. Furthermore, the law must be even-handed. If some legal interest groups were permitted to intervene then it might be difficult to justify the exclusion of other legal interest groups with equally strong views about issues such as the dangers of 'false memory syndrome' or allegations of deliberately false complaints being made in the context of proceedings for custody or access to children.

32. There would also be a problem of delineating the role of counsel given leave to appear for a feminist legal interest group in relation to limited issues and preventing the risk of demarcation disputes. What would the intervention involve? Would expert evidence be called or would the role be confined to the presentation of

argument? Would any argument be confined to matters of general experience or would it be tailored to the circumstances of the case? Would the role of counsel be governed by the same ethical constraints as those that bind prosecutors? Would that role extend to cross-examining the accused if he gave evidence of having believed certain things about the incident in question? What if the claimed belief was apparently based in part upon relevant myths or misconceptions? Would it extend to addressing the jury on such issues as whether the complainant was telling the truth or the accused was lying? How would differences of view between counsel for the Crown and counsel for a feminist legal interest group be resolved? The plethora of issues that would undoubtedly arise would cause considerable delay and, perhaps, prejudice the prospect of a fair and efficient trial being conducted.

33. There would also be a significant increase in the public expense of trials.

34. The Commission is of the view that arguments of this kind can most effectively be presented by prosecutors who can tailor them to the needs of the particular trial and incorporate them in an overall strategy. That obviously requires an understanding of the relevant issues and further education and/or liaison with feminist legal interest groups may help to equip them to present any arguments that might be appropriate. However, the Director of Public Prosecutions is an independent statutory officer and issues relating to the training of prosecutors and the manner in which prosecution cases might be presented are ultimately matters which fall within his or her area of responsibility.

***Corroboration***

35. In earlier years judges were obliged to warn juries that allegations of rape were easily made and hard to refute; hence it was dangerous to convict on the uncorroborated evidence of the complainant. This practice was abolished in the ACT by section 76F of the Evidence Act 1971 which was in the following terms:

> *(1) Any rule of law or practice requiring the corroboration of evidence or requiring the judge to give a warning to the jury in criminal proceedings to the effect that it is unsafe to convict a person on uncorroborated evidence is abolished insofar as the rule applies to or in relation to evidence given by the complainant in the trial of a person for a prescribed offence.*
>
> *(2) Nothing in this section shall affect the right of the judge in prescribed sexual offence proceedings to comment on any evidence that may be unreliable but the judge shall not, in such proceedings, give a warning to the jury to the effect that it is unsafe to convict the accused person on the uncorroborated evidence of the complainant.*
>
> *(3) Nothing in this section affects the operation of any rule of law or practice which requires-*

*(a) a judge, on the trial of a person for a sexual offence alleged to have been committed before 28 November 1985, to give the jury a warning as referred to in sub-section (1); or*

*(b) a judge, on the trial of any person, to give the jury a warning to the effect that it is unsafe to convict the person on the uncorroborated sworn evidence of a child.*

36. The intention of this legislative provision was relatively clear. It abrogated the common law requirement for corroboration in sexual cases and hence removed any basis for an implication that complainants may generally be considered less trustworthy than other witnesses. However, apart from the transitional provision dealing with offences alleged to have been committed prior to the enactment of the section, it preserved other rules of law relating to the need for corroboration of evidence given by children.

37. Only subsection (2) has been preserved by section 8 of the Commonwealth Act and the effect of the section has been substantially supplanted by section 164 of that Act which deals with the issue of corroboration in a more comprehensive fashion. Section 164 is in the following terms:

*(1) It is not necessary that evidence on which a party relies be corroborated.*

*(2) Subsection (1) does not effect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.*

*(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:*

*(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or*

*(b) give a direction relating to the absence of corroboration.*

38. Section 165 provides as follows:

*(1) This section applies to evidence of the kind that may be unreliable, including the following kinds of evidence:*

*(a) evidence in relation to which Part 3.2 (Hearsay Evidence) or 3.4 (Admissions) applies;*

*(b) identification evidence;*

*(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;*

*(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;*

*(e) evidence given in a criminal proceeding by a witness who is a prison informer;*

*(f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;*

*(g) in a proceeding against the estate of a deceased person – evidence adduced by or on behalf of a person seeking relief in that proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.*

*(2) If there is a jury and a party so requests, the judge is to:*

*(a) warn the jury that the evidence may be unreliable; and*

*(b) inform the jury of matters that may cause it to be unreliable; and*

*(c) warn the jury for the need for caution in determining whether to accept the evidence and the weight to be given to it.*

*(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.*

*(4) It is not necessary that a particular form of words be used in giving the warning or information.*

*(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.*

16. A submission from Family Support for Victims of Paedophiles (ACT) Inc made a strong plea for judges to be prohibited from warning juries of any perceived dangers of acting on the uncorroborated evidence of children. It also urged that judges be enjoined to tell juries that research has shown that the evidence of children can be trusted and that children seldom lie in cases of sexual abuse.

17. These suggestions may reflect an understandable response to scepticism about the credibility of children as a class which was reflected in the earlier practice. It was unfair and unrealistic to assume that all children were potentially unreliable witnesses. The submission quotes the following passage from a recent report of the Australian Law Reform Commission:

*Recent research into children's memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued. At the same time other research has demonstrated that adult testimony is not always reliable, showing that mature witnesses' memories can be equally fragile and susceptible to the distorting influences of suggestion and misinformation. The presumed gulf between the reliability of evidence from children and that from adults appears to have been exaggerated*[128].

18. The Commission accepts that it is generally inappropriate to make sweeping judgments about the credibility of the evidence of children as a class. It should be noted, however, that neither of the present sections in the Commonwealth Act contains any rule which requires a warning as to the unreliability of children as a class. Section 165 is rather concerned with evidence, whether from children or adults, that may be unreliable. The evidence of some children may fall within the description of 'evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like' but this description may also apply to many adults. Whilst the section refers to some categories of witnesses, such as potential accomplices, prison informers and claimants against estates, the section is generally directed not to classes of people but to potentially unreliable evidence. This is an important departure from the earlier practice.

19. In any event, the answer to concerns about the sweeping denigration of evidence by children as a class does not lie in equally sweeping affirmations that the evidence of children as a class can be trusted. It lies rather in directing juries that they must put aside any preconceptions they may have about classes of people or types of allegations and make a fair and objective assessment of the evidence of each person who gives evidence. It is generally quite inappropriate for judges to make statements about the credibility of any class of people, whether adults as an overall class or specific groups such as women, Aborigines, migrants, homosexuals or adherents to particular religious groups or denominations. No matter how laudable the motive, a judge should not seek to either undermine or reinforce the credibility of any class of person at the expense of any other. Furthermore, inflexible rules based upon the class of witness would inevitably jeopardise the essential fairness of the system of justice. Juries should neither convict nor acquit because of some view as to the reliability of children as a class. The issue is whether the evidence of particular people is sufficiently cogent to prove the Crown case beyond reasonable doubt. Any assumption that the evidence of one of those people should either be dismissed as unreliable or accepted as reliable because he or she is under 18 years of age would be unrealistic and unfair. Warnings should be given

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[128] Australian Law Reform Commission Report no. 84, *Seen and Heard: Priority for children in the legal process*, Canberra: 1997.

only if there are genuine grounds for concern based either upon a well documented history of wrongful conviction[129] or upon specific features of the evidence in the case. On the other hand, if such grounds exist then an appropriate warning should not be withheld merely because the witness is a child. For example, if a person is suffering from psychotic delusions then the jury should be warned that his or her evidence might be unreliable whether the witness is 12 years old or 50 years old.

20. Furthermore, whatever criticisms may be made of the relevant provisions of the *Evidence Act* it is a Commonwealth statute and, as mentioned earlier, can be amended only by the Commonwealth Parliament. It is not open to the ACT to introduce any laws inconsistent with its provisions.

### *Cross-examination as to sexual history or reputation*

21. Section 76G of the *Evidence Act 1971* (ACT) is in the following terms:

> *(1) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.*
>
> *(2) No evidence may be adduced and no question may be asked in prescribed sexual offence proceedings, except with the leave of the judge, relating to any sexual experience of the complainant with a person other than the accused person.*
>
> *(3) The judge shall not give leave in pursuance of subsection (2) for any evidence to be adduced or any question to be asked unless -*
>
> > *(a) an application for leave is made to the judge, in the absence of the jury; and*
> >
> > *(b) the judge is satisfied that a refusal to allow the evidence to be adduced or the question to be asked would prejudice the fair trial of the accused person.*
>
> *(4) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before 28 November 1985.*

22. Subsections (1), (2) and (3) of this section were preserved by section 8 of the Commonwealth Act. They provide two general rules ensuring due protection from unwarranted attacks upon complainants.

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[129] As in the case of warnings about the risk of mistaken identity.

23. The first excludes evidence of the sexual reputation of the complainant. This rule is in absolute terms unqualified by any proviso. The Commission is of the view that this rule should be retained in its present form. The prohibition on evidence of prior sexual reputation should remain unqualified. No issue of sexual reputation properly arises in trials for sexual offences.

24. The second rule excludes evidence of the complainant's sexual experience with anyone other than the accused. This rule is subject to judicial discretion to permit evidence as to prior sexual history in certain cases. The exercise of that discretion is constrained by the need for the judge to be satisfied that refusal would prejudice a fair trial.

25. It has been strongly argued that the section should be amended to remove any discretion to admit evidence of prior sexual experience. This suggestion has been supported by reference to the principle that the sexual experience of the complainant should be of no relevance because all people are equally entitled to the protection of the law. The Commission wholeheartedly supports this principle. However, that does not mean that exceptional circumstances might not arise in which evidence falling within the description of prior sexual experience might be of importance.

26. Take, for example, the case of a man charged with aggravated rape said to have been committed to punish a former wife for an affair with another person. An unqualified prohibition on the admission of such evidence might prevent the Crown from leading important evidence of motive. Furthermore, the complainant might be prevented from giving evidence of him saying things about his knowledge of that affair that might identify him as the assailant even though she had not seen his face. Whilst she might still be able to give evidence that she recognised his voice, if she were not permitted to tell the jury what she heard him say that evidence would carry little weight. Without such evidence the prosecution case might be hopelessly weakened. On the other hand the defence might wish to establish that the complainant had never had any such affair and that the whole basis of the Crown case was misconceived. Alternatively, the accused might wish to explain that whilst there was such an affair it occurred in the context of an 'open marriage' in which both parties had frequently had affairs and that one more would not have caused him to act so violently.

27. The basic problem is that whilst the argument in favour of an unqualified exclusionary rule may be valid in a 'run of the mill' case, courts are constantly confronted by cases with quite unusual features and it is impossible to anticipate every contingency. In some unusual cases the exclusion of such evidence might prejudice the conduct of a fair and effective trial.

28. The existing discretion is severely constrained by the terms of subsection (3) and there is no evidence to suggest that leave has been granted inappropriately for evidence of this kind to be adduced in the ACT Supreme Court. In these circumstances, whilst understanding the concerns which prompted this suggestion, the Commission believes that it is prudent to retain the discretion to avoid the risk of injustice that inevitably attends inflexible evidentiary rules.

29. There is no comparable provision in the *Evidence Act 1995* (Cth) dealing specifically with the issue of prior sexual experience. Section 56 might make such evidence admissible if it could be shown to be relevant though, so far as the Commission has been able to determine, such a contention has not been maintained. In most cases the evidence would not be relevant and even if it could be shown to have some peripheral relevance it might be excluded in the exercise of discretion under section 135 of the Commonwealth Act.

### *Other issues relating to cross-examination*

30. A number of submissions were made to the effect that courts should be empowered to intervene to prevent the cross-examination of complainants in a manner that was unduly harassing. Further submissions raised issues relating to the particular vulnerability of children being cross-examined about the evidence of having been sexually abused. Whilst the Commission is in broad agreement with the comments that have been made it would appear that the power to deal with issues of this kind has now been conferred by the Commonwealth Act.

31. Section 26 of that Act provides a general power for courts to control the questioning of witnesses giving evidence before them:

> *The court may make such orders as it considers just in relation to:*
>
> *(a) the way in which witnesses are to be questioned; and*
>
> *(b) the production and use of documents and things in connection with the questioning of witnesses; and*
>
> *(c) the order in which the parties may question a witness; and*
>
> *(d) the presence and behaviour of any person in connection with the questioning of witnesses.*

32. Section 41 provides more specific powers of intervention:

> *(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:*

*(a) misleading; or*

*(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.*

*(2) Without limiting the generality of the matters that the court may take into account for the purposes of subsection (1), it is to take into account:*

*(a) any relevant condition or characteristic of the witness, including age, personality and education; and*

*(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.*

33. The Commission is of the view that these provisions are sufficient to enable the court to deal with most of the issues raised.

34. Some submissions did include the contention that judges should be authorised to exclude questions on the ground that as a matter of general experience people who had been raped or otherwise sexually assaulted may have behaved as the complainant said she had done. Hence, it was suggested that defence counsel should not be permitted to ask a complainant why she had delayed reporting the matter because experience suggested that there were valid reasons why a complainant might do so. Whilst the Commission has no doubt that this is so, it is unable to accept the contention that the issue must therefore be irrelevant in any trial. The issue of relevance must always be determined not merely by reference to general experience but by reference to the circumstances of the case. The question is not "why have other complainants delayed reporting similar incidents?" but "why did this particular complainant do so?" That question may arise in the context of other factual allegations such as continued cohabitation, subsequent holidays together, the terms of correspondence between them and the like. As previously mentioned, it is not possible to predetermine many issues of relevance.

35. Furthermore, there is a real risk that unnecessary fetters on cross-examination may prejudice the fair and effective trial of an accused. It is the view of many prosecutors that if questions which jurors may think relevant are constantly disallowed they may feel that the prosecution is seeking to prevent the defence from eliciting the truth. On the other hand defence counsel maintain that it is unfair to the accused if potentially incongruous behaviour cannot be raised in cross-examination because it falls within one or more 'taboo' topics.

36. Again, however, the position is determined by the provisions of the Commonwealth enactment and the ACT has no power to add to the grounds of exclusion.

### *The maintenance of privacy*

37. The *Evidence Act 1971* (ACT) also contains two provisions which are intended to protect complainants from further humiliation and embarrassment due to unnecessarily intrusive publicity. Both provisions seem relatively uncontroversial.

38. Section 76D is in the following terms:

> *(1) Any evidence given by the complainant in prescribed sexual offence proceedings (including evidence given under cross-examination) shall, if the court so directs, be given in camera.*
>
> *(2) Where the complainant in prescribed sexual offence proceedings gives evidence in camera under subsection (1), a person nominated by the complainant is entitled to be present in court when the complainant gives that evidence in those proceedings.*

39. Section 76E is as follows:

> *A person shall not, without the consent of the complainant in any prescribed sexual offence proceedings, publish the name of that complainant or any reference or allusion by which the identity of that complainant is disclosed or from which the identity of the complainant might reasonable be inferred.*
>
> *Penalty: 50 penalty units or imprisonment for 6 months, or both.*

40. Both sections have been preserved by section 8 of the Commonwealth Act and the Commission recommends that both provisions be retained.

### *Victim impact statements*

41. Section 429AB of the *Crimes Act* requires a court to have regard to any victim impact statement that may have been tendered when determining the sentence to be imposed in relation to any indictable offence for which the maximum penalty is at least 5 years imprisonment. Sexual offences under Part 3A fall into this category.

42. The prosecution may tender such a statement only if the complainant has consented in writing. A copy must be given to the defence and the complainant may be cross-examined about its contents, though in practice that rarely occurs.

43. As mentioned earlier, there has been some difference of view concerning the use of victim impact statements. There has been opposition to their use from some feminists who fear that they will lead to discrimination, with the severity of sentences varying according to the perceived respectability of the women upon whom the

offences have been committed. They argue that the offender should be sentenced by reference to the objective gravity of the crime. Some defence counsel have presented the same argument: offenders should be sentenced by reference to the objective gravity of the crimes rather than the subjective feelings of complainants. Some have also argued that the process has an inevitable potential for injustice since any sceptical cross-examination of the complainant is likely to undermine any claim of remorse and any failure to cross-examine is likely to mean that the complainant's account is accepted as effectively undisputed evidence. On the other hand, it has been argued that complainants want the judge to know what they have suffered as individuals rather than as members of a class or social group. This point has been made strongly on behalf of women from certain ethnic groups within which a significant stigma still attaches to rape complainants. Furthermore, such statements vividly reveal the gravity of the trauma caused by rape and other sexual offences in a manner not conveyed by advertence to more abstract or generalised sources of information.

44. The Victims of Crime Assistance League (ACT) Inc ('VOCAL') has urged that they be retained, explaining that they are the only way in which a complainant can explain how 'the personal, financial, psychological and social impact of the crime has changed their life.' VOCAL states that the 'feed back' received from complainants suggests that the preparation and submission of victim impact statements has been 'very therapeutic'. The Australian Law Reform Commission has also observed that they provide an opportunity for victims of crime, including child victims, to participate in the sentencing part of the criminal justice process.

45. Having carefully considered the competing arguments, the Commission has concluded that, on balance, the interests of justice would best be served by the retention of the present provision.

**RECOMMENDATION 20**

The Commission is of the view that the present system should be monitored to ensure that it is effective but sees no reason to introduce a separate system for sexual offences.

***Issue of disclosures to counsellors***

46. One controversial issue to emerge during the past few years has been the practice of issuing subpoenas requiring counsellors to produce their notes of interviews with complainants. Access is then sought to the notes so that defence counsel may cross-examine the complainant on anything which she may have said to the counsellor during confidential sessions. As some counsellors have pointed out, many complainants of sexual assault express feelings of guilt or at least doubts as to whether they may have been to blame in some way. Those expressions of

guilt or doubt do not mean that the complainant was not sexually assaulted. They merely reflect a common psychological reaction to what has occurred. It may be potentially misleading for the defence to rely upon them as evidence of consent. Furthermore, the complainant may feel that she has bared her soul to the counsellor only to have her confidence cruelly betrayed. Accordingly, it has been suggested that such notes should be privileged from production.

47. On the other hand, it has been argued that the court should have access to all evidence which impinges upon the guilt or innocence of the accused. Concern for the presumed sensibilities of someone who may not be telling the truth should not prevent access to potentially exculpatory evidence of statements made when there was no obvious reason to lie. The essence of the argument is that the law should seek to ascertain the truth no matter what the cost to a complainant or any other person, especially when someone whom the law still presumes to be innocent is facing disgrace and imprisonment. Hence, any privilege of the kind proposed would inevitably pose a serious threat to the system of justice.

48. No privilege presently exists in the ACT that would enable either complainants or counsellors to maintain an objection to the production of records of this kind.

49. Furthermore, whilst it might be possible for the ACT to pass legislation creating such a privilege, section 56 of the Commonwealth Act would prevail over any ACT provision to the extent of any inconsistency. Hence, in the absence of any agreement from the Commonwealth to add the new provisions to those already covered by section 8, the privilege could not effectively prevent evidence of relevant disclosures from being admitted at a trial. Having regard to the potential importance of this issue the Commission has taken the view that it should make some observations as to the most appropriate form of such a privilege for the ACT even though no proposal could be effective without the cooperation of the Commonwealth.

50. Whilst conscious of Andrew Ashworth's admonition that bland assertions of balance lead to sloppy reasoning,[130] the Commission is of the view that there is a requirement to balance the need to protect the privacy of disclosures to counsellors against the risk of excluding important evidence.

51. It has been contended that a privilege in relation to disclosures to counsellors should be unqualified by any judicial discretion. This contention has been supported by reference to fears that the exercise of any such discretion may be influenced by underlying sexist beliefs held by trial judges. It has been argued that an absolute

[130] Ashworth, A., (1996) op.cit at 229

privilege preventing disclosure in any circumstances is the only means of obviating such a risk.

52. Such unqualified rights of confidentiality are virtually unknown in the law. Questions relating to the extent to which confidentiality should be maintained arise in many professions and callings including medicine, the church, psychology, business and journalism. In each case the law recognises a duty of confidentiality but qualifies that right in relation to disclosures required by the public interest. Thus a banker may encounter a situation in which the duty to his customer is outweighed by danger to the state or by some other public duty[131], an employee may breach the employer's confidence when the public interest so requires[132] and a psychiatrist or other medical practitioner may breach a patient's confidence when necessary for public safety or the prevention of crime,[133] though it has been said that the circumstances must be exceptional[134]. It is one thing to recognise a duty of confidentiality and another to create a privilege enforceable even in the face of a subpoena or other order of a court. The law acknowledges few such privileges and those few are generally subject to other considerations. Even the deliberations of the Australian Cabinet, which have been held entitled to 'the highest degree of protection against disclosure', are not subject to an absolute privilege[135] since the public interest in immunity from production must be weighed against the competing public interest in facilitating the due administration of justice[136].

53. The essential problem is again that one can never anticipate every situation that may arise over the course of many years. Even legal professional privilege which derives its unique status from its importance to the administration of justice[137]

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[131] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, 486

[132] *Initial Services Ltd v Putterill* [1968] 1 QB 396; *Lion Laboratories v Evans* [1985] QB 526.

[133] *W v Edgell & Ors* [1990] 1 All ER 835

[134] *X v Y* (1988) 2 All ER 648; *Hunter v Mann* (1974) QB 767. For an example of exceptional circumstances see: *Tarasoff v Regents of the University of California* (1976) 17 Cal 3D 358; *W v Edgell* supra.

[135] *Commonwealth of Australia v Northern Land Council & Anor* (1993) 176 CLR 604

[136] See also *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 43, Stephen J at 63-4 and Mason J at 98-9.

[137] See, for example, *In Re Director of Investigation and Research and Shell Canada* (1975) 55 D.L.R. (3d) 713. The High Court has said that: "Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognised crime or fraud exception... the public interest in 'the perfect administration of justice'...is accorded paramountcy over the public interest that requires, in the interest of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required." *Waterford v Commonwealth of Australia*

is subject to some limited exceptions. A rule that leaves no scope for exceptional circumstances is inherently dangerous.[138] It is difficult to find any justification for excluding evidence if such exclusion would genuinely prejudice a fair trial. Suppose, for example, that the disclosures to a counsellor revealed that a particular complainant was suffering mental illness characterised by delusions or that she had previously attributed the assault to someone other than the accused. It could scarcely be claimed that the accused could have a fair trial if information of that kind were to be withheld. It is true that such circumstances would rarely arise but if they did the consequences would be quite unacceptable.

54. Furthermore, a judge faced with a trial the conduct of which seemed likely to be unfair in the absence of apparently credible evidence excluded by the operation of an unqualified rule, might well feel that the only just course was to grant a permanent stay of proceedings.

55. The New South Wales *Evidence Act 1995* was amended in 1997 by incorporating two new privileges; a 'professional confidential relationship privilege'[139], similar to that recommended by the Australian Law Reform Commission in 1987, and a 'sexual assault communications privilege'[140].

56. The `professional confidential relationships privilege' is effected by providing that a court may, and in some circumstances must, direct that evidence not be adduced if a 'protected confidence', 'the contents of a document recording a protected confidence' or 'protected identity information' would thereby be

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(1987) 163 CLR 54 per Mason & Wilson JJ at 64. See also Brennan J at 74. Indeed, Sir Ronald Wilson has actually described it as 'the essential mark of a free society.' See *Baker v Campbell* 153 CLR 52 at 95.

[138] The inherent danger of any absolute privilege can be illustrated by the American case of *Spaulding v Zimmerman* 116 N.W. 2d 704 (1962) where the plaintiff who was a minor brought a civil action relating to injuries sustained in a motor vehicle accident. The defendant's attorneys arranged a medical examination of the plaintiff and were advised by a neurologist that he was suffering from an aortic aneurism which posed an 'imminent danger of death'. He also said that it may have been caused by the accident. The attorneys knew that the plaintiff was unaware of it but to reveal it might increase the damages. Faced with this dilemma they decided not to warn him and instead settled his claim for a modest verdict. It was not until two years later that his condition was discovered during the course of a medical examination for the Army Reserve and he received immediate surgery. The Supreme Court of Minnesota subsequently set aside the settlement and that decision was affirmed on appeal but, so far as the conduct of the attorneys was concerned, the court held that ‘no rule required or duty rested upon defendants or their representatives to disclose this knowledge.’

[139] See Division 1A

[140] see Division 1B

disclosed[141]. In this context the term 'protected confidence' [142]refers to a confidential communication in the course of a relationship in which the confidant was acting in a professional capacity and was under an obligation not to disclose its contents. The term 'protected identity information' refers to information concerning the identity of a person who made such a 'protected confidence'. In the absence of such a direction the evidence is admissible.

57. The `sexual assault communications privilege' arises quite differently. Section 126H (1) provides that evidence is not to be adduced of a 'protected confidence' or 'the contents of a document recording a protected confidence' without leave of the court. In this context the term 'protected confidence' refers to a 'protected counselling communication' made by a person against whom a sexual assault has been or is alleged to have been committed whether before or after the alleged offence. The term 'protected counselling communication' refers to a communication made in confidence to a counsellor in the course of a relationship in which the counsellor is 'treating the person for any emotional or psychological condition'.

58. The discretion to grant leave for such evidence to be adduced is severely restricted by successive subsections:

> *(2) Evidence of a protected confidence or the contents of a document recording a protected confidence is not to be adduced if the party adducing evidence has not given reasonable notice in writing of the party's intention to adduce the evidence to:*
>
> > *(a) each other party, and*
> >
> > *(b) if the protected confider is not a party, the protected confider, and*
> >
> > *(c) if the counsellor is not a party, the counsellor.*
>
> *(3) The Court must not give leave to adduce evidence of a protected confidence or the contents of a document recording a protected confidence unless the court is satisfied that:*
>
> > *(a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value, and*

[141] Section 126B

[142] Subsection 126A(1)

*(b) other evidence of the protected confidence or the contents of a document recording a protected confidence is not available, and*

*(c) the public interest in preserving the confidentiality of protected confidences and protecting the protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or a document of substantial probative value.*

*(4) Without limiting the matters that the court may take into account for the purposes of subsection (3)(c), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the protected confider if evidence of the protected confidence or document is adduced.*

*(5) The court must state its reasons for giving or refusing to give leave under this section.*

*(6) A protected confider or counsellor who is not a party to proceedings may, with the leave of the court, appear in the proceedings.*

59. These provisions have been set out in full because they indicate the nature and extent of the provisions imposed in NSW and provide a concrete focus for the competing arguments.

60. The Commission notes, in passing, that the meaning of paragraph (3)(b) has been described by the authors of *Criminal Law (NSW)* as 'problematic',[143] and that they seem to have concluded that the terms of this paragraph at least envisage that 'other evidence' of the protected confidence or document might be admissible. It is difficult to see why the section should apply to some evidence but not other evidence of the same confidence or document or, indeed, what purpose this paragraph is intended to serve.

61. However, the heart of the controversy relates to the criterion that the evidence must have 'substantial probative value'. This term has not been defined and it seems unlikely that any definition could be of assistance since what is probative can only be determined by reference to the issues that have arisen in a particular case. It plainly means that the evidence must have a significant value in tending to prove or disprove facts of significant relevance to an issue between the parties to the trial.

62. Dr Easteal has suggested that the way is left open for a judicial officer who adheres to the myth that women have a propensity to lie about being sexually assaulted to interpret these words in a way that gives life to the myth. She offers by way of example references in counselling notes to previous drinking, drug taking or

[143] Watson R., QC, Blackmore, AM & Hosking GS., SC, *Criminal Law (NSW)* Volume 1, LBC Information Services Sydney at para 6.1571.

affairs. Dr Easteal also expresses the concern that the words could be imbued with a cultural meaning in which there was seen to be 'substantial probative value' in establishing that the complainant was an 'immoral' woman. Other submissions have contained similar expressions of concern.

63. Whilst the Commission understands these concerns it does not accept that there is any substantial risk of the discretion being so abused. Such a construction would make a mockery of the spirit and intent of the section. Furthermore, even if some magistrate or judge were to act on such a basis then it would be open to the Crown to challenge the ruling by what is often referred to as a reference appeal[144] and obtain a decision that would be binding on future trial judges.

64. In recent years there has been an increasing recognition of the inadequacy of rigid laws. Fears of capricious or idiosyncratic decisions have always tempted legislators to seek safety in certainty. However, the cost has been great. The quest for justice has often been subverted into the simplistic allocation of cases into designated legal pigeon-holes and an equally simplistic application of predetermined consequences. Concerns have been expressed about the consequences of such approaches for decades[145] and a trend toward more open-ended discretionary rules has gradually emerged.[146] For example, in the civil law there has been an increasing willingness to restrain enforcement of contractual rights where unconscionable.[147] In the criminal law there has been an increasing emphasis on the discretion to exclude evidence on grounds of unfairness or public policy. The Commission does not believe that the suggested risk of some judges or

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[144] The procedure does not involve challenging any verdict actually returned at the trial but enables the Crown to challenge a ruling made at the trial concerning an issue of law and have it determined by an appellate court. In the ACT a reference appeal from the Supreme Court may be brought by the Director of Public Prosecutions to the Full Court of the Federal Court of Australia – s.30A *Federal Court of Australia Act 1976* (Cth), within 6 weeks of the acquittal of a person from the whole or any part of the indictment in the Supreme Court.

[145] As early as 1934 Lord Atkin coined the oft quoted aphorism: ‘Finality is a good thing but justice is better’: *Ras Behari Lal v The King Emperor* (1934) 150 LT 3 at 5. Half a century later Lord Scarman said: ‘Certainty is always an advantage in the law, and in some branches of the law it is a necessity. But it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law’s development, and stamp upon the law the mark of obsolescence when what is needed is the capacity for development: *Gillick v West Norfold AHA* (1986) AC 112 at 186. The need for flexibility has been a constant theme of law reform bodies both in Australia and overseas.

[146] See, for example, the discussion provided by Keith Mason QC, *Constancy and Change*, Federation Press, Sydney, 1990, at 58.

[147] See, for example, Keith Mason QC, *Constancy and Change*, supra; Paul Finn, ‘Commerce, the Common Law and Morality’(1989) 17 *MULR* 87.

magistrates abusing judicial discretion provides any justification for returning to rigid rules and accepting risks of real injustice.

65. Such an absolute privilege might produce unintended consequences. Suppose, for example, that a person who has been sexually abused tells a counsellor that he or she intends to kill the perpetrator. There have in fact been several such killings in Australia recently. Should a counsellor be compelled to remain silent and tacitly permit murder?

66. Ultimately, whilst the Commission is not insensitive to the concerns that have been expressed, it is unable to accept that the law should contain a privilege in such absolute terms that even evidence capable of demonstrating the innocence of an accused person would have to be suppressed and evidence of homicidal intent or other unacceptable consequences left unreported.

67. On the other hand, the Commission does not accept that the law should refuse to recognise any privilege in relation to disclosures to counsellors or that notes of such disclosures should be made available to counsel merely to facilitate a 'fishing expedition'. It seems unlikely that many counsellors' records would reveal any evidence of real importance to the outcome of a trial and in most cases continuing to permit unrestricted access would involve an unwarranted intrusion into expressions of anguish communicated in a relationship of trust. Such an intrusion may obviously cause further distress if not further feelings of violation. It should not be permitted unless there are compelling reasons for disclosure.[148]

68. The NSW provisions reflect an attempt to find some middle ground that would recognise the validity of these concerns whilst ensuring that evidence is available to establish relevant facts in exceptional cases. That is plainly necessary. The section is not limited to disclosures made to rape counsellors nor even to disclosures about sexual assaults. It applies to any communication made in confidence to a counsellor who is 'treating the person for any emotional or psychological condition' even prior to the offence. If the discretion to grant leave for counsel to examine evidence of that kind were to be removed this might mean that evidence of a mentally ill person's long history of psychiatric illness was effectively suppressed since even the obviously delusional statements upon which the psychiatrists had based their diagnoses could not be disclosed.

69. Unfortunately, mentally ill people continue to fall into the criminal justice system both as complainants and defendants and their psychiatric condition should

[148] Whilst this was the view of the majority of the Commission, Mr Walker dissented from the proposal to allow a trial judge a discretion to refuse to admit evidence of disclosures at counselling sessions on the basis that the opportunity for an accused person facing a serious criminal charge to obtain potentially relevant and perhaps exculpatory evidence should not depend upon the exercise of a discretion.

be revealed if it is likely to affect the reliability of their evidence. There are other exceptional cases. For example, the issue may be one of identity and the complainant may have described her assailant to a counsellor in terms wholly inconsistent with the appearance of the accused. The Commission considers that any proposal that would prevent a court from ascertaining the truth when there were grounds to fear that an innocent person might be wrongfully convicted and imprisoned would be contrary to principle and unjustified.

70. The NSW provisions are somewhat incongruous in that whilst purporting to create a privilege they do not identify the person entitled to the benefit of it nor authorise such a person to waive it if he or she considers it appropriate to do so. The section requires that both confider and counsellor be notified and that both may appear in the proceedings with leave of the court. This suggests that both may be entitled to the benefit of the privilege. However, the privilege in other confidential disclosures is almost always that of the confider rather than the person to whom the confidential statements are made. The Commission believes that the complainant rather than the counsellor should be entitled to the benefit of the privilege since it is the confidences of the complainant that are threatened. The question of waiver does not seem to have been addressed. That is unfortunate because the operation of the section is not confined to proceedings for sexual offences. Hence, a person charged with, say, shoplifting who wishes to raise, in mitigation, the fact that she had been suffering emotional trauma due to sexual assault might be forced to seek leave to obtain access to evidence of her own disclosures to a counsellor.

71. The competing arguments could no doubt be developed at length. Ultimately, however, the Commission is of the view that there will be many circumstances in which it would be appropriate for any order for production of records to be refused but some circumstances in which justice would demand that production be ordered. The complainant should enjoy a privilege in relation to such confidential communications and the right to waive such privilege, but the court should have a discretion to admit evidence of the communications in appropriate cases despite the absence of waiver.

72. MCCOC has expressed the view that there should be a sexual offences counselling immunity subject to the exercise of a judicial discretion confined by reference to a number of factors.[149] The Commission is in general agreement with this view. MCCOC has suggested that the discretion should not be available in preliminary criminal proceedings and that any application for access to the records should involve two stages. First, an applicant would be required to demonstrate

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[149] Chapter 5, Report, 'Sexual Offences Against the Person', May 1999, at 283. MCCOC noted that this position had been supported by the Office of the Status of Women (Cth), Women's Legal Service (SA), Australian Reproductive Health Alliance (ACT)' Catholic Women's League and the Salvation Army.

both a legitimate forensic purpose for seeking that leave and an arguable case that the counselling communication would materially assist his or her case. If those criteria were established then the court would make a preliminary examination of the evidence in the absence of the parties and their legal representatives. Leave could be granted only if, in the circumstances of the case, the public interest in ensuring the accused is given a fair trial outweighs the public interest in preserving the confidentiality of the counselling communication. In making that determination, MCCOC has suggested, the court would be required to take into account the following considerations:

> *(a) the extent to which disclosure of the counselling communication is necessary to allow the accused to make a full defence,*
>
> *(b) the public interest in ensuring that victims of sexual offences receive effective counselling and other treatment, and the extent to which disclosure of counselling communications dissuades victims from seeking such counselling or other treatment or diminishes the effectiveness of such counselling or other treatment,*
>
> *(c) whether the evidence concerned will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available concerning the matter to which the evidence relates.,*
>
> *(d) the likelihood that disclosure of the counselling communication will affect the outcome of the case,*
>
> *(e) whether admission of the counselling communication is being sought on the basis of a discriminatory belief or bias,*
>
> *(f) whether the victim or alleged victim who made the counselling communication concerned, or to whom it was made or relates, objects to disclosure of the counselling communication, and*
>
> *(g) the nature and extent of the reasonable expectation of confidentiality with respect to the counselling communication and the potential prejudice to the privacy of any person, including the extent to which any interest in confidentiality has been attenuated by the passage of time or the occurrence of any intervening event since the counselling communication was made.*

73. The Commission doubts that there is any real need to stipulate these criteria. Furthermore, criteria (a), (c), (d) and, perhaps (e) appear to address substantially the same issue, namely whether disclosure is really warranted in fairness to the accused. However, none are inappropriate and there is no obvious reason to oppose their inclusion.

74. The Commission does oppose the suggestion that complainants have no right to consent to disclosure. Any other right to confidentiality including legal

professional privilege can be waived and there is no apparent reason to withhold such a right from complainants. The suggested provision is intended to protect the rights of complainants, not remove them. In some cases complainants might wish to have evidence of such disclosures admitted. There may be cases in the which the evidence would be admissible under sections 66 and/or 72 of the *Evidence Act 1995* as evidence of the facts disclosed. There may be other cases in which evidence falling into this category would be admissible to rebut suggestions of implanted memories, delusional illness or recent fabrication. More fundamentally, however, the Commission believes that it is the complainants who should have rights to confidentiality and those rights should extend to the right of waiver.

**RECOMMENDATION 21**

The Commission recommends that the Commonwealth government be approached with a view to obtaining agreement for amending the regulations under the Evidence Act 1995 to ensure that the Act does not apply to a further provision to be inserted into the Evidence Act, 1971 in accordance with the recommendations of MMCOC but subject to a provision ensuring that complainants may waive any restriction on disclosure should they choose to do so.

***Dock Statements***

75. The former right of an accused person to make an unsworn statement from the dock has been abolished by section 68A of the *Evidence Act 1971* (ACT).

***Juries***

76. As previously mentioned, it must be acknowledged that some measure of misogyny and bigotry remains within any community and that some jurors might be afflicted by such qualities. Nonetheless, there is no basis for any fears that jurors are likely to be any more misogynistic or bigoted than other members of the community. In the ACT jury panels are generally representative of the wider community and evenly balanced in terms of gender, though the process of empanelling juries involves drawing names out of a box at random and some will have a majority of male jurors and others will have a majority of female jurors. Nor is there any obvious reason to suspect that the role as juror might subvert those empanelled from their usual values. Furthermore, the scope for trials to be influenced by inappropriate values is limited to some extent by the requirement that verdicts be unanimous.

77. In any event, there is no procedure that would enable prospective jurors to be 'screened' for inappropriate values. The process followed in some American jurisdictions of permitting opposing counsel to cross-examine prospective jurors about attitudes and beliefs is time consuming and expensive and its utility is dubious. Such a system is not employed in any Australian jurisdiction or in England and the Commission could not support the adoption of such an approach in the ACT.

78. It has been proposed that videotaped documentaries addressing pervasive myths about the behaviour of rape victims be screened to juries prior to the commencement of trials involving allegations of sexual assault.

79. The Commission agrees that there is a need for greater community education on these matters but doubts that the Supreme Court is an appropriate venue for screening documentaries of this nature. The court must be impartial and must avoid any appearance of partiality. If the trial begins with the screening of such a documentary some jurors might form the impression that the court is taking sides. The use of such a documentary would also give rise to some incongruity with the standard direction that juries should put out of their minds anything they may have heard or read and decide the case solely on the basis of the evidence adduced at the trial. However, there are more fundamental problems. One would have to determine the status of such a videotape. Would it be evidence in the case? If so, then how could the admissibility of a videotape not yet prepared be guaranteed by statute? If not, then how could a jury be invited to act on the basis of its contents? In either event, defence counsel would presumably seek an opportunity to answer the videotaped material and that might take the trial into unexpected areas. For example, the producers or speakers might be subpoenaed to attend for cross-examination, opposing experts might be called, or there might be an application to play videotaped documentaries about how rapists tend to behave. Furthermore, if the complainant in the particular trial has not behaved as the video tape suggests complainants tend to behave then that may be used against her.

80. Trials have to be conducted in accordance with the rules of evidence and anything which might be seen as an attempt to indoctrinate the jury or to create a bias in favour of conviction is bound to cause grave problems and, ultimately, give rise to the risk that any convictions may be set aside on appeal. For these reasons the Commission is unable to support this proposal.

## 6. LEGISLATION IS NOT ENOUGH

81. As mentioned in the Introduction, no legislative scheme can provide a perfect system in which the guilty are always convicted, the innocent are always acquitted and trials cause no further anguish to complainants. The criminal justice system should always strive toward such noble ideals but at the present stage of human development they are unattainable. The legislative reforms suggested in this report should make the law simpler and the system more effective and fair for complainants as well as the accused person. However, legislation alone cannot meet every need. The outcome of any given prosecution will depend upon a range of factors including the adequacy of the police investigation, the level of preparation and the standard of presentation of the Crown case, the credibility of the witnesses and the competence of the competing counsel. The substantive law and the rules of evidence and procedure may play an important part, but it is a human system dependent upon human beings with normal human weaknesses.

82. Furthermore, the ACT does not have an unfettered legislative power. There are many issues which can only be sensibly addressed by the Commonwealth. One obvious example is the prevalence of child pornography and promotional material issued by paedophile groups on the Internet. Another is the problem of child sex tours now prohibited by Commonwealth legislation.

83. In any event, no legislative provision will enable a judge to undo that which has occurred or assuage the pain so caused. Regrettably, the law must respond to the anguish of complainants by asking them to undergo the further ordeal of giving evidence at the trial of the alleged offender. The rules of evidence and procedure have been progressively changed to provide some limited protection from cross-examination as to prior sexual history and reputation, and to permit evidence via video link, but there are very real limits to what can be done to reduce the ordeal. Complainants need emotional support and specialised counselling facilities not only to help them come to terms with what has happened to them, but to help them cope with the strain of having to give evidence.

84. There is a need for a protocol to be developed in conjunction with the Director of Public Prosecutions to ensure that complainants are treated with respect and dignity from the time of the initial complaint. Many complainants find the initial report and forensic and investigative procedures intrusive and unwelcome. Complainants should be advised of each step in the process towards trial. Basic matters such as where to go when they arrive at court, how their concerns about protection and avoidance of confrontation with relatives or friends of the accused, should be addressed. Most complainants have never been to court before and have no idea what to expect. It will sometimes help to simply take them to court so that they may see the layout of the courtroom, explain the procedures including

taking an oath or making an affirmation and indicate the type of things that they will be asked. It will also be necessary to make firm arrangements so that they will be protected during periods at court including the times immediately after any short adjournments and before the resumption of the hearing.

85. The Director of Public Prosecutions does not have sole responsibility for the welfare of the complainant witness at court. The AFP, court staff including those at the public counter and in the court, corrective services and custodial staff must all act in such a way as to reduce the trauma of the court appearance for the complainant. Consideration should be given to the establishment of a formal group to develop a plan of management for the appearance of witnesses in a sexual assault case. Such a plan would involve all the personnel listed above in developing strategies to ensure that complainants are treated with appropriate dignity and consideration, with their need for security as paramount. The plan should include identifying secure areas for the complainant to use when waiting to give evidence or when accessing and exiting the court building, so as to avoid contact with the accused.

86. When the trial is over and the accused has been either convicted and punished, or acquitted and returned to the community, those who have been sexually violated will still have to face the anguish and somehow attempt to pick up the threads of their lives. Again they will need emotional support and specialised counselling facilities. The Commission strongly recommends adequate funding be provided to enable organisations such as The Canberra Rape Crisis Centre to continue to operate such facilities and that further consideration be given to the needs of male complainants in the light of the pilot project conducted by SAMSSA.

87. The plight of child complainants is particularly distressing and it is imperative that adequate specialist counselling be available. Such counselling should be available not only during the court process but also after the the trial. Additionally, staff of the DPP sometimes need to consult with a child's carers or counsellors to ensure that the evidence they adduce from the child accurately relays to the court what the child means. Many young children communicate with words that have entirely different meanings to those adults might attribute to them.

88. Secure and private areas where children and their supporters can feel safe are also needed in the courts. Consideration should be given to making the current facilities at the court child friendly, including the provision of child sized furniture and age appropriate play equipment to allow children to relax or release stress during breaks in giving evidence.

89. In summary, the processes of the criminal justice system and those involved in it should treat complainants with sensitivity and compassion. The need to attend court, give evidence in chief and be cross-examined will inevitably cause anxiety

and distress but some things can be done to alleviate the anguish without compromising the integrity or fairness of the trial process. Those things may include changes to the legislation of the kind recommended in this report but a more holistic approach is required.

90. Ultimately, there is a need for greater understanding of the problem of sexual assault within the Australian community.[150] People need to accept that sexual violence should never be tolerated and, notwithstanding the traditional Australian abhorrence of 'dobbing', the gravity of such offences demands that any information that may enable the police to identify offenders be provided without hesitation. Those who have suffered from sexual assault need comfort and support; not suspicion or condemnation. Community attitudes have changed during the past two or three decades and it may be hoped that those changes will continue. In the interim those involved in the administration of justice must seek to ensure that the system is fair and effective and that the processes employed are designed and implemented with due sensitivity for the special needs of those who have already suffered so much. Justice requires nothing less.

[150] A study conducted for the Federal Government as recently as 1995 revealed that there was "less community awareness and understanding about sexual violence than domestic violence". *Community Attitudes to Violence Against Women*, July 1995, prepared by ANOP Research Pty Ltd for the Office of the Status of Women. at 38

## APPENDIX A

**ATTORNEY-GENERAL'S DEPARTMENT**

**TERMS OF REFERENCE**

I, TERENCE CONNOLLY, Attorney General of the Australian Capital Territory, REFER the following matter to the Community Law Reform Committee as provided for in the constitution of the Committee:

TO REVIEW the laws in force in the Territory in regard to sexual assault AND TO REPORT on desirable changes concerning the existing laws, practices and procedures relating to sexual assault, including:

- whether the current system adequately deals with the needs of victims of sexual assault;
- on the need for further measures or legislation to improve the current system;

and on any other relevant matter the Committee wishes to take into consideration.

IN MAKING ITS REVIEW AND REPORT the Committee should consider:

- procedures in sexual assault cases;
- whether current evidentiary rules relating to sexual assault are appropriate; and
- practices relating to the sentencing of sexual assault offenders.

IN MAKING ITS REVIEW AND REPORT the Committee is to have regard to:

- any relevant recommendations of the National Committee on Violence Against Women;
- any views of government agencies, the community and individuals on this reference; and
- any relevant international conventions adopted by Australia.

Signed this 28th day of January 1993

TERENCE CONNOLLY

ATTORNEY GENERAL

**APPENDIX B**

List of Submissions received in response to the discussion paper and the draft report

1. Dr Patricia Easteal

2. Family Support for Victims of Paedophiles (ACT) Inc
   (2 submissions dated 29 October 1998 and 6 November 1998)

3. Women's Health Service,
   ACT Community Care

4. Women With Disabilities (ACT)

5. Victims of Crime Assistance League (ACT) Inc

6. Ms Rosemary Follet,
   Discrimination Commissioner,
   ACT Human Rights Office.

7. Canberra Rape Crisis Centre and The Women's Legal Centre (ACT and Region) (joint submission)

8. Child At Risk Assessment Unit,
   The Canberra Hospital

9. Children's, Youth and Family Services Bureau,
   ACT Department of Education and Community Services

10. ACT Women's Consultative Council

11. Service Assisting Male Survivors of Sexual Assault (SAMSSA)

# SUMMARY OF RECOMMENDATIONS

## REPORT OF THE LAW REFORM COMMISSION RELATING TO SEXUAL ASSAULT

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**RECOMMENDATION 1**

The Commission recommends:

(a) that paragraphs (a) and (b) of the definition of 'sexual intercourse' in section 92 be amended in each case by adding a comma and the word 'labia' after the word vagina and before the words 'or anus'.

(b) that the words 'and any contact between the penis of the offender and the mouth of another person' be added to subparagraph (c) of the definition of 'sexual intercourse'.

(c) that the following definitions be added to section 92:
- ***act of a sexual nature*** means sexual intercourse or an act of indecency;
- ***complainant*** means a person upon whom an offence is alleged to have been committed;
- ***person*** includes a child or a young person;
- ***rape*** means an offence under section 92D;
- ***vagina*** includes a surgically constructed vagina; and
- ***young person*** means a person under the age of 16 years.

(d) that sections 92EA, 92NA and 92NB be amended to remove the definition of 'young person' from those sections.

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**RECOMMENDATION 2**

The Commission recommends that:

(a) the existing 8 offences be replaced by offences of rape, assault with intent to rape and aggravated rape;

(b) the term 'rape' be defined to mean engaging in sexual intercourse with another person without that person's consent and knowing that that other

person does not consent or being reckless as to whether that other person consents;

(c) the maximum sentence for rape and assault with intent to rape be set at 15 years imprisonment;

(a) the offence of aggravated rape be defined to apply when the offender has acted in company with another offender or other offenders or has inflicted grievous bodily harm upon the complainant whether before, during or after rape; and

(b) the maximum sentence for aggravated rape be set at 20 years imprisonment.

Page 43
**RECOMMENDATION 3**

The Commission recommends that:

(a) the offence under subsection (1) remain unqualified by any statutory defence;

(b) the maximum penalty for such offence be increased to 20 years imprisonment;

(c) the maximum penalty for an offence under subsection (2) be set at 12 years; and

(d) the requirement that the defendant prove consent be repealed.

Page 51
**RECOMMENDATION 4**

The Commission recommends that section 92EA be repealed.

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**RECOMMENDATION 5**

The Commission recommends that:

(a) the number of offences relating to acts of indecency be reduced to 3. The offences should be:

- act of indecency;

- aggravated act of indecency; and
- assault with intent to commit an act of indecency.

(b) The maximum sentence for acts of indecency and assaults with intent to commit acts of indecency should be 7 years and the maximum sentence for the commission of an aggravated act of indecency should be 15 years.

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**RECOMMENDATION 6**

The Commission recommends that section 92K be amended as follows:

(a) that the offence under subsection (1) remain unqualified by any statutory defence;

(b) the maximum penalty for such an offence be increased to 15 years;

(c) the maximum penalty for an offence under subsection (2) be reduced to 6 years; and

(d) that subsection (3) be amended by deleting the words `and that that person consented to the committing of the act of indecency'.

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**RECOMMENDATION 7**

The Commission recommends that subsection (7) be amended to the following:

In this section, 'step-child', in relation to a person, means a person with whom the first-mentioned person lives and in relation to whom the first mentioned person has assumed a caring role of the kind that would normally be fulfilled by a parent.

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**RECOMMENDATION 8**

The Commission recommends that:

(a) section 92M be repealed; and
(b) section 37 be amended by adding after the words ‘advantage to any person’ the words ‘including sexual intercourse with the person so detained or any other person’.

Page 60
**RECOMMENDATION 9**

The Commission recommends that section 92NB be amended by:

(a) adding after the words 'sexual nature' in subsection (1) the words 'or the sexual organs or anus of a young person'; and
(b) adding to subsection (2) the words 'or that the film, photograph, drawing, audio tape, video tape or thing was in his or her possession for a legitimate medical or educational purpose or for purposes associated with the investigation of possible criminal offences and /or the maintenance of legal proceedings.'

(c) by the addition of the following further subsections:

(3) A person who knowingly has in his or her possession a film, photograph, drawing, audio tape, video tape, document or any other thing with the intention that it be used in an attempt to persuade a young person to engage in an act of a sexual nature is guilty of an offence punishable, on conviction, by imprisonment for 5 years.

(4) A person shall be taken to possess such film, photograph, drawing, audio tape, video tape, document or thing with the intention specified in subsection (3) if he or she possesses it with the intention of attempting to persuade a young person to engage in an act of a sexual nature by making any statement or adopting any strategy of a kind suggested in it.

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**RECOMMENDATION 10**

The Commission recommends:

(a) that police officers be authorised to demand the name and address of persons found loitering near schools, kindergartens or child care centres;

(b) that it be made an offence either to refuse to supply such information or to supply information which is false in any material particular; and

(c) that section 197 of the *Magistrates Court Act* be amended to authorise the court to grant orders, on the application of police officers, school principals or those in charge of kindergartens or child care centres, restraining people from loitering in or near schools, kindergartens or child care centres when there are reasonable grounds for suspecting that children might be in danger from such a person.

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**RECOMMENDATION 11**

The Commission recommends that:

The negative and piecemeal approach reflected in section 92P be replaced by a positive consent standard in the following terms:

For the purposes of this Part "consent" should be taken to mean a consent freely and voluntarily given with knowledge of the nature of the act in question and the identity of the other person or persons involved.

Page 72
**RECOMMENDATION 12**

The Commission proposes the enactment of a new offence in the following terms:

A person who induces another person to have sexual intercourse with that person by fraudulently representing that such act has a legitimate medical purpose or that such persons are lawfully married is guilty of an offence, punishable on conviction by imprisonment for 12 years.

Page 82
**RECOMMENDATION 13**

The Commission recommends that there be no change to the common law position.

Page 83
**RECOMMENDATION 14**

The Commission recommends that there be no change to this provision.

Page 84
**RECOMMENDATION 15**

The Commission recommends that there be no change to this provision.

Page 85
**RECOMMENDATION 16**

The Commission recommends that the operation of the principle in section 92U be extended to all offences involving acts of indecency.

Page 87
**RECOMMENDATION 17**

The Commission recommends that there no change to the legislative provisions concerning sentences other than by amending maximum penalties as recommended in other sections of this report.

Page 90
**RECOMMENDATION 18**

The Commission recommends that the current closed circuit television system be augmented by provisions enabling the Court to take evidence in any manner it considers appropriate.

Page 95
**RECOMMENDATION 19**

The Commission recommends that *Magistrates Court Act* to be amended to provide for the following:

(a) the prosecution be required to serve copies of statements of all witnesses upon the solicitors for the defendant prior to any date being set for the hearing of committal proceedings;

(b) the defendant or his solicitors then be required to provide written notification of any witnesses whom they wished to cross-examine during the course of the committal proceedings;

(c) in the event that such notice was not given it be presumed that the committal proceedings would involve nothing more than submissions made on the basis of the documents so served and the hearing time would be allocated accordingly;

(d) thereafter, no cross-examination of any of the Crown witnesses be permitted without leave of the committing magistrate;

(e) where notice was given of an intention to cross-examine a particular witness or witnesses then sufficient time be allocated to permit that cross-examination; and

(f) committing magistrates be given discretion to permit any evidence in cross-examination to be given by closed circuit television or video link and to limit cross-examination which appears to be unnecessarily lengthy and to prevent cross-examination altogether about matters which are of peripheral relevance or which is otherwise not warranted by the forensic needs of the case.

Page 113
**RECOMMENDATION 20**

The Commission is of the view that the present system should be monitored to ensure that it is effective but sees no reason to introduce a separate system for sexual offences.

Page 123
**RECOMMENDATION 21**

The Commission recommends that the Commonwealth government be approached with a view to obtaining agreement for amending the regulations under the Evidence Act 1995 to ensure that the Act does not apply to a further provision to be inserted into the Evidence Act, 1971 in accordance with the recommendations of MCCOC but subject to a provision ensuring that complainants may waive any restriction on disclosure should they choose to do so.