

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

Consultation Paper
October 1987

RAPE

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2.

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First Published 1st December 1987

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government. Its principal functions are:

- (a) to keep the law under review;
- (b) to undertake examinations and conduct research with a view to reforming the law; and
- (c) to formulate proposals for law reform.

The Commission prepared a programme of law reform in consultation with the Attorney General for submission by the Taoiseach to the Government. This was approved by the Government and copies were laid before both Houses of the Oireachtas on 4 January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General twenty-one Reports containing proposals for reform of the law. Details will be found on pp. 99-101.

The Commission was reconstituted on 2 January, 1987. In consultation with the Attorney General, it has decided to tackle those areas of law which seem most urgently in need of reform. To that end, it has produced a *Report on the Statute of Limitations: Latent Personal Injuries* and will shortly present to the Attorney General a Report on the *Receiving of Stolen Property*. Work in progress includes research on *child sexual abuse*, problems associated with *conveyancing* and *house purchases* and *debt collection*. Work is also far advanced on Reports on two of the Hague Conventions on Private International Law. That relating to the *Service of Legal Documents Abroad*, is nearing completion and will be presented to the Taoiseach shortly.

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GLOSSARY OF LEGAL TERMS

A priori	Reasoning from the cause to the effect.
Actus reus	The act or deed of which a crime consists - its physical manifestation. In rape: vaginal sexual intercourse with a female without her consent.
Deposition	A witness's statement taken on oath in the District Court. The witness can be cross-examined.
Dicta	Words used by a judge in a judgment.
Doli capax	Being deemed in law capable of committing a crime. A boy under 14 is presumed incapable of rape.
In camera	In chambers. When a case is heard <i>in camera</i> , only the judge, the registrar or clerk, the parties, their legal representatives and the witnesses giving evidence are allowed to be present. The public and press are excluded.
Indictment	The document comprising the accusation against an accused when he is tried by jury.
Indictable	Capable of being tried before a jury and thereby rendering the accused liable to incur the maximum penalty for the offence if convicted.
Mens rea	The state of a person's mind when he performs the <i>actus reus</i> which renders the act or deed criminal. In rape it consists of doing the <i>actus reus</i> (defined above) knowing that the female is not consenting or being reckless as to whether she is consenting or not.
Peremptory	(In the context of challenging jurors) Without having to give a reason.
Prima facie case	A case sufficient to call for an answer.
Obiter (dictum)	A statement of law made by a judge in a judgment which is not a point of law upon which the actual decision in the case is based.
Summarily	A case is dealt with summarily when it is heard and dealt with in the District Court. The penalty for any one offence cannot exceed 12 months imprisonment (2 years in total when offences are aggregated) or the maximum monetary penalty appropriate to a minor offence - approximately £1,000 today. There is no jury in the District Court.

CHAPTER 1: INTRODUCTION

1. On the 6th March 1987, the then Attorney General, Mr John Rogers SC, in pursuance of section 4 (1) (c) of the *Law Reform Commission Act, 1975* requested the Commission to formulate proposals for the reform of the law in a number of areas. These included some aspects of the criminal law, among them sexual offences generally, including the law relating to rape and child sexual abuse. This Consultation Paper represents the initial views of the Commission on the subject of rape.

2. The law of rape has been the subject of legislation as recently as 1981. In that year the Criminal Law (Rape) Act was passed, its principal objectives, as explained by the Minister of State at the Department of Justice at the time, being:

- (a) to protect complainants in rape cases against unfair or irrelevant cross-examination as to their previous sexual history;
- (b) to preserve the anonymity of the complainants in such cases;
- (c) to increase the penalties available for serious sexual assaults which were not comprised in the definition of "Rape"; and
- (d) to provide a statutory definition of "Rape".

3. It is clear that the introduction of this legislation reflected a widely held concern that the pre-existing law as to the cross-examination of the complainant and the publicity that could be given to rape trials inhibited many victims of rape from bringing complaints to the Gardai. It was hoped that the new Act would mean a greater likelihood of rapists being brought to justice.

We sought detailed information from the Department of Justice concerning complaints and prosecutions for various sexual offences for the period since the 1981 Act came into force to the present. Unfortunately, while the response was excellent from some Garda

Districts, the over-all response was incomplete and inconsistent to such an extent that we are unable to reproduce the figures or to draw any soundly based conclusions from them.

The following figures as to the detection and prosecution of rape for the years 1978/1986 have been abstracted from the report of the Commissioner of the Garda Síochána for each year.

No. of rape offences reported and known	No. of charges	No. of convictions	Acquitted or dismissed in District Court or Nolle Prosequi entered	Withdrawn	Pending
1978: 47	37	9	1	1	26
1979: 50	39	13	1	2	23
1980: 46	30	8	4		18
1981: 51	32	9	4	1	18
1982: 58	37	4	0	2	31
1983: 57	39	12	1	2	24
1984: 68	34	8	2	2	22
1985: 73	31	3	2	2	24
1986: 74	34	4	0	1	29

It may finally be noted that according to figures supplied by the Rape Crisis Centre, the Centre in 1984 received 365 calls relating to incidents of rape or sexual assaults on adults and in 1985 received 501 such calls.

4. The figures supplied by the Rape Crisis Centre appear to reflect a significant degree of under-reporting of rape and similar offences to the Gardai. In the absence of sufficiently detailed statistics, the precise extent of under-reporting is difficult to gauge. Nor is it possible to determine to what extent, if any, the position was improved by the 1981 Act. It should, however, be emphasised at the outset that a significant number of cases of rape or attempted rape will go unreported in every legal system for reasons which are not necessarily related to the nature of the legal process itself, e.g. embarrassment, fear of not being believed and psychological trauma.

The reformed rape law in Michigan has been subjected to an evaluation study carried out by the University of Chicago.* That study found no significant difference in rape reports before and after law reform. However, there was evidence of a continuing increase in rape reports over time, which the study attributed to social change rather than to specifics of law reform, or to an absolute increase in the crime. In other words, it was suggested that a change in public attitudes towards rape was one of the most important influences in reporting trends.

5. Where rape is alleged the trial procedure is of its nature potentially distressing, humiliating or embarrassing for the complainant in a way which other trial procedures are not. These are problems which any humane system of criminal justice must seek to address, without unfairly limiting the rights of the accused. Certain aspects of the present law which might require reform have been helpfully identified by the Fourth Report of the Joint

Oireachtas Committee on Women's Rights on *Sexual Violence* as giving rise to concern in this and other contexts and may be summarised as follows:-

- (1) the existing definition of rape, which is confined to vaginal penetration, and does not include other degrading forms of sexual assault;
- (2) the provisions in relation to the anonymity of the complainant;
- (3) the admissibility of evidence as to the complainant's previous sexual history;
- (4) the so called "marital rape" exemption;
- (5) the absolute presumption that boys under the age of 14 are incapable of rape;
- (6) the absence of separate legal representation for the complainant in court proceedings;
- (7) the holding of rape cases in public;
- (8) the random composition of juries in rape cases, allowing the possibility of predominantly male juries;
- (9) the alleged inconsistency in sentencing in rape and allied cases.

All of these matters are addressed in this Consultation Paper. In addition, the following aspects of rape are dealt with:

- (1) the extent to which knowledge that the woman was not consenting to the act of sexual intercourse is a necessary ingredient in the crime of rape and equivalent offences;
- (2) the desirability of retaining the mandatory warning as to the importance of corroboration in such cases;
- (3) the existing provisions as to the anonymity of the defendant;
- (4) the existing law in relation to indecent assault and certain ancillary offences falling short of rape, such as sexual intercourse with mentally incapacitated women or girls;
- (5) whether the Central Criminal Court should be given exclusive jurisdiction to try cases of rape and other sexual offences of equivalent gravity.

6. Special problems arise in the case of the rape of young children. These will be considered in a forthcoming paper on the law relating to child sexual abuse. At the outset we think it is important to stress our view as to the function of the criminal law in the case of rape. As in the case of any other serious criminal offence, its object must be to ensure, so far as humanly possible, that those who are guilty of the crime are convicted and punished in a manner commensurate with its gravity and that only the guilty are so convicted. The law must observe the constitutional requirement that no person should

be tried on any criminal charge save in due course of law, which in turn demands the observance by the law of basic fairness in the trial of such persons. In the special case of sexual offences, the law must also seek to avoid all unnecessary distress to the complainant.

In an ideal system all the guilty should be convicted and all the innocent acquitted. But the ideal is seldom attainable, and there will necessarily always be cases in which there is some doubt about who is telling the truth. In the past there was an unfortunate tendency to be over sceptical about rape allegations. While it is important that the balance should be redressed, it would be neither just nor reasonable to move to the opposite extreme of assuming that the complainant always tells the truth while the accused invariably lies. We have a system of criminal justice which operates on the basis that, where some doubt remains as to a particular allegation, the doubt should be resolved in favour of the accused. This is expressed in the principle that the accused is presumed innocent until proved guilty and in the heavy onus that is placed on the prosecution to prove its case beyond reasonable doubt. The operation of this principle means that, in cases of doubt, guilty persons may sometimes be acquitted. From the point of view of the victim and society this is a serious loss. On the other hand, if doubts were always resolved in favour of the complainant, innocent persons would inevitably sometimes be convicted. This would represent a loss of a different kind. Society has to make a choice about the balance it wants to draw, in doubtful cases, between ensuring the conviction of rapists and avoiding the conviction of the innocent. At present the criminal justice system operates on principles which assume that the need to avoid convicting an innocent person is, in a free society, important enough to justify the risk of allowing the occasional rapist to go free. This is a heavy price to pay for freedom, but it is generally felt that the price is worth paying.

In the context of rape, an offence which, as traditionally defined, is committed exclusively by men only on women, the emphasis within the criminal justice system on avoiding wrongful conviction will appear to some as an example of male protectionism. It is important to stress that the emphasis on avoiding wrongful conviction is general to the criminal law and that its application to rape is not, and should not be, a special case. The presumption of innocence and the onus of proof beyond reasonable doubt offer general protection to accused persons of either sex.

7. We have found difficulty in some areas in reaching conclusions in the absence of empirical data relating to the operation of the present law, e.g. on the question of the admissibility of the complainant's previous sexual history. We hope that, as a result of the publication of this Consultation Paper, the necessary data will be forthcoming which will enable the Commission's ultimate proposals for any alterations in the law to be soundly based on existing conditions in Ireland.

8. The first part of this Paper consists of an exposition of the existing law of rape and allied sexual offences and seeks to isolate the aspects of the law which appear to be in need of reform. The

second part examines the policy considerations which necessarily affect proposals for reform and draws attention to attempts which have been made to reform it in other jurisdictions, the emphasis being on countries where the legal system and the social conditions most closely parallel those in Ireland. The section then presents a range of options which, in the view of the Commission, merit further consideration and indicates the Commission's provisional conclusions on these matters. The Paper does not embody the Commission's final proposals to the Attorney General for reform in the existing law. The object of the Paper is rather to stimulate reaction among interested sections of the public to the Commission's initial and tentative conclusions. When those reactions have been carefully assessed by the Commission, they will be in a position to present their final Report and proposals to the Attorney General. So that the Commission's final Report may be available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission not later than the 15th February, 1988.

FOOTNOTES

* J.C. Marsh, A. Geist, and N. Caplan, *Rape and the Limit of Law Reform* (1982)

CHAPTER 2: THE PRESENT LAW

(1) The Meaning of Rape

9. Section 2(1) of the *Criminal Law (Rape) Act 1981* provides that:

“a man commits rape if-

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
- (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it...”

Section 2(2) provides as follows:

“It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

10. The expression “woman” includes a female person of any age.¹ Thus, it is possible that a man may be convicted of raping a very young girl, two or three years old, for example, where she is entirely incapable of giving or refusing her consent. The expression “man” includes a male person of any age;² but this “does not affect any rule of law by virtue of which a male person is treated by reason of his age as being incapable of committing an offence of any particular kind.”³

11. As to the latter, it has for long been accepted that a boy under 14 years of age should be absolutely presumed to be incapable of committing the crime of rape as a principal in the first degree.⁴ It is clear from the authorities that this is a presumption of physical impotence: it is not based on any assumption that the boy is incapable of forming the necessary criminal intention. Thus a boy under the age of 14 may be a principal in the second degree, for aiding and abetting a rape, if he is *doli capax*.⁵

12. There is a degree of judicial conflict on the question whether a boy under 14 can be convicted of attempt to commit rape. In *Williams*⁶ in 1893, the matter was discussed, *obiter*. Lord Coleridge, C.J. was of opinion that such a boy

“could [not] be convicted of attempting to do that which the law says he was physically incapable of doing.”⁷

But Hawkins J did “not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do.”⁸ Cave, J. reserved⁹ his position on the issue.

In the New Zealand case of *Angus*,¹⁰ Denniston J was of the view that a prosecution would not lie. It seems clear, however, that a boy of under 14 “can be convicted of a simple assault on evidence which in the case of a male over fourteen years of age would amount to rape.”¹¹ Similarly with regard to indecent assault.¹²

13. This irrebuttable presumption as to the incapacity of boys under the age of 14 to commit the crime of rape has been criticised on two grounds. First, it disregards the scientific fact that boys may reach puberty before fourteen. Secondly, it assumes that puberty is a necessary precondition of rape, whereas all that is required is the ability to have an erection, since rape requires only penetration and not fertilisation.

14. The various ingredients of the offence as statutorily defined are next considered in detail

(a) “Sexual Intercourse”

15. “Sexual intercourse” means penetration of the vagina by the penis. Even the slightest penetration is sufficient and it is not necessary to establish either the emission of seed or the rupture of, or injury to, the hymen. This is made clear by s. 1(2) which provides that references to sexual intercourse are to be construed as references to “carnal knowledge” as defined in s. 63 of the Offences Against the Person Act, 1861, “so far as it relates to natural intercourse (under which such intercourse is deemed complete on proof of penetration only).”

No other form of sexual assault constitutes rape in law. Accordingly, the penetration of any of the orifices of the body other than the vagina by the penis cannot constitute rape. Nor can penetration of any of the orifices, including the vagina, by objects such as sticks or bottles, constitute rape. Obviously, where such acts take place as a result of force or the threat of force other forms of criminal offence will be committed, including indecent assault. The law has been criticised, however, on the ground that such crimes merit the same maximum sentence as rape and that, in any event, it is not satisfactory that such actions should be inadequately and inappropriately described as forms of “indecent assault.”

(b) The Absence of Consent

16. Section 2(1)(a) makes it plain that the essence of the *actus reus* is the absence of the woman’s consent to sexual intercourse. In

former times the courts¹³ and commentators¹⁴ had regarded force or the threat of force as a necessary ingredient.¹⁵

The first cases in which the emphasis was progressively placed on the absence of consent rather than the presence of force were those involving unconscious¹⁶ or mentally incapacitated¹⁷ women. Faced with these instances of the manifest exploitation of the woman's vulnerable position,¹⁸ the courts came to the view that the absence of consent, rather than the presence of force, must be the test of responsibility.¹⁹ The progress towards this conclusion was not marked by impressive conceptual analysis. In *Camplin*,²⁰ for example, where the victim had been rendered insensible by drink given to her by the defendant, there was stress on the fact that the defendant was the author of the condition, an element in the case which was not central to the issue of the victim's consent. And in *Fletcher*,²¹ Willes, J. recalled an earlier case in which a rape had been perpetrated on "an idiot girl." He noted that he had directed the jury that if they were satisfied that the girl "was in such a state of idiocy as to be incapable of expressing either consent or dissent," and that the prisoner had connection with her without her consent, it was their duty to convict; but he had also told them that "a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape."²²

On the question of consent by a woman where a man impersonated her husband,²³ the English courts reached such a poor level of analysis as to warrant the observation by Lawson J in the Irish decision of *Dee*²⁴ that some of the decisions were "not only revolting to common sense, but discreditable to any system of jurisprudence."

We do not consider it useful to set out the holdings and analysis in these cases, since they appear to command the support of no court or commentator today. The decision of *Dee*, to the effect that such a fraudulently obtained consent affords no defence to the charge of rape, is clearly to be preferred. Moreover, section 4 of the *Criminal Law Amendment Act, 1885* (as amended by section 20 of the *Criminal Law Amendment Act, 1935*) provides as follows:

"... Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."²⁵

While the question is an open one, it also seems probable that an Irish court today would hold that engaging in sexual intercourse by the fraudulent representation that one is another person constitutes rape, even though the victim is not married to that other person.

17. Where the fraud relates to the nature of the act rather than the identity of the person it is clear that consent may in some circumstances be vitiated so that the defendant may be guilty of rape.²⁶ Where precisely the line is to be drawn is not entirely clear. Three types of cases may be distinguished. First, a man may say to a woman that he wishes to touch her in a non-sexual way, and

she permits this; he then proceeds to have sexual intercourse with her. Clearly this is rape.²⁷ The woman's consent was to an entirely different act. The *second* case is where a woman or girl, completely ignorant of sexual matters, is persuaded to engage in sexual intercourse in the mistaken belief that this constitutes some other, beneficial, conduct, such as medical treatment. Again it is clear that this constitutes rape. The victim's consent is to a therapeutic, rather than sexual, contact.²⁸

The third case occurs where a woman or girl who is aware of the facts of life, is persuaded to engage in sexual intercourse on a false representation as to its therapeutic effects. This is where the law becomes less clear.²⁹

On one view, a distinction should be made between fraud going to the nature of the act, on the one hand, and fraud falling short of this, on the other. On this approach, where a woman consents to have sexual intercourse, on the basis of a misrepresentation merely as to its qualities rather than its nature, this would not constitute rape. The question would then resolve itself into whether a particular misrepresentation related to the nature of the act.³⁰

On another view, the parameters of consent cannot be drawn by adherence to linguistic or philosophical distinctions, but rather by a somewhat pragmatic process, in the light of the policies grounding the offence of rape.³¹ Thus the court should have regard to how the victim perceived the moral quality of the action in which she engaged, and the capacity in which the defendant appeared to be acting.³²

The courts have not offered a clear conceptual analysis of the issue, but there are judicial precedents to the effect that sexual intercourse following a fraudulent pretence of marriage does not constitute rape,³³ nor does having sexual intercourse without telling one's partner that one is infected by a venereal disease.³⁴

Clearly, the use of force or the threat of force may vitiate consent, but there may be cases where the pressure is less overt. It is not clear, for example, whether a threat by a man to leave his partner or deny her financial support if she does not have sexual intercourse should be considered sufficient duress to vitiate her consent. There have apparently been no prosecutions raising this type of issue.

(c) Rape Within Marriage

18. It is noted that a person is guilty of rape only if he has *unlawful* sexual intercourse with a woman without her consent. The question thus arises as to the circumstances in which sexual intercourse, without a woman's consent, could nonetheless be lawful. This raises the general issue of sexual intercourse between spouses.

The position relating to rape within marriage has yet to be considered by an Irish court. In the seventeenth century Hale had written that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial

consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."³⁵

There are subsequent dicta by eminent English judges, however, questioning whether the exemption is as comprehensive as asserted by Hale. Later decisions in England have, moreover, accepted the rule "without enthusiasm".³⁵ Discussion has concentrated on the question whether a husband could be convicted of rape of his wife in circumstances where the spouses were separated. In *Clarke*,³⁷ the wife had obtained a non-cohabitation order from the justices which had "the effect in all respects of a decree of judicial separation"³⁸ from her husband, on account of his persistent cruelty. It could be discharged if she committed adultery or voluntarily resumed cohabitation with her husband. The husband was charged with raping her at a time after the order was made. A motion to quash the court order on the ground that it did not disclose any offence known to the law failed.

Byrne J accepted that "[a]s a general proposition"³⁹ a husband could not be guilty of a rape on his wife. Echoing Hale, he observed that the marital right of the husband existed by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse as in the case of unmarried persons. "Thus," he said, "the intercourse is not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage."⁴⁰ However, in the present case, the position was that

"the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent."⁴¹

By contrast, in *Miller*,⁴² it was held that a husband could not be convicted on a charge of raping his wife, even though she had left him and petitioned for a divorce from him on the ground of adultery.

In cases where the defendant could not be convicted in law of rape upon his wife, the facts supported a conviction on some other charge, usually assault. Indeed, although a husband may not be guilty of raping his wife, he can be found guilty of an indecent assault upon her on the same occasion. In a recent case of *R. v Kowalski*,⁴³ the appellant had married his wife in January 1985. By May 1986 the marriage was failing but the couple continued to share a home and a bed and began to live separate lives. The wife was in the lavatory when the husband burst in carrying a very sharp knife, placed the point against her throat and forced her to commit fellatio after which he had sexual intercourse *per vaginam* with her.

The Court of Appeal judgment (Kennedy J) was reported thus:

“It was clear and well settled, ancient law that a man could not be guilty of rape on his wife, he being the actor. That exception was dependent on the implied consent to sexual intercourse which arose from the married state and continued until that consent was put aside by decree *nisi*, a separation order or, in certain circumstances, by a separation agreement.

The exception for the husband could be found in the use of the word “unlawful” in the statutory definition of rape.

Clearly it was not the law that a man could never be guilty of indecent assault on his wife.

The consent to fellatio once given and even long practised, could not run backwards to attach to the marriage vows. Consent to an act of fellatio had to be shown to be a particular consent if it was not to be an assault. It was irrelevant where the fellatio was undertaken as a preliminary to an act of sexual intercourse *per vaginam* or as an end in itself.

The trial judge was entirely right to reject a submission that, within the context of sexual acts between husband and wife or on the facts disclosed in the case, fellatio could not be said to be indecent solely because there was lack of consent.

As the trial judge said, circumstances of indecency depended essentially on the whole circumstances and on the facts of a particular case. Even if a wife found oral sex to be other than indecent, circumstances could alter to the point where she was entitled to say that she now found it indecent, repellant and abhorrent.

Since it was clear that there was no positive consent to the act, the appeal was dismissed.”

19. In another context, i.e. the law of nullity, the courts in Ireland and England have, on occasions, considered the degree of force, if any, which a husband may legitimately use to consummate the marriage. In *G. v G.*,⁴⁴ Lord Dunedin had referred to the desirability, in his view, of using what he called “gentle violence” to achieve consummation and, it would appear, a similar view was taken by Hanna J in *McM v McM* and *McK v McK*.⁴⁵ However, in an earlier case of *G. v G.*,⁴⁶ Lord Penzance had rejected emphatically the view that a husband in such circumstances was “by mere brute force to oblige his wife to submit to connection.” More recently, Finlay P in *R. (or W.) v W.*⁴⁷ granted an annulment on the grounds of the incapacity of the female petitioner, stating the he considered it

“improbable that the marriage could have been consummated otherwise than by the exercise of considerable force by the respondent.”⁴⁸

It is probable that the approach favoured by Lord Dunedin and Hanna J. would be regarded as unacceptable by Irish courts today.

It must also be borne in mind that excessive sexual demands may constitute a degree of cruelty sufficient to justify the granting of

a decree of divorce *a mensa et thoro* and they would clearly be capable of constituting such a ground where they are accompanied by threats of force. (Conversely, of course, an unwarranted refusal to engage in sexual relations over a period of time may also constitute cruelty). Similarly, such conduct may justify the wife in leaving the matrimonial home, in which case the husband may be guilty of “constructive desertion.”

It also seems clear that where a husband forces his wife to submit to sexual intercourse or uses threats to that effect, such conduct may be grounds for making by a court of a “Barring Order” under s. 2 of the Family Law (Protection of Spouses and Children) Act, 1981. Such an order may be made where there are reasonable grounds for believing that the “safety or welfare” of a spouse requires the court to order the other spouse from the home or, if the spouses are living apart, to stay away from the home. In *O’B v O’B*,⁴⁹ O’Higgins CJ observed that

“The use of the word “safety” probably postulated a necessity to protect from actual or threatened physical violence emanating from the other spouse. The word “welfare”... was intended to provide for cases of neglect or fear or nervous injury brought about by the other person.”

20. It should also be noted that there may be constitutional grounds for supposing that the “marital rape exemption” has not survived in Irish law since 1937. It could be argued that a married woman’s right to privacy⁵⁰ protects her from having to submit to unwanted sexual intercourse with her husband. On this approach, the constitutional guarantee of this right would take priority over any other rights of her husband. Moreover, it may be argued⁵¹ that the marital rape exemption offends against the privacy rights of *all* women in that it compels them to choose between forfeiting their right to bodily integrity by marrying, on the one hand, and retaining that right only by forfeiting their fundamental right to marry, on the other. The contrary argument would presumably be that the constitutional guarantee of marital privacy protects the sexual relationship of the spouses against intrusive scrutiny by the State. It could also be argued that the constitutional policy against retroactive penal legislation should inhibit the courts from declaring conduct to be criminal which has not hitherto been unequivocally recognised by the law as such.

21. In the absence of Irish decisions on the topic, the present law cannot be stated with any great degree of confidence. It would appear, however, that to the extent that the marital rape exemption exists, it is confined to circumstances where the spouses are cohabiting and there are no separation proceedings in being, or even, perhaps, in contemplation.

(d) The Mental Element

22. Section 2 of the Act deals with the question of the mental element or *mens rea*. Subsection (1)(b) requires that, at the time a man has sexual intercourse with a woman without her consent, he must know that she does not consent to the intercourse or be

reckless as to whether she does or does not consent. Subsection (2) declares that:

“If at a trial for a rape offence the jury has to consider whether a man⁵² believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

It is difficult to see how the jury could properly have taken any other course, had subsection (2) been omitted: but its inclusion ensures that the trial judge will point out how they should approach the subject.⁵³ It is clear that the subsection prescribes a subjective test no different from the test generally to be applied in the criminal law. The jury's task is to determine the questions of knowledge and recklessness. To the extent that the accused's belief is in issue the jury must determine whether or not the accused believed that the woman was consenting to sexual intercourse by having regard (in conjunction with other matters) to the presence or absence of reasonable grounds for such a belief. In other words, the jury addresses the reasonableness (or otherwise) of the grounds for belief only to the extent that this throws light on the factual question of whether or not the accused had such a belief. The unreasonableness of the grounds of belief may well suggest to the jury that the asserted belief was not in fact held; but it is quite possible to envisage cases in which the jury, in the light of other relevant matters (to which the subsection also requires them to have regard), may conclude that, in spite of the unreasonableness of the grounds for belief, the belief was nonetheless held.

23. Section 2 of the 1981 Act is directly based on section 1 of England's *Sexual Offences (Amendment) Act 1976*. Section 1 followed the decision in *Morgan*,⁵⁴ where the House of Lords had rejected the argument that an unreasonable belief that the woman was consenting could not constitute a defence. In the wake of what *Smith & Hogan* describe as “widespread but largely unfounded concern” following *Morgan*, an advisory group under Heilbron J was appointed to review the law. That group recommended the codification rather than change of the law of *mens rea*, which was done by section 1 of the 1976 Act.

It is useful to refer in some detail to the decision in *Morgan*. The House of Lords, by a majority of three⁵⁵ to two,⁵⁶ held that a defendant cannot properly be convicted if he in fact believed that the woman consented even though that belief was not based on reasonable grounds.

Lord Hailsham said:

“Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a ‘defence’ of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves its case or it does not. Either the prosecution proves that the accused

had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the intent was actually held... It is my opinion that the prohibited act is and always has been intercourse without consent of the victim 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. A failure to prove this involves an acquittal because the intent, an essential ingredient, is lacking. It matters not why it is lacking if only it is not there, and in particular it matters not that the intention is lacking only because of a belief not based on reasonable grounds."

Lord Simon, dissenting, considered that earlier judicial authorities supported the requirement that the belief be reasonably held. As to why the law required this, he observed that:

"[t]he policy of the law in this regard could well derive from its concern to hold a fair balance between victim and accused. It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him."

Lord Edmund-Davies, who also dissented, took a somewhat different view. Like the majority, he considered that liability should not extend to an honestly held, but unreasonable, belief that the woman was consenting, but he felt constrained by the earlier judicial authorities to hold to the contrary.

The majority view of the House of Lords would seem, accordingly, to deny the existence of the necessary *mens rea* in a case where the defendant negligently disregarded the possibility of the woman's not consenting. In view of later decisions, however, it cannot be said that the law in either Ireland or England is as clear cut as these opinions would suggest.

24. In the *People v Murray*,⁵⁷ the scope of the concept of "recklessness" was considered by the Supreme Court in the context of capital murder. Walsh J said:

"recklessness may be found either by applying a subjective test as where there has been conscious taking of an unjustified risk of which the accused actually knew, which imports foresight, or by applying an objective test as where there has been a conscious taking of an unjustified risk of which the accused did not actually know but of which he ought to have been aware."

Henchy J quoted with approval the following test of recklessness in the U.S. Model Penal Code:

"a person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial

unjustifiable risk that the material element exists or will result from his conduct.”⁵⁸

Walsh J, in the passage cited, appears clearly to accept that the existence of recklessness can be determined objectively, from which it would follow that negligence on the part of the defendant may, in the circumstances of a particular case, amount to the necessary *mens rea*. Henchy J would appear to have confined the ambit of “recklessness” to “subjective recklessness,” although it may be that his comments should be seen as confined to determining the necessary *mens rea* in a case of capital murder, such as *Murray* was.

25. In *Caldwell*⁵⁹ the House of Lords decided by a majority that the concept of recklessness extended to cases of “objective” recklessness. Lord Diplock expressed his view as follows:

“ ‘Reckless’ as used in the new statutory definition of the *mens rea* of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech - a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one’s acts that one has recognised as existing, but also failing to give any thought to whether or not there is any risk in circumstances where, if any thought were given to the matter, it would be obvious that there was.”

Dealing specifically with rape, the Court of Appeal in England has also defined recklessness broadly, so as to incorporate cases of “indifference” and of “giving no thought to the possibility that the woman might not be consenting, in circumstances where, if any thought had been given to the matter, it would have been obvious that there was a risk that she was not”. The influence of the decisions in *Lawrence*⁶⁰ and *Caldwell* is apparent⁶¹, though the court has denied that the revised formulations in relation to recklessness in rape are new or that they involve any element of an objective test.

26. Criticism of the present law is advanced from two directions. The first line of criticism is based on the belief that s. (2) (1) (b) introduces a “subjective” test exclusively and that this tilts the balance too far in favour of the defendant. The second line of criticism is based on a contrary belief, i.e. that s. 2 (1) (b) allows an “objective” test, that this would require negligent conduct to be treated as seriously criminal and that this is unfair to defendants.

(2) Corroboration

27. It is perfectly permissible for a jury to convict a defendant for the offence of rape in the absence of evidence corroborating the complainant’s testimony, provided, of course, they are satisfied that the prosecution has proved its case beyond reasonable doubt. (Corroborative evidence is evidence which supports or confirms the evidence of the complainant).⁶² It is, however, necessary for the trial judge in every case of rape to warn the jury of the danger of convicting the accused upon the uncorroborated evidence of the complainant. (It should be noted that this requirement is not

confined to cases where there is no such corroboration: such a warning must also be given in cases where evidence is offered as corroborative of the complainant's story, in case the jury do not find such evidence corroborative). In the Court of Criminal Appeal case of *Cradden*,⁶³ Maguire CJ (for the Court) said that it was the Court's opinion that:

"however it be phrased, the warning to be given should convey to a jury in unmistakable terms the danger of acting upon the unconfirmed testimony of a prosecutrix if that testimony stands alone."

He went on to say that the Court wished:

"to emphasise that the degree and gravity of the warning called for may vary with the degree and gravity of the risk involved in accepting the evidence which requires corroboration. It will be for the trial Judge in each case to measure the strength of the warning having regard, in cases such as this, to what Hale... calls 'concurring circumstances which give greater probability'⁶⁴ to the evidence of the prosecutrix."⁶⁵

It is useful to quote a passage from Meredith J's judgment in *Williams*, which presents a most interesting critique of the warning requirement:

"I agree that the appeal should be allowed, and I have arrived at that conclusion on the most general ground - namely, that the learned trial Judge did not sufficiently bring home to the minds of the jury what, in this particular case, they would be doing if they found the accused guilty on the evidence before them, and of what they should be satisfied before they arrived at such a finding.

Two things have to be remembered. First, the weight of evidence, and, therefore, the denomination of each weight and measure that is put into the scales is by law a matter solely for the jury. The Legislature may take the matter out of the hands of the jury and make corroboration necessary; the Court cannot do so. Secondly, lawyers are accustomed to argue from the general to the particular. They are prone to have at the back of their minds that in general it is dangerous to act on the uncorroborated testimony of a young girl in a case like this, or even some more general danger, and to engage in a struggle with the jury to force them to approach the case from a recognition of a general danger to a recognition of particular security. The lawyer, if he were a juryman, would say to himself: 'I am loath to convict in general in a case like this,' and then he would ask himself if he sees in the particular case anything that completely overcomes his antipathy; and so he tries to insist on jurymen proceeding in the same way. But what is meant by saying that it is dangerous? That states an objective fact in general terms, although everything turns on the credibility of the particular witness in the particular circumstances of the case. If it means that a conviction would, on the average, be wrong in one case out of a hundred, there is the difficulty that no statistics are available, and, even if they were, they would be useless for a particular case of which the particular facts are

known. However confident lawyers may be of the superiority of their type of mind, the minds of jurymen do not proceed on these lines, and it is the jury that have to try the case - the business of the Judge is to sum up the evidence fairly and adequately, and enable the jury to understand the position and appreciate what they have to weigh. The peculiar nature of the offence and its possible effect upon the credibility of a witness is one of the matters to be weighed, but how it should be weighed and its weight in the scales is a matter for the jury. Until that matter is determined how can it be said that in the particular case a conviction is or is not dangerous? It is the facts of the particular case that impress the jury, and it is to such minds that the law entrusts the finding. If the jury are to convict on the uncorroborated testimony of the girl they must be satisfied from her story alone that she is telling the truth, and the grounds on which they accord credibility to her evidence and the conditions affecting her credibility must be weighed by them. They must reach a definite decision as to credibility after everything that affects that question has been pointed out to them.

Looking at the charge as a whole I do not think that the learned Judge adequately brought home to the minds of the jury all the circumstances bearing on the credibility of the witness to whose uncorroborated evidence they would have to give complete credence if they convicted. I do not think the doing or not doing of this is a question of the use of any set formula.⁶⁶

28. The reason usually advanced for requiring such a warning to be given in cases of rape and other sexual offences is the supposed ease with which accusations of such crimes can be made along with the scarcity or absence of proof independent of the complainant's testimony. Since the act of intercourse usually takes place in private and may not be accompanied by any physical violence leaving marks on the complainant, the jury is frequently presented with no evidence other than the conflicting versions of the complainant and the defendant. The *rationale* of the practice accordingly rests in the experience of the courts that such cases are peculiarly likely to provoke difficult conflicts of evidence between the complainant and the accused which, of their nature, may afford a dangerous basis for a conviction in the absence of corroborative evidence. There are also, however, dicta to be found by eminent judges that human experience has shown that women, for motives such as jealousy or spite or out of a penchant for fantasy, sometimes fabricate complaints of this nature.⁶⁷ One of the most celebrated textbooks on the law of evidence, Wigmore,⁶⁸ has given particular currency to this belief and has sought to ground it in modern psychiatry. This basis for the practice has been criticised as being both offensive to women and based on outmoded and discredited psychiatric theories.⁶⁹

29. The requirement as to a warning of the danger of convicting on the uncorroborated evidence of the alleged victim is not confined to cases of rape: it applies to all cases of sexual assault, whether the victims are adults or children, and whether they are male or female. (But it should be noted that Sullivan CJ questioned in *People (Attorney General) v Ward*⁷⁰ whether in the case of an adult

male a Judge is bound to warn the jury that there is danger in convicting without corroboration.) A requirement that a warning of this nature be given is not peculiar to cases of sexual assault: it is also regarded as essential in certain other circumstances. Thus, for example, a warning of this nature is mandatory in the case of accomplices to a crime giving evidence for the prosecution, although plainly the *rationale* is entirely different. A warning of a similar nature must also be given in all cases where the prosecution case is based on a visual identification of the alleged offender.⁷¹

(3) Restrictions on Evidence

30. Sections 3 to 6 of the 1981 Act prescribe restrictions on the introduction of the prosecution of certain types of evidence in a charge for a rape offence. It has been said that this change in the law is "probably the most important"⁷² in the 1981 Act.

Section 3 provides as follows:

- “(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience of a complainant with a person other than that accused.
- (2) (a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.
- (b) The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.
- (3) If, notwithstanding that the judge has given leave in accordance with this section for any evidence to be adduced or question to be asked in cross-examination, it appears to the judge that any question asked or proposed to be asked (whether in the course of so adducing evidence or of cross-examination) in reliance on the leave which he has given is not or may not be such as may properly be asked in accordance with that leave, he may direct that the question shall not be asked or, if asked, that it shall not be answered except in accordance with his leave given on a fresh application under this section.
- (4) Nothing in this section authorises evidence to be adduced

or a question to be asked which cannot be adduced or asked apart from this section.”

Section 4 provides for a similar process in preliminary examinations in the District Court, and section 5 deals with trials of juveniles.

31. Under the law prior to 1981, there was considerably more latitude to examine and, more importantly, to cross-examine the complainant on matters relating to previous sexual relations with men other than the defendant. Sections 3 and 4 were designed to meet the criticism of the former law that it was unfair to the woman in that these questions were frequently irrelevant, subjecting her to hardship and trauma and violating her privacy. It was said, moreover, that the jury might not believe her denials, even if true, that the relatively untrammelled right to ask such questions discouraged women from reporting cases of rape and that it might confuse juries by diverting their attention from a central issue in the case, namely, whether she in fact has consented.⁷³

There appears to be no reported Irish case in which the implications of the sections were analysed. In the English decision of *Viola*,⁷⁴ the Court of Appeal analysed similarly-worded provisions under the *Sexual Offences (Amendment) Act 1976*. The view there taken was that the relevance of the questions proposed to be put must first be considered according to ordinary common law rules. If the questions do not pass this test, that is the end of the matter. If, however, the questions are not irrelevant, the issue arises as to when a judge should be satisfied that to refuse to allow the questions would be unfair to a defendant. In *Lawrence*,⁷⁵ May J stated that the judge “must take the view that it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant’s evidence from that which they might take if the question or series of questions was or were not allowed.” In *Mills*,⁷⁶ the Court of Appeal approved of this approach, Roskill LJ adding that “[t]his is... essentially a matter for the exercise of discretion by the trial judge within the framework of the Act, bearing in mind that that statutory provision is designed to secure protection for complainants...”⁷⁷ In *Viola*,⁷⁸ the Court of Appeal corrected this emphasis on judicial discretion, stating that they considered it:

“wrong to speak of a judge’s ‘discretion’ in this context. The judge has to make a judgment as to whether he is satisfied or not in the terms of [the] section... But once having reached his judgment on the particular facts, he has no discretion. If he comes to the conclusion that he is satisfied it would be unfair to exclude the evidence, then the evidence has to be admitted and the questions have to be allowed.”

In the view of the Court in *Viola*, it was clear that the provisions were aimed primarily at protecting complainants from cross-examination as to credit alone. The Lord Chief Justice commented:

“The result is that generally speaking - I use these words advisedly, of course there will always be exceptions - if the

proposed questions merely seek to establish that the complainant has had sexual experience with other men to whom she was not married, so as to suggest that for that reason she ought not to be believed under oath, the judge will exclude the evidence. In the present climate of opinion a jury is unlikely to be influenced by such considerations, nor should it be influenced. In other words questions of this sort going simply to credit will seldom be allowed...

On the other hand if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit, they are likely to be admitted, because to exclude a relevant question on an issue in the trial, as the trial is being run, will usually mean that the jury are being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant. But, I repeat, we are very far from laying down any hard and fast rule.

Inevitably in this situation... there is a grey area which exists between the two types of relevance, namely relevance to credit and relevance to an issue in the case. On one hand evidence of sexual promiscuity may be so strong or so closely contemporaneous in time to the event in issue as to come near to, or indeed to reach, the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to lead the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant."⁷⁹

In *Cox*,⁸⁰ the Lord Chief Justice quoted from this statement in a case where the Court of Appeal held that the defence should not have been prevented from questioning the complainant as to whether on a previous occasion she had had sexual intercourse with another man and had falsely accused him of rape.

32. There is a divergence of view in England among commentators on this provision as to whether it represents the best approach to the problem. On the one hand, it has been said that researches indicate differing judicial interpretations of how s. 2 should be operated and that this suggests an undesirably arbitrary approach to the admission or rejection of such evidence.⁸¹ On the other hand, it has been defended as the best way of dealing with a "truly insoluble problem."⁸² The Criminal Law Revision Committee, who discussed the problem with Circuit Judges sitting at the Old Bailey, said that their enquiries did not disclose any ground for concern that either the letter or the spirit of the provision was being disregarded.⁸³ We are not aware of any similar research having been conducted in Ireland.

33. Section 6 provides for the exclusion from the court of all persons except officers of the court and persons directly concerned in the proceedings, during the hearing of an application under sections 3,4 or 5. However, a parent, relative or friend of the complainant may remain in court, as well as a parent, relative or friend of the accused where the accused is under the age of 21. The

Council for the Status of Women had recommended merely that the jury be absent during the hearing of the application, but the Government, when it brought forward the legislation in 1981, considered that there was "an overwhelming case"⁸⁴ for excluding the public.

(4) Anonymity

34. Sections 7 and 8 of the 1981 Act provide for restrictions on the publication of any matter likely to lead to the identification of the complainant or of the accused, unless or until he is convicted. Before 1981 the news media had generally refrained from publishing the victim's name or giving other identifying details but that practice has been breached on at least one occasion.⁸⁵

So far as the anonymity of complainants is concerned the general rule is that, after a person is charged with a rape offence, no matter likely to lead members of the public to identify a woman as the complainant in relation to that charge is to be published in a written publication available to the public or to be broadcast except as authorised by a direction of the court given in pursuance of section 7.⁸⁶

The court may direct that the general rule should not apply when it is satisfied that this is necessary in order that persons may come forward who are likely to be needed as witnesses at the trial and that the conduct of the accused's defence at the trial is likely to be adversely affected if such a direction is so made. This direction may be made at any stage *before the commencement of a trial* of a person for a rape offence in which case either the accused or another person against whom the complainant may be expected to give evidence at the trial may apply for the direction, to a judge of the High Court or Circuit Court.⁸⁷

During the trial any of the parties charged may apply to the trial judge for the direction.⁸⁸ *After being convicted* of a rape offence and having given notice of appeal (or of an application for leave to appeal, in the case of conviction on indictment) the person convicted may apply to the appellate court for the direction.⁸⁹

35. A separate and more general power to abrogate or modify the requirement of anonymity for the complainant is given to the trial judge by section 7(4). This subsection provides that, if the judge is satisfied that the effect of the anonymity requirement for the complainant is to impose "a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction," he is to direct that section 7(1) (which prescribes anonymity) is not to apply "to such matter relating to the complainant as is specified in the direction"; but a direction is not to be given in pursuance of section 7(4) by reason only of an acquittal of an accused person at the trial. The trial judge is given a wide discretion as to what may constitute the imposition of a "substantial and unreasonable restriction" on the reporting of proceedings, and as to why it should be in the public interest to remove or relax the restriction. Although the acquittal of an accused person is not sufficient justification to make a direction under the subsection, it may be that an accused

person was acquitted after having been subjected to what turned out to be demonstrably false and malicious allegations by the complainant. In such a case the trial judge would, of course, be quite free to make a direction if he thought it proper to do so.⁹⁰

So far as we are aware, trial judges have not made any directions under section 7(4).

36. Section 7(6) makes it an offence to publish or broadcast any matter in contravention of a direction by a judge made under section 7(1).

Section 7(8) provides as follows:

“Nothing in this section -

- (a) prohibits the publication or broadcasting of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with a rape offence, or
- (b) affects any prohibition or restriction imposed by notice of any other enactment upon a publication or broadcast.”

37. Section 8 of the Act provides for the anonymity⁹¹ of a person charged with a rape offence, in a manner broadly similar to the protection afforded the complainant by section 7. A co-defendant⁹² or, before the commencement of the trial, another person who is to be charged with a rape offence,⁹³ may obtain a direction authorising publication of the identity of the accused where the judge is satisfied that this is necessary to induce persons to come forward who are likely to be needed as witnesses at the trial and the conduct of the applicant's defence is otherwise likely to be adversely affected.

The accused also loses the protection of anonymity if he is convicted of the offence.⁹⁴ He can also waive this protection.⁹⁵ Finally, section 8(5) requires the trial judge to remove or relax the anonymity rule if satisfied that it constitutes a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to take this step.

This provision has been criticised as producing indefensible anomalies. It gives the successful defendant the protection of anonymity denied to those acquitted of even more serious crimes, e.g. murder: at the same time no similar protection is afforded to the accused in other cases of a sexual nature, such as prosecutions for indecent assault, buggery or gross indecency between male persons.

(5) Indecent Assault

38. Section 10 of the *Criminal Law (Rape) Act, 1981* raised the maximum penalty for indecent assault on a female from two years imprisonment on a first conviction (and five years on a later conviction)⁹⁶ to ten years' imprisonment for a first or later conviction. The Government considered that for the very serious and aggravated case of indecent assault, which did not amount to

rape or attempted rape, the previous penalties were “clearly inadequate.”⁹⁷ It believed that it was right that the Oireachtas should “mark its abhorrence of the more aggravated forms of indecent assault”⁹⁸ by providing for a maximum penalty of ten years’ imprisonment.

(6) Ancillary Offences

(a) Sexual Relations, Falling Short of Rape, with Mentally Incapacitated Women or Girls

39. We have seen⁹⁹ that where a man has sexual relations with a woman or girl who is so mentally incapacitated as to be incapable of giving her consent, the man may be convicted of rape. But the law adds a further protection, albeit expressed in the language of a former age. Section 4 of the *Criminal Law Amendment Act, 1935* provides as follows:

“(1) Any person who, in circumstances which do not amount to rape, unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any woman or girl who is an idiot, or an imbecile, or is feeble-minded shall, if the circumstances prove that such person knew at the time of such knowledge or attempt that such woman or girl was then an idiot or an imbecile or feeble-minded (as the case may be), be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for any term not exceeding two years.

(2) No prosecution for an offence which is declared by this section to be a misdemeanour shall be commenced more than twelve months after the date on which such offence is alleged to have been committed.”

(b) Procurement by Threats, Fraud or Administering Drugs or Intoxicants

40. Section 3 of the *Criminal Law Amendment Act, 1885*, as amended by section 8 of the *Criminal Law Amendment Act, 1935* provides as follows:

“Any person who -

(1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen’s dominions; or

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen’s dominions; or

(3) Applies, administers to, or causes to be taken by any woman or girl any alcoholic or other intoxicant or any drug, matter or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl,

shall be guilty of a misdemeanour, and being convicted

thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."

It seems that the offence is not committed until the woman or girl actually has sexual intercourse.¹⁰⁰ Prior to that, the defendant may be liable for an attempt to commit the offence, depending on how far matters have gone. Where the defendant procured the woman or girl to have sexual intercourse with *himself*, he may also be convicted.¹⁰¹

Much of the conduct falling within the scope of Section 3 will also constitute the far more serious offence of rape. In such circumstances, there is no difficulty in prosecuting for rape.¹⁰²

So far as the expressions "false pretences" and "false representations" are concerned, it is clear that these may range far more extensively than the type of deception capable of incurring responsibility for the offence of rape.¹⁰³

There is no obvious policy reason why the expression "false pretences" should be given the rather narrow meaning ascribed to it in relation to property offences.¹⁰⁴ At all events the expression "false representations," (especially when used as an alternative to "false pretences") seems very wide in its scope, capable of embracing representations as to present intention of future conduct.¹⁰⁵ Whether it extends to misrepresentations about financial or social position is not clear.¹⁰⁶ The practical dimensions to the question could be important. If a young man invites a girl on a date and impresses her with talk about his life as a university student when in fact he left school at fourteen, and if the two have sexual intercourse that evening, it is a matter of some importance whether this form of boasting may render the young man liable to be prosecuted for a misdemeanour carrying a two year prison sentence as a maximum penalty.

(7) Trial of Rape and Related Offences

41. Rape and attempted rape may be tried on indictment only, i.e. by a judge and jury. (If the accused pleads guilty in the District Court, the case may be dealt with summarily by the District Justice but only with the consent of the D.P.P.)¹⁰⁷ Until the enactment of the *Courts Act, 1981* the trial could be transferred at the election of either the Director of Public Prosecutions or the accused to the Central Criminal Court. Since then the trial must take place in the Circuit Court. Where, however, the accused is sent forward for trial to a Circuit Court other than the Dublin Circuit Court, either the D.P.P. or the accused may apply to have the trial transferred to Dublin and, provided at least seven days notice is given to the other side, the application must be granted. Where such notice is not given, the trial may still be transferred at the discretion of the Judge.

The manner in which juries are selected should be briefly summarised. All Irish citizens aged 18 years or upwards and under the age of 70 years are liable for jury service, without distinction of sex, unless they belong to certain specified occupations, e.g. the legal profession or the Gardai. The selection procedure is required by statute to be random or non-discriminatory. In every criminal trial, the prosecution and the accused may challenge up to seven members of the jury without showing cause. Where a juror is challenged for cause shown, the judge must allow or disallow the challenge as he thinks proper. Any number of jurors may be challenged for cause shown.¹⁰⁸

Indecent assault is an indictable offence but may be tried summarily if:

- (i) the Justice is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,
- (ii) the D.P.P. consents, and
- (iii) the defendant (on being informed by the Justice of his right to be tried by jury) consents to the case being tried summarily.¹⁰⁹

42. Article 34(1) of the Constitution requires that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public. The Courts are empowered by s.20 (3)(4) of the *Criminal Justice Act 1951* to exclude the general public in any criminal proceedings for an offence which is, in the opinion of the Court, "of an indecent or obscene nature." It is unusual, however, for this power to be exercised so as to exclude the public in cases of rape and related offences.

(8) Sentencing

43. The maximum sentence for rape is imprisonment for life.¹¹⁰ The maximum penalty for a person convicted on indictment of indecent assault is imprisonment for ten years.¹¹¹ Where the case is tried summarily, the maximum penalty is a fine not exceeding £500 or, at the discretion of the Court, imprisonment for a term not exceeding 12 months or both such fine and such imprisonment.¹¹²

FOOTNOTES

¹ Section 1(3)

² *Id.*

³ *Id.*

⁴ 1 Hale P.C. 630, *Eldershaw*, 3 C. & P. 396, 172 E.R. 472 (1828), *Groombridge*, 7 C. & P. 582, 173 E.R. 256 (1836), *Brimilow*, 2 Mood. 122, 169 E.R. 49 (1840), *Waite*, [1892] 2 Q.B. 600 (Cr. Cas. Res.).

⁵ Cf. Osborough, *Rebutting the Presumption of Doli Incapax*, 10 Ir. Jur. (n.s.) 48 (1975).

⁶ [1893] 1 Q.B. 320 (Cr. Cas. Res.).

⁷ *Id.*, at 321.

⁸ *Id.*, at 321-322.

⁹ *Id.*, at 322.

¹⁰ 26 N.Z.L.R. 948, at 949 (Sup. Ct., Denniston J 1907).

¹¹ *Id.*, citing *Brimilow*, *supra*, and *Waite*, *supra*.

¹² *Id.*

¹³ Cf. e.g., *Jackson*, Russ. & Ry. 487, 168 E.R. 911 (1822), *Williams*, 8 C. & P. 286, 173 E.R. 497 (1838), *Saunders*, 8 C. & P. 265, 173 E.R. 488 (1838). See Koh, *Consent and Responsibility in Sexual Offences - I*, (1968) Crim. L. Rev. 81, at 88, 89.

¹⁴ 1 Blackstone, 4 *Commentaries*, 210; cf. Hale, 1 P.C. 627, and see Scutt, *The Standard of Consent in Rape*, (1976) N.Z.L.J. 462, at 462.

¹⁵ Cf. Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 Can. - U.S.L.J. 173, at 183 (1984).

¹⁶ *Camplin*, 1 Den. 89, 169 E.R. 163 (1845), *Ryan*, 2 Cox C.C. 115 (1846), *Mayers*, 12 Cox C.C. 311 (1872), *Young*, 14 Cox C.C. 114 (1872).

¹⁷ *Fletcher*, Bell 63, 169 E.R. 1168 (1859).

¹⁸ The fact that rape ceased to be a capital offence in 1841 may also have encouraged the courts to address the issue in terms of consent rather than merely of force: cf. Koh, *Consent and Responsibility in Sexual Offences - I*, (1968) Crim. L. Rev. 81, at 88.

¹⁹ An interesting, though unconvincing attempt to harmonise the two tests was made by May CJ in *Dee*, 14 L.R. Ir. 468, at 476 (Cr. Cas. Res., 1884) (citation omitted):

"Rape may be defined as sexual connexion with a woman forcibly and without her will. It is plain, however, that 'forcibly' does not mean 'violently,' but with that description of force which must be exercised in order to accomplish the act; for there is no doubt that unlawful connexion with a woman in a state of unconsciousness produced by profound sleep, stupor, or otherwise, if the man knows that the woman is in such a state, amounts to a rape."

²⁰ 1 Den. 89, 169 E.R. 163 (1845).

²¹ Bell 63, at 70, 169 E.R. 1168, at 1171 (1859).

²² Cf. the criticism of Scutt, *The Standard of Consent in Rape*, (1976) N.Z.L.J. 462, at 463, to the effect that "[c]learly... 'consent' implies a standard of human intelligence, which is opposed to the idea of 'animal instinct.' See also the criticism by the Irish judges, expressed in the strongest of terms, *Dee*, 14 L.R. (Ir.) 468 (Cr. Cas. Res., 1884), at 488 (*per Palles CB*) and 490 (*per Lawson J*).

²³ See Koh, *supra*, at 88-91, Scutt, *Fraudulent Impersonation and Consent in Rape*, 9 U. Queensland L.J. 59 (1976).

²⁴ 14 L.R. Ir. 468, at 490 (Cr. Cas. Res., 1884).

²⁵ It also worth noting that section 3(2) of the 1885 Act provides that any person who "by false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion..." is guilty of a misdemeanour. Thus, even where the woman believed the man to be a person to whom she was not married he would, at the very least, be guilty of this misdemeanour.

²⁶ See Hooper, *Fraud in Assault and Rape*, 3, U.B.C.L. Rev. 117 (1967), Koh, *supra*, at 92-94, Puttkamer, *Consent in Rape*, 19 Ill. L. Rev. 410, at 418-422 (1925), Scutt, *Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and Its Moral Implications*, 18 Crim. L.Q. 312 (1977).

²⁷ Cf. *Stanton*, 1 Car. & K. 415, 174 E.R. 872 (1844). See also Scutt, *supra*, at 316, fn. 16.

²⁸ See *Flattery*, 2, Q.B.D. 410 (1877), *Williams*, [1923] 1 K.B. 340, *Pomeroy v State*, 94 Ind. 96 (1883); see also *Hegarty v Shine*, 4 L.R. Ir. 288, at 297 (C.A., *per Palles CB* 1878).

²⁹ Cf. *Case*, 4 Cox C.C.220 (1850), and Koh's comments on this decision, (1968) Crim. L. Rev., at 92; *Flattery*, 13 Cox C.C. 388, at 391 (*per Kelly CB* 1877), and Koh, *supra*, at 92-93; *Eberhart v State* 134 Ind. 651, 34 N.E. 637 (1893), criticised by Puttkamer, *Consent in Rape*, 19 Ill. L. Rev. 410 at 420-421 (1925); *Papadimitropoulos*, 98 C.L.R. 249, at 260-261 (1957); *Harms*, (1944) 2 D.L.R. 61, *Don Moran v People*, 25, Mich. 356 (1872). See further Hooper, *supra*, at 120-121, Scutt, *supra*, *passim*.

- ³⁰ Cf. *Clarence*, 22 Q.B.D. 23, at 44 (Cr. Cas. Res., per Stephen J, Huddleston B. Mathew and Grantham JJ concurring, 1888).
- ³¹ Cf. Puttkamer, *Consent in Rape*, 19 Ill. L. Rev. 410 at 421-422 (1925); also *id.*, at 423-424. See also Scutt, *supra*, at 323-324.
- ³² Cf. Scutt, *supra*, at 322-323.
- ³³ *Papadimitropoulos*, 98 C.L.R. 249 (1957). For critical analysis, see Koh, *supra*, at 96. Cf. the observation of Deasy, L.J., in *Hegarty v Shine*, 4 L.R. Ir. 288, at 301-302 (C.A., 1878).
- ³⁴ *Clarence*, *supra*, at 44 (per Stephen, J.).
- ³⁵ 1 P.C. 629
- ³⁶ English, *The Husband Who Rapes His Wife*, 126 N.L.J. 1223, at 1224 (1976)
- ³⁷ [1949] 2 All E.R. 448 (Leeds Assizes, Byrne J).
- ³⁸ *Id.*, at 449.
- ³⁹ *Id.*, at 448.
- ⁴⁰ *Id.*
- ⁴¹ *Id.*, at 449.
- ⁴² [1954] 2 Q.B. 288 (Manchester Assizes, Lynskey J 1953).
- ⁴³ The Times: 9th October 1987.
- ⁴⁴ *G. v G.*, [1924] A.C. 349, at 357 (H.L. (Sc.)). See also *S. v A. (orse. S.)*, 3 P.D., at 73 (per Sir James Hannen P 1878).
- ⁴⁵ [1936] I.R. 177, at 200 (High Ct., Hanna J 1935).
- ⁴⁶ L.R. 2 P. & D. 287 (1871).
- ⁴⁷ High Court 1 February 1980 (1977-22M).
- ⁴⁸ P. 5 of judgment.
- ⁴⁹ [1984] I.R. 182, at 188.
- ⁵⁰ See *McGee v A. G.*, [1974] I.R. 284, *Norris v A.G.*, [1984] I.R. 36, at 71 (Sup. Ct., per Henchy J dissenting) and at 100-101 (per McCarthy J also dissenting). Cf. *id.*, at 64-65 (per O'Higgins CJ). See also Mirabile, *Comment: Rape Laws, Equal Protection, and Privacy Rights*, 54 Tul. L. Rev. 456, at 474-479 (1980).
- ⁵¹ Cf. *Anon.*, Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, at 1264 (1980).
- ⁵² Not necessarily the defendant.
- ⁵³ Cf. Hoggett, *Rape - As Amended*, 121 Sol. J. 59, at 59 (1977).
- ⁵⁴ [1976] A.C. 182 (H.L. Eng., 1975), analysed by Russell, *Comment: The Necessary Intent in Rape*, 8 Sydney L. Rev. 196 (1977).
- ⁵⁵ Lords Cross, Hailsham and Fraser.
- ⁵⁶ Lords Simon and Edmund-Davies.
- ⁵⁷ 1977 I.R. 360. See McAleese *Just What is Recklessness?* 1981 Dublin University Law Journal.
- ⁵⁸ S. 2.02(2)(c) (American Law Institute).
- ⁵⁹ (1981) 1 All E.R. 961.
- ⁶⁰ *Id.*, at 974.
- ⁶¹ Cf. *Pigg*, 74 Cr. App. Rep. 352 (1982), *Thomas*, 77 Cr. App. 63 (1982), *Bashir*, 77 Cr. App. Rep., 59 (1982), *Stanam S. & Kewal S.*, 78 Cr. App. Rep. 149 (1983), *Breckenridge*, 79 Cr. App. Rep. 244 (1983), *Taylor*, 80 Cr. App. Rep. 327 (1984), *Haughian & Pearson*, 80 Cr. App. Rep. 334 (1985).
- ⁶² Cf. *Williams*, (1940) I.R. 195 (Sup. Ct.), *Cradden*, (1955) I.R. 130 (Ct. Crim. App., 1953). For an extended analysis, see O'Connor, *The Mandatory Warning Requirement in Respect of Complainants in Sexual Cases in Irish Law*, Ir. Jur. (n.s.) 43 (1985). See also Clarke, *Corroboration in Sexual Cases*, (1980) Crim. L. Rev. 362.
- ⁶³ (1955) I.R., 130, at 141. See also *Taylor*, 80 Cr. App. Rep. 327 (1984).
- ⁶⁴ 1 *Pleas of the Crown*, p. 633, in a passage cited and discussed by Geoghegan J in *Williams*, (1940) I.R., 195, at 200.
- ⁶⁵ (1955) I.R., 130, at 141
- ⁶⁶ (1940) I.R., 195, at 205-206.
- ⁶⁷ See observations of Ritchie J in *Hornsburgh v Queen* (1967) 63 D.L.R. (2d) 699 at 719, of Salmon LJ in *R. v Henry and Manning* [1968] 53 Cr. App. R. 150, at 153 and of Sullivan CJ in *People (Attorney General) v Williams* [1940] I.R. 195, at 201.
- ⁶⁸ *Treatise on the Anglo-American System of Evidence at Common Law* (Chadbourne Revision) Section 924a, pp. 736-7.
- ⁶⁹ *Anon.*, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, at 1373-1378 (1972).

⁷⁰ (1944) 78 I.L.T.R. 64.

⁷¹ *The People v Casey*, [1963] I.R. 33.

⁷² Speech of the Minister of State at the Department of Justice, Mr Seán Doherty, on the Second Stage of the *Criminal Law (Rape) Bill 1980*, 323 Dáil Debs., col. 1457 (4 November 1980).

⁷³ *Id.*

⁷⁴ 75 Cr. App. Rep. 125 (1982).

⁷⁵ (1977) Crim. L. Rev. 492, at 493.

⁷⁶ 68 Cr. App. R. 327 (1979).

⁷⁷ *Id.*, at 330.

⁷⁸ 75 Cr. App. Rep., at 130.

⁷⁹ *Id. Cf. Barton*, 85 Cr. App. Rep. 5 (1986), where the English Court of Appeal evinced some difficulty in articulating a clear rule to govern the position where the defendant seeks to adduce evidence of his prior knowledge of the complainant's promiscuity to support the credibility of his mistaken belief that she was consenting. O'Connor LJ, for the Court, observed (at 13):

"When an application is made in a case... where both consent and a genuine but mistaken belief are in issue, the trial judge has a difficult task. On the one hand the application necessarily involves an attack upon the credit of the complainant who has asserted in her evidence that she did not consent to intercourse and this aspect has to be considered in the context of the *dictum* of May J in *Lawrence (Supra)*. On the other hand when considering the effect of the complainant's past sexual promiscuity upon the defendant's belief that she was consenting to intercourse the judge must decide in the context of the facts of the case. It must be remembered that there is a difference between believing that a woman is consenting to intercourse and believing that a woman will consent if advances are made to her. In the end it is the application of common sense to the facts of the case."

⁸⁰ 84 Cr. App. Rep. 132 (1987).

⁸¹ Zsuzsanna Adler, *Rape on Trial* (1987).

⁸² D.W. Elliot, *Rape Complainants, Sexual Experience With Third Parties*, Crim. Law Rev. (1984) pp. 4-14, at p. 14.

⁸³ 15th Report para. 2.88.

⁸⁴ *Supra*, fn. 72, col. 1459.

⁸⁵ *Id.*, col. 1460.

⁸⁶ Section 7(1).

⁸⁷ Section 7(2).

⁸⁸ Section 7(3).

⁸⁹ Section 7(4).

⁹⁰ It is of interest to note the observations of Brenda Hoggett on an equivalent British provision in the 1976 legislation there:

"The threat of publicity should the charge fail might indeed deter frivolous charges (although the certainty of publicity apparently did not do so previously), but an acquittal certainly does not mean that the complainant is lying or in any way blameworthy. Furthermore, automatic publicity in such cases would give her an even more direct stake in the outcome of proceedings than she already feels she has. The judges may still, however, feel that it would be wrong to restrict reporting where she had obviously been lying, and some unfortunate results may be envisaged if publication of the name becomes inevitably linked with such a suggestion made in privileged circumstances." *Rape - As Amended*, 121 Sol. J. 59, at 60 (1977).

⁹¹ Section 8(1).

⁹² Section 8(4).

⁹³ Section 8(3).

⁹⁴ Section 8(1)(b).

⁹⁵ Section 8(2).

⁹⁶ *Criminal Law Amendment Act, 1935*, section 6.

⁹⁷ *Supra*, fn. 72, col. 1461.

⁹⁸ *Id.*, col. 1462.

⁹⁹ P. 8 *supra*.

¹⁰⁰ Cf. *Johnson*, [1964] 2 Q.B. 404 (C.C.A. 1963), interpreting similar legislation in England which replaced section 3 of the 1885 Act.

¹⁰¹ *Mackenzie*, 75 J.P. 159, 6 C.A.R. 64 (1910).

¹⁰² *Williams*, [1923] 1 K.B. 340.

¹⁰³ *Id.*

¹⁰⁴ Smith & Hogan make this point; cf. *Dent*, [1955] 2 Q.B. 590.

¹⁰⁵ *Quaere* whether a promise of marriage falls within the purview of the section: cf. Koh, *supra*, at 94.

¹⁰⁶ Cf. *id.*

¹⁰⁷ *Criminal Justice Act 1951: Criminal Procedure Act, 1967.*

¹⁰⁸ *Juries Act, 1976.*

¹⁰⁹ *Criminal Law (Rape) Act, 1961*, s. 12.

¹¹⁰ *Offences Against the Person Act, 1861*: s. 45.

¹¹¹ *Criminal Law (Rape) Act, 1981*, s. 10.

¹¹² *Id.*, s. 12.

CHAPTER 3: POLICY ANALYSIS AND PROVISIONAL
RECOMMENDATIONS FOR REFORM OF THE LAW

(1) The Meaning of Rape:

(a) Capacity

44. At present there is an irrebuttable presumption that a boy under 14 is incapable of being guilty of rape in the first degree.

Professor Glanville Williams has observed that:

“this fiction is doubly silly. First, puberty may be attained before 14, and secondly, puberty is not necessary for rape. Rape requires only penetration, not fertilisation, so that it is only an ability to have an erection, not an ability to emit semen, that is physically necessary for the crime.”¹

In South Australia, the Mitchell Committee recommended abolition of the exemption on the basis that “a presumption which protects only those boys under 14 who are capable of sexual intercourse serves no useful purpose.”² Legislation³ in 1976 in that State abolished the presumption.⁴ The same step had been taken fifteen years earlier in New Zealand.⁵

The members of the Joint Oireachtas Committee were agreed⁶ that the irrebuttable presumption of incapacity should be abolished and that a provision in our law similar to that in South Australia’s legislation would be appropriate.

In England, the Criminal Law Revision Committee in their Working Paper on Sexual Offences advanced a further argument in favour of repeal. They said:

“Boys under [14] are capable of sexual intercourse, however, and do in fact commit acts which would be rape if they were over 14, and the fact that they do is, we think, a matter of public concern. Cases of this kind occur in what have come to be known as ‘gang bangs’, that is a series of sexual assaults by a group of youths on a girl. Such cases are very serious indeed as the girl often suffers severe emotional injury as well as physical harm. The older boys will be

convicted of rape and punished severely, while a boy under 14, who may have had a leading part in the rape, can only be treated as having aided and abetted. Many think it is a scandal that this should be the law. At present we can see no justification for the continued existence of this limitation of the law of rape. If our recommendation was accepted the prosecution would, of course, have to prove, as in all cases involving defendants under 14, that the boy knew that he was doing wrong.”⁷

In their 15th Report the Committee reiterated⁸ this view. They noted⁹ that all who had commented on this issue had agreed with the recommendation. We take the same view. We can see no merit in the existing rule, which is anomalous and at variance with the facts in some cases. *Accordingly, we provisionally recommend the abolition of the presumption of incapacity of boys under the age of 14 in prosecutions for offences involving sexual intercourse.*

The wider question of the general criminal responsibility of children is a matter to be separately addressed on another occasion.

(b) ‘Sexual Intercourse’: The Problem of Definition

45. How should our law describe serious offences with a sexual component? It should be stressed at the outset that our discussion will proceed on the basis that the conduct to which we refer will constitute an offence, regardless of how it is described, and that the penalty for this conduct will be adequate. In other words, what we have to consider is exclusively a question of language, which has no implications in relation to whether or not any particular act should be an offence and, if so, what the penalty should be.

Three approaches merit consideration. They are as follows:

- (i) Extending the description “rape” to types of conduct not falling within the scope of the offence at common law;
- (ii) Removing the name of rape from the offence;
- (iii) Creating a new generic offence.

(i) Extending the name “rape” to certain other types of conduct.

46. This option would extend the definition of rape to include other forms of sexual violation. The argument here is that rape as now defined concentrates on elements which are not distinctive and which should not be the basis of specific characterisation.

In Victoria, for example, legislation¹⁰ in 1980 defined “rape” as including:

“the introduction (to any extent) in circumstances where the introduction of the penis of a person into a vagina of another person would be rape, of -

- (a) the penis of a person into the anus or mouth of another person (whether male or female); or
- (b) an object (not being part of the body) manipulated by a person (whether male or female) into the vagina or anus of another person (whether male or female) -

and in no case where rape is charged is it necessary to prove the emission of semen.”¹¹

47. Much of the public discussion has proceeded against the background of the present law, which can be criticised in two respects: first, it attaches the title “indecent assault” to certain modes of conduct which are so grotesque and outrageous that this very term minimises their gravity; secondly, it differentiates between rape and these modes of conduct by prescribing a lower maximum penalty - ten years imprisonment¹² as opposed to life imprisonment. A strong argument may be made that the present law is wrong in both of these respects.¹³ Indeed, as will be seen, we will be proposing that the law should abandon both positions and should provide that the maximum penalty for aggravated sexual assault should be the same as for rape. Thus, our discussion is limited to the question of nomenclature.

48. At the centre of the controversy is the claim that rape is “an assault with differences.”¹⁴ As the Law Reform Commission of Canada point out:

“Rape is the only known kind of assault which can cause a new, individual member of our human species to be ‘summoned’ into existence. The victim might become pregnant in this kind of assault. Egalitarian ideals of avoiding differentiation between the sexes apart, no woman of and by herself could ever impregnate a man or another woman, no matter how she carried out an assault. Our ancestors surely recognised this singular feature of rape as well as we do. It is this difference which always did, and still does, distinguish rape from any and all other forms of assault, whatever label it is made to bear.

The second distinguishing factor of this kind of assault is the essential ingredient of non-consent (or lack of informed consent) on the part of the victim. No other extremely serious crime is so similar to an act which, in other circumstances, is so mutually esteemed and valued - as is the case, of course, with consensual sexual intercourse. In the matter of assault, the question of consent, or its absence, does not come into issue, apart from sporting events and mutually arranged personal combat. The ingredient of non-consent is always an issue in an accusation of rape, whereas it rarely if ever is an issue in accusations of any other type of assault.

Rape, then, is an assault which is well known to be clearly different by reason of these two distinguishing features.”

On the other hand, one commentator, Jocelyne Scutt, has argued that:

“Loss of virginity and the fact of pregnancy arising through an attack are doubtless relevant considerations; however, these should not be primary considerations forming grounds for a male-female distinction. Pregnancy may or may not occur, and therefore cannot be a dividing line in terms of criminal liability or criminal punishment. Loss of virginity by force would seem to be no worse, in current times, than penetration of the anus by force. If the criminal law is seeking to protect women from some moral approbation which might fall upon them should they lose their virginity by forcible

means, it is spurious to suggest that the moral approbation, should it arise, would be any worse in fact if the girl had been penetrated vaginally or anally.¹⁵ What of those women who are raped, yet are not virgins prior to the act? In such cases it is not virginity which is being protected, but notice is taken of the indignity suffered by undesired penetration - just as, presumably, should be the concern of the criminal law, equally in protecting males or females from anal penetration. It seems similarly spurious to suggest that the fact that a male cannot be rendered pregnant by means of sexual attack should lessen the interest of the criminal law in protecting him to the same extent as a female, where manner of attack and injury occurring are substantially the same."¹⁶

It has also been urged that the argument based on the possibility of pregnancy is unsound, since it ignores the cases of rapes committed upon pre-pubertal or post-menstrual girls or women. This, however, would not seem to meet the point that it is the capacity of the act itself to give rise to pregnancy, rather than its effects in particular cases, which is relevant in definitional terms. Women within the child-bearing age range may be unable to conceive at the time of the rape for a variety of reasons, such as the practice of contraception, but it is the fact that they are subjected to an act which, given a combination of circumstances, may give rise to pregnancy which gives that act a unique quality.

49. In Britain a number of Committees have emphasised that the present definition of the *actus reus* of rape coincides with the general understanding of the crime. The Heilbron Committee considered that "the concept of rape as a distinct form of criminal misconduct is well established in popular thought, and corresponds to a distinctive form of wrongdoing. The law, in our view, should, so far as possible, reflect contemporary ideas and categorisations."¹⁷ The Criminal Law Revision Committee in its *Working Paper on Sexual Offences*¹⁸ and Fifteenth Report¹⁹ recommended that no extension of the definition of rape should be made.

The Committee noted that although "a number"²⁰ of women's groups had disagreed with their recommendation in the Working Paper and had, in effect, favoured an offence drawn very widely indeed, the "great majority"²¹ of other commentators had agreed with the Committee. The Committee added:

"We consider it likely to be harmful to the administration of justice if the definition of a serious offence becomes out of step with the understanding of a large section of the public. We appreciate that other forms of penetration are serious [and] degrading and can lead to pain and injury, but we take the view that they are distinct from rape."²²

50. The argument against the present law rests largely on the two specific objectionable features which we have mentioned i.e. the use of the word "indecent" to describe outrageous conduct and the fact that a sentence of only ten years is available for such conduct. Once these objectionable features are removed (as we will propose), one is left with the far more limited argument that vaginal sexual intercourse is so similar to other forms of demeaning conduct that the name "rape" should be extended so as to include these forms

of conduct. This argument, apart from ignoring or underplaying the quite clearly distinctive features of vaginal sexual intercourse, involves a *non sequitur*. Even if it were true that vaginal sexual intercourse and other forms of demeaning conduct were so similar as to require, or support, the same title, it does not follow that that title should be the word "rape", which has had distinctive reference to vaginal sexual intercourse for many centuries.

51. Another argument in favour of an extension of the definition of rape to other modes of sexual conduct, such as penetration of orifices by sex organs or other objects, is to the effect that what the offence of rape essentially penalises is not a physical act (sexual intercourse without consent) but the inducement of outrage and indignity in the victim.²³

To this it might be replied that an offence such as this must be defined in terms of its constituent elements so far as the *defendant's conduct* is concerned rather than in terms of the *victim's response* to that conduct. Most criminal offences provoke an unhappy response in the victim; more than a few involve outrage and indignity. Yet other criminal offences are not generally defined by reference to the victim's response.

A pragmatic, indirect, argument in favour of extending the definition of rape runs as follows. The community at present stigmatises rapists, and "rape" is a highly stigmatic word. Other forms of demeaning conduct are perhaps²⁴ not so highly stigmatised. Nonetheless they *should* be as highly stigmatised as rape. Therefore (the argument runs) if we extend the *name* "rape" to these forms of demeaning conduct, there is a likelihood that the community, on hearing the word "rape" applied in this new context, will "carry over" some of the stigma from rape as meaning vaginal sexual intercourse, so that the overall effect will be to increase the stigma for those who engage in these other demeaning forms of conduct.

However, it is not clear to us that potential offenders will be significantly deterred by any such change in nomenclature. They are more likely to be deterred by a law which operates efficiently and punishes such offenders with appropriate severity.

(ii) *Removing the name of rape from the offence*

52. In some countries the name of rape has been removed from the offence. New South Wales abolished the common law offences of rape and attempted rape and replaced them by four categories of sexual assault (supplemented by an attempt offence); (1) inflicting grievous bodily harm with intent to have sexual intercourse; (2) inflicting actual bodily harm with intent to have sexual intercourse; (3) sexual intercourse without consent, and (4) indecent assault accompanied by an act of indecency.

In Western Australia, legislation²⁵ in 1985 replaced rape by the offences of sexual assault and aggravated assault.

In Canada, the law was fundamentally altered in 1982 by the *Criminal Law Amendment Act*, which was proclaimed in force on 4 January 1983. The Act replaced the crimes of rape, attempted

rape, sexual intercourse with the feeble minded, indecent assault on a female and indecent assault on a male²⁶ by the new offences of sexual assault,²⁷ sexual assault with a weapon, threats to a third party or causing bodily injury,²⁸ and aggravated sexual assault.²⁹

This step was taken after the Law Reform Commission of Canada had argued in favour of change on these lines. The Commission in their Working Paper No. 22, had observed that, essential to the nature of the offence was:

“the violation of the integrity of the person through unwanted sexual contact. On this basis, rape is actually a form of assault and should therefore perhaps be treated as such under the law. An assault is essentially an intentional application of force on another, or an attempt or threat to apply force without that person’s consent. Rape is the intentional application of force in order to accomplish sexual intercourse without the victim’s consent. On this basis, it can be seen that all of the legally defined elements of rape are contained in the concept of assault, with sexual intercourse being a specific ingredient in addition to the force applied or threatened by the accused. The concept of sexual assault, therefore, more appropriately characterizes the actual nature of the offence of rape because the primary focus is on the assault or the violation of the dignity of the person rather than the sexual intercourse. In addition, it has been suggested that change in the focus of the offence from sexual intercourse to assault could in some measure help to lessen the unnecessary and embarrassing stigma which still adheres to rape victims by virtue of folklore about rape...

Where concern is focused only on reducing the incidence of acts now classified as ‘rape’, it must be recognized that the criminal law has extreme limitations in the matter of eradicating criminal behaviour of any sort, regardless of the terms by which it is described. To expunge from the code all mention of that crime called rape, and relegate it to a form of assault for all purposes would certainly effect a change in the characterization of the offence. Such a change of characterization, however, should not be seen as affecting and, in the view of the Commission, does not affect the reprehensible nature of the act. Whether the change would be more effective in terms of increased protection for the dignity and inviolability of the person, or whether its greatest value would lie in alleviating the distress, humiliation and stigmatization that is associated with the present law is not clear.”

We must confess that we are pessimistic as to whether a change in the focus of the offence from sexual intercourse to assault “could in some measure help to lessen the unnecessary and embarrassing stigma which still adheres to rape victims by virtue of folklore about rape.”³⁰ We do not for a moment wish to deny the emotive power of language in this context, but it is probable that the stigma referred to is related to the substance rather than the description of the events.

53. The principal virtue of the proposal under consideration is that it provides a consistent legal structure for dealing with cases in this

general area. At present there are certain inherent inconsistencies in that the most serious offence, rape, need not consist of or include an assault (as that expression is generally understood), although in practice rape is effectively a more serious version of the offence described by the law as "indecent assault." Categorising offences on the New South Wales model would also eliminate unnecessary and anomalous distinctions in the approach of the law to sexual offences against males on the one hand and females on the other hand.

Isolating the elements of actual assault and absence of consent would also enable the criminal law to achieve a flexible response to the very different categories of non-consensual sexual intercourse which at present constitute in law the crime of rape. To quote from the commentary on s. 213.1 of the United States Model Penal Code:

"There are a number of problems that arise with too much emphasis placed upon the non-consent of the victim as opposed to the overreaching of the actor. In the first place, over-emphasis on non-consent can obscure differences among the various circumstances covered by the law of rape. An exclusive focus on non-consent would collect under one label the wholly uninvited and forcible "attack by a total stranger, the excessive zeal of a sometime boyfriend, and the clever seducer who dupes his victim into believing that they are husband and wife. In the words of one commentator such an approach would compress into a single statute a diversity of conduct ranging from 'brutal attacks... to half won arguments... in parked cars.' Many old statutes failed to recognise this point and hence did not make provision for grading differentials within the law of rape. Such statutes generally assigned to every case within their coverage the same draconian penalties deemed appropriate for the most violent and shocking version of the offences. The result under such an approach is that some offenders are subjected to punishment more drastic than any rational grading scheme would allow, while others are beneficiaries of the reluctance of the jurors to condemn every offender to possible death or life imprisonment.

A second way in which overemphasis on non-consent can be troublesome relates to problems of proof. Evidentiary considerations aside, consent appears to be a conceptually simple issue. Either the female assented to intercourse, or she did not. Searching for consent in a particular case, however, may reveal depths of ambiguity and contradiction that are scarcely suspected when the question is put in the abstract. Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say 'no'. Her confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and 'cry rape.' It seems plain, on the other hand, that a barrage of conflicting emotions at the time of the assault does not necessarily imply the victim's consent, although it may lead to misperception by the actor. Further ambiguity may be introduced by the fact that the woman may appear to consent because she is frozen

by fear and panic, or because she quite rationally decides to 'consent' rather than risk being killed or injured.

The point, in any event, is that inquiry into the victim's subjective state of mind and the attacker's perceptions of her state of mind often will not yield a clear answer. The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants. Courts have not been oblivious to this difficulty, but in attempting to resolve it they have often placed disproportionate emphasis upon objective manifestations of non-consent by the woman. It seems plain that some courts have gone too far in this direction, although it is equally plain that one can go too far in the opposite direction."

(iii) *Creating a Generic Offence*

54. In rejecting the extension of the word "rape" beyond its present reference to vaginal sexual intercourse, we do not thereby exclude the possibility of providing for a *generic* offence, one species of which would be the offence of rape.

In New Zealand, the *Crimes Amendment Act (No. 3) 1985* has significantly altered the substantive law.³¹ It introduces four new offences: sexual violation, attempt to commit sexual violation, including sexual connection by coercion and compelling an indecent act with an animal. Of greatest present relevance are the first and third of these offences.

Sexual violation is:-

- “(a) that act of a male who rapes a female; or
- (b) the act of a person having unlawful sexual connection with another person.”³²

As regards rape, a man rapes a female:

- “if he has sexual connection with that female occasioned by the penetration of her vagina by his penis -
- (a) without her consent; and
- (b) without believing on reasonable grounds that she consents to that sexual connection.”³³

A person has unlawful sexual connection with another person if he or she has sexual connection with the other person -

- (a) without the consent of the other person; and
- (b) without believing on reasonable grounds that the other person consents to that sexual connection.”³³

“Sexual connection” is defined as meaning:

- “(a) Connection occasioned by the penetration of the vagina or the anus of any person by-
- (i) Any part of the body of any other person; or
- (ii) Any object held or manipulated by any other person,-

otherwise than for bona fide medical purposes:

- (b) Connection between the mouth or tongue of any person and any part of the genitalia of any other person;
- (c) The continuation of sexual connection as described in either paragraph (a) or paragraph (b) of this subsection.

Thus, under the generic title "sexual violation," rape and other forms of sexual connection are separate species, subject to the same maximum penalty of 14 years. The *mens rea* test is an objective one of reasonable belief.

55. In Washington the legislation provides that the term "sexual intercourse," as well as having its ordinary meaning:

"also means any penetration of the vagina or anus, however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes..."³⁴

The degree of specificity reached by statutory provision in the United States is indicated by a Colorado Bill in 1975 (later modified), which defined "sexual penetration" as meaning:

- "(1) Sexual intercourse, cunnilingus, fellatio, anal intercourse; or
- (2) Any intrusion, however slight, of any part of a person's body, or of any object, into the genital or anal openings of another person's body."³⁵

Similarly legislation in Michigan in 1975 defined "penetration" as:

"sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of the actor's body or any object manipulated into the genital or anal openings of the victim's body."³⁶

In South Australia, legislation in 1976³⁷ defined "sexual intercourse" as including "(a) the introduction of the penis of one person into the anus of another; and (b) the introduction of the penis of one person into the mouth of another." Where "sexual intercourse" so defined takes place with another person, male or female, without his or her consent, the offence of rape is committed.

56. We return to what we said at the outset of this discussion. We are dealing essentially with nomenclature and presentation. Provided the paramount objectives of ensuring that degrading sexual assaults equivalent in gravity to rape are capable of being dealt with in the same manner as rape and provided also that the wholly inappropriate term of "indecent assault" is no longer used to describe the grosser forms of such conduct, there is no major advantage to be gained by replacing rape as the description of a particular sexual offence. We do not think that the case has been established for changing the legal definition of rape based on

vaginal sexual intercourse, the description given to it over the centuries both by the law and the community at large, and which recognises the unique feature of rape as distinguished from other forms of sexual assault, namely, the fact that pregnancy may result from the act. While some of us remain unconvinced that this latter argument is entirely logical, we are on balance loath to recommend a change where no problem exists, particularly if there is the slightest danger that such a change would be interpreted as a discouragement to complainants or might lead to misunderstanding of the law.

57. The major problems which remain should accordingly be dealt with by creating two new offences: *sexual assault* and *aggravated sexual assault*.

The present law relating to indecent assault does not present difficulties in practice so far as questions of definition are concerned. It might therefore be considered advisable not to recommend change. We take a different view. The present law has two principal weaknesses. First, its maximum sentence, of 10 years imprisonment, seems too low for the very worst forms of outrageous assault which it covers. We are satisfied that a maximum of life imprisonment - the same as for rape - is appropriate to cover these cases though, of course, we do not envisage that this sentence would be the norm. The second weakness of the present law may at first sight appear relatively minor, but we are satisfied that in fact the issue is important. This is that the name "indecent" can seriously understate the gravity and enormity of the defendant's conduct. What may be involved is far more than an unwanted kiss. When there is no need to use the same, rather mild, word to describe the whole range of conduct, a change would seem desirable.

Accordingly, we provisionally recommend the creation of two new offences: sexual assault and aggravated sexual assault. Immediately, questions of definition arise, though it is as well not to exaggerate the problem: it is to be noted that in Canada, the change to "sexual assault" five years ago involved no definition of the sexual dimension of the offence.

1. Sexual Assault

58. *We provisionally recommend that an offence called "Sexual Assault" should replace the offence of indecent assault, in so far as it embraces the less serious sexual assaults, and, like indecent assault, should be undefined. It should be an indictable offence but should only be prosecutable on indictment at the election of the prosecution. Notwithstanding a prosecution election for summary disposal, a District Justice has a duty to return the accused for trial on indictment if he considers the offence not to be a minor offence.³⁸*

We propose prosecutorial election for two reasons. First, we see no reason why there should be an absolute right to trial by jury for a trivial sexual assault. Secondly, there are many cases where the District Court penalties are adequate and where the prosecution will wish to avoid a jury trial. It is not unknown for the accused to insist on a jury trial as a tactic in such cases.

The maximum penalty on indictment for sexual assault should be 5 years. The offence should encompass assaults on men and women and there should be no difference in procedure whatever the sex of the victim.

2. Aggravated Sexual Assault

59. A new offence called "Aggravated Sexual Assault" would encompass the more serious forms of sexual assault at present covered by the offence of indecent assault. The offence would carry the same sentence as rape i.e. life imprisonment. It would encompass penetration of the mouth or anus by the penis or of the anus or vagina by inanimate objects. It would be equally applicable to men or women as the context permits and would render buggery a superfluous offence. We have seen in the previous section on the generic offence how the comparable offence has been specifically defined in other jurisdictions. The problem however is that if one is too particular one can make an omission. If one is too general one cannot be sure what a court would do.

60. A precedent for specific definition exists in s. 23 (b) of the *Larceny Act, 1916*, as inserted by s. 6 of the *Criminal Law (Jurisdiction) Act, 1976*, which sets out the circumstances in which burglary becomes "aggravated burglary." This general approach has been adopted in Australia and New Zealand whose laws abound with specific definitions of sexual intercourse. The disadvantage of this approach is that the draughtsman may not anticipate the full range of degrading sexual assaults which might merit the description of "aggravated sexual assault."

The Joint Oireachtas Committee singled out oral sex, buggery and penetration of the anus and vagina by inanimate objects as meriting a life sentence. Buggery already carries such a sentence. If the specific approach were to be adopted, a start could be made by classifying these as aggravated sexual assaults and adding at least some of the specific acts encompassed in the Australian and New Zealand legislation.

Penetration is not always easy to prove, particularly when the victim is a child. Vaginal swabs may prove negative for semen. In the course of a violent assault, it is sometimes not clear whether the vagina or anus was penetrated or at which orifice an attempt was directed. Under the present law, this clearly presents problems as to whether there should be a prosecution for attempted rape or attempted buggery and, it would appear, leads to prosecutions for indecent assault in such cases, or the acceptance of a plea of guilty to that offence. There is, accordingly, much to be said for rejecting a penetration based offence and adopting a definition which is as flexible as indecent assault has proved to be. One possibility would be to provide in general terms that a sexual assault becomes aggravated when it is attended by serious violence or the threat of serious violence or is calculated seriously and substantially to humiliate, violate, injure or degrade its victim or is committed while the assailant has with him a weapon of offence. Again there are statutory precedents³⁹ in the criminal law for adopting this approach which have worked reasonably well.

A further possible solution to this problem would be to create an offence defined in these general terms and then to provide that, without prejudice to its generality, certain specific acts would constitute aggravated sexual assault.

61. It is obvious that serious problems of definition will arise and it would be premature at this stage of our deliberations to recommend to the draughtsman how they should be tackled. We would welcome views on the problem generally. But, however defined, and making obvious allowances for differences of context, *we provisionally recommend that the new offence should apply equally to assaults on men and women without any difference in procedure. We also provisionally recommend that all the procedural provisions of the 1981 Act relating to such matters as the previous sexual history of the complainant, and the anonymity of the complainant should apply to aggravated sexual assault and to sexual assault.*

(c) The Absence of Consent

62. Under present law, as we have seen, a person is guilty of the offence of rape where he has unlawful sexual intercourse with a woman "who at the time of the intercourse does not consent to it..." The meaning of "consent" in this context is not prescribed by the legislation. Accordingly, judicial analysis determines the issue.

We have discussed the evolution of the present law in Chapter 2. We must now consider whether it would be appropriate for the proposed legislation to include any provisions dealing with the meaning and scope of consent as has been done in other jurisdictions.

63. In New South Wales, section 61D (3) of the *Crimes Act 1900* (inserted by schedule 1 of the 1981 Act) provides that, without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated-

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

and

- (d) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.”

Section 324G of Western Australia’s *Criminal Code* (inserted by section 8 of the 1985 Act) provides that:

“(1) ...‘consent’ means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.

(2) A failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual assault.”

In New Zealand, section 2 of the *Crimes Amendment Act (No. 3) 1985* repealed s. 128 of the *Crimes Act 1961* and substituted section 128A (1) which specifies that the fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent. Moreover, section 128 (2) provides that the following matters do not constitute consent.

“(a) The fact that a person submits to or acquiesces in sexual connection by reason of -

- (i) the actual or threatened application of force to that person or some other person; or
- (ii) the fear of the application of force to that person or some other person.

(b) The fact that a person consents to sexual connection by reason of -

- (i) a mistake as to the identity of the other person; or
- (ii) a mistake as to the nature and quality of the act.”

Section 244 (3) of the Canadian Criminal Code provides that, in relation to all forms of assault, including sexual assault:

“no consent is obtained where the complainant submits or does not resist by reason of:

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

It does not appear that this list is intended to be exhaustive.⁴⁰ Thus, a decision on the same lines as *Olugboja*⁴¹ would appear permissible.

64. On balance we favour leaving the law as it is and leaving definition and interpretation to the Courts. We are not aware of any problems having arisen as a result of the 'non-definition' of consent. We are loath to suggest changes in an area where no problem has arisen. We would welcome views.

(d) Rape Within Marriage

65. As we have seen, the present law on marital rape is uncertain, in the absence of any relevant judicial analysis in the Irish courts. It seems clear, however, that if the marital rape exemption is still part of our law, it does not extend to cases where the spouses are living apart, at all events by court order. It is also clear that a person is not exempt from a prosecution for assaulting his spouse.

Several rationales for the marital rape exemption have been offered at various times by courts and commentators.

*(i) The Consent Rationale*⁴²

66. The consent rationale traces its origins to Hale's statement. In effect, it argues that, when people marry, they are freely committing themselves to a life of intimacy with each other; an important part of that intimacy is sexual intimacy, including sexual intercourse.

As against this, as we have seen,⁴³ *the law of nullity of marriage, divorce a mensa et thoro* and related areas does not proceed on the basis that, by marrying, a woman commits herself to have sexual intercourse with her husband at his demand. There is perhaps no logical inconsistency here. The fact that a wife may avail herself of matrimonial remedies to protect herself from unwarranted sexual demands does not necessarily mean that such conduct by her husband should constitute the crime of rape.

*(ii) Reconciliation and Family Autonomy Rationale*⁴⁴

67. The fear that abolition of the marital rape exemption could be damaging to families in a state of disharmony has been voiced by several law reform agencies. In Britain the majority of the Criminal Law Revision Committee who opposed the abolition of the exemption expressed their concern, in the Fifteenth Report, as follows:

"There are... several grave practical consequences which would flow from an extension of the offence to all marriages which might be detrimental to marriage as an institution. It is the common experience of practitioners in domestic violence cases that allegations of violence made by a wife against her husband are often withdrawn some days later or not pursued. Violence occurs in some marriages but the wives do not always wish the marital tie to be severed, whatever their initial reaction to the violence. Once, however, a wife placed the facts of an alleged rape by her husband before the police she might not be able to stop the investigative process if she wanted to. The police would be under a duty to investigate the matter thoroughly - as with any allegation of

a serious offence. The effect of the intervention of the police might well be to drive couples further apart in cases where a reconciliation might have occurred. All of this, more likely than not, would be detrimental to the interests of any children in the family.

This would be unfortunate enough if it was the wife on her own who made the decision to go to the police in full knowledge of the consequences. This degree of foresight is likely to be rare; moreover she may not always be left to make up her own mind. She might be persuaded by others to embark upon a course of action which she might later regret and from which she might find difficulty in withdrawing.⁴⁵

In favour of this argument, it is worth noting that, under present law, no criminal proceedings may be taken for offences against a spouse's property while the spouses are living together or, while they are living apart, concerning any act done *while living together*, by a spouse, unless property was taken wrongfully by that spouse when leaving or deserting or about to leave or desert the other.⁴⁶ There are here⁴⁷ clear policies of encouraging family harmony and of discouraging the intervention of the criminal law in the relationship of spouses.⁴⁸

68. As against this, it may be argued that the difficulty, if such it be, already exists under our law in relation to prosecutions for spousal assault, as well as in relation to such remedies as barring orders and common law injunctions. Moreover, it can hardly be a sound policy to remove from a wife the protection of the law for fear that in some instances recourse to this protection may have unfortunate effects.⁴⁹

(iii) The Alternative Remedy Rationale

69. It may be argued that the law already affords appropriate protection for married women who have sexual intercourse without their consent. It appears that the husband's immunity from prosecution does not extend to cases where the spouses have been separated by court order and possibly to cases where they are otherwise living apart. If there is doubt as to either case, it may be suggested that the proposed legislation could without any difficulty clarify the position. In cases where the exemption does apply, it is clear the wife may initiate criminal proceedings for indecent assault or for the offences of assault and battery.⁵⁰ Moreover she may take civil proceedings in tort for assault⁵¹ and battery,⁵² as well as for the intentional, reckless or negligent infliction of emotional suffering.⁵³

This argument has been criticised for "fail[ing] to address the basic violation."⁵⁴ It has been contended that "[a] sexual violation is by nature a greater invasion than other types of physical assault. Consequently, the penalties are more severe for rape than for battery."⁵⁵ Moreover, it has been said that the law:

"should... seek to provide the *appropriate* remedy. The label attached to the conduct should be the appropriate label. So long as rape remains a separate crime, not simply one form of assault, conduct which is, in reality, rape should be so charged."⁵⁶

70. The marital rape exemption no longer applies in Canada, Denmark, some countries in the Eastern European bloc, France, New South Wales, Norway, Sweden, Victoria and Western Australia.

In New Zealand, since 1980, the husband is immune unless the spouses are living apart in separate residences. However, in 1983, a report commissioned by the Minister for Justice concluded: "It seems to us there are no real arguments of logic or principle to justify the present immunity. There are, conversely, positive arguments for abolishing it."⁵⁷

In England, the Criminal Law Revision Committee recommended limitation of the exemption to cases where the spouses were cohabiting with each other.

71. Until recently, the case-law in the United States of America indicated "an unquestioning acceptance of the Hale *dictum*..."⁵⁸ There appeared to be "a tendency, not uncommon in American jurisprudence, to regard easily English common law writers, such as Hale, as a good deal more sacrosanct than their fellow countrymen are apt to hold them."⁵⁹ The courts went so far as to apply the exemption even in cases where the parties were living apart.⁶⁰

Some movement away from this position is apparent in recent years. In *State v Smith*,⁶¹ the New Jersey Court, while holding the exemption on the basis that it had become part of the statutory law, nevertheless went to great lengths to criticise the policy rationales frequently put forward in defence of the exemption.

In *People v Liberta*,⁶² the New York Court of Appeals rejected the marital rape exemption. And in *Warren v State*,⁶³ the Georgia Supreme Court held that the statute⁶⁴ on rape, which did not include an express reference to marital rape, did not implicitly incorporate the marital exemption. In *People v Brown*,⁶⁵ however, the Colorado Supreme Court considered, *obiter*, that the exemption should not be regarded as offending against the equal protection guarantee, as it was a reasonable way of protecting the State's interests in promoting reconciliation between the spouses and in preserving marital privacy.

The legislatures have been more active than the courts on this issue, though it is still the case that "[t]he vast majority of jurisdictions retain the exemption in a limited form..."⁶⁶ Eight State legislatures have completely removed the exemption.⁶⁷ Several States, including California, provide that a husband may be prosecuted for first or second degree rape, but not for lesser sexual offences.⁶⁸ In many States, the exemption does not apply where the spouses have separated: most stringent in this respect are Alabama, Illinois, and South Dakota, which require that a final divorce decree must have been obtained.⁶⁹ Some States are satisfied with proof that the spouses were living apart and one of them had filed a petition for annulment, divorce, legal separation or separate maintenance.⁷⁰ Others require separation by court order.⁷¹ Least restrictive are States requiring merely that the spouses be living

apart, regardless of any question of having sought or obtained a court order.⁷²

In recent years the legislatures in nearly a quarter of the States have expanded the marital rape exemption to cover persons cohabiting outside marriage.⁷³

72. It is said that evidential problems may arise if the marital rape exemption is removed. It may be that “[p]roblems of proof which are already difficult and serious would become more complex in cases involving wife/husband accusations.”⁷⁴ In the nature of things, there will often⁷⁵ be no witnesses, apart from the spouses themselves.⁷⁶

We do not see the difficulty of proof as a reason for retaining the exemption.⁷⁷ We consider it anomalous that a prosecution should be prevented on that basis when it is permitted in cases of non-marital cohabitation, where the evidential difficulties would be similar.⁷⁸ Moreover, similar difficulties of proof may arise in assault proceedings involving husbands and wives. They are quite rightly not regarded as a reason for prohibiting such proceedings.

73. It has sometimes been argued that abolition of the marital rape exemption could give rise to the risk of fabricated complaints by wives who are in serious conflict with their husbands. The possibility of wives seeking to blackmail husbands into making favourable property settlements or custody arrangements in relation to their children has also been mentioned.⁷⁹

The fact that the crime of rape reduces itself to the issue of consent, in a context where sexual intercourse is normally to be expected, means that the outcome of a prosecution at the complaint of a wife will depend on whether the jury believe the wife or the husband. If a vengeful wife considers that she will make a better witness than her husband, it is apprehended by some that she may possibly take proceedings against him.

Nothing is impossible in this world, and it would be wrong to discount completely the chance that an untruthful,⁸⁰ or mentally disturbed⁸¹ or avaricious wife might make a false charge against her husband.

The arguments against the risk of fabricated complaints can be summarised as follows.

First, there appears to be no empirical evidence that the rate of fabricated charges is higher for wives than for single women.⁸² Prosecutions may be brought by women who are cohabiting with men to whom they are not married; yet the problem, if such it be, of fabricated evidence would be just as real in this type of case.⁸³

Secondly, the fear of fabricated complaints ignores the fact that “it is one thing to make an allegation of rape and quite another to substantiate it in a court of law to the effect that a conviction is obtained.”⁸⁴ The wife must make a credible case to the prosecuting authorities. The onus of proof beyond reasonable doubt rests on the prosecution. As one commentator has observed:

“So far as marital rape is concerned, that onus will no doubt prove to be most difficult to discharge when one bears in mind that the ordinary juror, deeply imbued with the ‘husband immunity rule,’ is very likely to treat allegations of marital rape with considerable scepticism.”⁸⁵

Moreover, proof of *mens rea* could be particularly difficult in some cases.⁸⁶ A man who does not know the complainant well may find it difficult to convince a jury that he really believed she was consenting when in fact she was not, but a married man may be more credible in making this assertion as to his belief. Defence counsel may sometimes be able to convince the jury that the defendant was at worst guilty of gross insensitivity to his wife’s need, rather than of reckless or conscious defiance of her wishes.

Thirdly, a prosecution for rape, far from offering easy means of villifying a husband, can frequently be a very difficult experience for a woman.⁸⁷ As against this it may be said that being charged with rape is a remarkably unpleasant experience for a husband, so that in some cases merely initiating, or even threatening to initiate, false proceedings may be sufficient to induce him to succumb to pressure in relation to property settlements or custody arrangements. Moreover, one of the principal sources of embarrassment and difficulty for complainants, namely, cross-examination as to previous sexual history, would not be a factor in most cases of spousal rape.

Fourthly, a vengeful wife can always bring a false prosecution for assault against her husband.

74. *We provisionally recommend the abolition of the marital rape exemption.* If there can be a prosecution for indecent or common assault by a spouse we can see no reason why there should be not a prosecution for rape by a spouse. We acknowledge the difficulty that arises in cases where it could be said that sexual intercourse achieved without the wife’s full consent was significantly different in character from a degrading and vicious sexual assault by a total stranger. It is presumably with these considerations in mind that Swedish law provides for a reduced penalty in the case of marital rape. Similarly, the alternative draft of the Federal German Code also provides for mitigation in cases where there have previously been intimate relations between the complainant and the accused. We feel, however, that these potentially mitigating factors are matters to be taken into account by the prosecuting authority in the first instance and, where there is a prosecution and conviction, by the trial judge in imposing sentence. We also see no reason to provide for a lower maximum sentence in the case of marital rape. A rape of a particularly violent and degrading nature perpetrated by a spouse is not necessarily less loathsome than such a rape perpetrated by a stranger.

(e) The Mental Element

75. As stated in Chapter 2, section 2 (1) (b) of the 1981 Act requires that at the time the defendant has sexual intercourse with the woman, he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it...”

Section 2 (2) goes on to declare that, if the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

As also noted, there is no Irish authority on the scope of recklessness under section 2(1)(b). In England, it has been said that:

“so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk that she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.”⁸⁸

Section 2 of the 1981 Act is directly based on section 1 of the British *Sexual Offences (Amendment) Act 1976*, which followed the Heilbron Committee’s recommendations in their Report in 1975, after the House of Lords decision of *Morgan*⁸⁹ had given rise to public controversy. The Criminal Law Revision Committee, in their Fifteenth Report,⁹⁰ recommended that the existing approach should substantially be retained.

76. In theory, the following principal options present themselves:

1. Limiting criminal responsibility to cases where the defendant knew the woman was not consenting;
2. Imposing liability where in fact the woman did not consent, regardless of whether the defendant could reasonably have been aware of this fact;
3. Imposing responsibility where he either knew the woman was not consenting or was reckless as to whether she was consenting;
4. Imposing responsibility where (i) he knew the woman was not consenting, or (ii) was reckless as to whether she was consenting, or (iii) ought, as a reasonable person, to have been aware that she was not consenting.

1. *Limiting criminal responsibility to cases where the defendant knew the woman was not consenting.*

77. It would be possible for the law to limit criminal responsibility to cases where the defendant *knew* that the woman was not consenting. In favour of this approach it may be argued that it would be wrong to convict a man who might have had only a trace of suspicion, which he did not consider well based, that the woman was not consenting. The concept of “knowledge,” as has been mentioned, need not necessarily embrace only absolute certainty; it may extend to a wider range of belief, less certain, but ultimately found to be true.

On this view a legislative requirement that the defendant “knew”

the woman was not consenting would result in the imposition of liability where (a) the defendant was certain that the woman was not consenting or (b) believed (without being certain) that she was not consenting. This approach is in fact very close to that of the present law, on a narrow interpretation of the concept of "recklessness".

We do not favour this approach. We are agreed that it would be far too restrictive to require proof that the defendant was certain that the woman was not consenting. So far as the word "knowledge" is capable of embracing belief falling short of certainty, we consider that it would be dangerous for the legislation to use language which might reasonably suggest to the jury a more restrictive basis of responsibility. The trial judge could no doubt go a good way in disabusing the jury of a narrow interpretation, but there is no need to create the possibility of confusion in the first place.

The concept of consent is one with an objective dimension. Thus, even if a woman withheld her consent mentally, but, so far as external indicia were concerned, gave a clear manifestation of consent, there being no reason to suspect that she was not consenting, her conduct would legally be regarded as "consent," so that there would be no need to address the question, in separate terms, of the defendant's belief.

2. Imposing liability where in fact the woman did not consent, regardless of whether the defendant could reasonably have been aware of this fact.

78. In favour of this option, it may be argued that it is so important that a woman should not be subjected to sexual intercourse without her consent that men should be required to ensure, at their own peril, that they obtain that consent. If men find the prospect of fulfilling this task too onerous, they are free to abstain from sexual relations.

The primary objection to this approach is, of course, its unfairness. Why should a man be punished for engaging in sexual relations with a woman when he had every reason to believe she was consenting?⁹¹ How may it be considered that he has been guilty of any wrong? We think that this option is so vitiated by this basic injustice that it must be rejected.

3. Imposing responsibility where the defendant either knew the woman was not consenting or was reckless as to whether she was consenting.

79. This is, or course, the existing law, expressly prescribed by legislation six years ago. This approach harmonises with that of the criminal law in general, which is to the effect that a person should be punished only where he has a "guilty mind." This guilt must be premised on some degree of advertence to the factual elements of the offence.

It is significant that the law reform agencies which examined the subject of *mens rea* in Britain,⁹² South Australia,⁹³ Tasmania,⁹⁴ Victoria⁹⁵ and New Zealand⁹⁶ recommended that the law should be

in accordance with the present approach. As against this, it should be noted that legislation in New Zealand⁹⁷ enacted in 1985 prescribes the test of belief on reasonable grounds.

Before accepting or rejecting this option, it is necessary to address the final option, since the real controversy centres on which of these options is to be preferred.

4. *Imposing responsibility where (i) the defendant knew the woman was consenting, or (ii) was reckless as to whether she was consenting, or (iii) ought, as a reasonable person, to have been aware that she was not consenting.*

80. In favour of this option it may be argued that sexual intercourse is a matter of such very considerable importance that no one should engage in it unless he or she takes reasonable care that the other party is consenting. Those who are unwilling to take that care should face criminal proceedings.

Professor Glanville Williams has argued however that:

“[t]o convict the stupid man would be to convict him for what lawyers call inadvertent negligence - honest conduct which may be the best that this man can do but that does not come up to the standard of the so-called reasonable man. People ought not to be punished for negligence except in some minor offences established by statute. Rape carries a possible sentence of imprisonment for life, and it would be wrong to have a law of negligent rape.”⁹⁸

To this general argument, Professor Toni Pickard has replied that:

“[t]he appropriate way to handle this kind of unfairness is to modify the traditional measure of reasonableness. It is entirely possible to take the relevant characteristics of the particular actor, rather than those of the ordinary person, as the background against which to measure the reasonableness of certain conduct or beliefs. The fact finder must ask whether or not the belief was reasonably arrived at in the circumstances, given those attitudes and capabilities of the defendant which he cannot be expected to control. Such a measure avoids unfairness to those who may be incapable of achieving objectively reasonable standards without excusing those who are capable of so doing but have not exercised their capacities in a situation that required care.

This individualized standard is neither ‘subjective’ nor ‘objective.’ It partakes of the subjective position because the inquiry the fact finder must conduct is about the defendant himself, not about some hypothetical ordinary person. It partakes of the objective position because the inquiry is not limited to what was, in fact, in the actor’s mind, but includes an inquiry into what could have been in it, and a judgment about what ought to have been in it. It provides a simple answer to the most powerful claim of unfairness which can be brought against the purely objective position, without risking the over-inclusiveness of the purely subjective standard.”⁹⁹

81. In their discussion on *mens rea* the Joint Oireachtas Committee say the following:

“In other words, the actions of an accused are evaluated *subjectively*. It was put to the members [of the Committee] that in some instances, because of the aggressive and threatening approach of the man, fear may be instilled in the woman, to the extent that she does not give any expression physically or otherwise of her objection to intercourse. An accused person could in such a case advance reasonable grounds for consent, particularly when his actions are viewed *subjectively* as required by law. The members agreed that the existing legislation is seriously unbalanced in that it allows the motives and actions of the accused person to be evaluated *subjectively* but in a paradoxical way the complainant is obliged to prove objectively that she did not consent to being raped.”¹⁰⁰

We are not certain whether the Committee would have favoured option 2 or option 4. In the example given, if the man exhibited “an aggressive and threatening approach,” he would have the greatest difficulty in convincing a jury that he was not at least reckless as to the question of the woman’s consent. If he had reasonable grounds for believing in her consent why would he be aggressive and threatening? Nor should a defendant be convicted because of the complainant’s unexpressed private feelings. No country that we know of imposes criminal responsibility for the offence of rape simply because a woman with whom the defendant had sexual intercourse *subjectively* believed that she was not consenting.

The jury is specifically enjoined by section 2 (2) of the 1981 Act to have regard to the presence or absence of reasonable grounds for the (subjective) belief of the accused that the complainant was consenting. We consider this a satisfactory compromise between the subjective and objective approach.

82. *We provisionally recommend that the offence of rape should continue to be one resting on knowledge of or recklessness as to the woman’s lack of consent.* We fully recognise the strength of the argument in favour of a test based on negligence, but we are satisfied that a test based on knowledge or recklessness works satisfactorily. The universal experience of jurisdictions applying this test seems to be that it does not result in unsatisfactory acquittals. There is a world of difference between asserting that one reasonably believed that the woman was consenting and actually convincing¹⁰¹ a jury that this was so.

We considered in detail, but ultimately rejected, the option of introducing, as an offence less serious than rape, the offence of engaging in sexual intercourse with negligence as to the question of the woman’s consent. There is much to be said in favour of this approach in theory, since it is very hard to excuse such conduct. Nevertheless the practical objections are significant. Firstly there is the difficulty of explaining to a jury how this offence differs from rape. This would be far from easy, and the risk of confusion and consequent injustice is real. Secondly, there would be a danger that juries would use this offence to resolve cases where they consider the accused guilty of rape but they regard the victim

as having contributed to her plight. Regardless of the morality of the jury's attitude, it appears to be accepted internationally that such an attitude frequently exists. In fact, the new offence would have nothing to do with such cases, since the defendant would have been aware of the victim's lack of consent. What would happen, therefore, would be that the new offence would be a pragmatic "half-way house," yielding the wrong verdict for the wrong reasons. With some reluctance we do not recommend its inclusion in new legislation.

(2) Restrictions on Evidence

83. As explained in Chapter 2, section 3 of the 1981 Act significantly restricts the scope of the right of a defendant to question the complainant as regards her previous sexual history, or otherwise to introduce evidence in relation to it. The Joint Oireachtas Committee recommended that such evidence should no longer be admissible in any circumstances. It is necessary to quote extensively from their Report:

"it is acknowledged that justice and fair play must be the hallmarks of any judicial system and that every accused person is entitled to a fair trial. The Joint Committee having carefully weighed up the evidence submitted to them regarding this section of the Act came to the conclusion that it leans too far in favour of the accused person. A woman's previous relationships with her attacker or any one else is irrelevant to the case in hand. To allow evidence concerning a woman's past sexual behaviour reveals a misunderstanding of the real nature of rape. Rape is an act of humiliation and degradation committed by a man to dominate a woman, using sex as a weapon to achieve that purpose. It is seldom the act of a person seeking sexual gratification. The members consider that focussing attention in court on a woman's past sexual behaviour is to miss the point entirely. In other criminal cases if an accused introduces particulars of the complainant's character it would lose him the protection of the court and it would allow the prosecution to present evidence about his previous convictions or his general behaviour."¹⁰²

This passage might possibly suggest that the accused, by adducing evidence as to the complainant's previous sexual history, should expose his own previous character or "general behaviour" for scrutiny. There is something to be said in favour of such a suggestion, though in our view it is outweighed by considerations of justice to a defendant who is obliged in his defence to adduce evidence as to the complainant's previous sexual history. At all events, the summary of the Committee's recommendations makes it clear that the essence of their recommendations is not this, but that "the introduction in court of a complainant's past sexual history [is] to be ruled inadmissible"¹⁰³ in every case, it would appear.

84. The Committee's recommendation would mean that, in a case where a cohabitee accused her partner of rape, the jury could not be told that they had been sleeping together regularly for the previous twenty years. It would also have the necessary

consequence that, if the marital rape exemption were abolished, the jury could not be told in a case of alleged marital rape that the parties were in fact husband and wife. As far as we are aware, this proposal has not been implemented in legislation in any country. There may indeed be cases in which the previous sexual relationship of the complainant with the defendant may not be relevant to any issues in the trial, but a complete prohibition of the introduction of such evidence would be unjust.

85. The real difficulty is posed by the extent, if any, to which the previous sexual history of the complainant with third parties should be admissible. We think that there would be general agreement with the proposition that such questioning should not be allowed where it merely seeks to establish that the complainant has had sexual experience with men to whom she was not married so as to suggest that for that reason she ought not to be believed under oath. It was indeed to prevent this sort of questioning, going merely to the credit of the complainant, that section 3 of the 1981 Act was introduced, as the debate in the Dail at the time made clear. It is also the case, however, that in certain circumstances such questioning may be relevant to an issue in the trial and not merely to credit. A ban on evidence as to the complainant's sexual history in such a case would seriously enhance the risk of the jury coming to the wrong conclusion as to the facts. For example, if a man had sexual intercourse with a woman for an agreed fee, and the woman threatened to claim that she had been raped by him, unless he doubled the agreed fee, a jury hearing evidence in a prosecution for rape against him would be less likely to come to the correct verdict if the defence could not introduce evidence that on five previous occasions the same complainant had similarly threatened other men with whom she had had sexual intercourse.

Again it could be argued that evidence as to sexual history should be capable of being introduced where the defence alleges that the complainant has made a false allegation of rape in order to explain why she is pregnant when in fact the pregnancy is attributable to her having had sexual relations with another man. In such circumstances, the defendant should not be prevented from adducing evidence of this fact.

A third example of a case where evidence as to the complainant's sexual history could be relevant is where the defendant seeks to prove that, at the time the complainant was alleged to be with the defendant, she was in fact having sexual relations with another person.

Such evidence may also be relevant to the defence in explaining the complainant's physical condition alleged to have arisen from the acts with which the defendant is charged. This condition may consist of the presence of semen or disease, for example, or pregnancy.¹⁰⁴

86. In no jurisdiction we have examined is there an absolute prohibition on the introduction of this type of evidence. Legislation ranges between the discretionary approach which obtains here and

in the U.K. and the approach which allows few exceptions to a rule of strict exclusion, such as is found in Michigan and Louisiana.

The position in Australia has been summarised by Stephen Odgers, Senior Law Reform Officer of the Australian Law Reform Commission as follows:

“At one end of the spectrum, the Tasmanian provision disallows any cross-examination as to prior sexual activity with persons other than the accused unless, in the opinion of the magistrate or of the court, as the case may be, the question asked is directly related to or tends to establish a fact or matter in issue before the magistrate or court. This has done little more than restrict cross-examination of complainants which is allegedly relevant to credit. At the other end, New South Wales and Western Australia prohibit evidence relating to the sexual reputation of the complainant and to her sexual history in general. Limited exceptions to the latter prohibition include evidence of surrounding circumstances and a sexual relationship with the accused, but the probative value of such evidence must outweigh ‘any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.’ In between, Victoria, Queensland, South Australia and the Northern Territory do not permit evidence of the general reputation of the complainant with respect to chastity to be adduced but other evidence may be adduced of the complainant’s sexual history if it has ‘substantial relevance to facts in issue, other than by an inference as to ‘general disposition,’ or ‘would be likely materially to impair confidence in the reliability of the evidence of the complainant.’ Queensland and the Northern Territory also expressly permit evidence of an act or event that is ‘substantially contemporaneous with’ or ‘explains the circumstances’ of an offence with which a defendant is charged. The Australian Capital Territory makes sexual reputation inadmissible while evidence of the complainant’s sexual experience with a person other than the accused may only be adduced if the trial judge is satisfied that inadmissibility ‘would prejudice the fair trial of the accused person.’¹⁰⁵

87. The law in New South Wales offers a good example of the ‘non-discretionary’ approach. Section 409B of the *Crimes (Sexual Assault) Amendment Act, 1981* provides:

“(3) In (prescribed) sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except-

(a) where it is evidence-

(i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected

set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

(c) where

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61A (1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

(d) where it is evidence relevant to whether-

(i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

(ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;

(e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or

(f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

(4) In prescribed sexual offence proceedings, a witness shall not be asked-

(a) to give evidence which is inadmissible under subsection (2) or (3); or

(b) by or on behalf of the accused person, to give evidence which is or may be admissible under subsection (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible.

(5) In prescribed sexual offence proceedings, where the Court or Justice is satisfied that-

(a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period-

(i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or

(ii) taken part or not taken part in sexual activity of a general or specified nature; and

(b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

(6) On the trial of a person any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examination under subsection (5) shall be decided by the Judge in the absence of the jury.

(7) Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.

(8) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section."

In New Zealand, Section 2 of the *Evidence Amendment Act, 1977* provides:

"(2) In any criminal proceeding in which a person is charged with a rape offence or is to be sentenced for a rape offence, no evidence shall be given, and no question shall be put to a witness, relating to-

(a) The sexual experience of the complainant with any person other than the accused; or

(b) The reputation of the complainant in sexual matters,-
except by leave of the Judge.

(3) The Judge shall not grant leave under subsection (2) of this section, unless he is satisfied that the evidence to be given or the question to be put is of such direct relevance to-

(a) Facts in issue in the proceeding; or

(b) The issue of the appropriate sentence,-

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

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

Section 246.6 (1) of the Canadian Criminal Code provides that no evidence is to be adduced by the accused concerning the sexual activity of the complainant with any person other than the accused unless:

"(a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

(b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge, or

(c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant."

The accused must give reasonable notice to the prosecutor of his intention to adduce such evidence,¹⁰⁶ and the evidence will not be admissible unless the judge, magistrate or justice, after holding a hearing from which the jury and members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of section 246.6 are met.¹⁰⁷

88. Until about thirteen years ago, trial courts in the United States generally admitted evidence as to the complainant's sexual history.¹⁰⁸ In 1974 the Michigan legislature enacted the first "rape shield" statute,¹⁰⁹ restricting the permitted scope of such evidence. Today, the overwhelming majority of jurisdictions have similar statutes,¹¹⁰ although their content varies greatly from state to state. The statutes have been enacted against the background of the constitution, which guarantees the defendant a fair trial with the opportunity to confront his accuser.¹¹¹

At one end of the spectrum are Michigan and Indiana, which permit the introduction only of evidence of sexual relations with the defendant and specific acts of sexual intercourse with others which may explain the complainant's physical condition.¹¹²

At the opposite end of the spectrum are states permitting the introduction of almost all sexual history evidence.¹¹³ Thus, for example, Texas and New Mexico admit any such evidence if its prejudicial nature does not outweigh its probative value.¹¹⁴ In New York, a general exclusionary rule is qualified by the proviso permitting the admission of evidence determined by the court to be "relevant and admissible in the interests of justice."¹¹⁵

Some statutes make distinctions on the basis of the purpose for which the evidence is sought to be admitted. Thus, California's Evidence Code¹¹⁶ permits the introduction of such evidence to attack the victim's credibility but not to prove consent. A few states, including Florida and South Dakota, prohibit evidence as to specific acts, but not evidence of reputation.¹¹⁷ Some states permit evidence as to previous sexual history if it "tends to establish a pattern of conduct or behaviour"¹¹⁸; others if it proves that the defendant reasonably believed that the complainant consented.¹¹⁹ In North Carolina, evidence as to the complainant's sexual behaviour is admissible when offered "as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts charged."¹²⁰

89. In the U.K., Z. Adler conducted research into 50 trials in respect of 80 accused at the Old Bailey in 1978-9.¹²¹ 34 were convicted of rape, 7 of a lesser charge and 37 were acquitted. Application for leave to introduce evidence of previous sexual history under Section 2 of the *Sexual Offences (Amendment) Act, 1976* (similar to Section 3 of our 1981 Act) was made by 40% of the defendants and 75% of these applications were wholly or partly successful. In 80% of the applications the ground for the application was the relevance of the evidence to the issue of consent. Applications to cross-examine complainants on the ground of relevance to credit were relatively infrequent and arose mainly when the women involved were alleged to have made previous complaints of rape. She found that judges were very inconsistent in their decisions, that they frequently introduced previous sexual history through their own questions and did not intervene on occasions when defence counsel plunged into questions on the topic without seeking leave of the Court. She concludes:

"It would be foolish to deny that the issues in this area are complex and problematic. It is also fully recognised that there are circumstances, discussed above, where evidence of the complainant's sexual experience is relevant to the issues in a rape trial and properly admissible. However, the operation of the law as well as common sense indicate that there is no clear consensus about the concept of relevance: the current law effectively is that evidence of sexual history is relevant if the judge thinks that it is relevant. It must be recognised as a matter of some urgency that 'relevance' in this area is a subjective concept, and that this has important implications for the implementation of the law.

The role of the judge in a rape trial is crucial, and this has not been affected by the provisions of the 1976 Act. Most judges remain creatures of their time and circumstances, their social opinions largely shaped by education, class and

occupation. Their view of the proper sexual roles of men and women, and the social status and situation of women reflect, by acceptance or sometimes by rejection, the values of the generation to which they belong. These are bound to affect their decisions under section 2 of the Act. No doubt, judicial technique and professional experience can help to suppress the merely personal judgment, but, nevertheless, a detailed examination of this area shows the inescapable significance of what Holmes J. called the 'instinctive preferences and inarticulate convictions' of judges in this branch of the law.

Thus, in many cases, far from being relevant, such evidence is introduced to play on the jury's prejudices and widely believed myths regarding the role of the alleged victim in sexual assaults. Evidence of sexual experience may be admitted even though it has no relevance to the case as it is being put, or on the basis of highly questionable assumptions about the link between prior experience and consent on the occasion of the alleged rape. The myth that there are 'good' and 'bad' women when it comes to sexual behaviour dies hard. It remains an important defence strategy to portray the alleged victim of rape as 'bad', and to appeal to the widely shared attitudes undoubtedly present among the jury that women with a normal sexual past are more likely to consent to sexual intercourse than those without.

If the main consideration in this area is, as has been suggested, 'the precise contribution which admission of the evidence will make to the just resolution of the issues between the parties in the circumstances of the case,' then a good deal of further thought must be given to the criteria to be used in determining relevance in this very sensitive area of the law. It can no longer be assumed that judges are making such decisions either in a uniform manner, or in a manner conducive to the 'just resolution' of the issues most often present in rape trials. To try to give an objective credence to discretion by semantic exercise further confounds the reality behind the issue."¹²²

Miss Adler does not, however, in this article, make any suggestion as to how the equivalent legislation in the U.K. might be improved.

A different viewpoint is put by D.W. Elliot:

"... it is argued that one very important object of (the) law is to promote the social need to have rapists convicted. If we are going to continue to penalise rape, the offence needs to be reported by the victim and efficiently prosecuted thereafter. Our arrangements before the legislation, and to a less but still unacceptable extent after, militate against this important social need, which is great enough to justify some injection of social justice into the trial process. Of course the need can be met to some extent by measures which do not put justice at risk, or not much; such as inculcating better treatment of complainants by police investigators, no oral evidence at committal stage, no publicity, even (as is the case in Scotland) holding the trial *in camera*. But this will not remove all the problems and a substantial ordeal, a substantial deterrent to reporting offences, and a substantial

risk of unjust acquittal will remain. Further inroads into these three evils will require encroachment on the accused's right to defend himself in the best way he can. We can encroach on that without risking injustice for him if we make a rule forbidding illegitimate tactics, i.e. the appeal to a naked prejudice involved in the forbidden propositions about sexually experienced women; and to give the Judge power to disallow what looks illegitimate in a particular case. But to forbid *by rule* potential legitimate tactics, i.e. those which may help an innocent man to escape conviction, is to cross a hitherto uncrossed line.

Those who invite us to cross it require us either to prejudge the defendant and assume his guilt, or (the only alternative) to decree that, although innocent, he must nevertheless be hampered in his defence so that genuine rapists may be put down. If either course were ever proposed in stark terms, it would get short shrift; dressing them up in terms of justice for complainants does not make them any less unacceptable. If they are both unacceptable, we have to face the fact that the three evils will never be completely eradicated, and acknowledge that (except in the matter of the *prima facie* embargo, which could with advantage be widened) the English Act and Court of Appeal do as much as can be done with a truly insoluble problem.¹²³

Again Mr. Elliot does not suggest in what respect the *prima facie* embargo could be advantageously widened.

In Australia according to Zelling J., the line referred to by Elliott has been crossed:

"In my opinion courts must start again from first principles in interpreting these sections and however much this runs counter to long engrained and long established practices and modes of thought Parliament has said it must be done so that there is justice for the injured girl as well as for the accused. I am well aware of the dislocation in legal thought which these concepts will produce."¹²⁴

90. The main conflict then is between those who would keep intact the reform introduced by the 1981 Act and those who would elaborate it further, on the assumption that relevance of previous sexual history is capable of being defined in an objective way and applied consistently in every rape trial. The difficulties in this second approach are threefold. First, any attempt to list the circumstances in which previous sexual history may be relevant runs the risk that not all the possible circumstances in which the defendant may legitimately require sexual history to be admitted will be anticipated. Second, the most elaborate guidelines will still necessarily leave room for an evaluative judgment to be made by the Judge. Third, guidelines that attempt to limit the introduction of previous sexual history as evidence related to particular issues or even specific questions present the court with great difficulties in controlling the cross-examination.

91. Despite these difficulties the trend, as we have seen in recent legislation in New South Wales and Canada, seems to be towards guidelines which attempt to limit the scope of the judge's discretion

in determining the relevance of previous sexual history in rape trials.

Doubt has been expressed in other jurisdictions as to whether vesting a general discretion in judges can achieve a substantial reduction in the use of sexual history evidence. The Director of the New South Wales Criminal Law Review Division has written:

“The provision of a general discretion in South Australian legislation of 1970 has not satisfactorily changed the pre-existing law and practice in relation to prior sexual behaviour. One result has been continuing concern in South Australia about the character assassination of rape complainants.”¹²⁵

In Tasmania the Law Reform Commission has proposed that the discretionary legislation introduced there in 1976 should be abandoned in favour of provisions which set firm limits on the use of sexual history evidence. Similarly Canada in 1983 repealed discretionary legislation introduced there in 1975. The Scottish Law Commission's 1983 Report on Evidence in Rape Cases goes some way towards setting down guidelines regarding the admissibility of sexual history evidence.

“We do not consider that the interests of justice can best be served by leaving with judges a wholly unfettered discretion in such matters.”¹²⁶

As already noted, Adler's study in the Old Bailey suggests that the discretionary approach in England has not produced a significant alteration in the practice of the courts.

The main advantage in favour of the guidelines has been expressed by Berger:

“Shield laws not only serve to insulate the victim against irrational or biased rulings, they also aim to increase uniformity and hence predictability in practice. For these reasons one may favour specific provisions that leave little to the court's predilections.”¹²⁷

92. The ‘strict exclusion’ approach to the admission of evidence of the complainant's previous sexual history could well be challenged in Ireland as a violation of the constitutional guarantee to a trial in due course of law. The North American experience is of interest in this context.

Rape shield legislation would appear on balance to have survived constitutional challenge in the United States. One commentator wrote as follows in 1980:

“In those cases involving the validity of rape shield statutes the courts have been confronted with a number of different constitutional issues, but, almost without exception, have upheld the particular statute involved either on its face or as applied. Thus, the courts have rejected contentions that the particular statute constituted a denial of due process generally or of a fair trial, or unconstitutionally discriminated between the sexes. A defendant's privilege against self-incrimination has been held not violated by the application

of a rape shield statute requiring an offer of proof by the defendant as to evidence sought to be admitted concerning the sexual conduct of the victim, where the evidence offered by the defendant related only to the victim's conduct and not to the crime charged...¹²⁸

The following passage from the judgment of the Supreme Court of Ohio in *State of Ohio v Gardiner* is typical of the judgments upholding constitutionality:

"In determining whether [the legislation] was unconstitutionally applied in this instance, we must... balance the state interest which the statute is designed to protect against the probative value of the excluded evidence.

Several legitimate state interests are advanced by the shield law. First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute is intended to aid in the truth-finding process."¹²⁹

In certain states appeal courts have held that rape shield legislation has violated the defendant's constitutional right to confrontation.¹³⁰

In *Shockley v State of Tennessee*,¹³¹ the Court of Criminal Appeals of Tennessee adopted the strategy of holding that evidence as to a person's sexual history might be admitted, notwithstanding a prohibition in the legislation, because the question fell "outside the operation of [the legislation] as a matter of public policy, legislative interest, and constitutional mandate."¹³² The court said that they wished:

"To make it clear that we are not hereby declaring [the legislation] unconstitutional. Rather we are recognizing that the statute is not controlling in this particular case and that its application must be construed in light of the appellant's due process rights."¹³³

It is interesting to note than in Michigan, the state that pioneered rape shield legislation, there is still a place for judicial discretion:

"We recognise that in certain limited cases,... evidence [of sexual conduct] may not be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted... Moreover in certain circumstances evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge... Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past...

The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favour exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontations."¹³⁴

In Canada, the balance of judicial opinion appears to be to the effect that s. 246.6 of the Canadian Criminal Code¹³⁵ violates the Canadian Charter of Rights and Freedoms.

Section 7 of the Charter provides that:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice..."

and section 11 of the Charter provides that every person charged with an offence has the right:

"...(d) to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal..."

In *R. v Coombs*,¹³⁶ Steele J of the Newfoundland Supreme Court held that section 246.6 was contrary to the above sections of the Charter. He said:

"If section 246.6 stands the consequence is that the accused will not have a fair trial; there will be a departure from the principles of fundamental justice, as the accused will have no opportunity to properly plead his defence. The prerogative of an accused at a criminal trial to confront his accuser and to present a full answer and defence are necessary for a fair hearing and together constitute a cardinal principle of fundamental justice that cannot be denied in a free and democratic society. A 'reasonable limitation' on a legal right is one thing - a denial of fundamental justice and a fair trial is quite another matter."¹³⁷

However, Steele J sought to mitigate the force of this finding so as not to lead to a complete suspension of the protection afforded complainants. It was not his intention to hold that the section was "for all purposes and at all times"¹³⁸ invalid. It should be deemed inoperative "only to the extent that it is necessary for defence counsel to cross-examine the complainant and adduce evidence of her sexual activities with others in order properly to state the defence."¹³⁹ It would therefore be necessary for trial courts to conduct voir dire "to settle the vexing problems that will arise."¹⁴⁰

Supreme Court decisions in British Columbia,¹⁴¹ the North West Territories,¹⁴² Ontario¹⁴³ and of the Court of Queens Bench in New Brunswick¹⁴⁴ have also held that sections 246.6 and 246.7 offend against the Charter.

In *R. v Bird*, Simonsen J of the Manitoba Queen's Bench, held that sections 246.6 and 246.7 of the Criminal Code did not contravene sections 7 and 11(d) of the Charter.

He said:

“In my view the limitations or restrictions on evidence to be adduced found in s. 246.6 are reasonable limitations. They clearly allow rebuttal evidence of the complainant’s sexual activity, or absence thereof, if such evidence were adduced in chief by the Crown. As well, evidence of the complainant’s sexual activity on the issue of identity could be presented, as well as evidence of sexual activity which took place on the same occasion, where that evidence relates to the consent issue. These provisions permit the accused to adduce evidence that is reasonably relevant, and in fact constitute an exception to the rule that evidence cannot be adduced of past sexual activity of the complainant.

As for s. 246.7, while there may be circumstances, as in this case, where sexual reputation could be relevant, the provision is nevertheless justifiable and supportable, since the probative value of such evidence would generally be outweighed by the prejudicial effect.”¹⁴⁵

Even if sections 246.6 and 246.7 were *prima facie* in breach of sections 7 and 11(d) of the Charter, *Simonsen J* considered that they would be saved by section 1 as being “a reasonable limit prescribed by law as can be readily justified in a free and democratic society.”

If rape shield legislation were considered in Ireland, one could not ignore the constitutional implications. In the light of the experience in the United States and Canada, constitutional challenge would be virtually inevitable, grounded on decisions such as that in *The State (Healy) v O’Donoghue*¹⁴⁶ in which O’Higgins CJ said:

“... it is clear that the words “due course of law” in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself.”¹⁴⁷

93. We find it difficult to arrive at a conclusion on this topic in the absence of any information as to how s. 3 of the 1981 Act has been operated by Irish courts. We would welcome information from all those concerned in the conduct of trials for rape and related offences as to the manner in which the section is operated before coming to a final conclusion as to the extent, if any, to which it stands in need of reform.

94. When leave is sought to introduce evidence of previous sexual history, consideration might be given to having it first given in full before the Judge in the absence of the jury. This procedure has been adopted in Canada¹⁴⁸ and might arguably afford the Judge a better opportunity of assessing the relevance of the evidence, thereby in some cases eliminating the questioning completely or limiting its scope.

95. Another modification of the right of cross-examination as to the previous sexual history of the complainant has been introduced in Canada,¹⁴⁹ viz. a requirement that the defence give notice to the prosecution of their intention to apply for leave to introduce such

evidence. While we will give further consideration to this proposal in the light of any data we receive as to how section 3 is operating in the present circumstances, it presents two major difficulties. First, the receipt of such notice by the prosecution may involve the complainant in an intrusive investigation by the prosecution of her private life. Second, defence solicitors may feel obliged in their clients' interests to serve such a notice in virtually every case to provide against the contingency of such evidence coming to light before the trial and this might lead to the withdrawal of charges in some cases.

96. In one respect we provisionally recommend a change in the law. *We agree with the Scottish and English Law Commissions that it would be desirable that judicial scrutiny should extend to cases of the complainant's sexual history with the defendant.* In most cases, of course, an application under section 3 will be granted as a matter of course, but it is possible that in a very small number of cases it would not be just that such evidence be adduced.

(3) Corroboration¹⁵⁰

97. At present, as explained in Chapter 2, there is no substantive requirement of corroboration of the complainant's evidence in a rape trial but the trial judge must warn¹⁵¹ the jury of the danger of convicting without corroboration.

Three principal options present themselves:

- (a) To require corroborative evidence as a precondition of conviction;
- (b) To abolish completely the requirement of any warning regarding uncorroborated evidence;
- (c) To leave the present law unchanged.

(a) *Requiring Corroborative Evidence as a Pre-condition of Conviction*

98. In favour of requiring corroborative evidence as a precondition of conviction it has been argued that a rape prosecution raises particular difficulties for the defendant who is faced with an uncorroborated accusation:

"Under other circumstances, the jury may be relied upon to determine the veracity of the complaining witness. But too often in rape cases the adversary proceeding will offer the jury the opportunity to choose between the account of a woman who alleges that she has been grievously wronged and that of a man accused of both violence and indecency. In such situations, outrage at the attacker and sympathy for the attacked mean that the jury will seldom be able to make a dispassionate evaluation of the prosecutrix's credibility. The result of this almost inevitable jury bias is to override the presumption of innocence; the defendant in effect must disprove the accusation."¹⁵²

Yet the experience internationally is that in many cases where the complainant and the defendant were alone together at the time the rape took place, juries are disposed to find the defendant guilty of a lesser charge or, if none is available, acquit him entirely.¹⁵³

Juries sometimes take the view that the complainant, by her conduct, "somehow assumed the risk of rape"¹⁵⁴ or was guilty of contributory negligence. Thus, "the existing evidence indicates that juries view rape charges with extraordinary suspicion and rarely return convictions in the absence of aggravating circumstances, such as extrinsic violence."¹⁵⁵

99. The next argument in favour of a rule requiring corroboration is to the effect that the accusation of rape is:

"peculiarly difficult to disprove. Unless the accused can prove he was not with the victim when the crime allegedly occurred the very lack of evidence corroborating the complainant's accusation deprives the accused of evidentiary means beyond his own testimony to establish, for example, that penetration was never achieved or that the complainant consented."¹⁵⁶

The available empirical evidence suggests that juries are reluctant to convict in cases involving uncorroborated rape accusations.¹⁵⁷ Perhaps this reluctance may be attributed to the requirement of corroboration in some jurisdictions and, in others to the requirement that the trial judge warn the jury of the danger of convicting on the uncorroborated evidence of the complainant.

100. The third argument in favour of a corroboration requirement is that women may make false accusations of rape:

"A number of different motives may prompt a deliberately falsified accusation of rape. A woman may consent to sexual intercourse with a man, then feel ashamed of herself and bitter at her partner, and bring charges of rape against him. Or, she may have become pregnant and accuse an entirely innocent party for the purpose of shielding the man who actually caused her pregnancy. A woman may falsify charges for the purpose of blackmail. Or she may do so solely out of hatred or revenge, or for notoriety."¹⁵⁸

There are, however, several factors which discourage accusations of rape, whatever the motive may be:

"For example, there are the stigma that attach to the victim of an incident culturally defined as sordid, and the humiliation caused by some forms of publicity associated with such charges. Also to be considered are the necessity of confronting the assailant and the reluctance to face the barbs and insinuations of the defense attorney. There is, in addition, the fear of retaliation from the accused rapist or his friend."¹⁵⁹

We consider that the arguments in favour of a requirement of corroboration in every case are less than convincing. We see no need for such a "blunderbuss approach."¹⁶⁰ It could result in the acquittal of some men who, beyond reasonable doubt, are clearly guilty of rape.

(b) Abolishing Completely the Requirement of Any Warning Regarding Uncorroborated Evidence.

101. The case for abolition is argued as follows by Jennifer Temkin:

“For most other crimes, the word of the victim is sufficient evidence to sustain a conviction. There are two main grounds on which it is argued that the same should be true of rape. First it is said that the alleged justification for the rule is without foundation, secondly that the rule inhibits the conviction of rapists.

The principal justification for the corroboration rule is that women have a tendency to make false allegations of rape. To counter this men accused of rape must have protection over and above that which is afforded to most defendants. This assumption may be challenged on several grounds. First, the many disincentives to prosecute which the system currently affords the victim of rape might be thought to be sufficient to deter false allegations. Secondly, false accusations may be made in other crimes apart from sexual ones. Thirdly, the trial process and the cross-examination of the victim should be sufficient as it is with other crimes to detect falsehood. Fourthly, the final speech of defending counsel should be adequate without the need for a further warning by the judge. Finally this justification is based on prejudice not on fact. Underlying it is the folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.

There are several ways in which the corroboration requirement impedes the conviction of rapists. For example, where the defendant asserts that the victim consented to intercourse, her claim to the contrary will be sufficiently corroborated if, for example, she can adduce evidence of injury or if she arrives at the police station in a state of dishevelment with her clothing torn or dirtied. In a recent study by R. Wright, however, it was found that a high proportion of rape victims were subjected to rough treatment and/or threats of violence or death but were not in fact physically injured. Moreover the natural reaction of many women after a rape is to return home, wash and change their clothing before reporting the matter to the police. Thus in many cases the prosecution is unable to furnish the requisite corroborating evidence. The lack of it will also influence the decision to prosecute. This accounts to some extent for the marked discrepancy between the number of reported rapes and the number of prosecutions brought by the police.”¹⁶¹

102. Section 246.4 of the Canadian Criminal Code provides that, in relation to a number of offences, including sexual assault, no corroboration is required for a conviction; moreover, the judge is “not [to] instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.”

In the U.S.A. a relatively small number of jurisdictions require that the testimony of the complainant in a rape prosecution should be corroborated as a pre-condition of conviction. In others a warning similar to that under Irish law is required.

In *People v Rincon-Pineda*¹⁶² in 1975, the California Supreme Court held that the cautionary instruction was no longer mandatory in sex offence cases. The Court pointed out that in Hale's time, it was not clear that the prosecution was required to prove the guilt of the accused beyond reasonable doubt. Nor had the defendant the right to call witnesses or even to have a counsel to represent him. The Court recognised that:

"there may well have been merit to Hale's assertion that a prosecution for rape was an ideal instrument of malice, since it forced an accused, on trial for his life, to stand alone before a jury inflamed by passion and to attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence."¹⁶³

The modern requirement of due process and the improvement of the position of the accused made Hale's caution "superfluous and capricious."¹⁶⁴

The Australian Royal Commission on Human Relationships recommended abolition of the requirement to give a warning where the complainant's evidence is uncorroborated:

"In all criminal trials, no matter what offence is involved, the Crown bears the burden of proving its case beyond reasonable doubt. This means that if a jury has any real doubt as to any component of the Crown case, then it must acquit. It is adding little to tell the jury not to convict unless it is convinced of the victim's evidence..."

[W]e see little advantage in the warning and little effect in it... If we considered that it gave any real protection to the accused, we should be uneasy about recommending its abolition. However, since the warning exhorts the jury to do precisely what it is bound to do in any case, it appears to lack any real substance at all."¹⁶⁵

(c) *Leaving the Present Law Unchanged.*

103. The argument in favour of this approach is that the present rule can be justified without reference to any unsustainable folklore as to feminine mendacity and as soundly based in the experience of judges trying such cases. Looked at from this viewpoint, the isolation of sexual offences as a category which necessitates the giving of a warning is simply an example of the inductive approach of English law and its rejection of a *priori* reasoning. The fact that the warning as a matter of practice is required in such cases does not necessarily mean that it may not equally be required in a non-sexual case which also depends on the uncorroborated testimony of a single witness. There are, however, special features of cases of rape which are not present in others - the tendency of the act, which is normally consensual, to take place in private and without any necessary marking of the alleged victim - which makes it peculiarly a form of case in which corroborative evidence assumes an additional importance.

We are not agreed as to our provisional recommendations in this matter. We agree that *prohibiting* the giving of any such warning would be an unjustifiable interference with the exercise of the

judicial function. A majority of us feel that, on balance, no useful purpose would be served by changing the existing law. A minority of us think that the requirement of a warning should be abolished or that, as a minimum, some restrictions should be placed on the manner in which the warning may be given, to prohibit, for example, any reference by the judge to the supposed mendacity of rape complainants.

(4) Legal Representation for the Complainant

104. The Joint Oireachtas Committee recommended that complainants in rape cases and in other cases of serious sexual assault "should be granted free legal representation, if they so wish."¹⁶⁶ The Committee argued that:

"[a] defendant in a rape case has access to legal advice and he can apply for legal aid and receive free legal representation. The complainant however is denied access to discussion or consultation with the legal representatives of the State. Indeed it is normal for a complainant to meet the State prosecutor for the first time in court on the day of the hearing. This practice is unacceptable to the members of the Joint Committee having regard particularly to the special and unique circumstances that apply in rape and sexual assault cases. The members feel strongly that the victims of rape should be able to consult with the State's legal representatives before the court hearings and that they should be fully briefed on court procedures including the type of questions likely to be put to them by defending counsel. State counsel in prosecuting a case does not of course officially represent a complainant and the members agree with the proposition submitted to them that complainants in cases of serious sexual assault, and particularly rape, should be granted free legal representation, if they so wish."¹⁶⁷

105. The Committee considered that complainants "should be fully briefed on court proceedings including the type of questions likely to be put to them by defending counsel." It may be that the Committee envisaged nothing more than making the complainant familiar with the Court and its procedures and giving her general information that questions may be asked as to whether she consented. We would point out, however, lest it be misunderstood, that it is perfectly permissible for a woman who has been raped to consult a lawyer, and to bring a lawyer with her, in the capacity of friend, to the Court during the hearing of the trial. This is something quite separate from requiring the State to supply a lawyer to complainants in rape cases who will play an active role in the trial on behalf of the complainant. We will assume that it is the latter which the Committee envisages.

106. In Britain, the Criminal Law Revision Committee, in its Fifteenth Report, noted that the danger that the trial judge might give a wrong ruling on the admissibility of evidence as to the complainant's previous sexual experience had led some of those making submissions to the Committee to suggest that complainants in rape cases should have the right to be separately represented so that their own counsel could submit that cross-

examination about previous sexual experience should not be allowed. The Committee did not accept this argument. They said:

“The implementing of this suggestion would make a substantial change in criminal procedure which would be unnecessary and would probably have far-reaching consequences. In practice representation would be unlikely to make any difference to the judge’s ruling. Our correspondents may not have appreciated that judges have a duty to protect all witnesses from unfair cross-examination by counsel, whether they be prosecuting or defending. In our experience they try to perform their duty. They do not need counsel appearing for witnesses to remind them of it.

If representation of witnesses in rape cases were allowed, it would be difficult to refuse it in other cases. Cross-examination about previous sexual behaviour may become relevant in cases of all kinds. One of our members was once counsel in what seemed a straightforward receiving case. Cross-examination about past sexual behaviour revealed that the allegation of receiving had been fabricated because of sexual jealousy. Further, cross-examination about such behaviour is not the only kind of cross-examination about past conduct which may cause distress to prosecution witnesses.”¹⁶⁸

107. We would also be concerned that guidance of a complainant might become more specific and the risk of “coaching” would increase. We would for example oppose a procedure under which the complainant was advised to “down play” or highlight certain aspects of her evidence or to answer certain questions in examination or cross-examination in a particular way. This “coaching” is likely to pervert the course of justice and for good reason is not permitted in any proceedings, criminal or civil. Having said that, we agree that the complainant should be as fully informed as possible both by the Gardai and by the State prosecutor about the proceedings and her role in them. We make a further administrative recommendation on this matter at a later point.

108 It is an important function of trial judges to protect witnesses against unfair or irrelevant cross-examination and we are not aware that they are failing in their duties in this area. At the same time, however, we cannot say that we are agreed at present on our approach to this problem. Some of us feel that our judicial procedures offer adequate protection to all witnesses, including complainants, against unfair or irrelevant cross-examination. It is already the duty of counsel for the D.P.P. to protect State witnesses from irrelevant or unfair cross-examination. On this view, permitting criminal proceedings for rape to be conducted on fundamentally different principles from those to be applied in all other criminal proceedings is neither necessary nor desirable. It might indeed be constitutionally suspect, since it tilts the balance of the criminal process significantly in favour of the prosecution in a defined range of offences by permitting a dual representation hostile to the interests of the accused, thereby depriving him of one of the long standing benefits of a criminal trial conducted “in due course of law” as that phrase was plainly understood at the time

of the enactment of the Constitution. Some of us, however, take the view that the introduction of such a change would not in any sense be a reflection on those concerned in the trial of rape and similar offences but would simply be a recognition of the possibility of human error which could lead to damaging and unfair cross-examination of complainants in a particularly difficult and sensitive area. Since the participation of counsel for the complainant would be carefully limited, it would not in any sense unduly tilt the balance against the accused.

109. We are, accordingly, at the moment not agreed as to what recommendation we should make in this particular area and we invite comments on the approach that might usefully be adopted. We should, however, point out that, since the desirability of such separate legal representation would principally arise in the context of cross-examination as to the complainant's previous sexual history, the manner in which section 3 of the 1981 Act has been operated will necessarily be a factor to be taken into account in coming to a final conclusion.

110. If representation of complainants were to be adopted, the issue of legal aid would arise. Analogy with the position of the accused would suggest a means tested approach. On the other hand the Australian Commission on Human Rights has pointed out that unless legal aid were to be provided to all complainants for separate representation, the result would 'in some cases [be to] place [the complainant] in an even more hazardous position than she now occupies.. This could only add to the factors which might discourage a victim from reporting this crime.' The Royal Commission went on to state:

"Nor do we think that a case can be made out for urging that she be entitled to legal aid. In a sense the State already provides the victim with a representative, in the person of the Crown prosecutor, one of whose duties is to ensure that Crown witnesses are not harried or abused by the defence."¹⁶⁹

(5) Anonymity

(i) *Anonymity of the Complainant*

111. The starting point of our discussion must surely be the "fundamental principle of the administration of justice that the courts should be public and open."¹⁷⁰ The question is whether this principle should be sacrificed in the context of complainants in rape prosecutions and, if so, the extent to which it should have to be set aside.

The case for a general rule of anonymity for complainants was well put by the Heilbron Committee in 1975:

"Even in the case of a wholly innocent victim whose assailant is convicted, public knowledge of the indignity which she has suffered in being raped may be extremely distressing and even positively harmful,¹⁷¹ and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings.

Furthermore since in a criminal trial guilt must be proved

to the satisfaction of the jury, an innocent victim can never be sure that a conviction will follow her complaint. If the accused is acquitted the distress and harm caused to the victim can be further aggravated, and the danger of publicity following an acquittal can be a risk a victim is not prepared, understandably, to take... [I]f an exception is made for blackmail victims even though they have committed some criminal or reprehensible act, then it ought to be made for victims of rape, who have not. And since there is no way of distinguishing in advance between genuine victims and others, other protection - subject perhaps to exceptions - must be a general protection."¹⁷²

The Heilbron Committee accepted that, in an exceptional case, the accused might need to have the complainant's identity made public in order to enable witnesses to come forward to assist his defence with important evidence. As we have seen, this step was taken in this jurisdiction by section 7 (2) of the 1981 Act. The Heilbron Committee, however, rejected the suggestion that the trial judge should have a discretion at the end of the trial to release the name of the complainant where she had in his view behaved in a discreditable way. They took this view, first, because the release of the woman's name "can only be viewed as a penal measure and the woman is surely entitled to a regular trial before being so penalised."¹⁷³ Lying accusations of rape, supported by false testimony by the complainant, could render her liable to prosecution for perjury or a lesser offence.¹⁷⁴ Secondly, as the jury do not give reasons for their verdicts, the discretion to release the complainant's name "might have the tendency to result, by implication, in two classes of acquittal."¹⁷⁵ Thirdly, the issues involved in the reasons for disclosure would rarely have been thoroughly investigated and the decision to lift anonymity or not might work unfairly against either party. Finally, the risk of publicity "might encourage complainants to embroider their evidence and give them a stake in the outcome of the proceedings to the detriment of justice."¹⁷⁶

Neither the English legislation of 1976 nor the Irish legislation of 1981 has favoured this approach, since they empower the trial judge to waive the requirement of anonymity for the complainant if satisfied that its effect is to impose "a substantial and unreasonable restriction on the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction."¹⁷⁷ A specific limit on this power is that it cannot be exercised in favour of waiver by reason only of an acquittal of an accused person.

112. The Joint Oireachtas Committee addressed the subject in their Report. The Committee noted that it has been put to¹⁷⁸ them that the term "in the public interest" is "vague and it is not defined in the Act. It is a totally vague and non specific term."¹⁷⁹ The Joint Committee added that they were:

"aware of the concern being expressed by various groups to amend the existing rape law with regard to anonymity of the complainant and the members listened attentively to views put to them on this particular point.

They are not happy with the wording of Sections 7 and 8 of the Act and the fact that it leaves too many factors to the discretion of the Judge. The members agreed that a complainant in a rape case should, in the interests of justice, be accorded full anonymity, and that the Act should be amended to include a proviso on the following lines i.e. 'no matter likely to lead members of the public to identify a woman as complainant may be published or broadcast.'

113. We are concerned that *justice* would not be served by giving all complainants in rape cases complete anonymity. This change could lead to injustice where it would have the effect of preventing a defendant from locating an essential witness who could establish his innocence. Moreover, in a case where, for example, a complainant admits that her accusation against the defendant was false and malicious, it is hard to see how justice would be enhanced by the change the Committee propose. A different approach would be to seek to introduce a greater degree of certainty into the expression "in the public interest." Such a course would, however, involve the danger of failing to anticipate every conceivable case in which the anonymity requirement imposes a substantial and unreasonable restriction and in which it is in the public interest to remove or relax the restriction. In our view, the present lack of specificity is necessary in order to avoid this danger.

We have no information as to how the courts have operated section 7. We would welcome information on the matter.

114. We have considered the question as to whether the restriction on publication should apply equally to prosecutions for other sexual offences. We see no reason why it should not and accordingly we provisionally recommend that the present rules as to the anonymity of the complainant should be retained and extended to all sexual offences.

(ii) *Anonymity of the Defendant*

115. It can be argued that it is unjust to a defendant, charged on the basis of a complaint made by a person whose identity cannot be disclosed to have his own identity revealed to the world, even where he may subsequently be acquitted. The Criminal Law Revision Committee in Britain had this to say:

"...[R]ape is but one of many offences where a defendant who is acquitted may nevertheless suffer damage to his reputation. An acquittal on a charge of homosexual soliciting may be no less damaging than one on a charge of rape. There is no reason in principle why rape should be distinguished from other offences in this report. The 'tit-for-tat' argument - that the man should be granted anonymity because the woman has it - is not in our opinion valid, despite its superficial attractiveness."¹⁸⁰

Where a defendant is acquitted of rape but found guilty of an indecent assault and the newspapers publish this conviction, it may be clear to the reader that this is the defendant who was charged with rape. The Criminal Law Revision Committee proposed¹⁸¹ that the press should generally be free to publish the fact of acquittal of rape and conviction of indecent assault. In cases

“where the offence of which he was actually convicted was comparatively minor and any penalty imposed small,”¹⁸² however, the judge should have discretion to order, on the application of the defendant, that he should retain his anonymity in these circumstances.

116. There is clearly no justification for treating defendants in rape cases differently from defendants in other cases of sexual offences. Nor are we convinced that there are any factors peculiar to sexual cases which lead necessarily to the conclusion that defendants in such cases should be given the protection of anonymity where they are acquitted. The argument that such anonymity should be afforded to the defendant as a form of a *quid pro quo* for the anonymity afforded to the complainant is unconvincing. In our view, the only justification for requiring anonymity in the case of the defendant is that identification of the defendant would in some cases facilitate identification of the complainant as, for example, where the complainant and the defendant were related or worked in the same place. *We accordingly provisionally recommend that the present law be altered by removing the protection of anonymity from defendants, but giving the Court a residual discretion to prohibit publication of the name of the defendant where it might lead to identification of the complainant.*

(6) Trial of Rape and Related Offences.

(a) In General

117. Since the enactment of the Courts Act, 1981, the jurisdiction of the Central Criminal Court is effectively confined to cases of murder, attempted murder, treason and genocide. All other indictable crimes, including rape and sexual offences, are dealt with in the Circuit Court. At the same time, the civil jurisdiction of the Circuit Court has been substantially increased in the area of family law and certain statutory jurisdictions, such as appeals from the Unfair Dismissals Tribunal. This must inevitably lead to delays in dealing with rape cases which could be significantly reduced by transferring the jurisdiction to the Central Criminal Court. The prevalence of the crime, frequently accompanied by serious violence, also renders it desirable, in our view, that *it should be tried exclusively in the Central Criminal Court and we think that this should also apply to the proposed new offence of aggravated sexual assault. We also consider that the Central Criminal Court should have exclusive jurisdiction in the sentencing of such offenders, even where they plead guilty in the District Court.*

(b) In Camera Proceedings

118. At present, the Court must be cleared when applications regarding the admissibility of evidence as to the sexual experience of the complainant are being heard; but there is no obligation on the trial judge to hear the rest of the proceedings other than in public. The Joint Oireachtas Committee recommended¹⁸³ that the entire proceedings should be heard *in camera*.

This approach has not universal support. The Mitchell Committee opposed the *in camera* solution, stating:

“It is the tradition in our courts, a tradition which has been inherited from the English courts, that all trials should take place in public and it is believed that the fact that the trial is held in public is ‘the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.’¹⁸⁴ We think that the principle of open trial must be retained. In any event the woman who has to give evidence before a judge and jury of 12 and in the presence of court reporters and other officials as well as counsel and the accused, is not likely to suffer greater embarrassment in the presence of such few members of the public as today choose to visit the courts.”¹⁸⁵

And in Victoria, the Law Reform Commission in a Discussion Paper published in March 1987, were not in favour of closed courts for the trial of sexual cases. They said:

“There are means by which the distress of complainants can be alleviated without abandoning the principle that trials should be conducted in public. These include the court’s power to control proceedings before it and to exclude people from the hearing on the grounds of public decency or if it becomes necessary for the proper administration of justice.”¹⁸⁶

As against this approach, however, it may be argued that it leaves to the trial judge as a matter of discretion what is essentially an issue of general principle. The question whether complainants (and defendants) should be sheltered from unwelcome attention is one that does not depend on individual circumstances. A discretionary solution would mean that some judges would clear the court, and others would not. This would reduce the issue of principle to a lottery, so far as the parties were concerned.

In New Zealand, S. 5 of the *Crimes Act, 1985*, includes the following:

“(2) While the complainant in a case involving sexual violation is giving oral evidence (whether in chief or under cross-examination or on re-examination), no person shall be present in the courtroom except the following:

- (a) The Judge and jury;
- (b) The accused and any person who is for the time being acting as custodian of the accused;
- (c) Any barrister or solicitor engaged in the proceedings;
- (d) Any officer of the Court;
- (e) Any person who is for the time being responsible for recording the proceedings;
- (f) The member of the Police in charge of the case;
- (g) Any accredited news media reporter;
- (h) Any person whose presence is requested by the complainant;

- (i) Any person expressly permitted by the Judge to be present;
- (3) Before the complainant in a case involving sexual violation commences to give evidence, the Judge shall:
 - (a) Ensure that no person other than one referred to in subsection (2) of this section is present in the courtroom; and
 - (b) Advise the complainant of the complainant's right to request the presence of any person under paragraph (h) of that subsection."

The weakness of the Australian argument is the assumption that the accused is not likely to suffer greater embarrassment in the presence of such few members of the public as today choose to visit the courts. We think it is some degree of reassurance for women who have to undergo the inevitably embarrassing and humiliating experience of giving evidence to know that at least those present are confined to those who have a legitimate interest in the proceedings and that the merely inquisitive and prurient are excluded. Moreover, in a small society as ours, the well justified apprehension of the complainant that someone she knows may be in the gallery should be allayed as far as possible.

We provisionally recommend a change requiring that the proceedings be heard otherwise than in public. To this general principle there should be four exceptions. First, provision should be made permitting the presence of a limited number of family members and friends of the complainant, as well as of the accused. Secondly, members of the media should be permitted to attend and report the case. Thirdly, a member of the legal profession should be permitted to attend and report any aspect of the case of legal relevance. Fourthly, in particular cases, the judge should be empowered to permit the attendance of persons carrying out research of a criminological or other scientific nature. In all four cases, the present restrictions in respect of applications as to the admissibility of evidence regarding the sexual experience of the complainant would continue to apply. Similarly, the rules relating to the anonymity of the complainant and (in the court's discretion) of the accused would continue to apply.

(c) Sentencing

119. The Joint Oireachtas Committee recommended that "in the interests of having a consistent level of sentencing by all judges, a set of guidelines should be laid down for sexual offences and for all other serious crime."¹⁸⁷

It is difficult, if not impossible, for the legislature to provide guidelines for sentencing in the case of serious crime such as rape. In so far as they are either practicable or desirable, such guidelines can be effectively laid down only by the Court of Criminal Appeal or the Supreme Court. In the case of rape, a range of matters may arise for consideration such as the circumstances of the commission of the offence, the number of offenders, the use of violence, the duration of the attack, the effect on the victim, the age and

psychological condition of the offender and any previous convictions. We note that in England Lord Lane LCJ, speaking for the Court of Appeal, has laid down guidelines to be followed by trial judges in sentencing in rape cases and we think it must be left to the Court of Criminal Appeal or the Supreme Court to decide whether, in our conditions, similar guidelines are necessary or desirable.¹⁸⁸

120. It should be added that in this area there is again a lack of data on sentencing generally. We cannot accordingly say whether the criticism sometimes advanced that there is inconsistency in sentencing in rape cases is justified or not. To the extent that it is a problem, it may be mitigated in some degree by providing for the hearing of such cases in the Central Criminal Court. High Court Judges have more opportunities for consulting with each other than Circuit Judges and the fact that they regularly sit on the Court of Criminal Appeal keeps them in touch with the level of sentencing generally.

121. We have already recommended that the offence of aggravated sexual assault should carry a maximum sentence of life imprisonment and we do not recommend any change in the present maximum sentence of life in relation to rape. We consider that the maximum sentence for sexual assault should be five years. *We consider that there should be express statutory provision, enabling a judge to order the accused on conviction to pay compensation to the victim in addition to any other penalty imposed.*

(d) Time Limits

122. It is in the interests of all that prosecutions for criminal offences should not be unduly delayed. With the passage of time, witnesses' memories fade, important evidence may become less easy to obtain or retain, and, of course, the charge hangs over the head of the accused, as well as the witnesses.

From the standpoint of a victim of rape, the position calls for particular attention. Rape disrupts the victim's life. Remembering and re-living the experience aggravates the trauma she suffers. The longer the pre-trial delay, the greater the victim's fear of forgetting the facts, of becoming confused in the witness-box and therefore of further humiliation. She may also fear further violence from an accused on bail.

It is worth considering whether the legislation should introduce time limits in rape offences, after the accused has been charged. The justification for doing this may be considered to be a special one as far as this type of offence is concerned. As the Law Reform Commission of Victoria mentioned (in relation to sexual offences generally):

“Complainants in sexual cases are often particularly nervous and distressed. To give evidence in non-sexual cases may be difficult and unpleasant. To give evidence in sexual cases is likely to be even more difficult and unpleasant. Consequently there is a stronger case than usual for completing the legal proceedings as quickly as possible.”¹⁸⁹

We agree, but we are concerned that an inflexible time limit, which might at first sight appear the obvious solution,¹⁹⁰ could result in injustice and hardship. It could mean, for example, that a prosecution might have to be dismissed and a guilty man let go free on account of the delay of the prosecution. It could also mean that a victim of rape who suffered a severe trauma might be pressed to give evidence before she had recovered fully from her ordeal.

We do not recommend the introduction of time limits. We are satisfied that the reservation of serious sexual offences to the Central Criminal Court should reduce delay considerably.

(e) Composition of Juries

123. The Joint Oireachtas Committee recommended that compulsory equal representation of men and women on juries should be “the norm in all rape and sexual assault cases.”¹⁹¹ Apparently the recommendation was based on a desire to make the surroundings of the courtroom a less “unfriendly environment.”¹⁹² The Committee also stated that:

“[d]efending barristers are apt to object to women during the selection of juries on the grounds that they would, because of their sex, be too sympathetic to the complainant.”¹⁹³

The Committee gave no source for this assertion, and did not indicate whether these challenges were peremptory or for cause shown. It seems clear that they could not have been peremptory, since such challenges, of their nature, require no grounds to be given. If the challenges to which the Committee refer were for cause shown it is surprising to hear that this specific ground of challenge has been accepted by the Courts and we would welcome clarification on the matter. It may be that the Committee assumed that in the case of peremptory challenges of women jurors, the unstated motive was the sex of the juror, but this must not be more than speculation.

In Britain the Heilbron Committee in 1975 had recommended that there should be a minimum of four men and four women on the jury in rape trials. They argued as follows:

“It has been customary to attach great importance to the random selection of jurors as the best means of guaranteeing that the jury is both impartial and representative of the community as a whole, subject to the rules about ineligibility, disqualification and excusal from jury service. Our proposal might be held to infringe the principle of random selection but it seems to us less important to cling strictly to random selection than to seek to achieve a genuinely impartial and representative jury. In cases of rape we believe it to be crucial that both sexes should be adequately represented. The principle of random selection taken together with the scope of peremptory challenge is not able to guarantee this in every case and, therefore, we believe that a change is essential...”¹⁹⁴

Having acknowledged the practical difficulties in introducing a degree of equality of representation between the sexes, the Committee went on to say that:

“We are faced by the dilemma that in rape (as, no doubt, in many other sexual cases to a greater or lesser degree) a proper balance of the views of both sexes is of importance, indeed we feel of paramount importance, in reaching a proper view about the attitude of the man and of the woman. While rape cases are not unique in every respect, in rape there is the particular difficulty that the alleged consent of the woman to sexual intercourse is a vital factor, as well as the behaviour of the defendant himself and his own intention. While we recognise that this is a problem wider than rape, we think that a start should be made somewhere.

In our view the right course is to aim at altering the procedures, so as to ensure that in rape trials there is a minimum of four women and also four men on a jury, in order to keep the balance of the sexes within reasonable bounds (with appropriate exceptions for the occasional case where the jury falls below twelve during the trial due to sickness of a juror or for some other reasons). As regards the use of the peremptory challenges (which are, undoubtedly, often used to exclude women or to get other age groups) we suggest that challenges should not be capable of being used so as to frustrate the minimum numbers, and therefore if the number of either sex fall below four then we think that the juror should be replaced by another of the same sex.

Our reason for choosing a minimum of four men and women on the jury in rape trials, is that we think that equal numbers would be too difficult to achieve and the smaller number would allow for the possibility that less women are willing to serve (because more seek excusal) in any event.”

124. In Australia, the Law Reform Commission of Tasmania adopted substantially the same view as the Heilbron Committee in its 1976 Report, entitled *Reducing Harassment and Embarrassment of Complainants in Rape Cases*.¹⁹⁵ Six years later, however, in its Report *Rape and Sexual Offences*, the Commission recommended *against* legislation providing that women form a prescribed percentage of jurors in sexual cases. This recommendation rested on two bases:

- (a) the actual effect of the composition of juries in terms of sex on the verdict of rape trials “is open to question;”¹⁹⁶
- (b) rather than making special rules applicable to crimes of sexual assault, they should be treated in the same way as other crimes as far as possible.¹⁹⁷

In 1976 the Mitchell Committee in South Australia had addressed the issue. The Committee gave details¹⁹⁸ of a study of prosecutions for rape in the Supreme Court of Australia from 1965 to 1975. The data clearly indicated that there was no statistically significant difference between the verdicts of male and female dominated juries, and the Committee found it “safe to conclude that women are at least no more likely to convict of the offence of rape than are men.”¹⁹⁹ The Committee considered it:

“apparent that in [South Australia] the inclusion of equal numbers of men and women is not likely to result in either more or less convictions in rape cases...”²⁰⁰

In any event, considerations similar to those which had led them in an earlier report to recommend that there should be no provision for trial by jurors selected from the occupational or ethnic group of the accused satisfied them that it would be undesirable to vary the method of selection of jurors merely because the charge was one of rape. In their view there was "no justification"²⁰¹ for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men.

Also in 1976, the Victoria Law Commission addressed the issue. They noted that

"[i]t has been pointed out... that if you reject, for rape cases, the view that random selection is the best method of seeking impartial and representative juries, then you throw doubt on the appropriateness of that method in all those criminal cases in which the victim or the accused is a member of a racial, national, religious or other community having special interests and characteristics.²⁰² And this could lead to demands for privileges which would make the selection of juries impossibly complicated."²⁰³

In the Commission's view, the South Australian study provided

"clear evidence that to require the inclusion of a proportion, or for that matter a majority, of women on the juries trying rape cases would make no difference at all to the number of accused persons convicted or acquitted. The change would, at most, give a great appearance of impartiality, and even this, perhaps, only to the casual observer. For experienced observers might well take the view that the jurors most likely to acquit would be women of the complainant's age group, and that the jurors most likely to convict would be middle-aged men. Furthermore, it seems likely that any appreciable improvement in appearances would be limited to a relatively small proportion of rape trials."²⁰⁴

The proper conclusion in the Commission's view was that

"it would be a mistake to infringe the principle of random selection of juries by requiring a fixed percentage of women jurors on juries trying charges of rape offences; and that if it were desired to increase the proportion of women serving on juries the appropriate course might well be to re-consider the scope of the very widely expressed provisions under which women are able to claim to be excused from jury service."²⁰⁵

In 1977, the Australian Royal Commission on Human Relationships took the same position as the Heilbron Committee in recommending²⁰⁶ a minimum of four men and four women on juries dealing with sexual cases. They said:

"Our basic position is that there should be a balance of the sexes in all criminal trials of whatever kind ... The area where reform is most needed however is that of sexual offences, not so much to change the outcome of the trial but to ensure participation of women in a process and a broader range of attitudes. In trials involving sexual allegations, different attitudes might well be taken by people of different sexes

according to their own preconceptions. It seems to us to be undesirable that these cases are dealt with by one sex exclusively."²⁰⁷

In 1980, however, a national conference on rape law reform rejected the Royal Commission recommendation, stating:

"This Conference agrees that while it is important that both men and women should serve on juries in trials involving sexual offences, this applies equally in respect of all crimes. Provided that the law gives an equal opportunity to men and women for jury service generally, no special rule need be established in relation to rape trials."²⁰⁸

125. We have set out in an appendix figures supplied to us by the Department of Justice as to the composition of juries in rape trials for the period 1979/1986. While it is obviously very difficult to draw any firm inferences from these figures without having further details as to the strength or weakness of the particular cases, there is little in them to indicate any support for the proposition that juries in which men predominate are inherently more likely to acquit in rape cases.

We do not think that the arguments in favour of securing juries equally balanced between the sexes are sufficiently strong to outweigh the arguments to the contrary. If such a requirement were introduced into our law, it is difficult to see why there should not be a similar requirement that persons in certain groups which could be defined by age, religion, ethnic origins or social classification should only be tried by juries on which their peers were thought to be given adequate representation. Such a proposal would inevitably lead to the erosion of the fundamental principle of our law which requires that juries should be selected in a wholly random and non-discriminatory fashion and would introduce enormous and, in our view, unnecessary complications in the selection of juries. Nor, at the end of the day, could it be predicted with any confidence that the result would be to ensure a greater degree of justice for either the complainant or the accused.

(f) Sexual Offences With the Mentally Handicapped.

126. We have mentioned in Chapter 2, paragraph 40, that the offence created by section 4 of the *Criminal Law (Amendment) Act, 1935*, is expressed in the language of a former age. While we are only addressing the nomenclature of the section in this paper, we realise that sexual offences with the mentally handicapped merit special study. In many respects the problems which arise are similar to those which arise in dealing with the sexual abuse of children. Both children and the mentally handicapped are vulnerable. Both present problems as potential witnesses. As severe mental handicap can vitiate consent altogether one of the problems to be addressed is the range of mental handicap for which special offences should be created. Another is the extent to which a potential accused would have to be aware of the degree of handicap of his victim to render him guilty of an offence.

We have not had the time to conduct reasearch in order properly to address these matters. We need and would very much welcome

views and submissions on sexual offences with the mentally handicapped. However, no research is necessary to ground a conclusion that it is intolerable and offensive to have to present a witness as an idiot or an imbecile. *We provisionally recommend that the offensive wording of Section 4 of the 1935 Act be amended by the substitution of words such as "mental incapacity" or "mental handicap."*

(g) Administrative Changes

127. It is acknowledged that complainants often find rape trial procedures very distressing and can experience a sense of extreme isolation, anxiety and bewilderment. We consider that the trauma of trial proceedings for complainants can be somewhat alleviated by administrative procedures such as those recommended by the Joint Oireachtras Committee. The Committee made the following recommendations on page 40 of their Report:

- (1) that the complainant be given a copy of her statement to the Gardai, as a matter of course;
- (2) that the complainant be kept fully informed by the Gardai of developments and that she be afforded access to the State prosecutor before the hearing of the case in court.²⁰⁹

We agree with both these recommendations. So far as the latter is concerned, we consider that the access to the Gardai and the State prosecutor should relate only to matters concerning the complainant's evidence and the progress of the case in general terms. For example, she should not have access to statements of the defendant or of other witnesses, nor to medical or scientific reports.

Consideration should be given by the appropriate authority to the preparation of a standard booklet to be given to victims of sexual offences explaining all the circumstances attending the investigation and prosecution of sexual offences, with particular emphasis on the role of the complainant as witness.

FOOTNOTES

- ¹ G. Williams, *Textbook of Criminal Law*, 237 (2nd ed., 1983).
- ² *Mitchell Committee Report*, p. 13.
- ³ *Criminal Law Consolidation Act Amendment Act, 1976*, section 12.
- ⁴ The same change has been made in other Australian states, including Victoria (in 1980) and New South Wales (in 1981). The recommendation of the Australian Royal Commission on Human Relationships, in its Final Report, vol. 5, ch. 12, para. 20 (1977) is in accord.
- ⁵ *Crimes Act, 1961* (N.Z.) s. 127.
- ⁶ Para. 12.1 of the Report.
- ⁷ Para. 27.
- ⁸ Para. 2.48.
- ⁹ *Id.*
- ¹⁰ *Crime (Sexual Offences) Act, 1980*.
- ¹¹ *Id.*, section 4 (c), amending section 2A of the *Crimes Act, 1958*.
- ¹² *Criminal Law (Rape) Act 1981*, section 10 (1).
- ¹³ Cf. the Fourth Report of the Joint Oireachtas Committee on Women's Rights, *Sexual Violence*, para. 1.3 (1987):
 "The existing Criminal Law (Rape) Act, 1981 ignores the seriousness of other forms of sexual assault, such as forced anal and oral sex, apart from penile penetration, and in so doing it implies that one form of sexual attack is more serious than another. It is important that the gravity of forced sexual penetration through the use of objects is fully recognised and that the protection at present afforded to victims of rape should be extended to the victims of such sexual acts. The members agree that there is no logic in keeping as separate the treatment by the law of offences that reflect a correspondingly degraded level of sexual violence against women."
 So far as there is criticism of the existing law in this passage, it appears to refer to the fact that forms of sexual assault other than rape are subject to a less severe penalty.
- ¹⁴ Law Reform Commission of Canada, W.P. No. 22, p.
- ¹⁵ In a supporting footnote, Scutt states:
 "From the viewpoint of 'people knowing she was no longer a virgin due to sexual attack' etc., it would hardly be likely that, were outsiders to comment on the attack in such a manner, they would draw a distinction between types of penetration. Neither would it seem valid to state that a woman could draw comfort from the fact that she had been penetrated anally, and therefore was still a virgin in the technical sense of the hymen not being ruptured."
- ¹⁶ Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 *Austral. L.J.* 615 (1976).
- ¹⁷ *Report of the Advisory Group on the Law of Rape*, para. 80 (1975).
- ¹⁸ Para. 45, in which the Committee identified the risk of pregnancy as an "important distinguishing characteristic of rape."
- ¹⁹ Para. 2.47.
- ²⁰ *Id.*, para. 2.46.
- ²¹ *Id.*
- ²² *Id.*, para. 2.47. The Committee added, however, that it was necessary to ensure that the penalties for the other forms of sexual penetration were adequate - an important issue which, as we have stressed, is separate from that of nomenclature.
- ²³ Cf. *Commonwealth v Goldenberg*, 155 N.E. 2d 187, at 191-192 (Mass., 1959):
 "The essence of the crime is not the fact of intercourse but the injury and outrage to the feelings of the woman by the forceful penetration of her person. It is a crime radically different from assault and battery although the latter offence is incidental to it."
- ²⁴ This is a matter of speculation as the question has not been empirically studied in this country.
- ²⁵ *Acts Amendment (Sexual Assaults) Act, 1985*.
- ²⁶ See C. Boyle, *Sexual Assault* (1874), Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 46.
- ²⁷ Section 246.1
- ²⁸ Section 246.2
- ²⁹ Section 246.3
- ³⁰ See also Scutt, *op. cit.*
- ³¹ See Barrington, *Standing in the Shoes of the Rape Victim: Has the Law Gone Too Far?*, [1986] N.Z.L.J. 408.
- ³² Section 2 of the 1985 Act, replacing section 128 of the 1961 Act by a new section 128 (1).

- ³³ *Id.*, new section 128 (2). This approach is contrary to that favoured by the Criminal Law Reform Committee in its Report, *The Decision in D.P.P. v Morgan: Aspects of the Law of Rape*, published in 1980.
- ³⁴ Wash. Rev. Code, s.9.79. 140 (1) (b). See Tuft, *Comment: Washington's Attempt to View Sexual Assault As More Than a Violation of the Moral Woman - The Revision of the Rape Laws*, 11 Gonzaga L. Rev. 145, at 146 (1975).
- ³⁵ H.B. 1042 (original version), section 18-3-401 (5) (9), cited and analysed by Schneider, *Note: Sexual Assault New Reform in Colorado - An Analysis of House Bill 1042*, 53 Denver L.J. 349, at 349-356 (1976).
- ³⁶ Section 520A (1) of the legislation. See Scutt, *op. cit.*
- ³⁷ *Criminal Law Consolidation Act Amendment Act, 1976*, section 3.
- ³⁸ See the judgment of Henchy J in the State (*McEvitt*) & Others v District Justice Delap, [1981] I.R. 125.
- ³⁹ E.g. Expressions such as "wounding" "grievous bodily harm," "actual bodily harm" contained in Sections 18, 20 and 47 of the *Offences Against the Person Act, 1861*.
- ⁴⁰ Cf. C. Boyle, *supra*, 59-60.
- ⁴¹ 73 C.A.R. 344 (1981).
- ⁴² See Anon., *Comment, The Marital Rape Exemption*, 52, N.Y.U.L. Rev. 306, at 311-313 (1977), Klatt, *Note, Rape in Marriage: The Law in Texas and the Need for Reform*, 32 Baylor L. Rev. 109, at 113-114 (1980), Freeman, "But If You Can't Rape Your Wife, Who/What Can You Rape?": *The Marital Rape Exemption Re-Examined*, 15 Fam. L. Q. 1, at 14-17 (1981), Mitra, "For She Has No Right or Power to Refuse the Consent," [1979] *Crim. L. Rev.* 558, at 562-563, Menon, *The Law of Rape and Criminal Law Administration with Special Reference to the Commonwealth Caribbean*, 32 Int. & Comp. L.Q. 832, at 848-849 (1983).
- ⁴³ Cf. eg., Anon., *Comment: The Marital Rape Exemption*, 52, N.Y.U.L. Rev. 306, at 311-312 (1977), Klatt, *supra*, at 114, Freeman, *supra*, at 14-15, Mitra, *supra*, at 562-563.
- ⁴⁴ See Cobb & Schauer, *Note, Michigan's Criminal Sexual Assault Law*, 8 U. Mich. J.L. Rev. 217, at 233 (1974), *Comment, Rape and Battery Between Husband and Wife*, 6 Stan. L. Rev. 719, at 725 (1954), Drucker, *Comment, The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 Women's Rts L. Repr. 181, (1977), Sasko & Sesek, *Rape Reform Legislation: Is It The Solution?*, 24 Cleveland St. L. Rev. 463, at 473 (1975), Williams, *Marital Rape - Time for Reform*, 134 N.L.J. 26, at 26-27 (1984), Klatt, *Note, Rape in Marriage: The Law in Texas and the Need for Reform*, 32 Baylor L. Rev. 109, at 114-115 (1980), Menon *The Law of Rape and Criminal Law Administration with Special Reference to the Commonwealth Caribbean*, 32, Int. & Comp. L.Q. 832, at 850 (1983), Blay-Cohen & Coster, *Comment, Marital Rape in California: For Better or For Worse*, 8 San Fernando Valley L. Rev. 239, at 251-252 (1980).
- ⁴⁵ Paras. 2.67-2.68.
- ⁴⁶ *Married Women's Status Act, 1957*, section 9 (3). See A. Shatter, *op. cit.*, 182. Cf. W. Binchy, *A Casebook on Family Law*, 189 (1984).
- ⁴⁷ Cf. Scutt, *Consent in Rape: The Problem of the Marriage Contract*, 3, Monash L. Rev. 255, at 270-272 (1977), arguing against the marital rape exemption on account of the paradox created by the fact that section 30 (4) of Britain's *Theft Act, 1968* provides for the prosecution for theft by one spouse of another's property, with no qualification such as appears in section 9 (3) of our 1957 Act.
- ⁴⁸ Cf. Hilf, *Marital Privacy and Spousal Rape*, 16 New Eng. L. Rev. 31, at 34 (1980):
 "When two people are able, on their own, to compromise difference and resolve problems, a greater mutual respect and bond might be expected to result than if the couple had resort to the legal system of resolution. Allowing access to the criminal justice system for every type of marital dispute will discourage resolution by the spouses and will make their ultimate reconciliation more difficult.
- ⁴⁹ Cf. Freeman, *supra*, at 19-20, Anon., *Comment: The Marital Rape Exemption*, 52 N.Y.U.L. Rev. 306, at 315-316 (1977), Klatt, *supra*, at 115, Blay-Cohen & Coster, *supra*, at 246-247.
- ⁵⁰ It is useful to quote from the speech of the Minister of State at the Department of Justice on the Second Stage of the *Criminal Law (Rape) Bill, 1980*:
 "[T]here is a vast difference between saying that the law does not in the normal course allow a husband to be convicted of the specific crime of rape and saying or implying that the law permits a husband to use violence against his wife in order to force her to have sexual intercourse with him. No doubt many Deputies will have seen in newspaper articles or letters some rather horrifying stories of this nature - husbands behaving in outrageously brutal fashion, sometimes before their children. The difficulty about such allegations is that they tend to be made in a way that implies that there is no legal action that can be taken and this, in turn, can mislead women as to their legal position. Of course the law permits legal charges to be brought in such cases - not charges of rape but charges of assault of one kind or another depending on the facts. And in the course of any such legal proceedings, evidence of all the facts can be given.

Whether in any particular case it is in the best interests of the woman or of any children of the marriage that charges of assault should be brought as well as or in preference to reliance on other measures is another matter and one that may depend on many circumstances. But the impression should not get around that the law is indifferent to the kind of brutal situation that we see portrayed. It is not. To imply otherwise is misleading and, what is more important, misleading in a way that can have serious consequences for any woman who may be at risk in such a situation." 323 Dáil Debs., col. 1455 (4 November 1980).

- ⁵¹ Cf. *id.*, 132-133.
- ⁵² Cf. B McMahon & W Binchy, *Irish Law of Torts*, 130-132 (1981).
- ⁵³ Cf. *id.*, 133-134, 169-172.
- ⁵⁴ Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 Can. U.S.L.J. 173, at 179 (1984).
- ⁵⁵ *Id.*
- ⁵⁶ English, *The Husband Who Rapes His Wife*, 126 New L.J. 1223, at 1225 (1976).
- ⁵⁷ Warren Young: *Rape Study, A Discussion of Law and Practice*.
- ⁵⁸ Geis, *Rape in Marriage: Law and Law Reform in England, The United States and Sweden*, 6 Adelaide L. Rev. 284 at 292. See, e.g. *State v Haines*, 25 So. 372 (La. 1889), *Frazier v State*, 86 S.W. 754 (Tex., 1905).
- ⁵⁹ Geis, *supra*, at 292.
- ⁶⁰ Cf. *Frazier v State, supra*.
- ⁶¹ 372 A. 2d 386 (1977).
- ⁶² 64 N.Y. 2d 152, 474 N.E. 2d 562 (1984), *cert. den.* 105 S. Ct. 2029 (1985), analysed by V.L.C., *Note*, 24 J. Fam. L. 87 (1985), D'Amour, *Note*, 19 Suffolk U.L. Rev. 1039 (1985).
- ⁶³ 225 Ga. 151, 336 S.E. 2d 221 (1985), noted by Duffy, 2 Detroit College of L. Rev. 599 (1986).
- ⁶⁴ Ga. Code Ann. s. 26-2001 (1978), to the effect that "[a] person commits rape when he has carnal knowledge of a female forcibly and against her will."
- ⁶⁵ 632 P. 2d 1025, at 1026 (Colo. Sup. Ct., 1981).
- ⁶⁶ D'Amour, *Note*, 19 Suffolk U.L. Rev. d1039, at 1042 (1985). See also Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 Can. - U.S. L. J. 173, at 180, fn. 62 (1984), citing a news report quoting Joanne Schulman of the National Centre on Women and Family Law as stating that as of June 1981 only 23 cases of spousal rape had gone to trial in the United States: *Rape of Spouse Legal in Canada, Most U.S. States*, Toronto Globe & Mail, 3 June 1981, p. 14, col. 1. See generally Gonring, *Note: Spousal Exemption to Rape*, 65 Marq. L. Rev. 120, at 133-137.
- ⁶⁷ Florida, Kansas, Massachusetts, Nebraska, New Jersey, Oregon, Vermont and Wisconsin; see *Anon.*, *Note: To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 Harv. L. Rev. 1255, at 1259, fn. 28 (1986).
- ⁶⁸ *Id.*, referring also to legislation in Connecticut, Delaware, Iowa, Pennsylvania, Washington, West Virginia and Wyoming. See further Di Carlo, *Note, the Marital Rape Exemption in Pennsylvania: With this Ring...* 86 Dick. L. Rev. 79, at 86-89 (1981), Gonring, *Note: Spousal Exemption to Rape*, 65 Marq. L. Rev. 120, at 136-137 (1981), Schuerman, *Comment: Forcible Rape in Washington - Criminal and Civil Sanctions*, 19 Gonzaga L. Rev. 363, at 373-374 (1984), Blay-Cohen & Coster, *Comment, Marital Rape in California: For Better or For Worse*, 8 San Fernando Valley L. Rev. 239, at 254-261 (1980), Mirabile, *Comment: Rape Laws, Equal Protection, and Privacy Rights*, 54 Tul. L. Rev. 456, at 473 (1980).
- ⁶⁹ *Id.*, at 1259-1260.
- ⁷⁰ *Id.*, at 1259, referring to Indiana, Nevada, Ohio and Tennessee, and mentioning that in four States, Idaho, New Mexico, Oklahoma and Texas, it is sufficient if *either* the spouses were living apart or one spouse had initiated divorce proceedings.
- ⁷¹ *Id.*, referring to Kentucky, Louisiana, Maryland, Missouri, North Carolina, North Dakota, Rhode Island, South Carolina and Utah.
- ⁷² *Id.*, referring to Arizona, Colorado, Maine, Mississippi and Montana.
- ⁷³ *Id.*, at 1260, referring to legislation in Alabama, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Montana, Pennsylvania and West Virginia. See further Clancy, *Equal Protection Considerations of the Spousal Sexual Assault Exclusion*, 16 New Eng. L. Rev. 1, at 16-17 (1980).
- ⁷⁴ Menon, *supra*, at 849. See also Sasko & Seseck, *Rape Reform Legislation: Is It the Solution?*, 24 Cleveland State L. Rev. 463, at 473 (1975).
- ⁷⁵ Cases have, however, been recorded in the reports of husbands raping their wives in front of their children or third parties.
- ⁷⁶ We consider the corroboration requirement in general later in this chapter; *and cf. Mitra*, "...For She Has No Right or Power to Refuse Her Consent," [1979] *Crim. L. Rev.* 558, at 564-565.

⁷⁷ Cf. Klatt, *supra*, at 115-116:

"...[C]riminal offences are defined in terms of proscribed conduct rather than upon the basis of difficulty of proof, and the law does not determine the class of persons to be protected on the basis of the difficulty in gathering evidence and proving that a crime has occurred."

⁷⁸ Cf. Menon, *supra*, at 829-830, *Anon.*, *supra*, at 314, Freeman, *supra*, at 18.19.

⁷⁹ Cf. the Model Penal Code, s. 207.4 Comment 4, Cobb & Schauer, Note, *Michigan's Criminal Sexual Assault Law*, 8 U. Mich. J.L. Reform 217, at 233 (1974).

⁸⁰ Cf. Freeman, *supra*, at 19.

⁸¹ Cf. English, *The Husband Who Rapes His Wife*, 126 N.L.J. 1223, at 1225 (1976).

⁸² Cf. *Anon.*, *supra*, at 314.

⁸³ Cf. Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 Austr. L.J. 615, at 623 (1976), Williams, *Marital Rape - Time for Reform*, 134 N.L.J. 26, at 27 (1984).

⁸⁴ Buddin, *Revision of Sexual Offences Legislation: A Code for New South Wales?*, 2 U.N.S.W.L. Rev., at 129 (1977).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Cf. Klatt, *supra*, at 116, *Anon.*, *supra*, at 314-315, Freeman, *supra*.

⁸⁸ *Pigg*, [1982] 2 All E.R. 591, at 599 (C.A., per Lord Lane CJ). As we have seen, subsequent English decisions have sought to emphasise that, appearances perhaps to the contrary, this formula is an exclusively subjective one.

⁸⁹ [1976] A.C. 182.

⁹⁰ Para. 2.41 of the Report.

⁹¹ It is worth noting that the concept of consent is one with an objective dimension. Thus, even if a woman withheld her consent mentally, but so far as external indicia were concerned, gave a clear manifestation of consent, there being no reason to suspect that she was not consenting, her conduct would legally be regarded as "consent," so that there would be no need to address the question, in separate terms, of the defendant's belief. Cf. *O'Brien v Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (Sup. Jud. Ct., 1891). In some jurisdictions in the United States, the courts have dispensed with a *mens rea* requirement; but they have done so against the background of the requirement that the *actus reus* should involve force, as well as requiring proof of resistance by the victim: cf. *Estrich, Rape*, 95 Yale, L.J. 1087, at 1097-1100 (1986). We have already rejected both of these elements.

⁹² *Report of the Advisory Group on the Law of Rape* (The Heilbron Report) (Cmd. 6352, 1975).

⁹³ Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report: Rape and Other Sexual Offences* (1976).

⁹⁴ Law Reform Commission of Tasmania, *Report and Recommendations for Reducing Harassment and Embarrassment of Complainants in Rape Cases*, para. 7, (1976). A Report published for the Women's Advisor's Office of the Department of the Premier and Cabinet, South Australia did not favour the subjective approach: Naffin, *An Inquiry into the Substantive Law of Rape*, (1984). For criticism, see Goode, *The Mental Element of Rape, the Naffin Report and Other Questions: A Defence of the Common Law*, 9 Crim. L. J. 17 (1985).

⁹⁵ Law Reform Commission (Victoria), *Rape Prosecutions (Court Procedures and Rules of Evidence)* (1976).

⁹⁶ Report of the Criminal Law Reform Committee, *The Decision in D.P.P. v Morgan: Aspects of the Law of Rape* (1980).

⁹⁷ *Crimes Amendment Act (No. 3) 1985*, section 2, inserting a new section 128 (2) into the *Crimes Act 1961*.

⁹⁸ *Correspondence, The Times (London)*, 8 May, 1975, at p. 15, col. 6, quoted by Estrich, *supra*, at 1103.

⁹⁹ Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. Toronto L.J. 75, at 79 (1980). See also H.L.A. Hart, *Punishment and Responsibility*, 152-154 (1968). Professor Estrich's comments (*supra*, at 1103) are also worth recording:

"If inaccuracy or indifference to consent is 'the best that this man can do' because he lacks the capacity to act reasonably, then it might well be unjust and ineffective to punish him for it. But such men will be rare... More common is the case of the man who could have done better but didn't; could have paid attention, but didn't; heard her say no, or saw her tears, but decided to ignore them. Neither justice nor deterrence argues against punishing this man."

¹⁰⁰ Para. 5.1.

¹⁰¹ So far as the onus of proof is concerned, we suspect that, although in legal theory the onus is on the prosecution to show the presence of knowledge or recklessness, the reality is that a defendant asserting an unreasonable belief will have to convince a jury of its existence.

¹⁰² Para. 5.3 of the Report.

- ¹⁰³ P. 41, recommendation no. (6).
- ¹⁰⁴ Cf. Letwin, "Unchaste Character," *Ideology and the California Rape Evidence Laws*, 54 So. Calif. L. Rev. 35 and Williams, *Comment, Rape Reform Legislation and Evidentiary Concerns: The Law in Pennsylvania*, U. Pitts. L. Rev. 955 (1983).
- ¹⁰⁵ Odgers, *Evidence of Sexual History in Sexual Offence Trials*, 11 Syd. L. Rev. 73, at 75-76 (1986).
- ¹⁰⁶ Section 246.6 (2).
- ¹⁰⁷ Section 246.6 (3).
- ¹⁰⁸ Cf. Sasko & Seseck, *Note, Rape Reform: Is It the Solution?*, 24 Clev. St. L. Rev. 463, at 478-480 (1975).
- ¹⁰⁹ Act of August 12, 1974; 1974 Mich. Pub. Acts 266.
- ¹¹⁰ Cf. Fitzgerald, *Note: Evidence - Sexual Assault Victim's Prior Sexual Conduct Admissible if Three Conditions Met*, 67 Marquette L. Rev. 396, at 398-399 (1984).
- ¹¹¹ Cf. U.S. Const. amends VI, XIV, *Pointer v Texas*, 380 U.S. 400 (1965), *Davis v Alaska*, 415 U.S. 308 (1974). See further Doke & Kniffen, *Comment: Can Georgia's Shield Statute Withstand a Constitutional Challenge?*, 36 Mercer L. Rev. 991, at 996-1012 (1985), Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 Wm. & Mary L. Rev. 1 (1976). See also *State v Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980), noted by Kroeschell, 17 Wake Forest L. Rev. 781 (1981), *Commonwealth v Joyce*, 415 N.E. 2d 181 (Mass. Sup. Jud. Ct., 1981), noted by Lambert, 15 Suffolk U. L. Rev. 1023 (1981), *People v McKenna*, 196 Colo. 367, 585 P.2d 275 (1978), *People v Dawsey*, 76 Mich. App. 741, 257 N.W. 2d 236 (1977), *State v McCoy*, 274 S.C. 70, 261 S.E. 2d 159 (1979).
- ¹¹² Cf. David, *Rape Shield Statutes: Legislative Responses to Probative Dangers*, 27 J. of Urban & Contemp. L. 271, at 279 (1984), who adds that this solution "protects the interests of the victim at the expense of those of the accused, by prohibiting the introduction of most evidence that may embarrass the victim." *Id.*, Davis observes (*id.*, at 292) that the Michigan statute "is too inflexible and excludes evidence that could be relevant to the defendant's case... A trial court has no discretion to weigh the evidence and admit potentially probative evidence. The statute also does not admit sexual history evidence to impeach credibility, a prohibition that again may unfairly prejudice the defendant's case."
- ¹¹³ Davis, *supra*, at 279.
- ¹¹⁴ *Id.*
- ¹¹⁵ N.Y. Crim. Proc. Law. s. 60. 42. See further *People v Conyers*, 86 Misc. 2d 754, 382 N.Y.S. 2d 437 (Sup. Ct., 1976).
- ¹¹⁶ Cal. Evid. Code, section 782, 1103. See further Letwin, *supra*, at 39ff., Davis, *supra*, at 280.
- ¹¹⁷ Cf. Davis, *supra*, at 280.
- ¹¹⁸ E.g. Florida: cf. Davis, *supra*, at 282.
- ¹¹⁹ E.g. Georgia: O.C.G.A. sections 24-2-3 cf. Doke & Kniffen, *Comment: Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?*, 36 Mercer L. Rev. 991, at 995, 1004-1008 (1985).
- ¹²⁰ N.C. Gen. Stat. s. 8-58.6 (b).
- ¹²¹ She has discussed her survey in two articles, *Modern Law Review* Vol. 45, Nov. 1982 p. 664 and *Criminal Law Review* Dec. 85 p. 769 and recently in her book *Rape on Trial* (1987).
- ¹²² Cr. Law Rev. (Dec. 1985) 779-80.
- ¹²³ Cr. Law Rev. (Jan. 1984) 14.
- ¹²⁴ Gun (1977) 17 S.A.S.R. 175.
- ¹²⁵ G. D. Woods, *Sexual Assault Law Reforms in New South Wales - A Commentary on the Crime (Sexual Assault) Amendment Act 1981 and Cognat. Act* (Department of the Attorney General and of Justice 1981).
- ¹²⁶ *Evidence - Report on Evidence in Cases of Rape and Other Sexual Offences*, Paper No. 78, Edinburgh H.M.S.O. 1983.
- ¹²⁷ V. Berger, 'Man's trial, woman's tribulation,' *Rape Cases in the Court Room*, Columbia L.R. 1977.
- ¹²⁸ Smith, *Annotation: Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4th 283, at 287 (1980).
- ¹²⁹ 59 Ohio St. 2d 14; 391 N.E. 2d 337 (Ohio Sup. Ct., 1979). See also *People v Blackburn*, 56, Cal. App. Sol 685, 128 Cal. Rpts. 864 (C.A., 2nd District, 1976); *People v Arendo*, 330 N.W. 2d 814 (Mich. Sup. Ct., 1981).
- ¹³⁰ *State of Oregon v Jalo*, 27 Or. App. 845, 557 P. 2d 1357 (1976) following *Davis v Alaska*, 415 U.S. 308 (1974).
- ¹³¹ 558 S.W. 2d 645 (Tenn. Ct. Apps., 1978).
- ¹³² *Id.* at 651.
- ¹³³ *Id.* See also *Commonwealth v Majorana*, 503 Pa. 602, 470 A. 2d 80 (1983); *Commonwealth*

- v Jorgenson*, 512, Pa. 601, 517 A. 2d 1287 (1986); *Commonwealth v Lyons*, 528A, 2d 975 (Pa. Sup. Ct., 1987).
- ¹³⁴ In *People v Mackett*, 365 N.W. 2d 120, at 124-125 (Mich. Sup. Ct., 1984).
- ¹³⁵ *Supra*, p. 57.
- ¹³⁶ 49 C.R. (3d) 78 (Nwfld Sup. Ct., Tr. Div., Steele J 1985).
- ¹³⁷ *Id.*, at 87.
- ¹³⁸ *Id.*
- ¹³⁹ *Id.*
- ¹⁴⁰ *Id.*
- ¹⁴¹ *R. v Le Gallant*, 47 C.R. (3d) 170 (B.C. Sup. Ct., McLachlin J 1985).
- ¹⁴² *Reg. v Oquatag*, 18 C.C.C. (3d) 440 N.W.T. Sup. Ct., Marshall J (1985).
- ¹⁴³ *Re Gayine and the Queen*, Ont. Sup. Ct., Galligan J 22 Nov., 1985.
- ¹⁴⁴ 28 C.C.L. (3d) 396 (N.B. Cf. of Q.B., Deschênes J 1986).
- ¹⁴⁵ 40 C.R. (3d) 41 (Man. Q.B. 1984) appealed on another point, 12 C.C.C. (3d) 523 (Man. C.A., 1984).
- ¹⁴⁶ [1976] I.R. 325.
- ¹⁴⁷ *Id.* at 349.
- ¹⁴⁸ *Supra*, p. 57.
- ¹⁴⁹ *Id.*
- ¹⁵⁰ See generally O'Connor, *The Mandatory Warning Requirement in Respect of Complainants in Sexual Cases in Irish Law*, Ir. Jur. 43 (1985), Ludwign, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 Brooklyn L. Rev. 378 (1970), Pratt, *The Demise of the Corroboration Requirement - Its History in Georgia Rape Law*, 26 Emory L.J. 805 (1977), Anon., *Note, The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365 (1972), Anon., *Note, The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. Pa. L. Rev. 458 (1970), Arabian, *The Cautionary Instruction in Sex Cases: A Lingering Insult*, 10 Sw. L. Rev. 585 (1978), Eisenberg, *Abolishing Cautionary Instructions in Sex Offense Cases: People v Rincon-Pineda*, 12 Crim. L. Bull. 58 (1976), Hibeby, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 Am. Crim. L. Rev. 309, at 310-321 (1973), Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 Fordham L. Rev. 263 (1971), Goldstein, *Comment Corroboration in Rape Cases in New York - A Half Step Forward*, 37 Alb. L. Rev. 306 (1973).
- ¹⁵¹ The rule extends beyond rape to other sexual offences. Our present discussion is limited to rape.
- ¹⁵² Anon., *Note, The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. Pa. L. Rev. 458, at 460 (1970) (footnote reference omitted). See also Puttkamer, *Consent in Rape*, 19 Ill. L. Rev. 410, at 422 (1925), *Roberts v Smith*, 106 Neb. 362, at 367, 183 N.W. 555, at 557 (1921), *State v Connelly*, 57 Minn. 482, at 486, 59 N.W. 479, at 481 (1894).
- ¹⁵³ Cf. Anon., *Note, The Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, at 1380 (1972), LeGrand, *Comment, Rape and Rape Laws: Sexism in Society and Law*, 61 Calif. L.Rev. 919, at 932 (1973).
- ¹⁵⁴ Anon., 81 Yale L.J., at 1380.
- ¹⁵⁵ *Id.* See also O' Connor, *supra*, at 59-60
- ¹⁵⁶ Anon., *Note, The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. Pa. L.Rev. 458, at 461 (1970) (footnote reference omitted).
- ¹⁵⁷ Cf. Anon., *Note, The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, at 1384-1385 (1972).
- ¹⁵⁸ *Id.*, at 1373. See also the Victoria Law Reform Commissioner's Report No. 5, *Rape Prosecutions (Court Procedures and Rules of Evidence)*, Appendix B, pp 43-44 (1976). A study carried out in four selected Police Districts in Victoria showed that 50% of rape complaints were considered to be unfounded: *id.*, Appendix C, pp. 46-47. In a Scottish study, of 196 reported incidents of sexual assault, 20 were categorised as groundless, the police regarding 11 of these as completely untrue: Chambers & Millar, *Investigating Sexual Assault*, (Scottish Office, Central Research Unit, 1983), cited by O'Connor *supra* at 58, who states:
 "The Scottish and Australian studies undoubtedly suggest that false allegations are made. However, what is not indicated is the percentage of false allegations which escape pre-trial detection. There is no proof that the number of spurious charges which result in trials is in any way significant. Again, what has to be borne in mind is that the criteria used by the police, whatever they may be, for discounting allegations of rape, and other cases of sexual assault, may exclude cases where sexual offences have actually been committed. The criteria may thus be unduly biased in favour of the accused."
- Of course no comfort for those wrongfully convicted should be derived from proof that others, who were in fact guilty, had been acquitted. For a scholarly analysis of the historical background to this argument, see Simpson, *The 'Blackmail Myth' and the Prosecution of*

- rape and its Attempt in 18th Century London: The Creation of a Legal Tradition*, 11 J. of Crim. L. & Criminol. 101 (1976).
- ¹⁵⁹ Anon., 81 Yale L.J., at 1385. See also the Law Reform Commission of Victoria's Discussion Paper No. 5, *Rape and Allied Offences: Procedure and Evidence*, paras. 43-44 (1987), the Law Reform Commission of Tasmania's Report No. 21, *Report and Recommendations on the Law and Practice relating to Corroboration, with Particular Reference to the Evidence of Treason, Bigamy, Perjury, Forgery, Child Witnesses, Victims in Sex Cases, and Accomplices*, pp. 9-10 (1978) and the Law Reform Commission of Tasmania's Report No. 31, *Report and Recommendations on Rape and Sexual Offences*, para. 90 (1982).
- ¹⁶⁰ Anon., Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, at 1384 (1972).
- ¹⁶¹ Modern Law Review, vol. 45, No. 4, 417.
- ¹⁶² 14 Cal. 3d 864, 538 P. 2d 247, 123 Cal. Rptr. 119 (1975), analysed by Eisenberg, *Abolishing Cautionary Instructions in Sex Offence Cases: People v Rincon-Pineda*, 12 Crim. L. Bull. 58 (1976), Jorgensen, Note, 16 Santa Clara L. Rev. 691 (1976), Anon., Note, 14 Fordham Urban L.J. 419 (1976).
- ¹⁶³ 14 Cal. 3d, at 878, 538 P.2d at 257, 123 Cal. Rptr., at 129.
- ¹⁶⁴ *Id.*
- ¹⁶⁵ Final Report, vol. 5, ch. 9, para. 55 (1977) paras 53-4.
- ¹⁶⁶ Para. 6.2 of the Report.
- ¹⁶⁷ *Id.*
- ¹⁶⁸ Para. 2.100 of the Report.
- ¹⁶⁹ Final Report, vol. 5, ch. 9, para. 7 (1977).
- ¹⁷⁰ Law Reform Commission of Victoria, Discussion Paper No. 5 *Rape and Allied Offences: Procedure and Evidence*, para. 32 (1987).
- ¹⁷¹ See Weidner & Griffitt, *Rape: A Sexual Stigma?*, 51 J. of Personality, 153 (1983). Cf. *Quigley v Creation Ltd.*, [1971] I.R. 269, at 272 (Sup. Ct., per Waish J) and contrast M. McDonald, *Defamation Law in Ireland*, 91, (1987).
- ¹⁷² Para. 153.
- ¹⁷³ Para. 159.
- ¹⁷⁴ *Id.*
- ¹⁷⁵ *Id.*, para. 160.
- ¹⁷⁶ *Id.*, para. 162.
- ¹⁷⁷ Section 7 (4) of the 1981 Act.
- ¹⁷⁸ Para. 4.1
- ¹⁷⁹ *Id.*
- ¹⁸⁰ 15th Report, para. 2.92
- ¹⁸¹ *Id.*, para. 2.93
- ¹⁸² *Id.*
- ¹⁸³ Para. 7.1
- ¹⁸⁴ *Scott v Scott*, [1913] A.C. 417, at 463, (per Lord Atkinson).
- ¹⁸⁵ Criminal Law and Penal Methods Reform Committee of South Australia, Special Report, *Rape and Other Sexual Offences*, para. 15.4 (1976).
- ¹⁸⁶ Discussion Paper No. 5, *Rape and Allied Offences: Procedure and Evidence*, para. 37 (1987).
- ¹⁸⁷ Para. 10.1 of the Report.
- ¹⁸⁸ In a recent case of *Edward Tiernan*, the Court of Criminal Appeal dismissed Tiernan's appeal against a sentence of 21 years penal servitude imposed by the Dublin Circuit Court after he pleaded guilty to rape. The Attorney General has certified under Section 29 of the *Courts of Justice Act, 1924* that the decision involves a point of law of exceptional public importance, viz., the guidelines which the Courts should apply in relation to sentences for the crime of rape. The Supreme Court has not yet heard the case.
- ¹⁸⁹ Discussion Paper No. 5, para. 19 (1987)
- ¹⁹⁰ Cf. the Rape Crisis Centre's recommendation that "in cases where the assailant has been apprehended at an early date, a maximum time limit of four months from the date of the incident be placed on the hearing of rape/sexual assault cases." *Submission to the Joint Oireachtas Committee*, p. 22.
- ¹⁹¹ Para. 8.1.
- ¹⁹² *Id.*
- ¹⁹³ *Id.*
- ¹⁹⁴ Para. 180
- ¹⁹⁵ Para. 13. The Commission offered no policy arguments in favour of the proposed change.

The Commission stated that they "would... prefer to see women form at least half of the jurors in rape cases." *Id.* Again, no explanation for this proposal was preferred.

¹⁹⁶ Report No. 31, para. 102 (a).

¹⁹⁷ *Id.*, para. 102 (b).

¹⁹⁸ Criminal Law and Penal Methods Reform Committee of South Australia, Special Report, *Rape and Other Sexual Offences*, para. 17 (1976).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Citing Smith, *The Heilbron Report*, [1976] *Crim. L. Rev.*, at 106.

²⁰³ Report No. 5, *Rape Prosecutions (Court Procedures and Rules of Evidence)*, para. 85 (1976).

²⁰⁴ *Id.*, para. 87.

²⁰⁵ *Id.*, para. 88.

²⁰⁶ Final Report, vol. 5, ch. 9, para. 64 (1977).

²⁰⁷ *Id.*, para. 63.

²⁰⁸ Recommendation No. 11. The Conference was organised by the Australian Institute of Criminology, the Tasmanian Law Reform Commission and the University of Tasmania Law School: See J. Scutt, ed., *Rape Law Reform: A Collection of Conference Papers*, xxv (1980).

²⁰⁹ Cf. paras. 2.1-2.3 of the Report where these recommendations are made in greater detail. The Report states in para. 2.1 that "[a]part from informing the woman of her right to be examined medically, the members agreed that she should also be given the name, address and phone number of a social worker, or perhaps even the Rape Crisis Centre." This agreement is not referred to in the Recommendations on Rape/Serious Sexual Assault at pp. 40-42.

CHAPTER 4: SUMMARY OF PROVISIONAL CONCLUSIONS AND RECOMMENDATIONS

1. The presumption of incapacity of boys under the age of 14 in prosecutions for offences involving sexual intercourse should be abolished: para. 44.
2. The offence of rape should retain the name "rape." The definition of the offence of rape should not be extended to include other forms of sexual assault: para. 56.
3. Two new offences - sexual assault and aggravated sexual assault - should replace the present offence of indecent assault: para. 57.
4. The new offence of sexual assault should encompass the less serious sexual assaults. Like indecent assault, it should be undefined. It should be an indictable offence but should only be prosecutable on indictment at the election of the prosecution. The maximum penalty on indictment for sexual assault should be five years. The offence should encompass assaults on men and women and there should be no difference in procedure whatever the sex of the victim: para. 58.
5. The new offence of aggravated sexual assault should be generally defined although certain acts could be specifically designated as aggravated sexual assaults. The offence would encompass the more serious forms of sexual assaults. The offence would carry the same sentence as rape, i.e. life imprisonment. The offence would apply equally to assaults on men and women without any difference in procedure: paras. 59-61.
6. All the procedural provisions of the *Criminal Law (Rape) Act 1981* relating to such matters as the previous sexual history of the complainant and the anonymity of the complainant should apply to cases of aggravated sexual assault and sexual assault: para. 61.
7. The definition of the offence of rape in section 2 of the 1981 Act should remain unchanged: paras. 62-64, 75-82.

8. Legislation should remove the marital exemption in cases of rape: para. 65-74.
9. Section 3 (1) of the 1981 Act (which requires an application by the accused to the court before questions can be asked concerning the previous sexual history of the complainant) should be amended so as to require an application under it in respect of questions relating to sexual experience of a complainant with the accused: para. 96.
10. The present rules as to the anonymity of the complainant should be retained but should be extended to prosecutions for all sexual offences: paras. 111-114.
11. The protection of anonymity should be removed from defendants but the court should retain a residual discretion to prohibit publication of the name of the defendant where it might lead to identification of the complainant: paras. 115-116.
12. Prosecutions for rape and aggravated sexual assault should be tried in the Central Criminal Court: para. 117.
13. There should be a change requiring that rape proceedings should be tried otherwise than in public. To this general principle there should be four exceptions. Firstly, provision should be made permitting the presence of a limited number of family members and friends of the complainant, as well as of the accused. Secondly, members of the media should be permitted to attend and report the case. Thirdly, a member of the legal profession should be permitted to attend and report any aspect of the case of legal relevance. Fourthly, in particular cases, the judge should be empowered to permit the attendance of persons carrying out research of a criminological or other scientific nature. In all four cases, the present restrictions in respect of applications as to the admissibility of evidence regarding the sexual experience of the complainant would continue to apply. Similarly, the rules relating to the anonymity of the complainant and, in the court's discretion, of the accused, would continue to apply; para. 118.
14. There should be express statutory provision enabling a judge to order the accused on conviction to pay compensation to the victim in addition to any other penalty imposed: para. 121.
15. Time limits for rape prosecutions should not be provided by law: para. 122.
16. There should be no change in the law relating to the composition of juries: para. 125.
17. Section 4 of the *Criminal Law Amendment Act, 1935*, should be amended by replacing expressions such as "idiot" and "imbecile" with expressions more appropriate to describing the mentally handicapped and incapacitated: para. 126.
18. Certain administrative changes should be made designed to alleviate the distress of complainants in cases of sexual offences: para. 127.

19. In addition to arriving at the above conclusions, the Commission investigated a number of issues on which it is not yet prepared to reach conclusions. In these cases the Paper sets out the major options for reform. These matters include:

- (a) Whether further restrictions should be placed on the admission of evidence relating to the complainant's previous sexual history: paras. 83-95.
- (b) Whether the rule, which requires a judge in a trial of a sexual offence to warn the jury of the danger of convicting on the basis of the complainant's uncorroborated evidence, should be changed: paras. 97-103.
- (c) Whether the complainant in a trial of a sexual offence should be entitled to separate legal representation: paras. 104-110.

APPENDIX

COMPOSITION OF JURY IN RAPE TRIALS 1979-1986

Year 1979 and 1980	Number of Cases		Number of female jurors per jury
	6	x	0
	6	x	2
	3	x	3
	1	x	4
	3	x	5
	4	x	6
	Total 23 cases		

Females as a percentage of total jurors 23%

1981	Number of Cases		Number of female jurors per jury
	1	x	0
	2	x	1
	3	x	2
	3	x	3
	2	x	4
	1	x	5
	1	x	6
	Total 13 23%		

1982	Number of Cases		Number of female jurors per jury
	1	x	0
	1	x	1
	3	x	2
	5	x	3
	Total 10 18%		

1983	Number of Cases		Number of female jurors per jury
	2	x	0
	1	x	1
	1	x	2
	1	x	3
	1	x	4
	3	x	5
	1	x	6
	4	x	7
	1	x	8
	1	x	10
	Total 16 40%		

1984	Number of Cases		Number of female jurors per jury
	1	x	1
	2	x	2
	1	x	3
	1	x	5
	3	x	8
	1	x	11
	Total 9		
	44%		
1985	Number of cases		Number of female jurors per jury
	1	x	1
	1	x	2
	2	x	3
	1	x	4
	1	x	5
	1	x	7
	1	x	10
	Total 8		
	37%		
1986	Number of Cases		Number of female jurors per jury
	3	x	2
	3	x	4
	1	x	5
	2	x	7
	Total 9		
	34%		

COMPOSITION OF JURIES IN RAPE TRIALS 1979-1986

Year	JURY		Guilty	VERDICT	
	Men	Women		Not Guilty	Other
1979-1980					
(6)	12	0	2	1	1 attempted rape, 1 N.G. by direction, 1 nolle prosequi
(6)	10	2	4	2	
(3)	9	3	0	3	
(1)	8	4	1	0	
(3)	7	5	1	1	1 indecent assault
(4)	6	6	1	3	
1981					
(1)	12	0	0	1	
(2)	11	1	0	2	
(3)	10	2	0	2	1 attempted rape
(3)	9	3	0	0	2 jury disagreed, 1 attempted rape
(2)	8	4	0	0	N.G. by direction, 1 jury disagreed
(1)	7	5	0	1	
(1)	6	6	0	1	
1982					
(1)	12	0	0	0	1 jury disagreed
(1)	11	1	0	0	1 N.G. by direction
(3)	10	2	0	1	1 N.G. by direction+ 1 guilty assault
(5)	9	3	2	2	1 jury disagreed
1983					
(2)	12	0	0	1	1 indecent assault
(1)	11	1	0	1	
(1)	10	2	0	1	
(1)	9	3	1	0	
(1)	8	4	1	0	
(3)	7	5	1	1	1 attempted carnal knowledge and indecent assault
(1)	6	6	1	0	
(4)	5	7	3	1	
(1)	4	8	1	0	
(1)	2	10	0	1	
1984					
(1)	11	1	0	1	
(2)	10	2	1	0	1 jury disagreed
(1)	9	3	1	0	
(1)	7	5	0	1	
(3)	4	8	0	3	
(1)	1	11	0	0	1 N.G. by direction

1985					
(1)	10	2	0	0	1 N.G. by direction
(1)	10	1	1	0	
(2)	9	3	0	2	
(1)	8	4	1	0	
(1)	7	5	0	1	
(1)	5	7	1	0	
(1)	2	10	0	0	1 N.G. by direction
1986					
(3)	10	2	2	1	
(3)	8	4	0	2	1 jury disagreed
(1)	7	5	0	1	
(2)	5	7	0	2	

