

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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RAPE AND ALLIED OFFENCES

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CHAPTER 1: INTRODUCTION

1. On the 6th March, 1987, the then Attorney General, 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.

2. On the 1st December 1987, the Commission published a Consultation Paper on the Law of Rape. This Paper set out the matters which, in the opinion of the Commission, merited examination. The results of the Commission's researches into all the relevant aspects of the law in this and other jurisdictions were fully set out. The Paper canvassed in detail a number of options for reform and made provisional recommendations for changes in some of these areas.

3. In view of the sensitive nature of the issues involved and the degree of controversy which inevitably surrounds the subject, we considered it desirable that the views of as wide a range as possible of interested sections of the community should be ascertained before we proceeded to formulate our final proposals for reform. To this end, comments were invited from members of the public and the Commission received a number of submissions, written and verbal, in response, from individuals and organisations.

In addition, an all day seminar was held at the Commission's Offices on Saturday, January 30th 1988 at which a wide ranging discussion took place on the more difficult problems posed by the Consultation Paper. A full list of the participants in the seminar and of the persons and organisations who made submissions to us will be found at the end of the Report. Four complainants of sexual

assault were also interviewed by two members of the Commission. The Commission appreciates the co-operation of the Dublin Rape Crisis Centre in arranging these interviews.

4. The Commission wishes to thank all those who made submissions to them and participated in the seminar. Their work was of the greatest value in clarifying the issues and enabling the Commission to present its final proposals for reform.

CHAPTER 2: PROPOSALS FOR REFORM

1. THE MEANING OF RAPE

5. Our provisional conclusion was that the presumption that boys under the age of fourteen years were incapable of committing offences involving sexual intercourse should be abolished. No compelling arguments against this conclusion have been advanced to us and we accordingly adhere to our original recommendation.

(a) Sexual Intercourse

6. In its Consultation Paper, the Commission discussed the criticisms that have been advanced of the present law, which confines "sexual intercourse" within the meaning of section 2(1) of the *Criminal Law (Rape) Act 1981* to penetration of the vagina by the penis. The Commission accepted that penetration of other orifices of the body by the penis or penetration of the vagina by inanimate objects, such as knives or bottles, constituted as serious and degrading a form of sexual assault as the traditionally defined crime of rape. The paramount objectives of the Commission were to ensure that degrading sexual assaults, such as those just mentioned, were described with adequate gravity and attracted the same procedure and penalty as rape itself. Once these objectives were attained, one was dealing essentially with considerations of nomenclature and presentation. The Commission considered that the defects of the present law could be met, in part at least, by ceasing to describe such assaults under the plainly inadequate title of "indecent assault" and also providing that they should attract the same maximum sentence as rape, i.e. life imprisonment. Accordingly, we provisionally proposed the creation of two new crimes, *sexual assault* and *aggravated sexual assault*. The latter could include the acts already referred to in addition to other unspecified forms of serious sexual assault.

The Commission experienced considerably more difficulty in

coming to a conclusion on the question as to whether, in addition, the definition of rape should be extended to include the forms of conduct already referred to. Our tentative conclusion in the Consultation Paper (which was not unanimous) was that a case had not been made out for extending the description "rape" beyond vaginal sexual intercourse, which was the description given to it over the centuries both by the law and the community at large and which recognised the unique feature of rape as distinguished from other forms of sexual assault, namely, the fact that pregnancy might result from the *actus reus*.

7. It was urged that the victims of penetration other than in the vagina or by, for example, knives or bottles rightly saw themselves, and were seen by society, as having been "raped." It was also urged that to treat, for example, the forcible buggery of males as anything other than "rape" was wholly unreal.

The supporters of this view said that it was the violation of the bodily integrity of the victim which should be the distinguishing feature of rape as a crime and that victims of such assaults would feel psychologically vindicated by a conviction for rape rather than for indecent assault or some other offence. Psychological reassurance of this nature, it was urged, was a legitimate function of the criminal law additional to its primary function of punishing the guilty. It was also urged that the offence of rape should be clearly categorised as a "gender neutral" offence.

8. It is necessary at the outset to restate the principal approaches which appear to be open.

- (1) The present law could be left unchanged. This confines rape to non-consensual vaginal intercourse, the maximum sentence for which is life imprisonment, and treats all other forms of sexual assault as "indecent assault," the maximum sentence for which is ten years imprisonment.
- (2) The existing definition of rape could be retained, but the description "indecent assault" could be replaced by the description "sexual assault" and the maximum sentence increased to life imprisonment.
- (3) The existing definition of rape could be retained and the present offence of "indecent assault" replaced by two new offences, aggravated sexual assault and sexual assault, the former of which would carry the same maximum sentence as rape. This was the course provisionally preferred by the Commission in its Consultation Paper.
- (4) Rape could be redefined by statute so as to include other forms of non-consensual penetration. At the same time, the two new offences of aggravated sexual assault and

sexual assault would be created, the former carrying a maximum sentence of life imprisonment, to accommodate other forms of degrading sexual assault sufficiently serious to be equated with rape, but not involving bodily penetration. This was the approach favoured by the majority of those who made submissions to the Commission and participated in the Seminar.

- (5) A new generic offence called "sexual violation" or "sexual assault" could be created, of which rape would be a subspecies. This approach has been adopted in some overseas legislation, but was the subject of little discussion in the submissions advanced to the Commission. It could, however, accommodate an extended definition of "rape" in the same manner as in (4) and, accordingly, it can be assumed that it would probably commend itself to those in favour of that approach.
- (6) The term "rape" could be dropped from the law entirely and a new offence of "sexual violation" or "sexual assault" created which in turn would be divided into categories reflecting the specific nature of the crime charged. This has been the solution favoured in a number of overseas jurisdictions, including Canada, Western Australia and New South Wales. This approach was the subject of little discussion in the various submissions or at the Seminar, but has much to commend it, providing as it does a consistent and coherent approach to sexual offences which gives proper weight to the element of assault and enables a flexible response to be achieved to varieties of sexual assault.

9. All of these proposals, with the exception of (1), necessitate some changes in the definition of either "rape" or "indecent assault" or both. The advantages of leaving the present law unchanged, where it has not been demonstrated that it is failing significantly to achieve its primary object, should not be overlooked. In particular, it may be observed that the present description of "indecent assault" is relatively well understood and has attracted a body of useful decisions. Moreover, the number of cases in which a sentence in excess of ten years for assaults of an exclusively sexual nature, other than rape, would be justified is likely to be small. Giving due weight, however, to the strong arguments for leaving the present law unchanged where it is fulfilling its purpose, the Commission remains of the view that anachronistic descriptions of crime which do not accord with common usage should preferably not be retained by the law. In addition, however narrow the range of cases of sexual assault other than rape which justify a sentence in excess of ten years may be, the law should nonetheless accommodate them. Accordingly, it adheres to the view that the minimum change required in the

present law is that indicated in its Consultation Paper, i.e. the approach at para. 8 (3).

The more difficult question is as to whether "rape" should be redefined by statute. The Commission has been unable to reach a unanimous conclusion on this matter: what follows represents the view of a majority of the Commission.

10. The arguments in favour of broadening the definition of rape begin with dissatisfaction about its present definition. The main objection is that rape, when confined to non-consensual vaginal intercourse, arbitrarily selects for special classification a form of sexual assault which is no more distinctive than other similarly serious forms of sexual assault which are grouped together within a single offence. The opposing argument is that vaginal intercourse is different, because it uniquely may, given certain conditions, result in conception. The counter to this is that non-consensual vaginal intercourse remains rape even in cases where there is no possibility of conception and that conception may in fact result from other forms of assault, such as forced artificial insemination.

Those who do not accept that forced vaginal intercourse is a particularly distinctive form of sexual assault may conclude that its continuation as a separate offence reflects at best an unwanted paternalism towards women. Many regard it as a legitimate task of law reform to rid the law of features which are unnecessarily sex specific, particularly where those features have historical roots in the common law's proprietary or paternalistic attitudes towards women. As the Law Reform Commission of Victoria points out in its 1987 Report on Rape and Allied Offences.

"The modern emphasis is not upon the protection of virginity, the risk of pregnancy or disease, or the defilement of another man's wife or daughter, but rather upon providing the appropriate level of protection for the sexual autonomy of men and women."¹

The present definition of rape, because of its narrowness, may occasionally lead to difficulty in prosecutions, particularly in relation to attempts, as pointed out in our Consultation Paper.

11. Much of the difficulty arises from a disagreement as to whether the common usage of the word "rape" is different from its legal definition. Clearly, the Commission is not in a position to arrive at an unqualified conclusion on this matter. It must, however, attach due weight to the large number of submissions which have suggested that current usage in Ireland is broader than the legal definition. Of the 28 submissions in writing received by the Commission at least 19 were in favour of extending the definition of rape. They included submissions from:

(a) The Joint Oireachtas Committee on Womens' Rights;

- (b) Representatives of leading womens' associations, such as the ICA;
- (c) Representatives of professional associations, such as the Irish Medical Association;
- (d) Trade Unions, such as the IDATU;
- (e) Rape Crisis Centres.

The general consensus which emerged from those participating in the Seminar organised by the Commission also favoured an extended definition.

We attach considerable significance to the fact that these views are held by persons who are in daily contact with the victims of assaults and who are in a position to observe their use of language. We were also told by them that appropriate labelling of offences contributes to the victim's sense of being vindicated and protected by the State and that any description which seems to understate the gravity of an offence or put it in a lesser category will be resented by the victim. Consistently with such an approach, we have already decided that we should take terminology into account by suggesting that indecent assault is a wholly inappropriate expression to describe the more serious forms of sexual assault.

12. There is some indication of prosecutorial problems and increased plea bargaining in jurisdictions which have chosen to introduce complex gradations within sexual offences. There is little evidence, however, than an expanded definition of rape would necessarily lead to prosecutorial difficulties, provided that the expansion is within reasonably clearly defined limits. It may even be that in some respects prosecution would be facilitated, particularly in respect of attempts. There is no obvious reason why an expanded definition of rape, if limited to a range of reasonably well defined acts, should cause any more prosecutorial problems than those attendant on the present narrowly defined offence. It is true that difficult problems of definition arise, as is illustrated by the differing approaches to the problem in other jurisdictions, but this is not of itself a good reason for declining to implement desirable reforms.

13. An extended definition of rape will necessarily include other forms of forcible penetration of the body, such as buggery. It has been pointed out to us that it might not be desirable to legislate in such a manner as to suggest that such forms of penetration, even when taking place consensually, are necessarily lawful. This would arise where buggery is concerned and (as between males) oral intercourse. This is not, however, a fundamental objection to extending the definition of rape, since rendering such non-consensual action a crime of a specified nature does not have the automatic effect of decriminalising it where it takes place

consensually. We are, of course, in this Report solely addressing the inadequacies of the existing law of sexual assaults and the question on which strongly held and differing views are entertained as to whether homosexual activities between consenting male adults should be decriminalised does not arise.

14. We conclude, accordingly, that the case has been established for extending the definition of rape to encompass any non-consensual sexual penetration of the vagina, anus or mouth of a person by the penis of another person or of the vagina or anus of a person by an inanimate object held or manipulated by another person. An appropriate model is to be found in the definition contained in the *Crimes (Sexual Offences) Act 1980* in Victoria, which is quoted in our Consultation Paper. We think it worth pointing out, in this context, that the Law Reform Commission of Victoria in its Review of Rape and Allied Offences (Discussion Paper No. 2 August 1986) was of opinion that the 1980 reforms were satisfactory, noting that:

“There is something important and distinctive about the sexual penetration of bodily orifices. The common law crime of rape was restricted to vaginal penetration by the penis. In 1980, rape became an offence involving various bodily orifices and the use of objects, as opposed simply to the penis. It also became a gender neutral offence. These changes would appear to have received community support. There have been no obvious signs of opposition.”²

We accordingly recommend that the crime of rape should be defined by statute so as to include non-consensual sexual penetration of the vagina, anus and mouth of a person by the penis of another person or of the vagina or anus of a person by an inanimate object held or manipulated by another person and that in this form the crime should be capable of being committed against men and women.

15. The Commission remains of the view that it cannot be assumed that every form of serious sexual assault would necessarily be embraced by even as comprehensive a definition as that we have recommended in the preceding paragraph. Accordingly, we adhere to our provisional recommendation that the existing offence of indecent assault should be abolished and replaced by two new offences of sexual assault and aggravated sexual assault. Legislation should accordingly provide 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 accused has with him a weapon of offence, or by a person in a relationship of authority over the victim.

The offence should carry the same maximum sentence as rape,

i.e. life imprisonment, and should apply equally to assaults on men and women without any difference in procedure.

The offence of sexual assault should encompass the less serious sexual assaults and 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 assaults should be five years. The offence should apply equally to assaults on men and women without any difference in procedure.

(b) The Absence of Consent

16. In the Consultation Paper, we said that we were not aware of any problems having arisen as a result of the "non-definition" of consent and that the law should be left as it is.

While no cases have been drawn to our attention in which the present law created serious difficulty, it was represented to us that it was certainly capable of doing so. The Irish Association for Victim Support was strongly of the opinion that the absence of a definition had influenced verdicts. It would be accordingly advantageous if the legislature were to clarify the law so as to put it beyond doubt that consent obtained by force or fraud was not consent. It was urged that there was a real danger of juries equating a failure to offer physical resistance with consent.

17. We think that there is considerable merit in these arguments. As we pointed out in the Consultation Paper, the law has been put beyond doubt by legislation in Western Australia, New Zealand and Canada. We think that the case has been established for making similar provision in this jurisdiction. Accordingly, we recommend that legislation should provide 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.*

(c) Rape Within Marriage

18. In the Consultation Paper, we expressed our doubts as to whether the so-called marital rape exemption existed in Irish law. To the extent that it did, we recommended its abolition. This recommendation was, on the whole, generally welcomed, although some misgivings were expressed as to whether it might not lead to fabricated complaints and unwarranted intrusions in the marital relationship. We are satisfied, however, that our original conclusion

was correct and we accordingly *recommend the abolition of the exemption insofar as it still exists.*

(d) The Mental Element

19. In our Consultation Paper, we discussed at some length the various options that arose in this area. In particular, we discussed the desirability of imposing criminal responsibility in cases where the defendant ought, as a reasonable person, to have been aware that the alleged victim was not consenting to the act of intercourse. This would have meant substituting a purely objective test for the test laid down by section 2(2) of the 1981 Act which represents a compromise between the subjective and objective approaches. We provisionally recommended that the offence of rape should continue to be one resting on knowledge of or recklessness as to the victim's lack of consent and rejected the argument in favour of a test based on negligence. We also rejected the option of introducing, as an offence less serious than rape, the offence of engaging in intercourse with negligence as to the question of the alleged victim's consent.

20. The Consultation Paper did not deal with the difficult question of when drunkenness may afford a defence to a charge of rape and no submissions have been advanced to us on the topic. We are not aware of any recent Irish decisions, but it would appear that in England the law is that in a crime of "basic intent," such as rape, drunkenness affords no defence.³ Under section 2(2) of the 1981 Act, however, rape can also be committed where the accused is "reckless" as to whether the woman is consenting. To the extent that his recklessness is to be determined subjectively - i.e. by reference to *his* appreciation of the risk rather than that of a reasonable person - drunkenness might be thought to afford, in theory at least, a defence. In practice, it would seem that the law is not giving rise to unjustified acquittals on this ground and, since the question of when drunkenness constitutes a defence has implications for the criminal law in general, we think it is better dealt with in a wider context than the present.⁴

21. There has been, on the whole, little dissent from our provisional findings on this topic. We have not been persuaded by any argument that has been advanced to us that we were wrong in our original conclusion that the provisions of section 2(2) represent a fair and workable test in a difficult area. *We accordingly adhere to our original recommendation that no change should be made.*

2. RESTRICTIONS ON EVIDENCE

22. In our Consultation Paper, we pointed out that sections 3 to 6 of the 1981 Act had significantly modified the law by restricting the extent to which a complainant could be cross-examined or evidence adduced as to any sexual experience she might have had with persons other than the accused. We also observed that, while criticism had been advanced of the manner in which the

corresponding section in the English 1976 Act had been applied by the courts in that jurisdiction, we had no evidence as to whether or not it was working satisfactorily in our courts. In these circumstances, we were unable to reach even a provisional conclusion as to whether the law was operating satisfactorily and we laid particular emphasis on the importance of obtaining data as to how the relevant sections had been applied.

23. From the information supplied to us, it would appear that the occasions on which the section is invoked are surprisingly few. The various State agencies were unable to locate more than three instances in which there had been applications under the section. We doubt whether that figure is reliable, but it appears to be unquestionably the case that the section is not availed of very often.

24. This is not, however, to suggest that there is no problem in this area. On the contrary, it was strongly represented to the Commission, particularly by the Dublin Rape Crisis Centre, that such evidence was simply introduced by counsel for the defence in the form of questions containing innuendoes and hints without any formal application for leave to cross-examine being made under section 3(2).

We cannot say how widespread the practice referred to is. It is, however, clear that it cannot be eradicated by an amendment of section 3(2). If the practice exists, it can only be because counsel for the Director of Public Prosecutions, using their professional judgment, are not objecting to such questioning where it is conducted without the leave of the court and the court is not itself taking the initiative to rule the questioning out.

25. The problem remains as to whether section 3 should be amended by providing specific guidelines as to the circumstances in which the court should permit such questioning as to previous sexual experience. We have already referred in our Consultation Paper to the widely divergent views which have been expressed in various jurisdictions on this topic. Having carefully reviewed all the arguments that have been addressed to us, we have come to the conclusion that it would be at best premature to introduce changes in section 3 in the absence of anything to indicate that it is the manner in which the section is being operated, rather than the failure on occasions of counsel to object to a particular line of questioning, that is causing any problem.

It is, of course, the case, as we emphasise later in this Report, that every effort should be made to reduce the degree of trauma to which complainants of rape and other sexual assaults are subjected by the court proceedings. We do not think, however, that introducing amendments to section 3 along the lines suggested will result in any improvement in this area.

26. There has been some support for the view that the possibility of unfair or irrelevant questioning as to the previous sexual experience of the complainant would be reduced if the result of such questioning was to expose the accused to questions as to his previous convictions or bad character. (Such questioning is normally excluded on the ground that it might prejudice the fair trial of the issue of the guilt or innocence of the accused person). Under the present law, an accused person who gives evidence can be so questioned where the nature or conduct of the defence is such as to involve imputations on the character of the complainant, but it has been settled law for many years that the court has a discretion to prohibit such cross-examination and the practice has been to exclude it where the ground relied on is an imputation as to the previous sexual experience of the complainant.⁵

The Commission does not consider this a satisfactory approach to the problem. Exposing the accused to the risk of “dropping his shield” will not inhibit cross-examination in cases where there is no evidence as to previous convictions or bad character. Moreover, if the questioning is permissible, i.e., if disallowing it would unfairly hinder the accused in presenting a defence to the jury, it is unjust that he should be inhibited from doing so by the risk that he will render himself vulnerable to cross-examination as to previous convictions. It should, of course, be remembered that in cases of sexual assault, as in other cases, evidence of previous convictions may be admissible under the ‘similar facts’ rule.⁶

27. It was also suggested that the expression “sexual experience” in section 3 should be defined. As we have already indicated, it was said that counsel for the defence frequently sought to introduce evidence as to previous sexual experience by means of hints and innuendoes. The section, however, does not simply outlaw questions as to previous sexual *intercourse*; the expression “sexual experience” is used and, it must be assumed, designedly so. There is no reason to suppose that questioning as to previous sexual intimacy falling short of sexual intercourse is permissible under the section without the leave of the judge. If the conduct were so trivial as not to merit the description “sexual intimacy,” it would in any event be inadmissible as being irrelevant to any issue in the trial. As we have already stressed, if questioning of this nature does in fact take place, it can only be because counsel for the DPP are not objecting. We return to this topic in considering whether there should be separate legal representation for the complainant.

28. In two areas already referred to in the Consultation Paper, we recommend change. In the first place, *we consider it desirable that where the defence proposes to seek leave to cross-examine the complainant as to previous sexual experience, the application should be made at the beginning of the trial in the absence of the jury and any evidence which it is proposed to adduce should be given in full before the judge. It should not be possible for such an application to be made at any later stage of the trial without the*

special leave of the judge. We are also satisfied that it would be desirable that judicial scrutiny should extend to cases of the complainant's sexual history with the defendant.

3. CORROBORATION

29. We considered in detail in our Consultation Paper the present law on this subject which requires 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. We also stated that we were not at that stage in agreement as to whether any change is required in the law.

30. It has been strongly represented to us that the present law is unduly restrictive in this area. We have come to the conclusion that in some cases the mandatory warning is superfluous and may raise unnecessary doubts in the minds of jurors. (Thus, under the existing law, it is necessary for the trial judge to give the warning even though there is clear evidence which is capable of corroborating the alleged victim's account, in case such corroborating evidence is not accepted). It can be expected that in a case where the warning is obviously most appropriate - e.g., where the parties already knew each other, the alleged rape took place in private and there were no marks on the alleged victim - judges will continue to warn juries of the danger of convicting where there is no evidence which supports or confirms the complainant's version of events.

31. We had rejected in our Consultation Paper any prohibition on the giving of such a warning as being an unjustifiable interference with the exercise of the judicial function and adhere to that view. It has been suggested, however, that, where the trial judge considers that a warning is necessary, he should be expressly precluded from couching it in language suggesting that the evidence of complainants in cases of sexual assault should be treated with reserve. We do not think that this is either necessary or desirable. In particular cases, as a matter both of common sense and fairness to the accused, it may be perfectly reasonable for the trial judge to remind the jury that it was part of the defendant's case that the complaint was invented. In an appropriate case, where the evidence rested solely on the complainant's own version and this was the defence put forward, it would be clearly necessary for the trial judge to refer to the nature of that defence in his charge.

32. We have, accordingly, come to the conclusion that *the warning should no longer be mandatory. Whether a warning should be given or not and the terms in which the warning should be couched should in future be left to the discretion of the trial judge.*

4. THE COMPLAINANT'S POSITION IN THE CRIMINAL PROCESS

33. In the discussions which have followed the publication of the Consultation Paper, we have been made aware of the sense of

isolation felt by many rape complainants, and of their common feeling that they are treated as objects rather than persons within the criminal process. This sense of dissatisfaction revolves less around the initial contacts and interviews with the Gardai (which, according to our informants, are generally conducted with sensitivity), but more around the long period of silence which usually follows. Many complainants feel that they are not kept properly informed of the progress being made in the preparation of the prosecution's case. They are sometimes mystified why certain charges are preferred, and others, which may seem to them more appropriate, are omitted. They do not always understand the reasons for the long delays which often precede trial. The practices of prosecuting counsel differ, but we are aware of cases where the complainant's consultation with counsel has consisted of a brief and hurried discussion in a crowded corridor a few days, or even a few hours, before the trial is to begin. The complainant naturally in these circumstances may feel that she has not been properly advised as to her role in the proceedings and she will wonder how counsel can be fully prepared. In the absence of prior explanation or discussion, the complainant may also gain the impression that the case against the accused is not being fully stated before the court, that many facts which to her seem relevant have been ignored, and that not enough effort is being made to allow her the opportunity to vindicate herself.

We have been told that it is not uncommon for a complainant, who may have been given little explanation of the role of prosecution and defence counsel, to feel that she, rather than the accused, is on trial. The atmosphere in the court room can confirm this impression. In the unfamiliar and formal setting, the complainant will be required to speak of unpleasant events in the most intimate detail and she will do so in a court whose personnel are mostly male and whose layout and acoustics may demand that she raise her voice.

34. This is not a satisfactory situation. The criminal process should not be operated in such a way that it may deter the making of genuine complaints. The victims of crime should, in so far as it is compatible with fair procedures, be given some sense of being vindicated and protected by the legal system. Fairness to the accused demands objectivity, but it does not preclude sensitivity to the complainant's feelings. We have already commented on the relatively small number of prosecutions for rape and there can be little doubt that a contributing factor is a perception, based to some extent on the actual experience of rape victims, that the legal process is unsympathetic towards them. No doubt the re-telling and re-living by the complainant of a terrible event in her life will always be painful, but every effort should be made to eradicate from the system features which cause unnecessary additional stress.

35. The sense of isolation experienced by complainants is one of the reasons for the suggestion that complainants should be entitled

to separate legal representation. Before approaching this proposal, we think it important to consider in what other ways practices and procedures might be improved. It may well be that many of the objectionable features of the present system can be ameliorated by simple changes in practice and even attitude.

36. We re-affirm first the recommendations on administrative changes which we made in the Consultation Paper, the first two of which were originally made by the Joint Oireachtas Committee, viz:

- (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 solicitor and counsel acting for the prosecution before the hearing of the case in court.*

In relation to the second recommendation we confirm our view that such access should relate only to matters concerning the complainant's evidence and the progress of the case in general terms.

We re-affirm our view that a standard booklet should be prepared by the appropriate authority 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.

We also recommend that a positive attempt be made to ensure that some court officials or attendants at rape trials are women.

37. In addition we believe that serious consideration should be given to the role played by prosecuting counsel. The difficulties encountered by the prosecuting lawyers should not, however, be underestimated. Under the present system of listing cases, experienced barristers whom the DPP would naturally tend to brief in cases as serious as rape may find themselves under extreme pressure of time. Similarly, the pressure of work on the Chief State Solicitor's Office may from time to time give rise to problems which are not sufficiently understood.

Moreover, it may well be that the present system operates in a more satisfactory manner than some of its critics are prepared to allow. One victim of rape, who was prepared to name herself, said in a letter published in a national newspaper that her experience had been that the system was "incredibly sensitive to the victim."⁷ While too much weight should not be attached to the reaction of one victim to the circumstances of her particular trial, it is clear that one must treat with some caution the more extreme criticisms which are sometimes advanced of our system.

That having been said, the Commission is satisfied that the operation of the present system is on occasions unsatisfactory. We have already emphasised the importance we attach to a change of attitudes in this area. In addition, the Bar Council should consider making it clear that, provided the rule against coaching is strictly observed, there is no objection whatever to counsel for the prosecution having a proper consultation with the complainant and any other witnesses in sufficient time for the hearing, and that this indeed is normally desirable. At such a consultation, the complainant could be made fully aware of the nature of the trial and of the questions to which she might be subjected.

38. We believe that if the above recommendations are accepted and implemented, many of the unsatisfactory features of the rape process, some of which are at present attributed to the lack of legal representation for the complainant, would be removed. We recognise that many of these recommendations are less a matter of law reform and more a matter of practical and administrative change. We nevertheless feel justified in making these recommendations, given their bearing on the manner on which the law operates in practice. We think it inevitable that a law reform body should attempt, in assessing criticisms of the legal system, to disentangle those which arise from defects in the law and those which have other causes.

39. It was also strongly represented to the Commission that improvements could be effected in the case of rape trials if the lawyers participating, including both counsel and judges, were made more aware through training courses of modern developments in related fields such as psychology. Not all the members of the Commission are satisfied as to the practical utility of such courses in the day to day administration of criminal justice. On balance, however, the Commission takes the view that there are benefits to be derived from the participation of those concerned in the trial of rape cases in courses of this nature and we accordingly recommend that *consideration be given by the relevant professional bodies, the Bar Council and the Law Society, and the Presidents of the various courts concerned to the establishment of such courses.*

5. LEGAL REPRESENTATION FOR THE COMPLAINANT

40. It was strongly represented to the Commission, particularly by the Rape Crisis Centres and other women's organisations and by the complainants interviewed by two of the Commissioners, that the absence of provision for separate legal representation for the complainant was of its nature unfair to the complainant. The interests of the complainant and of the prosecution, it was said, did not always coincide; thus, counsel for the prosecution might refrain from objecting to a particular line of cross-examination because his experience suggested to him that it might result in the conviction of the accused and objecting might thus be counter-productive.

Such situations frequently arose, it was said, and sometimes necessitated the ultimate intervention of the trial judge.

41. To meet the alleged shortcomings in the present system, it was urged that the complainant should be separately represented throughout the proceedings by a barrister or solicitor of his or her choice who would be entitled to intervene in the proceedings to protect his or her interests whenever he considered it appropriate so to do. A more modified form of this proposal was also advanced to the Commission, i.e. that a complainant should be entitled to be represented where an application is made to the judge for leave to cross-examine him or her as to his or her previous sexual experience. In the event of such leave being granted, counsel or a solicitor on behalf of the complainant should be allowed to intervene whenever he considered it appropriate to protect his or her interests.

42. The Commission is not satisfied, however, that the complaints made as to the manner in which the present system operates are a sufficient ground for introducing so radical a change in the law as the extending of representation to a person who is not a party to the proceedings and whose interests do not necessarily coincide with the paramount objective of the trial, the ascertainment of the guilt or innocence of the accused person. The Commission is of the view that this applies, not merely to the more radical proposal under which separate legal representation would be available to the complainant in every case of rape, but also to the modified form of the proposal referred to in the preceding paragraph. Apart from the doubts which we expressed in the Consultation Paper as to the constitutional propriety of such a proposal, there must also be serious uncertainty as to the effect it would have on the trial of such cases. In some cases, far from assisting in the conviction of guilty rapists, it might so complicate the hearing and alienate the jury as to result in unjustified acquittals. For the reasons given in section 4 above, we are satisfied that the complaints to which we have referred can and should be adequately redressed within the confines of the present system. Accordingly, *we do not recommend that there should be any provision for separate legal representation of the complainant.*

6. ANONYMITY

43. In our Consultation Paper we had provisionally recommended that the present rules as to the anonymity of the complainant should be retained and extended to all sexual offences. *We adhere to our original recommendation in this regard.* We had also recommended that the present law should be altered by removing the protection of anonymity from defendants, while giving the court a residual discretion to prohibit publication of the name of the defendant where it might lead to identification of the complainant.

44. Some concern has been voiced to us as to the implications of

the second of these recommendations. First, it has been urged that since rape, in common with blackmail, has the unusual feature that the complainant may remain anonymous, basic fairness requires the extension of a similar protection of anonymity to the accused unless he is convicted. Secondly, it has been suggested that rape attracts a considerably greater volume of publicity than most other offences and that, accordingly, the damage done to the reputation of an innocent person is correspondingly greater. Thirdly, it has been said that, in a significant number of cases, sexual intercourse is admitted but the defence to the charge is that the intercourse took place with the consent of the complainant and that, where the accused is acquitted, publication of the fact that he had consensual sexual relations with the complainant may represent an unwarranted intrusion into his privacy. (This latter consideration does not arise in the case of other sexual offences, such as child molestation, where the admission of sexual intercourse renders the person guilty of a criminal offence). Unease has also been voiced as to the lack of protection afforded to *all* defendants who are acquitted of crime but nonetheless suffer serious damage to their reputations by the publication of their names and it has been suggested that a beginning might be made in dealing with what is, on this view, an unjust and anomalous state of affairs by extending the protection of anonymity to at least one category of crime where it appears peculiarly appropriate.

45. The Commission remains sceptical as to the first of these arguments, i.e., that anonymity should be given to the defendant as a *quid pro quo* for the anonymity extended to the complainant. This is an over-simplistic approach which gives insufficient weight to the major policy considerations differentiating the position of the complainant from that of the defendant, such as the importance of encouraging complainants to come forward. The Commission also recognises the serious policy reasons for not extending anonymity to defendants in general, such as the fundamental principle of the administration of justice that it should be public and open. We would also be reluctant to come to any conclusion on a matter which affects the entire range of the administration of criminal justice within the relatively restricted confines of this Report.

We have come to the conclusion, however, that the arguments in favour of retaining anonymity in the case of rape are sufficiently persuasive to call for the modification of our original recommendation. Given the general principle that the administration of criminal justice must be open and public and that therefore the name of the accused must, as a general rule, be published even though he may subsequently be acquitted, we think that there are nonetheless features of rape which are sufficiently distinctive to warrant an exception being made in the case of this crime. *We accordingly recommend that the existing restrictions on the publication of the name of the defendant should remain.*

7. TRIAL OF RAPE AND RELATED OFFENCES.

(a) In General

46. In our Consultation Paper we had recommended that both rape and the proposed new offence of aggravated sexual assault should be tried exclusively in the Central Criminal Court. We also recommended that the Central Criminal Court should have exclusive jurisdiction in the sentencing of such offenders, even where they plead guilty in the District Court.

It has been represented to us by some Circuit Court Judges that this recommendation is misconceived. The arguments addressed to us are principally as follows:

- (1) Rape is by no means the only serious crime frequently attended by violence which is tried by the Circuit Court: on the contrary, all such crimes, with the exception of murder and murder related offences, are exclusively tried by the Circuit Court.
- (2) The Central Criminal Court is not a suitable tribunal for dealing with such cases, having regard to the fact that the membership of the court changes frequently and that on occasions judges with little or no experience of criminal law preside at the trials.
- (3) It is reasonable that an accused person should be entitled to be put "on his country," i.e. to be tried by a jury of his fellow citizens from the same neighbourhood.
- (4) Contrary to what is suggested in the Consultation Paper, there is no serious delay in the hearing of rape cases in the Circuit Court.
- (5) Holding all rape trials in Dublin would result in additional costs and inconvenience.

As to (1), it is, of course, the case that since 1981 all serious crime, with the exception of treason, piracy, genocide and murder related offences, has been exclusively tried in the Circuit Court. Our original recommendation would redress this remarkable imbalance in at least one important area. We are not persuaded that we were wrong in taking the view that the imbalance is unjustifiable: the High Court, uniquely among the courts established under the Constitution, is invested by the Constitution with a full original jurisdiction in all matters, civil and criminal, and should have a realistic and comprehensive criminal jurisdiction. High Court Judges invariably sit on the Court of Criminal Appeal and, on occasions, on the Supreme Court dealing with criminal matters. They are also required to deal with a vast range of State Side applications, and other civil matters where questions emanating from the criminal jurisdiction of other courts constantly arise. It cannot be regarded as a satisfactory situation that High Court

Judges are confined in the practical administration of the criminal law to one range of offences alone. Transferring the crime of rape to the Central Criminal Court should be seen as part of the process of returning a wider criminal jurisdiction to the High Court.

As to (2), the Commission does not accept that the varying composition of the Central Criminal Court is a good reason for refusing to extend its present limited jurisdiction. If there were any force in this contention, the Central Criminal Court should logically not be entrusted with the trial of the most serious offences known to the law. One of the submissions made to us did indeed suggest that those offences should also be exclusively tried in the Circuit Court, but we do not believe that there is any widespread support for this view and in the opinion of the Commission it is not well founded.

As to (3), the essence of trial by jury, at least in the modern context, is, in the view of the Commission, the right of the citizen to be tried by twelve of his fellow citizens. We do not accept that the law should draw any distinction between residents in the greater Dublin area and other areas.

As to (4), while we accept that the delays formerly experienced have been significantly reduced in recent years, we think that a strong case remains for relieving the Circuit Court of some at least of the very heavy burden of work to which the judges and practitioners are now subjected.

As to (5), there is undoubtedly some expense and inconvenience involved in having trials in Dublin rather than in other venues. But this already happens in a significant number of rape cases, because such trials are frequently transferred from the local venue to Dublin. We do not believe that the admitted expense and inconvenience involved in transferring the remaining comparatively small number of rape cases involved to Dublin outweigh the other considerations to which we have referred.

It should finally be pointed out that there is a strong case for transferring other serious crimes to the exclusive jurisdiction of the Central Criminal Court, including in particular kidnapping, fraud, crimes involving the use of firearms or explosives and major drug offences. However, it would be inappropriate to deal with that matter in the limited context of the present Report and we merely refer to it in order to emphasise again that the transfer of rape and aggravated sexual assault to the Central Criminal Court should be seen as part of a larger process. *We accordingly adhere to our original recommendation.*

(b) In Camera Proceedings

47. While there was some dissent from the recommendations contained in the Consultation Paper, i.e., that trials for rape should be held in camera but that representatives of the media and others

with a legitimate interest should be allowed attend, we are satisfied that the arguments in favour of the change proposed are persuasive. *We accordingly adhere to our original recommendation.*

(c) Sentencing

48. Misgivings continue to be expressed as to the alleged disparity in sentencing. Concern has also been expressed, which the Commission fully shares, at the absence of data in this country as compared to other jurisdictions as to sentencing. However, no practical proposal has been advanced to the Commission which might secure greater uniformity in sentencing and *the Commission is still of the view that the question as to whether guidelines are necessary and, if so, what form they should take should be left to the Court of Criminal Appeal or the Supreme Court.*⁸

(d) Time Limits

49. In our Consultation Paper, we recommended that time limits should not be introduced on the institution of prosecutions for rape. We have not been persuaded that we were wrong in this conclusion and accordingly *we adhere to our original recommendation.*

(e) Composition of Juries

50. In our Consultation Paper we expressed the view that attempts to secure juries equally balanced between the sexes would 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 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. We are satisfied that this conclusion was correct and *we adhere to our view that there should be no such requirement.*

8. SEXUAL OFFENCES AGAINST THE MENTALLY HANDICAPPED

51. We had provisionally recommended that the offensive wording of section 4 of the *Criminal Law (Amendment) Act 1935* should be amended by the substitution of words such as "mental incapacity" or "mental handicap." It has not been suggested to us that there is any difficulty in so altering the law and *we adhere to our original recommendation.*

We also referred in our Consultation Paper to the importance of ensuring that legislation in this area is effective. We hope to address the entire topic in the near future in the context of sexual offences against another vulnerable section of the community, i.e. children.

9. TRANSMISSION OF SEXUAL DISEASES

52. We pointed out in our Consultation Paper that having sexual intercourse without telling one's partner that one is infected by a

venereal disease does not constitute in law the crime of rape. It has been held that the consent of the woman to intercourse in such circumstances is not vitiated in law by such a non-disclosure.

53. The major danger to public health represented by AIDS indicates that changes in this area might be required. It was suggested to us that consideration might be given to the creation of an offence where a person engages in sexual intercourse knowing that he or she is suffering from a sexually transmissible disease and that his or her partner is ignorant of the fact and being reckless as to whether the partner would consent if he or she knew of this fact.

54. While we have no doubt that such a proposal merits serious consideration, it would be premature to recommend its adoption until its implications have been more fully explored. Problems could arise from the criminalisation of non-disclosure: it might lead, for example, to less, rather than more, reporting by persons to the appropriate health authorities of the fact that they are suffering from such diseases. Moreover, there are other legal strategies which might have a greater impact in this area. Some of the suggestions which might merit consideration are compulsory testing for AIDS, either throughout the community at large or in disciplined sections, such as the prisons and the army; compulsory reporting of AIDS; the relaxation of the law as to the sale of condoms; and the registration of prostitutes.⁹ It would clearly be undesirable and impractical, however, to consider changes of this nature in the limited context of the present Report. *We accordingly make no recommendations in this general area.*

10. COMPENSATION FOR THE VICTIMS OF RAPE AND ALLIED OFFENCES

55. We had provisionally recommended that there should be express statutory provision enabling a judge to order the accused on conviction of rape and allied offences to pay compensation to the victim in addition to the provision for penalties. There has been little dissent from, and a wide welcome for, this proposal and we *accordingly adhere to our recommendation.*

11. DISSENT FROM RECOMMENDATION IN PARA 14

56. Two members of the Commission, the President and Mr. O'Leary, are not in agreement with the recommendation in paragraph 14 that the legal definition of rape should be extended. The following are their reasons.

57. We think it is axiomatic that changes in the definition of crime which will not result in the more efficient realisation of the criminal law's primary objective, the apprehension, conviction and punishment of the guilty, are to be avoided as creating unnecessary problems of a technical nature leading to unsatisfactory verdicts, unless there are clearly established benefits to be derived from the change. The more complex the alteration, the heavier the onus

would appear to be on those who seek it to establish that some benefit will result. In the case of the proposed alterations, it is suggested that the benefits which will result are:

- (1) bringing the definition of the crime into line with society's current view of what constitutes rape; and
- (2) offering some degree of psychological reassurance to the victims by describing the experience to which they have been subjected as "rape."

58. We are satisfied that the present definition of rape is creating no problems in the apprehension, prosecution and conviction of persons responsible for rape and other serious sexual assaults. The definition is straightforward and comprehensible and we have not been told of, nor are we aware of, any cases in which juries have evinced any difficulty in dealing with the ingredients of the *actus reus*. The difficulties attendant on treating serious and degrading forms of sexual assault, such as forced buggery or oral intercourse, as indecent assault can be effectively remedied by creating the new offence of "aggravated sexual assault" as recommended in para. 15.

59. We think that the difficulties which arise if any attempt is made to extend the present legal definition of rape are obvious. The majority recommend an extension of the definition which would encompass penetration of the major orifices of the body by the penis or an inanimate object. This would take as a model the *Crimes (Sexual Offences) Act 1980* in Victoria. Yet, since our Consultation Paper was published, we have received a Report of the Law Reform Commission of Victoria published in June 1987 which recommends alterations to this definition. A range of other solutions has also been proposed to these problems of definition in various jurisdictions which are discussed in more detail in our Consultation Paper. Most of them are so recent in origin that it is unlikely that any empirical data indicating how they have worked in practice is available. All one can say with confidence is that they illustrate the difficulty of arriving at any consensus as to the appropriate statutory definition for an extended crime of "rape."

60. We stress again, since it has repeatedly been given insufficient emphasis in some submissions, that the paramount objective of the law must be to ensure the apprehension, prosecution and conviction of persons responsible for rape and other sexual assaults. The proposed extension of the definition of rape will not assist in the attainment of this objective. (It is perhaps unnecessary to say that we have not been told of any cases in which women who complained of serious sexual assaults declined to report the matter to the Gardai because they considered the description of the offence alleged to have been committed inadequate).

The benefits which may result, i.e., bringing the definition of the

crime into line with society's current view and offering some degree of psychological reassurance to the victims, although undoubtedly valuable, are of secondary importance.

61. Moreover, while it may be that such benefits will result from a change in the law, we think it is impossible to say that this has been satisfactorily established. It is undoubtedly the case that the overwhelming body of submissions to the Commission and of the views expressed at the Seminar took the view that they would. But we do not think that it necessarily follows that this reflects the view of the community as a whole on the meaning of rape. We think it at least possible that, precisely because of their close involvement in the subject, the views of some of those who made submissions to us on this matter may not be the same as those of the community at large. It would, in any event, be presumptuous, in our view, to reject the possibility that the community's view as to what constitutes rape is more accurately reflected by the existing definition, i.e. that it is a violent abuse of the sexual act which can provide the most complete expression of love between men and women and normally enables conception to take place.

In this connection, we think it important to recall that the adequacy of the present definition of rape was considered as recently as 1981 by the Oireachtas. All the criticisms now made to us of the present definition were advanced with great force at that time in both the Dail and Seanad. Yet the decision was taken by the legislature to retain the definition. We also note that in the neighbouring jurisdiction of the United Kingdom, where conditions on the whole approximate more closely to conditions in Ireland than in the other jurisdictions considered in the Consultation Paper, the existing definition of rape has been retained. This was in accord with the view of the Heilbron Committee 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 wrong-doing."¹⁰

It was also the view of the Criminal Law Revision Committee which said that:

"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, degrading and can lead to pain and injury, but we take the view that they are distinct from rape."¹¹

62. We appreciate that our views on this matter may seem inconsistent with our joining in the recommendation that the existing offence of indecent assault should be replaced by two new offences of aggravated sexual assault and sexual assault. We would indeed accept that there is much to be said for retaining the offence

of indecent assault, while increasing the maximum penalty to life imprisonment. However, the arguments in favour of a change in this area are different and more persuasive: we agree that "indecent assault" is an inadequate description of the more violent and degrading forms of sexual assault, such as forcible buggery, which do not in law constitute rape. Nor does the creation of the two new offences of sexual assault and aggravated sexual assault present the same problems of definition that arise when one attempts to find a generally accepted basis for a definition of rape, other than vaginal sexual intercourse without the consent of the woman, the description traditionally attached to it by the community and the law for centuries.

FOOTNOTES

¹ Report, para. 35.

² Discussion Paper No. 2, para. 4.6.

³ *Director of Public Prosecutions v Beard* [1920] A.C. 479 as explained in *R v Majewski* [1977] A.C. 443.

⁴ The view is also expressed in the third report of the Henchy Committee on *Mentally Ill and Maladjusted Persons* (Prl. 8275) that

"The whole question of the attitude which the criminal law should adopt to intoxication, whether as a defence or as an aggravating factor, would need to be dealt with as part of a more general reform of the criminal law."

⁵ *R v Turner* [1944] K.B. 463.

⁶ Evidence which proves merely that the accused has committed crimes in the past and is therefore disposed to commit the crime charged is inadmissible. "It has however never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused, the manner in which the other crimes were committed may be evidence on which a jury could reasonably conclude that the accused was guilty of the crime charged. Similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence..." (*Director of Public Prosecutions v Boardman* (1974) 60 Cr. App. R. 165 H.L., per Lord Salmon at pp. 188-189.

⁷ *The Irish Times*, 13th April 1988.

⁸ Since the Consultation Paper was published, the appeal in the case of *Edward Tiernan*, in which the question of guidelines for sentences in rape cases was raised, has been heard by the Supreme Court. Judgment has been reserved. (*The Irish Times*, 14th April 1988).

⁹ See 'AIDS legislation - turning up the heat?' by Justice M D Kirby, President of the Court of Appeal, Supreme Court of New South Wales and former President of the Australian Law Reform Commission, *Journal of Medical Ethics*, (London) vol. 12, (1986), 187.

¹⁰ Report, para. 80.

¹¹ 15th Report, para. 2.47.

SUMMARY OF CONCLUSIONS

1. The presumption of incapacity of boys under the age of fourteen in prosecutions for offences involving sexual intercourse should be abolished: para. 5.
2. The crime of rape should be defined by statute so as to include non-consensual sexual penetration of the major orifices of the body, i.e. the vagina, anus and mouth, by the penis of another person or of a person's vagina or anus by an inanimate object held or manipulated by any other person and in this form the crime should be capable of being committed against men and women: para. 14.
3. Two new offences - sexual assault and aggravated sexual assault - should replace the present offence of indecent assault: para. 15.
4. The new offence of aggravated sexual assault should be generally defined to cover serious forms of sexual assault, not covered by rape, attended by serious violence or the threat of serious violence or calculated seriously and substantially to humiliate, violate, injure or degrade the victim or committed while the accused has with him a firearm or weapon of offence or by a person in a relationship of authority over the victim. The offence should carry the same sentence as rape, i.e. life imprisonment. The offence should apply equally to assaults on men and women without any difference in procedure: para. 15
5. The new offence of sexual assault should encompass the less serious sexual assaults but 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 apply equally to assaults on men and women without any difference in procedure: para. 15.

6. All the procedural and evidential provisions of the *Criminal Law (Rape) Act, 1981* relating to trials for rape should apply equally to trials for aggravated sexual assault and sexual assault: para. 15.

7. The word "consent" in section 2 of the 1981 Act should be defined so as to make it clear that physical resistance is not a necessary element in proving absence of consent: para. 17.

8. Legislation should remove the marital exemption in cases of rape: para. 18.

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. Applications under section 3 (1) should normally be made at the commencement of the trial in the absence of the jury: para. 28.

10. The present rules as to the anonymity of the complainant should be retained but should be extended to prosecutions for all sexual offences: para. 43.

11. The protection of anonymity should not be removed from defendants: para. 45.

12. Prosecutions for rape and aggravated sexual assault should be tried exclusively in the Central Criminal Court: para. 46.

13. Sexual offences should not be tried in public: para. 47. Five categories of persons should be admitted to the trial:

- (a) a limited number of family members and friends of the complainant as well as of the accused;
- (b) the media;
- (c) law reporters;
- (d) in particular cases, and with the leave of the court, persons carrying out research of a criminological or other scientific nature;
- (e) practising members of the legal profession, subject to such limitations as the court may impose.

14. There should be an express statutory provision enabling a judge to order the accused on conviction to pay compensation to

the victim of a sexual offence in addition to any other penalty imposed: para. 55.

15. There should be no time limits for prosecutions for sexual offences: para. 49.

16. There should be no change in the law relating to the composition of juries for the trial of sexual offences: para. 50.

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. 51.

18. It should no longer be mandatory for the judge in trials of sexual offences to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. Whether such a warning should be given and, if so, its terms should be left to the discretion of the judge: para. 32.

19. The present law prohibiting disclosure of previous convictions of the accused should be maintained even when he has been permitted to cross-examine the complainant about his or her previous sexual history: para. 26.

20. Provision should not be made for separate legal representation of the complainant: para. 42.

21. Certain administrative changes should be made designed to alleviate the distress of the complainant: para. 36.

GENERAL SCHEME OF A CRIMINAL LAW (RAPE) ACT

1. Provide that the Act may be cited as the *Criminal Law (Rape) (Amendment) Act 1988*.

2. Provide that Section 2 (1) and (2) of the *Criminal Law (Rape) Act, 1981* be amended by:

(a) substituting the word "connection" for "intercourse" and "person" for "man and woman";

(b) defining "sexual connection" as:

(i) Penetration, however slight, of the person's vagina, mouth or anus by another person's penis or of a person's vagina or anus by an inanimate object held or manipulated by any other person otherwise than for bona fide medical purposes;

(ii) continuation of such connection.

3. Provide that a new subsection (3) be added to s. 2 defining

“consent” for the purposes of the Act as in Section 324G of the Western Australia Criminal Code with appropriate adaptations.

4. Provide that being married to the victim at the relevant time shall not afford a defence to a charge of rape.

5. Provide that (except by special leave of the court) an application under s. 3 (2) of the Act may be made *only* at the beginning of the trial immediately after the arraignment of the accused and that any evidence as to previous sexual experience of the complainant which it is proposed to adduce must be adduced at that time to the judge in the absence of the jury.

6. Provide for the amendment of s. 3 of the Act so as to require the leave of the court for the adduction of evidence or the cross-examination of the complainant as to any previous sexual experience of the complainant with the accused.

7. Provide that, notwithstanding any rule of law to the contrary, it shall not be necessary for the judge in the trial of a rape offence to warn the jury of the danger of convicting the accused on the uncorroborated evidence of the complainant.

8. Provide that, notwithstanding any rule of law to the contrary, it shall not be presumed in prosecutions of boys under the age of fourteen for offences involving sexual connection with the penis that the accused was incapable of committing the offence with which he is charged.

9. Provide that the words “a sexual offence” be substituted for the words “a rape offence” throughout the Act.

10. Provide that the words “sexual offence” be defined so as to include rape, aggravated sexual assault and sexual assault and to include attempting, aiding and abetting, counselling and procuring and inciting to commit rape, aggravated sexual assault or sexual assault.

11. Provide for the abolition of the offence of indecent assault upon males and females and the creation of two new statutory offences of sexual assault and aggravated sexual assault on males and females.

12. Provide for the definition of aggravated sexual assault as a sexual assault which is not rape but which is attended by serious violence or the threat of serious violence or is calculated seriously and substantially to humiliate, violate, injure or degrade the victim or is committed while the accused has with him a firearm or a weapon of offence or by a person occupying a position of authority over the victim.

13. Provide that, if warranted by the evidence given at the trial,

- (a) on a count of rape, a jury may find an accused guilty of attempted rape, of aggravated sexual assault or of sexual assault;
 - (b) on a count of aggravated sexual assault, a jury may find an accused guilty of rape or of sexual assault.
14. Provide that sections 3, 4, 6, 7, 8, and 9 of the Act and section 7 of this Act shall apply to sexual assault and aggravated sexual assault in the same manner as they apply to rape.
15. Provide that if a person is convicted on indictment of any aggravated sexual assault upon a male or female he shall be liable to imprisonment for life.
16. Provide that if a person is convicted on indictment of any sexual assault upon a male or female he shall be liable to imprisonment for a term not exceeding five years.
17. Provide that the District Court shall have jurisdiction to try summarily offences of sexual assault where the Director of Public Prosecutions so elects.
18. Provide that where a person is convicted summarily of a sexual assault, he shall be liable to a fine not exceeding £1000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both such fine and such imprisonment.
19. Provide that rape and offences of aggravated sexual assault shall be triable on indictment only in the Central Criminal Court.
20. Provide that, where a defendant pleads guilty in the District Court to rape or aggravated sexual assault, the District Justice shall send him forward for sentence to the Central Criminal Court.
21. Provide that rape and aggravated sexual assault shall be tried otherwise than in public, but that the following categories of person shall be permitted to attend:
- (a) the immediate family and a limited number of friends of the complainant and of the accused;
 - (b) accredited representatives of the press, television and radio;
 - (c) members of the legal profession acting as court reporters;
 - (d) such persons engaged in research as the court may permit;
 - (e) practising members of the legal profession subject to such restrictions as the court may impose.

22. Provide for the payment of compensation to victims of rape, aggravated sexual assault and sexual assault.

23. Provide for the amendment of s. 4 of the *Criminal Law Amendment Act 1935* by substituting for the words

“any woman or girl who is an idiot, or an imbecile, or is feeble minded”

the words “any woman or girl suffering from mental handicap” and provide for any consequential amendments of the Act.