PART II: SEXUAL ASSAULT, SEXUAL HARASSMENT, CHILD SEXUAL ASSAULT

1. SEXUAL ASSAULT

A. INTRODUCTION

In most countries of the Commonwealth, sexual violence against girls and women is emerging as an increasing problem. There is no clear reason for this and it is similarly unclear whether the incidence of offences of this nature has increased or whether there has been greater recognition and reporting of violence that has always occurred.

This part of the manual contains a survey of how legal systems throughout the Commonwealth deal with sexual assault. It does not seek to indicate how often sexual assault occurs, nor why women are attacked in this way. Further, it does not describe how the prevalence of sexual assault affects both individual victims and women in general[1]. Part I contains an examination of Commonwealth legislation pertaining to sexual offences, while Part II comprises the sexual assault kit developed by the Royal Canadian Mounted Police, which is used by them in the investigation of sexual assault crimes. This kit has been included as an example of a strategy which has been introduced in one Commonwealth country to facilitate prosecution of sexual offenders and to alleviate some of the unpleasantness that the complainant faces when she complains of such an offence.

B. THE LEGAL FRAMEWORK

a) Introduction

All Commonwealth jurisdictions criminally sanction sexual offences against women in legislative offences which are variously entitled abduction, defilement, indecent assault, procuration, unlawful detention for immoral purposes and rape[2].

Over the last decade, most Commonwealth countries have witnessed demands for the reform of the law relating to these offences, particularly the offence of rape. These demands have addressed both substantive and procedural issues. Accordingly, some countries shave comprehensively reformed the law in this area, while others are considering proposals for such reform. In general terms, however, the crimes are defined and the procedural rules are formulated as they were last century.

A number of common issues for debate have emerged throughout the Commonwealth in this reform process. Much of this has surrounded the crime of rape and it will, thus, be concentrated on here. The major areas of controversy have been:

* The scope of the offence.
* Whether sexual assault within marriages is a crime.
* The question of the consent of the complainant.
* The related issue of the accused's perception of the complainant's consent.
* Evidentiary requirements, including evidence as to fresh complaint, past sexual history and corroboration.
* Amelioration of court procedures.
* Sentencing.
* Whether related support systems can be established to make the treatment of sexual assault more effective and sympathetic.

b) The scope of the offence

Most Commonwealth countries model their definition of rape upon that of the English law. Most, thus, define rape as sexual intercourse by a man with a woman which is unlawful and which takes place without her consent in such circumstances that the man knows she is not consenting or he is reckless as to that fact[3].

This section will consider the definition of sexual intercourse for the purpose of rape, whether the crime should remain in its blanket form, or whether different degrees of seriousness should be specified in legislation and, finally, whether the term "rape" itself should be retained.

(i) Sexual intercourse

In general, Commonwealth jurisdictions consider sexual intercourse for the purposes of rape to exist where there is the slightest penetration by the penis of the vagina. Ejaculation is not necessary[4]. Throughout the Commonwealth, the offence of rape, like the offence of buggery, is considered to be extremely grave and thus carries severe penalties. In most jurisdictions, the rapist can be convicted of up to life imprisonment.

Victims of sexual assault are usually subject to various forms of violation. Frequently, the offender is unable or chooses not to penetrate his victim with his penis, but may force her to perform acts of oral sex, penetrate her with this fingers or an object or demean her in other ways[5]. Activity such as this, although as demeaning and distressing as rape, usually falls within the definition of "indecent assault", penalties for which are considerably lower than rape or buggery.

A number of Commonwealth jurisdictions have taken the view that concentration on penile penetration as a particularly heinous form of misconduct is misplaced. Accordingly, they have widened the definition of sexual intercourse to encompass penile penetration of the anus and mouth and to penetration of the vagina or anus with any object. Thus, South Australia defines sexual intercourse to include the introduction of the penis of one person into the anus of another and the introduction of the penis into the mouth of another[6]. Victoria and New South Wales go further and include the insertion of objects into the vagina and anus, while New South Wales and New Zealand also cover cunnilingus[7]. All of these jurisdictions moreover, have made these offences gender neutral, so that both victims and offenders may be either male or female.

Canada has similarly replaced the crime of rape with a gender neutral offence which is called "sexual assault". Unlike in the Australian jurisdictions and New Zealand, however, the legislation does not define the conduct encompassed by the offence in a way that sets it apart form non-sexual assault. In other words, there is no indication in the legislation to indicate factors that will transform an assault into a sexual assault[8]. As a result, the legislation has left significant

scope for different interpretations of the meaning of sexual assault which has resulted in numerous cases in which courts have been asked to determine whether an assault is sexual. For example, the New Brunswick Court of Appeal has decided that sexual assault is limited to an assault on the sexual organs or genitals and does not include touching a woman's breasts. As one of the judges stated: "The problem in this case is that the contact was not with the sexual organs of the victim but with the mammary gland, a secondary sexual characteristic", which was equated with contact with other secondary sexual characteristics, such as touching a man's beard [9].

Other courts have refused to follow this narrow interpretation. Thus, the Ontario Court of Appeal, faced with the argument that the accused's actions of trying to kiss a woman, lying on top of her and biting her breast did not constitute a sexual assault as there was no interference with her primary sexual organs, concluded that in the determination of whether such an assault had taken place all the facts were material. The Court commented further that "to hold that an assault involving such a patently sexual symbol as mammary glands is not a sexual assault is simply an unacceptable construction of the new offence"[10]. Other decisions have determined that assault with intent to have sexual intercourse without consent, assault for the purposes of sexual gratification, acts of force, including acts intended to degrade and demean for sexual gratification, assault with sexual motivation and assault in an "aura of sexuality" all come within the offence of sexual assault[11].

The Canadian definition of proscribed activity has lent itself to both a narrow and liberal approach. It was originally hoped that by leaving the definition to judical interpretation a definition would emerge which reflected the growing knowledge and understanding of women's perspectives of sexual conduct[12]. Unfortunately, the cases indicate that the statutory formulation has led to uncertainty in the law.

Jurisdictions who have redefined rape in gender neutral terms and to include acts beyond the penetration of a vagina by a penis seek to stress the demeaning and violent aspects of rape, rather than its sexual nature. The new definitions acknowledge that violation may occur in the absence of penile penetration or violations such as forced oral sex and sodomy often accompany forced intercourse. The definitions are in line with the modern understanding of rape as a means of humiliation, degradation and violation, rather than a means of sexual satisfaction.

Commonwealth countries do not unanimously support redefinition, however. The English Criminal Law Revision Committee[13], for example, strenuously supports the retention of rape in its present definition and recommended that the penalties for indecent assault be raised from imprisonment for two years to ten years[14]. The view of the Committee rests on two grounds. First, it argues 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" and second, it states that the risk of pregnancy is an "important distinguishing characteristic of rape"[15].

Neither of these reasons is particularly compelling. The first suggests that reform of any area of the law is impossible where the public has had a particular view of the law[16], while the second ignores the fact that pre-pubertal, menopausal and sterilised women are all covered by the law of rape. Further, it is inconsistent with the Committee's view that non-consensual anal intercourse of a man or woman was an offence which similarly, demanded special condemnation.

The views of the English Committee are worthy of serious consideration, but it may be suggested that it sees sexual violation in very narrow terms. Penetration of a vagina by a penis or a bottle is similarly degrading and it may be that the latter involves a degree of sadism likely to cause the victim greater pain and damage than ordinary intercourse. Non consensual oral sex may be far more disturbing than penile penetration.

(ii) Gradation

In a number of Commonwealth jurisdictions, such as Canada, new South Wales and Western Australia[17] rape has not only been defined in gender neutral terms and in such a way as to stress the assaultive, as opposed to sexual, nature of the crime, but also, degrees of sexual assault have been created[18]. Penalties for sexual assault escalate in accordance with the gravity of the offence, such gravity being judged by the violence or other means used to gain the victim's submission to the unwanted sexual connection. The gradation schemes in Canada and new South Wales, which exhibit certain differences will be described here[19].

The Canadian legislation creates three levels of sexual assault. Grade I penalises "simple" sexual assault, grade 2, sexual assaults involving bodily harm, the threat or use of a real or imitation weapon, threats to a third party or where sexual assault is carried out with another person, while grade 3, "aggravated" sexual assault which occurs where the offender wounds, maims, disfigures or endangers the life of the complainant. Penalties range from a maximum of ten years imprisonment for "simple" sexual assault to life imprisonment for "aggravated" sexual assault.

New South Wales penalises four categories of sexual assault. Category 1, the most serious category, establishes a penalty of 20 years for inflicting grievous bodily harm either on the complainant or a third person with intent to have sexual intercourse. Category 2, which is defined as established where actual bodily harm is threatened or inflicted on the complainant or another person with intent to have sexual intercourse, by the

offender either alone or accompanied by others, carries a maximum term of 14 years imprisonment. Category 3, sexual intercourse without consent, which is defined as including sexual intercourse without the consent of the complainant, in circumstances where the lack of consent is known to the offender, a situation that is deemed to exist where the complainant is under 16 or where the complainant is under the authority of the offender, where the offender acts alone or in company, is punishable by up to 10 years imprisonment.

Finally category 4, indecent assault and act of indecency, committed by the offender, either alone or in the company of others, on the complainant or in her presence, carries a maximum penalty of six years imprisonment.

Gradation schemes have a number of aims. First, just as in the case of redefinition of the offence to encompass behaviour beyond conventional sexual intercourse, they seek to stress the violent rather than sexual nature of the crimes. Second, they seek to improve prosecution and conviction rates.

The provision of a series of offences instead of a single offence with a maximum of life imprisonment is believed to encourage some accused to plead guilty. Certainly conviction rates in New South Wales and in other non-Commonwealth jurisdictions where gradation schemes have been introduced have improved.[20]

Nevertheless, graded formulations should not be approached without reservation. One serious concern is that the more serious grades of assault are defined by the level of violence that accompanies the sexual attack, rather than by the sexual attack itself. Sexual assault that occurs where the victim submits for reasons other than actual or threatened violence usually comes low in the grade. This may lead to the misconception that sexual aggression per se is trivial in comparison with sexual aggression accompanied by violence, a perception that may affect judges and juries who may prefer to sentence unwanted sexual intercourse lightly.

Here the comments of the New Zealand Department of Justice and the Institute of Criminology are pertinent:

> "The stress upon the violent rather than the sexual component of the offence in determining its seriousness, especially in the New South Wales and Canadian models, is not in keeping with the way in which most victims described their rape experience in this study. They saw it as an act of extreme humiliation and degradation which was qualitatively different from other types of assaults. Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself wasn't accorded the centrality it

deserved. Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved, would therefore seem to be at odds with the perception of many victims. As the Auckland Rape Crisis Centre pointed out, it would punish the associated physical violence and still ignore the violence of rape"[21].

(iii) Labelling the crime

An issue which is closely associated with the question of whether rape should be redefined to acts other than penetration of a vagina by a penis and whether the offence should be graded in levels of seriousness is whether the offence should continue to be termed "rape". Certainly, a number of Commonwealth jurisdictions, including Canada, New South Wales, Tasmania, Western Australia and the Australian Capital Territory have rejected the term "rape" in favour of a more neutral term to over all offences, which are distinguished only by a number indicating the gravity of the assault. At the same time, the term is specifically maintained in jurisdictions such as Victoria and England and Wales, while New Zealand takes the unusual step of prohibiting "sexual violation" which it defines in terms of "rape".

The principal reason advanced for maintaining the term "rape" is that it carried with it the special opprobium and condemnation that should be reserved for the act of forced sexual intercourse. It is suggested that to discard the term would be to "water down" the special character of rape and trivialise the offence in the public mind[22].

A number of serious objections can be raised to the continued use of the term. First juries have preconceived notions about the crime of "rape". They consider it to be a violent and destructive crime and may be loath to convict in circumstances where these preconceptions are not fulfilled, such as in circumstances where the victim and the accused are past lovers and the submission is gained without brutality. Second, defence counsel exploit these known preconceptions and are inclined to suggest that the events under consideration are not particularly bad, the victim has lost little and thus the heinous crime of "rape" can hardly be said to have occurred. Third, the term carries with it a social stigma for the victim, particularly in view of the popular view that most rape complainants have "asked for it", while finally, as the word is a fixed term covering a range of violations, it may militate against securing conviction[23].

c. Sexual Assault Within Marriage

In most Commonwealth countries, sexual assault by a husband on his own wife is not regarded as unlawful sexual intercourse and thus is not a crime.

This rule is held to originate in a statement by Sir Matthew Hale, an English judge who remarked: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife has given up herself in this kind unto her husband which she cannot retract"[24]. Hale provided no authority for his statement and it has been suggested that English courts convicted men for raping their wives before he made his remark[25]. Nonetheless, Hale's statement has proved critical and since the case of Clarence[26] in 1888, except where specific legislation has been enacted, until 1991 a wife has been considered to have no right or power to refuse her consent to intercourse with her husband.

It is possible, however, for a husband to be convicted of assault upon his wife, in those cases where violence has been used to gain her submission[27]. Further, where parties are separated by agreement or by order of the court or where there is a non-molestation order, a husband can be convicted of rape[28].

The same would, it would seem, apply to a magistrate's order excluding the husband from the home, but not to a personal protection order which prohibits only violence or its threat. The marital immunity does, however, apply in circumstances where a husband and his wife are living separately without any form of separation order or agreement.

Those who are in favour of the retention of the immunity raise a number of arguments which, on the whole, tend to trivialise the importance of rape within marriage. They argue that rape within marriage would be difficult to prove and that the threat of unjustified proceedings could be used by a vindictive wife against her husband. They assert, further, that the criminal law should not intervene in marital relationships, the wife being, at all events, adequately protected by her matrimonial remedies. They formulate arguments on the lines of the English Criminal Law Revision Committee which in 1980 stated:

> "Spouses have responsibilities towards one another and to any children there may be as well as having rights as against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for any children could be grave, and for the wife too.[29]"

Arguments such as these appear to be based on the view that rape within marriage is infrequent or, if it occurs, it is not as serious as rape where the offender is not the victim's husband. There is little research into the issue of marital rape. Studies which do exist, however, suggest that there is considerable unwilling participation by wives in sexual activity and that the injuries such women suffer, be they physical or psychological, can be serious[30].

A number of Commonwealth jurisdictions have examined the important questions of policy that surround the marital immunity. Some jurisdictions have seriously curtailed the immunity, others have abolished it completely and still others are in the course of questioning it.

South Australia has partially removed the immunity so that a wife can complain of sexual assault by her spouse where an assault occasioning actual bodily harm is threatened or inflicted, an act calculated to seriously and substantially humiliate her is threatened or inflicted or there is the threat of the commission of a criminal act against any person[31]. Victoria, New South Wales, Western Australia, Queensland, Tasmania, Canada and New Zealand have completely abolished the immunity by statute[32], while recent decisions in Scotland suggest that the immunity, if it ever did exist in that jurisdiction, no longer does so[33].

It is now clear that the marital immunity no longer exists in England and Wales. The Law Commission recommended its abolition[34], Simon Brown J. refused to apply it in a case in the Crown Court[35], a course not followed by Rougier J., who although disapproving of the immunity, felt bound by it until legislative intervention[36]. In March 1991, the Court of Appeal decided unanimously, in a special five judge sitting, that the rule that a husband cannot be guilty of raping his wife if he forces her to have sexual intercourse against her will is an anachronistic and offensive common law fiction which no longer represents the position of a wife in present-day society and should no longer be applied. Accordingly, the Court determined in convicting a husband who had forced his wife, who was then living with her parents, to have sexual intercourse, a rapist remains a rapist irrespective of his relationship with his victim[37]. This decision was confirmed by a unanimous ruling by the House of Lords in October 1991. Lord Keith remarking:

"Marriage is in modern times regarded us a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband... on grounds of principle, there is now no justification for the marital exception in rape".

The question of rape within marriage remains a controversial one. Unwanted sexual activity is just as offensive to a wife as to any other woman. Difficulties of proof may confront such a charge, but this does not appear to be a valid reason to deny a spouse the ultimate sanction of the criminal law. Many other crimes are just as difficult to prove and others are capable of being used vindictively. These objections usually do not provide sufficient reason not to condemn and criminalise objectionable behaviour. It is up to the woman to decide whether to complain of her husband's activities. The immunity as it stands, may have the distinction of preserving the privacy of the family, but it removes from the wife autonomy over her own body and relegates her to the status of a chattel.

d. <u>The Complainant's Consent</u>

The central issue to be addressed in the context of the law of rape is consent. A present, in most Commonwealth countries, consent is the crux of the crime. Here consent is material in two ways. First, rape is defined as sexual intercourse without the consent of the complainant. Second, consent, or more properly, the lack of it, determines the guilt of the accused, as not only must he perform the act of penetration, but he must have the required <u>mens rea</u> or mental element. In most jurisdictions, the offender must be aware that his

victim is not consenting or, at least, he must be recklessly indifferent as to whether she is or not. Thus, consent becomes the all-important question in the interaction between accused and victim. Lack of consent is the only thing that distinguishes rape from lawful sexual intercourse.

The problems that arise from consent will be discussed under two heads. In this section we will consider problems which relate to the issue of whether the victim consented. In the succeeding section we will examine issues which arise form the belief of the accused as to the victim's consent.

In most Commonwealth countries, rape is defined by statute or by common law as sexual intercourse without the consent of or against the will of the victim. Originally, the law dictated that the threat or application of force by the accused was essential. This changed with time, so that intercourse with a sleeping, drunk or drugged woman was deemed to be rape, as was consensual intercourse where consent was induced by fraud, for example, where the man impersonated the woman's husband[38]. Further, in cases where the man deceived the woman as to the nature or quality of the act of sexual intercourse, it was said to occur without her consent[39].

Although Commonwealth countries shifted from the view that force is required to render sexual intercourse unlawful, research from all Commonwealth jurisdictions indicates that any woman who wishes to prove that she did not consent will face enormous difficulty unless she shows overt signs of fairly serious injury. She will face particular difficulty if she knows or has had a sexual relationship with the man in the past[40].

The reasons for this are varied. Fundamentally, the woman is fighting traditional stereotypes of how women behave in the context of sexual relations generally and sexual assault in particular. Women are believed to be passive in sexual relations, requiring seduction. It is commonly believed that women pretend to be uninterested in, or behave negatively to sexual relations, even in those cases where they are deeply interested[41]. At the same time, women who are forced to have sexual relations are expected to behave in a conventional fashion: screaming, crying and fighting for their virtue.

These stereotypes colour police, prosecutor, judicial and jury reaction to rape complainants. A complainant who is uninjured and behaves calmly and rationally will inevitably run the risk of being labelled a consenting party. The assumption of consent will be even stronger in cases where the complainant and the accused have some form of relationship or where the rape occurs in a social context such as a "date"[42]. Even if the complainant is injured, perhaps seriously, the prosecution will nonetheless frequently suggest that she consented, hoping that the jury will give the offender the benefit of the doubt[43].

A number of jurisdictions, recognising the difficulties that confront the complainant in this context, have attempted to shift the emphasis of the crime from her consent. Most takes as their inspiration the Michigan Criminal Sexual Conduct Act which eliminated consent as an element of crime, focussing on the conduct of the offender, rather than the consent of the victim. Thus, "Criminal sexual conduct" is committed when sexual intercourse occurs where the accused uses force or coercion

or in circumstances where the victim is deemed to be incapable of giving consent. Force or coercion receives a wide statutory definition and includes situations where the victim is overcome by the threatened or actual use of physical force or violence, where she is coerced into consent by threats of future retaliation against herself or any other person, such retaliation against herself or any other persons, such retaliation being defined to include threats of punishment, kidnapping or extortion when the offender medically examines or treats the victim in a manner, or for purposes, which are recognised as medically unethical or unacceptable and when the accused, by concealment or surprise, is able to overcome the victim. The victim is deemed incapable of giving consent if she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct, where she is temporarily incapable of appraising her conduct because she is under anaesthetic or under the influence of any other substance administered to her without her consent and when she is asleep, unconscious or unable physically to communicate unwillingess to do an act for any other reason.

In New South Wales, the consent of the victim is not material in sexual assault category 1 and 2 where, as in Michigan, the focus of attention is on the actions of the defendant. Under this legislation, where the offender maliciously inflicts grievous bodily harm, actual bodily harm or where he threatens to inflict actual bodily harm with a weapon, all that need be proven further is that he intended to have sexual intercourse. However, sexual assault category 3 is defined to occur where sexual intercourse takes place without the consent of the victim.

The Michigan statute and the New South Wales provisions go some way to address the fact that in charges of rape and sexual assault attention is usually focussed on the victim's state of mind, but evidence suggests that in those jurisdiction, her consent remains a material factor. Thus, in New South Wales, sexual assault category 3 is the most common sexual assault offence[44] and it has been held in Michigan that consent is available as a defence, a situation which no doubt is the case where the New South Wales category 1 and 2 sexual assaults are concerned[45].

Thus, for example, where sexual assault category 3 is concerned, New South Wales deems consent to be absent where the victim consents under a mistaken belief as to the identity of the other person or under a mistaken belief that she is married to the offender or where submission to intercourse is gained as a result of threats or terror, whether or not these threats are against the victim or a third person. Consent is further deemed not to exist where the victim is under the age of 16 years or under the authority, whether generally or at the time of the sexual intercourse only, of the offender[46]. Canada provides that consent does not exist where submission occurs because of the application of threats or fear or the application of force to the victim, or to someone other than the victim, such as, for example, her child, fraud or the exercise of authority[47].

Provisions such as these attempt to spell out the behaviour the law regards as non-consensual. To a certain extent, this relieves the factfinder of a major decision. Such provisions are of assistance in an

area which is nebulous and surrounded by prejudice and assumption. it is essential, however, that provisions of this nature should be clear and flexible, so as to allow the courts to recognise a wider range of circumstances that may negate consent[48].

The current provisions, in effect, merely codify and clarify the existing law, rarely going further. A case certainly exists for such clarification, however. The jury or factfinder is provided with a clear legislative guideline and the enactment of such a provision carries with it condemnation and criminalisation of acts of intercourse submitted to because of force or fear.

The important question, is however, whether such a provision should go beyond the current law. Naffin in South Australia[49] suggested a more detailed provision indicating that consent which is grudging or elicited following substantial pressure being applied should be inoperative. She proposed, further, that consent should be vitiated where it is gained by the imposition of the other person's position of authority over, or professional or other trust in relation to the victim, by the detention, whether lawful or otherwise, of the victim or by the exertion of the offender's influence over the victim in circumstances where the victim is under the age of 18 years and is living in the family home of the offender, who is her parent or step parent.

The provision proposed by Naffin recognises pressure which a woman may suffer and acknowledges that consent in these circumstances is unlikely to be real. A number of Commonwealth countries have considered the occurrence of sexual intercourse in circumstances such as described by Naffin and have preferred to condemn such intercourse by establishing specific offences. Thus, India criminalises sexual intercourse between a public servant with a woman in his custody, between a superintendant of a gaol, remand home etc, and the inmate of such an institution, hospital and intercourse by a member of the management of staff of a hospital with any woman in that hospital[50]. New Zealand has introduced the crime of "inducing sexual connection by coercion", which occurs where sexual activity takes place when the offender knows that the complainant consents because of the offender's position of power. Thus, sexual activity consented to because of an express or implied threat by the offender or some other person that he will commit an offence punishable by imprisonment, that does not involve actual or threatened force, an express or implied threat that the offender or some other person will make an accusation or disclosure, whether true or false, about the misconduct of any person, whether living or dead, in circumstances where that disclosure is likely to damage the reputation of the person against whom or about whom the accusation or disclosure is made or an express or implied threat by the offender to make improper use of any power or authority arising out of any occupational, vocational or commercial position he may hold, to the victim's detriment, is criminalised[51]. The offence, which carries a possible penalty of 14 years imprisonment, is based on the view that people who are in a position of vulnerability, be it psychological or commercial, should be protected from sexual activity that they do not want and to which they grudgingly consent. New South Wales, similarly, provides that where consent to sexual intercourse is obtained by virtue of a "non

violent threat", defined as intimidatory or coercive conduct or other threat, not involving a threat of physical force, in circumstances where the victim could not be reasonably expected to resist the threat and where the offender is aware that submission is gained because of the threat, the offender is liable to six years imprisonment[52].

e) The Accused's Mental State

To establish the crime of rape, the prosecution must prove not only the occurrence of the unwanted physical act, but also that the accused had the requisite mens rea or mental state. Accordingly, the prosecution is required to prove, beyond all reasonable doubt, either that the accused knew that the victim was consenting or he was recklessly indifferent as to her wishes[53].

Except in a very few Commonwealth jurisdictions, which include New Zealand and some Australian states, the tribunal of fact - the jury - need not consider whether the accused's belief concerning the complainant's wishes was reasonable, although it may consider this in attempting to discern whether the accused actually believed that she consented[54]. In short, whether the accused is guilty depends on his honest and genuine belief, not on what a reasonable person in his position may have believed. This means that if he can show that irrespective of what a reasonable person would conclude from the behaviour of the complainant at the time, he honestly and genuinely believed that she was consenting to his activity, he must be acquitted.

The mental element required for the crime of rape has been scrutinised by a number of Commonwealth law reform bodies and, generally, there has been no recommendation of change in this aspect of the current law[55]. Nevertheless, the area continues to be the subject of intense debate. Naffin, for example, argues that the current formulation confronts the prosecution with a task which is too formidable. It must seek to prove two subjective elements: the state of mind of the victim and the accused's perception of her state of mind. This, she argues leads to unfair weighting of the case in favour of the accused. This leads to low conviction rates in rape trials and opens the complainant to suggestions that, notwithstanding evidence which would indicate her dissent to any reasonable person, the accused believed that she was consenting to his actions[56]. A good example of the latter point is provided by the defence in Morgan[57]. There the three accused claimed that they believed Mrs Morgan was consenting to intercourse because her husband had told them that she was "kinky" and was likely to struggle to get "turned on".

Those who support the current formulation argue that rape is not a singular crime and there is little evidence to indicate that many guilty rapists are unjustly acquitted. They then suggest that the formulation is a statement of the general and principled position, which exists throughout the criminal law, which posits a subjective test of intention to allow an accused to be judged according to the facts as he or she believed them to be, rather than as they actually were. In other words, they argue, the mens rea required for rape is merely a particular example of the general view of the criminal law that offenders should be punished for what they are, rather than what they should be[58].

In essence, opponents of the current law suggest three models of reform[59]. The first, which is only a slight variation on the current law[60], requires the prosecutor to prove that the intercourse occurred without the victim's consent. The accused would then be able to lead evidence that he genuinely believed that the woman was consenting. The Crown would then carry the burden of persuading the jury, beyond all reasonable doubt, that the accused knew, either that the victim was consenting or that he was recklessly indifferent to her consent.

The remaining proposals substantially vary the current law. Both require the prosecutor, in the first instance, to prove that the intercourse took place without consent. Both then provide that it is a defence for the accused to argue that he honestly believed that the woman was consenting, a belief that he must convince the jury of, on the balance of probabilities. One proposal then goes further and requires the accused, not only to show this belief, but also that, on the balance of probabilities, this belief was honest and reasonable.

Both these proposals, to a certain extent, shift the onus of proof in a rape trial from the prosecution to the accused. The third model, however, involves a complete reworking of the mental element involved in the particular crime and, moreover, goes against many of the fundamental principles of criminal law. It thus deserves close scrutiny.

At present, the jurisdictions where an objective element enters into the assessment of the alleged rapist's mental state are Tasmania, Western Australia and Queensland, where the codes require that the defence of honest mistake be reasonable[61], and New Zealand.[62]

In New Zealand, the prosecution must prove that the accused had sexual connection without the consent of the complainant. If it is then able to show that there were no reasonable grounds upon which the accused could base an allegation of consent, it has fulfilled its task and the man must be convicted. The requirement of reasonable grounds should mean that the complainant will cease to run the risk of the accused suggesting that he honestly and genuinely believed that al women fought and screamed when having sexual intercourse. Whether this is the case will require research as the provision is new, having commenced on 1 February 1986.

Essentially, the questions of whether the accused's mental state should be judged subjectively or objectively or whether he should be required to give an account of himself by discharging a burden of proof are political ones. They resolve themselves into whether rape should be regarded as a singular crime deserving of special treatment and whether the rights of the accused in a criminal trial should be modified. The questions are serious ones and answers to them should not be reached without serious consideration or in undue haste. For example, it may be appropriate here to distinguish between classes of offenders. There may be, for instance, a stronger argument of the reversal of the burden of proof in certain fact situations. It might well be that a police officer or gaol superintendent should be required to give an account of himself in cases where he rapes a woman in his custody[63]. Whether every accused should be given such a burden is another question. It may be argued that in attempting to extend the law's protection to the

complainant in the definition of the offence, the legislature is unwisely whittling away the rights of the accused. Close observation of the New Zealand provision and its effect on the rate of conviction and the trial process is a clear priority.

f) Evidence

During the trial of the accused, the complainant in a case of sexual assault undergoes an ordeal which differs from that of other victims of crime. Like other crime victims she must relive the crime and withstand cross-examination designed to discredit her story. Like them she may have had to experience a long time lapse between the alleged offence and the trial. The accused may have been allowed bail and the complainant may have come into contact with him in the community. She does, however, have special problems which do not confront other crime victims. She is very often the sole witness; the success of the prosecution will depend on her evidence, particularly where it concerns her consent. The events described in court will be intimate and, very often, the details described will be humiliating. Defence attempts to discredit her as a credible witness will inevitably touch on her past sexual history, something she will wish to keep secret, or the fact that she did not complain of the assault immediately or that there is no evidence to corroborate her complaint. There are, thus, a number of aspects of a sexual assault trial which are worthy of consideration.

Traditionally, the trial testimony of the sexual assault complainant has been treated with suspicion. It is often claimed that the woman feels as though she, not the accused, is on trial[64]. Three aspects of the trial process particularly highlight this: first, the requirement that the victim provide evidence of "fresh complaint" of the assault, second, that her evidence should be corroborated and third, the fact that her evidence can be impugned by evidence which reveals her past sexual history. Each of these requirements will be considered below.

(i) Fresh Complaint

A rape complainant is entitled to give evidence that she complained, voluntarily and without prompting, of the rape to a third party at the earliest reasonable opportunity. This rule is an exception to the general evidentiary rule that previous statements of a testifying witness are inadmissible of the facts stated and is allowed in order to combat the assumption that would otherwise be made that her testimony is false[65].

Although the fresh complainant rule can provide advantages to a complainant, generally it acts negatively, because any delay in reporting the offence raises the implication that the complaint has been fabricated, which defence counsel has, traditionally been quick to exploit[66]. Further, many judges find it appropriate to instruct the jury that, in evaluating the evidence of a woman who complaints of rape, they should take into account, to her disadvantage, the fact that she made no complaint at the earliest reasonable opportunity.

Many studies indicate that for a variety of complex social and psycological reasons, women may delay complaining of sexual assault[67]. Both the Canadian and New South Wales sexual assault legislation contain provisions which are intended to address the problems raised by fresh complaint evidence. Thus, the Canadian Criminal Code provides in s. 246.5 that the rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated. New South Wales, on the other hand, provides that the judge must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false and inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making a complaint about the assault[68].

The Canadian provision appears to be less satisfactory than that of New South Wales as it appears not only to prohibit the judge from drawing adverse attention to that fact that the victim failed to complain, but also to prevent the prosecution or the judge from raising the fact that she did complain immediately, which given current prejudice, may assist her. Moreover, defence counsel is not precluded by the provision from drawing attention of her failure to complain in cross - examination[69]. The New South Wales provision, on the other hand, allows any complaint to be used to the victim's advantage.

(ii) Corroboration

The requirement of corroboration is of long standing, stemming from the fear, often articulated by trial judges, that rape and related sexual offences are easy to allege, but difficult to disprove. Where most crimes are concerned, the accused can be convicted on the testimony of one individual, but where the crime is sexual, the evidence of the victim alone is insufficient and it is essential that it is corroborated in some way. The principle justification for the rule is the view that women have a tendency to make false allegations of sexual assault, perhaps because they are inherently unreliable or because they wish to hide consensual sexual activity of which they are ashamed[70].

Doubts have been raised as to the justification and the value of the corroboration requirement and these deserve serious consideration.

First, it is doubtful whether sexual assault is ever an easy crime to allege. Certainly, there are many disincentives to reporting the crime and research has shown that the current system deters or certainly weeds out any shaky stories. Secondly, false allegations can be made with respect to any other crime, particularly crimes where insured property is involved. Further, the trial process with cross examination and the penalties for perjury should act as sufficient disincentive to false allegation. Finally, no evidence exists, beyond received wisdom, that women are particularly prone to hysterical or malicious allegations of sexual interference.

While there appears to be little justification for the requirement of corroboration, indications exist that it may seriously impede the conviction of sexual offenders. Where the victim has submitted to intercourse through fear, or in those cases where she is not seriously injured, or if she delays in complaining of rape, the prosecution will be unable to adduce sufficient evidence to corroborate her account. This will seriously affect the jury and further, may lead to failure to prosecute at the outset[71].

In a number of Commonwealth jurisdictions, corroborating evidence is not specifically required. However, it is a rule of law that the judge must tell the jury that it is unwise to convict on the uncorroborated testimony of the complainant[72]. Such a rule amounts, in effect, to a requirement of corroboration; it gives judges the opportunity, of which they unfortunately take advantage, to cast aspersions on the victim's honesty. Such warnings range from complete impartiality to remarks such as "It is known that women in particular and small boys are liable to be untruthful and invent stories"[73].

Some Commonwealth jurisdictions have abolished both the requirement of corroboration and the judges warning of the dangers of conviction on uncorroborated testimony. Canada, for example, provides that no corroboration is required for conviction and the judge shall not instruct the jury that it is unsafe to find the accuse guilty in the absence of corroboration[74], while in New South Wales the warning remains in the discretion of the judge[75]. It remains to be seen how judges will approach the question of corroboration in those jurisdictions where the requirement has been modified, but evidence from New South Wales indicates that in the majority of cases the corroboration warning is not given[76].

(iii) Past sexual history

The corroboration requirement is not the only method of testing the credibility of the complainant. In many Commonwealth countries, legislation provides that the complainant's character in can be brought into question in the trial, while in others, the common law provides that the complainant may be asked questions about her past sexual relationships with men other that the accused. Where the common law rule prevails, this evidence as to her past sexual history with men other than the accused can be introduced either to prove that the woman is of "notoriously bad character", for example, a prostitute or highly promoscuous and thus likely to have consented to intercourse, or to prove that she is unreliable and thus her evidence is suspect[77].

In general, the law as it exists, whether enshrined in statute or in the common law, allows examination of the complainant's past sexual history in fairly narrow circumstances. However, in practice, the complainant faces a barrage of questions in cross-examination about her past sexual, social and medical experience. The aim of these questions is to

protect the defendant and denigrate the character of the complainant. Certainly, any complainant who is promiscuous or a prostitute will be unlikely to be classed as a victim: she will always be considered as a willing participant, even in cases where violence has occurred. Even if the complainant has very little experience, or was a virgin before the assault, cross-examination can be savage, destructive and completely demeaning and leave her with the impression that it is she, not the accused, who is on trial.

Again, Commonwealth countries have introduced reforms which seek to limit the introduction of evidence of the complainant's past sexual history[78]. It is useful to consider the provisions in England, Canada and New South Wales in this context.

In England, such evidence may be admitted only if application to do so is made to the judge in the absence of the jury and the judge is satisfied that it would be unfair to the accused to refuse to allow the evidence to be adduced or a question to be asked. The Canadian provision is much more specific. Evidence as to the complainant's past sexual activity with the accused may be freely admitted, but no evidence may be adduced as to the complainant's past sexual history with any other person, unless it is evidence which falls within three categories. These are, evidence that rebuts evidence of the complainant's sexual history or absence thereof that was previously adduced by the prosecution, evidence of specific instances of 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 and the evidence relating to the consent that the accused alleges he believed he was given by the complainant to the sexual activity that is the subject matter of the charge. Even if the evidence falls within one of these categories, it is admissibile only after reasonable notice in writing has been given to the prosecutor of the evidence and its particulars and the judge has conducted a closed hearing, after which she or he decides that the evidence falls within one of the allowed categories[79].

The legislation in New South Wales absolutely prohibits evidence of sexual reputation, while evidence of sexual experience is inadmissible except in specific circumstances. These are where it is evidence of sexual experience or a lack of sexual experience or sexual activity or a lack of sexual activity taken part in by the complainant at or about the time of the alleged offence or evidence which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed; where it is evidence relating to a relationship which existed between the accused and the complainant which recently existed or existed at the time of the offence; where the accused denies that intercourse took place and the evidence is relevant to the presence of semen, injury, disease or pregnancy; where there is evidence of a disease in the accused or the complainant and its absence in the complainant or

accused; where the complainant only alleged sexual assault after the discovery of pregnancy or disease; where the prosecution alleges the complainant has or has not had previous sexual experience and where evidence is given by the complainant in cross-examination by or on behalf of the accused person and its probative value outweighs any distress, humiliation or embarassment which the complainant might suffer as a result of its admission[80].

The provisions limiting evidence of the complainant's past sexual history have had differing effects. The absence of specific guidelines in the English legislation has resulted in uneven interpretation of the discretion conferred on the judge by individual judges. Zsusanna Adler, who studied 40 contested rape trials, found that 40% of the defendants applied to introduce evidence of the complainant's past sexual experience and in many cases such evidence was admitted[81]. Even in cases where there was no solid evidence or valid grounds for an application to adduce such evidence, defence counsel did, in some way, attempt to attack the woman's past[82]. In New South Wales, on the other hand, the operation of the prohibition and exceptions appears to have reduced the admission of sexual experience and narrowed the scope of the material and its use. This means that the New South Wales amendments have been successful in reducing the personal trauma for the complainant[83].

No matter what approach is taken to the issue by the legislature, it is rare for the complainant's past sexual history to have any bearing on the particular complaint. Prostitutes are as susceptible to sexual assault as virgins, but any indication, at trial, that the woman is a prostitute or promiscuous will affect a jury and almost inevitably lead to the acquittal of the accused. It is a priority, therefore, that ways are found to limit the introduction of irrelevant evidence about the complainant's sexual activity.

It may be suggested that evidence of prior sexual activity with the accused stands on a different footing to evidence of past sexual activity generally. It is to be noted that the New South Wales provisions prohibit introduction of such evidence, unless it falls into one of the stated exceptions, while Canada allows the introduction of such evidence. Automatic introduction of such evidence allows a jury to conclude that because the complainant may have consented once to sexual activity with the accused or, indeed, have lived with the accused, she continues to consent. Such an assumption has the effect of denying the woman the right to determine how she will use her body.

The reforms described do not address other court practices which degrade and humiliate complainants. No restriction, beyond the requirement of relevance, is placed on questioning about dress, alcohol consumption or general behaviour. Legal practitioners and judges must exhibit greater sensitivity as to the other ways a woman's reputation can be ipugned at trial.

The complainant is a unique witness. Her testimony is essential, and within the adversary system, the defence must destroy her testimony to succeed. There is a difference, however, between destroying the complainant's testimony and the complainant herself. Suggestions have been made that complainants be independently represented at the trial, so that they can be shielded from irrelevant and harassing questions which seek to exploit stereotypical attitudes[84]. Ideally, separate representation should be unnecessary, as the judge should protect the victim from such examination and indeed, defence counsel, should not put such questions. Experience shows, unfortunately, that judges do not always fulfil this function and may themselves ask harassing and irrelevant questions and that defence counsel, routinely, cross-examine brutally[85]. The question that remains is whether further legislative restriction should be placed on cross examination or whether the behaviour of the bench and bar in rape cases can be addressed adequately by education and other strategies.

g) Court proceedings

Current court practice and procedures can exacerbate the complainant's ordeal during trial. These include long time lag between incident and trial, lack of information about the progress of the case and the whereabouts of the offender and the demeanour of prosecutors, judicial officers and other persons with whom she may have to deal.

It is important that the delay between incident and trial should be as short as possible. In Britain, it is usually more than a year before the offender is brought to trial. This impedes the victim's recovery, preventing her from resuming normal life as soon as possible.

Victims and their families often complain that they are given little information about the proceedings. They are frequently not informed about the progress of investigation, the charges laid or the reasons for not laying charges, the role of the victim as chief witness for the prosecution, the date and place of the hearing of the proceedings and other aspects of the case. Complainants and their families find this extremely disturbing. They are usually unfamiliar with legal proceedings and even where they are they are unlikely to be very familiar with sexual assault proceedings. In this context, it has been suggested that a carefully worded, explanatory statement could be sent to the complainant[86]. Most importantly, the complainant and her family should be told of the whereabouts of the offender. Bail should be denied unless there are very exceptional circumstances, the victim's views as to bail should be a material matter in any bail application and victims should be protected against unlawful intimidation. Where the accused is released or escapes, the victim should be informed.

Attention must be given to the physical aspects of the court. Separate waiting rooms and other facilities should be arranged so that the complainant does not meet the accused or his family and friends in the court precinct. She should be protected in the courtroom also. Thus, the victim and accused should not be in close proximity. Indeed, courtrooms could be arranged so that the complainant does not have to

see the accused at all. Arrangements could be made, further, so that a complainant who wished to sit through the entire trial could enter the court and sit in an area where she would be undisturbed.

A number of Commonwealth jurisdictions have legislated with these points in mind. In New Zealand, for example, the Victims of Offences Act 1987 directs prosecutors, judicial officers, counsel, officials and other persons who deal with victims to treat them with courtesy, compassion and respect for their personal dignity and privacy. Victims are to be informed of the services and remedies available to them and the conduct of proceedings. They should be protected from intimidation, their views on bail and any fears they have about the offender are to be imparted to the court deciding any bail application and they are to be notified of the release or escape of the offender.

In some countries, provisions have been introduced to limit the numbers of persons who can be present at the trial. Some provide for in camera proceedings[87], some provide that the court is to be closed to all except specified persons when the complainant gives her evidence, and others allow for her to give evidence in written form[88].

Anonymity of the victim of sexual assault is essential both as protection for the individual victim and to encourage other victims to report such attacks. In criminal cases, it is usual for a witness to state her or his name and address and the press and others are at liberty to publish these. Many Commonwealth countries have, however, introduced statutes that protect the complainant from the revelation of information which may lead to her identification[89]. These provisions take various forms. Some are flawed because, for example, they do not provide protection until a charges is laid or do not cover cases of indecent assault. Some allow the publication of the offender's name, which, given that most rape offenders know their victims, allows for identification of the woman. Most allow the judge a discretion to allow publication[90]. While such a discretion can be justified in order to balance the need to make the complainant's position as tolerable as possible and the need to ensure fair trial, exercise of the discretion must be responsible. Where the discretion is exercised, the judge must indicate that this is a serious decision and that the press will bear a heavy responsibility to act with sensitivity and compassion.

h) Sentencing

Light sentences in sexual assault cases not only trivialise the experience of individual victims, but also carry the wider implication that female sexual victimisation is unimportant.

Most Commonwealth countries provide a significant maximum penalty for the offence of rape, but serious penalties are uncommon. Many factors lead to the mitigation of an offender's sentence. For example, victims may be perceived of as "contributing" to the assault or the court may consider that the woman did not suffer significantly[91].

Criticism of sentencing practice in cases of sexual assault has led some jurisdictions to set minimum tariffs in legislation[92] or set judicial guidance for sentencing. In the United Kingdom, for example,

the Lord Chief Justice laid down specific guidelines for rape offenders in the case of Billam[93]. These proceed on the basis that the offender should receive a custodial sentence, unless the circumstances were most exceptional and that the starting figure, in the absence of mitigating factors, should be five years. Particularly dangerous offenders, such as serial rapists, should receive at least fifteen years, while in some cases, for example, where the offender is a psychopath, he should be imprisoned for life. The policy of the Chief Justice's guidelines was underlined by an announcement by the government that parole would normally not be granted where the offender was sentenced to more than five years imprisonment[94].

Other jurisdictions have introduced complementary strategies to ensure appropriate sentencing. New Zealand, for example, provides that the sentencing judge should receive an oral or written statement from the prosecutor about the physical or emotional harm that the victim has suffered[95], while Canada and a number of Australian states allow the prosecution to appeal against sentence.

i) Supports

Rape victims are usually ashamed, guilty and afraid of how people will react to them. Some are humiliated, ridiculed, scorned and stigmatised by police and social workers, and treated with hostility and suspicion by their family and friends. indeed, the victim is often stigmatised more than the rapist.

Negative responses to victims stem from attitudes to women, rape victims and rape which can be traces to myth and prejudice. Women are believed to provoke rape by the way they dress, where they go, the way they move and behave. They are considered to be responsible for their own protection and must ensure that they do not arouse male sexuality, which is traditionally portrayed as an uncontrollable force. Women are also believed to desire rape subconciously. These myths stem from the belief that any woman can avoid rape if she wants to, a belief which is difficult to support, in view of the fact that most men are significantly stronger than women. Rape has also been portrayed as the vindictive cry of the woman scorned or the girl who regrets intercourse.

Evidence from most parts of the Commonwealth indicates that the police are particularly at risk of being misinformed by these stereotypes. The police are often suspicious of complainants, particularly if there is no sign of injury, if the woman knows the offender, if she delays reporting the rape or if she appears unnaturally calm or unemotional. If the woman is seen as morally dubious, as she will be if she is living with her boyfriend, is sexually experienced or is a prostitute, the allegation will be completely in doubt.

Police suspicion manifests itself in various ways. Firstly the initial complaint may be totally disbelieved and the woman discouraged from pursuing her complaint at the outset. Secondly, police investigation may consist of insensitive, bullying interrogation of the victim. This may involve a succession of officers interviewing the woman or a medical examination in unpleasant or threatening surroundings. Further, she may not be supplied with basic information,

let alone helpful information that might lead to agencies which offer comprehensive victim support services.

Police stations are the traditional rape reception agencies. Police response to complainants of rape and assault requires priority attention. Here, again, education and training are essential. Police at all ranks must be educated so that prejudices are eliminated and practical approaches to a complaint are imparted. All police officers require training in this area, as do police surgeons, although it may well be that specialised teams should handle cases of sexual assault.

Throughout the Commonwealth, it is common for police offices to receive basic training in the law and practice relating to sexual assault. in most countries this training is brief and underresourced. Recently, however, a number of countries have turned their attention to specific training and education of police personnel at basic initial course level and refresher and advanced level. This training has concentrated on sensitising police to "rape trauma syndrome", behaviour the woman may exhibit after rape, which departs from expectations held about victim behaviour, and educating officers about appropriate procedures for the collection of evidence of the offence. In Canada, a critical part of the training and education process has been the Sexual Assault Examination Kit, which is included in this Manual.

This inexpensive Kit is used in the examination and treatment of a rape complainant, its aim being to collect and preserve evidence in the most sympathetic manner possible. It cannot be used until the victim completes a consent form and it contains an information guide for her, which explains legal procedures, medical examinations, the trial and victim services. It also contains guides for the police officer and the examining physician, as well as various forms to be completed by the examining physician and receptacles for the collection and preservation of physical evidence, such as fingernail scrapings, swabs, hair and clothes. All the guides and forms are in the two official languages of the country.

The introduction of the Kit required the education of officers as to its contents and use. Use of the kit continues the work of training and educating officers, making them meticulous in their evidence collection techniques and directing their inquiries in ways which are less heavy handed than in the past.

Other Commonwealth countries have introduced devices like the Kit to alleviate the ordeal of the complainant. In the United Kingdom, police have developed "rape suites". These are specially designed interview rooms, equipped with a bathroom and examination couch. The victim is interviewed and examined in the "suite", which is separate from the main station interviewing area and provides pleasant and comfortable surroundings. It is not uncommon for initial police examination to last up to eight hours and the introduction of "suites" has meant that the complainant is less threatened and, certainly, more comfortable than previously.

Many countries do not have the resources to introduce facilities such as the "rape suite" and even those countries that do will be unable to ensure that there are sufficient suites throughout the country. It

is unlikely, for example, that remote rural areas will have such a service. It is possible, however, for all countries to improve police attitude and training. All countries can increase the number of female police officers, allow the complainant to be accompanied by a supportive individual during police questioning and examination and seek to provide a female medical examiner, if the victim would prefer this. All countries can ensure that the questioning and examination of the victim take place in a discrete area, so as to reduce her distress and humiliation.

In many countries of the Commonwealth, voluntary groups have established what are sometimes called "rape crisis centres". Some of these operate a telephone advice line or a short term residential facility for victims. Most provide sympathetic and knowledgeable support for complainants. Their activities have been invaluable in educating the police and public to the reality of sexual assault and many individual victims have found their support critical. Where these centres exist, they should be encouraged and funded by the government. Further, close liaison with such centres and the police often provides a better service for victims, which leads to better evidence and, ultimately, greater conviction rate.

C. A LEGAL ALTERNATIVE

The criminal process is not the only way for victims of sexual assault to gain redress. Sexual assaults are civil wrongs and it is possible for a woman to sue the offender in tort or seek redress from the criminal compensation scheme which may exist in the particular country.

For the purpose of a civil suit, the woman need only prove that the assault occurred on the balance of probabilities and she may recover substantial damages. She may proceed civilly whether or not the man is prosecuted.

Civil proceedings in cases of sexual assault have been pursued in Canada, Australia and the United Kingdom. They are not common and frequently are pursued where the authorities have decided not to prosecute[96]. Successful criminal compensation proceedings allow the victim to receive compensation and also provide an indication that the attack is regarded seriously by society[97].

1. For discussions of this nature see M. Amir, Patterns in Forcible Rape (Chicago, University of Chicago Press, 1971); C. Boyle, Sexual Assault (Toronto, Carswell Co. Ltd., 1984) S. Brownmiller, Against Our Will: Men, Women and Rape (New York, Bantam Books, 1976); L. Clark and D. Lewis, Rape: The Price of Coercive Sexuality (Toronto, the Women's Press, 1977); A.N. Groth, Men who Rape: The Psychology of the Offender (New York, Plenum Press, 1979); R. Gunn and C. Minch, Sexual Assault (Winnipeg, University of Manitoba Press, 1988).

2. For example, Antigua, Offences Against the Person Act, Cap. 58 (as amended); Bahamas, Penal Code, Cap. 48; Barbados, Offences Against the Person Act, Cap. 141; Belize, Criminal Code, Cap. 21; Trinidad and Tobago, Sexual Offences Act, 1986; New Zealand, Crimes Act, 1961, ss. 127ff (as amended by the Crimes Amendment Act (No. 3 1985); India, Penal Code, ss. 302, Botswana, Criminal Code, s. 141ff.

3. Sexual Offences (Amendment) Act, 1976, England and Wales.

4. Hughes (1941) 9 C & P 752.

5. L. Holmstrom and A. Burgess, "Sexual behaviour of assailants during reported rapes", Archives of Sexual Behaviour, Vol. 9, 1980, p. 427.

6. Criminal Law Consolidation Amendment Act, 1976, s.3.

7. Victoria, Crimes Act 1958, s. 2A(1); NSW, Crimes Act, 1900, s. 61A; New Zealand, Crimes Act 1961, s. 128.

8. Criminal Code, RSC 1970, s. 246 1-3.

9. Chase v The Queen (1984) 40 CR (3d) 282, 13 CCC (3d) 187.

10. The Queen v Gardynik (1984) 40 CR (2d) 282.

11. R v Alderton (1985) 44 CR (3d) 254; R v Taylor (1985) 44 CR (3d) 263; R v Thorne (1984) 13 WCB 261; R v Ramos (1984) 42 CR (3d) 370; R v Cook (1985) 46 CR (3d) 129.

12. C.M. Boyle et. al., A Feminist Review of Criminal Law (Ottawa, Minister of Supply and Services, 1985) p.58f.

13. Criminal Law Revision Committee, Sexual Offences, Working Paper (London, HMSO, 1980); Criminal Law Revision Committee, Sexual Offences, 15th Report, Cmnd. 9231, (London, HMSO, 1984).

14. Sexual Offences Act, 1985 (England and Wales)

15. Criminal Law Revision Committee, Sexual Offences, op. cit, para. 45. The first argument is a quotation from the Advisory Group on the Law of Rape (The Heilbron Committee) Cmnd. 6352 (London, HMSO, 1975) para. 80.

16. J. Temkin, Rape and The Legal Process (London, Sweet and Maxwell, 1987), p. 30.

17. Criminal Code, RSC, 1970, (Canada) S.246. 1-3; Crimes Act 1900 (NSW) s. 61B-E; Acts Amendment (Sexual Assaults) Act 1985 (WA); See also, Crimes (Amendment) Ordinance (No. 5) 1985, ACT

18. The inspiration for grading sexual assault is the Michigan Criminal Sexual Conduct Act 1974.

19. Other jurisdictions such as Tasmania have graded sexual assault, while still others, such as South Australia, Malaysia and Victoria are considering such proposals of this nature.

20. H. L'Orange and S. Eggar, "Adult Victims of Sexual Assault" in Proceedings of the Institute of Criminology, (Sydney, NSW, 1987) p.12, p. 29f; J. Temkin, op. cit, p. 96ff.

21. Department of Justice and the Institute of Criminology, New Zealand, Rape Study, Volume 1, A Discussion of Law and Practice, 1983, p. 109.

22. Women's National Commission, Violence Against Women, Report of an ad hoc working group (London, HMSO, 1985) p.37.

23. H. L'Orange and S. Eggar, op. cit, p. 29f.

24. Sir M. Hale, History of the Pleas of the Crown, (1736) p. 636.

25. M.D.A. Freeman, "But if you can't rape your wife, whom can you rape?" Family Law Quarterly, 1981, p. 1.

26. [1888] 22 QBD 23. In reality this case is slender authority for the proposition it is used to support. The remarks pertaining to marital rape were obiter dicta and two judges pointed to the inconsistency of convicting a husband for assault, but not rape.

27. Miller [1954] 2 QB 282.

28. O'Brien [1974] 3 ALL ER 663; Steele [1977] Crim. L. R 290; Clarke [1949] ALL ER 448; see Act No. 9 of 1987 of Tonga which provides that a man can be convicted of raping the woman from whom he is separated or divorced by due process of law.

29. Criminal Law Revision Committee, op. cit., para.33.

30. D. Finkelhor and K. Yllo, "Rape in marriage: a sociological Hedlund (Stockholm, 1985) p. 57, p. 57ff; Dr Russell, Rape in Marriage (New York, Collie Books, 1982); Guardian, September 20, 1989.

31. Criminal Law Consolidation Act (SA) s. 73(5).

32. Crimes Act 1900 (NSW) s. 61A(4); Crimes Act 1958, (Vic) s. 62(2); Criminal Code (Qld) s.347; Criminal Code (Tas), s. 185; Criminal Code (Canada) s. 246.8; Crimes Act 1961 (NZ) s. 128(4).

33. HM Advocate v Duffy (1982) SCCR 182; Stallard v HM Advocate (1989) SCCR 248.

34. Rape within Marriage, Working Paper No. 116 (London, HMSO, 1990).

35. R v C (1990) 140 NLJ 1497.

36. R v J (1991) 141 NLJ 17.

37. R v R (1991) 141 NLJ 383.

38. J. Temkin, op. cit., pp. 61-76. Note, in Scotland the use of force has been traditionally emphasised. There the offence is not made out where the woman is unconscious or sleeping, drunk or drugged, unless the alcohol or drugs are given to her in order to make her insensible for the purposes of intercourse: H.M. Advocate v Logan (1936) JC 100.

39. R v Flattery (1877) 2 QBD 410; R v Williams [1923] 1 KB 340.

40. S. Edwards, Female Sexuality and the Law, (Oxford, Martin Robertson, 1981) Chapter 4; Z. Adler, Rape on Trial (London, Routlege and Kegan Paul, 1987) Chapters 3, 4 and 7.

41. S. Edwards, op. cit., Chapter 4; J. Temkin, op. cit., pp. 1-16. Temkin quotes the infamous remarks of Wild J. in the Crown Court at Cambridge in his summing up to the jury in a 1982 case which exemplifies these stereotypes:

> "Women say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used."

42. "Date", "petty" or "acquaintance" rape is the most common form of sexual assault and the most difficult to prove. Incidents of this variety of sexual violation will inevitably increase as women and men continue to have contact with each other in the workplace and elsewhere and traditional taboos separating the lives of women and men disappear. See the Editorial, Independent on Sunday, 16 June 1991.

43. Note the suggestions of defence counsel in the notorious case of Morgan [(1976)] AC 182.

44. H. L'Orange and S. Eggar, op. cit., p. 33.

45. J. Temkin, op. cit., p. 109ff; People v Khan (1978) NW 2d. 360.

46. See the legislation in Tasmania, Western Australia and New Zealand which also provide a general list of circumstances where consent will be deemed to be vitiated.

47. Criminal Code, Canada, s. 244(3).

48. K. Warner, "The mental element and consent under the new "rape" "laws" Criminal Law Journal, 1983, Vol. 7, p. 245.

49. N. Naffin, "An Inquiry into the Substantive Law of Rape" (Adelaide, 1984) p. 35.

50. Penal Code, s. 376A-D.

51. Crimes Act 1961, s. 129A (NZ).

52. Crimes Act 1900, s. 65A (NSW).

53. Temkin, op. cit., 76ff.

54. The mental element for rape was considered in the English case of Morgan [(1976)] AC 182. It is now codified in the Sexual Offences Act 1976 s. 1 (England and Wales). The test in Morgan appears to apply throughout the Commonwealth with the exception of some Australian states and New Zealand. See, for example, Scotland: Meek v H. M. Advocate (1982) SCCR 613; Canada:

Pappajohn v The Queen (1980) 52 CCC (2d) 481; M. Good, "The mental element of rape: the Naffin Report and other questions: a defence of the common law" Criminal Law Journal, Vol 9, 1985, p. 17; P.K. Menon, "The law of rape and criminal law administration with special reference to the Commonwealth Caribbean" International and Comparative Law Quarterly, Vol. 32, 1983, p. 832.

55. The Heilbron Committee, op. cit.; Royal Commission on Human Relationships, Final Report (Canberra, AGPS, 1977) Volume 5, Annexe VIIB.

56. N. Naffin, op. cit; See also, C. Boyle et. al., op. cit., p. 59ff; Consumers' Association of Penang, Memorandum in Amendments to Rape laws (Penang, CAP, 1985) p. 16-17.

57. [1976] AC 182.

58. M. Goode, op. cit, p. 17, p.22ff.

59. N. Naffin, op. cit; T. Pickard, "Culpable mistakes and rape: harsh words of Pappajohn" University Law Journal of Toronto, Vol. 30, 1980, p. 415; C. Boyle et al., op]. cit, p. 59ff; C. Wells, "Swatting the subjectivist bug" Criminal Law Review, 1982, p. 209.

60. M. Goode, op. cit., at p 24f. suggests that this is, in fact, how the current law operates in practice.

61. M. Goode, op. cit, p.39ff.

62. Crimes Act 1961 (NZ) s. 128.

63. Indian Penal Code, s. 376.

64. Z. Adler, op. cit., Chapter 7.

65. J. Temkin, op. cit., p. 144ff.

66. Z. Adler, op. cit., p. 119.

67. C. D. Woods, Sexual Assault Law Reforms in New South Wales (Sydney, Government Publisher, 1981) p.25ff; B. Toner, The Facts of Rape (London, Hutchinson, 1979)p. 676.

68. Crimes Act 1900, s.405B(2).

69. J. Temkin, op. cit., p. 146f.

70. J. Temkin, op. cit., p. 133-143; S. Edwards, op. cit., Chapters 3, 4 and 5; Z. Adler, op. cit., p. 161ff.

71. C. E. Legrand, "Rape and rape laws: sexism in society and law", California Law Review, Vol. 61, 1973, p.919.

72. G. Williams, "Corroboration and sexual cases", Criminal Law Review, 1962, p. 662.

73. Sutcliffe J., in 1976 quoted in S. Edwards, op. cit, p. 164.

74. Criminal Code, s.246.4.

75. Crimes Act, 1900, s. 405(2).

76. New South Wales, Bureau of Crime Statistics and Research, Interim Report, No 3 (Sydney, Government Printer, 1987).

77. J. Temkin, op. cit., p. 119ff.

78. Sexual Offences Amendment Act 1976, s. 2 (England and Wales); Sexual Offences Order 1978 (NI); Evidence Act, s.102A (Tas); Criminal Law (Sexual Offences) Act, 1978 (Qld.); Criminal Code, RSC 1970, s. 246.6 (Canada). Other jurisdictions include the Northern Territory, New South Wales, Victoria, New Zealand and Trinidad and Tobago.

79. Criminal Code s. 246.

80. Crimes Act, 1900, s. 409B.

81. Z. Adler, op. cit., 73ff.

82. Z. Adler, op. cot, Chapters 6 and 7.

83. H. L'Orange and S. Eggar, op. cit., p. 19-26.

84. Women's National Commission, Violence Against Women (London, 1985) p. 44; See also, J. Temkin, op. cit, p. 162ff.

85. S. Edwards, op. cit., Chapters, 4, 5, 6.

86. Women's National Commission, op. cit., p. 44. The Commission relied on the advice of a barrister complainant.

87. India, Code of Criminal Procedure s. 327; Canada, Criminal Code s. 442; NSW, Crimes Act 1900, s. 77A.

88. New Zealand, Crimes Act 1961, s. 375A; Summary Proceedings Amendment Act (No. 4) 1985.

89. See, for example, England and Wales, Sexual Offences Amendment Act 1976; Tasmania, Evidence Act, s. 103; India, Penal Code, s.228-A; New Zealand, Evidence Amendment Act, 1977, Crimes Amendment Act (No 3) 1985, s.2; Trinidad and Tobago, Sexual Offences Act, 1986, s. 32; Canada, Criminal Code, s.442.

90. J. Temkin, op. cit., p. 190-198.

91. J, Temkin, op. cit., p. 16ff.

92. India, Penal Code, 1860, s. 376.

93. [1986] 1 All ER 985.

94. Home Office News Release, March 13, 1986. See, C. Lloyd and R. Walmsley, Changes in Rape Offences and Sentencing, Home Office Research Study, No. 105 (London , HMSO, 1989).

95. Victims of Offences Act, 1987, s. 8.

96. J. Temkin, op. cit, p. 202pp. For an example of an English case see Miles v Cain, the Independent 26 November 1988. Ms. Miles was successful at first instance, but the decision was overturned on appeal.

97. Canberra Times, 22 May 1991 reported that an incest victim was awarded $A50,000 for the effects of two years of repeated sexual abuse.

2. SEXUAL ASSAULT KIT

INTRODUCTION

This kit, prepared by the Royal Canadian Mounted Police, contains four parts:

* **sexual assault examination kit** for the attention of the physician/nurse
* **patient's guide** for female victims explaining procedures adopted by doctors, the police and legal and support services
* **police officer's guide** on handling evidence collected during examinations
* **physician's guide** for use in conjunction with the sexual assault examination kit

SEXUAL ASSAULT EXAMINATION KIT

Attention: Physician/Nurse

This envelope contains all the instructions and forms to be used with the Sexual Assault Examination Kit.

THE KIT SHOULD BE USED ONLY:

* for the collection of specimens and clothing from a patient who is being treated for the trauma of sexual assault.
* when the occurrence is being reported to the police, and
* if the security seal on the kit has NOT been broken.

DO NOT OPEN THE KIT UNTIL:

* the patient, guardian or relative of the patient has read and signed the Consent Form,
* the Sexual Assault History form and the Medical History form have been completed.

THIS ENVELOPE CONTAINS:

* One Police Officer's Guide.

* One Patient's Guide, containing information for female victims.

* Separate English and French versions of the Physician's Guide, containing all the necessary instructions for the physician and nurse using the kit.

* FORM 1 - Patient Consent (bilingual).

* Separate English and French versions of the Physician's Guide, containing all the necessary instructions for the physician and nurse using the kit.

* Separate English and French versions of the following carbonless forms:

  FORM 2 - Sexual Assault History
  FORM 3 - Medical History
  FORM 4 - Forensic Evidence Record

* Separate English and French versions of the Specimen labels

USE ONLY "ONE" SHEET OF LABELS AS THE PATIENT REFERENCE NUMBERS MAY NOT BE THE SAME.

FORM 1 - PATIENT CONSENT FRANCAIS AU VERSO

1. CONSENT TO MEDICAL EXAMINATION AND TREATMENT FOR THE EFFECTS OF A SEXUAL ASSAULT.

2. CONSENT TO MEDICO-LEGAL INVESTIGATION OF THE SEXUAL ASSAULT.

3. CONSENT TO DISCLOSURE OF THE RESULTS OF THE MEDICO-LEGAL EXAMINATION AND INVESTIGATION.

To: _____

_____

and to: _____ and all physicians and other persons associated with said Hospital.

I, _____ hereby authorise you to:
(Name of person giving consent)

1. Examine and treat _____ for the effects of a sexual assault.

2. Conduct a medico-legal investigation for the purpose of assisting the police in apprehending and/or prosecuting the person(s) who committed the assault. This investigation will include a physical which may involve an examination of the mouth, vagina, anus and rectum; in addition it may include the removal and isolation of articles of clothing, scalp hair, foreign substances from the body surface, saliva, public hair, samples taken from the vagina, anus and rectum, and the collection of a blood specimen.

3. Inform the police that the sexual assault was committed, and provide them with any substances collected during the course of the medical investigation and any information and observations that might assist them in apprehending and/or prosecuting the person(s) who committed the assault.

I understand that I am free to consent to all or any part of the above, I also understand that my refusal to consent to either or both of Items 2 and 3 above will in no way result in denial of treatment for the effects of the assault.

I also understand that I am free to revoke all or any part of this consent at any time during the examination.

_____ _____
(Witness) (Signature of Patient)

_____ _____
(Date) (Signature of guardian or relative of patient where patient is under 16 years of age or is unable to consent by reason of mental or physical disability).

THIS FORM IS RETAINED BY THE HOSPITAL

3. SEXUAL HARASSMENT

Introduction

Sexual harassment in the workplace and elsewhere has attracted increasing attention throughout the Commonwealth during the last ten years. Initially, the problem was perceived as a trivial, or even amusing one, but recent reports have indicated that the phenomenon is widespread and it frequently can have serious and disturbing effects.[1] Indeed, reports indicate that sexual harassment in the workplace frequently and easily destroys a productive working environment and damages the confidence and self-esteem of those who experience it.

One of the major difficulties encountered in introducing effective strategies to deal with the issue of sexual harassment is defining behaviour which comes within the term. This has been compounded by the fact that for many women sexual harassment is such a familiar problem that they have come to accept it as a hazard of the workplace. Behaviour which falls within the definition ranges from what may appear to be trivial and inoffensive activity, which borders on normal social intercourse, to acts which are extremely serious and offensive and may fulfil the definition of rape. Definition is complicated by the fact that men, as well as some women, are unable to construe apparently innocuous, but inappropriate behaviour, such as sexual jokes, suggestions and innuendo, as conduct amounting to harassment.

One useful, but perhaps conservative, approach is to define sexual harassment in terms of what a woman in a particular situation will perceive as threatening. Viewed this way, the position of power or authority that the man has over the woman is extremely relevant. Thus, sexual harassment within the workplace or in an educational establishment will be more readily identifiable than harassment elsewhere and will encompass any form of sexual importuning by a man in a position of superiority in the workplace or educational institution. In these circumstances, importuning a woman, even on an apparently trivial level, carries with it an implied threat that she will be disadvantaged if she fails to respond to the advances or if she reports what she perceives to be offensive behaviour to the man's superiors.

In less formal employment situations, such as domestic service, any form of sexual suggestion by a man to a domestic servant in his or his family's employ will fall within the definition as here the man is in a position of authority and the implied threat of disadvantage will be very clear.

The approach to definition of sexual harassment based on the power or authority of the harasser is of limited use where the offender is equal, or junior, to his victim. In this context harassment involving co-workers, which creates an unpleasant working environment, incidents occurring outside the workplace or after hours, become difficult to categorise. This is particularly so where the harassment is offensive, unpleasant, but unthreatening. Examples of this might include catcalls in the street, "eve teasing" (see below) and the exhibition of "girlie" calendars or soft porn materials in the workplace, conduct which helps to perpetuate the subordination of women in the workplace and elsewhere, reinforcing their traditional role in society.

The search for an adequate definition to sexual harassment is likely to be a protracted one. There are two vital ingredients of the conduct, however. First, it is conduct which is unwanted by the recipient, in other words, unwelcome sexual attention. Second, it is conduct which from the recipient's point of view, rather than the point of view of the offender is offensive. This means that although the offender may be of the view that he is joking, being friendly or persistent, this is irrelevant. If the recipient finds the conduct unwelcome and offensive, it is sexual harassment. It follows that conduct which is sexual harassment in one context, may not be in another and conduct which may be acceptable to one woman, may, again, be sexual harassment to another.

Perhaps the best approach to the definition of sexual harassment is to consider examples of conduct which have been seen as falling within the term. Any unwanted physical conduct of a sexual nature, such as unnecessary touching, patting, pinching or brushing past another's person's body, as well as more serious activity including assault or coercing sexual intercourse is clearly sexual harassment as is verbal conduct of a sexual nature, such as unwelcome sexual advances, propositions or pressure for sexual activity, persistent suggestions for social activity outside the workplace, after it has been made clear that such invitations are unwelcome and suggestive remarks, jokes and innuendoes. Sexual harassment can also consist of non-verbal communication which has a sexual content. This may include the display of erotic pictures, soft toys and printed matter, anonymous letters and telephone calls, gesturing in a sexually suggestive manner, whistling and leering. Quite clearly, the examples outlined above do not provide an exhaustive account of conduct which falls within the definition of sexual harassment and it must be remembered that what is acceptable behaviour in one cultural context may not necessarily be acceptable in another, so that it is likely that some forms of conduct will be regarded as sexual harassment in some Commonwealth countries, while this conduct may well be perceived as inoffensive in other Commonwealth jurisdictions.[2]

Legal Strategies

The legal strategies currently available to a victim of sexual harassment are governed, first, by whether the conduct is perceived as falling within the definition of sexual harassment and second, by the circumstances within which the harassment occurs. Different legal approaches must be taken, for example, by a woman who has been harassed in the workplace than one who has been harassed in the street.

Although the perpetrator may perceive his activity to be harmless behaviour, some examples of sexual harassment fall within the definition of the crimes of rape, sexual assault, indecent assault or common assault. Where this is the case, each Commonwealth jurisdiction allows the woman to complain to the police, who may choose to institute a criminal prosecution against the offender. If the police choose not to institute such an action, the woman can prosecute privately.

The woman also has the option, regardless of whether a criminal action is instituted either publicly or privately, to pursue a civil action against the offender in either tort or contract, depending on the circumstances in which the harassment occurred.

The pursuit of a civil action in this context carries certain advantages for the woman. She need only prove that the offensive behaviour falls within a civil wrong on the balance of probabilities. This is a lower standard than that required in a criminal court where the offence must be proved beyond all reasonable doubt. Proving the offence beyond all reasonable doubt is often difficult for the woman. The offender will suggest that the victim consented and she will be forced to refute this allegation, often by her own uncorroborated evidence alone, as it is unusual for such harassment to be public. Here her problems may not be purely evidentiary, but may be coloured by the attitude of the bench which may not be sensitive to the issue of sexual harassment, nor take into account factors such as inequality in employer/employee relationships.

Successful outcome in a civil suit has another advantage for the woman. She will receive compensation, which may be substantial, either from the offender or his employer if his conduct makes the employer vicariously liable, and she may also ask the court for an injunction to prevent the offender repeating his behaviour.

In some Commonwealth countries, specific legislation prohibits sexually offensive behaviour. In India, for example, certain sections of the Penal Code establish the offence of insulting the modesty of a woman, whether by word, gesture or act.[3] Further, the Delhi Metropolitan Council has criminalised "eve teasing", which is defined as words, spoken or written, or signs or visible representations or gestures, or acts or reciting or singing indecent words in a public by a man to the annoyance of a woman. This crime is punishable by a minimum of seven days imprisonment.[4] Again, in England and Wales legislation proscribes "kerb crawling", defined as soliciting women, for the purposes of prostitution, from a motor vehicle.[5] To a certain extent, this discourages harassment in the street, although commentators have suggested that its aim is not to protect women, but rather, to penalise working prostitutes.[6]

Where sexual harassment occurs in the workplace, other legal remedies may be available. In a number of Commonwealth jurisdictions, legislation prohibits discrimination in employment on the grounds of sex.[7] Tribunals and courts in these jurisdictions have been prepared to interpret discrimination in employment on the grounds of sex as encompassing sexual harassment, concluding that this amounts to less favourable treatment for the complainant because of her sex.[8] For example, the United Kingdom Sex Discrimination Act 1975, while not specifically prohibiting sexual harassment, proscribes sex discrimination, defined as treating a woman less favourably than a man, and makes it unlawful for an employer to discriminate against a woman by dismissing her or subjecting her to any other detriment. Here, courts have concluded that sexual harassment is sex discrimination and that proven harassment may render an employer liable in damages.

Thus, in the first sexual harassment case to reach appallate level in the United Kingdom, Strathclyde Regional Council v Porcelli[9], where the complainant had been subjected to a deliberate campaign of vindictiveness, which included sexual behaviour, by two male colleagues, the Scottish Court of Session concluded that discrimination on the ground of sex exists where a woman is treated unfavourably and if any material part of the treatment includes a significant element of a sexual character to which a man would not be vulnerable. The Court also indicated that sexual harassment is a

"particularly degrading and unacceptable treatment which it must be taken to have been the intention of Parliament to restrain". Similarly, in the later decision of Wileman v Milenic Engineering Ltd[10], the Employment Appeal Tribunal stated that although the words "sexual harassment" do not appear in the legislation, the phrase is legal shorthand for activity which subjects the woman to "any other detriment" within the formulation of the Act.[11]

Remedies for sexual harassment in the workplace are also available under employment protection legislation which exists in some Commonwealth countries to protect workers from unfair dismissal.[12] Tribunals have held that sexual harassment may amount to constructive dismissal for the purposes of this legislation and thus allow the victim the remedies of damages or compensation.[13] The English Court of Appeal in Western Excavating (ECC) v Sharp[14] concluded that "persistent and unwanted amorous advances by an employer to a female employee would be conduct leading to a breach of contract" giving the victim remedies for constructive dismissal.

Recently, specific provisions aimed at discouraging sexual harassment in the workplace and elsewhere - such as educational institutions - have been enacted in a number of Commonwealth jurisdictions. For example, in Canada, the Federal Human Rights Act prohibits sexual harassment in employment and in the provision of goods and services where these come within the jurisdiction of the federal government. This legislation is complemented at federal level by the sexual harassment provisions of the Canada Labour Code which requires employers to issue a sexual harassment policy which condemns sexual harassment, indicates that disciplinary measures will be taken against transgressors and provides for procedures to deal with instances of harassment and informs employees of their rights under the Human Rights Act. Further, a number of provincial Human Rights Codes specifically address the issue, prohibiting sexual harassment in the workplace and other situations where a woman might be vulnerable, providing a complaint and compensation procedure.[15] Similar legislation is to be found in a number of Australian States.[16] Thus, for example, the Western Australian Equal Opportunity Act establishes a legislative regime to deal with sexual harassment by employers, fellow employees, those in educational posts and landlords. As in Canada, Australian federal legislation also provides remedies for sexual harassment, the Sex Discrimination Act 1984 providing that it is illegal for an individual employer to sexually harass a person seeking, or in his or her, employment, or for an individual who is a member of staff of an educational institution to harass an actual or potential student of that institution.

The legislation which specifically proscribes sexual harassment which has been enacted in the Commonwealth follows a fairly similar pattern. There are differences, however, in the definition of employment covered, the Federal and Western Australian Acts, for example, extending the definition to cover contract workers and commission agents in an attempt to protect women in less formal sectors of employment. Again, while each Act is broadly similar, the definition of conduct which falls within sexual harassment varies from statute to statute. Most statutes, however, establish a process for the resolution of disputes which is conciliatory, rather than judicial in nature. Thus, in Australia, commissioners, who work in conjunction with the Human Rights and Equal Opportunities Commission at the federal level or the Equal Opportunities Commission at the state level, are appointed to act as the tribunal under the legislation. These commissioners have the responsibility of examining complaints and endeavouring, through conciliation, to reach a settlement of

the matter. Where complaints cannot be settled through conciliation, the matter can be referred to the relevant Commission which will, in turn, attempt to conciliate. Both the commissioners and the Commissions are entitled to call for information and summon witnesses who are obliged to attend. The Commissions can issue declarations or determinations at the end of the inquiry, which a woman can seek to have enforced in a court, to the effect that the man who harassed her behaved unlawfully, that he should redress any damage suffered by her, that he should re-employ her, that he should promote her, that he should pay her damages or any other action that is appropriate.[17]

Resolution of complaints of sexual harassment is similar under Canadian legislation. For example, under the Federal Human Rights Act, an independent human rights commission investigates complaints of discrimination, including sexual harassment. After investigation, the commission decides whether the complaint should be heard by an independent tribunal. The commission has powers to appoint a conciliator before the case goes to tribunal. As in Australia, the tribunal can order remedies such as compensation and reinstatement. As in the Australian statues, the Canadian legislation makes it an offence to intimidate or victimise a complainant.

In a number of Commonwealth jurisdictions, the liability for sexual harassment in the workplace extends beyond the individual offending employee and renders the employer vicariously liable.[18] This has two advantages for the complainant. First, she is assured of adequate compensation if she is successful, because the employer is usually financially viable. Second, the threat of imposition of vicarious liability often results in employers taking positive steps to ensure that offences of this nature do not occur.

Other Strategies

In the context of sexual harassment, perhaps more than any other area of violence against women, women have concentrated less on legal remedies and more on less formal methods of complaint. These strategies have ranged from workplace campaigns and the establishment of organisations concerned with sexual harassment to enlisting the aid of trade unions to develop preventative strategies or assist with specific complaints.

Organisations concerned with sexual harassment have been established in a number of Commonwealth countries. In the United Kingdom, Women Against Sexual Harassment (WASH) publicises the issue, provides training for employers and support and advice for complainants of harassment. In Canada, the Women's Legal Education and Action Fund (LEAF) whose brief is to conduct test cases which explore the meaning of s.15 of the Canadian Charter of Rights and Freedoms which provides that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", has provided assistance in claims of sexual harassment, as has its United Kingdom sister organisation, the Women's Legal Defence Fund.

Throughout the Commonwealth, trade unions have issued guidelines and protocols to raise awareness and address the issue. In 1981, for example, the United Kingdom National Association of Local Government Officers (NALGO), the largest white collar union, issued guidelines for members on combatting sexual harassment at work, in a leaflet called "Sexual Harassment is a Trade Union Issue". NALGO's lead has been followed by other trade unions both in the

United Kingdom and elsewhere, while various universities throughout the Commonwealth have developed codes of conduct concerning sexual harassment.

Codes of conduct and protocols dealing with sexual harassment have also been issued by Commonwealth human rights commissions. The New Zealand Human Rights Commission, for example, issued "Eliminating Sexual Harassment - A Guide for Employers", which suggests strategies for approaching workplace harassment and provides a guide for those in charge of the management of the problem, in 1986. Similar guides have been produced by the Canadian and Australian Commission, while the Report of the Commission of Inquiry (Integrity Commission) in Guyana, issued in 1987, suggested the formulation of a code of conduct for persons holding positions in public life.

Other strategies have also been used to discourage sexual harassment. In some jurisdictions, unions have negotiated collective agreements for their members with employers which address sexual harassment, so that by 1985, for example 18.6% of all major collective agreements in British Columbia contained either a policy statement or a complaint measure concerning the issue. Some employers have gone so far as to draft contracts for employees and independent contractors which ban harassment. Thus, all building contracts issued by one New Zealand university bans catcalls, wolf whistles, insulting or objectionable language and gestures directed at staff, students and other campus users. The contract goes on to state that the university may ask the contractor to refuse any offender access to the building site.

Problems with Current Strategies

Perhaps the major obstacle to the legal strategies that can be employed to confront sexual harassment in the workplace or elsewhere is the fact that it is frequently considered to be a trivial matter or the figment of a woman's imagination. Many employers and their advisers have yet to be persuaded that sexual harassment robs the workforce of valuable female talent and productivity.

In so far as the current legal strategies are concerned, it remains difficult for a woman to find a legal adviser who recognises sexual harassment as creating a cause of action. Women are loath to complain of harassment to the police, even in serious cases, because they fear, just as in the case of domestic assault, that the complaint will not be taken seriously.

If police response is negative, and in most places under consideration this is likely to be the case, women, although they have recourse to private prosecution, do not take this route as it is fraught with difficulty. The woman is responsible for the case and is not, in many jurisdictions that have provision for legal aid, entitled to such assistance. She may thus have to pay some or all of the costs. Moreover, a criminal process, be it private or public, is difficult. The offence must be made out and proved beyond reasonable doubt. In this context, it is crucial that the prosecutor show that the victim did not consent to the conduct that has been complained of. This raises the familiar problems faced by women in trials for sexual offences.

A civil process is similarly complex. Certainly, the burden of proof is lower, but a successful case may result in substantial damages[19] and is thus likely to be seriously defended and protracted. The woman will require expert legal advice which will be costly in the absence of a group such as WASH which may be prepared to carry the action as a test case. Many Commonwealth jurisdictions do not have a legal aid service or if they do it may not cover such an action.

Where sexual harassment occurs in jurisdictions where there is unfair dismissal, sex discrimination or sexual harassment legislation, women are at an advantage. Nonetheless they still face obstacles.

In some jurisdictions, the process established by the legislation is complex and may only be available if the employment meets certain criteria. The United Kingdom Sex Discrimination Act, for example, only applies where the complainant's employer employs six or more employees. Again, legal aid may be unavailable, even where the legislative scheme is complex. Further, the compensation awarded by the special tribunals or boards may be inadequate, either because the arbitrator does not perceive the harassment to be serious[20] or because the legislation sets an upper limit. This is a particular problem as most victims choose to leave the employment where the harassment occurs.

Throughout the Commonwealth, women's work is carried out, in the main, in the informal sector. Unfortunately, it is in this sector that cases of sexual harassment appear to be most common. This is the most substantial obstacle to effective use of legal and other strategies to counter sexual harassment. Women in the informal sector are usually unable to take advantage of employment legislation and are usually powerless to negotiate with their employers on work conditions in general and sexual harassment in particular. The informal sector is not unionised and women are thus unable to take advantage of any available trade union support and assistance.

Conclusion

Sexual harassment of women in the workplace, educational institutions and elsewhere defines the role of women in sexual terms and serves to perpetuate their subordinate role in society. It causes harm to the individual woman, diminishes the effectiveness of an organisation and is wasteful of human and economic resources. Accordingly, it should be treated as a serious and important issue.

The public must be made aware of the issue of sexual harassment and its serious short term and long term implications. Specific efforts must be made to educate men to appreciate the nature and effect of such offensive conduct. At the same time, women themselves must be educated, both with respect to the issue and with respect to the procedures that they can use to counter the behaviour. For example, women in the workplace could make use of information which is available explaining how to conduct workplace campaigns or surveys and how to develop codes of conduct for the treatment of harassment.[21]

Government bodies can do much to increase awareness of the seriousness of sexual harassment and the procedures that can be invoked to confront it. Arresting pamphlets have been issued in Australia, Canada, New Zealand and the United Kingdom which could be used by other Commonwealth countries in developing strategies to deal with harassment. The Australian Human Rights and Equal Opportunity Commission, moreover, conducted a major campaign about sexual harassment in 1990, which was effective in sensitising the community about the issue. This campaign, entitled SHOUT (Sexual Harassment is Out), which consisted of a poster, magazine and radio advertising campaign, with the facility of a toll free telephone line for women who wished to provide information about harassment, was aimed at younger women in vulnerable occupations, such as in the catering sector and office workers. Women responded very favourably to the SHOUT campaign and its effects are continuing, although the main campaign has now come to an end.[22]

The value of trade union action activity should not be underrated. Women's groups and governments could assist unions to take a leading role in the regulation of workplace harassment. It must be remembered, however, that representation of women at the senior levels in trade unions is not high and that, often, unions are geared to the needs of male workers and marginalise the needs of women workers. Unions, thus, need to be educated in the area of sexual harassment and must be encouraged to develop specific protocols to address the issue, which they might seek to have incorporated in contracts of employment. Union activity might assist in setting standards for non-unionised employment. Finally, women should be encouraged to become active in trade unions.

Although legislation should in no way be regarded as the solution to the problem, it does provide a benchmark indicating conduct that is regarded as repugnant, and does provide remedies for those wishing to be able to take advantage of them.

To be effective, however, legislation must be accessible and provide appropriate remedies. Those who are responsible for the administration of the legislation must be sensitive to the issue of sexual harassment, so that women are not further victimised. Procedures must be straightforward and assistance must be available to encourage women to bring complaints. A machinery to provide for representative actions and trade union carriage of complaints is essential to protect women who do not wish to proceed unaided.

Any legislation must include vicarious liability of the employer so as to encourage employers to be vigilant about the occurrence of harassment. Further, legislation must provide for compensation and have adequate safeguards to protect the complainant from further victimisation.

Unfortunately, women most vulnerable to sexual harassment are workers in the non-formal, non-unionised sector such as domestics. Their vulnerability is frequently compounded by the fact that they may have limited working rights. They may, for example, be on a working visa that ties them to a particular employment and employer.[23] Indeed, they may be in illegal employment. Special strategies may need to be developed to provide assistance for these women who are particularly powerless. These women must be informed of their legal rights. It is essential, therefore, that information be disseminated to all immigrant and guest workers in all appropriate languages at point of entry to a country.

Ultimately, however, the eradication of sexual harassment will occur only when the importance of individual human dignity and autonomy are respected and when women are perceived to be as valuable as men. This requires significant social change, which can be facilitated by concerted government, trade union and employer action. In this context, it is heartening to note that the European Economic Community Council of Labour and Social Ministers, the decision-making body responsible for social affairs, employment and labour adopted a Resolution in May 1990 concerning sexual harassment in the workplace. The Resolution, although having no binding effect on member states is highly persuasive, sets out a definition of the term sexual harassment which will be effective at the European level, describes it as an "intolerable violation" which creates an "intimidating, hostile or humiliating work environment" for the worker. It calls on member states to initiate information campaigns, to remind employers of their duty to ensure that employees are free from sexual harassment, encourages the

formulation of appropriate clauses in collective agreements to guarantee a work environment free from sexual harassment and calls on the European Commission to continue campaigning around the issue.[24]

1. E. Collins and T.B. Blodgett, "Sexual harassment-some see it ... some won't" Harvard Business Review, (March-April, 1981) p. 76; C.M. Phillips, J.E. Stockdale and L.M. Joeman, The Risks in Going to Work (1989, London School of Economics and Political Science); M. Benn, "Isn't sexual harassment really about masculinity?" Spare Rib, No 156, 1985, p.6 which describes the notorious London firefighters case; Ethnic Identity and the Status of Women, Report on International Workshop held in Colombo, Sri Lanka, September 9-11, 1984, International Centre for Ethnic Studies, Sri Lanka, pp. 14-15; N. Hadjifotiou, Women and Harassment at Work (1983, Pluto Press) pp. 7-25; M. Rubenstein, Preventing and Remedying Sexual Harassment at Work: A Resource Manual (London, Industrial Relations Services, 1989) Chapters 1 and 8.

2. See, for example, the remarks of Chairman Shime in the Canadian case of Bell and Korczak v Ladas and the Flaming Street Steak House Tavern Inc. (1980) 1 CHRR D/155 where he cautions "an invitation to dinner is not an invitation to a [legal] complaint." He is, however, of no doubt that social contact which is coerced, wither expressly or impliedly, is sexual harassment. In some Commonwealth countries a dinner invitation may well amount to harassment.

3. Indian Penal Code, s. 509; see also Southern Nigeria, Penal Code, s. 360; Botswana, Penal Code, s. 143, 144, 146; Singapore, Penal Code, ss. 354 and 354A.

4. Delhi, Prohibition of Eve Teasing Bill, reported in Women's International Network News, Summer, Vol. 10, No 3, 1984.

5. Sexual Offences Act, 1985

6. S. M. Edwards, "Prostitution: ponces and punters, policing and prosecution", New Law Journal, 1985, 928 and "The Kerb crawling fiasco", New Law Journal, 1209

7. See, for example, Sex Discrimination Act (UK) 1975; Anti-Discrimination Act (NSW) 1977; Human Rights Commission Act (NZ) 1977

8. Bell and Korczak v Ladas and the Flaming Steer Steak House Tavern Inc (1980) 1 CHRR D/155 (Ontario); O'Callaghan v Loder and the Commissioner for Main Roads [1983] 3 NSWLR 89; Crockett v Canterbury Clerical Workers Union (1983) 3 NZAR 435; R v EO, ex parte Burns [1984] AILR 316; see, further, D. Pannick, "Sexual harassment and the Sex Discrimination Act", Public Law, 1982, 42 and S. Goundry, "Sexual harassment in the employment context" University of Toronto Faculty Law Review, 43 (1985) 1.

9. [1986] IRLR 134

10. [1988] IRLR 144

11. For further information on the United Kingdom Act see M. Rubenstein, Preventing and Remedying Sexual Harassment at Work, (Industrial relations Services, Eclipse Publications, London, 1989), chapter 4.

12. For example, Employment Protection (Consolidation) Act (UK) 1978

13. N. Hadjifotiou, Women and Harassment at Work (Pluto Press, London, 1983) 157ff.

14. [1978] 1 ALL ER 713, 719-20

15. See, Manitoba, Human Rights Code; New Brunswick, Human Rights Code; Ontario, Human Rights Code; Yukon, Human Rights Act.

16. Equal Opportunity Act (Vic) 1984; Equal Opportunity Act (SA) 1984; Equal Opportunity Act (WA) 1984.

17. See, F. Marles, Workplace Approach to Sexual Harassment, (Canberra, Australian Government Publishing Service, 1991), pp 17-19.

18. For example, Sex Discrimination Act (Cth) 1984, s. 106. For cases indicating how difficult it is for an employer to escape vicarious liability in these circumstances, see Boyle v Ishan Ozden & Ors (1986) EOC 92-165 and Aldridge v Booth (1988) EOC 92-222.

19. Sally Meurhing, an English publishing executive sued her former employers, Emap, for breach of contract, assault and battery and malicious falsehood. She accepted £25,000 from Emap in settlement of her claim in February 1989 and it was estimated that the employers spent in excess of £70,000 in legal costs defending her action. See, Sally Hughes, "New territory in a man's world", New Law Journal, 1989, p. 1675.

20. Note the decision of the Australian President of the Human Rights and Equal Opportunity Commission in Hall & Ors v Sheiban where sexual harassment was held to have occurred, but there was no compensation for humiliation, pain or suffering because the President was of the view that the harassment, which included touching and lowering the zips on the complainants' uniforms, was trivial. This decision was ultimately reversed by the Federal Court: (1989) EOC 92-250.

21. N. Hadjifotiou, op. cit. Chapter 5.

22. The SHOUT posters and pamphlets are available form the Human Rights and Equal Opportunity Commission in Sydney, Australia. The Commission is, at present evaluating the effects of the campaign.

23. Cases of this nature have been revealed in the United Kingdom recently. It is possible to arrange for the immigration of domestic servants who are tied to a particular family. These servants are not permitted to remain in the United Kingdom if they cease to work for the family. Cases of serious abuse of these powerless individuals, who are often unable to speak English and whose passports are frequently confiscated by their employers, have emerged.

24. Resolution No 6015/90

4. SEXUAL ABUSE OF CHILDREN

Introduction

The maltreatment of children by their parents or other caretakers is not a modern phenomenon. Children have been neglected and the victims of physical, emotional and sexual abuse since the beginning of history. They have been abused in the name of discipline and education, maimed to conform with ritual and set to work in horrifying conditions. Almost every culture has practised infanticide as a method of birth control, one commentator going so far as to suggest that infanticide has been responsible for more childhood deaths throughout time than any other cause, except perhaps, bubonic plague.[1]

Although child abuse in its various forms is not a modern phenomenon, it has raised serious public concern only in the last twenty years, although intermittent concern, resulting in the establishment of the various societies for the prevention of cruelty to children, which exist in most countries, has been manifested for over one hundred years.[2]

Modern concern about child abuse can be traced to the work of the American paediatrician, Henry Kempe and his colleagues in the early 1960's, who, with the help of the new science of radiology were able to conclusively assert that a large number of children who had been diagnosed as accidentally injured were, in fact, deliberately injured, usually by their caretakers.[3] Kempe's research was replicated in other countries, including the United Kingdom, Australia, New Zealand and Canada and the same results emerged. As a result, various of the jurisdictions of the United States, Canada and Australia introduced "reporting statutes" which oblige those who have professional dealings with children to report to the authorities any suspicion that a child is being abused. Other jurisdictions, such as the countries of the United Kingdom, chose not to pass legislation, but rather create administrative processes, including "child protection registers" so that the details of any child thought to be at risk could be recorded officially and information passed to the appropriate agencies.

Recognition of the numbers of children who were subject to physical violence resulted in revelations of other abuses suffered by children. During the 1970's, authorities began to become aware of child sexual abuse and this prompted individuals to begin research in this area. Studies revealed that incest and child sexual abuse were far more frequent than had been recognised and that sexual abuse in childhood was often associated with psychiatric and personality disorders later in life.[4] Researchers also challenged the widely held view that children fantasise about sexual activity, so that it is now widely accepted that if a child complains about sexual abuse, the complaint is likely to be well founded. Indeed, the major conclusions of the now considerable volume of written material which exists exploring the various aspects of child sexual abuse can be best summarised by the Cleveland Report[5] which states:

> "We have learned during the Inquiry that sexual abuse occurs in children of all ages, including the very young, to boys as well as girls, in all classes of society and frequently within the privacy of the family. The sexual abuse can be very serious and on occasions includes vaginal, anal and oral intercourse. The problems of child sexual abuse have been

recognised to an increasing extent over the past few years by professionals in different disciplines. This presents new and particularly difficult problems for the agencies concerned in child protection."

We do not intend in this Manual to provide a comprehensive account of the research and strategies which exist throughout the Commonwealth concerning child sexual abuse. All we seek to do is point to a number of concerns that the problem raises in the context of the legal process. We are aware that, as in the case of domestic and sexual abuse against women, the law has only a small part to play in the prevention and treatment of child sexual abuse and that attention must be devoted to difficulties of diagnosis, the education and training of professionals and community campaigns to raise awareness about child sexual abuse. Some Commonwealth countries, including the countries of the United Kingdom, Canada, New Zealand and Australia, see the issue of child sexual abuse as a pervasive and serious one and these governments, individuals, organisations and treatment specialists have initiated various prevention and treatment strategies.[6]

The Legal Process

In all Commonwealth countries, serious penalties are provided by the criminal law for the sexual abuse of children. Further, sexual assault is a tort and, theoretically, a child could initiate civil proceedings against the perpetrator which would result in compensation or seek compensation from the criminal injuries compensation board, if such a system exists in the jurisdiction.[7] Finally, the sexual abuse of a child amounts to neglect or ill-treatment which, in most Commonwealth countries, allows the initiation of care proceedings by child welfare authorities, which can lead to the removal of the child from the family.[8]

Ordinary criminal law can do little to prevent child sexual assault. Except where a community has been particularly sensitised to the existence of the problem, very few cases come to the notice of the authorities and of those that do, many are not persued because the child may not be believed, there may be insufficient evidence to prove the case beyond all reasonable doubt or it is feared that the child may be harmed to a greater extent than the initial assault by the criminal process, which will involve her or his oral testimony. Of those few that are pursued, unless the case is perceived as particularly heinous or the offender is a known paedophile, the perpetrator may receive merely a short prison term or even a non-custodial sentence.

Despite the drawbacks of the current criminal process as it operates in most Commonwealth countries, it is essential that child sexual abuse continues to be viewed as criminal behaviour. It is only where conduct is labelled and sanctioned as criminal, that is is clearly condemned by society and offenders are told that their acts, for which they alone are responsible, are legally and morally reprehensible. Some researchers argue, moreover, that a criminal prosecution is essential in the treatment of offenders and can lead to change in behaviour, Giaretto, the Co-ordinator of the Santa Clara Child Sexual Abuse Treatment Program concluded: "the authority of the criminal justice system has proven to be absolutely essential in beating incest".[9] In the context of child sexual abuse, however, the criminal justice process poses difficulties, many of which have been perceived and confronted by Commonwealth jurisdictions.

i) Preliminary investigation

Throughout the Commonwealth preliminary investigation in cases of sexual assault is hampered by the fact that there are few professionals who have specialised knowledge of the issue. Child sexual abuse is difficult to diagnose and it is generally accepted that no one professional can be responsible for making the diagnosis. It is a multi-disciplinary process.

Special training, protocols and checklists to aid in the diagnosis and investigation of cases of child sexual abuse have been introduced in the United Kingdom, New Zealand, Canada and Australia. Further, in some areas these countries have established special units with particular expertise in the field. In this context, caution must be taken that the knowledge and techniques required to diagnose and investigate child sexual abuse is not confined to members of special units. Child sexual assault is pervasive and all those who have professional contact with children and their families - midwives, health visitors, teachers, doctors, welfare and social workers and police - should have some knowledge of its manifestations so that children at risk are not ignored.

ii) Interviewing the victim

In most jurisdictions, the child may have to repeat her or his complaint to several people: the doctor, the social worker and the police. This is difficult and traumatic for an adult victim of crime. A child suffers even more, becoming confused, upset and bored.

In a number of Commonwealth countries new techniques have been introduced to humanise the process of investigation of child sexual abuse. In most cases the child is interviewed by a multi-disciplinary team of experts, who frequently include child psychiatrists. The team sometimes uses special equipment, such as anatomically correct dolls and child oriented questioning skills, in order to elicit evidence which may confirm suggestions of abuse and identify the perpetrator. These interviews are frequently recorded on video to avoid the need for repeated interviews.[10] Some countries use a "child advocate": a person experienced in child welfare and the prosecution of child sexual assault, who carries out the initial interview with the child and provides a report or tape of that interview together with any background material, to police and prosecutors. The "child advocate" then proceeds to represent the child's interests throughout the investigation, trial and post-trial phases. Finally, others have taken the approach first used in Israel, where an experienced child interviewer obtains the child's testimony and submits a written report.[11]

iii) Court proceedings

Adult victims of sexual assault find criminal court proceedings distressing and have indicated that the process has added to their feelings of victimisation. Small children must suffer even more. The physical surroundings of the court, the conventional courtroom itself, the appearance and demeanour of court personnel and the proximity of the offender can only exacerbate the confusion and distress that the child is already suffering. In most jurisdictions, the child is further victimised by the trial process, which by the rules of evidence and burden of proof may appear to protect the accused at the expense of the child.

Careful measures must be taken to reduce the impact of court proceedings on the child victim.

First, judges and lawyers must be educated so that they understand the nature of child sexual assault and incest and the varying reactions children can have to such abuse. They should be made aware particularly of the effect a child's age and level of development can have on her or his capacity to report on events and to deal with questioning.

Second, as in other cases of sexual assault it is a priority that the child and the accused do not come in contact with each other during the hearing. In cases of child sexual assault this is even more important given that the accused is most likely to be the child's father or step-father, elder brother or other close male relative. Separate waiting rooms and toilet facilities must be provided to avoid the likelihood of the accused confronting the child in any way.

Third, the courtroom itself may prove to be particularly daunting for a child. It is essential that child witnesses be familiarised with the physical surroundings of the court and the likely events that will occur during the trial. Films, puppets, fascimile courtrooms or specially written children's guides could be used for this purpose. A very good example of the latter is the Canadian child's guide to testifying as a witness in child abuse cases entitled "So, you have to go to court"[12], which is designed to be read by an adult to children of approximately five to eight years. Although explanations can go some way to relieve the anxiety a child may experience due to the close proximity of the accused in the courtroom, physical modifications of the courtroom in such cases may be appropriate. It is hardly likely that allowing the child to give evidence behind a screen or in the judges chambers or in a specially designed child-oriented evidence room would supply the prosecution with an advantage, which might deprive the accused of a fair trial.

iv) Evidence

The chief witness for the prosecution is likely to be the child. As we have seen, the legal system and, in particular, the rules of evidence can make the ordeal of the adult rape victim intolerable. The distress, humiliation and confusion of a child victim, usually abused by a close and trusted relative, can only be greater.

Most Commonwealth countries require that the competency or understanding of the child be tested before the child's evidence will be accepted by a criminal court and, in the event that the evidence is accepted, require that it be corroborated in some way. Hence, in general terms, a child may not give evidence on oath unless she understands the importance of telling the truth and the particular importance of telling the truth in a court of law. However, she may give unsworn evidence if it can be demonstrated that she has sufficient intelligence to justify the reception of her evidence and if she understands the duty of speaking the truth. In the event the child's unsworn evidence is heard, the court is forbidden to convict without corroboration, while where evidence on oath is received the court is usually directed to warn of the danger of convicting without corroboration. Some countries, moreover, add a blanket restriction on the reception of evidence of children below a certain age.[13]

Recently a number of countries have relaxed both that requirements of competency and corroboration where the evidence of children is concerned. Canada, for example, enacted major reforms of the law relating to the evidence of children in 1987, following the report of the Badgley Committee in 1984,[14] which had stated:

> "The Committee is strongly of the view that Canadian children cannot fully enjoy the protections the law seeks to afford them unless they are allowed to speak effectively on their own behalf at legal proceedings arising from allegations of sexual abuse. Accordingly, the Committee recommends that there be no special rules of testimonial competency with respect to children; a young person's testimony should be heard and weighed by the trier of fact in the same manner as the testimony of any other witness in the proceedings."[15]

Accordingly, a child's sworn evidence, or evidence under oath can be accepted, in which case it is not essential to have additional corroborating evidence[16]. In the event the child is unable to understand the meaning of an oath, but is able to communicate, she can testify after making a promise to tell the truth. This evidence is as persuasive as any other evidence and need not be corroborated.[17]

The various states of Australia have relaxed the competency requirement and the rules concerning corroboration, to a greater or lesser degree. The Queensland Evidence Act as amended in 1988 requires the court to receive the evidence of a child unless it is satisfied that the child does not have sufficient intelligence to give reliable evidence. In this determination, the court is allowed to receive evidence about the child's level of intelligence, powers of perception, memory, expression and any other matter that may be relevant. Where the child has sufficient understanding, the court will allow her to give evidence on oath, but the probative weight of evidence on oath is no greater than unsworn evidence. South Australia goes even further. There the unsworn evidence of a child under 12 is equal to sworn evidence if she promises to tell the truth and appears to understand this promise. Neither sworn nor unsworn evidence need be corroborated. Where a child is too immature to be able to promise to tell the truth or understand this promise, the evidence may nonetheless be received, but it must be corroborated and evaluated in the light of the child's level of cognitive development.[18] In New Zealand children over the age of 12 must give evidence on oath, while those below that age may give unsworn evidence if they formally promise to tell the truth. In neither case is there a formal requirement that the evidence be corroborated, but it is the practice of judges to give a warning. Finally, the rules concerning the corroboration of children's evidence have been significantly altered in England and Wales, where s. 34 of the Criminal Justice Act, 1988 removes the rule that there can be no conviction on the unsworn evidence of children and allows the unsworn evidence of one child to corroborate that of another. It does not, however, remove the requirement that there be a warning from the judge that to convict an offender of a sexual offence on the uncorroborated evidence of the victim is unsafe.[19]

Some jurisdictions have also considered alternatives to the usual requirement that witnesses give live evidence at trial. Most of these have involved the use of video technology. Thus, in Canada, in cases where the complainant was under 18 at the time of the alleged offence, a videotape made within a reasonable time after the offence in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts the contents of the tape while testifying.[20] This means that the tape supplements, but does not replace, the child's appearance as a live witness at the trial, but there the court has a discretion to allow the witness to give evidence from behind a screen or by means of live video link.[21] This discretion is exercised where the court finds it necessary so as to obtain a full and candid account of the acts complained of by the child.

Videotape and video link evidence is now under consideration in the states of Australia, New Zealand and the United Kingdom. Thus, in Western Australia legislation is in place which allows child witnesses to give evidence at trial by a live video link, as it is in Queensland which also provides for testimony behind screens and in court with the defendant in an adjoining room watching the child by live link. Live link is also being experimented within the New South Wales and the Australian Capital Territory. Only Queensland allows for video dispositions, whereby the child's entire evidence is taken in advance, in those cases where the court grants leave, thus relieving her from court attendance entirely.[22] The English Pigot Committee[23] made similar recommendations in its report in 1989, suggesting that the initial interview with the abuse victim would be videotaped and that later, in an informal setting, away from the courtroom, the video would be shown and the child cross-examined, with only the judge, counsel for the prosecution and defence, child and child supporter present. This cross-examination would be taped and the tape and that of the initial interview would be shown to the jury during the trial, which the child would not need to attend. While these recommendations received widespread support, they were watered down so that the Criminal Justice Bill will allow for videotaped interviews of the child by police or social workers to be admissible as evidence at the trial, although the child will still have to undergo cross-examination by defence counsel in the court building in a room linked to the court by television.[24]

v) Court closure

The general principle that exists throughout the Commonwealth is that cases are to be heard in open court so that justice is seen to be done. In the usual course of events, few people beyond those immediately concerned with the matter will be present at court. In the case of a trial for child sexual abuse, however, unusual interest, resulting in greater court attendance, could be aroused. In particular, this might occur in a small town where the spectators could well include the child's school friends or neighbours.

In most jurisdictions there are general statutory powers which allow judges to exclude persons from courts, while some have gone so far as to enact special legislation which provides for in camera proceedings for both civil and criminal cases where children are involved.

vi) Publication

Limits on publication are as important for the victim of child sexual abuse as for the adult victim of sexual assault. It is essential there is no publication of information that could lead to the identification of the child. A number of jurisdictions, such as Canada, provide for orders restricting the publication or broadcast of any information that could disclose the identity of the child victim or witness. Most provisions of this nature restrict the publication of the identity of the accused as well as the child as revelation of his identity usually identifies the child.[25]

Even where provisions exist limiting publication, the press has a heavy responsibility, especially in small communities, where the revelation of any information may lead to the identification of personalities.

Conclusion

Although the criminal law has a central role to play in the area of child sexual abuse, it alone cannot be relied on to confront the issue. While better criminal response is critical, it is even more essential that close attention should be given to the prevention of child sexual assault and the treatment and long term management of victims and offenders. Much must be done to ensure that children are secure from sexual violation, no matter how mature they appear to be and irrespective of the justification offered by the perpetrator, regardless of whether it is perpetrated by a stranger or a relative.

Public opinion must be mobilised against the sexualisation of children generally. Here public campaigns, such as the five year campaign conducted in New South Wales, which began with a public inquiry into sexual abuse and entailed, among other things, an arresting and continuous poster campaign, should be considered. A clear and consistent message must be given that sexual abuse is unacceptable and the offender alone carries the blame. Here mixed messages must be avoided. Sentences for abuse should be significant and it should be impossible for an offender to argue, as has been done, unfortunately successfully, that a child has not suffered because of sexual abuse or has provoked it in some way. The child should be the centre of concern, thus sentences should not be lowered in order to limit the impact imprisonment of the offender might have on the family unit. Moreover, sentences should be consistent. It is inconsistent, for example, for a legal system, such as that in England, to place a man on two years probation for sexually abusing his twelve year old daughter and convict a woman who pours boiling water on a man who rapes her five year old daughter, to two years imprisonment.

What is required is sympathetic and informed courts, better public and professional education, an informed judiciary and opposition to sexualisation of young people generally and in the media in particular. Moreover, abused children need treatment and support and their needs must be approached professionally and funded appropriately. Finally, treatment and therapy for child sex offenders is important. Persecuting perpetrators goes no way towards stopping abuse generally. However, care must be taken to ensure that the perpetrator is punished as well as treated. Punishment clearly relays society's disapproval, indicates that the victim is the priority concern and, to some extent, provides short term protection for the victim and other children. Treatment must occur during and after punishment, but never instead of it.

1. J. Solomon, "History and demography of child abuse" Pediatrics, Volume 51, 1973, p.773.

2. J. R. Spencer and R. Flin, The Evidence of Children: The Law and the Psychology (London, Blackstone Press, 1990), p.p.3-6.

3. H. Kempe et. al., "The battered child syndrome", Journal of the American Medical Association, Vol. 181, 1962, p.17.

4. D. Glaser and F. Frosh, Child Sexual Abuse (London, Macmillan 1988)

5. Department of Health and Social Security, Report of the Inquiry into Child Abuse in Cleveland 1987, Cmnd 412 (HMSO, London, 1987) This publication is the report of the committee set up to investigate whether there had been any mismanagement in Cleveland in England where 126 children had been diagnosed as sexually abused over a period of two months.

6. A. Bentovim, et. al., Child Sexual Abuse Within the Family: Assessment and Treatment John Wrights, Bristol, 1988); D. Finkelhor, Child Sexual Abuse: New Theory and Research (Collier Macmillan, London, 1984); D. Geddis, A Private or Public Nightmare: Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children (New Zealand, 1988); Rix Roger, An Overview of Issues and Concerns Related to the Sexual Abuse of Children in Canada (Canada, October 1988). Most of these contain comprehensive bibliographies.

7. Child victims of sexual assault can proceed by the "next friend" process or sue on attaining majority. There is evidence from Britain that some victims are taking this approach: see, Guardian, June 12, 1991.

8. See, for example, Children Act, 1989 (England and Wales) s. 31; India, Juvenile Justice Act, No. 53 of 1986; Lesotho, Children's Protection Act, 1980. All Commonwealth jurisdictions have child protection legislation which allows for the removal of children from their families on a short or long term basis. It is unusual, however, for such legislation to specifically prescribe "sexual abuse" as a ground for protection proceedings. In this context, the Children Act, 1989 is unusual as it does define "ill-treatment," which can lead to child protection proceedings, as including sexual abuse.

9. H. Giarretto, Integrated Treatment of Child Sexual Abuse (Palo Alto, California, 1983)

10. See, for example, the Bexley Project, Metropolitan Police and Bexley London Borough, Child Sexual Abuse: Joint Investigation Programme Bexley Experiment. Final Report (London, HMSO, 1987).

11. Law of Evidence Revision (Protection of Children) Statute 1955 sets up a system of "youth examiners" who interview the child and submit the record of evidence to the trial.

12. W. Harvey and A. Watson-Russell, So you have to go to court" (Butterworths, Toronto and Vancouver, 1986)

13. J. R. Spencer and R. Flin, The Evidence of Children (Blackstone Press, London, 1990) Chapters 4 and 8.

14. Badgley Committee, Sexual Offences Against Children: Report of the Committee on Sexual Offences against Children and Youths (Canadian Government Publishing Centre, 1984)

15. Ibid, p.371-2.

16. Canada, Evidence Act (RSC, 1970, C. E-10) s. 274.

17. Canada, Evidence Act (RSC 1970, C. E-10) s. 16.

18. Australian Law Reform Commission, Evidence, Report Number 38 (HMSO, Canberra, 1987) suggests that a child should be permitted to give evidence provided (a) she is capable of understanding that in giving evidence there is an obligation to tell the truth, and (b) she has the capacity to give a rational reply to the questions that may be put.

19. J. R. Spencer and R. Flin, op. cit., p. 174.

20. Canada, Criminal Code, s. 643.1.

21. Evidence Act, s. 486 (2.1)

22. J. R. Spencer and R. Flin, op. cit., p.311ff.

23. Home Office, The Use of Video Technology at Trials of Alleged Child Abusers (Home Office, London, 1989)

24. J. Temkin, "Doing Justice to Children" New Law Journal, March 8, 1991, p. 315.

25. Evidence Act, s. 486 (3) and (4).

5. GUIDELINES FOR INTERVIEWING CHILD VICTIMS OF SEXUAL ABUSE

These notes and guidelines, prepared by the Royal Canadian Mounted Police, contain six parts:

* introduction
* beginning the interview
* obtaining the child's statement
* use of aids (drawings & dolls)
* concluding the interview
* common problems - effective tactics

Introduction

- Comment of child anxiety and possible trauma of more than one interview
- Important factor: it should be presumed if child reporting sexual abuse, she or he is telling the truth

The following list of information should be obtained in the first interview:

1. Age
2. Family relationship
3. Maturity or immaturity
4. Cultural background
5. Child's understanding of sexuality and the functions of various parts of the body
6. Name of the offender
7. Relationship of child to the offender
8. The duration and seriousness of the abuse
9. What happened <u>in detail</u>, when it happened, where, and how often
10. Names of anyone else having knowledge of the abuse
11. Names of anyone else involved in or observing the abuse
12. Has the child been threatened?
13. Has the child been bribed not to talk or to take part in the activity?

14. Names of anyone the child has told

15. If the child has not told the mother, is the child able to say why not?

Beginning the Interview

1. Remember:

   (a) children less verbal than adults

   (b) often communicate non-verbally through behaviour, play or art

   (c) before a child will talk to the interviewer a sense of trust, safety and freedom from threats should exist.

2. Location - should be neutral and away from where alleged abuse occurred.

   Consider the following:

   (a) where and how disclosure occurred

   (b) reaction of the non-offending parent(s)

   (c) location of the alleged abuse

   (d) whether siblings are involved

   (e) where the victim will feel safe

   (f) where the interview can be conducted without interruptions

   (g) the location of the alleged <u>offender</u>

3. If the non-offending parent or parents are supportive it may be reassuring for one or both to be present (interviewer's discretion).

4. Arrange seating in non-threatening manner. Try to avoid more than one person facing the child. Others may sit alongside.

5. Begin interview with as much previous information as possible, i.e.

   (a) Names and nicknames of parent(s), brothers, sisters, pets and friends, school grade, etc.

   (b) Be informed about such things as: physically handicapped, sickness or recent trauma in family such as a death or divorce.

(c) Tell child your name, job (i.e. police officer, social worker, doctor). Give reassurance about your purpose is to help. (Children often respond well to request for help from an adult).

(d) You may wish to introduce the idea of an audio-tape recording. Show child how it works and let it play back before interview. (Periodically child may wish to sing into or talk into tape. Permit this so long as the tape is not turned off).

Obtaining the Child's Statement

1. Remember at all times you cannot suggest or ask the child leading questions.

(a) You may wish to start by making a statement. "We have been told that (the alleged offender - give his name) may or may not have done something to you that you do not feel quite right about. We need to talk to you about what may or may not have happened." Then return to concrete information that is non-threatening.

- remember the days of occurrence
- school day or holiday, etc
- when she or he got up
- what clothes she or he was wearing
- what she or he had for breakfast
- activities for the day

(Lead questions up to the time of offence gradually).

(b) Relation of time. Children relate time by birthdays, seasons, night and day, television programs, special events etc. Dates, hours or other measurements are seldom known.

Ask the child:

(i) where she or he was then alleged incident occurred

(ii) who else was present

(iii) who may be have been nearby - in the house

(iv) ask if something happened - can the child talk about it, (provide encouragement by saying it is alright to talk and make reference to other talks with other children and that some had things happen - others didn't. If something happened the interviewer can help, etc.)

(c) Allow the child to tell story in own words.

(i) Young children may use street words (may be embarrassed).

(ii) Tell then their own words are okay.

(iii) Adolescents may use formal or technical words.

(iv) Ask questions to assure yourself the same meanings are attached to the words as the child. e.g. make love (do not assume this means having intercourse).

(v) When the child talks - nod your head - repeat same words the child uses.

(vi) Ask for precise information in terms of:

placement

use of hands

penis

vagina

enlargement of penis

semen emerging, etc.

(vii) When the child pauses you may wish to encourage continuation by saying, "and then what happened" or "you have told me he touched you, can you show me where he touched you". Only after the child has begun talking and is describing an incident, should you press for clarification.

- Where were his hands?

- Where were your hands?

- Were your clothes on?

- Were his clothes on?

- Who took them off?

- Was he saying anything?

(Let the child know they are doing well by giving you complete information).

Use of Aids

Drawings: If possible have drawing materials available on a table in the interview room. (Bright coloured felt pens are ideal).

- Child may initiate drawing

- Other interviewer may start drawing if little progress is being made

- Stick to concept of less threatening matters. (Yourself, police station, house, school, interviewer and child). Invite child to fill in faces. Encourage child to take over drawing. Respond to the kind of expression you see. Then start to ask for specific persons, brothers, sisters, mother. Respond to the drawings and ask the child for names, meaning of expressions. Generally, child depicts sexuality abstractly. Use drawings as a springboard to talk about facts of the abuse.

Dolls: Anatomically complete dolls can be useful tools. (Diane Switzer - Family Dolls, 2019 West 36, Vancouver, British Columbia, U6M 1L1, 263-7575 - approximately C$250.00)

- Out of sight - fully clothed

- Introduce by pointing to them - holding in lap. (Remember the dolls symbolize the child). They should be held gently and cuddled. If that makes you uncomfortable place on a nearby chair. Allow child to hold them - undress them, etc. Do not hand the dolls to the child but allow them time to adjust and make their own approach. If the child does not want to touch the dolls go back to the drawing.

- If the child wishes to use the dolls allow her or him to explore the dolls for a few minutes with no comments except approving nods. Child may show embarrassment or laughter at genitals. Use dolls to identify child's name for various parts of body.

- Child may depict sexual acts by placing one doll on top of other. Tell the child what you see - "The man dolls is on top, the girl doll is on the bottom - they are doing something." Do not interrupt beyond this point. If the child says or does more listen carefully then ask more questions until the child says that is all.

- You may wish for clarification of names, meanings, things said, etc.

- The doll should be reclothed and put away before the interview finishes.

  Note If the child has been physically abused she may hit one doll against another or throw them around. (Sometimes the abused child will symbolically beat their abuser by having the child doll beat the adult doll).

Concluding the Interview

1. A child disclosing sexual abuse is disclosing her/his deepest, most confusing and frightening thoughts. The child needs praise, reassurance and protection. Give the child as much information as possible about what will happen next. Ask the child what they would like to see happen. Try to agree to at least one request, (i.e. talk to mother, father, have drink of water, etc).

2. If the decision is to apprehend the child, tell her/his you want them to be safe, will be staying with friends, will be talking to a judge who is concerned with child's safety, etc. Tell the child there will be follow-up with concern and help for the child's protection. Ensure there is follow-up. If it is likely the child requires further interviewing tell the child about it. (Remember the interview, hostility, revulsion, anger and all emotions other than caring, love, concern, help, etc. are potentially causing further injury to the child).

Summary

It is possible to obtain complete information even from reluctant children, very young children and children with poor verbal or mental ability. Keep in mind that the child's anxiety may be a block. Move in gentle but firm progression from the less threatening to the more threatening issues. Move as you sense the child becoming more comfortable with you. Listen carefully, and encourage the child to continue until you are sure you have the whole story. Aids such as drawing and dolls can be valuable to depict what children are unable to express verbally. Verbal labels can be attached to what the child has depicted or demonstrated.

Conclude the interview carefully and let the child know she/he is finished at that stage. Give assurance your interest in them will continue and she/he is cared for.

CHILD ABUSE INTERVIEWS

Common Problems	Effective Tactics
shock crying restlessness	reassurance, go slow, take time, talk about things until the symptom diminishes, have food and drink on hand, if possible, ask child if she/he needs to go to the bathroom
embarrassment	reassurance, demonstrate your own comfort in talking, tell child that other children you have talked with were embarrassed too
withdrawal refusal to talk repression (active forgetting)	use of drawings - draw yourself and child, let child fill in faces, draw building you are in, car you came in, keep it neutral and non-threatening and child will eventually approach you and begin to engage in the activity with you at her/his own pace - then proceed slowly, gently, firmly.
guilt - child fears she/he is bad, it is her/his fault, she/he shouldn't have talked	tell child that children often feel it is their fault - it isn't, do they really have any choice? - it is time it stopped
very young child who is blase about what happened	do not alert the child as to how seriously adults perceive the molestation, the innocence of the young child protects her/him from emotional trauma