Rape Law Reform: A Study of the South Australian Experience.

Peter Sallmann*

Duncan Chappell+

INTRODUCTION

The decade of the 1970's was a period of unprecedented discussion and activity in regard to reform of laws relating to sexual offences, particularly rape, in Australia. Much of the energy devoted to law reform in this area was but a reflection of a much wider and deeper debate about matters of social change and sexual morality being conducted in the society at large during the 1960's and 1970's. Many of the specific initiatives taken by Governments and Parliaments in the latter half of the 1970's in Australia were stimulated by similar, and somewhat earlier, developments in other parts of the English speaking world, especially in England and in the United States.

This report records some of the findings and observations made in the course of a study of some aspects of the manner in which the State of South Australia went about introducing a number of major substantive, procedural and administrative changes in regard to the handling of rape and allied sexual crimes. These crimes were selected for study because of their intrinsic interest and importance and also because they had become extremely controversial in the 1960's and 1970's as a result of the impact of the rise of the modern Women's Liberation movements. As the Royal Commission on Human Relationships has noted:

> " Rape has become one of the most controversial of all crimes in recent years - Undoubtedly the main factor has been the emergence and rapid development of groups concerned with the status of women in the community. To many of these groups, the concept of rape, and the treatment of rape victims epitomises the way our society tends to relegate women to the position of chattels. Other organisations take a less extreme view, but nevertheless express concern at the extent to which the victim of rape becomes in practice the victim of the society which has professed to set its face against rape, and which in fact imposes very heavy penalties on those convicted of the crime. The reform of the

> laws relating to rape, and the education of the community in its attitudes towards the crime, has become one of the main aims of many womens organisations and other concerned groups."[1]

South Australia was chosen as the focus of the study for two main reasons. First, despite the fact that all the Australian States have introduced rape law reforms of various kinds in recent years South Australia undertook during 1975 and 1976 by far the most extensive reforms of substantive, procedural and administrative aspects of rape laws.[2] This in itself made it the most interesting jurisdiction to investigate. Second, as part of its legislative programme South Australia removed the immunity from prosecution of husbands for the rape of their wives.[3] This radical change to a long established common law tradition protecting husbands from prosecution as principals for rape of their wives attracted enormous public attention and generated a great deal of debate about a large number of moral, religious, philosophical, sociological, political and legal issues relevant to the institution of marriage and the function of the criminal law in society. This feature of the Sou Australian situation provided a central focus for the study and precipitated the authors' initial interest in South Australia.

As indicated, the changes introduced by South Australia during 1975 and 1976 were broad-ranging and covered aspects of the substance of the law, evidentiary matters, and administrative aspects of police, medical and hospital practices.[4] These changes form the agenda for discussion in this report and will be dealt with in some detail in later pages.

The legal initiatives formed the backbone of the reform package. In brief, the key legislative reforms were as follows: in 1975 the Criminal Law (Sexual Offences) Amendment Act, enlarged the definition of rape to include non-consensual anal penetration of both women and men; a further

definitional change was introduced the following year by removing the phrase "carnal knowledge" from the statute and replacing it with the term "sexual intercourse". Under the same amendment "sexual intercourse" now also includes "the introduction of the penis of one person into the mouth of another". The effect of these changes has been to "de-sex" the crime of rape and to enlarge its scope to cover all three orifices.[5]

The same piece of legislation makes it possible for a husband to be prosecuted as a principal offender for the rape of his wife.[6] The legislation does not provide for a blanket removal of the immunity but is hedged about with qualifications and conditions which will be the subject of discussion further on in the report. The provision became known as the rape-in-marriage law.

On the evidentiary side of things some quite major new provisions were introduced by South Australia during 1976.[7] These provisions were not accompanied by anything like the fanfare of publicity and ferocity of debate which greeted the rape-in-marriage provision but in terms of practical impact they have proved to be of far greater significance than the changes to the substance of the law.

The most important of the new procedural requirements are those which prevent evidence being adduced from the alleged victim of a sexual offence concerning her previous sexual experiences or sexual morality without the leave of the trial judge.[8] Also extremely important is the provision preventing the alleged victim of a sexual offence from being required to give evidence at the lower court preliminary hearing unless the Magistrate is satisfied that there are special reasons for requiring that the evidence be given.[9] Of additional significance, are the new legislative requirements in relation to electronic and newsprint media publicity given to sexual offence proceedings and to the alleged offenders and victims involved in such proceedings.[10]

South Australia has also been in the forefront of changes introduced to the system for handling rape and other sexual offence complaints.[11] For some years the South Australian Police Department has had a squad of specially trained police women who attend to the needs of complainants during a substantial period of the investigative and pre-trial process.[12] As far as medical treatment is concerned a panel of women doctors has been established to conduct medical examinations of alleged sex offence victims. This has been done in an effort to solve a problem which many women's groups complain about, and that is the difficulty which some women experience in confiding intimate details of a sexual attack to a male doctor. This led to pressures for the establishment of a system which would permit a woman complainant to choose a woman doctor if she wished.[13]

All Australian States have now carried out various reforms of rape law procedures. These changes have been reviewed by a number of commentators, all of whom remark upon the piece-meal nature of the reform efforts undertaken so far but also point out that South Australia is the jurisdiction which has pursued the matter in the most far-reaching way and has produced the most extensive reforms.[14] This report does not purport to deal with the approach of States, other than South Australia, to the question of rape law reforms. Its scope is limited to South Australia and its emphasis is upon exploring some of the background to the legislative and non-legislative changes and the way in which they have been received by those groups and individuals in the South Australian community most immediately affected by them. It also provides a general commentary on the new order of things and the way in which it seems to be working in practice.

The Scope and Nature of the study

Because of the extensive nature of the changes governing rape laws and the handling of rape cases in South Australia and the fact that all other States in Australia have introduced some reforms, and that some are contemplating introducing others,[15] in relation to the same problem area the authors decided that it was an opportune time for some sort of evaluation of the South Australian situation to be made.

In so many instances, particularly in Australia, legislatures make grand flourishing gestures towards solving some sort of problem and no investigation is ever made of how the legislation and its various enforcement procedures are working out in practice. This study is in the nature of an impact study.[16] However, since the bulk of the legislative changes were introduced at the end of 1976 and the investigation was carried out during the first half of 1978 the findings are necessarily somewhat impressionistic and are based on the reports of people affected by the changes during the very early days of the new order of things.

Despite the fact that the research was carried out at a time when many of the teething problems associated with the new provisions and procedures were still emerging this report articulates a number of the strengths and weaknesses of what has been done in South Australia in regard to rape laws and procedures and provides observations about the important practical problems experienced in putting the changes into effect. A number of the perceptions of people involved and the practical problems presented also raise significant theoretical questions about the ability of the law and the legal system to cope with the problems of human behaviour, in particular in the sexual arena.

As originally envisaged the project was intended only to assess the impact of the rape-in-marriage provision but under closer scrutiny it quickly become obvious that this provision was but one aspect, albeit a highly controversial aspect, of a whole series of legislative changes in regard to rape and other sexual offences, some of which have had more practical impact and importance than the rape-in-marriage component. The authors decided to include some of these as an integral part of the study.

With the backing of research funds made available by the Australian Criminology Research Council the investigation was conducted from February until July of 1978. The authors, together with a Research Assistant,

carried out a series of semi-structured interviews in South Australia with as many of those persons directly concerned with the impact, implementation and administration of the new rape laws and procedures as could reasonably be discovered and persuaded to speak.

In-depth interviews were conducted with politicians, police, police prosecutors, crown prosecutors, representatives of women's shelters, defence lawyers, women's groups which lobbied for legislative changes, victims of rape, marriage guidance counsellors, doctors involved in examining alleged rape victims, a member of the South Australian Penal Methods Reform Committee (the Mitchell Committee), various opponents of the legislation and the then South Australian Attorney-General.

The interviews were tape-recorded and transcriptions were made from the tapes. In addition to these sources of information statistical data relating to rape was gathered, together with the relevant Parliamentary Debates and the procedural rules for the handling of rape cases by individual units like the police and the medical authorities, newspaper clippings and allied materials.

The work was carried out with no particular hypotheses or theoretical pictures in mind. The essential emphasis in the research was to assess the reactions of involved and interested parties to the changes which have occurred and to provide a commentary on the changes, in the light of the totality of material collected.

For the sake of convenience and clarity the material will be dealt with under the following sub-headings:

. Background to the South Australian law reforms;

. Rape in marriage;

. Substantive changes to the law;

. Procedural changes to the law;

. Changes in the administrative handling of rape cases;

and . The Implications for the future.

BACKGROUND TO THE RAPE LEGISLATION

In respect of most of the rape law reforms introduced by the South Australian government in 1976 the immediate background was the Special Report on Rape and Other Sexual Offences prepared by the Mitchell Committee.[17] This Report was commissioned by the then Attorney-General for South Australia, The Hon. Peter Duncan on the 2nd December, 1975 and submitted to him in March, 1976.

The fact that the Mitchell Committee, at the time it was asked to complete a Special Report on rape, already had a Reference on the substantive criminal law, the speed with which the Special Report was completed and the fact that legislation, largely based on the substance of the Report, was assented to within 1976 all suggest that the Government, or at least a number of individuals within the Government, viewed the matter of rape law reform as one of considerable urgency and importance.[18]

It is interesting to note in this context that the Mitchell Committee, in its Special Report, refers to the fact that the Attorney-General released a statement to the media in December, 1975, inviting written submissions to be made to the Committee and comments that;

> "The limited number of replies to the invitation for submissions causes the committee to doubt whether there is, in this State, a substantial dissatisfaction with the present law relating to rape and the administration of law. Nevertheless there is clearly widespread disquiet which warrants a re-examination of the law in some detail"[19]

This is a curious statement, in one breath raising doubt about whether the Special Report was necessary at all and then, in the next breath, admitting that there was "widespread disquiet" with the state of the law

which justified an investigation. It may simply be the authors' own peculiar interpretation but there does seem to be a suggestion in the remarks of the members of the Mitchell Committee that they at least did not see what all the fuss in relation to rape law was about or at least did not regard it as such an urgent matter that it could not be dealt with in the normal course of their other Reports.

Although the Mitchell Report provided a basis upon which reform legislation could be formulated the actual pressures for changes in the laws and procedures came from other sources. These were the pressures which led to the Special Report Reference in the first place. It is clear that the reform movement was made up of a number of elements and that many of these elements were quite disparate, despite the fact that there were linkages between them.

A series of factors combined to produce the reform of the South Australian rape laws in 1976. As a general factor, rape had been adopted as a crusading issue by the various groups and organizations, which, at the formal level, made up the Women's Liberation movement. This had also been the case in the United States and England. Events and developments of a political, social and legal nature so often have an impact in Australia if they have first taken root in these countries. This was certainly so in the case of rape. Many Women's groups argued that the nature of rape laws in the Anglo-American common law tradition was to help establish and cement the economic, political, psychological and legal dominance of men over women. Even those groups which did not espouse such strong views as these persuasively argued that the legal systems for handling rape cases were not doing justice to sex case victims and that one significant feature of the pre-trial and trial process in relation to sex cases was to place the victim on trial.

As Chappell has observed:

> "Many women regard this area of the criminal law as one protecting male property rights, rather than the integrity of a female's body.

> In the words of Kate Millet,
> "traditionally rape has been viewed as an offence one male commits upon another - a matter of abusing his woman." According to this view, a male dominated system of criminal justice sustains this attitude refusing to prosecute or convict all but a handful of rapists. Meanwhile the victim of rape is subjected to a host of indignities at the hands of the police and other system personnel." [20]

The fact that rape, because of its components of sex and violence, has traditionally attracted a high degree of media coverage and attention, coupled with the strong and rapid rise of Women's Liberation groups which had also gained enormous amounts of publicity, meant that public awareness of rape had reached a new high level.

There were also some additional, specific contributing factors. The momentum of criticism which had developed about rape laws and rape procedures was given added bite by the decision of the House of Lords in the case of Morgan v D.P.P.[21] This decision was handed down in April, 1975. This was a case in which a man invited three of his friends home to have intercourse with his wife. The three friends were convicted of rape. The husband was convictedof being an accessory to the rape. Because he was her husband Morgan could not have been convicted as a principal in the first degree of the rape of his wife.

In discussing the mental element necessary for conviction of rape the majority of the House of Lords confirmed that the Crown must prove beyond reasonable doubt that the accused had sexual intercourse with the victim without her consent and knowing that she was not consenting or recklessly indifferent as to whether she was consenting or not. It is sufficient that the accused's belief be an honest one. In other words, it prevents the conviction for rape of a person who honestly, even if unreasonably, believed the victim was consenting.

Because of the great amount of publicity and controversy surrounding rape generally at this time the Morgan case itself gained widespread media coverage. Amongst Women's groups generally, and feminist groups particularly, the decision created turmoil. The ruling was interpreted as a "green light" for would-be rapists. As Waller has observed:

> "The publication of this by no means unexpected judgment of the House of Lords aroused one of the fiercest public controversies experienced in response to a judicial decision"[22]

The reverberations of the Morgan decision were felt in Australia, and particularly in South Australia, where influential Women's groups and rape action centres were well established. In this respect it is interesting to note that a very similar ruling to that provided in Morgan had been handed down by the South Australian Full Court earlier in the same year.[23] This decision attracted little, if any, public notice.

The agitation in England was such that in July,1975 the Home Secretary established an Advisory Group on the Law of Rape under the chairmanship of Mrs. Justice Heilbron to investigate the need for reform of rape laws.[24] The Heilbron group directed their attentions to the problem of sex-victim justice and,in particular, to alleviating the stress and trauma experienced by many rape victims in the pre-trial and trial stages of processing rape complaints. It is quite clear that the Morgan case, the public interest which it stimulated and the setting up of the Heilbron group all formed an important part of the background to developments in South Australia.

The fact that 1975 was International Women's Year also needs recognition as one of the background factors which undoubtedly played a part in the thinking of the South Australian government on the question of rape and rape law reform. Some support for this proposition is derived from reported remarks of the Chairman of the Mitchell Committee, Justice Roma Mitchell:

> "The timing of the enquiry (the Special Report on Rape) was partly brought about by the British judgment, and partly by the fact that it was International Women's Year which in some areas led to great emphasis being placed on the subject of rape."[25]

What is also clear about the situation in South Australia in 1975 and 1976 is that there was a sympathetic, receptive and reform-minded Government in power.[26] The Dunstan Labor Government had established a record as a government intent on pursuing social change through law as part of an espoused Labor philosophy of egalitarianism, equality of opportunity and anti-discrimination. As such, the Government, especially individuals within the Government, notably Premier Dunstan and Attorney-General Duncan, were very open to representations and pressures from individuals and groups within the community who claimed that the law was out of step with changed circumstances and was operating in an oppressive and discriminatory manner. This is not to say that a more conservatively oriented government would not have listened attentively to calls for reforms. In fact, rape law reforms have been achieved in Australian States with conservative governments. It is notable, however, that the changes which have occurred in these States have invariably been of the ad hoc, piece-meal, procedural variety and no thorough-going reviews of the political, social and legal basis of rape laws have been conducted. The South Australian government gave the Mitchell Committee a broad mandate to investigate the full range of issues raised by the operation of the law in relation to rape. Some commentators have observed that the Mitchell Committee did not fully grasp this opportunity[27] but in any case the Report did provide a far broader base from which to work than has been so far presented in other States.

It is also interesting to note that whereas most governments in similar circumstances will use a Report such as the Mitchell Report as a determinant of the parameters within which reform gestures may operate, the South Australian Government, in a number of key areas, went considerably further than the Committee had done. This was certainly the case, as we shall see, in regard to rape-in-marriage.

The Mitchell Committee limited their recommendation to lifting the immunity from prosecution in relation to separated husbands and wives. The Bill introduced into Parliament by Attorney-General Duncan provided for a complete removal of the immunity, thus allowing prosecution even in the case of husbands and wives cohabiting.

The same Government had established a reputation in relation to reform in the allied areas of abortion and homosexuality by producing changes in the law, the like of which had not been seen in other parts of Australia.[28] So that as agitation and concern about rape and reform of the law relating to it reached a high level in the early 1970's there was a Government in South Australia in power which was prepared to listen to reform arguments, and there were individuals within the Government, such as the Attorney-General, whose views corresponded very much with those of many of the people pressing for new approaches. It was in this sort of climate that the reform legislation was produced.

The role of individuals in the law reform process is usually substantial. In the case of the South Australian initiatives the part played by Attorney-General Duncan was a major one. It was the Attorney who introduced the legislation into Parliament, it had been the Attorney who presented the Mitchell Committee with its Rape Reference and it was the Attorney who was the initial contact point for the representatives of many Women's groups who were pressing for reforms.

There seemed to be universal agreement amongst those people spoken to in connection with this research that the Attorney-General was a particularly reform-minded individual. Some interviewees expressed quite cynical views about the motives behind the reform moves initiated by the Attorney. For example, lawyer C,[29] when asked about the reasons behind the fact that South Australia had established itself as the pacesetter State in matters of criminal law reform asserted:

> "In my view the Attorney-General is interested in seeking political gain" (Interview)

and when asked about the reasons for the Mitchell Committe Special Reference on Rape the same lawyer replied:

> "I go back to my original point that I believe that so much of the change in sex law in South Australia came out of the desire of the Attorney-General to achieve firsts". (Interview)

Also on the subject of the Mitchell Committee Reference Lawyer B offered the following statement:

> "I think probably this is an area that attracted Peter Duncan, he was a new Attorney, he wanted to make his reputation as a reformer and this was therefore an obvious field".(Interview)

Lawyer F when asked about whether the reforms appeared to be mainly the results of significant community pressures or mainly the initiative of politicians, commented in the following manner:

> "I think less of the community ground swell, or perhaps a community feeling that something ought to be done and the politicians riding the crest of the wave. It was politically opportune to step in and say "we are doing something about it". It is a like a lot of the legislation we pass. Women go around crying that their daughters are getting raped and some enterprising politician, usually Labor, and usually the Attorney-General, or someone like that says "well, of course, we are just rushing in the Abduction of Women and Off-Road Vehicles Reform Act of 1978!"" (Interview)

There is no reason, of course, why lawyers, even criminal lawyers, should have any peculiar expertise in analysing the motives and actions of politicians in relation to criminal law reform. Some of the lawyers interviewed were dubious about answering questions which did not deal with strictly legal matters, and technical legal matters at that. Their

comments though are very interesting in terms of the relationship between perceptions of politics and perceptions about law reform. This issue is particularly important when it comes to a consideration of the actual changes in the law, especially the evidentiary and procedural changes.

Lawyer D, when asked about the general reaction of members of the South Australian legal profession to the reforms, had this to say:

> "The opinions of the profession seem to fall amongst criminal lawyers who know what it's about, non-criminal lawyers who really don't know what it's about, and political break-downs of lawyers into the Liberal and Labor factions. Criticism that I've heard from lawyers against the amendments to the criminal code are often from people who are known to be of Liberal affiliations - of course the converse applies that people with Labor affiliations support the legislation." (Interview)

Conceivably, and in terms of discussing the general background to the reform package, the above somewhat cynical adverse comments about the genesis of the legislation are from "Liberal affiliated" lawyers. Equally, perhaps, remarks to the effect that the Attorney was "progressive and courageous" etc. in bringing in the reforms are remarks to be attributed to "Labor affiliated" lawyers. The research did not pursue these matters in any detail but again it is interesting to raise this dimension in the context of the study of the impact of a set of law reforms. It is well established that to some significant extent people's views and perceptions about what should be done and how things are working out in practice will be coloured by their political and ideological stances.[30] This is not to say that interested parties cannot have perfectly valid "objective" type views about whether things are good, bad or indifferent. It simply says that ideology, particularly as it is manifested in respect to party political affiliations will very often play a not insignificant role in the formulation of personal views.

The Attorney-General himself has provided some valuable insights into his thinking leading up to the Special Report of the Mitchell Committee, and the subsequent steps which the Government decided to take in relation to legislation. When asked about the reason for the Mitchell Committee Special Report Mr. Duncan replied:

> "We considered the situation at that stage was sufficiently urgent that we could not wait until the full Mitchell Committee Report into the substantive criminal law had been produced. In particular I was concerned that there were a number of procedural matters related to the trial of rapists which were quite unsatisfactory from the point of view of the victim - We had one particularly appalling instance of a rape where the victim was forced to give evidence four times in the courts - the reason being that it was a pack rape, there were five involved in it, two were in fact charged as juveniles, so there was a preliminary hearing for them and a preliminary hearing for the people dealt with in the adult courts. There was a trial in the adult court and then the fifth person who had disappeared from the scene was apprehended and, fortunately, by that stage the others had been found guilty and he decided the best way out of the thing was to plead guilty at the preliminary hearing. I decided, as a result of that, that it was about time we had an urgent look at the laws relating to rape and endeavour principally to reduce the trauma faced by the victim in going through the court stages of the ordeal". (Interview)

Mr Duncan also defended himself against those critics, particularly some of the lawyers to whom we spoke, who had voiced concern about the nature of the reforms and the motivation behind them.

> "Firstly, the legal profession are very conservative and don't like change of any sort. I mean it means extra work for them, they have to familiarise themselves with new changes in the law and I have been responsible for a fair number of changes in the law generally. I think some of them just plain don't like that. Apart from that I think that many of these people are involved in representing the interests of defendants and to a quite minor degree, I would argue, we have reduced the chance of defendants being found not guilty on matters which are a formal legal technicality, and I think that the legal profession, generally, would prefer to see the situation as it was prior to the changes that I introduced. But that's certainly not

> the case with, for example, women's groups. I imagine most women's groups would give me fair credit for having introduced the changes - they certainly would like to see more changes. But I believe that there is a much better situation in South Australia from the point of the victim than elsewhere". (Interview)

It seems clear from the Attorney's comments that the manner in which the criminal justice system dealt with alleged sex case victims was the main stimulation for the activity within the rape law area. What is also very clear is that the Attorney was heavily influenced in his thinking by individual women, such as his Press Secretary, Carol Treloar[31] and the Women's Adviser to the South Australian Government at the time, Deborah McCulloch. And despite the fact that there were, and are, many different points of view on the sex law reform issues represented within the Women's Movement as a whole it is fair to say that the Attorney listened attentively to these points of view and responded sympathetically to a general perspective which maintained that it was time to do something about the lot of the sex case victim within the embrace of the criminal justice system. It was one of the complaints of the lawyers interviewed that the Government, and the Attorney in particular, were far more interested in the views of women and Women's groups on the subject of sex law reform than they were in the views of lawyers.

It is virtually impossible to assess the precise, or even approximate, level of contribution of the various factors discussed above to the initiation of substantial rape law reforms in South Australia. Overseas developments generally, the Women's Liberation Movement, the Morgan case, the fact that 1975 was International Women's Year, the reform nature of the South Australian Labor Government, and particular individuals within it, the influence of women's groups in South Australia and one or two particular rape cases, and needless to say, a number of other factors, combined to create a situation in which the stage was set for some kinds of reform.

What has not yet been mentioned, and merits mention is the incidence of the crime of rape itself. As is by now extremely well known one needs to be chary of crime statistics generally, and rape statistics especially. Crime statistics are usually collected, collated and presented on a "crimes known" or "crimes reported" basis. This means that they are really only a measure of the volume of crime which the police, through one means or another, are made aware of. They are in no sense an accurate measure of the actual amount of crime in the community. Rape figures are often regarded as being even more dubious than crime figures generally because of an allegedly very high rate of non-reporting. One of the main reasons for this is said to be the deterrent effect of the trauma and embarrassment suffered by victims in pursuing a case through the courts.

Having said this it does appear to be the case that the incidence of rape in South Australia, and indeed, in many other parts of the world as well, has increased. This is something which it is quite impossible to be categorical about because it is always possible that what may appear to be an increase in the number of rapes, as shown in the crime statistics, is not an absolute increase at all but merely a manifestation of a greatly increased public awareness of rape, accompanied by a much greater tendency to report its occurrence. Even allowing for a considerable increase in reportability there would still appear to have been an increase in rape. To the extent that this is true then it is likely to have operated as yet another contributing factor to the reform momentum.

According to official South Australian figures the rate of rape and attempted rape offences reported to the police as per 100,000 of the population has increased noticeably during the second half of this century.[32] During the 1950's and 1960's the rate was generally in the realm of 1.5 to 3.0. There was only a slightly perceptible increase overall in the twenty year period. However, the figures begin to climb rapidly in the early 1970's and the figures for the period 1972 to 1975 (inclusive) were 4.99, 4.27, 8.09 and 7.27

respectively. This trend appears to have continued because the figures for the 1976 to 1978 (inclusive) were 10.38, 11.67 and 13.34 respectively.[33]

Again, emphasis needs to be given to the fact that the reportability factor is an unknown and may well have contributed significantly to the increase. Of course, even if reportability did increase noticeably during this latter period, thus raising doubt about the reliability of the figures as a measure of reality, the fact that the figures showed an increase would be used as an argument by those individuals and groups who were claiming that the rape situation was getting out of hand and that the Government had to do something about it. Such arguments would gain plausability from the fact that senior South Australian police officers were convinced that the actual incidence of rape had increased markedly and had made these views known.[34]

Although the remarks made here about the background to the South Australian rape law reforms are admittedly sketchy the material contained in them does provide an indication of the climate for change which had developed and illustrates the context within which the Mitchell Committee Special Report was produced.

The Special Report on Rape and Other Sexual Offences

The Mitchell Committee completed its work on the Special Report most expeditiously, inside three months, in fact. Preparation of the Report was obviously facilitated by the fact that a good number of the issues contained within the Committee's brief were already being dealt with in relation to the substantive law reference, or had been dealt with in some form in one of its earlier Reports.

It is not the intention at this point to analyse the Mitchell Committee recommendations or to deal with the legislation which was produced based upon

them. The recommendations and the legislation, which at times part company, will be treated in following sections of this report devoted specifically to various key features of the South Australian reforms. It is sufficient for the present purpose of completing the background picture to simply chronicle those important aspects of the Mitchell recommendations which are discussed further on in the report.

The brief of the Committee was to report "upon the law relating to rape and other sexual offences".[35] As far as defining the offence of rape was concerned the Committee considered that the common law approach, as exemplified by Morgan v D.P.P. should be retained and that it would be "inadvisable to attempt an exhaustive statutory definition of rape".[36] However, it was recommended that the law should be changed "so that a husband may be convicted of the rape of his wife where the parties are living apart and not under the same roof at the time that the act giving rise to the allegation of rape occurred".[37] The Committee decided that there should be an offence, (analogous to rape) of forced fellatio, which should carry a more severe maximum penalty than indecent assault.

In the vital area of evidentiary and procedural matters two key features examined by the Mitchell Committee were the question of the appearance of the alleged victim at the committal proceedings and the highly contentious issue concerning the introduction into evidence, mainly by way of cross-examination by the defence, of material in relation to the prior sexual experience and sexual morality of the alleged victim.

In regard to the former the Committee suggested that the evidence of the alleged victim be given by a statement verified by affidavit; that the justice hearing the committal should have a discretion upon application by the prosecution or defence to compel the alleged victim to give oral evidence and be subjected to cross-examination; that the discretion should only be exercised upon special circumstances being demonstrated, and that when no oral

evidence is given by the alleged victim the defence should be supplied with copies of all statements made to the police by the alleged victim.

As to the latter the Committee felt that the general reputation or moral character of the alleged victim should be deemed irrelevant to the defence and that where the defence wished to cross-examine on previous sexual experience or introduce evidence in relation to it permission of the trial judge should be necessary and this would be obtained at a pre-trial conference. Such permission would not be given unless the cross-examination and the evidence sought to be adduced is relevant to the defence.

In relation to the investigatory stage of rape complaints the Mitchell Committee recommended that the specialised police officers who deal with alleged rape victims should take a course in practical psychology before being appointed to that position. It was also recommended that an alleged rape victim should have the option of medical examination by a woman doctor. For this purpose the Committee recommended that a panel of doctors, including women, should be set up to examine rape victims.

These are the features of the Mitchell Committee's work which the research carried out for this study has revealed to be of the most critical importance. It is essential to point out that the Committee dealt with a number of other aspects of rape and other sexual offences in its Report. These other aspects have not proved to be as significant in practice as those mentioned above, either because the recommendations in relation to them were not acted upon by the Government or because they dealt with issues which by their very nature are not controversial or do not have a special practical impact.

There are also areas in which the Committee recommended the retention of the status quo, for example, in respect to the corroboration warning. This is not to say that the requirement for the warning does not have a substantial impact. A number of people spoken to, such as police, prosecutors, and

Women's groups were very strongly in favour of removing the requirement that a warning be given about corroboration. Because we were examining the impact of changes which had been made we did not pursue with the same vigour aspects of the problem, albeit important aspects, which were not part of the new order of things.

A similar, but somewhat different situation was posed by the Committee's recommendation to abolish the right of an accused person, in all cases, to make an unsworn statement to the jury. The Government decided not to adopt this recommendation. In this case the police, prosecutors and Women's groups were also in favour of removing the unsworn statement from the defence armoury, and were joined in this call by a number of the defence lawyers interviewed. Again, although we did not pay as much attention to this as we did to changes which were actually implemented by the Government we were forced to consider it, at least in passing, because of the force and insistence with which viewpoints about it were expressed.

The Committee also made important suggestions about changes in the law in respect to the age of consent, evidence in respect to the timing of an alleged victim's complaint, publication of the names of alleged victims and alleged offenders, incest, the presumption that a boy under the age of 14 years is incapable of rape and a number of other features of rape law. The judgment about which problem areas in relation to rape to examine was to some minor extent an arbitrary one but one essentially made on the basis of the impact which those changes actually implemented appear to have had.

The Report of the Mitchell Committee received a great deal of publicity in South Australia and gave rise to a certain amount of controversy and lively debate within the community. Generally speaking, the Report was well received. The Advertiser newspaper, for instance, commented:

> "The Mitchell Committee's special report on the law relating to rape and other sex crimes is the first of its kind within memory on a controversial and emotive subject. To say the Committee has tackled its work courageously

> is not necessarily to endorse all its findings. Yet modern society is so different from that in which most existing law was framed that a review of such law is long overdue. In a community where, for example, so many married couples live apart, it seems proper that the wives concerned should no longer have to submit to sex with their estranged husbands unwillingly. Hence the recommendation that some husbands be liable to rape charges".[38]

Apart from its general comments The Advertiser quickly singled out the rape-in-marriage issue. This issue was to dominate the debate from that point on, both at the community and media levels and during the full course of the Parliamentary debates on the Bills which the Government introduced following the Mitchell Committee's Report. Although one of the effects of this was to deny sufficient attention to other important aspects of the legislation, particularly the evidentiary and procedural matters, rape-in-marriage clearly raises a multitude of issues of great variety and merits very special attention.

RAPE IN MARRIAGE

In examining the nature and scope of the law in relation to rape the Mitchell Committee had to deal with the situation as between husbands and wives. Ever since the oft quoted dictum of Lord Hale, to the effect that marriage denotes consent to sexual intercourse,[39] a tradition has become established in common law countries that a husband cannot be guilty as a principal for himself raping his wife. There is no doubt that a husband can be convicted as an accessory for assisting another, or others, to rape his wife. This is in fact what happened in Morgan's case.[40]

The immunity from prosecution has not by any means been a blanket one. As a result, mainly of a number of English case law developments during this century, the blanket immunity has been eroded so that husbands could be charged with rape of their wives under certain circumstances, such as the existence of officially sanctioned separation, and non-cohabitation agreements and decrees nisi for divorce etc.

The Mitchell Committee considered the legal developments and the general social and political climate of the day and broke new ground for Australia by recommending that:

> "a husband be indictable for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof notwithstanding that it was committed during the marriage".[41]

The Committee commented, in a passage that has been frequently quoted since the publication of the Report, that:

> "The view that the consent to sexual intercourse given upon marriage cannot be revoked during the subsistence of the marriage is not in accord with modern thinking. In this community today it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it irrespective of her own wishes. Nevertheless it is only in exceptional circumstances that the criminal law should invade the bedroom. To allow a prosecution for rape by a husband upon his wife with whom he is cohabiting might put a dangerous weapon into the hands of the vindictive wife and an additional strain upon the matrimonial relationship. The wife who is subjected to force in the husband's pursuit of sexual intercourse needs, in the first instance, the protection of the family law to enable her to leave her husband and live in peace apart from him, and not the protection of the criminal law. If she has already left him and is living apart from him and not under the same roof when he forces her to have sexual intercourse with him without her consent, then we can see no reason why he should not be liable to prosecution for rape."[42]

We have reproduced this quite lengthy passage from thetext of the Report because it represents the kernel of the Committee's reasoning on the subject. The passage also represents a substantial portion of what is, quite surprisingly, an extremely brief treatment of a highly complex problem.

Outline of the Law

Despite the fact that the Mitchell Committee recommendation is almost certainly in tune with the thinking of the times and from some points of view, somewhat cautious in tone, it represented a radical recommendation for change in the state of the law. It

becomes necessary at this point to sketch,in outline form only, some of the key features in the development of the law. A detailed treatment of the law has been provided by a number of commentators in recent times.[43] A general outline is produced here as part of a picture of the background to the legislation actually produced and passed by the South Australian Government and as a precursor to an examination of its impact.

Hale had stated that a man could not be guilty of raping his wife because, "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." In the landmark case of Clarence in 1888 a majority of the judges of the Queen's Bench Division, sitting as the Court of Crown Cases Reserved, accepted the Hale concept of the wife's implied consent to all acts of intercourse taking place during the marriage.[44] There were, however, a number of judges in the case who uttered dissenting remarks about the dicta of their brother judges in relation to rape in marriage. For example, Wills J. questioned the existence of any really authoritative basis for a rape-in-marriage immunity, and observed that the idea that rape-in-marriage was impossible was "a proposition to which I am not prepared to assent." Hawkins J. noted that "this marital privilege does not justify the husband in endangering his wife's health." Field J., while not doubting the authority of Hale's pronouncements, said "no other authority is cited by him for this proposition, and I should hesitate to adopt it."

In relation to these judicial utterances on rape-in-marriage in the Clarence case Geis has said the following:

> "The comments in Clarence upon rape-in-marriage amounted to little more than stray, unfocused observations. But later, these inconclusive musings would come to serve as a major basis for more fixed judicial views upholding Lord Hale's statement on the inviolability of the husband's right of sexual access to his spouse."[45]

He further notes that:

> "English cases since Clarence have concentrated primarily on judicial determination of whether the husband charged could be considered to be legally married at the time of the relevant act of nonconsensual intercourse, or whether the defendant fell outside the protective limits afforded by Hale's rule on the rape of a wife by her husband. If the couple were deemed not married, a rape charge could stand; if married still, no rape accusation could lie."[46]

A number of English cases since the Second World War have examined the rape-in-marriage immunity. In Clarke[47], Byrne J. decided that in the case of a husband and wife living apart, the wife having obtained a separation order containing a non-cohabitation clause, rape could be committed by the husband. In Miller[48], however, the Court decided that the immunity did operate because although the couple were living apart and the wife had lodged a petition for divorce there was no formal separation agreement. In 1972, the Court of Appeal in Reid[49], ruled that a husband could be guilty of kidnapping his wife, and in the following year, in O'Brien[50], Park J. decided that a husband could be guilty of rape of his wife if there was a decree nisi in existence in relation to the marriage.

In the case of Steele[51], in 1976, a husband, whose wife was seeking a divorce, gave an undertaking to the court "not to assault, molest or otherwise interfere with his wife - ". Because he gave this undertaking the wife's application for an injunction was adjourned. The husband failed to honour his undertaking and broke into his wife's room and had sexual intercourse with her without her consent. He was convicted of rape and appealed on the ground (inter alia) that his marriage was a bar to a conviction of rape.

The Court of Appeal reasoned that the issue of proceedings for an injunction against the husband would not be enough to remove the rape-in-marriage immunity but the granting of an injunction would be. The Court concluded that although there was no injunction in this case the undertaking given by the husband in lieu of an injunction was the equivalent of an injunction and hence operated to remove the wife's matrimonial consent to intercourse.

When placed in this sort of context the Mitchell Committee recommendation clearly broke new ground in suggesting that regardless of the existence of separation orders, injunctions, non-cohabitation orders, non-molestation agreements etc., a husband could be convicted of the rape of his wife if the couple were separated and not living under the same roof.

Reaction to the Mitchell Committee Recommendation

The Mitchell Committee Report was released for public consumption at the end of May, 1976.[52] The contents of the Report attracted a lot of attention from the press and the electronic media. Generally speaking, the reaction to the rape-in-marriage recommendation was relatively quiet and accepting.

There were however, some notable exceptions to this spirit of quiet acceptance. The Women's Adviser to the Government (Deborah McCulloch) said:

> "I support most of the recommendations wholeheartedly, but there are two areas where the recommendations don't go far enough. One is that it is still not an offence for a husband to rape his wife if they are living together. The report says it is only in exceptional circumstances that the criminal law should invade the bedroom. I consider rape an exceptional circumstance. If husbands can rape their wives with impunity, then married women have fewer rights inside marriage than they have outside."[53]

Dawn McMahon, Administrator of the North Adelaide Women's Emergency Shelter wrote:

> "The decision of the Committee to recommend the exemption of co-habitating husbands from prosecution because of "the dangerous weapon this might put in the hands of the vindictive wife" contrasts sharply with the lack of protection the law affords wives from "vindictive husbands" - Women's Shelters are all too familiar with the wife whose ego-frustrated husband comes home after a ticking off from the boss,or a session at the pub determined to salve his bruised self-esteem by taking it out on his wife. It is a matter of chance whether he will bash her up, or deliberately make degrading and humiliating sexual advances and provoke her resistance, so he can have the pleasure of forcing her to submit. In any circumstances outside marriage this would be called rape."[54]

It is very clear that the Attorney-General was heavily influenced by the points of view of these women and many others expressing similar sentiments The legislation introduced into Parliament in October 1976 removed completely the immunity from prosecution of a husband for the rape of his wife and thus flew in the face of the Mitchell Committee recommendation.[55] When asked whether the decision not to follow the Mitchell suggestion was a personal one the Attorney replied:

> "Yes, it was, it seemed to me that a woman should have the protection of the criminal law regardless of whether she was married, unmarried, living with the spouse or not? A woman living in a de facto relationship can claim that she has been raped by her de facto husband, why shouldn't a woman who is married be able to claim that she has been raped?". (Interview)

Asked whether he found the reasoning of the Mitchell Committee in respect to rape-in-marriage persuasive the Attorney said:

> "No, I thought the Committee had taken a rather cautious approach to the matter. It may be that the Committee was swayed by what they saw as the community attitude, but of course, it was a political decision for me to take as to whether the Government was prepared to fight for the introduction of rape-in-marriage legislation across the board, so to speak, and I thought it was of sufficient importance to do just that." (Interview)

It was in early August, 1976, that the Government announced its intention to introduce legislation in respect to rape and other sexual offences, following upon the Mitchell Committee Special Report. It was the Government's stated intention to completely remove the bar to prosecution of husbands for rape of their wives which gave birth to a heated and extensive debate at all levels of the South Australian community and also attracted world-wide attention.[56]

The Advertiser commented, in part, as follows:

> "The common law rule, stemming from the theory that marriage denoted consent to intercourse whenever required, is clearly not in accord with modern thinking. The days in which wives were regarded as the property of their husbands have

> long gone. Yet the Government would have been more prudent to stick to the Committee's recommendation that no husband should be indictable for rape of his wife with whom he is living. To do otherwise is, as the committee warned, to put a dangerous weapon into the hands of a vindictive wife."[57]

The public debate which followed the Attorney's announcement and the publication of the details of the Bills to be introduced continued at a high level of intensity until the end of November, 1976, when the legislation was passed by the South Australian Parliament, simmered thereafter, and picked up momentum again before, during and after the trial in May, 1978, of Heine Albert Greenway for the rape of his wife. This was the first rape-in-marriage trial.[58] The participants in the debate were Women's groups, politicans, church people, rape action groups, lawyers, marriage and family guidance consellors, the electronic and print media and a good number of interested citizens with no particular institutional or organizational affiliations.

Debate naturally focused around the key issue of whether the criminal law should provide for rape prosecutions in the case of husbands and wives cohabiting. The Women's Shelter groups in Adelaide strongly supported the Government move,[59] as did the Australian Women Against Rape organisation.[60] It was also endorsed by the Director of Counselling at the Marriage Guidance Council of South Australia.[61] Women's Electoral Lobby issued statements in favour of the move on the basis that it was a legal acknowledgment of a woman's rights over her body - both inside and outside marriage.[62] The Y.W.C.A. expressed approval of the move and pointed out, through their Executive Director that "marriage is a highly-regarded partnership and that husbands should not be free to abuse their wives physically - rape will never be eliminated from our society unless it is recognised by law that every woman, married or single, has the right to refuse any act of sexual intimacy".[63]

A central thread in the opposition to the provision had been summed up by The Adelaide Advertiser's editorial comment that the law would "put a

dangerous weapon into the hands of a vindictive wife." Several organisations which had welcomed the Mitchell Committee's recommendation backed off from the Attorney-General's proposal. The National Council of Women said that it might undermine the family and contribute more to the breakdown of marriages.[64] The South Australian Women's Council of the Liberal Party labelled it as "divisive, an attack on the family, and a ridiculous piece of legislation".[65]

The Anglican Archbishop of Adelaide, Dr. Keith Rayner said:

> "It would be dangerous for the criminal law to intervene in this area while husband and wife are living together. Sexual intercouse within marriage shouldbe by mutual consent - Rape as an offence in marriage would be difficult to prove and, as the Mitchell Committee rightly said, could put a dangerous weapon in the hands of a vindictive wife."[66]

The Liberal Party Opposition in the Parliament opposed the provision and initially supported an amendment to bring the situation back to that proposed by the Mitchell Committee. The Shadow Attorney-General Burdett asserted, "we believe the criminal law should not be used to establish a moral or social principle".[67] Instead, the Liberal Party advocated the setting up of additional Women's shelters and rape crisis centres as a short term answer to the problem of husbands maltreating their wives, sexually or otherwise.

The arguments which were canvassed during the debate were many and varied. The proponents positions ranged from those who claimed that totally lifting the immunity was necessary to provide wives with the full protection of the criminal law to those who recognised that enforcement would be extraordinarily difficult and wanted the provision essentially for symbolic and conceptual reasons. And on the opponents' side positions tended to range from those who could not comprehend the idea of rape within marriage, and tended to adopt a stance close to, or analogous to Hale's dictum on the matter,

to those who recognised the problem but claimed that because of the peculiar and intimate nature of the marriage relationship, and the problem of enforcement, a total lifting of the immunity from prosecution would be inappropriate. This, of course, is oversimplifying the issue because a number of the participants in the debate used a number of arguments from the range of positions and, in some cases, tended to use arguments which were inconsistent with each other.

The issues and arguments raised during the pre-Parliamentary period tended very much to set the agenda and the terms of reference for what was to be an extensive and extended debate in the South Australian Parliament on rape-in-marriage.

The Nature of Rape-in-Marriage

A feature of the problem, quite noticeable by its absence from discussions, was the lack of any empirical evidence about the nature and extent of rape within marriage. This is almost inevitable in the nature of things and it is almost impossible to conceive of a workable method of obtaining any really concrete data about the extent of the problem. One important contribution to the debate was an article written by Stewart Cockburn in "The Advertiser" (25 September, 1976) which reported some brief case histories compiled from talks with women who had visited the Naomi Women's Shelter in Prospect, Adelaide, on one particular day.

The details of the experiences of these women were quite horrific and made a significant impact on the nature of discussions about rape-in-marriage and were later to prove of great importance in the Parliamentary process in relation to the Government's rape law reforms. It is clear that the introduction of these case histories to the debates in Parliament was at least partly responsible for the ultimate acceptance of a modified rape-in-marriage proposal.

Part of our research consisted of an extensive series of interviews with women who were resident at, or visitors to, a number of Women's Shelters

in the Adelaide area. It cannot in any sense be claimed that the material collected in these interviews is valid evidence of the extent of the problem of rape-in-marriage in South Australia or in Adelaide. It is, however, evidence of the existence of the problem and it is evidence of some aspects of the nature of the phenomenon.

The interviews were conducted at the Naomi Women's Shelter, the St. Peter's Women's Community Centre and the Christie's Beach Shelter. They were handled by a woman research assistant both because of a general feeling that it would be more appropriate that a woman conduct such interviews and because of some specific pockets of resistance to the idea of male participation in interviews with particular women.

During the furore surrounding the idea of introducing legislation to cover rape within marriage the matter was much discussed in the Women's Shelters movement and amongst individual women connected with these Shelters. The Administrator of the Naomi Women's Shelter, Annette Wilcox, stated:

> "When we started talking about it there were originally six women, and we found that everyone of them had been raped in marriage. It was part of being bashed, although some of them when we first asked had they been raped, denied it and said "no, no, not raped." "Well then, have you ever had sex when you did not want to?" and they said, "oh, yes, that happens all the time". Then we said, "don't you see that as rape?" They said, "no, no, that's marriage, that's what being a woman is for. That's what we have to put up with", and only by finally talking about it did they see it as rape. So we decided after that every time a woman came into the Shelter we asked her had she been bashed and raped in marriage, and over a six week period we found that every woman had - an outstanding number of people." (Interview)

What follows are some excerpts from the interviews conducted:

WOMAN A.

"When mine (husband) was drinking, he would come home and if I'd do something wrong he'd think it was a punishment

> and he would make love to me as a punishment. It was against my will, I didn't want to do it, he was very violent and he was too strong. I couldn't resist him. I'm too scared of him, see when he starts drinking he gets really violent and I get so scared because he's so strong and powerful". (Interview)
>
> WOMAN B.
>
> "I thought to lay there and take it would be the best thing for me to do and it proved that it was because the first time it happened, I defended myself and finished up with black eyes, broken nose and bruises, so it happened a couple of times after that again and I just left. I lay there and waited until he'd finished what he wanted to do and then left." (Interview)
>
> WOMAN C.
>
> "I gave in to get peace, he'd be all night and so I just gave in and got it over with and then he'd leave me alone for the rest of the night. - He'd try every night but I wouldn't give in every night. This went on for the whole six years we were married. You see, I didn't love him, I married him because I got pregnant. I didn't love him, but I gave in to get peace". (Interview)
>
> WOMAN D.
>
> "He actually stripped me naked one night and threw me out of the house. I ran to a next door neighbour's house and the woman came out and gave me a gown to put on and the next day he came around and said I'd better come home or else. So I went home. He punched me in my kidney and I fell down. Then he pulled me on to the bed and raped me, and said, "see how far the rape-in-marriage law is going to help you", but I didn't report him because I was so scared of him and what he would do to me". (Interview)

These sorts of experiences, and others of a more grotesque and horrific nature were repeated in the course of interviews with more than twenty women at the Women's Shelters. Perhaps Women's Shelters are places where one would expect to find some of the more extreme accounts of marital discord and sexual violence but at the same time the very sorts of reasons which prevent residents of Women's Shelters from reporting such incidents as rape no doubt prevent a great number of other women from taking the steps necessary to seek refuge in a women's shelter. The

reasons are things such as feelings of ambivalence about the husband's behaviour, economic and psychological dependence upon the husband, feelings that to some degree this is a wife's lot in life and many other factors. What this suggests is that the evidence about rape-in-marriage obtained from the Women's Shelters is the tip of an iceberg of unknown proportions.

The Rev. Father Peter Travers, the Director of the Catholic Family Welfare Bureau in Adelaide, made the following comment :

> "I've been involved in marriage counselling work over some six or seven years, and it's a quite frequent comment that would be made by a wife, just in passing, that she'd been raped by her husband, or raped on various occasions. That comment has been made frequently enough for me to certainly have the impression that it's reasonably widespread".(Interview)

Mrs. Mander-Jones, the Director of the South Australian Marriage Guidance Council, was a proponent of the Government's view in relation to the rape-in-marriage provision and gave as one of her reasons the following :

> " - twenty years of counselling people particularly women who have been putting up with sex which they didn't want, under conditions which were violent and frightening".(Interview)

The material gathered from women in the Women's Shelters and Marriage Guidance Counsellors does little to establish the incidence of rape-in-marriage in the community at large. What it does do is to indicate that in a number of marriages sexual violence, including rape, is a common occurrence. The fact that this is so gives rise to the reasonable assumption that there is a good deal of this behaviour in the general community and thus goes a long way towards refuting the general proposition put by some people that rape within marriage is a figment of the somewhat vivid imaginations of a small group of vociferous women.

The Parliamentary Phase

Legislation implementing reform in the law relating to rape and other sexual offences was introduced to the South Australian Parliament on 19th October, 1976. In relation to rape-in-marriage the Attorney-General, in his Second Reading Speech said :

> "The Government has decided after thorough deliberation to legislate so that marriage will not be a bar to the normal application of the law of rape, we feel - and the Mitchell Committee points this out in the report - that it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it, irrespective of her own wishes. If the Government were to accept the Mitchell Committee's recommendation, this anachronistic view would remain embodied in the law. The only wives who will have the protection of the law will be those who can afford to maintain a residence of their own. As a Government, we are committed to a policy of equal rights and equal opportunity for all. In the light of this, we believe that all law which continues to treat a wife as the property of her husband and marriage as a contract of ownership, should be abolished or amended. Every adult person must be given the right to consent to sexual intercourse both within and outside marriage. Marriage, and sexual relations within marriage, ought to be a matter of equality, sensitivity, care and responsibility. Indifference, force, reckless or even intential sexual brutality should, of course, be no part of any relationship. But unfortunately they sometimes are, and at present a wife is virtually defenceless".[68]

The Opposition argued that the Mitchell Committee recommendation should be followed, thus limiting the operation of rape-in-marriage to the situation where the husband and wife were living apart. In response to this argument the Attorney retorted that :

> "This argument betrays, in my opinion, a middle class prejudice. It is all very well to argue that a woman should seek independent accommodation if she belongs to the middle or upper-socio-economic strata of our society. Such women will almost inevitably have family or friends who can support them in independence. However, such an argument is entirely misconceived when applied to groups at the lower end of the socio-economic scale. Many women in this class are totally dependent upon their husbands for support and could not obtain independent accommodation however much they might desire to do so".[69]

Dr. Tonkin, for the Opposition, spoke against the measure in the following terms :

> "While I understand the emotional drive towards a gesture of this sort, I can see no real value in the measure. I reiterate: it will not save one marriage relationship, it will not save one woman from repeated attempts and repeated subjection to these forcible efforts at sexual intercourse. Therefore, as the provision will not achieve that and as the present law provides as much protection, why are we considering this legislation? I do not know. I intend to support moves to bring this legislation back to the recommendations of the Mitchell Committee, and I believe that that is the sensible and rational thing to do. Changing the criminal law will not help in the bedroom and it will not help within the marriage in this case. I think it is about time the Government started to consider very carefully giving urgent priority to the provision of emergency crisis - care hostel accommodation. I think that is vitally important and would do far more for women in this predicament than would any change in the criminal law".
> 70

Debate on the rape-in-marriage Clause of the Bill in the House of Assembly reached a conclusion on 2nd November, 1976. The Bill as a whole, including the complete lifting of the husband immunity from rape-in-marriage prosecution, passed intact, on the casting vote of the Speaker (Mr.Connelly).

The Bill entered the Legislative Council on 3rd November and was read for a first time. The discussion on the rape-in-marriage Clause of the Bill was again extensive and pre-occupied the debate on the Bill. The level of debate was somewhat more sophisticated than it had been in the House. Initially, the Opposition continued its line of support for the Mitchell Committee recommendation but when the details of the Naomi Women's Shelter case histories were introduced by the Hon. Anne Levy, for the Government, the tide of debate changed noticeably.[71]

Partly as a result of the production of these harrowing accounts of actual instances of rape within marriage the Opposition seemed persuaded that there was a case for extending the operation of the rape law beyond the confines of that envisaged by the Mitchell Committee. An amendment was proposed by the Hon. R.C. De Garis, for the Opposition, to provide that a husband was not to be indictable for rape of his wife (except as an accessory) unless the alleged offence involved an assault occasioning actual bodily harm, the threat of same, or the threat of a criminal act against a child or relative of the wife.[72] He introduced a further stipulation that the amendment was not to apply in the case of oral or anal intercourse. This latter stipulation caused some consternation for the Hon. Anne Levy who said :

> " - it is one of the most incredible amendments I have ever seen - we will have rape-in-marriage which occurs anally or orally but which will not need to involve the same standards of brutality as rape occurring vaginally before an indictment can be made.
>
> I cannot see any justification whatsoever for distinguishing between the orifices of the human body in this way. I am almost moved to suggest that the mover of the amendment is concerned with his own orifices but that he adopts a different standard in relation to orifices that are common to females: whatever can be the logic behind this distinction between orifices?"[73]

The De Garis amendment was carried and the rape-in-marriage Clause, as amended, passed by the casting vote of the Chairman. (At this time the Liberal Party held a majority of one in the Legislative Council of the South Australian Parliament).

The House of Assembly rejected the Bill as amended and an impasse was reached, which was resolved by a conference of managers representing the Council and the Assembly. This conference was held on 29th November and recommended that Clause 12 of the Bill (the rape-in-marriage Clause) should read as follows :

> "Not withstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with :
>
> (a) assault occasioning actual bodily harm, or threat of such assault, upon the spouse;
>
> (b) an act of gross indecency, or threat of such an act, against the spouse;
>
> (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or
>
> (d) threat of the commission of a criminal act against any person".[74]

This was the form in which the provision for rape-in-marriage, as a legal concept, passed into law in South Australia. The provision has been attacked on a number of grounds, not the least of which is its "confusing and unworkable" nature.

The then Chief Crown Prosecutor, Mr. Kevin Duggan Q.C., was asked about the drafting of the total package of rape reform laws in South Australia, and, in particular about who drafted the rape-in-marriage provision. He offered the following comment :

> "I don't know but I would like to speak to him, particularly regarding the actual rape-in-marriage situation and the accompaniments which are to follow. It is so wide and so nebulous that it's not true and I am sure it will cause the courts considérable concern as the years go on". (Interview)

This question of the workability of the law and its substantive impact will be addressed in the concluding section of our discussion of rape-in-marriage.

The Impact of the Rape-in-Marriage Legislation

The convoluted and highly complex nature of the rape-in-marriage provision which finally passed into law in South Australia in 1976 made it exceptionally difficult for all but a very small number of the proponents and opponents of the original propositions to appreciate what had, or had not, actually been achieved. The full implications of the section are very unlikely to be explored in the short term because of the very few rape-in-marriage cases which have reached the courts and the likelihood that there will not be many cases in the future.

Scutt has provided a penetrating analysis of some of the important interpretative problems which arise on the face of the legislation.[75] The insights provided by Scutt's assessment of the law foreshadow that a number of subtantive and technical problems will arise in dealing with the provision but these are not going to be addressed until the cases arise for adjudication.

It is interesting to note that profound problems of interpretation have arisen in the South Australian Courts in relation to the evidentiary and procedural amendments introduced to the Evidence Act and the Justices Act.[76] These provisions concern the appearance of alleged victims at committal hearings in relation to alleged sexual offences and the adduction of evidence in respect to the sexual experience and sexual morality of the alleged victims. Problems have quickly surfaced in relation to these matters because they are issues which crop up daily in the courts. It appears that in the short term the courts will be saved the task of having to iron out the difficulties in the rape-in-marriage provision.

The then Attorney-General Mr Duncan, when interviewed, acknowledged some of these drafting problems regarding the rape law reform package, but responded in the following terms:

> " ... the criminal law has been developed by judges, principally over many many years, and in a sense they consider it to be the shining prize, I suppose, of the common law and some judges don't like to see the Parliament interfering as they see it, in the criminal law. They feel that the law can be satisfactorily developed from case to case as the need arises. And

> I think that when you have fundamental and major changes in the law, such as have now been proposed by the Mitchell Committee, inevitably the Courts are going to find fault, either through their own concern with civil rights or, in some instances through concern for precision. They will, I imagine, find many things wrong over the next few years with the amendments that we make to the criminal law arising out of the Mitchell Committee's recommendations. I don't find that surprising. I don't think that parliamentary drafting can be all-embracing or all-perfect. I think that it's up to the courts to point out where the Parliament has made mistakes and for the Parliament, or the courts, to correct such things. I think we ought to be honest about that. People who go around suggesting that the Parliament has been in error and has made great and grave mistakes in legislation that has been passed are overlooking the fact that Parliamentarians and Parliamentary Counsel are human beings and that we can all make mistakes The quicker we find them and correct them, the better." (Interview)

In the case of the rape-in-marriage legislation, the problems are unlikely to be unravelled in a hurry, particularly as, at the time of writing, there have been only two rape-in-marriage trials in South Australia since the passage of the legislation.

Problems of drafting aside, this fact raises, on the face of it, serious questions about the need for the legislation in the first place, and its impact, once having become part of the law.

Geis raised this issue when discussing the Swedish experience in relation to rape-in-marriage. Sweden had removed the husband immunity in 1965. Geis made these points:

> "Swedish statistical information indicates that the law has been used only very infrequently for complaints of rape by wives against their husbands. This might suggest that much emotion and effort is being expended on a matter of little practical significance. However, I would argue that the Swedish data support several different themes. To begin with, it seems most unlikely that removal of the marital rape exemption will place intolerable burdens on the police, the courts or marriage itself. Secondly, while removal of the exemption undoubtedly will not solve the problem of forced connubial sex - any more than rape laws solve the problem of rape - we do not know how many husbands are deterred by the threat or the moral persuasion of the law. Thirdly, additional new approaches are needed to aid "battered wives". Finally, it should be stressed that the possibility of marital rape charges offers an important symbolic endorsement of a significant social principle: that all women have the right to restrict their sexual behaviour to situations in which they participate of their own free will."[77]

Of these arguments in favour of the removal of the husband immunity from prosecution for marital rape , our research indicates that the last of these reasons is the one which appears to have received the most support and carried the most weight. There was a great deal of agreement about the idea that the new law established a vitally important principle concerning the bodily and spiritual integrity of a married woman in her relationship with her husband. An example of this line of thought is the comment by Judy McPhee, a lawyer who acts for a number of women who are resident in Women's Shelters:

> "I think it's a bit like the Sex Discrimination Act. I see the Sex Discrimination Act in South Australia as being more a statement of Government policy on what the population should be thinking, rather than as an effective measure for controlling sex discrimination. And I think the rape-in-marriage legislation is the same thing. I think that it is a statement of the Government's about the way in which we should regard women - I don't know that it was ever anticipated that it would be anything other than consciousness raising for the next two or three years." (Interview)

Father Travers of the Catholic Family Welfare Bureau saw value in this approach and said:

> "I would support the law even if there was never an actual case. I think I would accept the importance of the symbolic value of such a law and I made the comment at the time that I would see precisely that symbolic aspect as one of the main things in its favour." (Interview)

There was by no means universal agreement about the value of simply implanting a principle in the criminal law and leaving it there to act as an educational and moral influence. This issue raises complex questions about the role and purpose of the criminal law. A strong school of thought is that which maintains that the criminal law is only to be used against unacceptable behaviour as a last resort and that the legislature, in producing a new law, must always be reasonably confident that it will deal in a tangible way with a particular facet of behaviour, and that it stands a good chance in a good number of cases, of being enforceable.

A number of commentators argued in relation to rape-in-marriage, as proposed by the Government, that there were often difficult problems of proof associated with rape cases generally and that these would be compounded in the case of rape-in-marriage where one is dealing with a complex private relationship involving, almost invariably, a high degree of sexual intimacy between the spouses. Thus, these critics argued that the law would be difficult to enforce and that it would encourage "vindictive wives" to bring rape prosecutions against their husbands out of pure malice or as part of a divorce strategy. This was certainly a substantial element in the thinking of the Mitchell Committee on the matter.

In November 1977, a Report on Rape and other Sexual Offences was produced by the Criminal Law Review Division of the Department of the Attorney-General and of Justice in New South Wales.[78] In dealing with the subject of the husband immunity, and, in particular the Mitchell Committee argument about "vindictive wives", the Director of the Division said this:

> "... Perhaps the vindictive wife will falsely cry rape: but are there not the same basic safeguards as are applicable in every cry of rape, namely:
> (a) that the onus will be on her - or more accurately, the Crown - to prove the allegation;
> (b) that it has to be proved beyond reasonable doubt;
> (c) that a warning will be given as to the desirability of corroboration; and
> (d) in any event, even before the husband is charged, the complaint will be "vetted" by investigating police who are well familiar with (a), (b), and (c)?
> Furthermore, while, if the law were amended in accordance with my proposal (to remove the immunity completely without conditions) marriage would not be taken as an absolute indication of consent, would not juries approach the matter with at least a possibility of consent in their minds - a possibility somewhat more likely than if the accused and the complainant were complete strangers?"[79]

The Director completed his comments by making some strident remarks about the final South Australian rape-in-marriage provision in terms as follows:

> "In my opinion, such qualifications as those upon the right of the wife to protection from unwanted sexual advances by her husband have no role in a civilized society in the second half of the twentieth century."[80]

As far as "vindictive wives" are concerned in South Australia it may be a little early to make definitive statements but the experience so far has certainly not produced a flood of rape-in-marriage prosecutions, from vindictive wives or non-vindictive wives. In this respect, the Swedish experience, as described by Geis, has been echoed in South Australia. This goes quite some way towards refuting the "vindictive wives" argument relied upon by the Mitchell Committee and various other organisations and individuals.

Rather the interesting question which poses itself, given the accounts obtained from women in the Adelaide Women's Shelters, is why has the number of cases not been dramatically greater? Some of the material gathered in these interviews provides more than a hint as to some of the reasons.

One woman, asked whether she had reported a rape by her husband to the police said:

> "Hell no, I didn't want to go to court or anything".

Another woman said:

> "I didn't report it - I didn't think that they could even prove it. You get married, you are supposed to, you know, sleep with a man whenever he wants it and that is just some misconception I was under - just something I didn't know and I think a lot of women don't know. Others fear what their husbands might do afterwards, because having an order out against him to keep away from you - that doesn't work anyway so I think a lot of it has to do with fear."

A third woman put it this way:

> "Because for the simple reason that if I went and called rape to the police about my husband, I've still got to return to him and what happens to me then?"

And a fourth woman added a further dimension:

> "... the ways the police have of reversing the whole situation when you report anything like that".

A fifth woman went into some greater detail when she said:

> "I think they (wives who don't report marital rape) probably still do love their husbands when their husbands are sober, and so, the next day or something, everything is all forgotten in a way and maybe also they are just so intimidated that they can't do anything. A woman can become intimidated to the point where she gets so depressed that she doesn't ever go anywhere or she doesn't do anything, she just misses out on seeing her friends. There may be women living like this for months on end. When my guy was violent he just kept me indoors, kept me away from my friends, kept me down, intimidated and depressed and so it's pretty hard to take legal action unless it gets to the point where you think the guy is actually going to kill you."

These are a few among many similar comments made by a large number of women who alleged that their husbands had raped them. Again and again they emphasised fear, difficulties of proof, lack of encouragement from the society at large, the nature of the criminal justice and trial process and a general sense of futility about whether anything would be achieved by reporting the rape. Instead, they sought refuge in a Women's Shelter. At one level, this adds some credence to the viewpoint of Liberal members of Parliament who had urged that the emphasis should be on providing more shelters, not charging husbands with rape.

We must reiterate that the experiences of the women we spoke to in Adelaide may well be atypical experiences. The rape-in-marriage phenomenon in the community at large may well be different in nature from that described by the women in the Women's Shelters. For example, there may be differences in the incidence of the behaviour between different socio-economic groups.

In terms of the accounts we were given, however, the argument put forward by opponents of the legislation to the effect that the law would threaten the institution of marriage begins to wear extremely thin. It is clear that these womens' marriages were long ago dysfunctional, and even then they did not report the occurrence of marital rape.

The other thing emphasised by the Women's Shelters interviews is that the rape-in-marriage law is very unlikely to operate effectively, at least in the short term, as a protective device for women. In a number of instances the husbands and wives knew about the new law but the husbands appeared not to be influenced by it. One woman when asked what her husband thought about the rape-in-marriage law replied:

> "That it's completely ridiculous, of course. That was how he felt about it - there's just no such thing as rape even without marriage was how he felt. He didn't even believe in rape at all. You just don't get raped unless you really want to."

In the case of another woman, the following dialogue took place.

Interviewer: Does your husband know of the rape-in-marriage law?

Woman: Yes

Interviewer: Have you discussed the topic with him?

Woman: No, you can't discuss nothing with him. I like to sit down and talk but you can't.

Interviewer: Has he ever mentioned it?

Woman: No - I says didyou know a woman can press charges against their husbands for rape. He says "Yeah".

Interviewer: Did he approve or disapprove of it?

Woman: I don't know. He didn't say nothing, he just said "Yeah".

All of this points to the fact that it is very hard to say that the law has had a significant short-term impact. A number of our interviewees, however, expressed the general view that the rape-in-marriage legislation was yet another plank in a long process of modernisation and reform of the law directed towards the aim of eliminating the oppression of one sex by another in many spheres of life, and, in particular, recognising the institution of marriage as a true partnership. In this sense, they argued, the South Australian law is to be seen as having partly removed an anachronistic anomaly

in the law and as having contributed towards a campaign to change the community's perspectives about male and female roles in society, particularly as regards social and sexual relationships. It is too early to say whether this will happen but clearly, when and if, socio-legal history of South Australia is written the rape-in-marriage legislation must merit attention as an important legal, sociological and political gesture.

Rape-in-Marriage on Trial:

At the time of writing there have been two rape-in-marriage trials in South Australia. The first of these trials took place in May, 1978 and resulted in a conviction. The second occurred during February, 1980 and produced an acquittal. The fact that there have only been the two trials is an appropriate subject for comment in itself, given the amount of publicity which the legislation received and the insistence with which Women's Liberation groups in particular made their support known for the legislation as a protective device for married women who were being raped by their husbands. It is fair to point out that, to our knowledge, there have been at least two other reported instances of rape-in-marriage, neither of which reached the trial stage, in one case because it was alleged that the couple concerned had been reconciled.[81]

In relation to the first case, Greenway, interviews were conducted with the Prosecutor and Defence Counsel. In addition, since the Greenway case had concluded before we did the bulk of our interviewing comments made in relation to rape-in-marriage were made with the Greenway case in mind. We have not had the opportunity to examine the second case in the same way. Our inquiries have been limited to a close inspection of the trial transcript. In the second case an Order was made by the Court prohibiting publication of the name of the complainant. Since it was known to be a husband and wife case it was thought appropriate to extend the scope of the Order to include the husband. Since the name of the case is unimportant to us we will follow the spirit of that Order and simply refer to it as case No. 2 or the second case.

The background facts in the two cases bear quite a degree of resemblance to each other. In each case the husband and wife were separated. In each case the ages of the respective couples were very similar. Both couples had two young children. In both cases the respective husbands had refused to accept that the marriage relationship was over and had made persistent efforts to re-establish the relationship.

There were some differences. The Greenways were married in 1964 and separated in 1977. The couple in case No. 2 had married in 1970, finally separated in February, 1979 but had had a previous separation of at least some months duration. In respect to the Greenways two sets of Family Court injunctions were in operation.[82] In Case No. 2 the wife had initiated legal aid proceedings to apply for an injunction and a custody order in relation to the children but had not proceeded with this application.

As far as the facts surrounding the charges were concerned in Greenway there had been a period of some months preceeding the incident in question during which Greenway had appeared at Mrs. Greenway's home uninvited, had telephoned her on many occasions and had generally harrassed her. The police had been called on a number of occasions.

On the night of Thursday 16 February 1978 the accused had followed his wife to a restaurant where she dined with friends. After his wifehad returned home and made preparations for bed she heard noises outside her window and saw the accused running past the window. The police were called but on arrival found no sign of life. On two more occasions during the early hours of the morning Mrs. Greenway claimed to have been disturbed by noises outside her window. At one point during this time the accused telephoned her.

Some short time after returning from taking her son to school on the morning of 17th February Mrs. Greenway found her husband in the house. He had walked in through an open back door. She said:

> "He looked wild and I knew I had trouble". (Transcript p.13)

She began to run for help and screamed. She said the accused said:

> "Don't call any body. I don't want trouble. I'll kill you". (Transcript p. 1

Mrs. Greenway alleged that she was threatened with a screw driver, pushed to the floor, was grabbed by the throat and pushed into the bedroom where her underwear was torn off, furniture was overturned, the telephone pulled out and

subsequently sexual intercourse took place. Mrs. Greenway said that her husband had said:

> "It's about time somebody stuffed you." (Transcript p. 14)

She also said:

> "the more I fought him the more violent he was becoming - I thought I was going to die" (Transcript p.18)

Greenway told his wife he loved her, wanted to have sex with her and wanted to come back to her. She said:

> "I will come back to you" (Transcript p. 19)

This apparently calmed Greenway down considerably and this was when intercourse took place.

In his statement to the police Greenway said the following:

> "- we went back into the bedroom and stood there cuddling one another for a while. We both then decided that we were going to have sex. I started to take my clothes off and she stood there. I said "Aren't you going to get undressed". She said "I will leave my dress on". I said "Take it off love, take it off. You know I don't like it with your clothes on". She then took her dress and bra off. She said, "I want you to be tender with me, be gentle because my mouth is a bit sore". I said "All right love, I'll be gentle". I said you lay on top and I'll lay underneath". We have always done it like that. She prefers it that way. We both lay down she on top of me and after a while she said "Shall we turn over". We both turned over, she lay on the bottom and I on top and we had it again." (Transcript p. 74)

Mrs. Greenway explained to the Court that during the act of intercourse her husband appeared to become agitated. She said:

> "- he was becoming agitated and I was becoming - I was frightened anyway but I was really becoming more frightened when I saw him the way he was so we decided to change position and he was lying on top of me". (Transcript p. 22)

These proceedings were interrupted by a knock on the front door by the police. From that point on the normal investigatory process was set in motion.

In Case No. 2 the factual situation was a good deal more complicated and there was a lot more disagreement as to what had actually happened. In brief, however, the relevant facts in the case were the following: the couple separated after an incident on February 5, 1979 when the wife claimed she had been raped by her husband after he had assaulted her, ripped her nightdress and tied their wrists together with a piece of the torn nightdress. The wife followed a normal routine during the following day but then departed to a neighbour's house in the evening. This was the beginning of the separation.

The events which allegedly took place on the night of May 17, 1979, and which led to the accused being charged with five counts of rape (one of oral rape and four of vaginal rape) commenced when the husband arrived, as was his habit, to collect the balance of his pay packet from the letterbox outside his home where his wife and two children were living. Instead of taking the money and driving on he approached the front door of the house and demanded to be let in. His wife said she refused to admit him and told him that if he wanted to talk to her he should use a telephone.

The husband put his fist through a glass panel beside the front door. His wife, who was standing inside the house immediately behind the glass panel, was injured, she claimed, by the impact of her husband's fist on her face and also received a small particle of glass in her eye which was removed the following day at the Queen Elizabeth Hospital in Adelaide.

The wife then began the first of what was to be a series of three attempted escapes from the house. She tried first to get over the back fence to her next door neighbour's house, then later over the front fence to the same neighbour's house and finally, straight across the road to a neighbour's house opposite after the opportunity was created by the unexpected visit of an Avon

representative. All of these were unsuccessful and on each occasion she was led back to the house by her husband. Medical evidence at the trial revealed the existence of bruising consistent with the wife's evidence as to the manner and force with which she was "escorted" home after these abortive attempted escapes.

The complainant alleged that in between the second and third attempted escapes the accused had forcibly removed her boots, panties and stockings. After the third escape/attempt had been foiled the complainant alleged that she was forced to perform oral intercourse upon her husband after he had removed the remainder of her clothes from her. It was then alleged that the husband suggested that they both take a shower together. The wife said that she did not want to do this but was forced to do so. Then followed an act of vaginal intercourse which the husband claimed was consensual. The wife alleged that it was not. Then in the early hours of the morning it was alleged by the wife that three further acts of vaginal intercourse took place (all non-consensual). These acts were said to have occurred between 4.30 a.m. and 7.00a.m.

After the husband had left for work that morning his wife received a telephone call from a neighbour. The police were called. The wife's parents arrived on the scene and the rape investigatory process was set in train. The husband as mentioned, was charged with five counts of rape.

Greenway was convicted and sentenced to 2 years and 9 months imprisonment. The accused in the second case was acquitted on all counts.

Commentary

The interesting thing to note about both these rape-in-marriage trials is that the prosecution may well have been brought and may well have been sustained under the pre-existing common law position, especially if the Courts had decided to follow the English decisions mentioned above, in particular the most recent ones. In the Greenway case there was a separation and there were two Family Court injunctions ordering that the husband stay away from his wife except for the purpose of having access to his children. It seems highly likely that

under these circumstances an English court would have ruled that the law of rape could operate and there seems no reason to believe that a South Australian court would not do likewise.

The second case was perhaps a bit more tenuous but in many respects bears a remarkable resemblance to the English case of Steele[83] discussed above. Remember that in Steele the court reasoned that the existence of an injunction would have been enough to remove the marital rape immunity. The wife had applied for an injunction but proceedings had been adjourned because the husband had given an undertaking to comply with his wife's wishes in relation to their marriage. The court ruled that this undertaking was for the purposes of the rape law equivalent to an injunction.

In the second South Australian rape-in-marriage case the wife had applied for legal aid to initiate proceedings for an injunction but had not pressed on with this application because her husband had indicated to her that he was going to live and work in Darwin. Just how a court would have dealt with this is hard to say but it is at least arguable that the spirit of the English decisions may have been marginally extended to cover the case.

In fact, the trial judge in the second case, Cox J., made the comment that in his view marital rape charges may have been easier to sustain, where separation exists, under the common law than under the new South Australian provision.[84]

The fact that the cases could well have been successful under the common law meant that there was no real testing of the provision in its application to a husband and wife who are not separated and are living under the one roof. The provision in itself, of course, did not fulfil the desires of the Women's Liberation group lobby to remove the marital rape immunity altogether and simply apply the normal principles of rape law to the marriage situation. This would have been the effect of the Government's original Bill but the final product is the clumsy result of a good deal of political manoeuveringand compromise.

Certainly, the final provision does remove the total immunity and does not restrict the operation of the law to husbands and wives living apart but it does introduce a new and unexplored set of conditions which must be met before a prosecution can be successful. The present provision amounts to a new concept of aggravated rape.

The Act now provides that a person shall not be convicted of the offence unless it "consisted of, was preceded or accompanied by, or was associated with:

> " (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
> (b) an act of gross indecency, or threat of such an act, against the spouse:
> (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;
> or
> (d) threat of the commission of a criminal act against any person."[85]

Consistent with the approach in the rest of this article we are not going to present an analysis of the legal problems presented by the rape-in-marriage provision. It needs little reflection, however, to bring one to the conclusion that should further cases present themselves there are going to be difficult interpretative problems to be solved in what is a completely new conceptual approach to this field of law. Our interview respondents agreed that there should be few problems in respect to the "assault occasioning actual bodily harm" pre-condition, but even in relation to this sometime was spent in the second rape-in-marriage case in debating what its elements were.

All the lawyer interviewees agreed that considerable problems were to be expected in respect to the interpretation of the other sub-clauses, especially sub-clause (c) which deals with acts "calculated seriously and substantially to humiliate the spouse - ". This part of the Section occupied a good deal of the Court's time and attention in the second trial.

When asked about the drafting of the rape-in-marriage section Chief Crown Prosecutor Duggan observed:

> "I suspect that instructions were given to Parliamentary draftsmen in fairly round terms and that the draftsman who was involved may not have had a great deal of experience in the criminal jurisdiction and as a result produced something, which in my view, presents considerable practical difficulties: - I think its interpretation will be spread out over a long period of time because we are not going to have very many cases in which to flex our legal muscles."(Interview)

It is clear that the two trials held to date have not gone very far in the direction of ironing out the inherent legal difficulties. In Greenway there was an assault and a threat, according to the Crown, to kill, and there was no doubt that these were integrally related to the intercourse, so that there was no problem with "consisted of, was preceded or accompanied by or was associated with". In the second case the assault condition was fulfilled and, after some courtroom debate the trial judge also instructed the jury that there was evidence to be considered under the "act calculated (to) seriously and substantially humiliate the spouse" clause. We suspect that the major struggles in relation to the interpretation of this Section have not yet begun in earnest.

There were interesting observations reported on some of the less tangible aspects of the Greenway case which may well apply to most rape-in-marriage trials. Defence counsel in Greenway commented thus:

> " - of all the rape cases I have prosecuted or defended I felt very different about this one. The atmosphere was quite different - The concept of seeing two people who knew each other very well, who had been together, in bed together, who knew each other sexually very well. It was very different taking instructions from the man and in cross-examining the woman - there was a difference in feeling and atmosphere about the trial as a lawyer. If ever you get a situation when a case is brought to trial and the two people are living under the same roof, it is going to be extraordinarily difficult for all parties." (Interview)

Counsel went on to discuss the actual act of intercourse which occurred and made particular mention of the sexual positions adopted by Greenway and his wife and the remark of Greenway to the effect that "I know you like it on top". Counsel commented that these sorts of elements were quite unique in his experience and marked out rape-in-marriage as being something really quite different from the run of the mill rape case.

This lawyer's personal view was that it is not an appropriate thing for the criminal law, in the form of rape, to be applied to situations of close personal and sexual intimacy such as marriage, in the case where the parties are living together. He said:

> "You can only use it in cases of separation and it is the only way you can use it because the difficulties involved in two people living under the same roof are going to be enormous. For every conviction you get there are going to be acquittals and that is going to leave the woman even more prone to violence. Where a woman alleges rape and the man is acquitted he is not going to worry about the fact that the standard of proof is beyond reasonable doubt. He has then got open sesame to thump her as much as he likes because she is never going to be believed again having been disbelieved once. It has got that sort of danger. I think the Mitchell Committee saw that danger. You never needed to bring the complicated features of the rape law into what are fundamentally crimes of violence." (Interview)

The two rape-in-marriage cases adjudicated upon thus far in South Australia make for rewarding study because of their intrinsic interest but it seems a fair comment to make that they have not gone anywhere near solving the major legal and criminological or sociological issues which relate to the concept of rape-in-marriage. One would not really expect them to do so. As suggested earlier it will take a lot more testing of the legislation before the interpretative problems are sorted out and on the much broader plane, dealing with the question of the suitability of applying the law to husbands and wives living together, for reasons already made obvious, these two cases do not really shed much light on that issue.

The thorny question of whether these sorts of problems should be matters for the criminal law at all or whether they should be dealt with within the realm of the family law was broached with a number of our respondents. Most felt that, if anything, it was behaviour deserving of being dealt with by sanctions and, therefore, was to be handled by the criminal law or not at all. This simply brings the discussion back to the delicate balance question around which so much of the debate has ranged. The arguments in favour of including it within the

the criminal law are the desire to include married women within the protective umbrella of the law, to negative the idea that marriage denotes consent to intercourse on all occasions and to establish the symbolic and practical principle of female autonomy within marriage.

As against these points it is argued that although marriage does not operate as a signal of consent to intercourse whenever demanded most marriages are arrangements involving very high degrees of emotional and physical intimacy over a sustained period of time. Rape, it is said, is in essence a gross invasion of sexual privacy and autonomy. By reason of marriage a person divests him or herself of a considerable degree of such privacy. Because of this, so the argument goes, the application of the law of rape to the case of spouses living together is inappropriate. Proponents of this view attempt to bolster their stand by pointing to the considerable difficulties of enforcement and proof which they say pertain to rape-in-marriage.

Such an argument presumably involves the proposition that de facto relationships should be excluded from the operation of the rape law on the ground that they are, in fact qualitatively on a par with marriage relationships.[86] One of the difficulties is that there are many other varieties of relationships between men and women which are not necessarily as durable or stable as many marriages or de facto relationships but nevertheless are characterised by the same level of intensity in relation to emotional and sexual intimacy.

Clearly, there is strength in the arguments presented on both sides and the question of how the issue is to be resolved is a highly problematic one. We present our view on this matter in the concluding section of this report.

OTHER SUBSTANTIVE CHANGES TO THE LAW OF RAPE:

The issue of rape-in-marriage was dealt with by the Mitchell Committee as part of its inquiry into the nature and scope of the law of rape. The fact that rape-in-marriage became the cause celebre of the South Australian reform activities tended to mask the fact that a number of other substantive changes to the law were introduced by legislation during 1975 and 1976.

Rape, in the common law tradition, has been a heterosexual form of activity involving the penetration of the female vagina by the male penis, without the consent of the woman concerned.[87] In 1975 legislation was introduced to enlarge the definition of rape to include unwanted anal penetration of both women and men.[88] The effect of this legislation was to "de-sex" the offence of rape.

The second major change was introduced in 1976, by the same legislation which contains the rape-in-marriage provision. The import of this provision was to further enlarge the definition of rape by including within it the introduction of the penis into the mouth.[89] The same legislation introduced a number of other changes to the law but our research has revealed that the changes to the definitional aspect of rape mentioned here are those which have had the most important and immediate impact and these are the ones upon which we concentrate in this section of the report.

The extension of the definition of rape to include anal intercourse occurred before the Mitchell Committee received its Special Report Reference and, therefore, was not within its framework of inquiry. The Committee did, however, consider the question of oral intercourse. The Committee said:

> "We have considered whether rape should be extended to penetratio per os. We do not find any necessity to extend the definition in this way. In our view a forced penetratio per os should constitute an offence other than rape. We think that the infliction of force or the use of a threat to ensure submission to an act of penetratio per os, or the performance of such an act upon a sleeping person or one who is rendered incapable of resistance through intoxication or otherwise, is not appropriately characterised as merely an act of indecent assault. We recommend that such conduct should constitute a crime for which the penalty would be more severe than that for the crime of indecent assault".[90]

The Government did not follow this advice and legislated to include this behaviour within the definition of rape. Perhaps because of the enormous diversionary effect of the introduction of the rape-in-marriage Clause other aspects of the Bill, including the provision dealing with oral intercourse, received precious little attention in the Parliamentary debates. An amendment was passed removing the anachronistic Latin terminology and replacing it with plain language. Thus, the legislation now refers to the "introduction of the penis of one person into the mouth of another" rather than "penetratio per os". This section of the legislation passed into law almost unnoticed.

The Impact of the Definitional Changes:

As was the case in the Parliament the enlarging of the scope of the rape law has resulted so far in the absolute minimum of controversy and confusion. The new law appears to have been received with a good deal of equanimity and acceptance. Lawyer D, for example had this to say about it.

> "I take the view that it is a reasonable and working definition. It functions extremely well, the juries understand it, it's plain language and that is something in which the law is often very deficient".(Interview)

Lawyer C, while not disagreeing with the changes which had been implemented, doubted whether they were necessarily a worthwhile innovation. He made the following observations:

> "I don't think it matters a great deal because I've always seen rape as being fundamentally a crime of violence, and that the actual penetration of the penis into the vagina is a factor to be taken into account, and an aggravated factor in a crime of violence. But I don't really see that all the swaps and changes make any difference to what it's all about. - The emphasis on putting the penis into the vagina and looking for sperm cells on the pubic hairs - in my view gets away from the real issue in rape. I don't think the statutory changes make any difference and if the common law had that weakness then these other changes have got the same weaknesses". (Interview)

Lawyer E doubted whether the law and its application had been simplified by the changes:

> "The way in which it arises in a case now is that there is a course of conduct over a short period of time involving vaginal intercourse, oral intercourse and anal intercourse . There are three counts of rape alleged - one for each of those incidents, even though they occurred in close proximity to each other. Before perhaps there might have been three counts but one of rape and one of buggery or indecent assault. I don't know that it makes an enormous difference, except, of course, that the penalty for rape is greater than the penalty for indecent assault." (Interview)

There are obviously going to be practical and statistical impacts as a result of the statutory changes. Chief Crown Prosecutor, Mr. Kevin Duggan, Q.C., provided the following insights:

> "I don't like this oral rape or anal rape. I think that was a mistake. It has had an interesting little practical sidelight because when you have got certain alleged rape situations, you have got a number of offences of indecency associated with them, and in the old days we may have had some sort of oral contact and some sort of fingering and perhaps anal intercourse and then actual intercourse. If the accused was found guilty of rape then the other indecencies would be taken into account when fixing penalty.
>
> Now, it was no use, in most cases, adding counts of indecent assault because all the counts would either stand or fall on the issue of consent or identity and if the accused was found guilty, well, you could obviously say that he was also involved enough to be sentenced on the girl's version and that could include the other indecencies. Now we have to differentiate and it has meant that we might now charge an accused person with two or three counts of rape, instead of one, because if you have oral intercourse alleged, anal intercourse alleged and vaginal intercourse alleged, we have to lay those three counts because otherwise if the jury come back on a charge of rape and simply say "guilty" we don't know whether they mean guilty of one or the other or all of those offences, and it makes it very difficult for the sentencing judge. It has made the system rather more difficult, in my view, than it should be". (Interview)

Apart from these sorts of procedural and mechanical difficulties associated with the revised rape definition the potential is obviously there for the creation of a statistical artifact in relation to rape. The fact that types of behaviour which were not previously included within rape are now defined as rape involves the possibility of a statistical increase in "rape" due to the addition to the rape figures of the newly

covered forms of behaviour. This will need to be kept firmly in mind for the purposes of interpreting future South Australian rape figures, especially if comparisons are to be made with pre 1976 figures.

It may also be possible that future South Australian rape figures will show a real increase due to an increased incidence of oral and anal rape. We do not have any hard evidence on this, so that it is in the realm of speculation, but a number of people we spoke to, especially Crown Prosecutors and the Police told us that it was their impression that many more cases of oral and anal contact were coming before the courts. They generally attributed this perceived increase to modern liberal attitudes towards sexual behaviour and an emphasis on sexual experimentation. Some attributed it, in part, to pornography.

Amongst those people to whom we spoke concerning the enlarged scope of the rape provisions, we found very little general interest, apart that is, from the interest shown by the Prosecutors who had the task of actually framing the new charges.

In terms of impact then, it seems that the law reform endeavours are to be assessed, as in the case of rape-in-marriage, largely at a conceptual and abstract level. The Government was clearly at pains to establish the principle that men can be "raped" in the same sense as women and that certain forms of sexual abuse, previously outside the definition of rape, can be every bit as offensive and injurious as traditional rape. That this is so is no doubt true, the difficulty, however, is that "rape" as a concept has always been somewhat narrowly defined in one sense (forced heterosexual intercourse) and very broad in another sense in that it covers a multitude of different types of situations within its own framework, e.g. ranging from gang rapes by strangers to rape by a man of a woman with whom he has previously had a long-lasting and sexually intimate relationship.

The conceptual difficulty involved in broadening the rape definition to encompass all the various human orifices is that in doing so one tends to lose any semblance of a conceptual framework. Why, for instance, should not forced masturbation or sexual assault by the use of various implements be defined as rape? It seems that the further one goes in the definitional process the further one moves from rape, as such, and the closer one moves towards a concept such as sexual assault or just plain assault. This idea the Mitchell

Committee rejected, and perhaps under the circumstances, wisely so. In the absence, however, of an even more far-ranging review of rape than the Mitchell Committee provided,[91] rape, as a conceptual entity will continue to be confused. The theory notwithstanding, the statutory changes in South Australia appear to have been accomplished with little, or at least a minimum of fuss and bother, and no strong objections have been taken to them. A conceptual analysis awaits a treatment elsewhere.[92]

EVIDENTIARY AND PROCEDURAL CHANGES TO THE LAW

In terms of impact the 1976 amendments to the Evidence Act and the Justices Act in relation to sexual offences have been of enormous significance. Under the Evidence Act amendment stringent controls are imposed in respect of the introduction of evidence relating to the sexual experiences and sexual morality of the alleged victim. The key provision is Section 34(i). The relevant portions are the following:

(2) In proceedings in which a person is accused of a sexual offence, evidence of -

(a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed;

or (b) the sexual morality of the alleged victim of the offence,

shall not be adduced (whether by examination in chief, cross-examination, or re-examination) except by leave of the judge.

(3) Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that -

(a) An allegation has been, or is to be, made by or on behalf of theprosecution or the defence, to which the evidence in question is directly relevant;

and (b) the introduction of the evidence is in all the circumstances of the case, justified.

By amendments to the Justices Act the Legislature severely restricted the likelihood that the alleged victim of a sexual offence would be called to give evidence at the committal court hearing. Section 106 of the Justices Act now contains this provision:

(6a) Where -

(a) the defendant is accused of a sexual offence;

and (b) the defendant, or his counsel, requests, in pursuance of subsection

(6) of this section, that the alleged victim of the sexual offence appear at the hearing for the purpose of oral examination,
he (the alleged victim) shall not be called or summoned to appear at the hearing unless the justice is satisfied that there are special reasons why he should attend for the purpose of oral examination.

One of the major thrusts behind the South Australian set of legislative and administrative reforms in relation to rape and other related sexual offences was the idea of better treatment within the legal system for alleged victims of sexual offences. It will be remembered that this was the primary reason stated by the Attorney-General for engaging in a series of reforms of the rape laws.[93] These two provisions, concerned with aspects of the role of the alleged victim as a witness in criminal proceedings were manifestly intended to constitute a solid move in the direction of ameliorating the plight of alleged victims.

The provisions have provoked strong reaction and protest from within the legal profession, both from the Judiciary, who have already had occasion to deal with a number of issues arising from the interpretation and application of the law, and from the defence lawyers, whose central objection is that the new provisions have unduly tipped the balance of a delicately poised set of scales against defendants in sexual cases. We also found that there was some resistance to the changes from within the prosecuting branch of the legal profession, although this was more emphasised in regard to the committal hearing requirements than the sexual experiences and sexual morality provision.

While in general terms applauding the new legislation the various Women's groups have criticised the fact that it does not go far enough, and, having had a chance to observe the law in operation a number have alleged that the thrust and purpose of the legislation is being blunted by the manner in which the courts are using the new Sections, particularly the previous sexual experiences limitation.

The basis of the criticisms of the provisions is essentially two-pronged. One level of criticism is a general one and that is that the law has tampered unfairly with the balance between an alleged offender's rights and those of alleged victims. The allegation most often made in this respect was that the system now is unfair to defendants. The other level of criticism operates in relation to what one might term lawyers' law; that is to say, that the new provisions have been poorly drafted and have raised a large number of difficult and technical problems of legal interpretation.

To a great extent our interviews were directed towards gaining responses to the more general question of the impact of the law in relation to the balance between suspects'rights and alleged victims' rights. The technical side of the problem is certainly integrally related and aspects of this ha already been canvassed in a number of reported South Australian decisions which this report examines in later pages.

Some of the reactions of defence lawyers to the new situation were forceful and vociferous. Lawyer D, for example, expressed his views thus:

> "I take the view, firstly, that in cases of alleged multiple rape the law now operates most heavily against the young men in that situation. - The legislation, in so far as it applies to them is ill-informed:- gang-banging is now the habit of a certain social strata. I act for at least three bikie groups in Adelaide, all of whom have gang-bangs. I have discussed this with many of the fellows for whom I act and two of them, recently, for whom I acted in a a rape case, (and they were acquitted), told me that their particular group gets about one new ganger a fortnight, that is, a girl who is new to the game and will have multiple sex with other men. Now this means that the girl has given herself a particular reputation and, very often for some reason best known to herself, she suddenly decides to complain.
> In all of the gang-bang cases with which I have been involved recently the magistrate in the lower court refused to order the girl to the court for cross-examination and they were all acquitted. In all of the cases there may well have been sufficient to stop them being committed for trial or alternatively, to make it clear to the Crown that they should put in a nolle prosequi - I think it's unfair to a witness in a serious case to be led like a lamb to the slaughter

> into a court without having at least had a trial run. And it's all very well to talk about protecting the delicate creatures from the vicious tongues of the criminal cross-examiners but the plain fact of the matter is that a lot of the girls who are involved in gang-bangs are not delicate creatures, they are regular gangers." (Interview)

Lawyer E, again responding to a general question about the impact of the combined strength of the committal hearing provision and the sexual experiences provision, commented in these terms:

> "I am very unhappy about it as it stands at the moment. It is true that the judges have a discretion about it but they do have the basic philosophy of the legislation to observe in exercising that discretion, and the way that it has been exercised in the cases in which I have been involved is to really cast the onus on the accused to show good cause why leave should be granted. The thing that I think is overlooked sometimes is that the girl is not charged with anything, the girl is not facing any penalty, and this is a pretty serious crime, isn't it - rape? And I don't think it is a contest between the prosecutrix and the accused. I wonder if we have not now got an imbalance the other way" (Interview)

These are all by way of somewhat general comments on the shift in the balance as between accused persons' and alleged victims' rights. To deal separately with the two major components in this altered balance is the only sensible way to assess the impact of each.

The Committal Hearing

In its Third Report the Mitchell Committee dealt with Court Procedure and Evidence and said in regard to committal proceedings:

> "The purpose of committal proceedings is two-fold. Primarily, it vests in the justice hearing the committal proceedings the duty of deciding whether there is sufficient evidence against the accused to put him upon his trial; - It has come

> to be recognised as the second purpose of committal proceedings that they give to the accused full notice, not only of the charge against him but also of the evidence which will be called to support the charge."[94]

In the Third Report the Committee went on to recommend that witnesses who have made statements, accompanied by verifying affidavits, should not be required to attend a preliminary hearing in relation to an indictable offence unless the justice exercised his discretion to compel them to attend and give evidence.

The Committee then considered the various arguments in respect to the appearance of complainants in sexual cases at committal hearings and concluded:

> "We do not think that the accused would suffer any real injustice if he were given only one opportunity to cross-examine the prosecutrix, namely upon his trial, provided that he was supplied not only with the statement prepared for the prosecutrix for the committal proceedings, verified by her affidavit, but also with the original statement which she gave when first questioned by a police officer, together with any subsequent statement made by her."[95]

It is important to note, although there was no discussion about this in the Parliament, that the Mitchell Committee recommendations were not implemented in full in the final legislation. Although the substance of the recommendations was put into force, namely the presumption that the complainant will not appear at the committal hearing, the legislation provides that the defendant may request the attendance of the complainant to give oral evidence. No mention is made of the prosecution. The Mitchell Committee had recommended that the discretion of the justice be exercisable upon the application of the defence or the prosecution. The second significant discrepancy between the Mitchell approach and the legislation is that whereas the Committee suggested that copies of all the statements made by the alleged victim be supplied to the defence the legislation inserts no such requirement.

Reactions in South Australia to the implementation and operation of the committal hearings restrictions have been mixed. The discussion has tended to focus on two central aspects. The first issue concerns the question of whether it is an appropriate thing to limit the rights of defendants to cross-examine alleged victims in sexual cases at the lower court hearing, when the rights of defendants in other kinds of indictable cases are not so limited. The second issue, often raised by our respondents, was that of the impact of the new provision on the kinds of cases which are now finding their way through to the South Australian Supreme Court, and the way in which these cases are now being conducted. Interestingly enough it was this second problem area which was more often raised by our interviewees than the first. This may well simply be a reflection of the fact that the bulk of our interviews in relation to this matter were conducted with practitioners of the legal system who seem generally more concerned with the practical problems at stake rather than the issues of principle involved.

As far as the issue of principle is concerned viewpoints were essentially divided into two camps - those who felt that the severe restriction on the appearance of alleged victims at the preliminary hearing is an unfair weakening of the defendant's position in relation to his trial and those who felt that sexual cases were to be distinguished from other cases because they were much more a contest between the defence and the alleged victim and that, therefore, the special treatment of sexual cases was justified.

Judy McPhee, a lawyer who acts on behalf of many alleged victims of rape who contact Women's Shelters in Adelaide supported the legislation and stressed that:

> " - most of the rape crisis centres would say that the damage done to a complainant, in having to give evidence twice, is far greater than that done to the defendant by not permitting the complainant's appearance. He is not going to be

> convicted on the committal hearing. You have, maybe one or two cases a year in which there would not have been a case to answer found if the complainant was called to give oral evidence, but in the vast majority of cases under the old law, you would have complainants giving oral evidence simply for the purpose of being harrassed by defence lawyers." (Interview)

A Police Prosecutor was another supporter of the legislation. He put his views in this way:

> "It is asking a lot of any person to go through it twice. I think it is like going to a dentist, the first time in to have a tooth out you think it might be bad and you find out that it is bad but when you go the second time you know for sure what it is going to be like. I think that is where the girls could break down - the second time around they are nervous and waiting for another mauling. I know they have to be tested but perhaps testing them once is enough. Certainly, twice around may make it pretty heavy for a young girl and if it is one of these gang shows and there are about five solicitors - it is a hell of a trauma really." (Interview)

One lawyer added extra credence to this way of looking at the problem when he expressed the tactics in the following terms: "take off the right leg at the lower court and the left leg at the Supreme Court". (Interview)

As against this line of reasoning one commentator has expressed these sentiments in relation to the Mitchell Committee recommendations, which in essence are implemented by the legislation:

> "If, as the Committee has stated in its Third Report, one of the purposes of committal proceedings is to give the accused "full notice ... of the evidence which will be called," there is a strong case for giving the defence the right to hear the alleged victim's evidence orally, and to cross-examine her. Protection of the complainant must be secondary to ensuring justice for the accused. Mr. T. Smith, Victorian Law Reform Commissioner, has aptly remarked that the current trend for more open discussion of sexual matters could lessen the trauma involved in this procedure. He has also noted the existence of other offences likely to be as traumatic for the witness as rape (e.g. a woman charging son or lover with infanticide.) There is much to be said for his suggestion that the

> embarrassment of the victim in giving evidence and being cross-examined can be kept to a minimum by the provision of qualified presiding magistrates and prosecutors."[96]

Lawyer E had this to say about the impact of the provision:

> "I am not happy about it as a practitioner who acts for accused persons. I do not like to go into any criminal case where the main prosecution witness has not been heard before. You do not know what you are coming up against do you? It is not possible to take those sorts of considerations into your tactics when you have never seen the person. We have not really seen how this is going to work. There are a number of examples of occasions when the girl should be called to give evidence. For instance, if the defence is identity surely she ought to be called to give evidence to be able to positively identify at the committal stage rather than find something go wrong with that evidence much later." (Interview)

At this point the issue of the achievement of an acceptable balance in relation to accused persons' rights vis a vis complainants' rights begins to become less a conceptual one and more an "in practice" one. This approach to the question was best evidenced in remarks made by the then Chief Prosecutor, Mr. Kevin Duggan Q.C., when asked whether the balance had been tilted too far in the complainant's direction as a result of the South Australian legislation:

> "One of the necessary evils of rape cases - is that the complainants have to be tested, you cannot take their word as gospel. Now the difficulty, the evil which the legislation has sought to overcome in a Magistrates' Court, was to save them (complainants) in the lower courts, but I always looked on the lower courts as a very good sieve of rape cases - I think it does not operate as a sieve in a lot of cases, but it did in rape cases. Now, I am presented with depositions and it is very difficult, of course, to call the complainant, in most cases she is not called, and I am faced with a neat statement, which is taken down by a police officer, looks very nice on the surface, but does not transmit to me any difficulties that there might be in the case at all. Whereas previously I could look at a set of depositions and I could see how the girl performed, and I think I have saved her in many cases the drama of having to give evidence in the Supreme Court, now that is very difficult and it seems to me that more rape cases are going to come before the Supreme Court; and it is only in the

> Supreme Court that we are going to find out that the complainant is not as good as we thought she might be.
>
> Coupled with that I think that the police are a little sensitive in this area now and they seem not to be applying the sieve as much as they did in the old days. They used to have a pretty solid woman police officer over there and they were pretty used to assessing these girls - and they would quite often suggest that a lesser offence be charged. Now - the matters are coming over to me without the girl being cross-examined. We get to the Supreme Court and that is when the fun starts. We have got judges asking us to withdraw cases. So I rather think, as a matter of value judgment, that I prefer the old system". (Interview)

Mr Duggan further stated:

> "Undoubtedly, it is keeping them (complainants) away from court. - It is very very rare, and in accordance with the legislation itself, only in very exceptional circumstances that magistrates are allowing the complainants in rape and other sexual cases to be called." (Interview)

What can be said, therefore, about the new committal hearing provision is that it is certainly achieving its purpose in protecting alleged victims from having to give evidence twice. The main questions which arise are that of the advisability of passing theprovision in the first place and, once having passed it, of considering its implications for the processing of rape and other sexual cases. If, for example, Mr. Duggan's observations have validity it is likely that a number of alleged victims are being put into the position of having to give evidence in the Supreme Court, and be cross-examined on that evidence, in cases which would not have reached that level at all if the alleged victim had appeared for cross-examination at a lower court hearing. Thus, alleged victims may be put in the most unenviable position of having to undergo the considerable stress of a Supreme Court appearance quite unnecessarily. Added to this, of course, is the possibility that in such cases the cross-examination may be a good deal more savage than in cases where the prosecution brief is a lot stronger.

As we have shown Adelaide defence lawyers have expressed strong consternation about the restrictions applied to the calling of alleged victims to give evidence at committal hearings. Judges of the South Australian Supreme Court have also already had occasion to exercise their minds regarding both the policy implications and interpretative subtleties of the provision. These opportunities arose in the latter half of 1977 in the cases of Byczko[97] and Stephenson[98].

Byczko was convicted of rape and appealed against his conviction on three main grounds, one of which was that the Magistrate had erred in refusing the defence request that the complainant be called to give evidence at the committal hearing. The Court of Criminal Appeal (Bray C.J., Hogarth and King JJ.) decided that an error, if there was one, at the committal hearing could not be made the subject of an appeal against conviction at the trial, but in the course of the judgments members of the Court paused to make some observations about the new provisions. Of particular interest in the Byczko case are the remarks of the former Chief Justice, in commenting on the new sections; that is to say the committal provision and the sexual experiences provision:

> "I cannot part with the case without expressing my disquiet at the possible effect of the legislation I have been discussing. It is, of course, no part of my duty to criticise the policy as opposed to the technical draftsmanship of legislation. It is for Parliament to say what the law should be and how far the traditional rights of persons accused of serious crimes should be cut down. This legislation does cut down those rights as they previously existed and does place a defendant charged with a sexual offence in a significantly more disadvantageous position than a defendant charged with any other kind of offence. It can readily be appreciated that Parliament should have striven to relieve the victim of a rape of unnecessary embarrassment There is, of course, no reason why a person making a false charge of rape should be relieved of any embarrassment and a logician might be excused for thinking that the assumption behind the legislation is that all sexual complainants are prima facie genuine victims so that there is a presumption in favour of guilt before the trial to determine it has begun,

> contrary to the traditional presumption of innocence which surely it was not intended to weaken."[99]

These are quite strong comments from the Chief Justice. They take on added status because of the fact that they were not at all necessary for the purposes of deciding the issues at stake on the appeal in Byczko.

In Stephenson sub-section 6(a) of Section 106 of the Justices Act was treated in a more extensive manner. The Full Court of the Supreme Court (Bray C.J.; Zelling and Wells JJ.) were dealing with a motion to make absolute an order nisi which, in effect, called on the Special Magistrate to show cause as to why he should not be compelled to hear and determine an application under the Section according to law.

Stephenson had been charged with rape. At the committal hearing the police prosecutor tendered statements made by witnesses including the complainant. Defence counsel applied for an order to compel the complainant to appear to give evidence. Initially, the application was granted but then refused, apparently on the ground that the Special Magistrate was not satisfied that the defence had established special reasons. The Court decided that because the only reasons advanced were not reasons justifying the calling of the girl but rather were reasons to justify cross-examination under section 34(i) of the Evidence Act (the sexual experiences provision) there was no basis for saying that the Special Magistrate's discretion under Section 106 had miscarried.

Nevertheless, the Court again took the opportunity to comment on the import of the legislation. In particular, Bray C.J. expanded upon his observations in Byczko:

> "It (the argument in Stephenson) has - convinced me that the legislation contains even more complexities, ambiguities and moot (in every sense of the word) points than I had previously realised. I am conscious that it is unwise to express dogmatic opinions on matters which do not directly arise

> in the case and have not been argued in the context of a real factual situation. However, I accede in part to the somewhat optimistic request of the Solicitor-General that we should provide some guidance for other courts - "[100]

The Chief Justice then went on to provide an analysis of Sections 34(i) and 106 and the integral relationship between them. He concluded his judgment with these remarks:

> "We have to accept that Parliament, for reasons which seemed good to it, has thought fit to deny to a defendant charged with a sexual offence the full range of the rights he formerly possessed and which he would still possess if he were charged with any other kind of indictable offence. It may be true as the Solicitor-General says, that the right of the accused to cross-examine the witnesses for the prosecution at the preliminary examination is not a common law right but something bestowed by nineteenth century statutes. It is at least a right which was enjoyed in South Australia by persons accused of rape for a very long time, certainly between 1849 and 1976"[101]

Zelling J. on the other hand, in Stephenson, whilst agreeing that there were significant problems of statutory interpretation involved in respect to Sections 106 and 34(i) went on to part company with Bray C.J. and Wells J. in regard to the general tenor and spirit of the provisions.

> "The convention of statutory interpretation by Courts established over many years of decisions is that the new statute is to be fitted into the existing common law and statutory framework. The courts treat the new statute as amending the law, and the common law in particular, no more than the words of the new statutory directive imperatively require the court to do. The statute, in words which have been quoted many times, is to be treated as an intruder upon the rounded majesty of the common law.
>
> In these days when Parliament use statutes as instruments of social policy and social engineering rather than as mere amendments of the law, Parliament frequently does not intend to amend the basic concepts of the common law in a particular field. It intends to remove them and to substitute new ones in their place."[102]

After giving an illustration of what he meant Zelling J. went on to conclude that:

> "It is true that the sections of the Justices Act and the Evidence Act - are amendments to existing statutes, but they were put there in my opinion for the express purpose of altering the basis of the law in this area and not merely of amending it. Parliament is saying: "You the Courts have been so engrossed in seeing that justice was being done to the accused rapist that you have entirely overlooked the fact that the girl who has been raped is also entitled to justice at your hands. We are going to redress the balance. The girl who has been physically and emotionally injured ought to have at least as much claim on your justice as her assailant."[103]

These remarks of dicta uttered by Bray C.J., Wells and Zelling JJ. in Stephenson are most important and provide significant insights into judicial thinking and attitudes and also give a guide as to the likely impact of these evidentiary provisions. The Court in both Byczko and Stephenson went to some lengths to analyse the "special reasons" aspects of Section 106 of the Justices Act. A detailed treatment of this problem would be well worthwhile, but would require latitude which we have not permitted ourselves within the scope of this report What emerges from the judgments, however, is that in general terms the approach of Bray and Wells JJ's involves a wide, and perhaps progressively expanding, category of "special reasons", whereas in the case of Zelling J. "special reasons" will have to be very special. The passing of time will determine how this process will work itself out. Perhaps the legislature will again intervene.

In the meantime it is clear that the short-term impact of section 106 has been to put a severe clamp upon the calling of alleged victims at the lower courts. This had, of course, met with the strong approval of proponents of the overall rape law reform initiatives. Foremost among these are the various women's groups. The legal profession seem opposed to the provision because it strategically disadvantages the defence in a rape case. The judges, in the published judgments discussed above have voiced their

concern about the policy implications (Zelling J. excepted) of the new law and have made trenchant comments about the lack of precision in the drafting.

Unless some definitive approach to "special reasons" is arrived at, and an approach which takes a broad view at that, it seems that complainants will not be appearing at preliminary hearings in large numbers. It is conceivable, however, that should a number of cases arise which lead to appeal court decisions explicitly dealing with the meaning of "special reasons", and that phrase receives a wide interpretation, then the flow of complainants through the lower courts will significantly increase.

The issue of principle at stake; that is to say, the question of the alteredbalance as a result of Section 106 is unresolved and by its very nature is probably insoluble to everyone's satisfaction. Doubtless, however, it will continue to be debated in South Australia.

Evidence as to previous sexual experiences and sexual morality

In discussing the problem of the admissibility of evidence of prior sexual experience the Mitchell Committee, in its Special Report, quoted from an English Court of Appeal decision which stated the relevant law at the time of the Committee's deliberations. It is appropriate to here reproduce the same passage to make clear the background to this particular set of problems:

> "It is settled law that she who complains of rape or attempted rape can be cross-examined about (1) her general reputation and moral character, (2) sexual intercourse between herself and the defendant on other occasions and (3) sexual intercourse between herself and other men; and that evidence can be called to contradict her on (1) and (2) but that no evidence can be called to contradict her denials of (3):"
> 104

In coming to its conclusion on the matter the Mitchell Committee argued

that there was room for reform of the law in this area but the Committee was by no means persuaded that the right of the accused to cross-examine regarding prior sexual experiences should be heavily eroded.

The Committee recommendations were as follows:

> "(a) We recommend that the alleged victim of a rape be not liable to cross-examination upon her prior sexual experience and that evidence of such prior sexual experience be not admissible at the trial unless the fact of such sexual experience is relevant to the defence.
>
> (b) We recommend that the general reputation or moral character of the prosecutrix be deemed not relevant to the defence.
>
> (c) We recommend that where the accused intends to cross-examine the prosecutrix or to call evidence concerning her prior sexual experience he seek leave of the judge in pre-trial proceedings.
>
> (d) We recommend that where the judge rules in such pre-trial proceedings that the prosecutrix may be cross-examined or evidence called as to her prior sexual experience or any part thereof a note be taken of the intended defence and such not be admissible in evidence at the trial."[105]

The South Australian Evidence Act Amendment Act 1976,[106] goes part of the way towards implementing what the Mitchell Committee suggested, but again, as in the case of committal hearings there are variations between the Committee recommendations and the final legislation. The legislation provides that evidence of the sexual morality of the alleged victim may continue to be admissible provided that it is "directly relevant" and its admission is justified in all the circumstances of the case. There is no provision in the legislation for the question of admissibility of the evidence to be determined in a pre-trial hearing and no requirement for a note of the intended defence to be taken.

Apart from the requirement in the legislation that the evidence of prior sexual experiences or sexual morality be "directly relevant" there is the additional requirement that "the introduction of the evidence is, in

all the circumstances of the case, justified."

The overall series of issues involved in relation to the introduction of this sort of evidence is probably the most controversial aspect of rape law and rape law reform. As the New South Wales Criminal Law Review Division Report put it:

> "This is the most controversial area in relation to the law of rape and is the area at which most of the calls for reform have been directed. The substance of most of the calls for reform can probably be summarized in the question: What relevance can the prosecutrix's sexual background either with the accused or anyone else, have either to an issue in the trial or to her credit? Much of the law in this area, it is said, is founded upon the sexual morality of a period more than a century ago, it is completely anachronistic and it should be accorded with current community standards."
> 107

As was the case with respect to the changes introduced to govern committal hearings in sexual cases the new law regarding evidence of previous sexual experiences and sexual morality has generated problems of principle and practical problems which are often integrally related. In general terms the problems of principle revolve around the question of the right of the defence to pursue matters of sexual experience and sexual reputation and the practical problems concern questions of the interpretation and administration of the new section. There have been more cases in South Australia dealing with this issue than cases dealing with the committal hearings section.

We will first deal with some of the general reactions to the new law and then examine briefly the ways in which the South Australian Supreme Court has approached the problem.

The tone of the objections to restrictions of the right to cross-examine about sexual reputation generally is captured by the remarks of Lawyer D:

> "It seems to me that a man's or a woman's sexual behaviour may be highly relevant to whether they will consent to have sex with another person, because it leads to a sign of sexual pattern, methods of operation, places of pick-up etc. - all the ploys in the sexual game, the come-ons and the put-offs. It seems to me that the cross-examiner is deprived of the sort of information that the ordinary juror wants to know about women - Is she virtuous?" (Interview)

He later added these comments:

> "If a girl is regularly picked up in Hindley Street, for example, by single males, whom she hasn't met before, and asks them to take her to a hotel to have a few drinks, gets drunk, then leads them on to the point where they are sexually excited, and then knocks them back - surely this is relevant to determine whether she is really consenting or not. One could expand for hours on sexual patterns and to me it is extraordinarily unrealistic of the law to stop a cross-examining lawyer exploring sexual pattern because that is what consent is all about when all is said and done.
>
> Some girls like to start with touching fingertips and holding of hands and a whole lot of gentleness and romantic stuff. Other girls like a rough approach. Other girls like you to get them drunk or feed them marihuana, depending on their age group - there are an extraordinary diversity of patterns.
>
> I take the view that if the jury is to be deprived of this sort of information they are being deprived of social reality, and they are left in the dangerous position of trying to assess a girl's personality from her appearance in the box." (Interview)

This view was one shared, by and large, by most other lawyers with whom we spoke. What needs to be observed is that depending, of course, on the facts of the particular case, it is by no means clear that much of the sorts of material mentioned would necessarily be excluded from the evidence under section 34(i) of the amended South Australian Evidence Act. Clearly, what the legislation had in mind was the prevention of the open-slather cross-examination of alleged victims about sexual matters - cross-examination which adduces evidence going purely to the credit of the witness.

In the case of the sorts of fact situations posed by Lawyer D there will be an issue as to consent and provided that the judge is satisfied that the evidence is "directly relevant" and its introduction is justified "in all the circumstances of the case" then presumably it will be admitted. Even if the evidence is not directly relevant to one of the elements of the offence (e.g. consent) it would still be possible to cross-examine in relation to matters of general sexual morality, provided that an allegation in respect to same has been made to which the evidence sought to be adduced is "directly relevant" and its introduction is "in all the circumstances of the case, justified".

It depends, then, in part, on the manner in which the judicial discretion is exercised as to whether this provision is to be seen as a particularly radical one. Our feeling is that it should not be so seen. It is to be seen rather as a strong reminder to judges and magistrates to be particularly careful in supervising the introduction of evidence in relation to such matters, and especially, to be satisfied about the requirements of relevance and justifiability before allowing the evidence to be admitted.

The comments of Lawyer D should perhaps be taken not so much as a measured response to the actual terms of section 34(i) but rather as a plea of resistance to any suggestion that previous sexual experience and general sexual demeanour and reputation be totally excluded from consideration by a trial court.

Some light has been shed on this by remarks of the then Chief Prosecutor, Mr. Kevin Duggan, Q.C.:

> " - there should have been no need for this legislation, because I think judges should have kept cross-examination on the rails and I am afraid they did not. They could have applied the ordinary rules of evidence, particularly the rule relating to relevance, and said, "Mr. So and So that is just not relevant to the issue", and if they bleated

> cries of relevance to the witness's credit I think the judges should have sat on them. But they did not and perhaps in those circumstances some legislation was necessary to make judges realise that the emphasis should be altered, but the way in which it was done was not very effective."

Apart from placing the onus squarely on the accused person to convince the judge that a particular line of questioning should be opened up the new legislation also excludes material which would, in most cases, have been admissible at common law; that is, material concerned with the previous sexual experiences or sexual morality of the alleged victim going to her credit rather than being of relevance to a central issue in the trial. The traditional defence tactic, of course, has been to cross-examine in relation to sexual matters in the hope perhaps of revealing evidence of promiscuity on the part of the alleged victim. In so doing the defence would hope to implant in the minds of the jury the idea that the alleged victim is a person who is free and indiscriminate in her sexual life and is thus quite likely to have consented to the accused person in the instant case [When regarded in this light it can be seen that purely as a matter of tactics and strategy it is in the interests of the police and the prosecution to have this sort of wide questioning by the defence excluded.] At least this is probably the case in terms of traditional views about sexual morality in the community. It is not at all clear how changed and changing community attitudes to these matters have been reflected in relation to this issue in jury trials of sexual cases. A number of our lawyer respondents told us of cases in which open cross-examination had been allowed, the result of which was to reveal that the alleged victim was a person of vast and indiscriminate sexual experience and yet rape convictions were recorded.

Whatever may be the social reality of the situation Section 34(i) certainly has as one of its main thrusts the removal of cross-examination on sexual matters of a general or specific kind going purely to credit.

As Brian Martin, Crown Prosecutor noted:

> " - the first thing it does is to cut out what was allowed previously and that is the open slather questioning of the girl about her previous sexual experience simply going to credit. - They have got to get to square one of relevance as opposed to credit, direct relevance before they can seek leave. So they have to show (1) direct relevance and then (2) that as well as being relevant it is justified in the circumstances of the case, and quite frankly it is very rarely used now to cross-examine the girl simply to show that she is the wanton type who would give consent to anyone. I suppose that could arise if the defence said, "she is a prostitute and I refused to pay and that is why she has cried rape". It is more often used on the basis that the accused has heard something about the girl, for instance, that she has been involved in gang bangs. They have heard that or they have themselves had previous sexual experience with the same girl or they know people who have." (Interview)

It is a very difficult matter indeed to make any kind of assessment of the manner in which Section 34(i) has been received by those who pressured for changes in the law in this area and those who opposed any change. The main reason for this is, as in the case of rape-in-marriage law, that the law is so complicated. It is complicated in at least two ways. The pre-existing common law situation, although perhaps understandable to judges and practising criminal lawyers, was complex and involved quite sophisticated evidentiary concepts and practices. This made it hard for interested non-lawyers to understand.

The second complication is that the new law has made things even more intricate and considerably more vague. Supreme Court judges in South Australia have had great problems in working out what the various elements of the new Section really mean. In terms of our research this meant that many interested observers, such as people involved in the Women's Movement, for example, were quite unable to assess the impact of Section 34(i). They were pleased that some effort appeared to have been made to restrict the admission of evidence about an alleged victim's sexual attitudes and

behaviour but were quite unsure of the extent and implications of the changes and were, therefore, not generally able to speak confidently on the matter.

As mentioned, some of the Judges of the South Australian Supreme Court have made valiant efforts to unravel some of the intricacies of Section 34(i) and, in doing so, have also provided some comments of their own about the general tenor and spirit of the legislation.

Two of the Judges in Byczko commented on the basis of the legislation:

King J: "It is plain that the section was enacted to protect alleged victims of sexual offences from the embarrassment and intrusion upon privacy involved in an investigation of their personal lives unless that embarrassment or intrusion upon privacy is justified in the interests of the administration of justice. It is a protection for the witness and the interests of the witness must be considered by the judges in deciding whether to grant leave."[108]

Hogarth J: "I have no doubt that Sec. 34(i) was intended to prevent indiscriminate cross-examination of a prosecutrix, on the off chance of eliciting some act or acts of sexual immorality in her past history, which might found an argument to the effect that she was likely to have consented to the act of intercourse, the subject of the pending proceedings. In the past, some cross-examinations of this nature have been oppressive and embarrassing, and without justification. But there will be many cases in which it is important that the defence should have the right to investigate the past history of the prosecutrix, if the trial is to be conducted on a just basis. Parliament may very well have intended to give a general discretion to the court to determine when it considered it necessary in the interests of justice to permit such a cross-examination, and when to exclude it. But the section in terms does not proceed on that basis".[109]

In Stephenson Zelling J. stated:

" - the Courts tolerated almost unlimited ferreting into the girl's past and attack on her character by direct question, by innuendo and regrettably sometimes by smear. I agree with my brother Wells that an active and

> vigilant use of Sections 22-25 of the Evidence Act 1929 would have been quite sufficent to stop this pernicious process. However it is equally well known to all of us who have practised in these Courts that that did not happen."[110]

In the same case Wells J. stated:

> "It was, of course, inevitable that the examination of a prosecutrix would often lead to, or be carried out in conditions of emotional tension, not infrequently and naturally she felt shame, embarrassment, or distress, at being required to discuss intimate details of her sexual conduct, both in the circumstances of the alleged offence and otherwise.
>
> - A perusal of depositions and, it must be acknowledged, of the transcripts of actual jury trials, has revealed cases where the Court insufficiently addressed itself to the test of relevance, and to its responsibility to exercise the powers, and to discharge the duties conferred and imposed by sections 23 to 25 (inclusive) of the Evidence Act."[111]

There seems to be a general consensus of opinion expressed in the above judicial remarks that inadequate control had been exercised in the past in regard to cross-examination relating to sexual experience and morality and that it was this mischief at which the legislation was aimed.

In Byzcko and Stephenson a consensus emerged amongst the judges that Section 34(i) is fraught with problems of drafting and interpretation. The main division of opinion which emerged was in respect to the advisability of actually producing legislation in the form of Section 34(i). On this matter a number of the judges expressed feelings of disquiet in respect to the impact of the new law. For example, Hogarth J. had this to say in Byczko:

> "It seems to me that the intent of the Legislature is to require the party intending to put the evidence before the court, whether prosecution or defence, to specify with some degree of particularity what evidence is sought to be adduced in order that the court may guage its relevance and importance -

> The result of this, as it seems to me, is to prevent the defence from adducing evidence by cross-examination of a prosecutrix or her witnesses, unless it is already in possession of information which it seeks to put before the court in evidence. In view of the frequently recurring question whether or not a prosecutrix was a consenting party and the importance to the defence of knowing her background, the section in its present form presents the rather disturbing prospect of an innocent man being in danger of being convicted because he is unable to exercise the right given to him at common law to cross-examine the party who seeks to have him convicted of what is a very serious crime."
> 112

Bray C.J. in Byczko said:

> " - there is no doubt that the legislation does significantly hamper the defence and increase the chances of convicting the innocent by preventing the exploration of matters which could prove their innocence. It is not for me to weigh that consideration against the obvious desirability of sparing victims of rape from further distress."
> 113

In Stephenson Wells J., after analysing some of the technical problems associated with Section 34(i), commented as follows:

> "It seems to me with all respect to those who think otherwise, that there were ample powers to protect prosecutrices against insulting and unwarranted questions relating to the sexual side of their lives without the enactment of S.34(i). It may be true - that not enough care has been directed in the past to the definition of what was and what was not relevant when questions of that kind were asked, and that judges and magistrates - more especially, in the case of the latter, when hearing committals - have failed to invoke sections 23 to 25 (inclusive) of the Evidence Act when they should.
>
> Many references to a prosecutrix's sexual life are relevant, and hence admissible on any view of law and policy. The occasions when such references would formerly have been permissible as going only to credit would, if the above mentioned trilogy of sections had been invoked as it ought, have been remarkably few.
>
> What perhaps was needed to remedy the situation was not so much a change in the law, as a

> determined, unremitting, and informed, campaign on the part of those who appear for the prosecution in sexual cases to bring those sections out of cold storage and make them once again active and potent ingredients in hearings and trials."
> 114

In the same case Bray C.J. commented that:

> "It is unfortunate that this section is likely to beset the path of a court conducting a trial for a sexual offence, already thorny enough, with a new and luxuriant crop of briars. - It might have been thought enough, in my view, simply to forbid any questioning of any witness about the alleged victim's previous sexual experiences which is directed only to credit and is not relevant to any of the factual issues in the case, and to make a corresponding provision about an unsworn statement.
>
> In Byczko's case I referred, and I refer again to the logical fallacy involved in the assumption that every complainant in a rape case has really been raped and therefore suffers a double wrong by embarrassing questioning whereas the whole object of the trial is to find out whether she has really been raped or not. - I would stress as energetically as I can that the accused, if he has pleaded not guilty, is still presumed to be innocent until his guilt is proved beyond reasonable doubt and I protest against the question - begging assumption of guilt so often made in popular discussion of the topic."
> 115

In contrast to the flavour of most of the above Zelling J. in Stephenson, after dealing at some length with some aspects of the ordeal which many alleged rape victims suffer in the criminal process, said the following:

> "In my opinion, courts must start again from first principles in interpreting these sections and however much this runs counter to long ingrained and long established practices and modes of thought Parliament has said that it must be done so that there is justice for the injured girl as well as for the accused. I am well aware of the dislocation in legal thought which these concepts will produce. that, however, is not peculiar to this type of legislation or indeed to Australia."
> 116

We have gone to some length to quote at length from various observations made by Judges in the cases of Byczko and Stephenson. This has been done because the sentiments expressed in the quoted passages seem to us enormously important and insightful in terms of assessing the general impact of Section 34(i). It may well be that from a strictly legal standpoint the very difficult and serious problems of interpretation raised by Section 34(i) will be seen to be of greater significance than those general reactions of the judges to the section. (The treatment of these problems by Wells J. in Stephenson is a masterful exegesis which culminates in the learned Judge completely re-drafting the section to take account of the various problems of interpretation.)[117]

The main reason that the Judges' observations are so important is that (apart from Zelling J.) they have gone out of their way to make it quite clear that the general tenor of Section 34(i) and its implications are ill-advised and inappropriate. The Section, in their view, has improperly and unfairly eroded common law rights of defendants in sexual cases and works in an unjust manner. Again, Zelling J. apart, this probably means that the judges will make every effort to ensure, open-slather questioning excepted, that defendants are placed as closely as possible in the same position as they were before the introduction of Section 34(i). The significance of this is that defence lawyers will be working solidly to do the best possible job for their clients in sexual cases by pursuing as many avenues of inquiry as possible, and they will be met by and large, by judges who are essentially well disposed towards the common law position as it existed before the amendments of 1976.

Despite the fact that the obiter dicta pronouncements of the judges in Byczko and Stephenson appeared to have presented a wall of resistance to the import and thrust of Section 34(i) the results in actual cases have presented a mixed picture.

In Byczko the appellant objected to the fact that the following evidence had been led by the prosecution from the complainant and admitted into evidence after an application under Section 34(i).

> "Q. Prior to the evening we are concerned about Janice, the Saturday night, had you ever had intercourse before?
>
> A. No.
>
> Q. Had you any sexual education as part of the school teaching program?
>
> A. Yes
> 118

Because counsel for the appellant had not expressed any objection to the admission of this evidence at the trial the Court of Criminal Appeal decided that this ground of appeal would not be successful but because the appeal was to be allowed on other grounds the court went on to express some views about the Section 34(i) issue.

King J. said this:

> "I think that the evidence that the complainant had not had prior sexual intercourse was relevant in the following ways:
>
> 1. It was a consideration for the jury to assess when considering the likelihood or unlikelihood of the complainant consenting to her first act of sexual intercourse with a total stranger in the circumstances described in the evidence.
>
> 2. It was material which the jury was entitled to consider in assessing the truth of the conflicting accounts given by the complainant and the appellant as to the complainant's reactions and responses during the events in the motor car including the sexual intercourse both per vaginam and per anum.
>
> 3. It was directly linked to the incident by the conversation deposed to by the complainant and denied by the appellant on the topic of the intercourse hurting because she was a virgin.
>
> I think that the evidence that she had had sex education was admissible as tending to show that although she lacked previous sexual experience she understood what was occurring during the incident."
> 119

King J. then went on to consider some matters relevant to whether he would have exercised his discretion under Section 34(i) to admit the evidence. He did not reach a view about the matter because he said it was something for another judge at another time to do but he did observe that:

> "The evidence here led was not evidence of sexual experiences but it was, I think, evidence of the sexual morality of the complainant. I think that sexual morality in this context embraces both moral attitudes and moral conduct in relation to sexual matters. Although the evidence is not admissible for the purpose of establishing the good moral character of the complainant, it has the effect, when admitted on other grounds, of tending to show that she has led a virtuous life in relation to sex and is, therefore, in my view properly described as "evidence of sexual morality".
> 120

Hogarth J. said:

> " - it seems to me to be relevant for the Crown to establish that the girl had never previously had sexual intercourse. This must surely have been relevant to the consideration by the jury whether, on the probabilities of the case, she may have consented to an act of this nature with a stranger who had picked her up casually, a stranger with whom she had had no previous contact. Conversely, in such a case it would also be of relevance for the defence to be able to establish that a girl in the position of the prosecutrix had been promiscuous in the past".
> 121

Having said this Hogarth J. also stopped short of giving an indication as to how he would have exercised his discretion in this particular instance.

Bray C.J. said:

> "- on the issue of consent or no consent it is relevant to enquire whether the complainant was before the intercourse in question a virgin, because the reaction of a girl faced with a sexual advance may be expected to differ in accordance with her previous experience."
> 122

Having decided that the issue of sexual education was also relevant Bray C.J. indicated that the evidence in question was admissible at common

law and went on to observe that he could see no objection to the discretion being exercised in favour of admitting the evidence under Section 34(i) because it was relevant to the Crown allegation that the girl did not consent to intercourse.

The Court of Criminal Appeal has considered the same issues in a number of subsequent cases. In Stephenson Bray C.J. stated:

> "It is impossible to enumerate every case in which the sexual experiences of a victim may be relevant to the factual issues in the case. If the accused's defence is that he believed the woman was consenting I do not see how the grounds of that belief could be shut out, and if they include his knowledge of or his belief about her previous sexual behaviour, I think he must be allowed to say so. Technically such evidence may not be evidence of her sexual experience but of his state of mind, but if he can give it surely, in justice to her as well to him, it must be possible to extract her version of the matters alleged. - Where the defence is consent, previous sexual experiences between the girl and the accused will almost always be relevant".
> 123

The case of Byczko and more particularly Stephenson have laid the basis upon which subsequent treatments of Section 34(i) have proceeded. In Gray, Adams, Brannon and Knox[124] counsel for one of the accused sought leave under Section 34(i) to ask the alleged rape victim, a fourteen year old girl, whether she had or had not had previous sexual experience. Counsel said that the question and the answer were relevant to the question of consent. Jacobs J. refused leave to ask the question. He said, inter alia:

> "I do not see how the mere fact that she may have had previous sexual experience - and that is all that it was sought to elicit - can be directly relevant to the issue of whether on this occasion she consented to four successive acts of intercourse with complete strangers."
> 125

In the same case a second counsel applied for leave to cross-

examine the complainant about a sexual relationship with a person other than the four accused, and in particular to pursue the question of whether she had had intercourse with this person a few days after the alleged rape. Jacobs J. decided that this material was certainly relevant to the "sexual morality" of the alleged victim but declined to grant leave because its probative value was very slight when weighed against the girl's right to privacy.

126

In Robertson and Mihailov Mihailov applied for leave under Section 34(i) to cross-examine the alleged rape victim about her sexual relationship with his co-accused and with another group of men. These matters, he said, were relevant to his belief about consent. In effect Mihailov was saying that because of information he had received about the girl and what he had seen at the time of the incident itself he believed that the girl had consented. Hogarth J. decided that he would grant leave to cross-examine in relation to the alleged victims activities with Mihailov's co-accused, Robertson: He did so in part because the material sought to be adduced was relevant to Mihailov's belief about consent.

127

In De Angelis, a case of alleged multiple rape, the appellant appealed against his conviction. Some grounds of his appeal were based on the trial judge's interpretation of Section 34(i). The defence was consent and counsel for the defendants, four in all, relied upon a number of allegations about previous single and group sexual incidents involving the girl and the defendants. In giving judgment for the Court of Criminal Appeal (King C.J. Jacobs and Legoe JJ.) the Chief Justice said that evidence of the alleged incidents was directly relevant to the allegation by the prosecution of lack of consent. He ruled this way for two reasons:

1. "Evidence of prior sexual relations between an accused person and the alleged victim of rape is admissible as relevant to the issue of consent. -
2. The alleged habitual indulgence of the girl in group sex incidents rendered it less un-

> likely that she would consent to sexual intercourse in these circumstances with four boys in succession - "
> 128

It is very difficult to make any assessment of the ways in which interpretations of Section 34(i) will develop. The South Australian judges have commented in the cases that each situation will be different and that it is very difficult to talk in terms of precedents in relation to this matter. The major impact of the new law has been to cut out indiscriminate and exploratory questioning of rape case complainants about sexual matters which go to credit rather than substance. More generally, the legislation has reminded the judges that they ought to look very hard and long before deciding to allow the Crown or the defence to pursue general details of the alleged victim's sexual behaviour.

As far as the broader questions of principle are concerned the judges and defence lawyers have expressed strong reservations about the legislation on the ground that it unfairly tampers with the traditional common law rights of defendants in sexual cases. On the other hand women's pressure groups, which had originally greeted the provision with enthusiasm, quickly changed their views as a result of monitoring proceedings in rape cases and discovering that leave to cross-examine alleged victims about sexual morality was being granted quite frequently, particularly in cases of alleged multiple rape. Only time will tell how the situation will develop. The then Attorney-General was aware of drafting difficulties and in his interview with us foreshadowed further amendments to clear up some of the difficulties. It is not clear what developments, if any, will occur in this regard in South Australia as a result of the change of Government.
129

CHANGES IN THE ADMINISTRATIVE HANDLING OF RAPE CASES

We deal under this head with some aspects of police procedures in regard to the investigation of rape complaints in South Australia and also featuresof the medical side of things. Together with the evidentiary and procedural aspects of court proceedings in rape cases the police and medical stages of the processing of rape complaints have borne the brunt of much criticism over much of recent history. According to many critics the male dominated police and medical professions have often taken an abrupt, suspicious, unsympathetic and matter of fact approach to the investigation and treatment of rape complaints and complainants. Those critics who do not choose to emphasise the oppressive or sexist elements as part of their complaint nevertheless point out that for the most part police and medical attention is primarily focussed on securing information and material to further a criminal investigation and to proceed towards a conviction in the courts. In the pursuit of these aims, so say this group of critics, the psychological and emotional, and even sometimes the physical health of the alleged victim, is not infrequently neglected.

Police Procedures

When the Mitchell Committee investigated the South Australian system of police handling of rape complaints it found that there was already in existence a specialist squad of four policewomen attached to the Major Crime Squad whose task it was to conduct certain aspects of the investigation and to generally look after the alleged victim through the criminal process.

We interviewed members of the special squad of policewomen deployed to deal with rape complainants and also members of the South Australian Police Department Major Crime Unit who are often involved in rape investigations.

The police seemed quite well satisfied with their own system for handling rape complaints. As one senior detective commented, "most of the bullets are being fired at the legal system and not at us." There is evidence that, generally speaking, the South Australian Police have gained a very high reputation in relation to other police departments in Australia.[130] It is also true that even in the area of rape investigations, a sensitive topic at the best of times, the South Australian police appear to have fared reasonably well under the microscope of public criticism. A crucial test of police performance in this field is the reaction of rape victims themselves. In the interviews conducted with victims of marital rape the question of the behaviour of the police was pursued. One victim said:

> "They were really good. They said to charge him I would have to have bruises to show but they told him to go for a long walk and cool down and come back a couple of hours later, because I wasn't really going to charge him at the time because I really didn't have any bruises. I go hysterical when he gets violent but they were really good. They said don't hesitate to call us again or if you have to call us, do it. It got really bad one night it got so bad that I was really afraid of having a bad accident. I was really afraid that I might be choked to death or something so I ended up down at the police station". (Interview)

These sentiments were echoed by a number of women who stated that they had been treated sympathetically by the police. Equally, however, there were a number of women who were severe in their criticisms of police handling of rape complainants. One of these had the following comments to offer:

> "Really bad; the police have no time for it. Police are men for a start and the policewomen are the worst oppressors of women that there are because they are really bound up in the power structure of the police force. The police really have very little time for women who are raped. They get a real kick out of it - "oh, and what happened next?" deal. This is true, I mean I've been in touch with untold numbers of women who have been raped and the police are really bad about it. I mean they try to give the impression that they are supercool and that they have to check-out whether it has actually happened, or whether someone is just crying rape but they are very hard on women. They take no account of the trauma and stress that a woman goes through and how a woman actually feels. How she feels abused; how she wishes she could rip every bit of flesh off her body and throw it away. A hell of a lot of women, as soon as they are raped, the first thing they do is go and have a shower and scrub themselves, and the police cannot relate to that. They are men." (Interview)

Clearly, what is at issue in relation to this matter is not so much the relative merits of the various State Police Departments in respect to the handling of rape complaints nor the behaviour of individual officers in particular cases but rather the more basic question of the consideration of an adequate and professional system and method for use in dealing with rape. There have been complaints, and there probably always will be, about police behaviour in this context. Success is more likely if individual problems are worked out within an overall structure which makes sense.

The major component in the innovative South Australian approach to the vexed issues of rape investigations is the special squad of four policewomen. The Mitchell Committee described the functions of the squad in this way:

> "She (the complainant) is interviewed by a specialist woman Police Officer attached to the Major Crime Squad who, in addition to looking after her, conducts certain aspects of the investigation. Before any enquiry is commenced and in order that the victim is aware of what is going to happen, she is told of the procedures

> to be followed throughout the enquiry and the reasons for them. The welfare and comfort of the victim is considered at all stages of the enquiry and she is accompanied by a woman Police Officer throughout the investigations and the subsequent court hearings." 131

The two major questions which arise in relation to this system are first, whether the scheme is a good idea in the first place and, second, given that it is in operation, how well does it appear to be working. One of the present authors has provided elsewhere a response to both these questions:

> " - the current South Australian police procedures for investigating rape seem to reflect traditional views about the role of women police, who have in the past been concerned with the handling of female offenders, child victims and with the various office and clerical duties less "demanding" than the duties assigned to male police - Interviews with rape victims are undertaken exclusively by women police who then hand over their interview statement to the major crime investigators. It is apparently not uncommon for investigators to subsequently "re-interview" rape victims in order to clear up any ambiguities in the victim's original statement.
>
> This quite absurd duplication and demarcation of duties bares no relationship to either the effectiveness of rape investigations, nor to the established needs of rape victims. What rape victims basically desire is sympathetic and humane treatment which can be provided by either a man or a woman although if a preference is expressed by the victim for a woman this preference should be met. What should be avoided at all costs is the repetitive interviewing of the victim by law enforcement personnel." 132

We wish to reiterate these sentiments but also to emphasise that they do not constitute a savage indictment of the South Australian system but rather raise the question of the rationale for the scheme. If it is the case that women do not have a monopoly of the sorts of qualities that are so important in dealing with people in situations of extreme distress then there seems little point in assigning a squad exclusively constituted by women to perform the task of interviewing and looking after rape victims. Surely the better system would be a series of investigatory units

or teams each one containing a woman police officer who would work on an equal footing with the other members of the team?

There seemed to be general agreement among members of the Major Crime Unit who deal with many rapes in South Australia and the women of the Special Squad that it should not and probably does not make any difference whether the contact point for the rape victim is a man or a woman. Asked about whether there are problems associated with men dealing with rape victims one member of the Special Squad of policewomen replied:

> "No. It depends on the male's attitude, you get some men that are very anti-rape anyway and I think their attitude rubs off on the girls. They don't believe in the word rape - Don't believe in rape itself- " (Interview)

Having said this the policewoman went on to say that these sorts of male police officers were a rapidly decreasing minority in the Force and that she thought that men were just as well equipped to look after the initial stages of a rape investigation. One of the male rape investigators had this to say:

> "We go out and see a rape victim, say the following day, and when you walk in there is a sheet of ice between you. There is no communication. She is only going to say what she has to say. She is saying it reluctantly. But I have found that if you go in with a bit of bounce and say "What about making us a cup of tea?" or something like that, it sort of breaks the ice, and you sort of sit down and have a cup of tea and you talk about the races or whatever it might be, and the next thing you know, they are giving you the story. They are more open, they are telling you more, more even than what is contained in the original statement." (Interview)

We put to members of the Major Crime Unit the suggestion that the ideal solution would be to have a team or series of smaller teams each one including a female officer, for the purpose of conducting rape investigations. There appeared to be virtually unanimous agreement that this would represent the best possible approach to the task but that lack of personnel and resources

would be the overpowering obstacle to the implementation of such a scheme. One detective said:

> "It would be so fantastic if you could do it, but I can't see any way of doing it. I suppose it would centralise and collate the information relevant to all rapes - It would be better for sure, but the manpower is just not available." (Interview)

There did seem to be a problem in South Australia of needless and potentially oppressive duplication in relation to rape investigations as a result of the somewhat complicated investigative arrangements. One of the women special squad members made this observation in response to a question about whether members of the special squad should be also involved in the investigative work:

> "I think we should be because apart from anything else, when you are talking to a victim like that you get lots of little snippets of information that come from her, that you cannot put in the statement and you cannot always communicate to the investigating officers. Of course they do see the girls, but the girls probably would not tell them what they tell me for instance. You always write so much down to give them information but you cannot always pass all of it on and it would make it easier I think, but then again you would have to have such a large team to cope with the number of rapes that are going through."

These remarks deal with an aspect of inefficiency which can arise by reason of duplication of investigative endeavours. As far as the potential for the system being oppressive is concerned some evidence in support is gained from the remarks of one member of the special squad. She was talking in a group with some members of the Major Crime Unit:

> "I said that I think you should go and talk to them, but my beef was that in one case I had a rape victim who had a particularly bad reaction to the rape and she had been up all night and was given valium to calm her down. At nine o'clock in the morning the dayshift C.I.B. got the crime report and they were jumping up and down saying "this is not a rape, blah blah blah" and they were going to rock straight out and see her after she had been up all night. It was only by pure

> accident that I found out that they were going to see her and give her the rounds of the table and I said "cut it out, she was raped." That is where I am saying that the C.I.B. who are investigating it should come to us who have been handling it all night to find out just exactly what the score is before they go out and see her and give her a hard time."

One other feature of the South Australian special squad system worthy of mention is the stress imposed on its membership. As one woman member of the squad remarked:

> "I don't think its a good thing for any girl to do it for too great a length of time without having a break away from it. The work in itself, the getting of the statement, is not difficult - but it's the associated problems of coping with girls that are uptight. You get called out of bed at one o'clock in the morning and you spend about four, five or six hours with them and then maybe you've got to stay up working for the rest of the day - that's how our situation is at the moment - sometimes you spend all day, from one o'clock in the morning till four in the afternoon, having done a pretty heavy sort of case during the night with no sleep. It gets a bit wearing after a while." (Interview)

We did detect that there was something of a morale problem in the squad because of the stressful, tiring and limiting nature of the work. A system whereby women police officers were integrally involved as part of the investigatory machinery in respect to rape complaints would, in our view, be preferable to the present system on the grounds that it would, in a proper form, eliminate the inherent weakness of the current regime.

Medical Procedures

There is not a great deal to report concerning the operation of medical procedures in respect to rape complaints in South Australia. We rely on interview material obtained from Dr. Shirley Broad at the Queen Elizabeth Hospital in Adelaide where the special medical unit operates and also some remarks from the police about the medical services offered for rape victims.

Whereas the Mitchell Committee Report had no direct bearing on police procedures in relation to rape (the special squad having been formed some years earlier) it did have an influence on the system for dealing with the medical aspects of rape complaints. The Committee noted that:

> "Many victims of rape must find the (medical) examination very distasteful. Wherever possible in South Australia the examination is made by the police surgeon. It has been suggested to us that the alleged victim should have the option of being examined by a woman doctor. We think that this suggestion is a reasonable one." 133

The Committee went on to recommend that a special panel of doctors, including women, be formed to conduct medical examinations of alleged rape victims. The Committee further recommended that the alleged victim should always have the option of being examined by a woman doctor.

Such a panel of doctors was formed at the Queen Elizabeth Hospital in Adelaide. Initially there was a solid burst of enthusiasm for the panel concept, but at the time of our research in 1978, when the panel had been established some ten months, there appeared to be difficulties in regard to sustaining this momentum. As Dr. Broad noted:

> "We were hoping that we would only have to be called about once a month, if we had sufficient doctors to be on a roster one day a month, but it is gradually decreasing because although we had thirty to begin with it is now down to about twenty-one - Each time a roster is put out there seem to be less on it." (Interview)

Dr. Broad was asked why the interest was waning. She replied:

> "It could be that it is involving a little more of their time than they anticipated, and the awkward hours too. You never know when you are going to be called. You are on for twenty-four hours when you are on - From 8 a.m. one morning to 8 a.m. the next morning and, of course, most of the calls come at very inconvenient hours, which is a bit disrupting to family life.

> It is not an easy sort of thing. The cases take a long time with all the specimens and the writing up of notes. You then have the ordeal of the court afterwards, of course."(Interview)

Dr. Broad then went on to outline the normal chain of events which occurs in relation to a rape complaint and to comment on features of it which particularly affect the medical stage of the process. She pointed out that in most cases the alleged victim has already been seen by a woman police officer from the special squad before being taken to the hospital and that a statement has usually been obtained from her. She remarked that:

> " - it is a help if there is a police statement but it does not seem to work very well. Some of the women police officers are experienced in this and they do know to tell us about the statement. But the one I had the other day did not tell me anything before I saw the girl. She did not give me her statement to read through - we need to know what happened so that when the girl comes back for follow-up she is not asked each time what happened." (Interview)

Dr. Broad described how the administrators of the medical scheme had originally attempted to provide for a system which meant that the doctor who first examined the alleged victim would do the subsequent follow-up examinations and consultations. This did not work out in the way it had been hoped that it would. Instead, a Tuesday clinic run by two doctors was established to assist alleged victims who had already had their initial examinations.

Dr. Broad then went into some detail about the problems which medical practitioners from the panel experience in having to give evidence in court. She said that she thought it was very demanding for doctors who are inexperienced in relation to court procedures to appear as witnesses. She noted that in her own case whereas she had expected to be asked to provide a factual account of the steps she took in medical examinations she was actually asked all sorts of hypothetical questions which caused her to become very confused and irritated. She concluded that although

the panel scheme was introduced to overcome the problems associated with medical examinations being conducted by a lone male police surgeon the ideal solution would be a small, full-time,salaried panel of medical practitioners which included women among its members. She then said that she thought this solution was not possible because of the difficulties of finding suitably qualified and willing doctors to do the job on a full-time salaried basis.

We asked the rape investigators attached to the Major Crime Unit about the standard of medical service at the Hospital. One of them commented in this way:

> "Very good from the victim's point of view. You are delayed though at times when it is out of hours. The length of time down there is the problem. It is basically because the doctors do not really know what they are doing, and they will insist upon taking a lengthy history from the girl and writing it all down. It is a pity that there is not some way you could streamline it because a girl comes in and she can really write off five hours at least before she can go home again." (Interview)

There are some inconsistencies within this statement. This police officer and a number of others to whom we spoke agreed that alleged rape victims were being very well cared for under the new hospital procedures but in pinpointing the fact that long case histories are often taken by doctors the occurrence of further duplication and unnecessary strain and time-wasting is highlighted. Based on evidence we have gathered it is at least possible that in some instances an alleged rape victim will first be contacted by

a uniformed police patrol, which will inevitably involve the need for some account of what happened to be given. Then the victim may be seen by a member of the Special Squad, followed by a medical examination and then a meeting with a rape investigator from the Major Crime Unit. All of these steps may involve the necessity for the victim to rehearse in some detail the facts of the alleged crime. This seems quite an excessive ordeal, especially when one considers that the system has been designed to limit the trauma and inconvenience as much as possible. So many of these problems, particularly at the medical examination stage, could be avoided by a process of common sense consultation and co-ordination.

IMPLICATIONS FOR THE FUTURE

In this study we have painted with a broad brush on a large canvas.[134] The thrust of our endeavours has not been in the direction of providing a detailed legal analysis of the various rape law reforms introduced by South Australia. Each one of the areas and subjects of reform are capable and deserving of such a detailed analysis. Rather, our emphasis has been upon attempting some sort of overview of the changes which have occurred in the context of some of the background to the changes, the ways in which they were achieved, and the manner in which they have been received and appear to be operating in South Australia. To a significant extent we have allowed the interview data to speak for itself on the basis that it does reveal some significant insights into various aspects of the reform package and raises a lot of questions and issues about the merits of the legislative and procedural changes and their impact which may be of interest and assistance to other jurisdictions involved in, or contemplating, similar moves.

This approach seems to have been rewarded by one of our major general assessments which is that political, social and cultural attitudes are of paramount importance when looking at the "success" or "failure" of a set of reforms such as the one we have examined.[135] Although very clearly one of the functions or purposes of this set of reforms was to achieve a change in community and social attitudes our study reveals that the process of implementing changes will be fraught with problems if negative and defensive attitudes are taken towards the reforms themselves.

We conclude that overall the South Australian experience has generally been a favourable one and that much can be learned from it by other jurisdictions. Public and criminal justice attitudes to the handling of rape cases and rape victims in South Australia appear to be moving towards a more enlightened approach. The changes brought in by the South Australian government have been a major contributing force in this movement.

The removal of the marital rape immunity was the most controversial and most hard-won of the reforms. As Geis has commented in relation to the United States:

> "Repeal of the rape-in-marriage doctrine has not enjoyed the kind of enthusiastic support accorded measures such as those limiting cross-examination into the complainant's sexual history, excising the cautionary instruction, redefining rape to include sexual assault against a member of either sex and penetration of any bodily orifice as well as changes in law enforcement and medical procedures for dealing with rape victims. Undoubtedly, there are diverse reasons for the inertia associated with change in the rape-in-marriage doctrine, including intellectual reservations about the desirability of change. But as was true for rape law reform in Britain, there also seems to be an element of self-concern behind legislative inaction: the matter may be too close for personal comfort for the well-placed, married males who make up the vast majority of the membership of American State legislatures. It may take only a little imagination for them to create a scenario in which in their worst forebodings, they are cast as the protagonist in a Kafka-like performance".[136]

Geis goes on to conclude that:

> "The idea of exempting husbands from rape charges by their wives is anachronistic, if indeed the practice ever had any semblance of a just law. The South Australian amendments, problems of drafting aside, point roughly in the right direction of rape reform generally. - Rape law should focus on the consequences of the criminal act and not on the status or the intimacy of the relationship between the parties, except as they modify the consequence in fact and not by presumption".[137]

Despite the practical problems involved and the substantive arguments to the contrary we feel that Geis' sentiments are appropriate and that the husband immunity should be removed, and in a much more precise and clear-cut fashion than has been the case in South Australia.[138] We would side with the recommendation of the New South Wales Criminal Law Review Division to abolish absolutely by statute the common law immunity of husbands in relation to rape.[139]

For those jurisdictions which decide not to remove the immunity

completely but rather to arrive at some sort of in-between position we suggest that the clumsy and unweildy nature of the South Australian provision should be avoided at all costs. It is essential that any new law of this nature be drafted with great care.

Also, if other jurisdictions need any encouragement they should receive sustenance from the fact that the new South Australian law has not opened the floodgates to marital rape prosecutions and they should, therefore, not be overborne by arguments along those lines.

The other changes to the substantive law of rape appear not to have had dramatic effects. For the most part they have been enacted and received with little publicity or consternation. They have had an impact at the procedural level in as much as they have involved a change of approach for police and prosecutors. They may produce a marginal impact on rape statistics in South Australia because of the enlarging of the scope of the offence.

The major question about these changes concems the principle of the matter. This is an issue which really opens up debate on the whole question of what the offence of rape does and should consist of. The widening of the definition of rape has taken the offence well away from the traditional concept of non-consensual, heterosexual vaginal intercourse. In so doing the much broader issue is raised of whether there should be degrees of rape or whether the offence of rape, as such, should be abolished and be replaced by a graded series of assault offences in respect of which the sexual element may or may not be merely incidental.

Overall the changes seem to be working reasonably well and there appears to be general agreement that the new definitions make sense, are workable and that juries understand them. The major point of our criticism is that the changes were produced without a full-scale investigation of the nature and scope of rape. The results may well have been the same as a matter of sheer practical politics but it would have been more satisfying if the broader questions of principle had been thoroughly explored. This should be taken into account by other

jurisdictions which contemplate further rape law reforms.

From a practice and practical standpoint the evidentiary and procedural reforms have had by far the heaviest impact. The question of whether or not the complainant in a rape case should appear to give oral evidence at the committal hearing arises in a great many cases and has been the subject of much legal debate both in the lower and in the higher courts in South Australia. The use of the phrase "special reasons" in the legislation is clear evidence that the legislature intended that the complainant's appearance at the committal hearing be much more the exception than the rule. The legislation does not supply magistrates, judges and lawyers with any criteria to assist them in formulating what circumstances constitute "special reasons". The legislation as it is is considerably vague and it ought to have been possible to spell out some of the circumstances under which leave to call the complainant would be granted e.g. where there is an issue as to the identity of the assailant.

The issue of principle which is affected by the committal hearing provision is that of the appropriate balance to be achieved between the interests of the complainant and those of the accused person. One direct result of the amendments to the South Australian Justices Act on the matter of committal hearings in sexual cases is to deprive the accused of a right which he previously had to (a) hear the complainant give her evidence in court and (b) cross-examine her about that evidence. The question of how these difficult balance issues are to be resolved is a problematic one. The suggestion that all or most rape complainants suffer considerable trauma and distress as a result of having to give evidence at committal hearings is an assumption. It may be, and probably is, a correct assumption but there is a case to be made for the suggestion that when governments are contemplating such changes in the law they would do well to commission some research into the problem which it is proposed to deal with.

As social attitudes in general change and sexual attitudes in particular change it is likely that the trauma associated with having to discuss sexual

matters in a court may lessen. This may particulary be the case in relation to certain sorts of gang rape situations in segments of society where this behaviour is not at all uncommon on a consensual basis and in instances where it even receives a certain amount of encouragement within particular social milieus.

As far as defendants and the committal hearing are concerned one commentator has observed, in referring to the Mitchell Committee's original recommendation on the matter, that:

> "If - one of the purposes of committal proceedings is to give the accused "full notice - of the evidence which will be called", there is a strong case for giving the defence the right to hear the alleged victim's evidence orally, and to cross-examine her."
> 140

This argument needs to be met by pointing out how the interests of the complainant, in being protected from the stresses of the committal hearing, outweigh the interests of the accused in having "a first bite at the cherry." The problem is that it is almost, if not completely, impossible to talk empirically on the matter.

Yet another dimension which our research revealed was the view expressed by Crown Prosecutors, especially the then Chief Crown Prosecutor, that the fact that the sieve (the committal hearing) was no longer being applied in rape cases has meant that quite a number of shaky cases are reaching the Supreme Court which would not have done so under the previous system. This view was echoed in some "off-the-record" remarks of one of the judges of the South Australian Supreme Court. As we pointed out earlier this may in some cases, be having the double-barrelled impact of (a) causing complainants to give evidence twice in cases which may have been rejected at the committal stage under the previous procedure and (b) subjecting the complainant in one of these more shaky cases to a more stressful and rigorous cross-examination which may have been avoided under the earlier regime.

What has to be remembered, of course, is that the rules laid down are to apply to all cases and there does appear to be a good a priori case for protecting complainants in these cases in the manner provided for by the legislation. We would suggest, however, that the operation of the legislation be very carefully monitored in an effort to assess whether the scales of justice in this respect have been fixed in an appropriate position.

The restrictions placed upon cross-examination about previous sexual experiences and sexual morality of the complainant do not, in our view, present the same sorts of balance problems as does the committal hearing provision. The general approach seems to be a correct one. The drafting of the provision is bad. We would suggest that the model provision produced by Wells J. in Stephenson represents a far clearer and more precise version of what it was that the legislature had in mind to achieve.[141]

There seemed to be general agreement that there was power before the enactment of Section 34(i) of the Evidence Act to restrict and control this sort of cross-examination but in many cases it had been allowed to "go off the rails". This admission, by opponents of the legislation, goes some of the way at least, in our view, towards justifying some legislation on the matter.

The legislation does still give wide latitude to the judge to decide on what matters can be pursued and how. The spirit of the legislation must be followed but it is difficult to see how prohibition of a particular line of cross-examination can be, or should be, enforced if the accused argues that the matters in question caused him to believe that the alleged victim was consenting. The legislation has achieved the exclusion of unfettered, open-slather questioning of alleged victims about their previous sexual experiences and attitudes. This is a major achievement. As to the other matters the judge must have a discretion to exercise in the light of all the circumstances in the case.

The fact that Judges of the South Australian Supreme Court have privately

and publicly expressed misgivings about the tenor and impact of the legislation brings into play important, extra-legal, political and philosophical dimensions over which there is little control. The fact that these attitudes do exist, however, is an important thing for a reform government, or any government for that matter, to bear in mind. It may be that if these attitudes show an influence on the way in which the law is interpreted and enforced over time amendments to the law may be in order to ensure that the spirit of the legislation is carried into action.

Apart from the evidentiary matters discussed in the substance of this article it is very likely that in the future there will be increasing pressures to remove the corroboration warning requirement and to remove the right of the accused person in a criminal trial to make an unsworn statement. These pressures will come from an unusual alliance between women's groups and police groups. These groups expressed strong views in regard to both these matters in the course of our research. The interesting thing about both these issues is that those in favour of retaining the status quo were really only lukewarm in their expressions of opinion on the matter, especially in relation to the unsworn statement. It is difficult to make any kind of assessment as to the likely governmental response to the continuation of such pressures for changes. It is most probable, however, that changes in these areas would be resisted by the legal profession and a conservatively oriented government is more likely to take notice of the views of the legal profession than a reform-minded, liberal oriented government.

On the whole the police and medical approach to dealing with the victims of rape in South Australia is a laudable one but not completely free from criticism. The special rape squad consisting of four women was no doubt the product of pure motives but there was a considerable amount of doubt expressed to us as to whether women were necessarily more sympathetic towards victims or better able to establish rapport with them. The consensus of opinion

amongst the police themselves was that "it depended upon the individual". There was support for this view expressed by a number of marital rape victims we interviewed. It is possible that the scheme was introduced as an over-reaction to some of the more extreme elements of the Women's Movement who wish to have nothing whatsoever to do with men. The better solution would have been to provide for both sexes to be represented on the initial investigatory team, thus following the same principle as the doctors panel at the Queen Elizabeth Hospital. This approach would also remove the needless and oppressive repetition of interviewing which takes place under the present system.

In the case of the panel of doctors for the examination of alleged rape victims the principle seems excellent. In practice, however, our research revealed that there were problems in filling the roster, the doctors actually involved complained of long hours and inconvenience and they also expressed concern about the trial process and the lack of liason between the medical investigatory stage of a rape case and those responsible for conducting rape trials in the courts. These are all surely matters to be sorted out by a process of consultation between the parties and institutions involved? The principle at stake, that of providing an alleged rape victim with a choice between a male and female doctor is an excellent one and has received strong approval from various representative Women's groups in Adelaide and, apparently, no significant adverse comment from any circles. Its future does depend however, on the continued co-operation and contribution of the Adelaide medical profession.

In her review of rape law reforms in Australia Deidre O'Connor concludes that:

> "A summary of the moves to reform the law of rape in Australia presents a picture of great activity with few constructive results. The spate of legislation which has followed either recommendations of commissions or initiatives within the legal bureaucracy of State Governments has made the law of rape even more confusing and potentially inequitable than it was prior to the "reform". - It is clearly arguable that reform of the substantive law is necessary but without

some centralisation the result has been duplication of activity and a confused national picture."
142

We are not concerned to join issue with the questions of unformity between States and centralisation. We can only comment on South Australia and in that respect our view is that the legislative, procedural and administrative approaches to dealing with the problem of rape, with rape cases and rape victims are now considerably more advanced and more enlightened in South Australia than they were before the changes which we have examined in this article. There are delicate questions of principle at stake, there are considerable problems of drafting and of practical implementation but, on balance, the whole reform exercise has been well worthwhile. Any jurisdiction in the common law tradition contemplating rape law reforms ignores at its own peril the South Australian experience.

Footnotes

This Report is the product of research carried out by the authors in South Australia during 1978. This research was made possible by Grant No. 11 of 1977, provided by the Australian Criminology Research Council. The authors gratefully acknowledge the support of the Criminology Research Council. The authors also wish to record their thanks to Michelle White who carried out a good number of the interviews with rape victims and women's groups and rape crisis centre personnel in Adelaide and the Adelaide area.

* LL.B. (Melb.); M.S.A.J. (American); M.Phil. (Cambridge).
Lecturer, Legal Studies Department, La Trobe University, Melbourne, Australia.

+ B.A.; LL.B (Tas), Ph.D. (Cambridge).
Professor, Department of Criminology, Simon Fraser University, Vancouver, Canada.

1. Royal Commission on Human Relationships, Final Report, Volume 5. Part VII, Rape and other Sexual Offences, Australian Government Publishing Service, Canberra, 1977, p.159.

2. For a summary and analysis of the major changes in rape laws and administrative procedures in Australia during the 1970's see Deidre O'Connor. "Rape Law Reform - The Australian Experience" Parts 1 and 11 (1977) 1 Criminal Law Journal 305 and (1978) 2 Criminal Law Journal 115.

3. Section 73 Criminal Law Consolidation Act Amendment Act, 1976.

4. The relevant pieces of legislation are the Criminal Law (Sexual Offences) Amendment Act, 1975, the Criminal Law Consolidation Act Amendment Act, 1976, the Evidence Act Amendment Act, 1976, and the Justices Act Amendment Act, 1976.

5. For a commentary on these changes see John Willis, "Sexual Offences Law in South Australia: A Special Report", (1976) 2 Legal Service Bulletin 31 at p.42.

6. ibid n.3

7. The amendments to the Evidence Act and the Justices Act (see note 4 above).

8. Section 34i of the Evidence Act (S.A.).

9. Section 106 (6A) of the Justices Act (S.A.)

10. Section 71(a) of the Evidence Act (S.A.)

11. For an account of these changes see the article by Deidre O'Connor (Note 2 above) and Part VII of the Royal Commission Report on Human Relationships (Note 1 above).

12. An outline of the way in which this squad works is provided in the Special Report of the Criminal Law and Penal methods Reform Committee of South Australia on Rape and other Sexual Offences, South Australian Government Printer, Adelaide, March, 1976 at p.36. (Hereinafter referred to as the Special Report).

13. This was a recommendation made by the Mitchell Committee (see note 12 above) in its Special Report at p.38.

14. See the O'Connor articles (Note 2 above) and also generally Carol Treloar, "The Politics of Rape - A Politician's Perspective", in Rape Law Reform, ed. Jocelynne A. Scutt, Australian Institute of Criminology, 1980. (Ms. Treloar is a former Press Secretary and general policy advisor to Mr. Peter Duncan, the former Attorney-General of South Australia who was the leading architect of the legislative reforms).

15. At the time of writing the State of New South Wales was in the process of preparing a package of reforms to the laws of rape and the manner in which rape cases are handled in that State. The Criminal Law Review Division of the Attorney-General and of Justice has produced two Reports on Rape and other Sexual Offences. (Reports Nos.249 and 250 dated, 28 January, 1977 and 12 October, 1977 respectively).

16. It should be acknowledged immediately that much of the data used in this study is, from the perspective of a social scientist, impressionistic. While this imposes certain limitations the study does, so far as the authors are aware, represent the first attempt in an Australian setting to review systematically the progress of rape law reform in our jurisdiction.

17. ibid n.12

18. A lengthy interview conducted for this study with Mr. Peter Duncan, the then Attorney-General confirmed that the Dunstan Labor Government did attach a high priority to reform of the rape laws. Further confirmation of this is provided by Ms. Carol Treloar, Mr. Duncan's former Press Secretary and policy adviser. (See Note 14 above.)

19. Special Report, page 1.

20. Duncan Chappell, "Forcible Rape and the Criminal Justice System: Surveying Present Practices and Projecting Future Trends," (1976) 42 Crime and Delinquency, pp.125-126.

21. [1976] A C 182.

22. Louis Waller, "Victims on Trial - Prosecutions for Rape" SACC/SASK (South African Journal of Criminal Law and Criminology,) Vol. 1. No.2 July, 1977 p.147 at p.148.

23. R v BROWN [1975] 10 S.A.S.R. 139.

24. Advisory Group on the Law of Rape (Eng.), Report, Cmnd. 6352 (1975).

25. The Advertiser (Adelaide) 16 June, 1976.

26. (See Carol Treloar "Politics of Rape-" Note 14, above)

27. (See John Willis "Sexual Offences Law in South Australia -" Note 5, above.

28. In 1972 South Australia de-criminalised homosexual acts between consenting male adults in private. Under the Criminal Law (Sexual Offences) Amendment Act, 1975, homosexual acts between consenting adults (male or female) are no longer offences. South Australia introduced legislation in relation to abortion in 1970. This legislation allowed for legal abortions if performed by a doctor and supported on legislatively prescribed grounds by a second doctor.

29. A number of Adelaide criminal lawyers were interviewed for the study about various aspects of the new rape laws and their impact and implementation. A number wished that their names not be used. For simplicity sake we have simply assigned alphabetical tags to them for some sort of identification.

30. For a basic but interesting analysis of this phenomemon in the criminal justice context see Walter B. Miller, "Ideology and Criminal Justice Policy: Some Current Issues," The Journal of Criminal Law and Criminology, 64 (June, 1973) pp.141-162.

31. ibid n.14.

32. The figures relied on here are those supplied by Dr. P.N. Grabosky, Director, Office of Crime Statistics, Department of the Attorney-General, Adelaide, South Australia. The authors wish to record their thanks to Dr. Grabosky for providing this material.

33. These figures supplied by Dr. Grabosky had their source in the Annual Reports of the Commissioner of Police for South Australia.

34. These views wre expressed to the authors in informal conversations with a number of senior members of the South Australian Police Department Major Crime Unit.

35. See Special Report p.1

36. Special Report p.18

37. Special Report p.15

38. Editorial, The Advertiser, (Adelaide) 2 June, 1976.

39. Hale's Pleas of the Crown, Vol.1 at p.629.

40. Authority for this general proposition can be found as far back as 1631 in AUDLEY, (1631) 3 State Tr.402; Much more recently in R v COGAN and R v LEAK. (1975) 3 W.L.R. 316 it was re-affirmed that a husband can be indicted as a principal where he assists someone else to rape his wife.

41. Special Report p.15

42. Special Report p.14

43. A most useful and interesting treatment of the subject can be found in Jocelynne Scutt, "Consent in Rape: The Problem of the Marriage Contract", Monash University Law Review, Vol.3 June 1977 p.255 An analysis of the United Statessituation is provided in "The Marital Rape Exemption", New York University Law Review, vol.52, May, 1977, p.306.

44. 22 Q.B.D. 23

45. Gilbert Geis, "Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden," (1978) 6 Adelaide Law Review, 284 at p.288

46. ibid n.45 at p.288

47. [1949] 2 All E.R. 448

48. [1954] 2 Q.B. 282

49. [1972] 2 ALL E.R. 1350

50. [1974] 3 ALL E.R. 663

51. [1977] Crim.L.R. 290

52. The Special Report was submitted to the Attorney-General in March, 1976.

53. The Advertiser, (Adelaide) 2 June, 1976.

54. Letter to the Editor, The Advertiser, (Adelaide) 5 June, 1976.

55. ibid n.3.

56. See Geis ibid. n.45

57. Editorial, The Advertiser, (Adelaide) 9, August, 1976.

58. This case is discussed in some detail further on in this report but it should be stated at this point that the Greenway case was a case which would quite possibly have reached the same result after having been dealt with under the common law. Mr. and Mrs. Greenway were separated and there were Family Court injunctions in operation in relation to the marriage.

59. The Advertiser (Adelaide) 5 June, 1976.

60. Brisbane Courier Mail, 7 July, 1976.

61. The Advertiser, (Adelaide) 11 August, 1976.

62. The Advertiser, (Adelaide) 11 August, 1976.

63. The Advertiser, (Adelaide), 19 August, 1976.

64. The National Times, 27 September - 20 October, 1976.

65. ibid n.64

66. The Advertiser (Adelaide), 7 August, 1976.

67. ibid n.64

68. Parliamentary Debates, House of Assembly, October, 1976, p.1612.

69. ibid n.68

70. Parliamentary Debates, House of Assembly, November, 1976. p.1829

71. Parliamentary Debates, Legislative Council, November 1976. pp.2096-2098.

72. Parliamentary Debates, Legislative Council, November, 1976, p.2406.

73. ibid n.72 at p.2407

74. ibid n.72 at p.2534

75. See Jocelynne Scutt, ibid n.43

76. Some of these problems have been ventilated in cases decided by the South Australian Supreme Court and discussed in this report in the section dealing with evidentiary and procedural changes to the law.

77. GilbertGeis, ibid n.45 at p.302

78. See n.15 above.

79. N.S.W. Criminal Law Review Decision Report p.52.

80. ibid n.79 at p.52.

81. An allegation of rape within marriage followed by a claim that the husband and wife have been reconciled will, of course, pose considerable problems for the exercise of police and prosecutorial discretion. On the one hand the fact that a serious crime is alleged should give rise to a presumption that, provided the claim can be substantiated, a prosecution would follow. On the other hand a prosecution of a husband for the rape of his wife is not going to be particularly helpful as part of a reconciliation process.

82. The injunctions were granted to restrain the husband from assaulting, molesting, harrassing or otherwise attempting to communicate with his wife.

83. ibid n.51

84. See Transcript p.346 J.

85. See Section 73 Criminal Law Consolidation Act Amendment Act, 1976.

86. Proposals for the reform of the laws of the Australian Capital Territory in regard to rape and other sexual offences under consideration at the time of writing contain a limitation of the "defence" of marital consent where the spouses (whether legal or de facto) are living together. (See Arthur Watson, "Reform of the Law of the Australian Capital Territory Relating to Rape and other Sexual Offences", in Rape Law Reform ed. Jocelynne Scutt, ibid. n.14).

87. There has also, of course, to be a guilty mind on the part of the accused. The law as to the requisite state of mind was re-affirmed in Morgan's case. (ibid. n.21).

88. Section 4 Criminal Law (Sexual Offences) Amendment Act, 1975 (S.A.)

89. Section 3 Criminal Law Consolidation Act Amendment Act, 1976. (S.A.)

90. Special Report p.17

91. Carol Treloar, the former Press Secretary to the then Attorney-General, Mr. Duncan, has commented: "In retrospect it is to be regretted that the government did not undertake a review of the law wide enough to allow a total re-conceptualisation or categorisation of the crime of rape, or attempt to bring about a more far-reaching congruence between the nature of the offence and its causes, the politics of its incidence, and the laws relating to it. This, however, was not the Mitchell Committee's brief and the real political need to act and the need to be seen to be taking action were largely the imperatives of the time." (ibid n.14)

92. To the authors' knowledge no far-ranging analysis has yet been provided in the Australian context of the nature, meaning breadth and scope of rape as a concept and as an applied term.

93. So stated in an interview with the former Attorney-General, portions of which are extracted above. (see p.15).

94. Criminal Law and Penal Methods Reform Committee of South Australia (The Mitchell Committee), Third Report: Court Procedure and Evidence, 1975 Ch.5, para.3.3

95. ibid n.94

96. See John Willis ibid. n.5

97. R v BYCZKO (No.1) (1977) 16 SASR 506.

98. R v GUN, ex parte STEPHENSON (1977) 17 SASR 165.

99. op.cit. at p.521-2.

100. op.cit. at p.171.

101. op.cit. at p.171

102. op.cit. at p.173

103. op.cit. at p.173

104. re KRAUSZ (1973) 57 Cr.APP.R. 466 at p.472

105. Special Report p.52

106. Section 3, Evidence Act Amendment Act, 1976 (S.A.)

107. Criminal Law Review Division Report, p.28

108. op.cit. at p.539

109. op.cit. at p.529

110. op.cit. at p.173

111. op.cit. at p.179

112. op.cit. at p.530

113. op.cit. at p.522

114. op.cit. at p.185

115. op.cit. at p.170

116. op.cit. at p.175

117. op.cit. at p.186-7

118. op.cit. at p.517

119. op.cit. at p.538

120. op.cit. at p.539

121. op.cit. at p.527

122. op.cit. at p.520

123. op.cit. at p.169

124. (1977) 17 SASR 534

125. op.cit. at p.541

126. (1978) 17 SASR 479

127. (1979) 20 SASR 288

128. op.cit. at pp.291-292

129. At the most recent elections in South Australia the Labor Government was defeated and the Liberal Party won office.

130. See generally on this subject Duncan Chappell and Paul Wilson, The Police and the Public in Australia and New Zealand, University of Queensland Press, 1969.

131. Special Report, p.36

132. Duncan Chappell, "Investigating Rape: A New Approach," (1980), 5 Legal Service Bulletin, p.19 at p.20.

133. Special Report, p.38

134. Rather than go into intricate detail we have sought to survey a broad range of changes and innovative programmes instituted in South Australia.

135. In her paper on the politics of rape in South Australia, Carol Treloar, Press Secretary, to the Attorney-General during the reform period comments:

> "In accordance with those who refer to the South Australian Sex Discrimination Act, and to the amendments to rape laws, and to the law in general as inadequate instruments of social reform, we too knew the limitations of the law and law reform by themselves. Attitudes were what had to be changed; our reforms to the rape laws should not be seen only for what they were, but as part of the far wider general programme of the Dunstan government." (ibid n.14).

136. ibid n.45 at p.294

137. ibid n.45 at p.303

138. At a National Conference on Rape Law Reform held in Hobart, Tasmania from the 28-30 May, 1980 a number of resolutions were passed. Among these was the following:

> "This Conference Agrees that any immunity which currently protects men against prosecution for rape within marriage should be abolished, noting that:
>
> a) husbands have for many years been liable to be convicted of indecent assault if they in fact rape their wives, and this has not led to any "undermining of family life";
>
> b) the abolition of immunity for husbands would emphasise the community's condemnation of sexual violence within the family." (See Scutt, ibid No.14)

At a Conference attended by approximately 200 persons there were 4 dissentients from this motion.

139. See N.S.W. Report ibid n.15 at p.21

140. John Willis, ibid n.5 at p.21

141. op.cit. at p. 186-7.

142. ibid. n.2 at p.128

345.02532099423
f
SAL

SALLMANN, Peter & Duncan Chappell.

Rape law reform: A Study of the

CRC Meeting 10 June 1981.
Report approved for printing + distribution.

Mr Miller reported that he had sought Mr Johnson's assistance in this matter. Mr Johnson advised that Mr Eakin had been in contact with him and indicated that the final report on this project would be received by the Council prior to the next meeting. This item will be included on the agenda for the next meeting.

(c) Grant 20/75 - Mr R. J. Homel. The Council received a letter dated 14 May 1981 from the grantee in which he indicated that the first three chapters of the final report had been completed and that these could be made available to the Council. It was resolved to thank Mr Homel for his letter and request that one copy of the first three chapters be forwarded to the Council.

(d) Grant 11/77 - Dr D. Chappell and Mr P. Sallmann. The Council resolved that the final report of this project should be made available to the Law Department or the Attorney-General's Department in each of the six States and two Territories. The Council requested Mr Miller to contact Mr Sallmann to ascertain what arrangements had been made for the distribution of the report and to advise him that the Institute would take responsibility for printing the report and distributing it to the various departments.

(e) Grant 5/79 - Mr H. Van Moorst. This progress report in the form of occasional papers was received and noted. It was resolved that Dr Seymour telephone the grantee conveying the Council's concern that the final report should not contain personal statements unsupported by research data. The inclusion of statements of this kind in the occasional papers was drawn to the Council's attention by Mr Johnson.

4. CRIMINOLOGY RESEARCH FUND

(a) The Council resolved that the Statement of Receipts and Payments as at 20.5.81 be received (Attachment 'A').

(b) The Council resolved that the Funds Statement as at 20.5.81 be received (Attachment 'B').

(c) The Council noted the Summary of Approved (on-going) Grants to 31.3.81.

(d) Draft Estimates of Expenditure 1981-1982. The Chairman advised that because of the direction by the Government for strict financial restraint, a request for an increase in the level of funding would not be advisable. It was therefore resolved that an amount of $50,000 as the Commonwealth Grant, be sought for the financial year 1981-1982.

5. NEW APPLICATIONS FOR RESEARCH GRANTS

(a) Application 5/81 - Professor W. D. Fenz - 'The Adaptive Nature of Anxiety in Anticipation of a Stressful Event'. The Council rejected this application because of doubts as to the proposed methodology, because the practical value of the research had not been demonstrated, and because access to data was not assured.