THE ROYAL COMMISSION ON HUMAN RELATIONS

— A comment on the recommendations related to rape and sexual offences against young people.

Richard Chisholm

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The Report of the Royal Commission on Human Relationships was not only about sex, and not only about law; but many of its more controversial recommendations concerned the role of the criminal law in connection with sexual behaviour. Though some of the ideas are new, much of the Report brought together in a lucid and available form arguments that serious scholars have been urging for years. The reaction of some members of the community — especially Prime Ministers and bishops — nevertheless shows how far some community leaders are from a thoughtful, or even non-hysterical, appreciation of the issues. Ironically, their reactions demonstrate how much we needed the report.

In this column, I will summarise the Commissioners' recommendations about rape and sexual offences against young people! Later, probably next time, I will look at the areas of abortion, incest, and perhaps the legal context of family planning.

Rape

Susan Brownmiller declared that rape is "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear."[2] Rape has become, for feminists, a political issue. Yet current trends among criminologists and criminal lawyers in other areas is towards a greater concern with justice for defendants, and an increasing questioning of the effectiveness of the criminal law. It looks like a head-on collision, and in her preface, Ms Brownmiller tells how her work on rape led her to see "the civil rights movement, defense lawyer heroics, and psychologic sympathy for the accused" as anti-female.

I find myself with divided loyalties here, because I am in sympathy with both the feminist and the civil rights perspectives, and I would have thought that they were compatible; indeed, different aspects of a just society.

There has been a great deal of though given to rape in the last few years, and there is a vast recent literature discussing various reforms. I claim no particular expertise in this highly specialised field, and in what follows I refrain from much comment. But I would like to say that I am very much in sympathy with the Report, and it seems to me a major contribution to working out a law that is both humane and just. In particular, the proposals on rape seem to me to go a considerable way towards resolving the apparent conflict between the principles of a fair trial and a recognition of women's rights. I should add that in this summary I have simplified the argument and the recommendations: I urge those who are interested to read the Report itself, which is both more detailed and more eloquent that what follows.

Rape as presently defined consists of the traditional two elements of a crime: a prohibited act (actus reus [8] "guilty act") and a specified mental state (mens rea — "guilty mind").

The prohibited act is sexual intercourse with a woman without her consent. The mental state is that the act is intentional. Normally, the mental state is easy to prove, in that it is difficult to have intercourse without meaning to; but the accused can argue that he **thought** the victim was consenting: if the jury believes this, they should not convict.[3] Note that violence, threats etc. are no part of the definition of the crime. But they are very important as evidence relating to whether the woman consented.

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Rape differs from most offences against the person in that women are not inherently averse to sexual relations, whereas normally people are averse to assaults. So consent is the key issue, and the point taken by the defence is often that the woman consented. It is on the issue of consent that the familiar problems arise from the point of view of the victim: the police may subject her to a harrowing examination before they decide to press charges, and she will be subjected to long and severe cross-examination in court on two occasions: at the committal proceedings before a magistrate and again before the jury at the trial in the Supreme Court. This cross-examination usually goes well beyond the facts of the case, and she may face accusations relating to her general morals and prior sexual behaviour. The feminist movement, in its work in rape crisis centres and women's refuges, has rightly drawn attention to the rigours of this process, and the fact that it is one reason for the serious under-reporting of rape. The system appears one-sided. It is the victim, the woman, who seems to stand accused, since the trial focuses on her character and behaviour; whereas the accused's sexual history cannot be revealed, and he need not even give evidence: he may choose to make a statement from the dock, and so escape cross-examination altogether.

Present Law

Yet the present law gives the accused only the rights of **any** accused in the elaborate system of criminal justice which is supposed to prevent people from being falsely convicted. And **some** false accusations are surely made. Thus the law faces the dilemma: how to remove the awfulness of the present system without sacrificing the standards of a fair trial[0]

The Commissioners point out that to some extent, criticism of the system is misguided, as when it is argued that the woman should be legally represented. The proceeding is not a personal battle between the woman and the accused. It is a criminal prosecution by the Crown, in which the woman is merely the chief witness. The accused in rape trials has the same rights as accused in other criminal matters: it is a general principle that the character of the accused cannot be revealed, lest he be convicted on his reputation; and it is a general (though controversial) principle that the accused should not be forced to subject himself to cross-examination. The intense pressure on the woman stems from the nature of the issue, whether or not she consented.

Changes In Procedure

Nevertheless, the Commissioners acknowledged the injustices in the present system (as have other law reform groups in recent years) and recommended some important changes in procedure:

1. The woman should not be cross-examined on her prior sexual history, except by order of the Court, which can only be given in the following circumstances: (a) where the prior sexual acts are alleged to have taken place between the victim and the accused, or (b) where they are part of a pattern of behaviour which was strikingly similar to her alleged behaviour at the time of the alleged offence or (c) where it is relevant to explain the source of semen pregnancy or disease.

2. There should be a minimum of four men and four women on the jury of twelve.

3. Publication of identifying materials should be forbidden.

4. At committal proceedings, the woman need not give evidence in person; an affidavit will suffice, unless the magistrate orders otherwise.

These recommendations are broadly in line with those of several other law reform bodies in recent years.

Commissioners Go Further

However, the Commissioners go further, and recommend important changes in the law of rape itself. They say that rape, as presently defined, covers too much — it may be a violent attack, or at the other extreme a consenual relationship "where the male goes further than the woman intended". The law does not distinguish between slight cases and severe ones, and gives too little importance to the surrounding acts of violence.

The Commissioners' solution is therefore to focus on violence and threats, where they exist. They would abolish rape as such and substitute a series of offences based on the degree of violence, threats etc., where they are committed with the intention of effecting sexual penetration. This is to be built into the existing criminal law. Thus s. 33 of the **Crimes Act** (N.S.W.) imposes a maximum penalty of life imprisonment for the offence of maliciously wounding, inflicting grievous bodily harm, or shooting at a person with intent to do grievous bodily harm, or shooting at a person with intent to do grievous bodily harm. The Commissioners would amend this by adding an alternative intent: "or to effect sexual penetration of any person". Similarly, other offences such as attempts to choke with a view to effect sexual penetration of another person, would be created.

These offences would replace rape in most instances. The seriousness of the offence would vary according to the seriousness of

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THE SECOND INTERNATIONAL CONGRESS ON CHILD ABUSE AND NEGLECT
will be held at Imperial College of Science and Technology, Kensington, London, from 12 to 15 September 1978, on

THE ABUSED CHILD IN THE FAMILY AND THE COMMUNITY

Themes will include:

1. The rights of the abused child, his development and his needs for treatment, for care and for parenting.
2. Family problems and interactions within the family, however constituted, including the rights of the siblings and the parents.
3. The community's responsibility towards the abused child and towards his family.

Other important subjects to be discussed include:

Prediction and prevention. Assessment, management and treatment needs, Follow-up studies of abused children and their families and methods of assessment, New developments in methods of work and their impact on clients and workers, The tasks and needs of professional workers, of lay helpers and of self groups and the problems of their organisation, Problems of the law and of court action.

Each day will begin and end with a plenary session. The rest of the programme will be planned round seminars, workshops, and small discussion groups and will include films and videotapes.

Accommodation for delegates has been reserved in the halls of residence at Imperial College and in neighbouring hotels.

Requests for further information should be directed to Conference Services at The Conference Centre, 43 Charles Street, London, W1X7PB.

The provisional programme and registration forms will be available shortly from the Children's Welfare Association of Victoria, 313 Kingsway, South Melbourne 3205.

NOTE:

The Children's Welfare Association are planning a three week tour to England which will include this conference in the first week.

The second week will focus on visits to agencies within the Greater London Area and the third week will be free for private visits and sight seeing.

The total cost for the tour was not available at the time of going to press but if you require further information please fill in the attached coupon and forward to the Association office.

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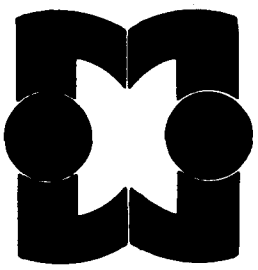
the accompanying violence. Consent would not be an issue, nor would it matter whether sexual penetration had been effected. Incidentally, the commissioners quite rightly draw their new offences wider than attacks by men against women: obviously, homosexual attacks should be as subject to the criminal law as heterosexual ones. This point also applies to sexual relations with young people, considered below.

However, there still remains the problem of sexual penetration without violence or threats, but also without consent. Perhaps the victim was so intimidated that no threats or violence was necessary: many women believe quite plausibly that to fight back may make things worse. This situation is to be covered by an offence of assault whereby sexual penetration is effected: the penalty is higher (14 rather than 5 years) where two or more people act together in committing the assault. Consent would be a defence here, so the problem would not be totally avoided. But it would only arise in the less serious cases. And in those cases the problems would be mitigated by the procedural changes mentioned above.



Criminal law, sex and young people

The present law varies among the States and Territories of Australia, but there is a common pattern, in which certain sexual acts committed with or upon young people are prohibited by the criminal law. The present law imposes penalties of life imprisonment (20 years in Victoria) for "carnal knowledge" of girls under ages ranging from 10 to 13 years. Consent is not a defence, the assumption being that the child is unable to give a consent which ought to be recognised in law.

There is then a more complex pattern of offences for girls over 10-13 but under 16 or 17. Basically, it is an offence for a man to have intercourse with a girl in this age group, whether or not she consents. The offence is called "carnal knowledge", and carries a penalty less than rape, but substantial. The variations between the States are summarised in the Report: (p 208).

The Commissioners' reforms in this area are not radical. They agree with the distinction between children and young people, and set the age for "children" at 10. The arbitrariness of the cut-off point is acknowledged, but "we know of no alternative: devices which might provide flexibility deprive the law of its certainty."

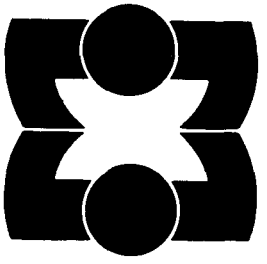
Children Under 10

Sexual intercourse with children under 10 will remain an offence, regardless of "consent", and will carry the penalty for the most serious form of rape. Sexual molestation short of penetration will be the lesser offence of "indecent assault", a summary offence. The existing offence of "attempted carnal knowledge" will be abolished. Where threats or violence are used, the offender will also be guilty of the appropriate category of assault (see above).

But the most difficult questions in this area are procedural: the involvement of the child in the legal process might cause further damage, perhaps worse than the effects of the offence itself. The child has to tell the story over and over to different people, perhaps be cross-examined, and this process can drag on for months. How can the children be protected without sacrificing the fairness of the trial?

High Correlation

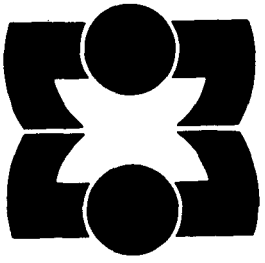
Reviewing the evidence of de Francis[4] and Gibbens and Prince[5] the Commissioners found that there was a high correlation between sexual abuse of children and family pathology. Even apart from those cases where the offender was a member of the family (25%) there was a high rate of neglect, and of the parents' contribution to the circumstances of the offence (72%). Thus "most families whose children become victims of sexual offences are urgently in need of assistance in a social sense". Yet this is not reflected in the prosecution machinery: the decision whether or not to prosecute is usually taken by the police with little intervention by child welfare agencies. This is a pity, because the decision whether or not to prosecute ought to be mad only after a weighing up of the balance between law enforcement, and the needs of the child (which might be better met by means other than the criminal law).



Two Measures

The Commissioners recommend two measures to deal with this problem. First, they recommend that all cases of sexual abuse against children be referred to the child protection service (i.e. the body they recommend should be set up to deal with child abuse generally). Second, there should be stablished a child protection tribunal, whose job is to decide which cases should be prosecuted. The tribunal would be closed to the public, and would work from written reports only.

from the Court when the child gives evidence. Similar pre-trial concerences are recommended for summary proceedings.



Lessen the Trauma

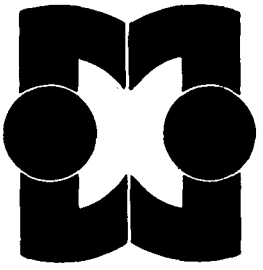
Certain measures are suggested to lessen the traumas of the trial for the child victim. Committal procedings on indictable offences should normally be based on the written evidence of the child, who would therefore be spared two episodes of cross-examination. Cross-examination cannot be dispensed with altogether at the trial: it is a basic part of the criminal justice system. But a pre-trial conference should be held to see how far the child can be spared. At the conference would be the judge, the prosecutor, the defence counsel, and the child protection service. Wigs and gowns could be dispensed with, and perhaps the public cleared

Children Over 10

We now turn to the other part of this topic, sexual offences with young people over 10. The Commissioners point out the irony that 100 years ago the age of consent was 13, now it is around 16; yet over the same period the menarch has dropped from about 16 to about 13. "We consider that the present law is unrealistic and unfair. While its apparent aim is to protect young girls, its common effect is to put the young male who takes part in a consenting sexual relationship at risk of prosecution. The girl who has, in fact, committed no offence, is sometimes dealt with under the Child Welfare Acts as being in moral danger. This can be a quite inappropriate way of treating a youthful relationship."

Crucial Point

The Commissioners then make what seems to me to be the crucial point. The aim of this part of the law is to protect young people against exploitation by older people, particularly those in authority over them, e.g. schoolteachers. It is, as the Commissioners mildly put it, "inappropriate" for a boy and girl who develop a sexual relationship to run the risk of the boy getting a prison sentence of some years. The criminal law is not the way to tackle any problems that might exist in a sexual relationship between young people.



System Liability

On the basis, the Commissioners agree with the system of liability on a relative age basis. The recommendation is that the age of consent should be 15; and the offence is only committed if the other person is five years older than the victim. Thus the 18 year old boy who lives with his 14 year old girlfriend does not come within the criminal law; but if his father seduces her while he is away, the father commits an offence. This rule only applies if the "victim" is 13 or over; since puberty generally occurs about 13, the Commissioners thought intercourse below that age is substantially more likely to be exploitative and damaging, both mentally and physically. They made no formal recommendation for a relative age rule here, but stated that where the other person is within two or three years of the "victim's" age, "common sense should dictate that criminal proceedings are quite inappropriate as a way of dealing with the matter."

Moderate

I am sure that these recommendations will be critically evaluated — I hope they are. Perhaps there are holes in them which I can't see. They seem to me to be carefully thought out, moderate proposals; innovative indeed, but well within the limits of conventional wisdom. They are not upopian ramblings, and could be implemented tomorrow. Well, if these proposals do not seem calculated to bring about the collapse of civilised society as we know it, what about abortion[0] What about incest[0] We can look at those next time.

FOOTNOTES

1. **Report of Royal Commission on Human Relationships, (AGPS 1977) Vol 5.**
2. **Against Our Will** (Penguin 1976) p 15.
3. In **D.P.P. v Morgan** (1975) 2 W.L.R. 913, the House of Lords held that a mistaken belief that the woman consented is a defence even if there was no reasonable grounds for it. The Report, Vol 5 p 266ff, gives an excellent commentary on the case.
4. Dr Vincent J de Francis, **Protecting the Child Victim of Sex Crimes Committed by Adults** (1969).
5. T.C.N. Gibbens and J. Prince **Child Victims of Sex Offences** (ISTD London).

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