

## PAPER PRESENTED BY THE MINISTER OF JUSTICE

- Hon. J.K. McLay

Traditionally, studies of crime have been orientated towards either or both the offence and offender. In other words: the analysis of crime has been presented in terms of offences committed - crimes which have been detected and followed up - and emphasis has been placed on a description of offenders. The significant thing about this is that the victims of crime have tended to be neglected. More recent overseas studies have tended to correct this offender bias in favour of a more victim oriented approach although little work of this nature has been done in New Zealand.

Particularly in the United States of America it has come to be recognised that the conventional information about crime based on police and court records is not only inaccurate but also misleading. Experience in the U.S.A. with victimisation surveys has shown that the incidence of forcible rape in the community is much higher than might be indicated by official statistics.

This is of course consistent with the experience of Rape Crisis Centres in New Zealand. In fact it is widely believed that a large proportion of rapes are not reported to the police.

An analysis of the police records of rape complaints also presents problems. There is a considerable element of judgment and discretion in the police handling of rape complaints. Many of the decisions which the police have to make determine whether a complaint is taken further. Moreover, it must be emphasised that there are inherent difficulties involved in the prosecution of a case. Thus, the police, and consequently the court's records tend to present a one-sided view of rape as a social phenomenon; and this may well have led to the entrenchment of myths about this crime.

Paul Wilson, an Australian sociologist, has commented, "there is no assurance that we can take for granted ... that rape is basically a crime perpetrated by unmarried working class drunk young males, that because of prior acquaintanceship the victim initiates the crime and that severe damage to the victim is a relatively infrequent event"

The Rape Study:

In recent years in New Zealand pressure for change has arisen from the same impetus and heightened consciousness of the offence that is evident abroad.

I have asked for a study on rape to be carried out that will examine in detail some of the issues that are currently under discussion.

The terms of reference for the present rape study, which is being undertaken jointly by my department and the Institute of Criminology, Victoria University of Wellington, are to determine whether the law and the criminal justice system procedures should be modified to recognise the special problems encountered by rape victims and, if so, to recommend in what ways this should be done.

This does not, of course, mean that other views will not be relevant or significant. That is why so many people from such a range of diverse organisations - professional and voluntary - have been invited to contribute. Above all we must not perpetuate systems and processes that further victimise the victim - if in fact we find this to be the case. It is our task, in concert with others, to discover whether and to what extent this victimisation exists, and if so how we might correct this without at the same time jeopardising the rights of the accused person.

Having said this, I would like to turn to some of the issues involved in the problem of rape and in so doing I particularly want to place some emphasis on their significance for the victim and her experience with the criminal justice system.

Whatever the underlying and precipitating causes of rape, it is important to remember that it does not occur in a social or political vacuum. One particular aspect of rape that has been repeatedly demonstrated in overseas studies is that it is a crime surrounded by deeply entrenched myths. Many of these myths have their origins in past and prevailing attitudes - attitudes towards women and their role in society, attitudes towards the masculine

role and its connection with the dominance of the male in sexual behaviour. Others are based on a view of the offender and victim that result from prosecution processes.

We do not know enough about the views held within our own society about rape. We do know that many people have their own theories and remedies - many of these are conveyed to me as Minister of Justice (some in the most colourful language). We know that there are assumptions about the kind of people who commit rape and the kind of people who get raped. There are others about rape itself - the significance of the act and its consequences. How widespread these are and what variations upon them exist, we can only guess.

The more common myths include

- Rape is impossible.
- Women ask to be raped - they have only themselves to blame.
- Only women who flaunt themselves will be raped.
- Women don't know their own minds - they secretly enjoy rape - they pretend to resist then co-operate.
- Women lie about sexual matters - there are a lot of false complaints.
- A woman who has really been raped will tell someone as soon as she can.
- If a woman has really been raped she will report to the police.
- A woman who has been raped will be able to give clear and accurate details.
- A woman will physically resist rape; will scream and try to escape.
- Most rapes are committed late at night in deserted streets on women who go out alone.
- Rapists are psychopathic strangers, dirty old men, vicious blacks, frustrated single men and/or working class.
- Rapists are after sex, so they choose 'sexy' or 'provocative' women.

- Everyone is against rape. Society sees rape as a dreadful crime and punishes it accordingly.
- The victim receives sympathetic and understanding treatment.

In 1977 a small rape victim survey was conducted by the National Organisation for Women in the form of a voluntary - return questionnaire through the New Zealand Women's Weekly. I prefer to use this rather than to overseas material because it is local. (The results of a 1981 survey are not yet available).

This survey revealed a reality of a different kind from the current mythologies.

Of the women who were raped, 25% were under the age of 16; 4% were over 40 years old; 36% were married. Their occupations were: housewife, student, nurse, clerk, typist, laboratory technician, teacher, shop assistant, journalist.

Where were they? 19.6% of the victims were raped in their own home; 26.1% were raped in his home, 13.8% in a car; 10% in the country, 3.8% on the street, 3.8% in a park. Other places included beach, racecourse, cemetery, party, nurses homes.

In 28% of the cases, other people were present.

How did they react? The women were smaller than the men. Most of the women said they resisted - either verbally or physically. 33% were beaten, hit or choked.

Cases reported to the police - only 18.5% of victims reported their cases to the police. Of the 17 rapists involved, 11 were arrested and eight convicted. 59% of the rape victims considered they received unsympathetic treatment.

Who were the rapists? Only 18% of the rapists were strangers to their victims. Their attitudes towards their victims were described as: Calm and matter of fact (34%), contemptuous (25%), hostile (12%) and/or righteous (11.5%). The profile of men

involved emerged as someone in his twenties and predominantly European. A large proportion were married. Occupations ranged over accountant, driver, teacher, labourer, policeman, soldier, engineer, company manager, town clerk, unemployed.

Some of the effects of the rape experience on their lives included: nightmares, 42%; loss of self-respect, 37%; fear, 39%; hostility towards men, 30%; life affected sexually, 35%; loss of trust in male/female relationships, 34%; suicidal feelings, 36%, psychiatric care, 30%.

4% became pregnant - a figure which tends to answer the suggestion that women will "invent" a rape to explain a pregnancy.

A commentator remarked: "of particular concern to psychologists was that over a third had nightmares and a quarter had contemplated suicide with 20% seeking psychiatric care. This is a high number since only 46.8% sought any form of psychological support". 53.2% suffered in silence and wrote that they had not talked about it before answering the questionnaire."

Overseas research, including that conducted in Australia, bears out the main findings and particularly that a majority of women not only do not report rape but that many do not tell anyone about it.

This research also discredits the myth that rape is an isolated crime of sexual perversion. It shows instead that rape is one of the more common forms of violent crime. The fact that most rapes are not reported tends to obscure the true incidence.

Research has also cast doubt on the contention that were it not for learned, social controls, all men would rape. Rape is not, however, universal to the human species. Studies of rape in 'western' societies tend to suggest that instead of being the result of impulsive, uncontrolled behaviour, most rape is planned. And further, it is contended in our societies, rape is learned behaviour stemming from the kind of socialisation that encourages aggression from males and passivity from females.

Reactions to rape - the victim.

There are problems for the victim whichever way she reacts to a rape experience.

Opinions vary on whether a woman should submit to an attack or try and prevent it. Advice to women reflects this uncertainty. If she resists, she may provoke further violence. If she submits she faces condemnation on the score that it is a woman's duty to defend her honour even if this jeopardises her own safety. If she then reports the rape she will have difficulty convincing the police of the validity of her complaint and a jury of the absence of consent. Further, if she appears to be physically unharmed and even calm, this can be adduced as a further indication that her claims cannot be taken seriously.

It has been said that a woman's case is more easily proved if she has been badly beaten, if torn clothing attests to a struggle and if she is emotionally distraught. Otherwise, the victim must virtually 'prove' that she has been victimised and that her complaint is not vengeful, malicious or unfounded.

The psychological injuries suffered by victims are a matter of concern. What has been termed the 'rape trauma syndrome' or the 'rape crisis trauma' may seriously handicap the victim for some considerable time. Some respondents, for example, in the NOW survey wrote that they had not told anyone of their experience for 30 years and even with the lapse of time they were able to describe the event in great detail.

The psychological reactions of a woman who has been raped are said to be similar to the reactions of people who have experienced other sorts of crisis such as severe accidents or the death of someone close to them.

Researchers have observed a common pattern of emotional reaction which has been termed the 'rape trauma syndrome'. Three phases are usually described. These are:

1. The acute phase.
2. The adjustment phase.
3. The integration phase.

The effects of the crisis can influence the victims experience with the criminal justice system, often to her disadvantage. Her responses may be inappropriate in terms of the standard procedures for investigating and prosecuting rape cases. She may be unable to relate the incident fully or accurately. Following the assault, some victims revert to a state of dependence or helplessness. Decision-making may become an ordeal and the victim is very susceptible to pressure and highly sensitive to the attitudes and judgment of authority figures. Victims often experience feelings of guilt and assume an undue responsibility for not avoiding a dangerous situation. These feelings can be reinforced by questions about her inability to resist successfully or escape.

If the people on whom she relies within the criminal justice system are guided or influenced by some of the social myths about women's behaviour great harm can be done to her personally and to the successful prosecution of her case. Her performance as a witness can be seriously impaired.

The victim who reports a rape is at a serious disadvantage if those interviewing her have little or no understanding of her emotional state. In consistencies, lapses of memory and her demeanour can lend undue credence to a defence counsel's case.

The rape victim must contend with the rape experience and its effects with or without support.

If she reports the rape and the case proceeds, she assumes the role of complainant - the chief witness for the prosecution in criminal proceedings. Such a role can result in a number of problems for the victim, and the anticipation of these may influence her not to pursue this role. As a witness the complainant provides, in court, evidence that a rape has taken place and recalls the events of the alleged crime. Following this she is subject to cross-examination by counsel for the accused.

Prior to the Evidence Amendment Act 1977 defence counsel often adverted in cross-examination to what was considered to be largely irrelevant but highly prejudicial aspects of the complainants character and behaviour (particularly her sexual behaviour). The victim, as the prosecution's chief witness, could be intimidated and the thrust of the trial could be moved away from the accused. Arising from this was the perception that it was the complainant and not the accused who was on trial. Although the practice had been widely criticised, by the N.Z. Law Society for example, it was frequently used as a defence strategy.

The Evidence Amendment Act inserted a new section into the Evidence Act to make substantive and procedural changes in trials where the accused is being prosecuted for a rape offence. Procedurally, the section required that the court may hear evidence relating to: (a) the complainants sexual experience with persons other than the accused; or (b) her sexual reputation; only by leave of the trial judge.

The research now being undertaken will tell us how effective this legislation is or whether innuendo has replaced direct questioning or whether emphasis is placed on other aspects of the victims character in order to discredit her as a witness and thereby casting doubts upon the rape allegation.

Even with certain protections, similar to those in the Evidence Amendment Act, overseas experience has shown that one of the most striking aspects of defence arguments in sexual offence cases is the extent to which stereotypes of what constitutes typical female



behaviour are marshalled to discredit the witness and her testimony. Such arguments resort to stereotypes about how women are supposed to act in situations, comparisons are made with the way in which the victim responded, and these are used to 'prove' that her behaviour in the circumstances should be regarded as suspect. In the words of one authority, "this is a highly insidious method of argument and one that is exceedingly difficult to rebut because it proceeds from myths, not facts".

Given the effects of the rape experience on the victim, such tactics are highly damaging to her self-confidence and engender a reaction to the legal process itself.

The focus of attention on rape and the sense of urgency that has come about through research, surveys, and from political pressure has produced many changes in the way criminal justice systems overseas have responded to the problem of rape.

Many of the changes effected to date have been largely procedural; though reform of rape laws has now gained some momentum. Basic to the matter of legal reform is a recognition, as an Australian Criminologist noted, that: "Laws alone do not necessarily effect a change in peoples behaviour. New rape laws will not by themselves change the deep-seated public attitudes about sex roles and behaviour which account for many of the problems associated with this crime". I share that view.

It would nevertheless be naive to presume that the laws themselves did not embody some of these deep seated public attitudes for laws are not created in a vacuum. For this reason they should be scrutinised carefully to see whether there is relevance to today's needs. Moreover, there is a special obligation on those of us who are connected with the law and for others involved in decision making processes to be among the first to submit our own attitudes to close scrutiny.

Procedural changes may, in theory, be easier to introduce but again underlying attitudes must change if they are to be effective.

I would like to mention two points that are of concern to those who see the fears in them as obstacles to rape convictions. Both are, in a special sense, also linked to the area of the myths mentioned earlier.

1. Rape laws and the relevant literature have been dominated by fears that false rape charges might result in the conviction of innocent men. False complaints are particularly feared in rape cases because of the assumption that many women are hostile to men, amoral or that they can induce conviction solely on the basis of fabricated reports. The motives for such false accusations are said to be: shame, protection of another person, blackmail, hatred, revenge, malice or notoriety, fantasy. Bearing in mind the vital principles of innocence until guilt is proved, and of the burden of proof resting on the prosecution, if those complaints were substantiated by fact they would be well grounded. However in fact they are largely not capable of being substantiated.

The disincentives to report rape and the rigour of criminal investigation and legal rules should make such motives and actions extremely rare. There has been no rigorous research or analysis of these assumptions and yet they retain their currency. Such fears, one prominent American authority notes 'have produced and sustained laws and attitudes that seek to protect the innocent from unjust rape, rather than to protect women from rape'.

2. Associated with the assumption that women make false rape charges, is the belief that it is difficult to defend against a charge of rape. Lord Chief Justice Hale's dictum that rape is a charge "easily to be made and hard to be proved, and harder to be defended" expresses those fears. He is still quoted extensively by legal writers and the reservation is still expressed in many addresses by defence counsel and even in some judges summings up to a jury.

## RAPE IN MARRIAGE

Lastly, there is the issue of 'marital rape'. Whether this will emerge as a priority for change remains to be seen. It is however, a subject that has concerned the women's movement and others who point out the obvious anomalies with regard to the personal rights of married women. Certainly I have no fixed or firm view on the topic.

The traditional common law position is that a husband cannot be guilty of raping his wife. The justification for this rule was that, as part of the marriage contract, a wife agreed to submit to the sexual and other demands of her husband. The rule is anchored in the period when wives were viewed as chattels belonging to their husbands and when their rights to own property or conduct other affairs were very limited.

A number of English Court decisions since the second world war have eroded this common law stance. The direction taken has been to remove the immunity of husbands in cases where court orders such as decrees nisi for divorce, separation arrangements and injunctions are in force in respect of the marriage. Overall these decisions have been characterised by a strong degree of caution.

In New Zealand, the Family Proceedings Act 1980 amended s.128(3) of the Crimes Act to provide that no man may be convicted of raping his wife -

Unless at the time of the intercourse he and his wife were living apart in separate residences.

In the debates on the issue in South Australia this aspect was said to have 'generated far more heat than any other aspect of rape law reform, presumably treading on many sensitive male toes'.

Two years after the rather qualified reform in South Australia, there were only two complaints lodged. None of the flood of complaints expected were received, none of the vindictiveness predicted and no cases of blackmail or fraud. The question being asked is 'does this mean that there are no rapes in marriage or is it simply the case that women are not prepared to bring such complaints to the notice of authorities?'

The question has been of special interest since studies have established that there is a substantial 'dark figure' of rape in marriage. Interviews with lawyers, shelter workers and women about their experiences revealed that women who seek refuge do so because of domestic violence which included forced, non-consensual sexual intercourse and a range of other physical brutalities. The true extent of domestic violence in Australia, as in New Zealand, remains concealed.

The reasons for the lack of recourse to the law are therefore not entirely clear.

A prominent criminologist commented "The rape in marriage reform in South Australia demonstrates how an apparently highly contentious criminal law can, in practice, ultimately be implemented in society with scarcely a ripple". In the end, most of the debate revolved around ideology rather than about substantive matters. The fact that the Swedish legislation passed in 1965 produced similar results and few prosecutions would suggest that some of the fears that had been expressed were groundless.

Whether any perceived difficulties outweigh what some regard as the anomalous and anachronistic idea that married women are in a different position from non-married women is a question that should be addressed. I expect the report I am to receive in a few months will canvass this issue - and certainly I reserve my judgment on the issue until that is received.

Many would agree that some improvements are needed in the way that society in general and the criminal justice system in particular treats the victim of rape. As I have pointed out, rape is a crime surrounded by deeply entrenched myths based on past and prevailing attitudes. Many women are justifiably impatient of their strength and tenacity. There is now a growing realisation that to tackle the problem of rape effectively, we need to start at a level where societal attitudes can be modified.

In the meantime, through discussion, consensus and informed opinion, it may be possible to identify shorter term measures that will relieve the situation of the victim without prejudicing the rights of an accused or pre-empting possible longer term solutions.

I have mentioned on several occasions that any changes that come about will be the result of a proper appreciation of the gravity of the problem of rape, the advice I receive and public opinion. If there are definite pointers to particular areas of change, I hope that these can be introduced promptly. It would however be short-sighted and indeed harmful to move precipitately without a full appreciation of any need for further refinement. Any change must also have a degree of public confidence and support if it is to be effective.

The necessity for avoiding piecemeal responses is underlined by a writer commenting on the South Australian reform of the laws relating to rape. Who said:

In retrospect it is to be regretted that the government did not undertake a review of the law wide enough to allow a total reconceptualisation 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.

It is interesting to note that the Attorney-General's Department in South Australia is now contemplating a study such as we are undertaking.

In this address I have not mentioned any specific suggestions or canvassed particular options since to do so would pre-empt the research that is now being done. I hope that a range of issues and problems have been and will be aired at this seminar and that discussion on them will be a further contribution to the widespread participation that I have invited.