INTRODUCTION

On 27 August 1982 the Legal Research Foundation conducted a seminar entitled "Sexual Violence A Case For Law Reform". The Foundation promoted this seminar at the suggestion of Margaret Wilson, a Senior Lecturer in Law at the University of Auckland, to examine the dissatisfaction felt particularly by interested groups with the administration and the law relating to sexual offences and a demand for action.

In consequence of the seminar the Foundation is pleased to publish the instructive and challenging papers presented by Margaret Wilson and the Minister of Justice, the Honourable Mr J. K. McLay, and Dr Johnson.

It is hoped, following an expressed aim of the Minister, namely, to promote and encourage discussion and examination of these problems, that these papers will contribute towards furthering that aim. In addition to the formal papers presented there were two panel discussions held: one entitled "The Profession's View" which comprised Mr D. S. Morris Crown Solicitor, Auckland, Mr Michael Bungay Barrister, Wellington, and District Judge R. J. Gilbert of Auckland; the other, took up a topic entitled "Are The Victims' Best Interests Being Presently Served". This panel comprised Chief Superintendent Brian Wilkinson of the Police, Dr Lan Johnson a Police Surgeon who is also a Student Health Doctor and general practitioner, Julie Pettit a Senior Probation Officer in Auckland representing the Help Foundation, and Chris Bennett for Rape Crisis.

Formal papers were not sought from the panelists but discussion and interchange that followed has enabled the Foundation to publish a paper written by Dr Johnson. Like Mr Wilkinson and Julie Pettit, Dr Johnson is involved with the administration of the Help Foundation.

THE PANEL "THE PROFESSION'S VIEW"

The following questions were posed for both panel and audience, namely:

a) Is the present definition of rape, namely, sexual intercourse without consent, satisfactory? Would there be any value in adopting the extended definition of sexual intercourse as in the N.S.W. Sexual Crimes (Amendment) Act (N.S.W.) 1981.

b) Is the time-honoured warning of Judges to effect "that it is dangerous to convict on the uncorroborated evidence of the complainant" either discriminatory and offensive to women or undesirable when offences, such as culpable homicide or 'white-

collar' offences do not carry such requirement?

c) Should there be any right at all to cross-examine a complainant on her sexual experience? Does the present right place a "premium on virtue" or constitute an invasion of a womans privacy? How is the discretion exercised by New Zealand Judges?

d) Should the requirement that there be recent complaint be abolished?

e) Would a total suppression of or closed Court situation assist?

f) Should the term "rape" be discarded?

Not all the points were taken up but some of the following salient points were made:

a) A consensus of opinion favoured extending the definition of rape by including the extended definition of 'sexual intercourse' as set out in Section 61A of the Sexual Crimes (Amendment) Act N.S.W. 1982, which states:

> "Sexual intercourse.
> 61A. (1) For the purposes of this section and sections 61B, 61C and 61D, "sexual intercourse" means -
> (a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by-
> (i) any part of the body of another person; or
> (ii) an object manipulated by another person,
> except where the penetration is carried out for proper medical purposes;
> (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;
> (c) cunnilingus; or
> (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c)."

Such an extension would obviate the need to rely on 'attempts' and overcome the problem caused by the requirement to prove any penetration of the female labia by the male member.

b) There was strong support for abolishing the practice of Judges to give the time-honoured warning of juries to effect:

> "that it is dangerous to convict on the uncorroborated evidence of the complainant."

The thinking behind this strong objection was that implicit in this rule of practice only is the inference that women are 'second class' or unreliable witnesses. The suggestion that the retention of this rule of practice was justified on another so-called "rule of experience" that charges of a sexual nature are easy to

make and difficult to refute was considered totally unsatisfactory. A consequence of abolition might be that it would assist the police and prosecuters in bringing charges of rape where there is no corroborative evidence of physical assault such as bruises, torn clothes, or the like. The N.S.W. legislation /Section 405C(2)7 directs that the trial judge is not required by any rule of law or practice to give such a warning. That means however that depending upon the circumstances it would be open for a trial judge to give such a warning if the corroborative evidence was very flimsy in the circumstances. On this question a lawyer raised a practical point (which argument really can be used to support the abolitionist's view), namely, that no matter what criminal trial one is dealing with, whether it be murder, white collar crime, or the like, the need for corroboration in one form or another is a must before a conviction will normally be sustained. Therefore why be concerned about change? Conversely it could be said why make it a requirement in sexual offences? It may well be open to argue that the rule could still be used when dealing with cases of child-complainants. The N.S.W. Act still preserves the warning where children are complainants. Again the same arguments of discrimination etc. can be suggested. In any criminal trial, defence or prosecution can place as much weight as possible on the absence or presence of corroboration without the need to elevate it to the position of being a rule. In the case of young complainants where experience shows that sometimes quite innocently their accounts can differ from say a deposition hearing to the District Court or High Court trial, counsel for the defence would not be disadvantaged by the abolition of this rule as it would be open for challenge to be made under the heading of "credibility" without having to 'dress-it-up' in the guise of a rule of practice which is discriminatory by present standards. It is just as important to a complainant that justice should not only be done but be seen to be done.

c) There was a further strong plea to abolish the right to cross-examine a complainant on past sexual experience. It was not seriously challenged by any of the legal speakers present. Mr Bungay gave an example where it would be unjust to prohibit such questioning (e.g., where a woman claims to being raped at a house and as part of the evidence semen fluid is found on the bedclothes and there was evidence that two days before she had had sexual intercourse in the same bed and the linen had not been changed. Should it not be

permissible for questions to be put to the woman on her past conduct). In New Zealand the legislation which covers the right to cross-examine a complainant on previous sexual behaviour is Section 23A of the Evidence Act 1908 (1977 amendment). There are considerable and defined limitations upon the right to so cross-examine. There was no real call for altering Section 23A of the Evidence Act 1908, it being felt that there was sufficient restraint embodied within that Section to meet present needs. Dealing with the right to question a complainant on her sexual experience a matter was raised which is perhaps an unfortunate consequence of deposition hearings preparatory to committal for trial: there is a general practice that counsel may lead evidence or cross-examine at depositions on matters which may ultimately turn out to be inadmissible, the admissibility of which being ruled upon at the trial. How does one overcome the problem? At deposition therefore a complainant could be subjected to an unrestricted questioning on her sexual experience which may be inadmissible and so prohibited by the trial judge. The real practical problem is that most depositions are presided over by Justices of the Peace who are not trained to rule on matters of evidence-admissibility. That is a matter which perhaps could be dealt with by making it mandatory for District Judges to be asked to sit through a deposition hearing where such questioning is to be raised, or at least have the matter referred to a District Judge for a ruling in the course of a deposition hearing being conducted by Justices of the Peace.

d) The consensus considered that the rule of practice relating to warning a jury about the need for evidence of recent complaint by a complainant should be abolished. The N.S.W. legislation S.405B(2) provides that where there is any questioning of the witness which tends to suggest an absence or delay in complaint being made by the complainant the Judge shall:

   i) give a warning to the jury to effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and
   ii) inform the jury that there may be good reasons why a victim of sexual assault may hesitate in making or refrain from making complaint about the assault.

Although the practices of warning that it is dangerous to convict on uncorroborated evidence and about the need for recent complaint could well be abolished as '<u>rules</u>', there is nothing to stop

counsel from emphasising these matters to a jury. It therefore may be helpful to adopt the N.S.W. approach, like Section 405B(2) (which specifically directs a trial judge to tell the jury that the lack of or delay in the making of the complaint does not mean that the complaint is false) in that case and where there is an absence of corroboration. It seems reasonable to accept that would-be complainants do not go around armed or trained to make a complaint to the police, or others, the moment they are the victims of rape. A reasonable jury should be able to understand it as normal that reaction time may differ from person to person. So the overall concern may be expressed, why elevate it to a rule when it is no more than just another piece of evidence that may be given in such a trial?

e) There was a call to abolish Section 128(3) of the Crimes Act 1961 as amended by the Family Proceedings Act 1980 which provides that no man shall be convicted of rape in respect of intercourse with his wife unless at the time of the intercourse he and his wife were living apart at separate residences. A speaker pointed to the anomalous situation of a rape charge being able to be laid against a de facto partner who lives with his partner yet not a married partner. Its retention appears to be another example of male "proprietary-right" thinking which should be laid to rest. We submit that it should be abolished. We further submit that it is discriminatory.

Finally the seminar discussions dwelt on the problem of complainant-children having to give evidence at trial. There was a suggestion that there be a guardian or lawyer appointed who could present the child's evidence on behalf of that child. This would involve a considerable change in the criminal law. In a sense it might be considered as not so radically removed from the use of the interpreter system. Certainly it is not foreign to other branches of the law where the aged and infirmed, mental patients and infants are represented by next friends, guardians or Court appointed counsel. These appointees represent persons with disabilities. They put together accounts on behalf of that person. The Courts rely on these accounts. Such a change to the criminal law is not beyond implementation and deserves examination. Overseas examples were pointed to where such a procedure is apparently in use. This procedure might equally be considered in the case of very elderly complainants.

In these remarks the Foundation has attempted to convey the mood and views of the seminar. The clear impression gained was that not only has the law failed to meet present thinking and need but also that the lawyers, the skilled technicians applying the rules governing trials involving sexual offences, did not or would not appreciate the need for change unless it advantaged his or her side.

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Convener