QUESTIONs:

Warren Young asked "Would written evidence suffice? Would psychological testing of the victim (e.g. Trauma scale) and lie detector information be acceptable evidence to prove credibility prior to Court appearance?"

It seems to me that in a post Freudian so-called sophisticated society, we could be far more intellectual and scientific in our approach to collection of evidence.

It seems that there is a tendency by police and lawyers to indulge in concrete thinking and to decide major issues on minor points, which brings me to -

The Question of Penetration:

It is always annoying to be cross-examined on this; to me it's not so much the penetration of the vagina that is important, but the degree of penetration of cerebral cortex. How much scarring up there rather than the lacerations down below.

I believe our definition of 'rape' must be changed to include any penetration of the genitalia and body orifices by any object used by the offender. Why do we consider the hymen important at all?

REGARDING THE NEW SOUTH WALES LAW REFORM:

Where the degree of violence used determines the category of sexual assault and thus the degree of penalty.

This worries me; how can one objectify "violence?"

A young girl raped after a Sunday school outing, who faints and suffers no physical damage but who requires years of psychiatric help later; or an Upper Queen Street lass who stoutly resists and gets thumped up with lots of bruising etc. but who says later, as she lights a fag, "Its all in a day's work"?

Who is going to measure the violence, and what sort are we going to measure? Is the onus on the doctor to state the degree of violence used?

I was once asked by a defence lawyer "You stated small lacerations around the vagina, doctor. Do you mean little violence was used?" I answered that to bring about even small lacerations with a blunt object such as most men have, indicates considerable use of violence. Again, black and white thinking "objectifies" the victim" rather than sees her as a person.

In the case where extreme violence is used, and this is not uncommon, and the victim is lucky to escape with her life, then surely it is rape plus attempted murder. My point is

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. McKay, 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 Professor'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 Len 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 woman's 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 immediate care, medical and psychological long term care and follow-up statistics, collection and dissemination of information family help and advice education and training of personnel are co-ordinated in one official centre and patient help is available 24 hours a day to any victim of any sexual assault.

One disadvantage of our centre, is that it is not located in a suitable part of the National Women's Hospital - where more facilities are available, both for care and for better collection of evidence (sperm motility etc.). Our Auckland Hospital Board, in their extreme wisdom, and after many approaches by the Committee, refused to assist HELP in any way. My advice to other areas is to insist that the local hospital be involved, both with premises and with nursing staff. We need to get more professional in the treatment of sexual assault victims - and HELP goes a long way towards that.

SOME POINTS TO MAKE:

Care of the victim and apprehension of the offender, are not mutually exclusive. The better the immediate care (sympathetic environment, no pressures, washing and clean clothes after examination, etc.) the more reliable the history and testimony. It has been shown overseas that apprehension rates go up when a comprehensive rape crisis centre opens, and that a delay of one hour before the definitive police interview, makes no difference to apprehension.

ADVANTAGES OF AN OFFICIAL CO-ORDINATED CENTRE:

1. Advantages to the doctor:
   Forensic police doctor work is extended to caring for the victim - facilities away from the cells.

2. Advantages to the police:
   Better evidence in individual cases, allows retraining and forming new attitudes to rape. Long term statistics.

3. Advantages to the victim:
   Obvious care, etc. Costs met by Accident Compensation Commission, etc. Protection from secondary mental rape by defence lawyers, etc. by "protection" with the counsellors.

4. Advantages to society:
   Centre for education and information, to encourage changing attitudes, e.g. that the victim is not on trial.
RAPE AND THE NEED FOR LEGAL REFORM
- Dr Lannes Johnson

As the only medical person on the panel, it appears that my responsibility is to speak more to the victim and the effects of sexual assault on her, rather than to speak against the rapist or male chauvinists generally. Thus I wish to confine my comments to sexual violence only - not get drawn into discussion of women's rights, sexist attitudes in New Zealand, male chauvinism, etc. They are other issues and should not cloud this issue.

Rape as I see it, is a major crime because its effects on the victim can be permanent, or at least long-lasting. It is also a crime which offends deeply the sensitivities of a civilised society. Murder, by definition, has a permanent effect on the victim. Kidnapping, an invasion of family with physical and psychological violence, can scar the victim permanently. Rape, a sort of sexual kidnapping, is a profound invasion of person, and family too, which demonstrates the rapist's inability or inadequacy, or care or respect to fellow members of his society.

ROLE OF THE POLICE DOCTOR:
This is simple. There is no confusion as to our role:
(1) to act for the police as an objective examiner and provide unemotional forensic evidence;
(2) to act as a doctor and help the victim.

In Auckland, before the establishment of the HELP CENTRE (which Julie Pettit will explain in more detail), the police doctor functioned only in the former role. The latter, the care of the victim, was impossible except by referral back to the family G.P. - not ideal as:
- the G.P. often not trained;
- the family too embarrassed;
- inevitable delays;
- sometimes no G.P., etc.

There are agencies available to help victims but these seemed unco-ordinated and not available to police cases (often the most brutal rapes). Thus the police doctors, mostly Dr BillDaniells, initiated a committee to establish a rape crisis centre where:

make and difficult to refute was considered totally unsatisfactory. A consequence of abolition might be that it would assist the police and prosecutors 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)) 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 bed clothes 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:

1) 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

2) 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 'rules', there is nothing to stop
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.

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 infirm, 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.

P. T. Finnigan
Convener

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.