PROPOSED REFORMS OF THE LAW OF RAPE

I Introduction

In response to the rising rate of reported crimes of sexual violence against women, Justice Minister Jim McLay has commissioned a report[1] which analyses the flaws in the present law. The recently released report also makes suggestions for improvements to increase the rate of reported crimes, reduce the trauma for the victim and result in a higher rate of convictions.

The proposed reforms are destined to come before Parliament later in 1983.

The report stated that as many as 80 percent of the rapes committed in New Zealand each year are not reported and of those that are reported the chances of the rapist being caught and convicted is between 4-11 percent.[2]

In this essay the writer proposes to briefly outline the existing state of rape law in New Zealand, followed by a summary of the most important proposals made by the report.

II The Definition of Rape

The Existing Law

The sections relating to sexual offences are set out in Part 7 of the Crimes Act 1961. That part is headed "Crimes against religion, morality and public welfare".

Sexual intercourse is defined in s 127 of the Crimes Act and as such has been interpreted to be complete only upon penetration of the vagina by the penis.[3]

Rape is defined in s 127 of the Crimes Act as follows:

> (1) Rape is the act of a male having sexual intercourse with a woman or girl;
> (a) without her consent . . . .

And s 128(3) states 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 in separate residences.

1 A joint Justice Department/Institute of Criminology Study of Rape in New Zealand, A Discussion of Law and Practice by Warren Young — released 21 March 1983.

2 In 1981 there were 316 reported cases of rape and 36 convictions. In theory this means that there may have been 1264 unreported cases of rape.

3 *R* v *Kaitamaki* [1980] 1 NZLR 59.

The Reform Proposals

The committee received a number of submissions to the effect that under the present law it is too easy for the accused to rely upon consent as his defence; that essentially irrelevant evidence about the complainant is frequently adduced by the defence in order to suggest that the complainant consented and that the end result is that many complainants feel that the blame is placed on them, especially if the accused is acquitted. Therefore, the whole court room experience can be a major traumatic experience for the complainant in the area of consent.

Four approaches to reforming the law as to proof of consent were listed in the report. Briefly they were:

(1) To redefine unlawful sexual activity by reference only to actions by the offender. The report submitted that it was unrealistic to believe that the issue of consent can be avoided by this sort of change in wording.

(2) To make consent irrelevant in certain cases (eg, where a weapon is involved). This reform was criticised on the grounds that it would not shift attention away from the complainant's behaviour on to the accused's behaviour to any significant extent; also it should be realised that in cases involving a weapon, the issue of consent is unlikely to arise.

(3) Define objective criteria which may constitute evidence that consent was not given. The reform committee found it difficult to see how this suggested reform would assist the complainant or reduce the importance of the issue of consent, especially where the complainant alleges that she was forced to have intercourse and the accused maintains that she was a willing party.

(4) To define "consent" in generalised terms. It was submitted that consent in law should mean knowledgeable assent and willing participation, not mere acquiescence or submission. The committee held that a provision of this nature would do little more than restate what is already the law, although it would at least be a positive expression of the fact that a woman's freedom of choice in sexual matters should be respected.

The report recommended that the definition of sexual intercourse could be broadened to include penetration by any object into the vagina or anus as well as to include oral sex.

The study recommended the removal of spousal immunity from rape as they could find no convincing justification for such immunity. The original notions of this immunity came from the common law, which stated that under the marriage contract, the wife gives her implied consent to sexual intercourse whenever her husband should demand it, and that she cannot revoke this consent while the marriage continues.

III Police Procedure

The Existing Law

The police are usually the first official agency with which rape complainants will come into contact with after the offence.

It is apparent that many women in New Zealand have a poor image of police methods of investigation in the area of rape. For example, of the women in the victim interview study[4] who had not reported their rape to the police, some cited the anticipated police response as one of their reasons for failing to report. They were uncertain or fearful of the police reaction, for example they expected not to be believed. These perceptions were based on their past encounters with police officers, socially or in other ways.

In the victim interview study, those victims who had reported the offence to the police were asked to give their impressions of police attitudes and the police response to their complaint. Their response varied a great deal, ranging from glowing praise to severe criticism. Overall, their positive and negative responses were fairly evenly balanced. However, many of them gained the impression at some stage of the investigation that their complaint was treated with scepticism or disbelief.

Reform Proposals

The recommendations made in the report were that there should be improvements in the training of police recruits so as to enable them to understand and support victims of sexual violence. Secondly, more use should be made of policewomen for interviewing rape complainants. And finally, more information should be provided to the victim on police, medical and court procedures, so that she can prepare herself for the ordeal.

IV The Medical Examination

The Existing Law

In any case where rape is alleged to have occurred, the medical examination of the complainant is an indispensable part of the collection of evidence. It may provide both proof of penetration and evidence of external and internal injury to the woman.

The medical examination is usually conducted by a police surgeon at the police station or doctor's surgery, or occasionally at a hospital.

Some of the criticisms made by the victims in the study can be summarised as follows:

(1) While some victims found the police doctors sympathetic and understanding, others found them cold, business-like and insensitive.
(2) There was criticism that police doctors often failed to explain to the victims why they were conducting a particular examination or taking certain samples.
(3) It was found that medical personnel generally do not receive adequate training to meet the medical and counselling needs of the victims of sexual violence. Also, under the present medical pro-

4 The Rape Victim Survey was compiled by the Justice Department and the Wellington Institute of Criminology.

cedures, there is a virtual absence of follow-up services for the rape victim. And some police surgeons neglected to give advice about contraception or venereal disease.

(4) There were also complaints about the lack of female doctors acting as police surgeons, since some victims would certainly prefer to be examined by a woman. Apparently, female doctors are reluctant to apply for appointment as police surgeons since they do not want to be involved in the wide range of duties that this would entail.

(5) The final concern was that in some police districts medical examinations are usually conducted in rooms in the police station, usually near the cells. These rooms are poorly lit, inadequately furnished and quite unsatisfactory for conducting a medical examination. And such an environment does little to comfort the victim.

Reform Proposals

The report suggested that the procedures used by the HELP Centre in Auckland could be adopted. That is, that the examination should be conducted in facilities designed for medical examinations, but at the same time the rooms should not be cold and sterile. A number of female doctors should be available, and during the examination and after it the victim should be able to receive support from a counsellor. No police officer should be present. And after the medical examination has been completed the victim should be able to shower and receive a fresh change of clothes before returning to the police station for interviews.

The reform committee also submitted that the development of adequate and properly funded support systems, such as the HELP and Rape Crisis Centres, will do more to help the plight of rape victims than any changes to the substantive or procedural law, and therefore such centres should receive departmental financial support.

V Financial Compensation

A rape victim often suffers financial loss as well as mental anguish. Her psychological state may prevent her from continuing with her employment. In addition, she may feel the need to move home, or to instal alarms or to take other steps to protect her personal safety.

The report pointed out the startling under-utilisation of the entitlements under the Accident Compensation Act by rape victims. Three victims claimed accident compensation in 1981 compared to fifty six who had abortions approved on the grounds of rape. The psychiatric grounds for abortions would usually constitute eligibility for compensation for pain and suffering. Therefore, there should be better procedures for advising victims of the potential entitlements under accident compensation.

VI The Trial Procedure

The Existing Law

Preliminary hearings

These are held in the District Court, with the purpose of establishing whether there are grounds for a trial. Usually the complainant is required to give evidence to ensure this. Often these hearings take place in front of a Justice of the Peace who may not have the training necessary to protect the infringement of the victim's rights by the defence.

The complainant's evidence

Rape victims are often forced to recount details of humiliating and intimate nature in front of a large number of spectators in addition to court personnel, judge and jury. There is provision in the Summary Proceedings Act[5] and the Crimes Act[6] for courts to be closed during the giving of evidence if it is in the interest of justice or public morality, or the reputation of the victim requires it. However, these sections are rarely invoked during a rape trial.

The problems faced by a complainant in giving her evidence are magnified by the means in which evidence is recorded in New Zealand. At the preliminary hearing and the High Court trial, all evidence is transcribed directly on to a typewriter, and witnesses are therefore required to speak at an unnaturally slow speed so that the typist can keep up with them. This undoubtedly cumbersome method (since people simply do not speak naturally at typewriter speed) thus adds to the difficulties faced by a nervous and embarrassed witness.

Cross examination

In the past it was felt that the defence's case often relied too heavily on the use of detail about the complainant's past sexual history so as to undermine her credibility as a witness. Under a 1977 amendment to the Evidence Act,[7] evidence about the complainant's past sexual history was made inadmissible as evidence.

The corroboration rule

Judges are obliged in the case of certain types of witnesses to warn the jury of the dangers of convicting on the uncorroborated evidence of the witness. Sexual offences are one of these categories. The warning tends to reflect the myth that women are prone to make malicious accusations of rape for various reasons, such as fantasy, sexual problems or jealousy. As such, they do not make reliable witnesses unless there is some independent evidence to support their claim.

The burden of proof

Under the present system, the onus is on the prosecution to prove that the complainant did not consent to intercourse so as to establish a prima facie case. The defendant therefore need not raise the issue of consent, nor call any evidence in relation to it, and unless the prosecution proves her lack of consent beyond reasonable doubt the defendant must be acquitted.

5 S 156(2) Summary Proceedings Act 1957.
6 S 375(2) Crimes Act 1961.
7 S 23A Evidence Amendment Act 1977.

The defendant's mistaken belief

In summing up to the jury in rape trials, judges often state that a man must have intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she was consenting. However, if the man mistakenly believes that the woman was consenting, he will not be reckless or indifferent. A fortiori, he will not have the intention to have intercourse without her consent and therefore he cannot be guilty of the offence of rape.

In the case of the *Director of Public Prosecutions* v *Morgan*[8] it was held that if a man honestly believes that the woman was consenting, even if that belief was not based on reasonable grounds, he cannot be guilty of rape. Needless to say this decision raised a storm of protest in England. This case, though not binding on the New Zealand courts, is at least persuasive.

Reform Proposals

Preliminary hearings

The report proposed that where there is a serious charge like rape, where difficult decisions often have to be made about the admissibility of evidence, District Court Judges rather than Justices of the Peace should preside over the hearing.

The complainant's evidence

The committee submitted that a court should be closed during the giving of the complainant's evidence unless there are special reasons for ordering otherwise. This, the report claimed, would offer greater protection to the complainant's privacy and it would also prevent sensational and harmful publicity, especially at the preliminary hearing stage. The report does not suggest any alternative methods for the taking of witnesses evidence.

Cross examination

The report found that the 1977 Amendment to the Evidence Act was operating as it was intended.

The corroboration rule

The report found the existing rule in desperate need of reform and it went on to list two possible options:

(1) Abolish the rule requiring the corroboration warning altogether, so that sexual offences would be treated in the same way as almost all other offences. This would leave judges with a discretion to warn the jury of the special need for care in deciding whether to rely on any particular piece of evidence if the circumstances of the witness or the nature of the evidence required it.

8 [1975] 2 A11 ER 347.

(2) Replace the rule with a direction to the jury as to a "special need for caution". This was considered replacing one evil by another evil which would do little to alleviate the myth that the complainant is not trustworthy.

The burden of proof

It was submitted that the evidential burden should be shifted on to the accused, thus requiring him to produce some evidence of consent or his belief in it in order for it to be raised in issue. In this respect, rape would then be placed in the same position as other assaults. Unless there was some evidence to the contrary, lack of consent, and the accused's knowledge or recklessness as to it, would be presumed.

The defendant's mistaken belief

The report submitted that this area of law is in need of legislative clarification after *Morgan's* case.[9] It listed three possible options:

(1) Declare honest belief as to consent to negative the mens rea.
(2) The second option would be to require that a mistaken belief in the woman's consent must be honestly and reasonably held.
(3) The final option is to create a separate and lesser offence to catch the man who mistakenly but unreasonably believes the woman is consenting. However, the New Zealand Criminal Law Reform Committee (1980)[10] considered that it would complicate the task of the judge and jury and would tempt juries to convict of the lesser offence as a compromise rather than convicting or acquitting of rape itself.

VII Conclusion

Since the release of the report the committee has received approximately 211 submissions, most of which support the committee's findings. It remains to be seen how many of the proposals are adopted. However, the consequences of a rape can never be entirely overcome by changes in the law or procedure. There is a clear need for provision of more and better support facilities for the victims of rape; a better understanding of the motivation for the crime; and education towards removal of any social stigma from the victims.

M W Frawley*

9 Supra.
10 Report on the decision in *DPP* v *Morgan,* Wellington.

*Fourth year LLB student, Faculty of Law, University of Otago.