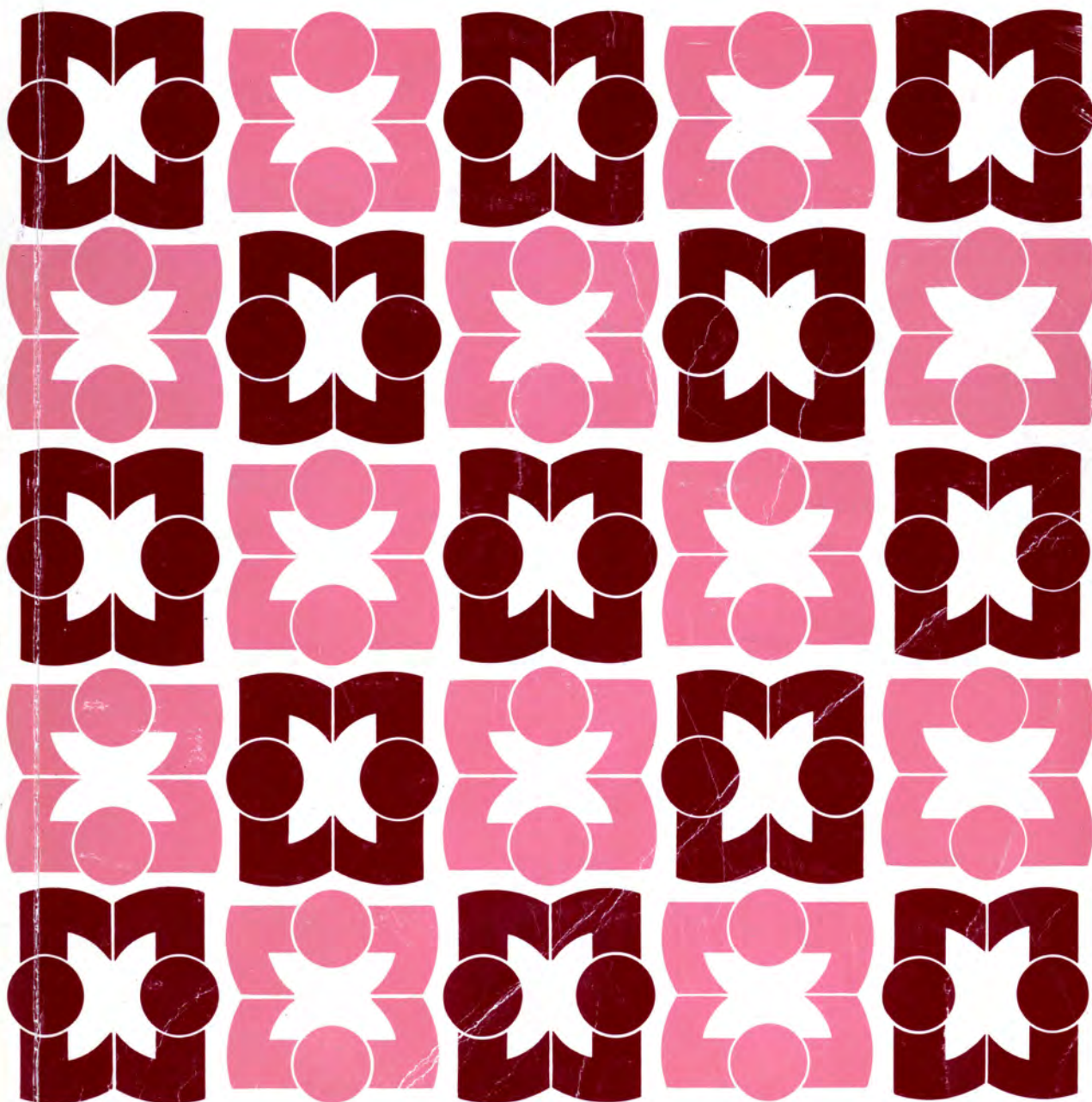


# ROYAL COMMISSION ON HUMAN RELATIONSHIPS

## Final Report Volume 5





ROYAL COMMISSION  
ON HUMAN RELATIONSHIPS  
Final Report  
Volume 5

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# **ROYAL COMMISSION ON HUMAN RELATIONSHIPS**

## **Final Report Volume 5**

**Part VI  
Equality and discrimination**

**Part VII  
Rape and other sexual offences**

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ROYAL COMMISSION  
ON HUMAN RELATIONSHIPS

100 William Street  
Sydney  
21 November 1977

Your Excellency,

In accordance with Letters Patent, dated 21 August 1974, we have the honour to present to you the Final Report of the Royal Commission on Human Relationships, prepared as at April 1977.

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Felix Arnott  
Anne Deveson

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# 1. Introduction

1. 'What do you think?' was a question we put to the community at large early in our work of inquiry. We sought to get the public's reactions to the major social issues in Australia today, and the many aspects of male and female relationships.

2. Our evidence included allegations of discrimination against women, children, fathers, the aged, psychiatric patients, handicapped people, Aborigines, South Pacific Islanders, migrants, country people and homosexuals. These categories of people are diverse: the property which they have in common is their claim that they should be treated like everybody else; alternatively that they need special treatment to set right some disadvantage.

3. The recurring concept in this evidence was to secure real 'equality': a social and political ideal of Australian society.

4. Social justice implies the principle of impartiality, which means that people should be treated equally unless there is a valid reason to treat them differently; that is, distinctions between people should be made only on the basis of pertinent criteria. Unfair discrimination occurs when a person or persons are disadvantaged or denied equality.

5. The essence of our consideration of equality and discrimination is to determine which criteria are apposite and which are not, and what can be done to remedy unfairness and inequality.

6. Discrimination is difficult to define because it is a value-laden concept and individuals or groups with differing value systems are likely to use the term in different ways. In today's usage, to be guilty of discrimination means giving unfair treatment at the personal level, being prejudiced or biased in assessing claims at the institutional level, and denying equality and social justice at the government level.

7. The main ways in which discrimination operates in so far as governments are concerned are by the application of law, legislation or regulation, and in social areas and activities such as employment, housing, income, security and welfare benefits. There are those cases in which the law applies unequally, for example where male homosexual acts are penalised and female homosexual acts are not. In other cases the law though equal in form falls unequally on different groups, as Anatole France said:

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.<sup>1</sup>

8. Law and policy may also discriminate in a positive way to achieve equality. This is described by Gareth Evans as 'benign discrimination'. He poses the problem of 'how such discrimination can be reconciled with the principles of equality'.<sup>2</sup> Examples include pensions for the aged, assistance for handicapped persons, programs of assistance to Aborigines, rural subsidies and supporting mothers benefits. A decision is made that these groups merit favoured treatment, e.g. to overcome a disadvantage or to meet an acknowledged need. Positive discrimination is designed to minimise inequalities by some form of redistribution, and is itself an important part of social

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1. Anatole France, quoted in Cournots, *Modern Plutarch* (West, Philadelphia, 1928), p. 27.

2. Gareth Evans, 'Benign discrimination and the right to equality', *Federal Law Review* 6 (1974).

justice. The selection of categories, however, though fair in itself, may lead to unfairness when a group not included considers that it has equivalent disadvantage or need, e.g. supporting fathers excluded from benefits available to supporting mothers.

9. Unfair discriminatory practices occur when employees are assessed on the basis of age, sex, ethnic origin or religion instead of on their capabilities.

10. With changing norms and standards legislators often have difficulty in dealing with these problems. Notions of social justice have changed.

11. Care and discretion are necessary in according favoured treatment to any group. What was designed as protective legislation may later be seen as restrictive. It is sometimes necessary for governments to grant privileges to minority groups, but at a certain point in a group's emancipation these very privileges and protections may be seen as demeaning and a denial of equal status. Marcuse makes this point in relation to the treatment of Negroes in the United States:

Every individual wants to stand on his own two feet and compensatory treatment beyond a certain point is an affront to pride and an insult to dignity. Particularly is this so where race is involved and each minor example of preference is a continual reminder of racial differentiation.<sup>3</sup>

12. Discrimination against women arises because of assumptions about their abilities and their roles. As a result they do not share equally with men status, power, privilege or responsibility.

13. The homosexual is discriminated against by laws which do not apply equally to men and women. A major complaint is that discrimination is set in social attitudes which fail to see the homosexual as a person with a many-sided personality and many needs.

14. The Aboriginal is discriminated against by a society which attempts to impose the values of a dominant culture upon a minority people, unaware of their true aspirations and needs.

15. Migrants suffer from discrimination in the failure to provide services needed to overcome the many disadvantages they incur on being transplanted into a new country. For example, a common complaint is that they are not given adequate opportunities to learn English.<sup>4</sup>

16. All these kinds of discrimination arise for consideration in this part of the report. Their common link is the complaint of unfairness or inequality in treatment. The topics we consider are: women, homosexuals, prostitutes, the handicapped, Aborigines and migrants.

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3. *ibid.*, p. 25.

4. *Evidence*, pp. 1457-62, George Kokoti.

## 2. Equality for women

### Introduction

1. The theme of this chapter is that women in Australian society do not share equally with men in status, power, privilege or responsibility; that women suffer discrimination, injustice and inequality; that there are measures which can be taken to redress the balance and that these should be taken as soon as possible.

2. This theme has long been debated.<sup>1</sup> There are many recent publications in Australia on the role of women in Australian society.<sup>2</sup> Inquiries have made recommendations.<sup>3</sup> The conclusions are generally the same—that positive measures are necessary to promote equality for women in Australia. We add our voice to this and make recommendations for action.

3. There are several compelling reasons for positive action. Each citizen is entitled to equal rights and equal opportunity to seek employment and promotion; positions of leadership and authority and ability to participate in public life and in important decisions should be open to all of us. None should be excluded arbitrarily or by a process of systematic discrimination. We cannot afford as a society to waste the potential talents of half our members by unfair distinctions, exclusions and preferences. Each member of society should be encouraged to make his or her contribution to society.

4. In her 'Ode to pioneer women', Dame Mary Gilmore drew a romantic portrait of women:

For they were women who at need took up  
And plied the axe, or bent above the clodded spade,  
Who herded sheep; who rode the hills, and brought  
The half-wild cattle home—helpmates of men,  
Whose children lay within their arms,  
Or at the rider's saddle-pommel hung,  
And at whose knees, by night, were said familiar prayers.

Miriam Dixon on the other hand reached the view that:

... by the 1880s, when the womens movement began to emerge in Australia, Australian women had settled into a standing uniquely low in western-type communities.<sup>4</sup>

5. It seems to us that history has left us with a concept of male predominance, of mateship and the image of the rugged Australian male. This has little to do with the lives of most Australians today. The problem now is how to reconcile woman's traditional and domestic role with her wider role outside the family.

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1. e.g. Mary Wollstonecraft, *A vindication of the rights of women* (1792, recently republished by Penguin, 1975); Charlotte Gilman Perkins, *Women and economics* (1898, republished by Harper & Row Publishers Inc., NY, 1966).

2. Ryan & Conlon, *The gentle invaders* (Nelson, 1974); S. Encel, N. McKenzie and M. Tebbutt, *Women and society: an Australian study* (Cheshire, Melbourne, 1974); J. Mercer (ed.) *The other half: women in Australian society* (Penguin, Melbourne, 1975); Anne Summers, *Damned whores and God's police* (Penguin, 1975); Miriam Dixon, *The real Matilda, woman and identity in Australia 1788 to 1975* (Penguin, Harmondsworth, 1976); Germaine Greer, *The female eunuch* (Hart-Davis, MacGibbon & Paladin, London, 1971).

3. Commission of Inquiry into the Status of Women in Queensland (Chairman: The Hon. A. G. Justice Demack), 1974; Victorian Committee of Inquiry into the Status of Women (Chairman: Dr E. G. Eden), 1976.

4. Dixon, p. 213.

6. The socially valuable function of caring for home and young children does not carry the status and income which convey its real worth to the community. Employment and income largely determine status. Women cannot attain equality of status until they have equal access to jobs and careers, commanding wages and salaries equal to those of men. The woman who fulfils a domestic role is penalised if she also attempts to maintain an outside job; she gets little help by way of child care facilities or part-time job opportunities. Nor does she get economic independence in the domestic role.

7. This basic situation can be changed only by positive programs of public education. Equality can be achieved only by greater sharing of responsibility in the home and in earning the family income.

8. Many of our submissions took up the theme of equality and discrimination against women. Some pressed for an improvement in the status of women and implementation of the terms of the United Nations Declaration on Human Rights.<sup>5</sup>

9. Remedies in the past have been ameliorative, disparate and uncoordinated. Little fundamental remedy has been attempted.

10. Most women still owe their status and well-being to a father or husband, whilst their needs and status are subsumed under family.<sup>6</sup> They usually experience a loss of status or income if male support is withdrawn or becomes unavailable following divorce, desertion or death.<sup>7</sup>

11. Women are conspicuously few in the hierarchies of power, such as politics, the public service<sup>8</sup>, the judiciary, the churches, the professions<sup>9</sup>, the top echelons of business<sup>10</sup> or trade unions<sup>11</sup>; they have relatively less income and are more likely to be impoverished<sup>12</sup>, have less education and fewer skills<sup>13</sup> or have skills which are regarded as of less value.<sup>14</sup> The work they do is either unpaid or undervalued and underpaid.<sup>15</sup>

12. Not all women saw themselves as powerless and discriminated against; some specifically disclaimed it. Many, however, did allege discrimination and some resented women's inability to influence the priorities of government.<sup>16</sup>

13. The lack of resources available to women's groups as compared with other organised opinion is in itself a measure of the powerlessness of women in Australian society. It is the totality of women's position in society which is seen as discrimination.

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5. Submission 460, National Council of Women, NSW.

6. S. Encel, *Equality and authority: a study of class, status and power in Australia* (Cheshire, Melbourne, 1970); Encel et al., 1974.

7. See Part V of this report, chapter 7, on lone parent families.

8. *Royal Commission on Australian Government Administration report* (AGPS, Canberra, 1976), p. 187.

9. Encel et al., 1974, pp. 100-34.

10. J. P. Young & Associates Pty Ltd, Attitudes to women executives in Australian business: a survey, 1973 (unpublished).

11. 'Women's full and equal rights in trade unions', *The Modern Unionist*, July-September 1976, pp. 33-5.

12. M. Power, 'Wages of sex', *Australian Quarterly* 46, 1 (1974), pp. 2-14.

13. 'Educational statistics, population 15 years of age and over by level of and field of qualification obtained, Australian census, 30 June 1971', *Education News* 14, 7 (1974).

14. National Committee on Discrimination in Employment and Occupation, *Annual report*, 1974-75.

15. S. June Menzies, 'The uncounted hours: the perception of women in policy formulation', *McGill Law Journal* 21, p. 615.

16. Evidence, pp. 1378-86, H. Raduntz & M. Hogan.



## How discrimination works

14. Discrimination against women may be inadvertent or deliberate. It often arises from ignorance of the needs and abilities of women or of their rights. Sometimes there is a lack of awareness of women's potential or long-standing assumptions about women (such as 'women can't do it' or 'never seen a woman do it').

15. People with entrenched attitudes about male/female roles often ignore women's claims and needs.

16. For example, when industry sets up a new town, the need for jobs for women is ignored as women are seen only as wives and mothers, subsumed under the title of 'family'.<sup>17</sup> This results in towns with a preponderantly male workforce, high labour turnover and women in domestic isolation. Had the decision makers been aware of women's work patterns and work aspirations, they could have established a work-force structure to include women, and so have reduced the numbers of families needing to be catered for<sup>18</sup> and cut labour turnover, through men moving to towns that do have work opportunities for women.<sup>19</sup>

17. There is discrimination in decisions on employment based on often unconscious prejudices about men and women rather than on real job needs. The employer does not see the absurdity of automatically banning all women from being train drivers and bus drivers and men from some branches of nursing and teaching.

18. Intentional discrimination occurs where a decision maker acts against others on the grounds of sex or marital status. For example, employers sometimes do not appoint the best qualified applicant to a high status job because that applicant is a female.

## Education

19. Educational systems could play an important part in developing a better understanding of women and of their changing roles and status in society. The evidence suggests, however, that education in Australia tends to reinforce attitudes which discourage female aspirations and deny girls equal education experience. There is no evidence of any lesser ability on the part of women; but girls nevertheless fail to take up or pursue educational opportunities.

20. A number of studies in recent years have compared girls' and boys' scholastic achievements, their ages at leaving school, their rate of entry into tertiary education and trade training and their rate of qualification in these fields.<sup>20</sup> The picture is a depressing one.

21. Girls leave school earlier than boys, although the difference has diminished over the last few years. Girls comprise nearly half of all school students aged 14, but at age 17 their proportional representation drops to around one-third. The position of girls improved significantly between 1968 and 1973. In 1968 girls comprised 30.3 per cent of students over 17, but by 1973 they comprised 35.3 per cent.<sup>21</sup>

22. Women and girls are much less likely to have tertiary or technical qualifications (see table VI.1).

17. Irene Bruegel and Adah Kay, 'Women and town planning', *Architectural Design*, August 1975; Zula Nittim, *How you gonna keep 'em down on the farm* (WEL Publications, Sydney, 1974).

18. 'Mining companies have to build towns from scratch', *Sydney Morning Herald*, 17 November 1975.

19. 'WA unions stop women working on the open cut', *Nation Review*, 13-18 June 1975.

20. e.g. Roper, 'Inequalities in the Australian education system: an overview', in Mercer, p. 117; *Girls, school and society*, a report by a study group to the Schools Commission, 1975.

21. ABS, reference no. 13.5.

**Table VI.1 Population 15 years of age and over by level and field of qualification obtained**

Highest level of qualification obtained	'000 males	'000 females	Females as percentage of total	'000 persons
No qualification	3 237	3 992	55	7 230
Trade level qualification	813	70	8	882
Technician level qualification (including nursing)	155 (5)	158 (127)	50 (97)	313 (131)
Tertiary qualification other than degrees (including education)	150 (38)	138 (105)	48 (73)	288 (143)
Bachelor degree, post-graduate diplomas or equivalent	111	43	28	155
Higher degree level or equivalent	19	4	17	23
Qualifications not classified by level	46	148	76	194
Inadequately described	1	..	..	1
Total with qualification	1 295	561	30	1 856
Total population 15 and over	4 532	4 553		9 086

*Source:* Commonwealth of Australia, 1971 census of population and housing. (Figures are rounded to nearest 1000.)

23. The figures in table VI.1 are for the whole population and do not necessarily reflect current rates of entry or qualification.

24. The 1976 census may show marginally improved female participation in the professions and in non-technical qualifications, partly because of a heightened awareness among women of the need for better education, and partly because of the movement of older women to re-enter education.

25. The low proportion of women in some fields and their heavy concentration in such areas as nursing and teaching mean that they do not, as a group, possess the same range of qualifications as men and that they have not had the same benefits of higher education. At university level, women are more heavily concentrated in the humanities and behavioural sciences and under-represented in other fields.<sup>22</sup> Changes are occurring; for example the proportion of women in medical schools has been increasing steadily. These changes have not affected all fields. A working group set up by the Assembly of the University of Melbourne to examine the position of women in the university community and in society observed that the Faculty of Arts contains more than 49 per cent of all female undergraduates but only 16 per cent of all male undergraduates. As a result of a survey, they concluded that parental influence was the main variable in faculty choice; in their view parental goals were restricted to the traditional image of women as non-achievers.<sup>23</sup>

26. The result is that women are less able to compete in the labour market and less able to command the pay accorded to the well qualified.

27. A study of women in the professions has shown that even where women have attained equal qualifications and experience they do not achieve equal opportunities or rewards.

22. Elliott, 'Women in the professions', in Mercer, pp. 139-41.

23. University of Melbourne, University Assembly, Womens Working Group report (July 1975), p. 23.

28. Table VI.2 represents the academic achievement of Australian women in terms of appointment to university teaching staff. Although the percentage of female appointees is increasing, the upper echelons, where teaching policy and curriculum are decided, are still almost totally in the hands of men.

**Table VI.2 Staff of Australian universities—full-time teaching positions, 1972, 1976**

Position	Male		Female		Females as percentage of total	
	1972	1976	1972	1976	1972	1976
(1) Professor	834	1 029	14	19	1.6	1.8
(2) Associate professor/reader	818	1 070	23	44	2.7	3.9
(3) Senior lecturer	2 110	2 616	123	219	5.5	7.7
(4) *Lecturer/teaching registrar	1 987	2 480	306	484	13.3	16.3
(5) *Assistant lecturer/principal tutor/senior tutor	436	598	198	328	31.2	35.4
(6) Demonstrator/tutor/teaching fellow	845	903	473	514	35.8	36.2

\* In 1972 these categories were (4) 'Lecturer' and (5) 'Assistant lecturer', which could account for the larger increase in these categories.

Source: Australian Bureau of Statistics.

29. Education is, therefore, one of the principal factors which determine the status of women in society. Unless changes can be made in education itself other changes will be slow to follow. The statistics we have referred to show what happens but they do not explain fully why it happens or what the effect is.

### ***How education discriminates against girls***

30. The education system's disadvantages for girls is shown in a report prepared for the Schools Commission in 1975 entitled *Girls, school and society*. Among the points made in that report are that fewer girls than boys remain in school beyond the compulsory age, that girls achieve at least as well as boys in school but their subject choices are more limiting and that they are far less likely to enter post-school education than boys, except in a few special sectors.

31. The report concluded that in capacities and personality traits the differences within each sex are much greater than those between the sexes and that social attitudes and realities teach girls to be less confident and ambitious than boys. The school experience conveys to boys and girls that they are expected to behave differently and have different futures.

32. The report drew attention to the failure of education to present the contribution of women to society and to the absence of women from responsible positions in schools.<sup>24</sup> Similar conclusions were reached in recent years by inquiries in Queensland<sup>25</sup>, Victoria<sup>26</sup>, Canada and New Zealand.<sup>27</sup>

24. *Girls, school and society*, p. 157.

25. *Report and Recommendations of the Commission of Inquiry into the Status of Women in Queensland* (1974).

26. *Report of the Victorian Committee of Inquiry into the Status of Women* (1976); see also Evidence, pp. 2769–80, Dr Don Edgar.

27. *Report of the Royal Commission on the Status of Women in Canada* (1970), pp. 161 ff; *The role of women in New Zealand society*, report of the Select Committee on Women's Rights (1975), pp. 45 ff.

33. Our submissions supported the view that the education system fails to encourage girls to achieve and restricts their vision and their options by basing educational practice on invalid attitudes to girls and women.

34. The position was graphically described for us by Mrs Shirley Sampson, convener of the Victorian government Sexism in Education Inquiry:

. . . beginning with pre-school where boys and girls are often encouraged to play in separate groups. In primary school they are given different kinds of tasks, girls are more frequently bigger than boys in the primary school but in fact boys are still given duties that require strength, like emptying incinerators etc. It is quite irrational, it is not based on genetic factors at all, it is a sex or social role that is being taught.

When you get to secondary school all kinds of different behaviour are expected. For instance, you take no notice of boys creating a hullabaloo but you would be very much down on the girls if they did it, because as a teacher you do not expect it from the girls.<sup>28</sup>

A mature age student echoed this, saying:

There is still more emphasis on male careers in school than on female careers. In the most simple areas of conditioning are the young child's textbooks, which always show Mummy at home and Daddy coming home from work.<sup>29</sup>

35. A retired teacher spoke of how the 'hidden curriculum' in schools teaches girls that males are dominant through the school's hierarchy and get preferential treatment in teacher scholarships and promotion. She drew our attention to a press article which described how mini-computers were being introduced into the teaching of mathematics and how 'pre-programmed simulation studies enable students to explore life from all directions'. A diagram in the article showed a sequence of situations which could arise on having a flat tyre. The outcome depended on the sex of the participants:

. . . the author . . . shows how a girl must solve the problem of a flat tyre by looking helpless and appealing to a passing Galahad; a boy must ask his female companion to do this while he hides; while a boy alone with a flat tyre must—mend it!

In the author's view the article reinforced views that girls cannot solve problems and that they are weak, deceitful and parasitical.<sup>30</sup>

36. Despite their greatly increased participation in the workforce, women workers remain concentrated in traditional female occupations. They earn less and seldom rise to high levels of pay or responsibility. A submission from a voluntary welfare worker pointed to some of the effects on girls of lack of motivation to achieve higher education, and their consequent lack of self-esteem, in Sydney's western fringe:

Many girls . . . seek exemption from school as soon as they are 15 years old, and drift into one of the many dead-end jobs in the various factories in the area. They all seem to see this as a rather boring 'fill-in' until Prince Charming comes along on his motor cycle and marries them at about 17 or 18 years of age (frequently pregnant) and presumably they are to find a house, produce a family and live happily ever after. Unfortunately it rarely turns out that way, and these girls are so often the ones who turn up in one of the welfare agencies about 8 years later, with one or two marriages or de facto relationships behind them, a number of small children at foot, thoroughly disillusioned and fed up with life, and so lacking in training, personality and self-confidence that it is quite heartbreaking to see. Nor can one blame the young husband who has deserted them—he may have been tied down with mortgages, hire purchase, a boring job and a wife and children since he was 19 or 20 years old, and finally 'cracked and quit'.<sup>31</sup>

28. Evidence, pp. 520–1, Mrs Shirley Sampson.

29. Submission 788, Mrs J. Driscoll.

30. Submission 613, Miss S. C. Wakefield, quoting L. Field, 'Active third party in the classroom', *Sydney Morning Herald*, 20 May 1975.

31. Submission 821, Mrs B. M. Harding.

37. To make matters worse it has been difficult for mature age women to return to education to acquire necessary skills.<sup>32</sup> The removal of fees from technical and further education and from tertiary education is an important factor in opening up opportunities for dependent women to re-enter the field.

### *What can be done?*

38. The matters set out above are well recognised. What is now needed is a program to rectify the imbalance of the present system. A submission put the view that funds should be allocated to establish programs to meet the educational needs of women and girls, with specific grants and funding bodies on curriculum development and research, and with representatives concerned with the education of girls.<sup>33</sup>

39. The Schools Commission report for 1976-79 makes no mention of funds to remedy the disadvantages experienced by girls. Perusal of the lists of educational research projects funded by the government through federal agencies does not indicate any specific attention to the educational disadvantage of women and girls.

40. State governments have begun to respond to women's allegations of discrimination in the educational system. Committees of inquiry are at work in NSW, Victoria and Western Australia, looking at teachers' attitudes, classroom practices, textbooks and vocational guidance.

41. Teachers in other States have moved within the profession to initiate reform. The NSW Teachers Federation, in 1975 with the aid of an IWY grant, and in 1976 using corporate funds, has employed an organiser to visit schools, address teachers' conferences and initiate teacher awareness programs.

42. The Victorian Teachers Union made a submission to the Committee Investigating Equal Opportunity in Schools in the 'belief that there is no justification for segregated activities or areas in any aspect of the curriculum' and that their recommendations 'if implemented would help eliminate any sex bias in schools'.<sup>34</sup>

43. Similar moves have been made by teachers in SA, Queensland and Tasmania.

44. In 1976 the Commonwealth government began appointing womens units within government departments and statutory authorities to promote the government's policy of equality of opportunity, freedom from discrimination and equal status in society<sup>35</sup> for women. Both the Department of Education and the Schools Commission appointed officers. An interdepartmental working group on womens affairs co-ordinates the activities of the various departments.

### *Conclusions*

45. Education has a vital role in the improvement of women's status. The necessary strategies have been planned. The will to change and acceptance of the need to change are essential to achieve educational equality for women. Educators care for young people and, if they are given the opportunity to reassess their attitudes and practices, they will respond.

46. The government has a responsibility to promote the ideal of equality in education. To bring about the necessary changes we consider that there should be a visible commitment by way of resources. We support the proposal that an expert

32. Evidence, pp. 2924-32, Ms G. Wesson.

33. Submission 587, Women in Education, NSW.

34. Victorian Teachers Union, submission to the Committee Investigating Equal Opportunity in Schools, 27 April 1976.

35. Press statement, 'Co-ordination in womens affairs', Prime Minister, Canberra, 4 July 1976.

advisory committee on the education of girls and women be set up, to tender advice to the Schools Commission, to promote action and research in curriculum and vocational guidance for girls and women and to promote parental awareness of girls' capabilities.

47. The Schools Commission should give priority to funding programs in schools that will develop equal education for girls.

48. The following action is needed:

- (a) teacher education to develop awareness of these issues;
- (b) recruitment of women to high level positions in schools and Departments of Education;
- (c) re-examination of school organisation to remove unnecessary sex distinctions;
- (d) the encouragement of boys and girls to learn basic practical skills and to share sporting activities as far as possible;
- (e) revision of curricula and textbooks to ensure equality in course options and to ensure that men and women are portrayed in a full range of working roles and domestic responsibilities;
- (f) revision of vocational guidance programs to ensure that a wide choice is offered to boys and girls and that neither the officer nor the literature imposes any sex-based restrictions on choice;
- (g) opening up further education courses, trade, technical and university, to boys and girls on equal terms;
- (h) extending adult educational opportunities, particularly for women whose access to education has been restricted, with specialised counselling, orientation courses and training allowances if needed.

## **Employment**

49. National and State Committees on Discrimination in Employment and Occupation were established by the government in 1973. The first two reports of the National Committee, those for 1973-74 and 1974-75, reveal that more than half the new complaints received were from females alleging discrimination on the basis of sex.

50. Evidence we received included many complaints about discrimination in employment. Some were specific cases, many were general expressions of opinion. In scope they covered much the same matters as those dealt with by the Committees, including practices which prevent or deter females from applying for jobs, denial of female participation in training for more senior positions and prescription of inferior conditions of employment for females. Many of the issues raised have been well ventilated in the past. We therefore confine ourselves to outlining briefly the forms which discrimination takes, with some examples, and then consider the social and economic effects of discrimination and the means of overcoming such discrimination.

### ***Forms of discrimination***

51. Discrimination in employment was outlined by the Zonta Club of Sydney:

- (a) comparisons of average pay rates for men and women;
- (b) surveys of occupational levels of men and women;
- (c) separation by sex of job advertisements published by most major newspapers;
- (d) limitations on vocational training opportunities for women, both at pre-employment and post-employment levels, especially in admission to some apprenticeships where girls are not even considered for selection;

- (e) differences in superannuation benefits and other fringe benefits generally;
- (f) perpetuation of traditional male and female roles at work as well as in society and protection of traditional male employment preserves;
- (g) limitations on opportunities for promotion for women especially where this may involve the supervision of men;
- (h) lack of interest in or prejudice against employment of women in a wider range of jobs by employers, unions, by men and by women themselves.<sup>36</sup>

### **Wage rates**

52. We heard evidence from Margaret Power, an economist specialising in women's labour market economics. She told us that her studies of male and female incomes based on the 1968–69 census showed that the annual incomes of full-time female employees were only 59 per cent of equivalent male incomes; the biggest discrepancy was in the professional and technical group where the women's average was 51 per cent of the male average. Women's proportion of male salaries tended to decline with age, from 70 per cent at 15–20 to 64 per cent at ages over 45. Among the reasons suggested by the witness and by others for this discrepancy was the fact that women have less access to overtime than men, receive less in over-award payments and are also unemployed for longer periods. Another important factor is that women do not have equal access to higher positions in firms. In her view the implementation of equal pay following the decision of the Arbitration Commission in 1972 would have only a minor effect on the differential because women do not, as a rule, find jobs where the work is 'equal' to that of men, but tend to concentrate in low wage occupations. She considered that lower incomes were closely related to occupational segregation.<sup>37</sup>

### **Workforce structure**

53. An important change in workforce participation of women in Australia in recent years has been the influx of married women. The proportion of women in the total workforce has grown from a quarter in 1961 to a third in 1973. In August 1976, 42 per cent of the female population over 15 was in the workforce, compared with 29 per cent in June 1961. The big increase has been in the number of married women as a proportion of the female workforce. This has risen from 15 per cent in 1947, to 48 per cent in 1966, to 62 per cent in 1973.<sup>38</sup> In August 1976, 63.4 per cent of females in the labour force were married.<sup>39</sup>

54. Margaret Power writes that about 90 per cent of all women in the workforce consistently work in occupations which are predominantly female. Among the occupations mentioned where women are over-represented (i.e. more than one-third of the total workforce) are typing, food and clothing, teaching, nursing, unskilled jobs, cashiers, bank tellers. She noted that occupation divisions often lead to a work relationship in which women are subservient to men.<sup>40</sup>

55. Other information reveals that 67 per cent of workers in clerical occupations are women, but in executive and managerial only 11 per cent are women.<sup>41</sup> A survey in

36. Submission 414, Zonta Club, Sydney.

37. Evidence, pp. 118–27, Ms Margaret Power, Dept of Economics, University of Sydney.

38. ABS, *The labour force*, movement November 1972 and February 1973 (September 1973), p. 1; Dept of Labour and National Service, 'Changing horizons', *Women in the workforce*, no. 9 (1970), p. 13.

39. Figures supplied by Department of Employment and Industrial Relations.

40. M. Power, 'The making of woman's occupation', *Hecate* 1, 2 (1975); M. Power, 'Woman's work is never done—by men: a socio-economic model of sex-typing of occupations', *Journal of Industrial Relations*, September 1975, pp. 225–40.

41. 1971 census.

1969 of 145 manufacturing firms revealed the scarcity of women in better paid positions. Of 1801 executives surveyed, only twenty-eight were women.<sup>42</sup> In the professions, too, women predominate in the lowest paid positions, forming the low-paid base of professional hierarchies.

### **Job advertisements**

56. Discrimination in job advertisements can take the form of listing jobs under male and female categories, or requiring a male or female for no apparent reason. Some consider that segregated job advertisements are very disadvantageous to women, and that even if not segregated the wording can discourage women from applying.<sup>43</sup> Some newspapers group jobs under such headings as 'Men and boys' and 'Women and girls'. They claim this is what their advertisers want. We note with pleasure, however, that a number of newspapers have abandoned this practice.

57. The Chairman of the National Committee on Discrimination gave evidence on segregation in job advertising and of the Committee's efforts to eliminate it. He told us of some changes that had been made and of the newspapers' defence 'that it is what the advertisers want'. Mr McGarvie's view was that people are not only discouraged from applying for work for which they might otherwise be fit, but are also being taught again and again that they are unfit:

. . . because the assumption is if bright boys are wanted for the position then bright girls cannot fill it.

He believed that legislation would be helpful in preventing this form of discrimination.<sup>44</sup>

58. The National Committee's report for 1974-75 states that while a significant proportion of advertisements make a sex specification, 'justification for such a specification based on the inherent requirements of the job could, the Committee found, be rarely supported'.

59. We note that the Committee has published guidelines for eliminating discrimination from job advertisements. These lack legal force at present.

60. Our view is that legislation is needed to ensure that advertisements do not specify unnecessary requirements or ask for a male or female when the job does not require such a distinction.

### **Recruitment and dismissal**

61. The Working Womens Centre wrote that, if a woman does reach the interview stage:

. . . she is likely to be asked detailed personal information, i.e. if she is single the question of marriage will arise. If married, employers will want to know the likelihood of her having any/any more children.

Surely, employers have no more right to know a woman's marriage or maternity plans, or how her children are being cared for while she works, than they have to know about a male applicant's arrangements.<sup>45</sup>

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42. Survey by Dept of Labour and National Service.

43. Evidence, p. 126, Margaret Power cites a study: Benn & Benn, 'Does sex-biased job advertising "aid and abet" sex discrimination?' *Journal of Applied Social Psychology* 3, 1 (1973), pp. 6-18; see also Submission 43, Working Womens Centre, Melbourne.

44. Evidence, pp. 2901-2, Mr R. E. McGarvie.

45. Submission 43, Working Womens Centre, Melbourne.



62. Other evidence cited specific cases where discrimination was alleged in job advertising and hiring. It was said to be difficult for women with children to get an interview. A professional publicity agent told us that when she inquired about a job as a national promotions manager she was told that the company was not interested in interviewing or hiring a woman for the position.<sup>46</sup>

63. We had evidence of banks, insurance companies, municipal councils, hospitals, stores and business houses dismissing women on marriage or requiring them to 'resign on marriage'.<sup>47</sup> Another witness told us of a woman's dismissal by an advertising company because her fiancé took up employment with the same firm. Neither had been informed of the company's policy not to employ married or engaged couples.<sup>48</sup> Another woman lost her executive position in an advertising company partly because a client believed that women should not hold executive positions.<sup>49</sup>

### **Vocational training**

64. Few women in the workforce have formal qualifications. The 1971 census showed that 81 per cent of females in the workforce had no vocational qualifications compared with 68 per cent of males. Only 1.9 per cent of females, compared with 20.3 per cent of males, had trade qualifications. Very few women are engaged in technical occupations. Recently, however, girls have been entering a wider range of apprenticeship trades including motor mechanic, printing trades and joinery. Discriminatory provisions are being progressively amended to allow female entry. Some employers and trade unions are unenthusiastic about girls entering apprenticeships; progress is slow, particularly in a time of unemployment. During the term of our inquiry some publicity was given to the obstacles raised by male workers to the admission of women as trainee engine drivers.

### **Superannuation**

65. A common complaint was the ineligibility of females for superannuation schemes or lower benefits for females. Helen Coonan, solicitor, told us:

In many instances, women are not allowed to join superannuation schemes, and the law gives them absolutely no remedy. It is not so much that the law discriminates it is just that the people running the superannuation scheme can make rules and regulations which mean that there is discrimination and that there is no redress.<sup>50</sup>

66. A population survey in February 1974 showed that only 16 per cent of employed women are covered by superannuation compared with 41 per cent of men. Of employees in government service, 37 per cent of women and 66 per cent of men are covered.<sup>51</sup>

67. The lack of provision for a surviving beneficiary or dependant of an unmarried member of a scheme was mentioned as being harsh to single women who work all their lives.<sup>52</sup> Under some schemes a wife can draw on her husband's superannuation after his death but a widower may not draw on a deceased wife's superannuation. Women may be required to resign from superannuation schemes on marriage.<sup>53</sup> Other complaints were that women's entitlements were less than those of men for the same contribution.<sup>54</sup>

46. Submission 1090, Miss P. Woolley.

47. Evidence, pp. 1257-67, Roseanne Debats, WEL, Adelaide; Exhibit 82.

48. Interview report, NSW, 295.

49. Submission C295, confidential.

50. Evidence, pp. 2489-90, H. Coonan.

51. ABS, *Year Book of Australia*, no. 60 (1974), p. 719.

52. Submission C28, confidential.

53. Submission 43, Working Womens Centre, Melbourne.

54. Evidence, pp. 2665-6 and Submission 594, Edna Ryan.

68. Much superannuation is entrusted by employers to life insurance companies. We were told that approximately 700 000 people participated in such schemes.<sup>55</sup> This is approximately half the total covered. On the face of the material before us, these superannuation schemes appear to discriminate unfairly against women.

69. We note that the NSW government's Discrimination Bill, before the NSW Parliament in December 1976, and the South Australian Sex Discrimination Act both specifically exempt superannuation from their general provisions. In 1975 payments and entitlements for superannuation were equalised for males and females in the Commonwealth public service.

70. In our view, where superannuation is compulsory the rates should not vary between male and female but should reflect the marital status and dependants of the participant. We conclude that the government should ensure equal access by men and women to superannuation funds.

### **Other benefits**

71. We received complaints that women are unfairly treated in regard to other benefits. Examples of these are as follows:

- (a) A married female airline employee is not entitled to concession air travel for her children, whereas a male is so entitled.<sup>56</sup>
- (b) Women often have to retire at 60, while men can go on to 65.
- (c) Bank housing loans sometimes differentiate between male and female employees.<sup>57</sup>

### **Workplace attitudes**

72. A submission from Edna Ryan, trade unionist, showed how traditional attitudes operate in the workplace itself to keep women in low-pay, low-status jobs and prevent their movement to supervisory roles. In many cases these are the attitudes of male workers, not of employers. Her comments were based on a survey of two groups of assembly line workers:

On the assembly line, foremen and charge hands are always men. Quite often a woman does the duty of a charge hand but she is never given the classification or the pay.

Relatively more women have been retrenched from the motor industry than men. If any men are retrenched the men in the workshop turn to women and ask them aren't they ashamed because men have been put off instead of women.

On the factory floor women are more likely to be placed on the jobs that have disadvantages, like an ear-shattering noise which men would not be expected to tolerate.

Women complain that men are given more sympathy and consideration if absent for illness than women are. Women's illnesses are regarded with derision or hostility and, in order to retain their jobs, women are more likely to return to work sooner than desirable. They sense a lack of tolerance on the part of male supervisors and executives.<sup>58</sup>

73. A program for change was put to us by the Zonta Club of Sydney, who said:

Problems stem as much from apathy as from prejudice and we need constructive programs to educate and stimulate employers to reassess their employment practices, so that women as individuals are given more genuine equality of opportunity, and so that the present under-utilisation of women's skills, talents and abilities is diminished.

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55. Letter, 'Life funds', *Sydney Morning Herald*, 12 November 1976; *Year Book of Australia*, no. 60, p. 532.

56. Submission 323, Mrs J. Longe.

57. Submission C1175, confidential.

58. Submission 594, Ms Edna Ryan.

Limitations on wider job scope for women are rarely based on valid factual assessment, but the processes for change will need to be subtle and comprehensive. There is little to be gained from turning the employment sphere into a battleground, as success will come only by a co-operative effort. This must involve government example, encouragement and extension of educational and advisory services, a willingness on the part of employers and unions to rethink present practices, and courage on the part of women to qualify for, seek and then maintain their new opportunities.<sup>59</sup>

74. Many practices are based on traditional attitudes rather than on evidence. The literature of industrial relations and personnel practice was researched in 1974<sup>60</sup>, and again in 1976 by our staff, to check beliefs about women workers. There was little research literature on any of these topics and what did exist invalidated some common beliefs and severely modified others.

### **Promotion opportunities**

75. The report of the National Committee on Discrimination for 1974-75 referred to the denial of female participation in training:

This restriction, either unconscious or deliberate, contributes to the predominance of women in relatively junior or subordinate positions in many occupational areas.

Many submissions drew attention to the lack of opportunities for women to reach senior positions. This applies to the unskilled as well as to the university graduate.<sup>61</sup>

76. We heard complaints about the lack of opportunities for training and promotion in banks:

The regional staff manager, Mr . . . , explained that the employment of girl tellers had been resumed so that young men freed from these positions could move more quickly through the training system to senior positions.<sup>62</sup>

77. Edna Ryan's submission said that a woman had never been appointed as a supervisor in a railway telegraph office. Her other comments about promotion were as follows:

In the public service relatively more women [cleaners] than men are temporary employees; this means no opportunity for promotion to leading hand.

Younger men who are appointed to jobs as leading hands over women their senior in age and experience tend to be vindictive and savage about making the women perform physically more arduous work than has been the custom. Many men tend to overlook completely the question of skill being as valuable as muscle. Such leading hands generally say: 'you're getting equal pay now, you must do the work'.<sup>63</sup>

Male business executives often have reservations about women occupying senior positions or even having equal status to themselves. Among the myths that keep women out of senior positions is that it would make other women jealous.<sup>64</sup>

78. Since so few women do reach higher positions it cannot be concluded that training would be wasted, or that women are in fact resented in supervisory positions or that they dislike making hard decisions.

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59. Submission 414, Zonta Club, Sydney.

60. Bielski & Surtees, Women: a squandered resource (unpublished paper, Seminar, University of Sydney, August 1974).

61. Evidence, pp. 118-26, Ms Margaret Power; Submission 1048, Ms P. Simons also points out that few women reach eminence in universities and schools of advanced education.

62. Evidence, pp. 1257-67, Roseanne Debats; Exhibit 82.

63. Submission 594, Ms Edna Ryan.

64. Evidence, pp. 1257-67, Roseanne Debats; Exhibit 82.

### **Lack of opportunities for employment**

79. There is generally a higher rate of unemployment among females seeking full-time employment than among males. In August 1976, 6 per cent of females and 3.7 per cent of males were unemployed. Among juniors the rates were 14 per cent for females and 12 per cent for males. Half the females unemployed are under 21.<sup>65</sup>

80. The employment of women is especially affected by the lack of employment opportunities in particular areas, for example the western fringe of Sydney and rural areas.<sup>66</sup> The monthly employment statistics show how, in heavy industry towns and rural areas, women suffer a proportionately higher rate of unemployment than men.<sup>67</sup> Almost no part-time work is available.

81. A woman from Queensland stressed the lack of employment opportunities for women in country towns.<sup>68</sup> Girls are given preference over women partly because their wage rates are lower. Most women of above average ability have few opportunities to fulfil a truly productive work role.

### **Causes of discrimination**

82. Women's lower incomes and their occupational segregation arise, according to Margaret Power:

. . . from factors intrinsic to the workforce but also from other social and economic institutions, such as the family, such as schools, such as on-the-job training, trade unions and so on and of course the origin of all this is in our stereotype of the male breadwinner/female housewife, so that one has this sort of definition of men and women accepted as a social convention and then the other characteristics follow that the institution was designed to perpetuate; the division of roles, so that women will necessarily be disadvantaged in their employment.<sup>69</sup>

83. The situation is perpetuated by the attitudes of employers, customers, trade unions and male employees. Employment practices are largely in the hands of male executives and there is little pressure for change. Trade unions have been slow to move for equality for women workers. The attitudes of male employees, real or imagined, often inhibit employers from placing women in male-dominated work areas.

### **Absenteeism and turnover**

84. One reason sometimes given for restricting women's employment opportunities is that they have a higher rate of job turnover and absenteeism. Official figures for separation rates do show higher turnover rates for women in most industries.<sup>70</sup>

85. A survey of sickness absence in the Commonwealth public service in 1972 sampled 11 899 (or 4.9 per cent) of the full-time staff employed under the Public Service Act. The main findings on sickness absence in the Australian public service were:

- (a) Absence rates for females were higher than those for males.
- (b) Absence increased with age, but more so for males than females.
- (c) There was no clear-cut trend whereby absence rates could be seen to be increasing with length of service, especially among females.

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65. ABS, Labour force survey. Figures supplied by Department of Employment and Industrial Relations.

66. Submission 821, Mrs B. M. Harding.

67. Department of Employment and Industrial Relations.

68. Submission 48, Mrs M. H. Waldron.

69. Evidence, p. 123, Ms Margaret Power.

70. See Submission 43, Working Womens Centre, Melbourne.

- (d) Frequency rates declined with age, particularly among females.
- (e) Frequency rates increased initially with length of service, then declined, especially among the longer serving females.
- (f) The average duration of absences was the same for both sexes.
- (g) Duration of absences increased with age and with length of service. This increase was most marked among the longest serving males.<sup>71</sup>

86. In 1973 the State Departments of Labour for Vic, NSW, Qld and SA collaborated to survey State public services for absences from work. As with the Australian public service, it was found that married women were marginally more prone to absence than single women; older employees had higher absence rates than other age groups.

In New South Wales, female absence was noticeably higher than that for males, but in Victoria and Queensland there was relatively little difference in the absence levels for men and women.<sup>72</sup>

However, the studies were not correlated with status and responsibility in the public service hierarchy. Perusal of State public service annual reports and a study of women in the Australian public service show that women are overwhelmingly located in the low-status, low-salary, unskilled and semi-skilled ranks of the service. In the Australian public service women are 27 per cent of the total service and 80 per cent of them are in the fourth division, the lowest paid and least skilled section of the service<sup>73</sup>; compared with this 68 per cent of full-time male employees are in this division.

The Working Womens Centre, Melbourne, comments:

Low-paid unskilled workers have understandably a high absentee rate. A large number of women work in unskilled, monotonous jobs, therefore the average absentee rate for women workers is higher than that for men.

With increasing responsibility, turnover decreases. Middle-aged women are a more stable group than men or women under 25; women who enter the labour market in their 40s show very low turnover rates.

This myth of higher job turnover and absenteeism has led many employers not only to reject female employment, but also to refuse to expend time and money training them. So many women miss out on career opportunities and promotion because on-the-job training is denied them.<sup>74</sup>

87. Without further research it is not possible to draw conclusions from these surveys adverse to women. The male-female differences may, on investigation, prove to be marginal on a variety of issues, and immaterial over a lifetime of work. They may reflect the lower commitment to work of unskilled people in low-wage, low-status and low-responsibility sectors of the workforce.<sup>75</sup> There has been no significant research on this in Australia. This is an important omission with serious social and economic consequences for women, for labour and for management.<sup>76</sup>

## Conclusions

88. There is discrimination against women in the work situation. Discriminatory attitudes are evident in recruitment, training, promotion, conditions of service and pay.

71. D. S. Millar, 'Sickness absence in the Australian public service', *Personnel Practice Bulletin* 30, 4 (1974), pp. 333-41.

72. 'State government absence surveys', *Work and people* 1, 3 (1975).

73. Millar, *Personnel Practice Bulletin* 30, 4 (1974).

74. Submission 43, Working Womens Centre citing P. Riach, 'Women and the Australian labour market', in Mercer.

75. David C. Thorne, *Suburbia* (MacGibbon and Kee, London, 1972), pp. 93-110.

76. E. Sawhill, 'The economics of discrimination', *Journal of Human Resources* 8, 3 (1973).

89. In Australia work is still predicated on men's life pattern, freedom from child-bearing and ability to work from youth to old age. Consequently, when work patterns are broken because of childbearing and child rearing, penalties are exacted, often entailing resignation, refused promotion and downgrading. The inadequacy or absence of child care facilities leaves women with few options as to the kind of employment they can undertake.

90. A great deal needs to be done to change this sorry picture. Research is needed into basic causes and finding and evaluating possible courses of action. We would like to see the government publicising its basic policy of equality and spelling out detailed new policies to give leadership and guidance on this special problem. There needs to be public education and public commitment by both unions and employers.

### *The public service*

91. The report for 1974-75 of the National Committee on Discrimination in Employment mentioned that a feature of the complaints received 'was the large number affecting employment in the government sector including both Commonwealth and State government departments and authorities'. Our own submissions confirm a general lack of satisfaction with the employment opportunities for women in public service.<sup>77</sup>

92. It is fair to point out that efforts are now being made to bring about change. The NSW government, for example, is establishing a womens unit within the public service to monitor government programs. The position of women in the Commonwealth public service was considered in some detail by the Royal Commission on Australian Government Administration, who reported that:

. . . women are to be found predominantly in occupations which offer lower rewards and limited career prospects. Women employed under the Public Service Act are to be found predominantly in service occupations and in service-oriented departments, and tend to be grouped largely in the lower levels of nearly all occupational structures. Their exclusion from a number of specialist occupations is often attributed to the residual effect of the marriage bar. However detailed analyses of the progression of males and females with similar qualification and service attributes strongly suggest that the lack of female representation at the top levels of occupational structures owes more to the continued operation of prejudice than to history or the lack of ability on the part of women recruited.<sup>78</sup>

93. The annual reports of each State government's Public Service Board reflect similar patterns.

94. The Commission concluded that it would be unjust to rely solely on time to remedy discrimination and recommended the initiation of special recruitment, training and career development programs, with a unit within the Public Service Board to stimulate and monitor programs and identify and study problems in female employment.<sup>79</sup>

95. The Commission believed that equality could be advanced by legislation which has declaratory value on important social issues and which can be seen as an instrument of persuasion and social pressure:

. . . strengthening those who wish to resist discrimination, stiffening the resolution of the waverers and giving those inclined to discriminate reason to pause and reconsider.<sup>80</sup>

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77. e.g. Submission 418, Mrs J. Schofield.

78. RCAGA report, p. 187.

79. *ibid.*, p. 187.

80. *ibid.*, pp. 190-1.

The Commission recommended legislation:

... to require all agencies of the Commonwealth government to exercise any powers or discretions they possess in a manner which does not discriminate in employment on grounds of race, creed, sex, age, marital status, political belief, security record or educational qualifications, except where reasonably and justifiably required for the effective performance of the work to be undertaken.<sup>81</sup>

The legislation should not, in their view, preclude action to confer advantages on members of disadvantaged groups.

96. The Commission recommended that an Office of Equality in Employment be established within the ambit of the Public Service Board to pursue purposes designed to create equality.<sup>82</sup> Neither penal sanctions nor civil remedies were recommended in cases of discrimination. Instead the Office would proceed by a process of investigation, counselling and conciliation, with a right of appeal to the Public Service Board or ombudsman.<sup>83</sup>

97. The Commission also made a number of recommendations aimed at increasing the opportunities for female participation in policy decisions affecting women. They recommended that a Bureau of Social Policy initiate and conduct specific studies relating to women.<sup>84</sup>

98. We support these recommendations. We consider, too, that the position of women in industry and commerce is similar to that in the public service and calls for a similar kind of response.

99. The setting up of an Office of Equality in Employment is a pioneering venture in a new field of labour relations and the experience of the Office will be valuable in all areas of employment to show how discrimination operates and how it can be overcome. Reports on the work of this Office should be widely disseminated.

100. There are a number of practical steps which we think should be considered and implemented as soon as possible as part of the programs to promote equality. These include the progressive introduction of part-time employment as part of the public service permanent career structure and the provision of full-time child care facilities wherever possible. These need not necessarily be provided without charge but should be subsidised for those who cannot afford full fees. The provision of child care facilities by private employers is an area needing further study; the public service could lead the way in pilot projects. These key provisions are necessary if long-term changes are to have any prospect of success.

101. Other matters which could be considered for early action include the following:

- (a) a review of vocational guidance material prepared for or used by the government to ensure that only those publications are used which encourage both men and women to consider a wide range of occupations;
- (b) a review of public service recruiting policies to ensure that job advertisements and recruiting programs encourage women applicants and that the qualifications required for appointment to senior positions do not unnecessarily exclude suitable women applicants;
- (c) the selection of more women for training for administrative and management positions;

81. *ibid.*, p. 191.

82. *ibid.*, p. 191.

83. *ibid.*, p. 193.

84. *ibid.*, pp. 342-5.

- (d) the removal of unnecessary obstacles to the transfer from secretarial to clerical grades.

102. The question of qualifications for appointment or promotion raises difficulties. Women who have been out of employment for some years may lack experience in a particular field though otherwise well qualified. Very often advertised positions stipulate that experience in a certain field is necessary. These requirements should be re-examined to see whether they are really necessary and whether the job could be filled by someone who does not have that precise experience. Women should be credited for skills acquired in the family, in home management and in voluntary work.

103. Since the theme which has been pursued in this report is that of equality and equal opportunity, it may seem a contradiction to suggest special advantages for women, such as preference in selection or promotion. Certainly in the long term women seek only to stand on their merits; their ambition would and should be to eliminate the need for specially advantageous treatment. In the short term, however, there is a great deal of leeway to be made up. To speed the process there should, in our view, be interim policies to bring about a better balance of men and women at each level of employment. Where a particular job classification in the public service is dominated by persons of one sex these policies should ensure that suitably qualified persons of the other sex are given preference in appointment and promotion. The aim is not necessarily to achieve equality in numbers, but to reduce serious imbalances.

104. Investigation is needed of the conditions of service to ensure that there are no unjustifiable distinctions between men and women. Superannuation and family removal expenses on transfer were mentioned as providing benefits for men better than those accruing to women.

105. While we have not considered in any detail the conditions of recruitment, appointment and promotion in the armed services, we believe that further investigation is needed into ways of integrating women fully into the services and also into the Australian police.

### ***Women and trade unions***

106. Historically unions attempted to enable male workers to exercise more control over their work and its conditions. In the main they concentrated on increasing pay, improving conditions, reducing hours and excluding non-members, aged men (after the introduction of the old age pension) and competition from youth and women. Their early preoccupations have become their traditional preoccupations. Submissions to us suggest that some unions have not responded to the entry of migrants and women into the workforce. It is claimed that their neglect amounts to discrimination by omission in that they accept subscriptions for services they fail to give.

### **Participation by women**

107. In 1974, 55 per cent of total wage and salary earners were union members, including 63 per cent of male workers and 48 per cent of female workers. Women make up 31.3 per cent of all union members. In recent years, in fact, women have joined unions in proportionally higher numbers than men.<sup>85</sup>

108. The Working Womens Centre, Melbourne, wrote of reasons why women might be reluctant to participate in union activities. These relate mainly to lack of interest by the union on issues important to women and discouraging attitudes on the part of men.

85. ABS, *Trade union statistics, Australia, 1974*, ref. no. 6, 24.



A woman who does manage to attend union meetings may well find that she is the only woman there. Many may not have sufficient confidence to put their point of view, particularly when faced with an intimidating set of rules and procedures or a group of men who seem unconcerned about women's special handicaps.<sup>86</sup>

### Attitudes neglectful of women's interests

109. Ms Edna Ryan, in evidence already mentioned, drew our attention to provisions in NSW awards which discriminate against women. She pointed out that in many cases these are agreed to by unions and that they are the result of a failure by some unions to safeguard the interests of their women members. In some cases these provisions grant concessions only to women, such as part-time work or rest periods. In others they restrict women's work activities:

Part-time work in a number of awards (e.g. printing, metal) is tolerated for women only, being regarded as a concession for married women . . . provision should be made in all occupations for a percentage of part-time work also, and that it be made available without discrimination as to sex.

It has been laid down in other awards (metal and meat) that women may perform certain specified tasks only with permission from the union or by recourse to a board of reference. The issues here are that the restrictions apply to females and that the union and the board of reference would be composed of males. Recent meat industry awards have modified this provision to some extent and the restrictions may be on the way out.

The NSW Factories and Shops Act regulates the weight that a junior or a woman may be allowed to lift and, in so far as it is mentioned in some awards, the restriction does tend to discriminate against women. Concerning weight lifting: medical officers working in this area of compensation maintain that women are more able to withstand weight lifting than men! In other words, men also need protection.

A board of reference in some awards has authority to determine whether females should be prohibited on night shift. Such restrictions need to be eliminated. Women should have the same right as men to decide if they prefer night work.

Sometimes seating is required for women in award entitlements but not for men. Men have no more stamina than women and this paternalism is misplaced. Jobs which demand standing without relief should have shorter hours for women and men.<sup>87</sup>

110. Ms Ryan also drew our attention to the way in which the Arbitration Commission decisions on equal pay and equal minimum wage in 1972 and 1974 were implemented. She detailed specific incidences showing that the restructuring of awards sometimes led to women being downgraded. In general women did not take part in the negotiations and some were dissatisfied.<sup>88</sup>

111. Ms Ryan's views are in tune with the findings of a Committee, representing government, employers and unions, set up in South Australia in 1975 to examine industrial awards and agreements. The Committee found distinctions between male and female conditions, principally in types of work, work restrictions, the employment of apprentices and minors; rests, meal breaks and amenities; hours, overtime and part-time work; annual and sick leave; transport; weight lifting; and uniforms.<sup>89</sup>

112. We assume that this situation is nation-wide. The distinctions appear to be based on the assumption that women are weaker than men. But women's longer life pattern and their capacity to manage paid work as well as their home challenges these assumptions.

86. Submission 43, Working Womens Centre, Melbourne.

87. Submission 594, Ms Edna Ryan.

88. *ibid.*

89. SA Department of Labour and Industry, internal report (unpublished).

113. Womens Electoral Lobby, Adelaide, submitted that while unions sometimes take up women's causes to ensure equality for them, there are instances where women's benefits are traded off against the men's and where women's complaints are not taken seriously.<sup>90</sup>

### **Trade union support**

114. A few trade unions have done better and have been actively involved in gaining equality of job opportunity for women members and in developing welfare programs. The Electrical Trades Union surveyed its women members to establish their attitude to work and child care,<sup>91</sup> and it continues to interest itself in child care programs. The Australian Railways Union resolved in 1974 to provide equal opportunity and this is being promoted by officers of the union.<sup>92</sup> The Food Preservers Union are moving for an equality clause in their awards. The Teachers Federation employs an officer whose function is to promote equal educational opportunity for girls and to alert women teachers to their opportunities.<sup>93</sup> The Amalgamated Metal Workers Union is attempting shop floor education of its members.

115. Some unions have complained of female members taking too little interest in pressing their own claims and in supporting the claims of men.<sup>94</sup> It is also claimed that often they do not see any advantage in union membership. The argument is circular.

### **Opposition to part-time work**

116. Instances were put to us of situations where unions have not only neglected women's interests but have actively opposed the introduction of provisions designed to help women. One illustration is the intervention by the Commonwealth Bank Officials Association (CBOA) in the part-time work case involving the Australian Bank Officials Association (ABOA). The CBOA had earlier opposed the introduction of part-time work in 1967 when the Commonwealth Bank wanted to employ experienced women as part-time workers. As a result of a court decision in 1967, part-timers entered the industry and there were 600 in the Commonwealth Bank in 1974. Some of these would have been members of the CBOA.

117. The representative of the CBOA supported the opposition of the ABOA to part-time work, stating that its opposition over the years was unchanged.<sup>95</sup> The basis of the opposition was that part-timers represented 'dilution of experience', were a burden on the full-time staff because many had no training, worked only peak periods and were not available for the clearing periods.

118. On the other hand, the union appears to have made no effort to regulate the training of part-time workers and appeared agreeable to part-timers remaining in low level positions not leading to a career, thus enhancing the career prospects of the full-timers by reducing internal competition. Part-time members pay union dues pro rata to their salaries. Despite this their union appears to pay little attention to their interests by securing the best possible terms for part-time workers. The Arbitration Commission ordered that part-time employment should be instituted for a trial period, substantially on the terms put forward by the employers; an appeal was dismissed.<sup>96</sup>

90. Evidence, pp. 1257-67, Roseanne Debats; Exhibit 82.

91. A. Burns et al., *Working mothers and their children: the electrical trades union study* (School of Behavioural Studies, Macquarie University, 1974).

92. Commission correspondence, Australian secretary, ARU, file S126.

93. Reports of various activities, *Education* (Journal of the NSW Teachers Federation), 1975-76.

94. J. P. Maynes, *Women in the workforce*, 1970 (paper delivered at IWY seminar, Melbourne, 1975).

95. Transcript, C. no. 664 of 1974, Aust. Conciliation and Arbitration Commission, page 90.

96. *Australian Industrial Law Review* XVII, 15 (1975), p. 421.

119. Another example of opposition to part-time work arose in relation to the Australian public service. The Public Service Board published a discussion paper in 1975 outlining proposals to integrate permanent part-time employment into the service so that officers could elect to work part time for part of their careers. This scheme would help women, by enabling them to retain their skills during their child-bearing years, older officers with chronic but less than total ill health, and persons caring for the sick and elderly.

120. The Administrative and Clerical Officers Association (ACOA) opposed permanent part-time employment on the grounds that it is contrary to the concept of a career service, that part-time officers could not act as supervisors, that there is no satisfactory base for competitive assessment or for regulating overtime or job rotation. They also claimed that part-timers would lack interest in industrial affairs.<sup>97</sup> In effect the union is opposing those officers, mainly women, who are in the service and who wish to retain their career prospects and skills during a period of social and family responsibility.

121. In 1976 we sent a written comment to the Public Service Board outlining our views on part-time employment.<sup>98</sup>

122. Not all unions are opposed to part-time work. Some awards, e.g. in clothing trades and food industries, have special provisions for short weeks with a full range of conditions.

### Migrants

123. The Working Womens Centre, Melbourne, described how the unions have failed to meet the needs of migrant women:

In many workforce areas there is a high proportion of migrant women who are not able to participate in union affairs because of their inability to understand English.

A large percentage of migrant women begin to work for the first time in their lives when they come to Australia. They are unaware of industrial and union procedures. Nonetheless, they join the ranks of the industrial workers. As women, they meet with low-paid, dead-end jobs and with work contracts that pay no heed to their special needs:

- maternity leave
- child care facilities
- flexible working hours

As migrant women they meet apparently insurmountable obstacles—indifference and incomprehension.<sup>99</sup>

124. The submission argues that unions should recognise women as an indispensable part of the workforce and that their needs should be considered. Unions should teach about their own operations and also press for the teaching of English to migrants during working hours without loss of pay. Motion sheets at meetings should be printed in migrant languages.

Most importantly, migrant women must be assisted to take their place in the management and leadership of their job organisations and trade unions.<sup>100</sup>

We agree with these general aims and add that the Department of Immigration could assist unions with migrant language information leaflets.

97. *White Collar* 3, 2 (1976) (Official journal, ACOA, NSW branch).

98. Commission correspondence, file S172.

99. Submission 43, Working Womens Centre, Melbourne.

100. *ibid.*

125. A recent Australian research study confirms what the Working Womens Centre said about the plight of migrant women and the lack of union concern. The report concludes that:

Trade unions, no less than other Australian institutions, have not understood, adapted to or articulated the specific problems, needs and demands of migrant workers, especially those who are women.<sup>101</sup>

### Action by and for women

126. The Working Womens Centre in Melbourne is a centre for research, education and information, to create awareness among unions of women's needs and to help women in unions. It was opened in 1975 with a grant from International Womens Year funds. During its first 6 months of operation the Centre handled over 1000 inquiries and circulated discussion papers to unions on such issues as child care, migrant women and maternity leave. The Centre has provided courses in trade unionism for women and publishes a multilingual newspaper. It has participated in government inquiries relating to women's employment.

127. In April 1976 the Womens Trade Union Commission was established with a grant from International Womens Year funds. The Commission is independent of any trade union or political group and its aim is:

. . . to improve the status of women in the union movement, to encourage unions to recognise the special needs of women workers and to promote a greater participation of women members in the decision-making areas of the trade union movement.

The Commission also provides information and assistance to individual women about employment problems.

128. In August 1976 the Commission convened a national conference of women unionists to look at problems facing women at work and in the unions. The report of the conference, 'Unions are for women too', indicates the scope of the needs and interests of women workers. Recommendations formulated in workshop sessions covered the following topics:

- working hours and conditions
- specially disadvantaged women
- mothers wage
- training and apprenticeship
- division of labour based on sex
- part-time and casual employment
- discrimination legislation
- retirement and superannuation
- health
- women and the economy
- wages and unequal pay
- children
- welfare, legal aid and the unions role
- maternity-paternity leave
- right to work
- unions and unemployment
- safety, workers compensation etc.
- non-unionised women
- women and unions

129. The WTUC and WWC have recently received grants (of \$24 000 and \$8000 respectively) to examine child care needs and to develop services in highly industrialised areas. We support the aims of these two bodies and believe that they play an important role on behalf of women in industrial matters and in developing positive attitudes by trade unions and women. We believe they should receive further support.

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101. Storer et al., *'But I wouldn't want my wife to work here . . .': a study of migrant women in Melbourne industry* (Centre for Urban Research and Action, Melbourne, 1976), p. 117.

130. The *Trade Union Training Authority Act 1975* established an Australian Council for Trade Union Training funded by the government. Trade union training centres are established in each State to conduct courses for union members and the Clyde Cameron College at Albury-Wodonga gives residential courses. The Council subsidises students to the extent of a third of their wages while they attend. Participants must be approved by their unions.

131. Special courses have been run for women in all States to help them become more effective union participants and office holders. At present few women attend. The Trade Union Training Authority could play an important role in educating women and in encouraging trade unions to revise their attitudes and services to women. It could, for example, give instruction on the socio-economic status of women and of migrants. The Authority could also develop residential schools and courses mainly for women and catering for their needs by providing child care. Unions should be encouraged to seek women actively to train for trade union office.

### Conclusions

132. We believe that unions should reconsider their policies and pay due regard to the needs of women members for a work and career pattern that enables them to fulfil family responsibilities. Women need education and encouragement to play a more active role in union affairs. We consider that the government should contribute funds to the Working Womens Centre, Melbourne, the Womens Trade Union Commission, Sydney, and such other working womens centres as may develop elsewhere in Australia to assist in these objectives.

### Child care

133. A major factor in establishing equal employment opportunities is the provision of adequate child care.

Working mothers carry a double burden of home and child care duties on the one hand and employment on the other. Immediate provision of child care facilities and opportunities for part-time work would greatly ease these burdens, until society accommodates over the long run to new definitions of sex roles and equalisation of parental responsibilities.<sup>102</sup>

While our main study of child care is in another part of the report, it should be mentioned briefly in the context of discrimination in employment. Many working women have children under school age. A survey conducted by the Australian Bureau of Statistics in May 1973 showed that 27 per cent of women responsible for the care of children under 6, and 35 per cent of women responsible for children under 12, were in the labour force. Ten per cent of the children under 6 were in child care centres and 56 per cent were cared for by relatives or friends. During school holidays 22 per cent of the persons responsible for children aged 4 to 11 stopped work or took leave.

134. The need to make provision for child care often restricts women's employment opportunities. They have to seek jobs with certain characteristics, e.g. with hours similar to school hours, flexible hours, part-time work or work close to home. The opportunities to obtain more skilled or higher paid work are thus limited.

135. Women's options in regard to choice of child care facilities are also restricted. Often child care arrangements are inferior and expensive. Migrant women are particularly vulnerable in this regard.<sup>103</sup>

102. Alice H. Cook, *The working mother* (NY State School of Industrial and Labour Relations, Cornell University, 1975).

103. Evidence, p. 141, Miss V. Koutsounadis.

136. The inadequacy of child care facilities has adverse consequences for working mothers and for their children. Many consider that mothers should not absent themselves from young children to take paid employment and that they should be given financial incentives to remain at home. There are, however, no obvious practical ways of giving effect to this proposal without incurring very great expenditure. It also takes insufficient account of the reasons why women work, which are not exclusively financial, and of the numbers of lone parent families who would be dependent on social security if the parent could not arrange for the care of the children. While argument on these points continues, many children are not receiving adequate care.

137. It is important to monitor the effects of different arrangements for child care such as day care centres and family day care programs. Alternative forms of care should be available wherever possible. After-school and holiday care should be included in child care programs. While it may not be practicable to provide free child care services, we consider that subsidies should be provided for those who are in greatest need. These groups should also have priority where facilities are inadequate. The government should be active in promoting the provision of child care facilities.

138. We consider it important not only to extend the scope of child care services but also to involve both employers and unions in planning and providing facilities essential to working parents. Work-based child care may have some advantages, provided that physical conditions are suitable and that parents are not tied to the job by the lack of alternatives. There is a clear need here for unions to be involved in planning the arrangements.

### **Credit, goods and services**

139. We heard claims of discrimination against women in housing, finance, insurance and credit.

140. Womens Electoral Lobby, Adelaide, reported the following cases of discrimination:

- A woman with a steady income could not get a mortgage unless the home was registered jointly in her father's name; she pays but all correspondence is addressed to him.
- A deserted wife whose home is in joint names, and who makes all payments, cannot receive accounts directly because 'the computer has been programmed to send accounts only to men'.
- A husband may have unlimited access to a joint account whereas the wife may be limited to a certain amount.
- A business woman had to get her husband as guarantor when making home purchases as part of her renovating business.
- A separated woman with a good salary was denied a personal loan as a matter of policy.
- A married woman was refused a loan to purchase a motor bike unless her husband joined in the transaction.<sup>104</sup>

141. In other cases reported to us:

- A building society would allow only 25 per cent of a wife's salary for loan purposes, though she had worked 25 years and was well past 40—'it's policy'.<sup>105</sup>

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104. Evidence, pp. 1257–67, Roseanne Debats; Exhibit 82.

105. Commission correspondence, file S133.

- Stores restrict credit in budget accounts for divorced women and widows and require guarantors.<sup>106</sup>

142. Ability to pay is apparently not the only criterion of credit worthiness.

- A married woman with her own income and steady employment could not open a charge account in her own name without a special request; she still had to give the particulars of her husband's employment.<sup>107</sup>

143. In this last example, the woman also went to some other stores and found similar policies except in one case where only the husband's name was asked for.

Most of the stores indicated that a single woman was not discriminated against if she was employed steadily and could produce references. She would not be asked to give a guarantor.

However, the married woman is definitely discriminated against technically even when the account is in her name, her husband is still being used (his credit rating) to guarantee the wife's credit.

All stores asked for the husband's employment etc. except David Jones. As David Jones does not find it necessary to have such information, it does not make sense that the other stores should make such requests.<sup>108</sup>

144. Most complaints against bank credit were associated with employment. A solicitor stated that two banks gave male officers loans at reduced rates and female officers loans at customer rate. She was informed that the reason was that the 'women leave'. When she asked what happened when a man left she was informed that he was then put on the customer rate.<sup>109</sup>

145. We wrote to six major Australian banks asking for their policy on credit for any purpose, because some complaints were received.

146. The Commonwealth Trading Bank replied as follows:

The lending policies and practices of the Commonwealth Trading Bank do not discriminate between the sexes or between married persons and single persons. These policies and practices are long standing. All have to satisfy normal tests of credit worthiness and ability to meet repayments from his/her own resources. Where it is not possible for the Bank to be satisfied that an applicant would be able to meet repayments entirely from his/her own income or resources, it is normal practice to consider introducing a third party into the transaction as a joint borrower or as a guarantor . . . an application from a man or woman is subject to the same tests and the question of a guarantee could arise in either case.

The stated official policy of other banks was similar, with some variations.

147. Women's relatively low incomes, their poor income prospects due to their low place in the workforce, their vulnerability to unemployment at all times<sup>110</sup>, i.e. their 'apparent ability or otherwise to service total liabilities' (National Bank), are likely to be the reason for women being refused loans and credit from banks. The possibility of pregnancy or views that women are ordinarily dependent or that 'women do not understand money' do not appear to affect the banks' official policy.

148. We had no way of ascertaining whether the official policy is applied correctly or whether local managers and officers are affected by such concepts. Some women

106. Submission 161, name withheld.

107. Interview report, NSW, 292.

108. *ibid.*

109. Commission correspondence, file S133.

110. Submission 603, Rennie Lyne-Browne (Womens Bureau) cites ABS, *Employment and unemployment* (1975), ref. no. 6, 4.

still complain of difficulty in obtaining mortgages and operating joint accounts.<sup>111</sup> As there is a widespread belief that banks do discriminate against women, we suggest that banks' staff training programs include the need for equal treatment of women. We would like to see this backed by legislation to deal with cases of credit withheld in a discriminatory manner.

## **Discrimination in insurance**

### *Sickness and accident*

149. The main complaint of discrimination here was in insurance against loss of income by self-employed women due to accident or sickness. Women also have difficulty in getting a disability policy to cover the cost of employing home help.<sup>112</sup>

150. The South Australian Medical Womens Society wrote that it is difficult to insure against loss of income and that some policies exclude illness affecting female organs.<sup>113</sup> They point out that the morbidity associated with such illnesses is now much reduced and that women's life expectancy is greater than that of men. Most professional women, including doctors and lawyers,<sup>114</sup> have similar difficulties in obtaining this form of insurance. Policies applying to men do not exclude prostate gland surgery. One reason given by insurance companies for not providing such insurance is the lack of available statistics covering self-employed women.

151. Mr Colin MacDonald, insurance broker, confirmed discriminatory practices in the insurance field. He had tried unsuccessfully to get sickness and accident cover for women. It has become easier for professional women to get cover and recently for some business women. In general, however, there is still discrimination in sickness and accident insurance. He said:

I think discrimination comes under three main headings: one, eligibility for the insurance; two, premium structure; three, conditions which automatically include definitions of exclusions.<sup>115</sup>

152. Mr MacDonald tendered some insurance company forms and documents relating to accident and sickness liability which exclude women from eligibility.<sup>116</sup> He said that the reason for the exclusion was 'underwriting policy'. He told us that although discrimination in premium structures was not industry-wide women in some cases had to pay higher premiums in respect of lesser benefits.

153. The witness went on to deal with exclusions and conditions which he said discriminate against women.

The standard tariff wording which mainly is the most common thing reads something like this: 'In the case of a woman a claim will not be payable . . .' A lot of companies simply truncate that to the sort of terminology used in the Australian Casualty, 'This policy does not cover any loss caused by pregnancy, childbirth or miscarriage.'<sup>117</sup>

154. Mr MacDonald said that housewives cannot easily get cover against sickness and accident, because benefits are usually a percentage of income and do not apply where there is no income. Very few companies offer cover where there is no income.

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111. Evidence, pp. 1257-67, Roseanne Debats; Exhibit 82.

112. *ibid.*

113. Submission 143, SA Medical Womens Society.

114. Evidence, p. 1448, Drs Kerry Davis, Olive Johnson.

115. Evidence, p. 2368, Mr Colin MacDonald.

116. Exhibits 179 A, B, C, D.

117. Evidence, p. 2372, Mr Colin MacDonald.



155. Womens Electoral Lobby, Sydney, forwarded to us the results of a survey of insurance practice made in May 1975. They found a marked reluctance on the part of insurance companies to review their discriminatory policies and recommended that anti-discrimination legislation be introduced, so that pressure may be brought to bear on insurance companies to produce the statistics at their disposal, in order that a person refused insurance cover may know the reason why and any refusal be not based upon susceptibilities of any one sex.

156. Mr MacDonald's evidence brought some responses from the industry. The Institute of Actuaries pointed out that there have been investigations into the incidence of disability among women by comparison with men. Reports in the United States indicated that the incidence of disability among women is such that the average claim cost is higher than for men. The Institute also referred to a recent publication analysing absences from work due to sickness or injury among London transport staff from 1950 to 1970. Single and married women had higher rates of absence than men. The Institute concluded that in general the cost of providing benefits in the event of disability is much higher for women than it is for men.

157. There has until recently been a lack of data for Australia.<sup>118</sup> Between 1 July 1975 and 25 September 1976 the Health Insurance Commission recorded all 'fee-for-service' medical services and the incidence of hospitalisation, duration etc. in Australia for that period. These statistics showing age and sex are computerised and available.

158. The Life Offices Association of Australia wrote to us pointing out that it is not always possible to compare the policies of different companies in offering cover for a particular life. They also referred to the extra risks of pregnancy and to the need to defer insurance until those risks were over and a full medical examination could take place. They then went on to deal with disability income policies.

The second matter to which Mr MacDonald referred was connected with the issue of disability income insurance policies. On pages 2370 and 2373 of the transcript Mr MacDonald infers that no specific study has been made of morbidity rates such as would justify the granting of disability income insurance to females on other than the same terms as males. Investigations have been carried out in the United States and support the practice which exists in other countries of issuing disability income insurances with a higher premium structure for females than for males. Investigations into the morbidity experience under non-cancellable disability income insurances in Australia have not been made, as this type of insurance was commenced here only very recently. However, Australian investigations into other similar areas have shown a pattern broadly consistent with that of the United States.

There are two other aspects of the situation to which we would like to draw your attention:

Firstly, the long-term disability income insurance to which Mr MacDonald referred is designed to compensate the policy holder for a specific loss of earned income, and it is not appropriate for such insurance to be issued to persons (male or female) who are not in receipt of earned income.

Secondly, differentiation between males and females in relation to disability income insurance has parallels in other areas of insurance. It is seen in the practice of granting life assurance to females at lower rates of premium than apply to males, and in the practice of granting (for a given amount of purchase money) a higher rate of life annuity to a male than to a female of the same age.

It is our contention that, quite contrary to discriminating against females, members of our Association endeavour to apply such statistical evidence as is available to ensure, as far as we are able so to do, that there is no discrimination against either males or females.

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118. P.A.Burns, 'Permanent disability insurance', in *Transactions of 1971* (Institute of Actuaries of Australia and New Zealand, Sydney, 1972), p. 228.

When there is statistical evidence to support differentiation between the sexes we differentiate in the terms on which insurance policies may be written accordingly.<sup>119</sup>

159. According to Powles, longevity and health are related to class.<sup>120</sup> Both middle class males and females live longer and have better health than males and females of lower socio-economic status. The sickness and absenteeism rates of London transport workers are not directly relevant to women doctors, lawyers and other self-employed women.

160. It appears to us that the industry's attitudes to insuring women is based on inadequate data. We have suggested sources of further information; the industry needs to research this matter further. It seems fair to say that this field is rife with preconceptions about susceptibility of women to certain sex-linked illnesses, and the actuarial data are often based on considerations that are erroneous or which do not apply to a particular category of women.<sup>121</sup>

161. The point made by the Life Offices Association that long-term disability income insurance is designed to compensate the policy holder for a specific loss of earned income, and that it is not appropriate for such insurance to be issued to persons (male or female) who are not in receipt of earned income<sup>122</sup>, ignores the realities of domestic production. Domestic production has a replacement value just as paid work has, and could be given a notional value for insurance purposes, the risks calculated and a premium struck which is accepted or rejected by the applicant. Blanket discrimination against the woman engaged in domestic work is unreasonable; it also cuts off a possible source of business. We consider that the industry should tackle the task of designing disability insurance for women of specified categories taking into account age, socio-economic status and other factors. This should be done to enable women to insure against loss of income or loss of services to the family.

### ***Life insurance***

162. It was generally accepted that life insurance operates on a sound actuarial practice in that women get some financial benefits from their greater life expectancy, now estimated at 5¾ years.<sup>123</sup> Women get lower premiums for ordinary whole of life policies because a woman is normally chargeable at 3 to 5 years preferential age.<sup>124</sup> There were complaints about some minor distinctions regarding deduction facilities.<sup>125</sup>

163. We consider that legislation is necessary to ensure that there is no discrimination between men and women in the terms upon which insurance is offered and that distinctions are based on proper actuarial data.

### **Leisure and recreation facilities**

#### ***Licensed premises***

164. Some women complained of segregation in licensed premises. For example:

Many hotels only serve women in the lounge where the drinks cost more.<sup>126</sup>

119. Commission correspondence, file 75/1416.

120. John Powles, 'Why do women live longer than men?', in *Older women in the community* (Australian Council for the Aged, Melbourne, 1975), p. 3.

121. Commission correspondence, Institute of Actuaries, file 75/1972.

122. Commission correspondence, file 75/1416.

123. Powles.

124. Evidence, p. 2373, Mr Colin MacDonald.

125. Exhibit 82.

126. *ibid.*

This appears to be a particularly Australian form of segregation. It is prohibited only in SA under that State's recently passed Sex Discrimination Act, 1975. Discrimination is frequently enforced by asking women to leave<sup>127</sup> or to use the lounge facilities where higher prices operate. Similarly men are excluded from lounges if unaccompanied by a woman.

### *Clubs*

165. Clubs are of two kinds—proprietary clubs, which are businesses providing goods, services and recreation, and private clubs based on a membership, sharing a common interest such as a sport, a welfare objective or an occupation. The former frequently exclude women unless escorted by a male. The latter frequently restrict women to associate or non-voting membership or restrict their access to facilities. Many of the latter are not private in the true sense of the word. They have memberships of many thousands and the common interest has ceased to be the dominant interest of the club.

166. A correspondent wrote to us:

... why in clubs, such as bowling clubs and RSL clubs and leagues clubs which are used for sporting and general social activities of both men and women, are women not permitted to hold office in the management [i.e. to be full members]?<sup>128</sup>

167. Some clubs are granted concessions in rates and taxes and are permitted to occupy public land, yet exclude women altogether or restrict their membership rights and access to facilities. The Victorian Committee on the Status of Women reflected:

Where such a club or association is granted rate or land tax concessions or other governmental subsidy, the Committee is not unsympathetic to such practices being proscribed.<sup>129</sup>

168. The UK Race Relations Act covers exclusion from clubs.<sup>130</sup> Clubs are often a major community resource for providing social and recreation facilities, especially in rural and remote communities where they may be the sole provider of such facilities.<sup>131</sup> Some clubs also provide an atmosphere where professional, business, occupational and union news is discussed and in which informal networks operate.

169. Persons excluded from such clubs on the grounds of sex or ethnic origin are disadvantaged by being denied access to a major facility and by being excluded from informal networks.

170. A recent research study by Oxley suggests that mixed clubs help to break down barriers between groups at different ends of the social hierarchy, especially in country towns.<sup>132</sup>

171. We believe that, if club life remains preponderantly male or male controlled, it will continue to reinforce the sex role polarisation considered so remarkable and so destructive of male–female relationships in Australia. While it is not appropriate to interfere in the activities of purely private associations, a distinction can be made in the case of clubs which receive any public benefit such as tax remissions or the favoured use of public property. In our view the exclusion of males or females from

127. Interview report, NSW, 490.

128. Submission 952, Ms S. M. Midson.

129. Victorian Committee of Inquiry into the Status of Women, Interim report to the Premier of Victoria, August 1975, p. 24, para. 7.11.

130. UK Race Relations Act outlaws discrimination in clubs with twenty-five or more members.

131. H. C. Oxley, *Mateship in local organisation: a study in egalitarianism, stratification, leadership and amenities* (Queensland University Press, St Lucia, 1974).

132. *ibid.*, pp. 94–5.

large business, sporting, social or professional clubs which provide major facilities for entertainment, sport, recreation or refreshment should be outlawed where the club receives any such public benefit. The granting or continuation of such public benefit should depend on proof of non-discriminatory practices and there should be a public right of objection.

### **Women and the law**

172. Evidence given to us was that women are ostensibly equal before the law but have less than equal access to the law and that laws that appear even-handed are often discriminatory in their application.

### ***Legal documents***

173. The Catholic Womens League, NSW, said:

Women generally find it repugnant to find when being described on legal documents it is by reference to their marital status. It is suggested that women no longer be referred to as 'wife of' or 'spinster' or 'widow' or any other appellation referring to their married state. There is no reason why a woman should not be described in accordance with her occupation, whether it be clerk, schoolteacher, home duties or whatever her work may be, in the same manner as a man is described.<sup>133</sup>

This is a common complaint. Many forms and documents require a woman to describe her marital status even where this is irrelevant to any purpose contemplated by the form. Obviously there are cases, e.g. marriage applications, where it is necessary. To overcome the objections the Queensland Commission of Inquiry into the Status of Women recommended legislation:

. . . to provide that women shall not be required by any Act, or by any rule or regulation made pursuant to any Act, to describe themselves or to state their occupations by reference to their marital status.<sup>134</sup>

We agree with this recommendation. All official forms should be examined to ensure that this principle is being complied with, and necessary amendments should be made to Acts and regulations specifying forms to ensure that a description of marital status is not required unless it is necessary.

### ***Discrimination in legislation***

174. A statement from the Commonwealth Attorney-General's Department, 'Discriminatory provisions of federal and territorial legislation' dated May 1976, indicates certain matters in respect of which a distinction is made on the ground of sex or marital status. The list is not exhaustive and some laws and regulations may have been amended subsequent to May 1976.<sup>135</sup>

175. Matters included are wages, conditions of employment, licensing laws, jury service, first offenders and the capacity of married women.

176. Such legislation is often based on paternalistic notions which stem from the primitive notion that woman is the property of man and a weak thing who needs 'protection'. For example the Australian *Citizenship Act* 1948-1973 confers on a woman, not an Australian citizen, who is married to a man having the status of a British subject the right to be registered as a British subject, but no such reciprocal right is bestowed on men—the assumption being that a woman will follow her husband's choice

133. Submission 586, Catholic Womens League, NSW.

134. Report of Commission of Inquiry into the Status of Women in Queensland.

135. Commission correspondence, file S164.

of country and not vice versa. Even when such anomalies are removed, often departmental policy will continue to discriminate against the woman. If a woman is married, even if she continues to use her maiden name, her passport will routinely be endorsed with the information that she is a married woman, although men do not normally have marital status on their passports unless children are included.

177. While men, on average, are larger than women, and again, on average, are stronger and faster in the limbs than women, men and women are on overlapping continuums of height, weight and strength. Some men are smaller and more feeble than some women. The laws and regulations could well be framed to protect persons equally rather than men or women. Women are no more or no less qualified for jury service than men. Men may well need the protection of a First Offenders Act to protect them, their jobs and families on arrest and trial, but the law should reflect the societal view that the disadvantaged or the weak need protection, rather than men or women as such.

178. We consider that all legislation should be examined for instances of distinctions between males and females which are no longer justified and that the necessary amendments be made either separately or in a general legislative provision overcoming such distinctions. Similar action should also be taken in each State.

### *Women's access to the law*

179. Women's relatively restricted access to law reflects the results of societal discrimination rather than conscious discrimination aimed at women. Women's comparative lack of economic resources and their lack of worldly experience means that the law appears to work less well for them. Helen Coonan, Sydney solicitor, testified to this effect; she spoke of women's ignorance of the law and about their own right to liberty:

Battered wives endured for years and years and years because they were not aware of their right to leave and also they did not have access to legal advice.

She spoke of the need for the law to reach out to provide a service to women, to overcome their relative poverty and isolation from the law, of the lack of research relating to women and the law and of the need for a specialised service for them.

180. Among the areas where, in her view, remedies are deficient or are not sought are injury from contraceptives, and consumer protection. The causes of this situation are partly the unapproachability of the legal profession, partly the difficulty solicitors have in dealing with disturbed people. Women need a specialised service because they are not conditioned to pursuing remedies. They use lawyers and the courts less and have a fear of approaching them.

181. The witness considered that inequality is not in the law itself but in its administration and in access to advice and information. To overcome these deficiencies she proposed the establishment of special legal advice and resource centres to give advice and information and to research women's legal needs and improve by education and otherwise their access to the law.<sup>136</sup> We support this proposal. Although in general, and in the long term, community legal services should not be specific to women's needs, there is in the short term a need to develop a specialist service, perhaps as a pilot project.

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136. Evidence, p. 2485, H. Coonan.

## **Probate and estate duty**

182. Probate and estate duty are examples of legislation which in its terms is even-handed but which in fact affects men and women differently.

183. Many submissions from organisations and individuals referred to problems of matrimonial property and probate and estate duty. They called for uniformity of probate laws and exemption from duty where the whole or part of the estate passes to the surviving spouse.<sup>137</sup> A submission from the Womens Electoral Lobby spelt out the situation in all States and in the Commonwealth, as at February 1975, regarding probate and estate duties. It also illustrated the attitudes and assumptions underlying public policy in regard to domestic production.

Existing legislation may imply that it will have equal effect on widows and widowers, but this even-handed treatment does not eventuate in practice owing to most family assets being held in the husband's name . . .

Since only 5 per cent of death duties collected in Australia come from estates where death occurred earlier than 50 to 55 years of age (see Senate Standing Committee's Report on Death Duties, page 28), widows presently facing probate problems are those who, when young, were forced to terminate public service employment on marriage, and whom society would have considered anti-social if they had remained in employment while their respective husbands were employed or while other men remained unemployed.

The existing legislation, by imposing death duties on an estate inherited by a spouse, encourages a husband to bequeath the family assets to their children rather than to the wife, in order to avoid double death duties. This means that, in their old age, many widows are left dependent on their children, with consequent deprivation of dignity. Men do not have to face this extra hazard of old age since death duties on a deceased wife's estate rarely affect a widower financially.<sup>138</sup>

184. In their view the less affluent widows were hardest hit, and inflation was causing increasingly greater hardships. Another hardship faced by widows is that their savings from the housekeeping are included in the husband's estate; the assets are frozen from the date of death often for a year or more. Even if a joint tenancy of the home has been established she has to prove she had paid her half or duty is payable on the full value; her domestic work has no financial value. A similar rule applies to joint bank accounts. A widower does not have this problem since the assets are usually seen as his.

185. The submission quotes case histories to show how assets are frozen, widows have to borrow and pay interest on the loans to live, how incompetent solicitors advise them poorly, how the valuers give useless items a value and increase the estate, how joint bank accounts are valued to the widow's detriment, how women who worked jointly with husbands had their contribution to family assets denied and were forced to pay death taxes on the total.

186. Other submissions complained of delays in granting probate, particularly to widows who are sometimes reduced to poverty, dependent on charity and in need of assistance to avoid losing the family home.<sup>139</sup>

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137. Submissions 63, YWCA; 474, Co-ordinator, Womens group, Gunnedah; 426, WEL, Surfers Paradise; 350, Maggie Wilson; 414, Zonta Club of Sydney; 586, Catholic Womens League, NSW; 603, The Godmothers; 784, Mrs M. V. Higgins; 814, Women Active Politically; 844, Mrs M. J. Vaughton; 210, WEL, Victoria; 460, National Council of Women of NSW; 817, Mr Ian M. Johnstone; Evidence, pp. 3125-27, R. Janssen.

138. Submission 1227, WEL, Probate group

139. Submissions 134, Mrs E. Jukes; 256, Mrs Gould; 814, Women Active Politically; 1227, WEL, Probate group.

187. As one person stated:

. . . no woman should be made to feel that her contribution to the matrimonial home in terms of loving care over many years is not of equal value to that contribution made by women . . . who have been encouraged to work outside the home.<sup>140</sup>

188. The WEL submission criticised the report of the Taxation Review Committee which decided against abolishing death duties between spouses as this might lead to 'estate splitting'. WEL considered the report to be concerned only with the male and to disregard the inequitable incidence of estate duty on widows. For example the Committee reported:

A heavier tax on capital at death could be used to offset a lower tax on income during life, and produce the same overall progressivity. In terms of incentives such a combination might be superior to high lifetime rates and low death rates, since a man might save more to enjoy more possessions in his lifetime.

189. The WEL submission did not consider that exemption of the matrimonial home would go far enough and that it might lead to inequitable results.<sup>141</sup>

190. The Senate Standing Committee Report on Death Duties, concerning estates passing to the spouse, reads:

That where the whole or part of the estate passes to the surviving spouse, it should be free of death duties with the proviso that the estate should be taxed if the surviving spouse remarries (page 60).

191. WEL considered that the proviso would seldom apply to men; the duty would fall mainly on widows.

192. The Queensland Commission of Inquiry into the Status of Women recommended certain exemptions in respect of succession duty:

The Commission considers that a wife who has contributed to the building up of the matrimonial property should not be discriminated against in the matter of death duties because she has chosen to assume the responsibility for the home and children, or as in the case of a rural property to work beside her husband rather than to seek paid employment in the labour force so that she could make a monetary contribution to the matrimonial property and so prove legal ownership.<sup>142</sup>

The *Family Law Act* 1975 now recognises a woman's contribution to the family home as a homemaker.

193. All State probate duties have been removed in Queensland. Duty on estates passing between spouses has been removed in South Australia, Victoria and New South Wales. Tasmania has exempted estates of \$100 000 or less and Western Australia has exempted estates of \$50 000 or less and has said it will remove the tax progressively over 3 years. The ACT and the Northern Territory are subject to estate duties only.

194. Federal estate duty is levied on the net value of estates passing between spouses. State probate succession duties are an allowable deduction. The net duty assessed in 1972-73 was \$64 366 000. While widows in States where probate is discontinued will benefit, the government will now have a larger tax base. A widow will still be taxed on what she and her husband acquired during the marriage and from assets on which she has expected to rely in her old age.

140. Submission 784, Mrs M. V. Higgins.

141. Submission 1227, WEL, Probate group.

142. Report of Commission of Inquiry into the Status of Women in Queensland, 1974, pp. 16-17.

195. Since wives tend to survive their husbands, estate duty tends to fall more frequently on female survivors who frequently have no other resources. Most estates pass between elderly spouses. It would, in our view, appear just and reasonable to abolish all estate duty on estates passing between spouses. The removal of Federal estate duty would have the effect of recognising women's contribution to domestic production as well as easing the difficulties of their old age.

### **Social security**

196. It is claimed by some that governments discriminate against women by omitting from national accounts the value of women's household production in the care of husbands, children and relatives, and the production of public well-being through their contribution to the voluntary sector. As against this it is argued that to account for household production does not increase the sum total of production.<sup>143</sup> However, its omission affects the way women are viewed as economic units and how women view themselves. It affects the level of social services to women and it affected the compensation for housewives under the projected national compensation scheme; this was fixed at half the average male wage.

197. Because women are treated as dependants, and as non-contributors to production, social security payments tend to be seen as grants unrelated to past, present or future productivity.

198. Women's dependent status and low level of skills makes them more reliant than men on social security services, e.g. as supporting mothers, widows, deserted or separated wives, age pensioners. A number of submissions claimed that women are not accorded equality under social security and that their rights are subsumed under family dependency.

### **Unemployment benefits**

199. At November 1976 the unemployment benefit for a single person was \$43.50 and that for a married person \$72.50. These rates are the same as for most other Australian pensions, e.g. old age. In applying the income test to determine eligibility the incomes of husband and wife are combined. In effect, neither is entitled if the other is employed. If both are unemployed the family rate will be paid; the wife is not entitled to a separate benefit.

200. It was submitted by some that this is unfair and that women need to have economic independence and to contribute financially to the family.

A married person on unemployment benefits is paid the single person's rate plus an allowance for dependent spouse and children. Even the Commonwealth Conciliation and Arbitration Commission, in the National Wage Case of 1974, eliminated the concept of the family wage, and made it possible for women, whether married or single, to receive the same minimum wage as men.<sup>144</sup>

Other submissions made the same point.<sup>145</sup>

143. M. Jones, 'A housing policy for the middle class?' in Department of Urban and Regional Development, *Community* (AGPS, Canberra, 1975).

144. Submission 43, Working Womens Centre, Melbourne.

145. Submissions 401, Dr M. R. Cooney; 268, Catherine Morgan; 591, ACOSS; 801, R. F. Donnelly; 980, Ms E. M. Behne, WEL, Brisbane; Evidence, pp. 620-9, Ms M. R. Owen; p. 886, Ms H. Prendergast; pp. 1531-8, Dr Mary Mahony; p. 1781, Ms W. Metcalfe; p. 1661A, Ms M. Hardy; pp. 1700-3, Mrs E. Thiele; pp. 2250-2, Mrs H. M. Speden.



201. Where a couple are living in a de facto relationship the same rule applies. If both are unemployed they will receive half the married rate instead of the single rate, even though there are no maintenance obligations and neither can claim the other as a dependant, unless there are children.

202. The question of dependency in unemployment benefits cannot be considered in isolation from dependency in other social security pensions. We consider that the question of dependency should be reviewed in all pensions to determine whether it is possible to establish an independent right to a single rate unemployment benefit where one spouse or de facto is unemployed.

### *Sickness benefits*

203. Persons who are temporarily unable to work because of illness or accident may claim sickness benefit. The basic rates are the same as for unemployment benefits. A married woman is able to claim sickness benefit only if her husband is unable to support her. If he is employed or receiving unemployment benefit she cannot claim sickness benefit, even when she had been the breadwinner. On the other hand, a man can claim single rate benefit even if his wife is working. For similar reasons we consider that these entitlements should be reviewed.

### *Age pension*

204. A married couple receive less in benefit than two single people living together. When both are eligible for benefit there is a case for granting the single rate pension to each. ACOSS raised this point in a submission and pointed out that there may be justification for paying a single person living alone a supplement of some kind in view of the additional housing costs.<sup>146</sup> We consider that entitlements should be reviewed in conjunction with an income maintenance or guaranteed minimum income scheme.

### **Training programs**

205. The Working Womens Centre, Melbourne, made a substantial submission on the issue of access to government training programs. They said that:

NEAT seems to have been established solely for men made redundant because of governmental policies or the present unemployment conditions, because many married women have been considered ineligible for NEAT just because they are married.

The two training schemes which previously catered for women—the Department of Labour Womens Retraining Scheme and the Department of Social Security Widows Retraining Scheme—were incorporated in NEAT, but when women are not accepted for NEAT, no alternate avenues for assistance are available.<sup>147</sup>

206. Their submission appended case histories suggesting that the NEAT scheme is administered arbitrarily and that women are discouraged from applying. Many of the applicants for retraining were women with little or no education trying to make up for earlier deficiencies in their education. One was refused as she was not a primary breadwinner and another was told that women were low priority in a time of unemployment.

207. The NEAT scheme was modified during 1976 to meet a new unemployment situation. The emphasis switched from formal training to subsidised in-plant training and work experience covering all occupations except the trades requiring apprenticeships and the occupations requiring tertiary education. Women returning to work were eligible for training. The Department has informed us that the guidelines now

<sup>146</sup>. Submission 591, ACOSS.

<sup>147</sup>. Submission 43, Working Womens Centre, Melbourne.

direct assistance to those who are unemployed, are at risk of losing employment or who do not have reasonable prospects of obtaining employment without training. In November 1976, 12 665 persons were in training, including 5341 women (42 per cent of the total). This total includes 2148 in the Special Youth Employment and Training Program of whom 52 per cent are females.

208. There are obvious difficulties in developing such a scheme in a time of high unemployment. We note that women have a higher rate of unemployment than men. While the complaints evidenced by the Working Womens Centre may not show wide-scale discrimination, it is clearly important that women should not be discouraged from applying on the basis of any assumptions. Eligibility criteria should take account of the number of women unemployed or seeking re-entry into the workforce and of the generally low level of skills of women. The scheme could also be used as a means of balancing the sexes in certain classifications.

### **Marriage and economic dependence**

209. Many submissions argued that it is common for women to have little or no income and to be cast in the role of dependants; this leads to low self-esteem and to lack of confidence and resources.<sup>148</sup>

210. Miss Sue Richardson maintained that social attitudes towards careers, promotion, employment opportunities and superannuation disregarded the needs of motherhood and financially penalised women by regarding them as dependants.<sup>149</sup> Helen Coonan advocated that a married woman should be directly paid a fixed proportion of her husband's wage. She thought that the fact that women needed maintenance was a tacit acknowledgment of their depressed socio-economic status in the community. Many women were in desperate need of money in her view.<sup>150</sup>

211. Women Active Politically thought the status of housewife should be upgraded by sharing assets equally. They referred to the housewife as isolated and lacking in confidence, and listed case histories showing lack of personal income and the need for part-time work. They thought men and women would benefit from greater sharing of financial responsibilities and child care.<sup>151</sup> Other submissions spoke of the problems of women adjusting to economic dependence after having worked prior to marriage<sup>152</sup>, of the humiliation of not being trusted with money<sup>153</sup>, and the fact that government policies regarded women only as part of a family unit and not as individuals.<sup>154</sup>

212. A point repeated in a number of submissions was the need for the woman at home to have some money and not to be dependent upon her husband.

She certainly is worthy of pay as she is working very hard, but it is the husband who receives the pay cheque for his work.<sup>155</sup>

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148. Submissions 962, WEL, S.A.; 814, Women Active Politically; 289, name withheld; 334, Canberra Womens Refuge Committee; 400, National Council of Women, Queensland; 591, ACOSS; 611, Anglican Diocese of Sydney; 787, Mrs V. Knight; C809, confidential; Evidence, pp. 2491-2, Helen Coonan.

149. Submission 962, Sue Richardson, WEL, S.A.

150. Evidence, pp. 2491-3, Helen Coonan.

151. Submission 814, WAP; Evidence, pp. 3120-7, Robyn Janssen.

152. Submission 787, Mrs V. Knight.

153. Submission 289, name withheld.

154. Submission 334, Canberra Womens Refuge Committee; see also Submissions 787, Mrs V. Knight; 289, name withheld; 400, NCW, Qld.

155. Submission 936, Miss G. Graetz.

213. Several submissions also saw the need for educational, financial, employment and housing resources to be available to women in crises to help them to establish their independence and give them the opportunity to escape from situations which many are now forced to endure.<sup>156</sup> If this were done, the overall effect would be to reduce the number of women dependent on social security; they would need help only when they were prevented from being self-supporting because of incapacity, sickness or lack of employment opportunities.<sup>157</sup>

214. ACOSS submitted that the principle that family support is a joint responsibility made it an anachronism to pay the widows pension automatically to widows under a certain age with no dependants, since able-bodied women could support themselves in widowhood.<sup>158</sup> They may, however, require help in the form of sickness or unemployment benefit or special assistance for retraining.

215. The Elsie study confirmed the helplessness to which women are reduced by dependence. The study showed that thirty-one of the 111 women involved had no money at all during their marriage. A further six had no regular money; 10 per cent reported that the husband paid all the bills.<sup>159</sup> If the marriage deteriorates the dependent wife and children are in a particularly vulnerable situation.

216. The submissions which have been mentioned represent one side of the picture. The other side is that many women are satisfied with their roles and are content to depend on their husbands for financial support while they contribute to the marriage and the family by caring for the home and children.<sup>160</sup> Some women feel that their own life style is threatened by the two-income family and that mothers who leave children to go to work are not being fair to their families.

217. The need to care for young children at home, and the resulting economic dependence of women who accept this role, were underlying factors in the claim for a mothers wage or for a guaranteed minimum income such as that recommended by the Poverty Commission. The domestic role leaves many women with little or no income or property to call their own.

## Single women

218. Single women complain that they are disadvantaged in a largely married society. The following statistics were furnished to us:

According to the 1971 census, of those people aged between 15 and 19 years (inclusive) 95 per cent had not married. For those aged 20 to 24 years, this figure had dropped to 50 per cent, and for those aged 25 to 29 years, only 19 per cent had not married. For those over 30 only 8 per cent had not married, with a further 16 per cent giving their marital status as 'permanently separated', 'divorced' or 'widowed'.<sup>161</sup>

219. The dilemma of single people, especially women, in our society is underlined by Margaret Mead, when she advocates the following essential attitudinal changes:

If we are to build a new image of womanhood, we cannot even subconsciously go on teaching little girls, as we do today, that marriage is the only state for men and women and that every other devotion—to work, art, science, society or God—is only a poor substitute for marriage.<sup>162</sup>

156. Submissions 334, Canberra Womens Refuge Committee; 400, National Council of Women, Qld.

157. Submission 591, ACOSS.

158. *ibid.*

159. C. Gibbeson, Domestic violence, Commission research report, no. 11, 1977.

160. Evidence, pp. 2604–5, Mrs Frieda Brown.

161. Submission 986, Christian Citizenship Ministry, Methodist National Memorial Church, Canberra.

162. Quoted in 'Sexism in education', *Womanspeak* 2, 1 (1976), p. 19.

220. Several submissions raised issues of concern to single women. They spoke of the couple-oriented society, of social isolation, of the pressures to marry and have children, of the lack of status.<sup>163</sup> Discrimination was seen in the use of the terms 'Mrs' and 'Miss'.<sup>164</sup> Social attitudes towards the sexuality of single women were referred to by some people: that a 'double standard' of sexual morality for single men and women still existed<sup>165</sup>; that counselling facilities should be available to help people adjust to single living<sup>166</sup>; that sex education should not present sexual fulfilment in marriage as the only goal of sexual and emotional development.<sup>167</sup>

221. The submissions complained of the discrimination built into the taxation system, the provision of public facilities, superannuation and commercial transactions because of the prevailing view that single people are without responsibilities, despite the fact that they may be caring for relatives or have dependent family members. The taxation system was seen as biased against single people in favour of married people.<sup>168</sup>

222. The failure of superannuation schemes to provide for the surviving beneficiary or dependant of the unmarried member was mentioned, e.g. widowed parent living with son or daughter, siblings living together, unrelated people living together, and it was submitted that superannuation and tax benefits (similar to those for widows/widowers) should be available for those surviving (and perhaps dependent on) a deceased single person who has lived with the survivor on a permanent basis.<sup>169</sup>

223. Single women, particularly elderly single women, were seen to be disadvantaged in obtaining public housing and similarly in trying to provide for themselves privately, because of the lack of suitable accommodation and the difficulty in securing finance. Applications are frequently refused in the absence of 'a male guarantor'.<sup>170</sup>

224. Single women also suffer from discrimination in employment on the assumption that they will leave upon marriage, despite the fact that a large number of single women do not fall into that category.<sup>171</sup>

225. Margaret Power wrote of the ageing unmarried woman with no family support and on a low income. Many cannot provide for old age because of low earnings and generally do less well in superannuation schemes. If they buy the maximum number of superannuation units they lose pension benefits and if they retire before 60 they are not entitled to any pension or retraining.<sup>172</sup> The Queensland Commission drew attention to the plight of the elderly single woman and called for action to involve her in community life and to protect her from misfortune.<sup>173</sup>

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163. Submissions 207, Humanist Society of Victoria; 12, Miss M. H. Calder; 154, Miss A. Siddall; 986, Christian Citizenship Ministry; 991, Commission on Status of Women, NSW State Council, Aust. Council of Churches; 611, Anglican Diocese of Sydney.

164. Submission 991, Commission on Status of Women, Aust. Council of Churches.

165. Submission 1097, Mrs A. Day.

166. Submission 986, Christian Citizenship Ministry.

167. *ibid.*

168. *ibid.*; Evidence, p. 3217, Ron (name withheld), CAMP NSW.

169. Submission C28, confidential.

170. Submissions 586, Catholic Womens League, NSW; 21, Miss W. K. Lulham; 986, Christian Citizenship Ministry; 991, Commission on Status of Women, Aust. Council of Churches; Evidence, p. 1921, Ms Irene Greenwood.

171. Evidence, p. 1262, Ms Roseanne Debats.

172. Power, 'Wages of sex', p. 11.

173. Report of Commission of Inquiry into Status of Women in Queensland, 1974, p. 7.

226. While single men face some of the same problems of social isolation, their status is more readily accepted and their earning capacity is generally greater than that of women.

227. The NSW Council on the Ageing and others spoke of the aged and ageing single woman, the former 'very much on her own', isolated, lonely, and the latter, while ageing herself having cared for an older parent, having worked as well, and, having been unable to develop friendships and leisure interests, likely to face a lonely future.<sup>174</sup>

228. Submissions called for improvement of the status of the single woman and removal of legislative, economic, employment and attitudinal discrimination.<sup>175</sup>

### Conclusions

229. In our view, the disabilities of single women should be removed by greater social acceptance of the single status and recognition of the fact that the single person may have dependent relatives. Employment policies, taxation, superannuation and all social programs should recognise and make provision for the single person who is a breadwinner for dependants. Where a person has for many years supported a close relative, the superannuation schemes should recognise this and should permit single members to nominate defined dependants as beneficiaries.

### Language

230. There are no singular personal pronouns in English capable of including both the male and female gender, e.g. he, she, him, her. The official language of law and public administration, politics, the learned professions, education, business, trade unions, appears to refer only to men. The convention is that the male pronouns include the female for official purposes. The complaint was made, however, that legislation, even anti-discrimination legislation, contains expressly or by reference such terms as:

. . . words imparting the masculine gender shall include females . . . unless the contrary intention appears.<sup>176</sup>

231. Some women object to this, especially where the use of the masculine gender in an Act is interpreted as being intended to exclude females.<sup>177</sup> In a Canadian example women were denied the rights and privileges of males in such tax-supported organisations as cadets until the word 'boys' was changed by statute recently to 'persons'.<sup>178</sup>

232. It may be tempting to dismiss these complaints as without real substance. But we do not think this can be lightly ignored. Language may be perpetuating hidden values. Experiments commissioned by the United States Department of Labour on the effect of job advertising which used the male terms, and the convention that he/him includes she/her, found after tests on readers that women did not see themselves as applicants because the job advertising was addressed to males. Some publishers<sup>179</sup>, some employers<sup>180</sup>, the National Committee against Discrimination in

174. Evidence, pp. 2570-3, Ms Averil Fink.

175. Submissions 991, Commission on Status of Women, Aust. Council of Churches; 448, Christian Womens Convention International; 1193, Miss G. Morris.

176. *Acts Interpretation Act* 1901-1973, s. 23.

177. Marguerite C. Ritchie, 'Alice through the statutes', *McGill Law Journal* 21, 4 (1975), pp. 685-707.

178. *ibid.*, pp. 702-3.

179. Scott, Foresman & Co., *Improving the image of women in textbooks* (1974).

180. *Management tips* (Drake Personnel, Melbourne, 1975), quoting *The Personnel Administrator*, April 1975.

Employment and Opportunity<sup>181</sup> and educators<sup>182</sup> have accepted the view that non-discriminatory language can be developed and have issued guidelines, with examples, for the use of writers, employers, teachers and educational authors.

233. We support these moves to use alternative terms wherever possible to replace he, she etc. But it is not always possible to do this, and the word 'person' is limited in use. It would help to overcome some assumptions and barriers if alternative terms could be found to replace the male and female pronouns, just as 'Ms' has now been accepted by many (not all) to replace 'Miss' or 'Mrs'. We appreciate that it takes more than an act of legislation to make a new word or phrase catch on in a language (or to prevent it). New pronouns may not immediately be taken up in daily speech.

234. Legislation and official documents are, regrettably some think, remote from common speech. New terms could be introduced there with appropriate definitions. For example:

<i>Present form</i>		<i>Possible new forms</i>	
he, she	id	hei	se
him, her	id	heim	sem
his, her	ids	heis	ses
his, hers	ids	heis	ses
himself, herself	idself	heimselb	seselb

All new ideas such as this suffer from looking strange and unfamiliar at first. We commend the idea and believe it could gain acceptance.

**The media**

235. The media often popularise unthinking attitudes towards women, their appearance, domestic life, their husbands and children. Female sexuality is exploited by giving currency to words which belittle women and leave them as sex objects. Terms like 'chick', 'bird', 'sheila', 'tart' have sexual overtones. This usage affects young women who may come to see themselves as sex objects. Older women, no longer in the 'chick' age group, see themselves as valueless.<sup>183</sup>

236. The use of language in the media is a major part of the way in which young people come to accept social values and attitudes to men and women. To rewrite a newspaper article reversing the sex roles is a salutary experience, and demonstrates the distorting role that the language of the press plays in presenting males and females to one another.

237. Edgar and McPhee surveyed the contents of the media—radio, TV, press, magazines and comics. They concluded that the media distorted the realities of women's lives, depicted women as sex objects, needing aid to retain their youth, to be deodorised, slenderised, always anxious about the service aspects of mothering and rarely, or never, as paid workers. They say:

TV commercials are an affront to men, women and children. Grown-up men buy powerful cars, drink lots of beer, kiss girls who are pretty enough, thin enough or fragrant enough to warrant it . . . grown-up women diet for love and approval, serve tough meat and have their husbands rush out the door despite the pathetic plea 'It's your favourite pudding'.<sup>184</sup>

181. Pamphlet, 'Employment without prejudice', National Committee on Discrimination in Employment and Occupation.  
182. *Re-educating a generation: avoiding sex bias*, guidelines for the avoidance of sex bias in education materials and media (Curriculum Development Centre, Canberra, 1976).  
183. Submission 344, Mrs Kate McConnell.  
184. P. Edgar & H. McPhee, *Media she* (Heinemann, Melbourne, 1974). See also P. Edgar, 'Sex type socialisation and television family comedy programs', a technical report from the La Trobe University School of Education; P. Edgar, *Growing up feminine: the part played by schools and the mass media* (address to the United Nations Status of Women Association, Camberwell, 10 April 1975).

238. We received a number of submissions that argued for positive, rather than restrictive, guidelines to be established in relation to material broadcast by radio and TV. Several submissions complained about the 'very many sexist-oriented shows' and the 'sexist bias against women in commercials'.<sup>185</sup> The Advisory Committee on Program Standards to the Broadcasting Control Board described this concept succinctly:

The portrayal of women in domestic situations as empty headed, housebound, obsessed with household cleanliness and unable to cope with domestic chores is sexist. Recent research evidence has shown the negative self-image that many girls and women hold which restricts their potential. Advertising of this kind must contribute to this negative self-image.

239. We were told that part of the problem is that women try to keep the house spotless as recommended in advertisements on television. The media may argue that they only reflect society and do not influence it. The most notable observation about the media portrayal of women, however, is that it does not reflect present reality. It derives from a stereotype held by script writers, producers and media management that is outdated, that probably never existed. Our understanding of the role of women, both in the workforce and in the home, conflicts with the media image of women. Women are playing a major role in industry, commerce and the professions and the full-time housewife's role has become more economically and psychologically complex—these facts are rarely reflected in the media. Advertisers, editors and programmers are depriving themselves of audiences because they are not connecting with reality.

240. The media have tremendous power which can be used either to reinforce outdated attitudes or to gain acceptance for new ideas and attitudes. This power should be used positively and responsibly.<sup>186</sup> Pat Edgar's view is that television is probably the most unused resource for doing something about human relationships.<sup>187</sup> In her view the soap opera format could be used to tackle a wide range of problems, without being obviously educational. The realities are, however, that the media portray women in a discriminatory way, and treat them as an audience with a limited intelligence and a low range of interests. This tends to perpetuate women's low self-esteem.<sup>188</sup> The opportunity to provide positive stimulation of interests is missed.

241. The report of the Australian National Advisory Committee to International Womens Year also discussed at length the portrayal of women by the media and stated:

There is a strong case to support the view that the media are not only reinforcing outmoded attitudes, but actually hindering the process of social change.<sup>189</sup>

242. One explanation of the present position is that media policy is dominated by men. The image they portray is a male stereotype image of women. It follows that the best way to bring about improvement is by improving the balance of sexes working at policy levels of the media. This would lead to a better balanced portrayal of men and

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185. Submissions 454, Ms Geraldine Pack; 344, Mrs K. J. McConnell; Evidence, pp. 1247–51, Mrs K. J. McConnell.

186. Report of the Secretary-General: *Influence of mass communication media on the formation of a new attitude towards the role of women in present-day society* (UN Social and Economic Council, Commission on the Status of Women, 10 January 1974).

187. Evidence, p. 681, Dr P. Edgar.

188. Advisory Committee on Program Standards, Report to Aust. Broadcasting Control Board, February 1976, pp. 52–3.

189. *Report of the Australian National Advisory Committee to International Womens Year, March 1976* (AGPS, Canberra, 1976), p. 41.

women.<sup>190</sup> A Unesco seminar in 1976 looked at the professional participation of women in the media in Australia.<sup>191</sup> The resolutions of the seminar aimed at opening up employment prospects for women throughout the media. A group called Women Media Workers was formed to organise and unify women at all levels and in all branches of the media.

243. Another form of action which could be taken in the meantime is to encourage the media to take a close look at themselves and to adopt some guidelines to help remove what is often unconscious discrimination. The UK National Union of Journalists has issued guidelines to the British press on how to treat news items about women in a less discriminatory manner.<sup>192</sup> The United States National Commission on the Observance of International Womens Year recommended the adoption of guidelines for the treatment of women in the media; it also recommended a check list for the portrayal of women in entertainment programming and advertising.

244. Women Media Workers in Australia has adapted a set of guidelines for non-sexist journalism from those drawn up by the Equality Working Party of the National Union of Journalists in the UK. They are primarily for press, radio and TV. Points from the guidelines are as follows:

- (a) When reference is to either or both sexes, but not specifically to the male sex, the words 'man' and 'men' can be avoided. Possible alternatives are 'person', 'people', 'human beings', 'men and women'.
- (b) Journalists often assume that all children are male and that there is only one form of family, i.e. taxpayer with a dependent spouse and children.
- (c) Many journalists have a habit of describing women in terms of their marital status, age and physical appearance, in contexts in which they wouldn't dream of describing men in such terms e.g. 'Melbourne mum wins air race'.
- (d) Women do not need to be defined in terms of their relationship to a man nor in terms of how they appear to men. A woman's age need not be quoted unless it is relevant.
- (e) Defamatory or trivialising generalisations about women and women's activities can be avoided.
- (f) It is no longer safe to assume that women are confined to traditional female roles or that marriage is the goal in every woman's life. Don't assume that only women are responsible for children or patronise men who rear children.
- (g) The political and industrial activities of women demand full and serious coverage and need not be denigrated and trivialised.

A typical example of the kind of story which these guidelines would exclude is the following:

#### WOMAN OF 53 IN EPIC SOLO VOYAGE

Anna Gash, a 53-year-old grandmother . . . is the only woman to have sailed single handed across the Indian Ocean. A mother of six, and grandmother of three . . .<sup>193</sup>

190. *Women in the CBC*: report of the CBC Task Force on the Status of Women (1975), p. 188; ' . . . To form a more perfect union . . . ' *Justice for American women*, report of the National Commission on the Observance of IWY, 1976, pp. 250-3.

191. The professional participation of women in the media (papers given at UNESCO Seminar, 28-30 August 1976); Women in the media, the professional participation of women in the audio-visual media—film, radio and television, Australia, 1976 (The Film and Television School, for UNESCO).

192. 'Guidelines for non-sexist journalism', *New Journalist*, no. 24, September 1976, pp. 9-16; *Images of women: guidelines for promoting equality through journalism* (National Union of Journalists, London, 1975); Non-sexist code of practice for book publishing, by women in the publishing industry (undated).

193. *Sydney Morning Herald*, 11 February 1976.



245. We have been informed that the NSW branch committee of the Australian Journalists Association has sent the guidelines to the federal executive to endorse and publish.

246. We consider that the media in Australia should respond to the criticisms we have outlined. The responsible bodies such as the Australian Press Council, the Australian Broadcasting Tribunal, the Media Council of Australia, the Australian Journalists Association and the Advertising Standards Council should adopt guidelines for the treatment and portrayal of women and should encourage their acceptance.

Women in public life

Politics

247. Women in Australia were first given the right to vote and stand for Parliament in South Australia in 1894. In Western Australia the right to vote was granted in 1899 and the right to be elected in 1920. The Commonwealth *Franchise Act* 1902 gave universal suffrage in Federal elections. The other States gave the right to vote and to be elected as follows: NSW 1902, 1918, Tasmania 1903, 1921, Queensland 1905, 1915 and Victoria 1903, 1923.

248. The first woman to be elected to the House of Representatives was Dame Enid Lyons in 1943. Since then there have been only four women members. There is no woman in the House as at March 1977. The number of members is 127.

249. Women have fared better in the Senate. Senator Dorothy Margaret Tangney was elected first, in 1943, and there have been eleven women senators since then. At present there are five women in the Senate out of a total of sixty-four (ten from each State, two from each Territory).

250. The number of women elected to State Parliaments up to the middle of 1975 is shown in table VI.3.

Table VI.3 Number of women elected to State Parliaments

State	Legislative Assembly		Legislative Council	
	Total women ever elected	Total number members	Total women ever elected	Total number members
NSW	4	99	11	60
Vic.	4	73	..	34
SA	2	47	1	22
Qld	4	82	..	..
WA	4	51	4	30
Tas.	3	35	3	19
NT(a)	2	19	2	17
ACT(b)	8	18	..	..
Total	31	424	21	182

(a) On 30 July 1974 the Legislative Assembly replaced the former Legislative Council of seventeen members.

(b) On 28 September 1974 the Legislative Assembly replaced the former ACT Advisory Council.

Source: Background papers, 'Women in politics' conference (Canberra, September 1975).

251. The number of sitting women members in local government in 1973 was 357, and on 31 December 1974 it was 460. The total women ever elected from 1920 to those dates were 715 and 877.<sup>194</sup>

252. The position of women in Australian politics is far from satisfactory. The number of women candidates for the House of Representatives is small (thirty-seven in the 1972 election and forty-five in 1974) and the number elected very small. Most women candidates have been preselected for seats regarded as safe or fairly safe for the opposing party.<sup>195</sup> There is, however, no evidence that women candidates are likely to be less successful at the ballot box than men. The voting pattern usually follows party trends. More women have been elected to the Senate, where the party selects a group of candidates for each State. Perhaps it is felt that there is less risk in standing women for the Senate. The facts do not suggest a risk either way.

253. In our view it is vitally important to involve more women at all levels of politics in Australia. Women have an outlook and an experience of life different from that of men whether in the home or in the workforce. Australia needs the diversity of experience and outlook which women can bring into political life on all sides of the political spectrum. We cannot afford to waste so much potential talent, or to exclude half the population from a chance of taking part in the parliamentary process and in making important decisions which affect us all. The many issues in social policy and planning which women understand from being at the 'other end', e.g. urban planning, child care and employment, would not be relegated to a low priority if more women were involved in decision making.

254. Many Australian women are active politically in organisations outside the main political parties, e.g. the Womens Electoral Lobby, the National Council of Women, the Union of Australian Women, the Country Womens Association and the Womens Liberation Movement. Women in these and many other organisations have fought to improve the status of Australian women and have shown their ability to influence opinion and to effect change. Some prefer to work outside the established political parties on the ground that some issues affecting women cross all party lines. Some will always prefer to pursue an independent and radical line. All, however, should be given the opportunity to enter into the main political arena.

255. We consider that it is the responsibility of each political party to take positive action to seek out women as candidates in electorates where the party has some prospects of electoral success, not just in the 'losing' electorates. This active policy should be pursued until the present imbalance has been overcome by an infusion of a substantial proportion (say 25 per cent) of women into the lower house of Parliament.

256. The preliminary steps which we see as essential are that each party ensures that women are represented at all levels of party activity, on an equal footing with men, and that they are chosen as party delegates in proportion to their membership. The next step should be to ensure that women are encouraged (not just invited) to take part in all preselection procedures, and that party policies ensure that a woman candidate has a fair chance of selection.<sup>196</sup> The next step would be for the parties to enter into a voluntary agreement to select at each election a proportion of women candidates, starting at 10 per cent and increasing progressively at each subsequent election.

194. Viola Smith, *Australian women in governments: past and present, NSW 1973* (background papers, 'Women in politics' conference, Canberra, 1975), p. 31.

195. 'Women in politics' conference, background papers, pp. 21-4, the classification of seats is from M. Mackerras, *Australian general elections* (Angus & Robertson, Sydney, 1972).

196. The Commission of Inquiry into the Status of Women in Queensland made a similar recommendation in their report: no. 43, p. 4.

There would be some problems to overcome, since the sitting member usually has some claim to preselection. This should not be used as an excuse to avoid the necessary action. We call upon the political parties to declare their policies and to agree on a program of action to give women their fair share of political power.

*Legal profession and judiciary*

257. The lack of women in political life in Australia is more readily understood when the background of the members of parliament and senators is considered. Table VI.4 shows the professions and callings of Federal members; women are under-represented in nearly all these groups.

**Table VI.4 Professions and callings of members of the Australian Parliament**

Career prior to Parliament	<div>% House of Representatives</div>	<div>% Senate</div>
Farmers	16.6	23.4
Lawyers	15.8	15.6
Management/economic consultants	8.7	
Professionals <sup>(a)</sup>	11.9	10.9
Union officials	7.9	9.3
Company directors	7.1	
Accountants	4.7	4.6
Public servants	4.7	4.6
Other <sup>(b)</sup>	22.6	31.6

(a) Professionals—includes doctors, pharmacists, academics.

(b) Other—includes teachers, local government officials, military and small businessmen.

Source: *Australian Parliamentary Handbook* 1976.

258. Many of our legislators have been drawn from the legal profession. This is one of the professions in which women have a low representation. Although the first woman was admitted to practice in Victoria in 1903, in 1977 the ratio of female to male law graduates in Australia was 956 : 8994, i.e. 9.6 per cent of law graduates were women.<sup>197</sup>

259. This deficiency of women in the profession is apparent at all levels, in the judiciary, the magistracy, the practising profession, the public service and the academic field. The number of women appointed to the judiciary in Australia is shown in tables VI.5 and VI.6.

260. It is difficult to ensure the appointment of women to the bench unless there is a sufficient number of eligible women practitioners. A recent innovation of making some appointments to the Federal judiciary from the solicitor's branch of the profession may give women a better chance of selection. Part of the problem may be that women will not be encouraged to enter the legal profession unless they see some prospect of advancement. The absence of women in the judiciary, and the lack of encouragement from some members of the profession, makes it difficult for some to get started as barristers or solicitors or to move beyond a certain stage. The work done by the Women Lawyers Association of NSW has been particularly helpful to young women wanting to make a career in the legal profession.

197. Australian Bureau of Statistics.

**Table VI.5 Judges in Federal jurisdictions**

Court or Commission	Male	Female
High Court	7	0
Bankruptcy Court	2	0
Industrial Court	12	0
Family Court	24	4
Conciliation and Arbitration Commission <sup>(a)</sup>	9	1

(a) President/Deputy Presidential Members (of twenty-one Commissioners, two are women).

Source: NSW Law Almanac, 1977.

**Table VI.6 Judges and magistrates in State jurisdictions**

State	Supreme Court		District/County Court		Magistrates		QCs	
	male	female	male	female	male	female	male	female
NSW (1977)	35	0	28	0	93	3	75	0
Victoria (1976)	22	0	30	0	67	0	57	0
South Australia (1976)	9	1	16	0	34	0	..	..
Queensland (1976)	14	0	17	0	24	0	22	0
Western Australia (1976)	7	0	9	0	29	0	15	0

NSW: Industrial Commission, eight commissioners—no women. Workers Compensation Commission, nine commissioners—no women.

SA: Industrial Court and Industrial Commission, thirteen members—no women.

Qld: Industrial Court and Industrial Commission, seven members—no women.

WA: Industrial Court and Industrial Commission, ten members—no women. Family Court, four members—no women.

Source: Law Almanacs and Law Calendars.

261. In our view positive action should be taken by professional bodies and by solicitors firms to help women to start a legal career. The Commonwealth and especially the State governments should make special efforts to appoint women to judicial office from all branches of the legal profession, including the academic and public service fields.<sup>198</sup>

### **Trade unions**

262. A certain proportion of members of parliament have a trade union background. We have already commented on the fact that women workers represent 35 per cent of the workforce and about 31 per cent of trade union membership. We also mentioned the low level of participation by women in trade union activities.

263. A recent publication of the Womens Trade Union Commission<sup>199</sup> contained details showing the number of women holding trade union office in four States (see table VI.7).

198. *Role of women in NZ society*, pp. 40–3; *Report of Royal Commission on Status of Women in Canada*, Recommendation No. 140; *Report of Commission of Inquiry into Status of Women in Queensland*, p. 5.

199. *Womens unions, 1976* (Womens Trade Union Commission, 1976).

**Table VI.7 Women holding office in trade unions, 1976**

	Female	Male
Victoria		
President	3	71
Secretary	1	74
Tasmania		
President	0	24
Secretary	2	56
New South Wales		
President	1	99
Secretary	3	99
Queensland		
President	0	28
Secretary	2	38
Total		
President	4	222
Secretary	8	267

*Source: Womens unions, 1976 (Womens Trade Union Commission, 1976).*

264. In 1975 there was only one female member on the executive of a State Labour Council. The NSW Labour Council had twelve–fifteen women members out of 400, more than any in Australia.<sup>200</sup> There are no women on the seventeen-member executive of the ACTU or of CAGEO. Two out of eighteen members of ACSPA are women. Of the 700 delegates to the 1975 ACTU congress, twenty-three were women.<sup>201</sup>

265. This is not good enough. Women's special needs in the workforce are not sufficiently represented—and indeed their special needs in fulfilling their dual roles are a major reason why they are not represented. The Womens Trade Union Commission and the Working Womens Centre are working to change the attitudes of unions to women. What is needed now is action by the unions themselves to recognise their women members fully, to integrate them into all levels of union activity and to make the changes in administration and organisation at all levels necessary to bring this about. They should actively recruit women for all representative positions, in proportion to their membership, and assist them to fulfil their functions by assisting them to attend training courses.

### ***Statutory bodies***

266. Another area of power and influence is that of statutory bodies—authorities, agencies, councils, committees and commissions whose members are appointed by the government. There are many such bodies; in 1975 a list of over 100 was published in the press. They advise the government on a wide range of economic and social issues. The committees whose terms of reference include matters considered to be exclusively of interest to women have a high proportion of women members. Others do not or have only token representation, despite the fact that their conclusions and recommendations are of as much concern to women as to men.

200. 'Women in politics' conference, background papers, p. 98.

201. *Womens unions, 1976*, p. 2.

267. The government should, in our view, adopt a positive action program to ensure that the number of women members of all such bodies is substantially increased. The goal should be equal representation of the sexes, though it may not be possible to achieve this quickly in cases where there are too few women with appropriate qualifications. Action could be taken immediately to establish lists of women eligible for consideration.

### *Voluntary organisations*

268. We have already referred to organisations devoted exclusively to women's interests in politics and in the social field; women are members and office holders in these organisations. There are a great many other voluntary associations which have a substantial number of women workers. These associations are often influential in the community and their decisions can affect many people. Some are engaged in charitable work. Too often women members of these associations are assigned to subordinate roles, to 'auxiliaries' or to 'womens committees', while the main decisions are made by men.

269. The Canadian Royal Commission, the Queensland Commission of Inquiry and the New Zealand Select Committee came to similar conclusions on this matter.<sup>202</sup>

270. In our view all voluntary associations including churches and trade unions should seek actively to involve women in the policy-making areas of activity. This may require action to encourage women to seek election and to make such changes in structure, organisation and administration as are necessary to enable women to participate fully.

### **The cost of discrimination against women**

271. Much of our evidence indicates that Australian society accepts discrimination against women as a normal state. It is the life patterns of men that determine the norm in such things as employment, wages, job classifications, training, accommodation, superannuation, recreation, shopping hours, credit and finance. The effects of this imbalance are great and they are cumulative.

272. This unrelenting discrimination against women in education and the workforce locks women into occupations which do not use their range of talents and aptitudes.<sup>203</sup> If only in economic terms, this is a waste of resources.

273. Some women are conscious of discrimination and react against it by organised action and debate. Others do not experience it or are not consciously aware of it.<sup>204</sup> The behaviour of many, however, suggests that they experience feelings of less general well-being and dependency.<sup>205</sup> This is evidenced by statistics of women's dependence on doctors, which indicate that women consult their doctors in matters of

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202. cf. *Role of women in New Zealand society*, pp. 37-40; *Report of Royal Commission on Status of Women in Canada*, pp. 99-100; *Report of Commission of Inquiry into Status of Women in Queensland*, p. 5.

203. Womens Bureau, US Dept of Labour, *Underutilization of women workers* (1971, revised).

204. 'Many women admit "myth" of discrimination', *Sun Herald*, 2 November 1975 (report of a survey of 3000 women workers in Melbourne).

205. Ian Rowe, 'The increase of mental disorders', *Australian Family Physician* 4 (1975), pp. 53-8.

mental health two and a half times as often as men<sup>206</sup>, women's greater use of mood-modifying drugs<sup>207</sup>, women's increasing rate of suicide<sup>208</sup>, their increasing rate of attempted suicide<sup>209</sup>, and their reported depression and helplessness in their domestic role.<sup>210</sup>

### The persistence of discrimination

274. Discrimination on the grounds of sex and marital status persists because of its long history, its strength and the fact that it is built into the customs, practices and institutions of Australian society; it persists because to many people it seems natural and inevitable; it persists because people are used to it, and are loath to change and because people feel they profit from it in domestic, commercial or public life.<sup>211</sup>

275. An additional factor in Australian society could well be a reluctance to admit to the fallacy of the belief that Australia is an unusually egalitarian society.<sup>212</sup> Encel remarks that Australian egalitarianism not only defers to the powerful and the professionals but is also limited to white Anglo-Saxon males.<sup>213</sup>

276. Perhaps the main barrier to change is the widespread belief in the 'natural law' of sex differences. Anne Oakley points out that in human biology there are many similarities between the male and female and that these are more important than the differences. She concludes that much that is popularly considered male and female behaviour is not ascribable to biology but is learnt; that differences in behaviour between men and women have 'their source in culture not nature'; they differ from culture to culture and differ in earlier periods of the history of a culture. They are not a constant, as is biological sex.<sup>214</sup>

277. Margaret Mead points out that in different human societies qualities have been assigned in some cases to one sex and in some to the other. This division of traits has been arbitrary, but all societies have made some division.<sup>215</sup> She points to the value of sex differences as a basis for diversification and to the importance of emphasising the potentialities of each sex, not just their limits.<sup>216</sup>

278. These questions must be kept in mind in the reassessment of sex roles which is now occurring and which, in our view, is hindered by discrimination. The structures and beliefs of an earlier society still persist as the criteria by which we judge things male and female, and by which we validate discrimination against women in our society. By expanding the opportunities for men and women we enable each sex to come closer to developing its full potential for diversity; from this new social patterns may emerge.

### The movement for change

279. The international movement to promote female equality began after the war of 1914–18. When the International Labour Office was established in 1919, one of its first Conventions—No. 3, Concerning Maternity Protection, 1919—set standards for

206. *ibid.*, p. 54.

207. Evidence, p. 2888, Prof. Basil Hetzel.

208. *ibid.*, pp. 2887–9.

209. B. Hetzel, 'The epidemiology of suicidal behaviour in Australia', *Aust. and NZ Journal of Psychiatry* (1971), p. 156.

210. Evidence, pp. 2701–11, Frank Pace.

211. Anne Oakley, *Sex, gender and society* (Sun Books, Melbourne, 1972), p. 189; *Fighting discrimination in employment and occupation* (ILO, Geneva, 1968), pp. 9–12.

212. Oxley, pp. 23–8.

213. Encel, 1970, p. 54.

214. Oakley, p. 18.

215. M. Mead, *Male and female* (Penguin, Harmondsworth, 1950), pp. 30–1.

216. *ibid.*, pp. 37, 41–2.

maternity leave for women employed in industry and commerce. These standards are still to be attained in most countries and have rarely been implemented in full anywhere.

280. The international movement for human rights was accelerated with the adoption by the UN of the Universal Declaration of Human Rights in 1948. Conventions of the ILO and the United Nations, while not always ratified by member nations, had the effect of causing and creating a climate of opinion favourable to change.

281. Significant international milestones on the road to equality were:

ILO Convention 100, Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951

UN Convention on the Political Rights of Women, 1953

ILO Convention 111, Concerning Discrimination in Employment and Occupation, 1958

UN Declaration on the Elimination of Discrimination against Women, 1967

282. Governments around the world have effected change by a combination of public commitment, public education, persuasion and conciliation, publicly funded research, benign discrimination, repeal of sex-linked protective legislation, through equal pay legislation and/or the enactment of anti-discrimination legislation.<sup>217</sup> Effort has traditionally concentrated on working conditions and equal pay. Emphasis now appears to be shifting to the effects of unequal education, to training and to restructuring work to accommodate people's domestic needs. Examples of positive action programs are referred to in the following paragraphs.

283. We were not able to survey discrimination against women on the international scene, but we did make inquiries about the United States and Sweden.

### *Sweden*

284. The Swedish government has had a long-term commitment to promote equality for women.<sup>218</sup> In 1972 a Swedish government Advisory Council on Equality between Men and Women took the initiative in launching a pilot program with the aim of making it easier for women to take 'male jobs'.<sup>219</sup> The County Employment Board approached companies with a shortage of manpower and asked them to take part in the scheme. Women who were interested attended a 4-week introductory course entailing job orientation on both theoretical and practical planes, followed by an offer of permanent employment. The women received training allowances for the duration of the introductory course and child care was provided. Approximately 75 per cent of women who attended the course got permanent jobs. A sample of thirty families of those women were followed over a 6-month period. The women, with the exception of two, saw great improvement in their situation by entering the paid workforce. The attitudes of their husbands, however, saw little change.

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217. *Report of the National Committee on the Observance of International Womens Year, 1976* (US Government Printing Office, Washington, DC, 1976); see also policy documents, Liberal Party and ALP, issued prior to Australian federal election, May 1974 and December 1975.

218. Birgitta Linner, *Society and sex in Sweden* (The Swedish Institute, Stockholm, 1971).

219. Rita Liljeström et al., *Sex roles in transition*, a report on a pilot program, Advisory Council to the Prime Minister on Equality between Men and Women (Swedish Institute, Stockholm, 1975).



285. The study showed that people need time to adjust, to evaluate new situations and create new roles. Studies of domestic time budgets in Australia<sup>220</sup> and internationally<sup>221</sup> indicate that changes in family roles lag behind changes in the economic role of women, especially in lower socio-economic groups.

286. The public commitment of the Swedish government was an important factor in ensuring the success of the program. Commitment from 'the top' is essential; authoritative persons lend an atmosphere of security to an otherwise threatening experiment.<sup>222</sup>

### *The United States*

287. In the United States, under the civil rights legislation of 1964, discrimination on the grounds of sex or race is prohibited.<sup>223</sup> Employers have a duty to engage in 'affirmative action' to rectify the effects of prior discriminatory practices. Similar provisions apply to employers who have entered into a contract to provide goods or services to the government.<sup>224</sup>

288. These programs are enforced by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. Enforcement measures include prosecuting in individual cases, conciliation and investigation. Recently recommendations have been made to make the enforcement programs more effective.<sup>225</sup> Despite criticisms which led to these recommendations the two associated programs have resulted in major employers and some unions being required by court order to change the pattern of employment and adopt programs which ensure greater participation of minorities.

289. The Swedish and US programs illustrate how governments and departments of labour or employment might develop an active program in promoting equal opportunity for women and in allocating to women's programs a more equitable portion of the nation's resources.

### *International conventions*

290. Australia's record in regard to the ILO and the United Nations initiatives is as follows:

- (a) United Nations Declarations relating to discrimination on the grounds of sex or marital status which Australia has supported:

Australia voted in favour of UN General Assembly resolution 217A (III) of 10 December 1948, which adopted and proclaimed the Universal Declaration of Human Rights.

Australia voted in favour of UN General Assembly resolution 2263 (XXII) of 7 November 1967, which adopted the Declaration on the Elimination of Discrimination against Women.

220. Harper and Worrell, Young mothers and the workforce, Commission research report, no. 12, 1976, pp. 160-6.

221. Alexander Szalai, *The situation of women in the light of contemporary time-budget research*, background paper, World Conference of International Womens Year (UN publication, 1975).

222. Barbara Boyle, 'Equal opportunity for women is smart business', *Harvard Business Review*, May and June 1973.

223. Civil Rights Act 1964, Title VII.

224. Executive order 11246, 3CFR, S. 339, 1965; Executive order 11375, 3CFR, S. 684, 1967.

225. '... To form a more perfect union ...' *Justice for American women*, pp. 192 ff.

- (b) United Nations, ILO and UNESCO Covenants and Conventions relating to discrimination on the grounds of sex or marital status which Australia has ratified or acceded to:

*Ratified in*

- 1957 The UN Convention on the Nationality of Married Women
- 1974 The UN Convention on the Political Rights of Women  
ILO Convention No. 100 (Equal Remuneration)
- 1975 The UN International Covenant on Economic, Social and Cultural Rights
- 1966 The UNESCO Convention against Discrimination in Education
- 1974 The Protocol relating to it
- 1969 ILO Convention No. 122 (Employment Policy)
- 1973 ILO Convention No. 111 (Discrimination in Respect of Employment and Occupation)<sup>226</sup>

291. The ratification of Conventions is the responsibility of the Commonwealth government, though in practice the subject matter of a Convention may fall wholly or partly within the jurisdiction of the States, and their agreement may be needed for ratification.

292. In addition to the instruments mentioned above the following ILO instruments are relevant to women in the workforce:

- Recommendation No. 90—Equal Remuneration 1951
- Convention No. 102—Social Security (Minimum Standards) 1952
- Convention No. 103—Maternity Protection (Revised) 1952
- Recommendation No. 95—Maternity Protection 1952
- Convention No. 140—Paid Education Leave 1974
- Recommendation No. 148—Paid Education Leave 1974

**Maternity protection**

293. ILO Convention No. 103 on Maternity Protection (Revised) 1952 applies to women employed in industrial and agricultural occupations. It provides that a woman shall be entitled to maternity leave of at least 12 weeks including a period of compulsory leave after confinement of not less than 6 weeks. The absence from work is to be paid as normal working time. A woman is also to be entitled to cash and medical benefits and may not be given notice of dismissal during or at the end of leave.

294. Recommendation No. 95 recommends 14 weeks leave, more generous cash benefits and provides for the preservation of seniority and level of pay. The 1965 Recommendation No. 123 on Employment of Women and Family Responsibilities calls for broader recognition of women workers in reconciling their dual roles.

295. Australia has not yet ratified these instruments regarding maternity protection because paid maternity leave provisions are in general confined to public employment. The *Maternity Leave (Australian Government Employees) Act* 1973 provides for 12 weeks minimum leave on full pay, commencing at least 6 weeks before the expected date of confinement and extending for at least 6 weeks thereafter. Leave can be taken for up to 52 weeks (40 without pay). A permanent officer taking maternity leave is entitled to be re-employed in her former position or as nearly as possible level with that position. A father may take one week's leave with pay.

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226. Commission correspondence, Dept of Foreign Affairs.

296. Most States have some provision for maternity leave or accouchement leave in public employment, though not necessarily up to the ILO standard. Victoria is an exception as its provisions do conform with the Convention. South Australia has legislation under consideration.

297. In the private sector special provisions for maternity leave are rare and it is even rarer for part or full payment to be made.<sup>227</sup> Legislation exists in some States but does not come up to the ILO standards and does not cover all employees. A few industrial awards have maternity provision.

298. The question of financing maternity leave presents some difficulties. An individual employer with a disproportionate number of workers of child-bearing age could incur a heavy burden. The ILO Convention does not require employers to meet the full cost.<sup>228</sup> To comply with the Convention it would probably be necessary to meet payments from revenue or to establish a special fund with contributions from employers and/or employees.

299. The provisions of maternity leave in the public service are sometimes criticised for being over-generous; it is argued that some women retire from employment shortly after they have taken benefits offered by the provision for 52 weeks leave. We do not believe that individual cases of abuse should be relied on to reduce maternity benefits. The absence of child care, part-time work and opportunities for advancement could be reasons why women are unable to resume full-time employment. The rate of progress is uneven.

300. Paid maternity leave, leave without pay and preservation of job, seniority and salary are essential elements in establishing equality for women. The burden of ensuring that young infants have their parents' care and that the mother does not suffer in her work prospects because she is meeting the child's needs should be borne by the community as a whole. Fathers should also be encouraged to take a share in infant care. In Sweden fathers have to take a proportion of unpaid parental leave.

301. In our view the government has a responsibility to ensure that all women employed in Australia are able to take advantage of maternity leave. Discussions should be held with State governments, trade unions and employer organisations to work out the most appropriate way of incorporating maternity protection into the system of social security and industrial awards. We consider that leave should also be available to fathers at the time of birth and that in due course long parental leave should be shared.

302. As a first step the standards now available to women in the Commonwealth public service should extend to all women. The aim should be to enable Australia to ratify the ILO Convention as soon as possible.

### **Equal pay**

303. ILO Convention No. 100 on Equal Remuneration, 1951, requires equal remuneration for men and women workers for work of equal value. The principle may be applied by national laws or regulations, wage determinations or collective agreements. Until 1967 the male basic wage was fixed having regard to the needs of the average family including the support of wife and children. This concept of need was a factor in establishing a lower basic wage for females—then 75 per cent of the male rate; in 1967 the total wage concept was introduced and a male minimum rate was established.

227. Editorial, 'Holding the baby', *Australian*, 15 July 1975.

228. Articles 4.4 and 4.8.

304. The principle of equal pay for equal work was introduced in 1969 by the Arbitration Commission. It did not apply to work usually performed by women and it did not ensure that women could obtain jobs in male-dominated classifications carrying higher rates.

305. In December 1972 the Arbitration Commission decided on equal pay for work of equal value, to be phased in by 30 June 1975. This led to a progressive reclassification of jobs though it still did not ensure that women would gain access to highly paid jobs. In 1974 the Arbitration Commission changed the basis of calculating the minimum wage to remove the family needs concept; the adult male minimum wage was applied to adult females.

306. The ILO Convention No. 100 on Equal Remuneration, 1951, was ratified by Australia in 1974.

307. The impact of the equal pay decisions of female wage rates can be seen from table VI.8.

**Table VI.8**

	Weighted average minimum weekly rates		
	Adult males	Adult females	Female rate as a percentage of male rate
	\$	\$	%
December 1972	67	52	77
December 1974	103	90	87
December 1976	135	125	93

*Source:* Australian Bureau of Statistics, ref. no. 6.37.

308. Despite the closing of the gap there remain discrepancies. Table VI.8 does not show overtime or over-award payments (which increase the differential). A survey in the metal trades in 1973 showed that the average over-award payment for a male metal process worker was \$9.30 and for a female \$2.85.<sup>229</sup>

### **Equality of opportunity**

309. ILO Convention No. 111 on Discrimination in Respect of Employment and Occupation, 1958, requires ratifying countries:

. . . to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.<sup>230</sup>

Discrimination is defined to include:

. . . any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>231</sup>  
A distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.<sup>232</sup>

229. Submission 594, Edna Ryan.

230. Article 2.

231. Article 1 (1) (a).

232. Article 1 (2).

310. On 22 May 1973, the Minister for Labour announced the intention of the government to ratify ILO Convention No. 111. He described discrimination as an anti-social offence, as a human rights problem and as a moral problem. Following upon this announcement, National and State Committees on Discrimination in Employment were established as tripartite Committees with the support of State governments, employer organisations and the trade union movement. There is a chairman, and representatives of employer and union organisations and of the Commonwealth and (in each State) State governments. The National Committee also has members with special knowledge of the employment problems of Aborigines, immigrants and women.

311. The function of the State Committees is to investigate complaints of discrimination, on the grounds set out in the Convention or other grounds, and to resolve those complaints. The National Committee considers unresolved complaints referred to it by the State Committees and is also responsible for education programs. The programs include publication of guidelines for eliminating discrimination from job advertisements, preparation and translation of pamphlets, meetings and discussions. The special projects of the National Committee include: compulsory retirement ages for men and women; employment and promotion for females in the banking industry; and contribution rates and benefits for males and females in retirement schemes.<sup>233</sup>

312. When the National Committee is unable to resolve a complaint it may report the matter to the Minister, who may table a report in Parliament. There is no power to award damages or to impose fines.

313. In the year ended 30 June 1975 the Committees considered 841 complaints of which 638 were new. About half the complaints were on grounds specified in the Convention and half of these (183) alleged discrimination on the ground of sex.<sup>234</sup> Many involved employment in Commonwealth and State government departments. Most complaints were dealt with successfully. The kind of matters investigated in 1974-75 included job advertisements excluding women, less favourable treatment in pay, allowances and fringe benefits and reduction of status or dismissal of women on marriage.

314. The lack of full investigation and enforcement power is seen by some as a weakness of the Committees.<sup>235</sup> This should not be taken as criticism of the Committees. The point is that their terms confine them to individual complaints, which are few in number compared with pervading discrimination. As a matter of practice no details of cases are disclosed.

It is in the areas of covert and systematic discrimination that the committee system works less well. This type of discrimination is less easily recognised and it is much more difficult to gain a consensus as to what constitutes a discriminatory practice.

An examination of an alleged discriminatory practice in relation to one person might cause an investigator to conclude that the practice is quite harmless. An examination of the same practice in relation to its effect on an entire minority group might lead to an entirely different conclusion.<sup>236</sup>

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233. *Equality in employment*, second annual report of the National Committee on Discrimination in Employment and Occupation, 1974-75, p. 17.

234. *ibid.*, pp. 5-6.

235. e.g. Entekin, Popp, Jay and Savery, *Discrimination in employment* (paper delivered to 47th ANZAAS Congress, 10-14 May 1976), p. 20.

236. *ibid.*, pp. 23-5.

315. The lack of resources to carry out effective education programs and the relatively small number of cases have led to the comment that there has been only a minimal effect on advertisers or on the job market.

316. The situation can be compared with that in the United States. The Equal Employment Opportunity Commission began by adopting a case-by-case enforcement system and then extending its conciliation procedure to include efforts to remove the underlying discrimination in order to ensure more effective compliance.<sup>237</sup> The number of charges received increased from 8000 in 1966 to 65 000 in 1975. The total backlog by 1975 was 102 000 cases.<sup>238</sup>

### **Legislation and discrimination**

317. In 1973 the Minister for Labour stressed the importance of education and conciliation as the principal means of combating discrimination, rather than the imposition of penal sanctions. He foresaw some difficulties in enforcing anti-discrimination laws, but he said:

This does not preclude legislation either on a particular matter or generally, at a later stage, should the need for such action become evident.<sup>239</sup>

318. The National Committee's second annual report noted:

... that there could be value in having a legislative basis for the Committees to assist in the resolution of complaints where this is not otherwise possible, by enabling the Committees to acquire all relevant information. In the view of at least some members, it would be of value if there were legislation imposing penalties on those who discriminate.

319. Legislation can have an influence on behaviour and this in turn can bring about attitude changes.

320. Baroness Seear made the following comment in reference to the United Kingdom Sex Discrimination Act:

The value of discrimination laws is their formal stamp of society's disapproval of sex discrimination in employment. Legislation raises people's consciousness; when discrimination is unlawful they have to start thinking about it and checking up on the degree of compliance.<sup>240</sup>

321. Publicised case histories can have a dramatic effect on the behaviour of organisations which adopt practices similar to those found to be in breach of the law. The process of conciliation is important; it would be enhanced by the imminence of sanctions and publicity.

322. Governments are coming to rely on anti-discrimination legislation to effect a more rapid change in behaviour and attitudes to women. Legislation certainly changes behaviour and attitude change follows. Legislation is effective in expressing society's disapproval of anti-social behaviour, and in engendering re-education.

### **State action**

323. The South Australian Sex Discrimination Act, 1975 makes unlawful discrimination on the grounds of sex or marital status in relation to employment, education and the provision of goods and services (including bank loans, professional services and the provision of accommodation). Complaints about discrimination are made to

237. '... To form a more perfect union ...' *Justice for American women*, pp. 194-5.

238. *ibid.*, p. 192.

239. Discrimination in employment and occupation: ministerial statement—by leave—Mr Clyde Cameron, 22 May 1973, House of Representatives, Canberra.

240. *Sydney Morning Herald*, 29 July 1975; ABC transcript, 'Monday conference', 28 July 1975.

a Commissioner for Equal Opportunity who proceeds first by way of conciliation. If conciliation does not resolve the matter, the Sex Discrimination Board has power to award damages. It may also hold inquiries and issue orders in respect of contravention of the Act. Fines may be imposed for failure to comply with orders of the Board. Excluded from the legislation are wages, religious bodies, superannuation and life and disability insurance.

324. The New South Wales Anti-discrimination Act, 1977 makes unlawful discrimination on the grounds of race, sex or marital status in relation to employment and the provision of goods and services (including finance, professional services and the provision of accommodation). The Act provides for a Counsellor for Equal Opportunities and an Anti-discrimination Board with a judge as chairman. The Counsellor will have conciliation functions and the Board will have power to issue injunctions and award damages. Excluded from the Act are wages, educational and religious establishments, clubs and superannuation. The Board will have power to inquire into discrimination on the grounds of age, religious or political conviction and homosexuality but will not be able to take direct action in individual cases.

325. An Equal Opportunity Bill pending in Victoria would make unlawful discrimination on the grounds of sex or marital status in the fields of employment, education and the provision of goods and services. Excluded from the Bill are religious bodies, clubs, certain aspects of life insurance and superannuation. Employers who do not employ more than ten employees are also exempt.

326. Some State governments such as South Australia, Victoria and Tasmania have appointed women advisers to monitor government programs for their impact on women, to research and suggest reforms. The NSW government has a Womens Advisory Council, to which the government appointed representatives of a variety of womens groups.

327. There are difficulties in implementing effective anti-discrimination legislation. For example, in the field of employment, the circumstances in which it is valid to require a person of one sex or another need to be spelt out and the circumstances in which persons of one sex may be favoured in order to overcome a previous imbalance between the sexes need definition. It is too early to comment on State legislation mentioned above except to say that the effect will depend largely on the powers and resources of the bodies appointed to implement the law. While we welcome the legislation in principle we regret the differences between the scope of the law and in particular we regret the many important exclusions and exemptions. After experience in operation it is hoped that some of these omissions may be rectified.

### ***National action***

328. The *Racial Discrimination Act* 1975 makes unlawful discrimination on the grounds of race or national origin. The remedies provided to persons aggrieved by unlawful actions are by way of complaint to a Commissioner and by civil remedies. The Act implements the United Nations Racial Discrimination Convention, 1965, (which came into force in 1969) and covers discrimination in regard to civil, political, economic, social and cultural rights. Persons aggrieved may complain to a Commissioner for Community Relations and there is provision for civil remedies. The Act has not been fully implemented and the government has announced its intention to absorb the functions of the Commissioner in a Human Rights Commission.

329. The National Committee on Discrimination in Employment and Occupation noted the potential for overlap between their functions and those of the Commissioner for Community Relations. The National Committee also noted the possibility of further State legislation against discrimination in employment on the ground of sex and, possibly, other grounds. It is the view of the Committee that:

Proliferation of alternative machinery arrangements operating in the area of employment discrimination will result in confusion in people's minds as to which machinery to involve in order to have a complaint investigated; that it is wasteful in terms of financial and human resources; and that it fosters a disjointed approach to a social problem which demands, essentially, a co-ordinated and uniform approach.<sup>241</sup>

330. The report emphasised the advantages of the tripartite Committees acting with the support of Federal and State governments, which enables them to cover the whole range of employment, and called for:

. . . one set of machinery to deal with discrimination in employment and occupation, covering both Commonwealth and State legislation or other arrangements.<sup>242</sup>

## Conclusion

331. Our review of the position of women in Australia today has led us to believe that there is a case for legislation against discrimination on the ground of sex. The case-by-case system of conciliation, though valuable for the individual, does not really strike at the heart of discrimination.

332. In our view there is a need for comprehensive nation-wide legislation against discrimination on the grounds of sex and marital status in employment and other areas. It would be an important element in overcoming discrimination; it would change behaviour and public opinion by providing machinery for wide-scale investigation and case-by-case review and for public education.

333. The machinery needed to enforce anti-discrimination legislation requires provision for conciliation; for powers of compulsory investigation; for proceedings by way of complaint or charge; and for the enforcement of positive action programs. Ideally, complementary Federal and State legislation would establish comprehensive machinery at State and Federal level, with compulsory powers of investigation and enforcement to deal with systematic discrimination. It is very important in our view to establish a nation-wide system. In a comprehensive scheme the present State and National Committees could be given an expanded role in conciliation and investigation in matters relating to employment.

334. Other policies to be pursued under such legislation include campaigns for public education.

335. Positive action programs and public employment policies should be predicated on the need to change work structures so that men and women can play their part in economic life and discharge family responsibilities. Changes are needed in hours of work, part-time work, job sharing, parental leave and retraining and re-entry into the workforce.

336. Legislation against sex discrimination should not be limited in its operation to discrimination in employment and occupation, but should extend to discrimination in other areas, such as education, the supply of goods and services, credit and finance,

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241. *Equality in employment*, p. 19.

242. *ibid.*, p. 19.



banking and insurance. We also consider that ways should be found of eliminating discrimination in clubs, in life and disability insurance and in superannuation—these may require separate and specific measures to which we have referred.

337. We consider that the inequalities suffered by women require the intervention of governments, who have a responsibility to remedy inequalities.

338. We see the need for an integrated program with the Commonwealth government using its powers of persuasion, legislation and funding to collaborate with State governments, organisations and individuals to raise women's status and their personal and economic autonomy.

339. We believe that legislation should be a priority and that it should take account of the following considerations:

- (a) Commonwealth and State governments need to adopt a uniform policy against discrimination on the grounds of sex and marital status and set up national and State machinery to put the policy into effect;
- (b) the policy should apply to agencies of Commonwealth, State or local government, to industry and commerce, to employers and unions and it should apply in the fields of education, credit and finance, banking and insurance, accommodation and the supply of goods and services;
- (c) implementation should be by way of legislation providing for conciliation, compulsory powers of investigation, enforcement through legal procedures and penalties and the award of damages;
- (d) public education programs on the nature and effects of discrimination and positive action programs should be provided for and pursued;
- (e) government departments, agencies requiring government licensing, agencies which are publicly funded and organisations obtaining government contracts should be required to give equal opportunity to males and females.

### 3. Prostitution

#### Introduction

1. Many submissions we received raised issues relating to prostitution. Although prostitution is not exclusively confined to the activities of women engaged in commercial sexual transactions, the term 'prostitute' commonly implies a female person. For this reason, this chapter, in talking about prostitution, will implicitly be referring to female prostitution.

#### Issues

2. Among our submissions were several that claimed laws relating to prostitution were discriminatory in nature and were applied unfairly. Some called for legalisation or decriminalisation of prostitution, with various recommendations as to control. Others voiced objections to prostitution: its association with organised crime; its spreading of venereal disease; and its moral impact on the family and society at large. We were unable to investigate all of the social issues raised by the question of prostitution, but we present here a summary of the material we have gathered.

3. Although the Womens Liberation Movement has not had much contact with prostitutes as such, the influence of womens groups on attitudes in the community has had an impact on prostitutes themselves. The first serious attempt to organise prostitutes was made in California, USA, with the establishment of COYOTE (Call Off Your Old Tired Ethics) to agitate for changes in the law, the establishment of a professional code and the defence of members against the harassment of law enforcement officers. Representatives from COYOTE have since toured Europe helping prostitutes in Britain, France and elsewhere to organise.<sup>1</sup> In Paris, in June 1975, French prostitutes went on strike, occupying churches and similar gathering places to hand out leaflets. They called for legalisation of prostitution and an end to police persecution. They also demanded the right to social security benefits.<sup>2</sup>

4. Recently, in NSW, a Prostitution Law Repeal Association has been formed which has called on the State government for an amnesty on arrests and penalties, to allow them to openly discuss reform of the laws covering prostitution.<sup>3</sup>

5. These actions indicate a greater confidence amongst prostitutes that public feeling is on their side. It also appears to indicate that the women are prepared to organise collectively and are not so much under the influence of pimps and male 'protectors' of one sort or another. One Sydney prostitute, speaking on the ABC's program 'New society' on 27 October 1975, indicated that the only girls who had pimps were those who worked the streets, the lowest type, who voluntarily, from feelings of insecurity and loneliness, sought someone who cared for them. This analysis was also backed up by the prostitutes interviewed by Paul Wilson in his study published in *The sexual dilemma: abortion, homosexuality, prostitution and the criminal threshold*.<sup>4</sup> A Sydney solicitor also concurred with this:

We should add that we have never struck a situation where a prostitute has a male pimp, tout or protector, so, although these persons probably exist, the numbers are probably small. Some girls work in 'massage parlours' where the employer is a man, but most of

1. *Observer*, 16 November 1975, p. 5.

2. *Australian and Sydney Morning Herald*, 9 June 1975.

3. *Sydney Morning Herald*, 16 November 1976.

4. Paul Wilson, *The sexual dilemma: abortion, homosexuality, prostitution and the criminal threshold* (University of Qld Press, 1971).

them work on their own or from plain brothels with a 'madam' in charge. A lot of the girls do have steady lovers but these do not usually act as pimps. We do not know how many of these live off the earnings of the prostitutes but we submit that this is a moral problem and should not be a legal offence.<sup>5</sup>

Public attitudes towards prostitutes seem to indicate that actions such as these by prostitutes, if not gaining public support, would, at least, not suffer from violent opposition from the general public.

6. One of our research projects investigated attitudes to sexuality and to various kinds of sexual behaviour. The findings relating to prostitution were as follows:

This is a question which gets a lot of attention in one form or another, usually in relation to some sort of police action. It is interesting therefore that only 2 per cent of the respondents considered it to be a criminal act calling for police action and jail. On the contrary 70 per cent thought that prostitutes were rendering a public service. At the same time 75 per cent of the sample were not looking for the services of a prostitute, female or male, but 19 per cent had or would like to visit a prostitute, male and female as appropriate . . .

When sorted on a sex basis, there is little difference in the way single sex or mixed groups approached the topic. However, what is clear from the reaction of all the groups is that, contrary to official opinion, prostitution is not a subject which people feel strongly about at all. What they do feel strongly is that the police and authorities are far too concerned about it and that it is they, and not the general public, who make it a big issue. It was clear that the trend in all the groups was to see heterosexual activity as something between two people and of itself should be of no concern to the police or the legal processes at all.<sup>6</sup>

7. In another research project, based on a nation-wide sample of electors, 56 per cent agreed that prostitution should be legal (62 per cent of males and 50 per cent of females).<sup>7</sup>

8. Many of the submissions which referred to prostitution started from the assumption that it was an inevitable part of our society:

Its long existence indicates that it is a necessary social service.<sup>8</sup>

This [prostitution] is known fairly universally as 'the oldest profession'. The implications are that most communities need the service.<sup>9</sup>

Prostitution will never be eliminated.<sup>10</sup>

9. Paul Wilson refers in his book to the impossibility of wiping out prostitution, stating that prostitution will always exist because of the conditions of our society:

First, there would have to be no institutional control of sex, with promiscuity the accepted norm . . . Secondly, the economic inequality between classes and between male and female would have to be eliminated . . . [and lastly] prostitution will always find customers in those people who are too physically or otherwise repulsive or ineffective at finding someone who is sexually attracted to them.<sup>11</sup>

## The question of legalisation

10. The arguments around the question of legalisation of prostitution seem to crystallise into several basic disagreements: the question of public health and the spread of venereal disease; the extent of any connection between prostitution and

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5. Submission C1188, confidential.

6. A. J. Scott, Attitudes to sexuality, Melbourne, Commission research report, no. 7, 1976, pp. 26, 102.

7. Simon Hasleton, Attitudes to sexual issues, Commission research report, no. 6, 1976, p. 11.

8. Submission 454, Mrs Geraldine Pack, Lower North Shore Co-ordinating Council, minority report.

9. Submission 436, NSW Council for Civil Liberties.

10. Submission C1188, confidential.

11. Wilson, p. 83.

organised crime; and the relationship between prostitution and other 'sex crimes' or what some consider to be 'unsocial' sexual practices. These can obviously be the subjects of research and investigation. But the underlying basis of the debate, i.e. freedom of sexuality as against moral purity, cannot really be the subject of any inquiry and must continue to be essentially one of conviction.

11. The argument for and against the legalisation of prostitution, as contained in the submissions presented to us, can be summarised as follows:

*In favour*

12. Laws relating to prostitution should be brought into line with current thinking and existing social conditions in Australia. Prostitution should be legalised with the necessary controls exerted, such as regular health inspection of prostitutes. Such legalisation would stop police bribery and corruption, extortion of prostitutes by the criminal element in the society, prevent possible blackmail, lessen sex crimes, supply a necessary service to shy men and help to prevent mental illness in men. Australia should take the lead from such countries as West Germany, Denmark, Sweden, France and Holland. Legalisation should preferably be controlled by the Commonwealth government to maintain uniformity throughout the country.<sup>12</sup>

*In opposition*

13. There is not enough evidence to support the belief that legalisation of prostitution will reduce sex crimes. Prostitution is psychologically and hygienically dangerous, and nurtures a decadent sensual attitude to sex instead of one of love. Legal prostitution would encourage intercourse outside marriage. Prostitution is degrading to women, to human relations and to human life values. The government must eliminate prostitution wherever possible and reduce it to a minimum. Incorruptible policemen are needed for the task of eradicating prostitution. As prostitutes are 'sold' and do not 'sell themselves', they are the innocent victims and must not be punished, but should be rehabilitated in whatever ways suitable. Female students should be taught, through their education curriculum, of the dangers of becoming a prostitute. Legalisation of prostitution will not stop the evils of it, other than white slavery. Those persons who wish to legalise prostitution must themselves prove clearly that such legislation will improve the quality of life.<sup>13</sup>

14. Before discussing the proposals for legalisation, we should take a brief look at the reasons for and against legalisation and their objective basis in fact. Prostitution is often believed to be a major contributor to the spread of VD. A survey of ten countries done under the auspices of the United Nations in 1958 showed that 'the prostitute had ceased to be a major factor in the spread of venereal disease'.<sup>14</sup> While that study is now nearly 20 years old, a study in 1971 of prostitutes in Seattle, Washington, noted that:

Public health advisers believe that prostitutes are well educated about venereal disease problems and are watchful for them. They are aware of preventive techniques which

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12. Submissions 20, Mrs N. D. Wright; 33, Mr J. Hunt; 257, Mr N. K. Madsen; 301, R. C. Gardiner; 325, Joseph Molhen; 392, Mrs E. Easton; 428, F. & R. Roberts; 639, name withheld; 694, Mr & Mrs C. F. Johnson; C696, confidential; 911, Mrs B. R. Adams; 989, Mr J. M. Godfrey; 1125, Mrs D. Davies; 1182, Mr M. Croll; C1188, confidential; Interview report, NSW, 60; Evidence, pp. 1670-71A, Paul Wilson.

13. Submissions 1147, Aust. Festival of Light (NSW); 211, Knights of Southern Cross; 227, Citizens for Kalgoorlie; 1096, Josephine Butler League; Evidence, p. 2607, Rev. F. Nile.

14. 'Prostitution and anti-venereal disease measures in ten selected countries', *International Review of Crim. Pol.* 13 (1958), pp. 67, 69.

include using prophylactics, checking customers, and seeking medical care, because a reputation as one who is infected would cut down the relatively large volume of repeat business which most prostitutes depend on.<sup>15</sup>

This equates with Paul Wilson's estimation that:

The spread of venereal disease has also been attributed, at least in part, to prostitution. Though unsupervised prostitution can increase the number afflicted, it is carelessness allied with promiscuity which is the real offender in the spread of this disease, and the prostitute is probably more careful than the promiscuous amateur.<sup>16</sup>

15. The connection between prostitution and crime was alluded to in some submissions:

- . . . prostitution should be controlled by the government and not by thugs.<sup>17</sup>
- . . . no more illegal prostitution and money-making black market.<sup>18</sup>

16. The connection between prostitution and organised crime was also alluded to by a Committee of the American Bar Association:

Another common justification for criminalising prostitution is that it is 'a source of profit and power for criminal groups who commonly combine it with illicit trade in drugs and liquor, illegal gambling and even robbery and extortion'. The Presidential Task Force on Organised Crime, however, has specifically rejected this contention: 'Prostitution . . . plays a small and declining role in organised crime's operation . . . Prostitution is difficult to organise, and discipline is hard to maintain.'<sup>19</sup>

17. Any connection between prostitution and organised crime could be related to its illegal status. As the experience of the American prohibition era has shown, criminalisation of social practices which are commonly accepted and engaged in by substantial sections of the community does tend to provide an opening for organised crime and corruption:

The practice of driving prostitution underground has had precisely the same effect as denying the other human entertainments, gambling and drinking, to people who wish to indulge in them. The entertainment still goes on but with the practitioners forced more and more into the hands of protectionists and stand-over men.<sup>20</sup>

18. Some submissions referred to the connection between prostitution and police corruption:

- . . . the existence of laws against prostitution has been held responsible for widespread police corruption.<sup>21</sup>

19. Another confidential submission suggested that bribery of the police was common and resulted in fewer arrests of the women concerned; the submission referred also to police harassment in that prostitutes are sometimes arrested when out shopping.<sup>22</sup> We could not investigate these allegations.

20. At our Brisbane hearing, Paul Wilson said that, in attempting to enforce laws relating to prostitution, the community and the police force would be corrupted and

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15. James & Burnstein, 'Prostitution in Seattle', *Washington State News* 8 (1971).

16. Wilson, p. 89.

17. Submission 301, R. C. Gardiner.

18. Submission C696, confidential.

19. *Journal of Human Rights* 4 (1974), p. 77.

20. Wilson, p. 90.

21. Submission 639, name withheld.

22. Submission C1188, confidential.

the activity itself would not be stamped out. It was a perversion of priorities in terms of how criminal law was applied and how police forces were deployed. The job of criminal law was not to enforce people's private moral behaviour.<sup>23</sup>

21. It has even been suggested that the practice of the courts with respect to their dealings with prostitutes also indicates less of an intention to 'stamp out' the crime than to regulate the earnings of prostitutes by some sort of court-imposed taxation system:

Prostitutes . . . before the court . . . some [of whom] had been arrested more than once on a particular night, were fined for each instance \$80, in default 16 days hard labour. Each was allowed time to pay . . . The girls were plainly being allowed time to earn the fines . . . The policy . . . was one of revenue production. If the government of [the] State wishes to live off immoral earnings then it should do so openly by legalisation and taxation of [prostitution].<sup>24</sup>

The penalty for soliciting is \$400 fine or 6 months imprisonment.

22. Some submissions suggested that the legalisation of prostitution would lead to a decline in rape and other sex-related crimes:

I also think that prostitution should be made legal. I think that, in that way, if it was properly organised it could cut down some of the rape cases and bashings of women in their homes.<sup>25</sup>

23. A possible connection between the incidence of rape and the closing down of brothels in Queensland was suggested in an article by R. N. Barber called 'Prostitution and rape in Queensland'<sup>26</sup>, but this seems to be a speculative suggestion and there appears to be no real evidence to prove this assertion.

## The law

24. It is not really accurate to talk about the legality or illegality of prostitution, as prostitution as such is not an offence. Basically there are three offences which cover the operations of prostitutes which bring them into conflict with the law. These offences are: soliciting; being on premises used for the purpose of prostitution; and living off the prostitution of another person. In addition there exist related provisions which cover offences such as managing a brothel and allowing premises to be used for prostitution. These provisions are of concern when considering the practice of keeping brothels but are not of great concern when discussing the issue of prostitution itself. In NSW the most important sections are those contained in sections 28, 29, 30, 31 and 32 of the Summary Offences Act, 1970:

### Soliciting for prostitution

28. A person who—

- (a) for the purpose of prostitution, solicits another person who is in or near a public place; or
  - (b) for the purpose of prostitution or of soliciting for prostitution loiters in, near or within view from a public place,
- is guilty of an offence.

Penalty: Four hundred dollars or imprisonment for six months.

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23. Evidence, pp. 1670–71A, Paul Wilson.

24. Submission 392, Mrs E. Easton quoting a letter in the *Sydney Morning Herald*.

25. Submission 1125, Mrs D. E. Davies (similarly 325, Joseph Molhen; C696, confidential; 1182, Mr M. Croll).

26. R. N. Barber, 'Prostitution and rape in Queensland', in Chappell & Wilson (ed.), *Australian criminal justice system* (Queensland University Press, 1972), p. 187.

### Prostitute on premises habitually used for prostitution or soliciting

29. (1) A reputed prostitute who is in or on premises habitually used for the purpose of prostitution or of soliciting for prostitution is guilty of an offence.  
Penalty: Four hundred dollars or imprisonment for six months.
- (2) A reputed prostitute who is in or on premises that may be reasonably suspected of then being premises habitually used for the purpose of prostitution or of soliciting for prostitution is guilty of an offence.  
Penalty: Two hundred dollars or imprisonment for three months.
30. A person who uses, for the purpose of prostitution, or of soliciting for prostitution, any premises held out as being available for the provision of massage, sauna baths, steam baths, facilities for physical exercise, or services of a like nature, or held out as being available for the taking of photographs or as a photographic studio is guilty of an offence.  
Penalty: Four hundred dollars or imprisonment for six months.

### Living on earnings of prostitution

31. (1) A person who knowingly lives wholly or in part on the earnings of prostitution of another person is guilty of an offence.  
Penalty: First conviction—eight hundred dollars or imprisonment for twelve months. Second or subsequent conviction upon indictment—imprisonment for five years.
- (2) For the purposes of subsection one of this section, a male person who—  
(a) lives with or is habitually in the company of a reputed prostitute; and  
(b) has no visible lawful means of support,  
shall be deemed knowingly to live wholly or in part on the earnings of prostitution of another person unless he satisfies the court before which he is charged with an offence under that subsection that he has sufficient lawful means of support.
32. The owner, occupier, manager or person assisting in the management of any premises who knowingly suffers or permits the premises to be used for the purpose of prostitution, or of soliciting for prostitution, is guilty of an offence.
25. In other States similar legislation exists, although the more usual formulation of the law refers to the offence being committed by 'a common prostitute' and the sections relating to living off the earnings of a prostitute usually specifically refer to a male offender.

26. In the ACT, the sections which are relevant are section 17A and section 23 (1.) (j) of the *Police Offences Ordinance* 1930–1970. Although the offence of managing a brothel (section 18) and permitting the use of premises as a brothel (section 19) exist, there is no specific offence equivalent to section 29 of the NSW Summary Offences Act:

- 17A Any common prostitute who, in or near any public place, or within the view or hearing of any person passing therein—  
(a) solicits, importunes or accosts any person for the purposes of prostitution; or  
(b) loiters about for the purposes of prostitution,  
shall be guilty of an offence.
- 23 (1.) Any person who  
(j) being a male person—  
(i) knowingly lives wholly or in part on the earnings of prostitution; or  
(ii) in any public place persistently solicits or importunes for immoral purposes;  
shall be guilty of an offence.

27. The use of the term 'a person' in section 28 of the NSW Summary Offences Act was introduced to encompass homosexual soliciting, although soliciting by a male person is an indictable offence under section 81B of the New South Wales Crimes Act.

28. The use of the term 'common prostitute' was considered by the British Home Office Working Party on Vagrancy and Street Offences in its *Working paper* (of 1974) but it rejected the idea of changing the terminology of the Act under consideration:

We received suggestions that the phrase 'common prostitute' should be replaced by one such as 'any person'; but we believe that (apart from widening the offence beyond the activities of prostitutes and including soliciting by men) this would remove a valuable safeguard and make it far more difficult to prove guilt.<sup>27</sup>

29. The offence of soliciting is obviously the most important one in terms of the rate of convictions for the offence. It appears to be very easy to prove guilt, even in NSW where the term 'common prostitute' is not used. A NSW Bureau of Crime Statistics and Research project done of convictions in Courts of Petty Sessions in 1972 showed that, of fifty-one charges for 'using premises for prostitution', 5.9 per cent were dismissed or withdrawn, 74.4 per cent were convicted and fined and 2 per cent were convicted and imprisoned; of forty-six charges for 'living off the earnings of a prostitute', 8.7 per cent were dismissed or withdrawn, 41.3 per cent were convicted and fined and 26.1 per cent were convicted and imprisoned. By contrast there were 4288 charged with 'soliciting'—2.3 per cent were dismissed or withdrawn, 93.2 per cent were convicted and fined and only 0.3 per cent were convicted and imprisoned.

30. Laws prohibiting soliciting in public places are primarily aimed at keeping public order and preventing public offence caused by these activities. As such they should apply equally to males and females. At the same time it has to be recognised that they do not in fact prevent prostitution. The British Home Office Working Party on Vagrancy and Street Offences was careful to point out:

. . . it is not the duty of the law to concern itself with immorality as such . . . It should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious: and the simple fact is that prostitutes do parade themselves habitually . . . and their continual presence affronts the sense of decency of the ordinary citizen.<sup>28</sup>

31. It was suggested to the British Home Office Working Party that, as the law was based on nuisance or public annoyance, the offence should consist of 'soliciting, accosting or importuning in public, if it is persistent, is for the purpose of sexual relations, and causes a nuisance to the person solicited or some other person present'. This was rejected because it was considered by the Working Party to be too difficult to enforce and placed an unreasonable onus on the police.<sup>29</sup>

32. The Sexual Law Reform Association went even further to suggest that:

. . . the law relating to public order and decency should be based on annoyance, injury or nuisance to specific citizens, and that no person should be convicted of such annoyance without the evidence of the person aggrieved.

It recommended 'a general provision penalising offensive or pestering behaviour in the street, without specific mention of any sexual purpose'.<sup>30</sup>

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27. BHO, Working Party on Vagrancy and Street Offences, *Working paper* (HMSO, London, 1974), para. 235.

28. *ibid.*, para. 243.

29. *ibid.*, paras 236–7.

30. Sexual Law Reform Association, *Report of Working Party on the Law in Relation to Sexual Behaviour* (HMSO, London, 1972), pp. 19, 20.



33. The experience in England after the implementation of the Wolfenden report (which made it easier to prove the offence of soliciting) was that soliciting in the streets was reduced but that other means of attracting clients was adopted. The Committee had expressed concern about this happening in its report:

It has been suggested to us that to 'drive the prostitute from the streets' is to encourage the closer organisation of the trade, with greater opportunities for exploiting prostitutes and greater dangers that new classes of 'middlemen' will arise.<sup>31</sup>

34. The Committee thought, however, that its aim was not to eradicate prostitution, as it considered that prostitution could only be eradicated through:

. . . measures directed to a better understanding of the nature and obligations of sex relationships and to a raising of the social and moral outlook of society as a whole.<sup>32</sup>

The seminar on 'Victimless crimes' (Sydney, 24–27 February 1977), in its background paper on prostitution in New South Wales, considered ideas about reforming the law with regard to soliciting:

It would be unjust and probably still ineffectual to raise the penalties drastically. Some sort of licensing system could work if it were flexible and well moderated. If working off the streets were not illegal and working conditions were not exploitative, as they are now, some street girls might choose to work in other ways.<sup>33</sup>

The paper also suggested that living off the earnings of a prostitute should only be an offence where it was accompanied by 'coercion or violence'.<sup>34</sup>

35. In our view there should no longer be an offence as such. The activities of females or of males should be an offence only to the extent to which accosting a person for a sexual purpose causes, or is likely to cause, annoyance to that person or to other persons.

## Brothels

36. So far as brothels are concerned we can see little justification for laws which make it an offence for a prostitute to be on premises habitually used for the purposes of prostitution. This appears to be unfair in its application since the client is not liable for prosecution. The NSW Summary Offences Act does not define brothel. But case law has defined it as a place resorted to by persons of both sexes for purposes of prostitution.<sup>35</sup> Premises used by one woman cannot be regarded as a brothel.<sup>36</sup> The ACT Police Offences Ordinance specifically defines a brothel as:

- (a) premises, a vehicle or a caravan to which persons of opposite sexes resort for the purposes of prostitution; or
- (b) premises that are occupied or used, or a vehicle or caravan that is used, by any woman or women for the purposes of prostitution

but there is no offence of being on premises used for the purpose of prostitution.

31. *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London, 1958), para. 286.

32. *ibid.*, para. 292.

33. Jan Aitken, *Prostitution in New South Wales* (background paper compiled for seminar on 'Victimless crimes', Sydney, 24–27 February 1977).

34. *ibid.*, pp. 221–2.

35. *Singleton v. Ellison* [1895] 1 QB 607.

36. *Strath v. Foxon* [1956] 1 QB 67; *Abbott v. Smith* [1965] 3 WLR 362; [1964] 3 All ER 762.

37. The Sexual Law Reform Association proposed that:

It should no longer be an offence for premises to be used as a brothel, providing that the planning laws and the law of public nuisance are not infringed.<sup>37</sup>

38. Some submissions suggested that, as prostitution fulfils a necessary function in our society, legalised brothels should be established.<sup>38</sup> The ideal, it was said, would be to have the brothel run along the lines, for example, of a restaurant. In this way premises offering a service would be open to the public, subject to inspection for cleanliness and safety and service could be refused to unacceptable clients (as in restaurants). The prostitute would be seen as giving a personal service, similar to a waitress, and in this situation award conditions could be built in.<sup>39</sup>

39. The Wolfenden report rejected the idea of licensed brothels as such a move would imply that 'the state recognised prostitution as a social necessity'.<sup>40</sup>

40. One submission recommended the establishment of government-run brothels:

We submit that legislation on the lines suggested could achieve the following:

- (1) By providing for licensing of prostitutes and compulsory medical checks it could reduce the incidence of venereal disease.
- (2) By providing for government-run brothels it could reduce the number of prostitutes working the streets, although never eliminate this practice altogether. This would reduce the number of police required to enforce the law.
- (3) Bribery of police will be reduced although probably not eliminated.
- (4) Prostitutes, instead of paying fines and bribes, will pay income tax which only some of them are doing now.
- (5) Brothels can be set up in areas where they are not a nuisance to residents, such as in business areas, and also in places where the male population is not at present catered for. This could reduce the number of rapes and/or mental illness in men who for some reason have difficulty in obtaining female company.<sup>41</sup>

Two other submissions, however, which recommended the legalisation of prostitution, while recognising the need for some control, specifically rejected the idea of government-run brothels:

Necessary safeguards

- (i) Elective adoption of the profession, *not* as the result of economic or social pressure.
- (ii) Safeguards against exploitation and violence and involvement of criminal networks.

We advocate decriminalisation, and some control, e.g. licensing. Freedom from official control is intrinsically desirable. However, to prevent disease spread, regular medical checks are necessary; desirably to both prostitute and client though administration of the latter would be extremely difficult.<sup>42</sup>

In general, we would see freedom from official controls as a desirable principle. However, as sexual contact involves the spread of disease, regular medical examination of the prostitutes, as exists in other parts of the world, seems a reasonable requirement. It would also be desirable to look for regular medical examination of clients; however, we cannot see how this requirement could be administered.<sup>43</sup>

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37. Sexual Law Reform Association, report, p. 19.

38. Submissions 33, Mr J. Hunt; 192, Mr N. C. Jukes; 301, R. C. Gardiner; 694, Mr & Mrs C. F. Johnson.

39. Submissions 436, NSW Council for Civil Liberties; 454, Mrs G. Pack.

40. Committee on Homosexual Offences and Prostitution, report, para. 292.

41. Submission C1188, confidential.

42. Submission 454, Mrs G. Pack.

43. Submission 436, Council for Civil Liberties, NSW.

41. The French organisation of prostitutes also opposes the institution of government-run brothels:

We refuse firmly:

- (1) the reopening of brothels . . .
- (2) to be sex servants without any freedom at all;
- (3) to be put under control of Town Councils.<sup>44</sup>

42. The Josephine Butler League opposed the establishment of government-run brothels, citing the fact that such brothels in Europe had been a source of government and police corruption and intimidation.<sup>45</sup>

43. The seminar on 'Victimless crimes' background paper on prostitution also commented that the problem with any licensing system was that it could restrict the number of licences granted and so increase the bribery and dishonesty associated with their distribution.<sup>46</sup>

44. A report of the Sexual Law Reform Association concluded:

. . . we do not regard it as a proper use of the law to enforce standards of morality in sexual behaviour upon individuals . . . All citizens should possess, as of right, the maximum possible degree of free choice in its exercise—provided always that others are not directly harmed or unwillingly involved

and recommended that:

There should be no move towards the State regulation of prostitution. Social policy should be neutral towards the fact of prostitution. Prostitutes, in common with everybody else, should pay income tax on their professional earnings.<sup>47</sup>

45. A total of 100 members of the United Nations, with UN endorsement, have in fact eliminated the crime of prostitution and abandoned all experiments at regulation.<sup>48</sup>

46. It has been suggested by some that government toleration of prostitution has a detrimental effect on the stability of the family and a degeneration of attitudes towards sex. In contrast, one submission specifically called for the legalisation of prostitution so that married men could go to brothels instead of 'trying to find another girl' and subsequently leaving their wives.<sup>49</sup> Paul Wilson also points out:

It would seem, rather, that the increasing amount of pre-marital and extra-marital promiscuity poses a much greater threat to the family and even, paradoxically enough, to prostitution itself as a social institution.<sup>50</sup>

47. We agree that social policy should be neutral towards the fact of prostitution. The law in this area of sexual behaviour should impose no regulations or prohibitions except to punish assaults, protect the immature and prevent public annoyance.

48. By recommending decriminalisation we do not imply approval or encouragement of prostitution, but merely that we regard such legislation as an inappropriate use of the criminal law.

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44. From *Womens Liberation News*, Britain, January 1976.

45. Submission 1096, Josephine Butler League of Australia.

46. Aitken, p. 224.

47. Sexual Law Reform Association, report, p. 19.

48. 'Recommendation and Report to the House of Delegates by the American Bar Association Section of Individual Rights and Responsibilities Concerning Prostitution and Solicitation', *Journal of Human Rights* 4 (1974), p. 94.

49. Submission C696, confidential.

50. Wilson, p. 92.

**Conclusion**

49. We consider that the prohibition and punishment of prostitution as such is not justified except to the extent necessary to protect the immature, to prevent violence and coercion and to prevent public nuisance.

## 4. Aboriginals

### Introduction

1. As part of our inquiry we sought to make contact with members of Aboriginal communities in urban, rural and remote areas. We were aware that the human relationships issues identified in our inquiry might affect Aboriginal people in different and in special ways; we were aware of cultural differences; and we were aware of the disadvantages suffered by many Aboriginal people in a predominantly white society.

2. Our efforts to make contact with Aboriginal people were not as successful as we would have wished. We had few written submissions about issues relating to Aboriginals. We heard some oral testimony, and we spoke informally to Aboriginal people at 'open house' hearings in the Northern Territory and Tasmania.

3. We held a special Aboriginal access day in Redfern, Sydney, in December 1975. This was unsuccessful. The arrangements were made through various Aboriginal organisations, and people from these groups had suggested that an 'open house' in the local community centre would be the best approach. However, not many people came and it was later considered that this approach had been wrong. One Aboriginal leader suggested that the best approach in the future for contacting Aboriginals would be to go in ones or twos, unofficially, and talk to people in their own surroundings, individually or in small groups.

4. Our planned research project on Aboriginals and human relationships did not proceed.<sup>1</sup>

5. To deal with the central issues of the inquiry as they affect Aboriginal people we felt it was necessary to have some understanding of the social context in which those issues arise, and of the issues which are of greatest concern to the Aboriginal community. There are three main groupings of Aboriginals—traditional tribal Aboriginals, fringe dwellers who live on the outskirts of the towns and urban Aboriginals.<sup>2</sup> There were several barriers which impeded us in our efforts to consider how Aboriginal people are affected by the issues. It was difficult for us as a Commission to make effective approaches to Aboriginal communities due to our limited knowledge, absence of contact, and lack of time and other resources. It was difficult for Aboriginals to understand the nature of the inquiry and how it could be of concern to them.

6. We are aware that many Aboriginals are concerned about issues such as land rights and the administration of criminal law to Aboriginals, which do not fall within the scope of our inquiry. Other Inquiries and Commissions have looked at these and other matters; a list of recent inquiries appears at Annexe VI.A. We confine ourselves to highlighting the issues which we think of most significance, having regard to our own terms of reference, and to proposing programs and reforms which we think are necessary.

7. The issues which we deal with are:

- relationships between the Aboriginal and white communities
- education
- health and family planning

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1. Royal Commission on Human Relationships, *Interim report* (AGPS, Canberra, 1976), p. 71 (no. 27).

2. Evidence, pp. 1197–209, Jim Stanley.

- traditional family relationships
- inequality and discrimination
- access to welfare services

8. The 1971 census identified 115 953 people as of Aboriginal or Torres Strait Islander racial origin, although this is not universally regarded as a correct figure. The National Population Inquiry reported that, although Aboriginal people suffer the worst socio-economic conditions of any identifiable section of the Australian population, there are fewer hard data available about them than about any other group.<sup>3</sup> The report considers the implications for future social planning and population policy.<sup>4</sup>

### **Race relations—bridging the gulf**

9. When Europeans came to settle in Australia they took by occupation or by conquest the lands inhabited by Aboriginals. Since that time the pattern has been, at least until recently, one of successive deprivation of the Aboriginal of his land, his culture and his identity. The dominant white European culture has imposed its law and social values upon the Aboriginal largely in ignorance of Aboriginal cultural values. The Aboriginal community has found it difficult to preserve its own values and culture. The consequent loss of identity has enhanced the difficulties for the Aboriginal in adapting his own values or in becoming integrated with white society.

10. Lack of understanding of the Aboriginal contributes to discriminatory attitudes and behaviour towards the Aboriginal. There is evidence that many white people have stereotyped attitudes towards Aboriginals, regarding them as lazy, dirty, irresponsible, lacking in drive and unwilling to work.<sup>5</sup> It is also suggested that these attitudes are reinforced in some cases by attitudes of such groups as the police, officers of government departments<sup>6</sup> and the media.<sup>7</sup> We dissociate ourselves from any such views.

11. The investigating team from the Office of the Commissioner for Community Relations found that stereotyped attitudes were widespread among white people. They did not consider that this was due to malice or perceived racist outlook:

... they believe all the problems associated with the black community are the problems of that community and are due to alleged failures of blacks to adapt and to conform to the standards of the white society. There is very little appreciation of the true position of the Aboriginals, that they have been deprived of their land and their rights as a cultural group, and that their mores have been rejected.<sup>8</sup>

These attitudes find their expression in situations where white and black communities are in close proximity and where the differences in social and economic conditions show most clearly. There may be resistance to Aboriginal families moving into a neighbourhood,<sup>9</sup> or resentment at benefits available only to Aboriginals such as education and housing allowances.<sup>10</sup>

3. National Population Inquiry, *Population and Australia: demographic analysis and projection*, vol. 2 (AGPS, Canberra, 1975).

4. *ibid.*, p. 457.

5. Interview report, NT, 19; Submission 508, name withheld; Evidence, pp. 1944–52, Dorothy Parker.

6. Evidence, pp. 1944–52, Dorothy Parker; Submission 1067, Mr D. McLeod, Aboriginals Nomad Group.

7. Evidence, pp. 1280–91, Ruby Hammond.

8. Office of the Commissioner for Community Relations, Report into the existence of racial discrimination in northern New South Wales and north Queensland and the combat of that discrimination (June 1976), p. 1.

9. Evidence, pp. 1280–91, Ruby Hammond.

10. Interview reports, NT, 16, 30; Evidence, pp. 1944–52, Dorothy Parker.

12. Discriminatory attitudes are often based on ignorance and lack of understanding. To overcome them it seems to us that a program is needed which has as its main elements:

- education of the white community about Aboriginals
- the fostering of relationships between Aboriginal and white Australians
- improvement in the social and economic position of Aboriginals

13. A great deal could be achieved through public education to change attitudes towards greater understanding and acceptance of Aboriginals as a people with a distinct cultural history and outlook. Schoolchildren should be taught not only about Aboriginal tribal life and customs, but also about the impact of white settlement on Aboriginal culture and the process of adaptation to social change. Ideally the Aboriginal community should be involved in planning and presenting such programs.<sup>11</sup> Adult education programs of a parallel kind should also be developed; the media could play a positive educational role. Aboriginal journalist Bobbie Sykes spoke to us about the need for Aboriginals to see some reflection of themselves in the community:

When you see crowd scenes on television, there are not any blacks in the crowd. There are not even any blacks in here. Everything that you see is white so that you do not see any impact of yourself . . . we just do not have an identity in the white society. When you talk about blacks, what you think you are talking about are what we think we are now—a deprived fringe on the edge of society. While we continue to see ourselves like that, that is what we will continue to be.<sup>12</sup>

14. We were told of human relations workshops run for Aboriginal people. These workshops are aimed at promoting 'adaptive social development' by discussing human relations problems within the context of a permanent functional group.<sup>13</sup> Such groups could play an important role as part of a continuing program of community development by concentrating on particular problems of relationships between black and white communities.

15. In many cases prejudices, intolerance and discrimination arise from and are perpetuated by extreme differences in social and economic conditions. Attitudes may more readily be overcome if there is a substantial improvement in the health, social conditions and economic status of Aboriginals. Unfortunately programs aimed at overcoming disadvantages sometimes cause resentment among white people, particularly those in the country and remote areas who claim also to be disadvantaged in a number of ways. In the long term the need for special programs may diminish; but in our view it is essential to make special provision in order to achieve equal opportunity for Aboriginals.<sup>14</sup>

## Education

16. In our society education is a key factor in determining social and economic status. Work opportunities depend on training and qualifications. For Aboriginals, education could be an equalising factor, helping to overcome disadvantages and laying the basis for opportunities in many fields. As yet the potential of education has not been realised. Aboriginals remain disadvantaged in several ways. In the more remote areas there is often a gulf between the family and tribal life of Aboriginal children

11. Evidence, pp. 1944–52, Dorothy Parker; see also Australia, Parliament, Senate Select Committee on Aborigines and Torres Strait Islanders, *The environmental conditions of Aborigines and Torres Strait Islanders and the preservation of their sacred sites* (AGPS, Canberra, 1976).

12. Evidence, p. 58, Ms Bobbie Sykes.

13. Submission 608, Mr Ron Spain.

14. See also *Population and Australia*, p. 738.

and the content, values and environment of their education in a western setting. When Aboriginal children have to leave the outback to be educated, family and cultural ties are broken. In some cases the parents cannot communicate with their children because the children acquire a different set of values. The inability to speak English adequately can also be a serious disadvantage for the young Aboriginal.

17. Various proposals have been made to overcome these problems, e.g. the provision of pre-school education to overcome language barriers. Another suggestion was that early education of Aboriginal children should be in their own language.<sup>15</sup> It is also considered by some that, so far as possible, Aboriginal children should live at home while attending school.<sup>16</sup> This would require an extension of education facilities in remote regions. Such a process of decentralisation could be expensive but may be necessary to ensure the full development of the young Aboriginal. The content of education should aim to reinforce the children's identification with their own community while providing adequate opportunities for them to live and work among the white community should they choose to do so.

18. Teachers, particularly those in the remote areas, need to have special training and instruction in Aboriginal life styles and in special problems faced by Aboriginal children in their education.<sup>17</sup> Aboriginal teacher aides can perform valuable functions in helping children to overcome some of their difficulties in attending school and maintaining progress.

19. The disadvantages from which Aboriginal children suffer can lead them to have low expectations and to develop feelings of inferiority in comparison with white children. This, together with prejudiced attitudes by some white people, has led some Aboriginals to propose more schools solely for Aboriginals.<sup>18</sup> We doubt the wisdom of this as it may reinforce separation between white and Aboriginal people.

20. The Schools Commission emphasised the need to involve Aboriginals in planning education policies.

Aboriginal children are on every count the most socially and educationally disadvantaged. An Aboriginal Consultative Group whose composition was agreed upon with the National Aboriginal Congress helped the Commission frame proposals in this area. Commission initiatives will concentrate on the more active participation of Aboriginal people in the education of their children and on promoting a wider understanding of Aboriginal social perspectives, culture and values. The training of Aboriginals to enable them to assume leadership roles both among their own people and in schools and systems is vital.<sup>19</sup>

21. There is a need for adult education for Aboriginals to make up for some of the past deficiencies. Many urban Aboriginals have little understanding of tribal life. Tribal Aboriginals can be helped to understand urban life. There is at least one college in Adelaide which has been providing a service of this kind for tribal Aboriginals who then return to their people.<sup>20</sup> The Institute for Aboriginal Development in Alice Springs has organised English literacy courses for Aboriginal communities.

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15. Submission 1062, Australian Council of State School Organisations.

16. Evidence, pp. 1197-209, Jim Stanley.

17. See *The environmental conditions of Aborigines and Torres Strait Islanders*.

18. Evidence, pp. 48-61, Bobbie Sykes; Interview report, NSW, 263; see also Commission of Inquiry into Poverty, *A study of Aboriginal poverty in two country towns* (AGPS, Canberra, 1975), p. 73.

19. Schools Commission, *Report for the triennium 1976-1978: a summary* (AGPS, Canberra, 1975), p. 5.

20. Evidence, pp. 1197-209, Jim Stanley.



22. The problems of sex education and education for human relationships have to be considered in the light of the factors mentioned. There are differences between urban Aboriginals, with few links to tribal life, and tribal Aboriginals. Education needs to take into account cultural factors and family relationships in the tribal community. It is essential that steps be taken to enable the Aboriginal to regain self-esteem, and to reinforce this with provision for educational and employment opportunities.

## Health

23. There are many serious health problems affecting the Aboriginal community. These were considered in some detail by the Poverty Commission.<sup>21</sup> Their recommendations included the increase in recruitment of Aboriginal staff as liaison and welfare rights officers and the participation of Aboriginals at all planning levels in services which have heavy involvement in Aboriginal affairs.<sup>22</sup> In Part III, chapter 3, human relationships issues for medical practice, we mention some problems of delivering health services to Aboriginals and the need to involve Aboriginals as part of the team in health care delivery.

24. The attitudes of medical practitioners may make it difficult for them to relate to Aboriginal people and their health care problems.<sup>23</sup> Health workers involved with Aboriginals, including doctors and nurses, should have training in Aboriginal customs and in Aboriginal languages wherever possible.

25. Health education for Aboriginals should be developed within the community and carried out by community health services using Aboriginal nurses and other members of the Aboriginal community concerned.

26. The need for Aboriginal involvement in the planning and delivery of health services is extremely important. The Aboriginal Medical Services have made a valuable impact in this area. We support the recommendation of the Commission of Inquiry into Poverty that they should be expanded and supported.<sup>24</sup> The need to do this was explained by the Poverty Commission in terms of the failure to adapt existing health services to the needs of the Aboriginal community and the consequent difficulties encountered by Aboriginals in using these services:

In general terms the traditional western health service model practised in Australia has been inadequate to meet the needs and demands of many Aboriginal people in urban and rural areas. Existing public services have made little effort to adapt to the needs of Aboriginals, who find these services difficult to use effectively, fragmented, élitist and costly. Complicated medical services, especially hospitals, can seem alien and depersonalised to many people, and infinitely more so for many Aboriginals. Australian health services are geared to middle class people and in some respects are organised more for the convenience of the professional staff they employ than for the community that has need of them. For these reasons many Aboriginals have difficulty in using these services. This is a major factor in their continuing poor health status.<sup>25</sup>

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21. Commission of Inquiry into Poverty, third main report, *Social/medical aspects of poverty in Australia* (AGPS, Canberra, 1976), pp. 210–50.

22. *ibid.*, p. 250.

23. M. Kamien, 'Education in community medicine with an emphasis on the health of an Aboriginal community: a pilot project', *Medical Journal of Australia* 2 (1975), p. 510.

24. *Social/medical aspects of poverty in Australia*, p. 248.

25. *ibid.*, p. 225.

27. While there is clearly a need to establish Aboriginal health services to try to overcome the many health problems in Aboriginal communities, we consider that there is also a case for making other health and medical services more readily accessible to Aboriginals and more appropriate to their needs. One way of achieving this would be to employ Aboriginal health workers or liaison officers within existing services with the specific task of helping Aboriginal people to use and to understand those services.

### **Alcohol**

28. Aboriginals have distinctive drinking problems which are due more to their social conditions and feelings of hopelessness than to individual personality disorders.

I really cannot describe the frustrations that people feel, you can only look and talk about the symptoms . . . that show themselves in the black community—such as alcoholism which is a result of the frustration.<sup>26</sup>

29. One indication of the severity of the problem was revealed in a 3-year study of the health of Aboriginals living in a NSW country town: 53 per cent of the men and 3 per cent of the women were heavy drinkers.<sup>27</sup> The national average for Australia of 'alcoholics' and 'excessive drinkers' is said to be males 5 per cent, females 1 per cent.<sup>28</sup>

30. Examples of effective services for Aboriginal problem drinkers are given in the third report of the Commission of Inquiry into Poverty.<sup>29</sup> Such services depend for their success upon Aboriginal support and involvement. Our own evidence and the evidence of the Poverty Inquiry suggested there is now widespread concern among urban and rural Aboriginals about alcohol problems. Aboriginals are themselves moving to set up treatment programs. The structure of Aboriginal society with its strong kinship ties provides a strong base for such services and we note that the Poverty Inquiry report stated that, within an overall program for Aboriginal advancement, the prospect for successful treatment of alcoholism is better than for other sections of the Australian population.

31. We endorse the views of the Poverty Inquiry that real progress in this area will only come about if Aboriginals are able to regain their self-esteem.

This would, in turn, require on the part of Australians an acceptance of Aboriginals as people of worth and a respect for their traditions, beliefs and social systems to the extent that Aboriginals wish to retain them. It requires an acceptance of the right to be an Aboriginal and the right to maintain distinctive racial and cultural characteristics.<sup>30</sup>

### **Family planning and contraceptive services**

32. Some aspects of family planning and contraceptive services for Aboriginals are considered in Part IV, chapter 2. The Poverty Commission made recommendations to promote family spacing through the Aboriginal Medical Services and other special health services for Aboriginals and to involve Aboriginals in the planning of health services.<sup>31</sup>

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26. Evidence, p. 53, Bobbie Sykes.

27. Dr Max Kamien, 'Aborigines and alcohol—intake, effects and social implications in a rural community in western NSW', *Medical Journal of Australia*, 8 March 1975, p. 291.

28. *Social/medical aspects of poverty in Australia*, p. 111.

29. *ibid.*, p. 234.

30. *ibid.*, p. 235.

31. *ibid.*, pp. 230, 248.

33. The Poverty Commission commented on the high infant mortality among Aborigines. Their families tend to be large—traditional methods of controlling births have been lost.<sup>32</sup> These factors point to a need for effective contraceptive services available to all Aborigines.

34. Evidence to us suggested that some Aborigines consider that contraceptive services may be used by white people as a form of genocide, to reduce the number of Aborigines<sup>33</sup>, hence the importance of education programs. Some Aboriginal women do not fully understand the implications of the alternatives available to them; doctors and others providing services do not appreciate Aboriginal tribal customs.<sup>34</sup> It is important that contraceptive services take into account cultural factors and community attitudes. Where there is no Aboriginal Medical Service, contraceptive services should use Aboriginal health workers and community workers.

35. The important factors in the development and delivery of family planning services to Aborigines are:

- (a) the use of the Aboriginal Medical Services and other special health services for Aborigines;
- (b) the involvement of the Aboriginal community in planning contraceptive services and in helping to gain acceptance of those services by members of the community;
- (c) the training and employment of Aboriginal health workers and community workers;
- (d) the wider use of resident community health nurses, health visitors and domiciliary services.

### **Family and traditional life**

36. One of the most serious effects of white settlement has been the breakdown of traditional cultural patterns of tribal life and family life, and the unpreparedness of Aborigines to adopt life styles and cultural values different from their own. This has been recorded in many studies<sup>35</sup>, in reports of Inquiries<sup>36</sup> and in submissions to us.<sup>37</sup>

37. Aborigines are often dispossessed people, in unnatural groupings—for example, different tribal, clan or linguistic groups. This means that they have no sense of belonging. Tribal customs do not have the same tradition today because of this mixing up of different tribes which happened as a result of being removed to reserves. Urban Aborigines have lost many of their links with their heritage, though they still seek a cultural identity.

38. In the past tribal elders commanded much respect from the younger people, but this is now breaking down. As a result the elders are refusing to pass on tribal myths and cultural values, and these are in danger of dying out.<sup>38</sup>

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32. *ibid.*, p. 136.

33. Evidence, p. 2504, Marcia Langton; Interview reports, ACT, 2; NSW, 263.

34. Submission 155, Miss D. O'Halloran.

35. e.g. A. P. Elkin, *The Australian Aborigines* (fifth edn, Angus & Robertson, Sydney, 1974); C. D. Rowley, *The destruction of Aboriginal society* (Penguin, 1972), *Outcasts in white Australia* (Penguin, 1972), *The remote Aborigines* (Penguin, 1972).

36. *The environmental conditions of Aborigines and Torres Strait Islanders*.

37. Submission 1104, NSW Department of Education; Interview report, NT, 19; Evidence, pp. 2499–505, Marcia Langton.

38. Evidence, pp. 1197–209, Jim Stanley.

39. Many health, education and welfare policies have as a key factor the training of Aboriginals to deliver or assist in delivering community based services. There is, however, a tendency for the person concerned to be absorbed into the education system and to break away from traditional tribal values. This is said to apply particularly to teachers<sup>39</sup>, but can also affect welfare workers.<sup>40</sup> It is a factor which needs to be taken into account in planning training programs.

### **Tribal marriage**

40. One specific matter which was put before us was the non-recognition in Australian law of Aboriginal tribal marriages.<sup>41</sup> The consequences of the failure to recognise such marriages are as follows:

- (a) the children are regarded as ex-nuptial—although for statistical purposes they are recorded as nuptial;
- (b) the parties cannot legally adopt;
- (c) the marriageable age of Aboriginals is determined by the law of the Australian white community;
- (d) the parties do not have the same rights of succession as people whose marriages are recognised;
- (e) polygamy is not recognised.

41. Current reform proposals (referred to in the chapter in Part V on family law) would ensure that children born out of wedlock have the same rights and status as legitimate children. We have recommended, in the chapter on adoption, that tribal marriages should be recognised for the purpose of adoption. It was put to us by a welfare officer that tribal marriages of 3 years duration are recognised by government departments for the purpose of social security benefits and that there may be few advantages in extending recognition.

42. The Australian Law Reform Commission has been asked to consider the application of tribal law to Aboriginals as follows:

... to inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aboriginals, either generally or in particular areas or to those living in tribal conditions only.<sup>42</sup>

Because of this reference we have not carried to a conclusion our limited study of this subject. A preliminary paper outlining some of the problems involved in recognition of tribal marriage is at Annexe VI.B and makes the following provisional conclusions:

- (a) The principal difficulties in the recognition of tribal marriages are, first, the proof of marriage and, secondly, the consequences of such recognition for marital obligations and divorce.
- (b) To recognise the fact of tribal marriage without recognising other tribal laws relating to family relationships could lead to inconsistencies and anomalies. These would be reduced if recognition were limited to cases where both parties applied to record the marriage. The failure to recognise that parties are married because their marriage is tribal can also lead to anomalies, though there is not a great deal of evidence of this.
- (c) Steps could be taken to provide for the recording and recognition of tribal marriages.

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39. *ibid.*

40. Interview report, SA, 109.

41. Submission 1027, Mr Len Muller; Interview report, NT, 45.

42. Terms of reference, Aust. Law Reform Commission.

## Employment

43. There is some evidence that Aboriginal people suffer from discrimination in employment, although we have not been able to investigate this.<sup>43</sup> We consider, however, that lack of education and training is an important factor restricting the employment opportunities of Aboriginals and thereby impeding their social and economic advancement. In the long term progress will depend upon education, special training and wider employment opportunities.

44. We note that the Royal Commission on Australian Government Administration recommends a 5–10 year program of special recruitment and training of Aboriginals in the Department of Aboriginal Affairs, other departments with significant numbers of Aboriginal clients and the administration generally. We welcome this recommendation.<sup>44</sup>

## Pacific Islanders

45. Our attention was drawn to the position of Australians of South Sea Island descent. They claim that, as a black minority group, they are discriminated against because they are not eligible for benefits available to Australian Aboriginals.<sup>45</sup> A research study was undertaken for us to examine health and family problems of women in this community and the effects of ineligibility for benefits; the project was not finalised.

46. These people are the descendants of South Sea Islanders who were brought as indentured labour to the canefields of Queensland and northern NSW at the end of the 19th century. They have intermarried to some extent with Australian Aboriginals, but they retain a community identity. Evidence to us was that these South Sea Islanders suffer from many of the disadvantages which affect Aboriginals.<sup>46</sup> They are regarded by white people as if they were Aboriginals with all that this implies in terms of discriminatory attitudes.

47. In the last 10 years, following the referendum in 1967, a number of special benefits in fields such as education, health and housing have been introduced for Aboriginals and Torres Strait Islanders. The South Sea Islanders are not eligible for these benefits unless they claim to be Aboriginals, a claim which many feel is a denial of their own origin. We consider that these people suffer unjustified hardship because of this exclusion and that action should be taken to extend to them eligibility for benefits now available to Aboriginals.<sup>47</sup>

## Welfare services

48. Some special welfare services are provided for Aboriginals in addition to the general welfare services. It was put to us that there are too many welfare agencies involved and that some means need to be found of reducing the number of officials who visit Aboriginal families.<sup>48</sup> We do not consider it desirable to centralise existing services; it does appear, however, that local agencies should attempt to co-ordinate their service delivery.

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43. Evidence, pp. 2499–505, Marcia Langton.

44. RCAGA, *Report* (AGPS, Canberra, 1976), p. 188.

45. See evidence, p. 2447, Ms F. Bandler.

46. Evidence, p. 1834, Mrs Daphne Lavelle; pp. 2447 ff, Ms F. Bandler.

47. See also *Social/medical aspects of poverty in Australia*, pp. 225, 250.

48. Evidence, pp. 2081–93, Gerry Bodeker and Jenny Hewitt; see also *The environmental conditions of Aborigines and Torres Strait Islanders*.

49. While we have not considered in detail such problems as Aboriginal housing or the operation of the Homemaker Service, it seemed to us that barriers which made it difficult for Aboriginal people to have effective access to our inquiry may also impede Aboriginal access to many health, education and welfare services in our community. The involvement of Aboriginal communities in the planning and delivery of services could overcome some of these problems. However, it is not always possible, particularly in urban settings, to establish special Aboriginal services. It would not always be the best use of resources to do so.

50. In the absence of special services, there appears to be a need to provide liaison officers and, in particular, to train and employ Aboriginal people to work in key positions in existing services in order to help members of the Aboriginal community to make better and more effective use of those services. Examples of such liaison people are Aboriginal health workers and teacher aides. We envisage, however, that such persons could be used in other services, e.g. in hospitals, in social security offices and as vocational officers. Their functions would include explaining the service and helping other Aboriginals to use it, thus providing a link between the Aboriginal community and existing services.

51. We consider that health, education and welfare services providing for the needs of Aboriginal people should have one or more liaison officers with the functions mentioned.

### **Self-determination**

52. Our outstanding impression of the issues put before us is that Aboriginals are searching to establish their place in contemporary Australia. This search is complicated by the fact that there are differences between Aboriginals, both as to their life style and as to their aspirations. The needs of the urban Aboriginal differ from those of tribal groups: the need to establish their place in society may be greater because of the absence of the traditional tribal community; their aspirations may be towards equality of opportunity in a white society.

53. The remote and tribal Aboriginals face the dilemma of preserving their culture, adapting it to meet the pressures and influence of white society or abandoning their traditional values.

54. The common ground among the different groups is the desire to exercise control over their own affairs, to be autonomous, to make their own decisions, their own successes and failures. Whether they choose assimilation, integration or separation, urban and tribal programs should aim to offer them a wide choice.

55. Policies of this kind tend to be open-ended and difficult to administer. The Royal Commission on Australian Government Administration commented on the problems of assessing programs:

... aimed at the encouragement of a conscious and independent Aboriginal identity and a developed capacity in Aboriginals to manage their own affairs.<sup>49</sup>

They recommended research into the assessment of such programs.

56. We consider that there is a continuing need to provide special programs of assistance for Aboriginal people. There should be flexibility in sponsoring and supporting self-help programs whose objective is to build independence and confidence among Aboriginals.

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49. RCAGA, *Report*, p. 342.

## **Conclusions**

57. We do not profess to have analysed fully the complex issues surrounding the status of Aboriginals in Australian society. The problems are as hard to formulate as they are to resolve. We believe there is a continuing obligation to assist Aboriginals to find a place in Australian society, a place of their own choosing which maintains their identity and independence while allowing equality of opportunity in all fields.

58. Policies and programs for Aboriginals need to have certain objectives. In our view these should include:

- (1) encouraging self-help programs of many kinds to build confidence and independence;
- (2) assisting Aboriginal communities who wish to preserve the essential cultural values of their society;
- (3) encouragement of Aboriginals to take part in the planning and implementation of programs;
- (4) developing programs of an outreach type; developing ways of making it easier for Aboriginals to use existing services;
- (5) taking into account cultural differences in planning programs;
- (6) encouraging white people to learn about Aboriginal culture both historically and in today's setting; involving Aboriginals in this process of education.

## 5. Migrants

### Introduction

1. Australia has traditionally been a country of immigration. At the 1971 census, 2 579 318 persons, or 20 per cent of the population, were born outside Australia. Of these 695 905 (5 per cent of the population) had been in Australia less than 5 years. Since the 1939–45 war there has been a great increase in the number of immigrants from countries other than English speaking. At the 1971 census 11 per cent of the population were born in such countries compared with 4 per cent in 1901 and 2 per cent in 1947.<sup>1</sup>

2. Australia has welcomed its migrants and in very many cases has assisted them financially to come here. Australia has received many benefits from its migrants. They have been needed to work in Australian industry; they have brought with them culture and traditions which have enriched the lives and tables of Australians. Many migrants have been glad to come to Australia to find a better life and better opportunities for themselves and their children. Some have settled in well. The hopes of many others have not been fulfilled; they feel, and with some justification, that they have not had fair treatment.

3. The disadvantages suffered by migrants in Australian society have been well documented in numerous official and unofficial reports. Many recommendations have been made for action to improve the situation. Some action has been taken. The office of Commissioner for Community Relations was established under the *Racial Discrimination Act* 1975. Some efforts have been made to assist migrants to overcome the language barrier and the lack of knowledge about services available to them. There is general agreement on the nature of and the solution to many of the problems faced by migrants. By and large, however, a high proportion of migrants remain poor and suffer disadvantages for many years after their arrival.

4. We believed that we had a responsibility to provide all Australians with equal access to our inquiry. We were aware that the most disadvantaged migrant groups were those with the least knowledge of English. These are concentrated in Sydney and Melbourne. Many immigrants are illiterate even in their own language. This factor meant that, although we put advertisements in ethnic newspapers and arranged for some translations of publicity material, we could not rely solely on these means to contact the ethnic community.

5. We had made plans to employ a team of ethnic liaison officers fluent in the major migrant languages to contact the ethnic community and make detailed reports to us on matters coming within our terms of reference. This team had already been used successfully to explain Medibank.<sup>2</sup> This project had to be abandoned because of lack of funds, and this has denied the migrant community fair and equal access.

6. We sponsored a research project by E. M. Cox and J. A. Martin on the attitudes, problems and expectations of migrant women in the workforce. The results of this project are referred to here and in the earlier chapter on women; a summary of the main findings is at Annexe VI.C.

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1. Australian Population and Immigration Council, *A decade of migrant settlement: report on the 1973 immigration survey* (AGPS, Canberra, 1976), p. 84.

2. Royal Commission on Human Relationships, *Interim report* (AGPS, Canberra, 1976), p. 72.



7. We present in this chapter a summary of the evidence and submissions made to us, particularly those relating to human relationships and family matters. The material we received concerned mainly the southern European migrant, particularly the Greek.

8. The core problem is one of communication. An inadequate command of English prevents the integration of the newcomer into the mainstream of Australian society and restricts his access to the entire range of services provided by Federal, State and local government. There are too few interpreters and too little foreign language material available to the non-English-speaker to bridge the information gap. The evidence also stresses that communication goes beyond language. There is a great need of material to explain the culture, attitudes and social mores of migrants to Australians and vice versa.

9. The largest single non-British ethnic groups are Italian born (289 000 or 2.3 per cent), Greek born (173 000 or 1.4 per cent) and Yugoslav born (130 000 or 1.0 per cent).<sup>3</sup> When the 1976 census figures are available they will probably reveal a significant group of Turkish and Spanish-born immigrants. One in every seven children in the education system comes from a home where English is not the first language.

10. Charles Price, of the ANU Demography Department, gave evidence to us about the pattern of migration; the occupational skills of migrants; their concentration in urban areas; their marital status and religion; intermarriage and education. He showed how these patterns contributed to a number of social and intercultural problems affecting migrants and their children. A summary of the evidence and the tables are at Annexe VI.D.

11. Submissions point out that life in Australian cities and factories is a shock to migrants, especially to those women used only to the slower pace of the rural village and agricultural work. A Melbourne medical practitioner, Dr Spiro Moraitis, wrote that over 90 per cent of Greek immigrants have a peasant background, are unskilled and semi-literate even in their own tongue.<sup>4</sup> They come from close-knit families and societies in which rigid codes of authority, behaviour and morality are still obeyed.<sup>5</sup> Migrants often have attitudes, and ways of behaviour, different from the Australian culture and life style.<sup>6</sup>

12. We were told that Australians generally appear indifferent and make little individual effort to allow for cultural and language differences. Australians seldom develop friendships with migrants.<sup>7</sup> The interim report of the Department of Labour's Committee on Community Relations said:

The outstanding impression gained by the Committee in its studies was an appreciation that greater sensitivity to factors arising from the diverse social and cultural backgrounds of Australia's population is called for in almost all levels of our community.<sup>8</sup>

3. National Population Inquiry, *Population and Australia* vol. I (AGPS, Canberra, 1976), p. 119.

4. Submission 215, Dr Spiro Moraitis; Evidence, p. 1070, Professor C. Price; Exhibit 60, table 9. The 1971 census showed that two-thirds of Italian and Greek adults and one-half of the Yugoslav adults had less than 5 years primary education: Bureau of Census and Statistics, 1971 census bulletin, *Birth-place, Australia*, ref. 2.86.9.

5. Submission 215, Dr Spiro Moraitis.

6. Evidence, p. 138, Ms V. Koutsounadis; E. M. Cox and J. A. Martin, Stress amongst migrant women, Commission research report, no. 13, 1976, sections 5-8.

7. Submissions 683, Mr T. Advokat; 812, Mrs Enid Eyles.

8. Dept of Labor and Immigration, Committee on Community Relations, *Interim report*, p. 1, para. 3.

13. A common complaint is that Australian social, medical and legal institutions, and government departments, have made little effort to understand the attitudes or background of their migrant clients and little attempt to meet their particular needs. Yet they expect the instant understanding of Australian systems and attitudes from the migrant population.<sup>9</sup> Migrants are often treated with suspicion and prejudice by the police.<sup>10</sup>

14. The submission from the Australian Council of Social Service maintained that both official and informal social pressure is put on migrants to change to an Australian way of life. The cost of that change to the individual and the family is not considered. There still persists in Australia considerable hostility towards the formation of ethnic enclaves or the development of ethnic structures.<sup>11</sup>

15. ACOSS believes, as we do, that migrants should have the same freedom as any other group to follow their own religious, social and sporting interests.<sup>12</sup>

16. A thriving ethnic community with its own medical and social workers, counsellors and teachers would provide the surest way to give migrants the security and recognition that is necessary for their integration into the mainstream of Australian society.<sup>13</sup> Mr W. Lippman, chairman of the Migrant Issues Committee of the Australian Council of Social Service, said:

. . . migrant groups and ethnic community groups are their own best system of integrating, giving them the sense of security. Australians in London are prone to congregate in Earls Court. It is a normal human trait to want to relate with people who have something in common and through that you get a feeling of security in a strange community and then you drift away. I think the same applies. There is talk about migrant ghettos which is very undesirable and very detrimental because in fact it discourages the migrant from finding the security that they can find in their own environment and once they have the security this will encourage them to work out rather than to separate out.

I have always used the simile with the country womens organisations. Nobody in Australia refers to the Country Womens Association, or any of our other thousands of special interest clubs in the community, as segregating their members from the rest of the community. I think that a Greek club or an Italian club should be seen in exactly the same light, as special interest groups used to help the migrant to find his feet in Australia.<sup>14</sup>

17. Several submissions we received oppose the idea of a multicultural, multisocial and multilingual society. They oppose the development of ethnic group structures and believe that migrants should not continue to speak their own languages and that ethnic radio, newspapers and schools should not be encouraged because they make assimilation impossible.<sup>15</sup> Many people feel that the activities or indeed the very existence of ethnic groups represent a political and social threat to the Anglo-Saxon way of life.<sup>16</sup> Other submissions support a policy which would exclude all non-Europeans

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9. Interview report, NSW, 1; Commission of Inquiry into Poverty, third main report, *Social/medical aspects of poverty in Australia* (AGPS, Canberra, 1976), pp. 194-5.

10. Interview report, NSW, 285; Commission of Inquiry into Poverty, second main report, *Law and poverty in Australia* (AGPS, Canberra, 1975), pp. 223-5; Committee on Community Relations, *Interim report*, p. 41.

11. Submission 591, ACOSS.

12. *ibid.*

13. Dept of Labor and Immigration, Committee on Community Relations, *Final report* (AGPS, Canberra, 1975), p. 35.

14. Evidence, p. 2840, Mr W. Lippman.

15. Submissions 856, National Australian Association; 1108, Mr A. N. Györy, enclosing a copy of the editorial of the *Sydney Daily Telegraph*, 12 February 1976.

16. Submission 856, National Australian Association.

from Australia on the ground that they will bring misery, interracial violence, poverty and the collapse of working conditions and wages.<sup>17</sup> We cannot agree with the sentiments expressed in these submissions; indeed we received them with abhorrence.

18. In recent years the government has followed a policy of integration not assimilation. A former Minister for Immigration, Mr A. J. Grassby, spoke of the 'family of the nation' in his address *A multicultural society for the future* in 1973. He said:

In a family the overall attachment to the common good need not impose a sameness on the outlook or activity of each member, nor need these members deny their individuality and distinctiveness in order to seek a superficial and unnatural conformity.<sup>18</sup>

Clearly, we must reject that chauvinistic view which conveniently devalues the presence and activity of ethnic groups as somehow un-Australian.<sup>19</sup>

The Minister for Immigration and Ethnic Affairs, the Hon. M. J. R. MacKellar, more recently described the policy as follows:

I cannot overstate the importance of encouraging those from different cultures to value their cultural backgrounds and to regard them as sources for the enrichment of Australian society . . . I do not see integration, therefore, as simply meaning the initiative which a migrant might be expected to take to assume his place within the Australian community. I understand it to mean a coming together; the interaction by which persons in a community complement and support each other.<sup>20</sup>

## Communication

19. The assumption that everyone can speak, read and write English cuts many migrants off from the rights and services English-speaking Australians take for granted.<sup>21</sup>

20. There is a pressing need for bilingual professionals such as doctors, social workers, lawyers, psychologists, psychiatrists and teachers.<sup>22</sup> While the Committee on Overseas Professional Qualifications has developed principles for the equitable recognition of overseas qualifications<sup>23</sup>, reluctance to recognise professional qualifications gained in non-English-speaking countries has contributed to a shortage of professionals able to service the migrant community. Selection criteria have also led to the absence of professionals in some areas. Mr Lippman said:

The other point that I feel needs to be made in regard to overseas qualifications is our selection criteria now specify particular skills that are needed and will only allow people to come here who have skills that are recognised and needed. This has led to a tremendous shortage, I might almost say absence, of professionals being able to service the migrant community adequately, and particularly in sensitive professions where communication is an important area. Doctors, psychiatrists, social workers, teachers are practically non-existent. There are a few social workers and there are a few teachers but very few and totally inadequate to the need of the community.<sup>24</sup>

17. Submissions 1083, Mr C. I. Borough; 875, Mr K. Wilson; C912, confidential; 876, Mr C. J. Willet; 563, name withheld.

18. A. J. Grassby, *A multicultural society for the future*, Immigration reference paper, 11 August 1973 (AGPS, Canberra, 1973), p. 5.

19. *ibid.*, p. 9.

20. M. J. R. MacKellar, The people make the nation (an address to the seminar on ethnic integration, Ringwood, Victoria, 20 November 1976), p. 7.

21. *Report of the Royal Commission on Australian Government Administration*, Appendix 2C, Access to government sources (AGPS, Canberra, 1976), pp. 232-9; Submission 475, Mrs Eva Byrne.

22. Submission 215, Dr Spiro Moraitis.

23. Committee on Overseas Professional Qualifications, *Fifth report*, 1973, pp. 12-3; see also *Seventh report*, December 1975.

24. Evidence, p. 2832, Mr W. Lippman.

21. There is a need for professional interpreters in hospitals, mental hospitals, the courts, schools, legal aid offices, the police force and in industry, the trade unions, employment offices and social welfare services. Professor Rodney Shearman, Head of the Department of Obstetrics and Gynaecology at Sydney University, said:

Take the problem of the Greek or Italian patient who cannot speak English at all. Neither the Health Commission nor the federal government will provide us with any interpreters. This is quite literally true. In obstetric units in this country it is an incredible situation. It would be like you or me being sick in Teheran and not speaking Iranian . . . in King George V, which is now the biggest obstetric unit in Sydney, we have one interpreter who is employed part time to speak Yugoslav and English. There is nobody who can speak Greek, Italian, Turkish or Lebanese. This is an incredible situation.<sup>25</sup>

Social worker, Miss V. Koutsounadis, made a similar point:

About interpreters and the shortage of interpreters: interpreters are needed in all areas, especially in hospitals because children, and they are young children aged 6 or 7 or 8, have to go to hospital to interpret for their parents. In some situations, for example where the mother has to go to a gynaecologist and you have a 7-year-old son interpreting between mother and the doctor, this is a very bad experience because the children feel ashamed and they are pressed to do it by the parents, they are forced to do it. If they want to hire an interpreter it could cost them up to \$30.<sup>26</sup>

22. In Mr Lippman's view, courses are needed to train interpreters and interpreting needs to be recognised and paid as a professional skill; the government should take the lead in training and employing professional interpreters.<sup>27</sup> The telephone interpreter is an efficient, easily accessible service which in our view should be expanded to cover country centres where there are large concentrations of migrants. Doctors and other social and legal personnel should be trained in the use of interpreters.<sup>28</sup>

23. Our submissions constantly stressed that communication is not just a matter of language but depends upon an understanding of the social and cultural background of migrant groups. In health care, sex education, family planning, social work, marriage guidance and youth counselling, professionals are needed to establish cultural and linguistic rapport with their migrant clients.<sup>29</sup>

24. Dr A. J. Tahmindjis, a medical practitioner of Sydney, gave the following example of problems experienced by Greeks to which Australians tend to be insensitive:

The second major factor of concern to doctors of migrant women patients is the cultural one. For example, I have a patient—a 16-year-old girl—who was introduced to a 20-year-old boy, whom she was to marry a few weeks later. The marriage, of course, had been organised by the parents before she had even met the boy and this was quite an acceptable state of affairs to her. They married but failed to satisfy the demands of the parents by producing a blood-stained sheet the next day. The next few weeks involved the couple in making further attempts at intercourse interspersed by visits to various doctors and finally to a solicitor to arrange an annulment or divorce.

25. Evidence, pp. 3099–100, Professor R. Shearman.

26. Evidence, p. 147, Miss V. Koutsounadis.

27. Evidence, pp. 2826–31, Mr W. Lippman and D. Cox; p. 752, Dr S. Moraitis; Aust. Government Commission of Inquiry into Poverty, first main report, *Poverty in Australia* (AGPS, Canberra, 1975), p. 275; *Law and poverty in Australia*, p. 221. We noted with approval press reports of a national accrediting body for interpreters and translators being set up by the government—*Sydney Morning Herald*, 1 December 1976, p. 13; *Age*, 23 October 1976, p. 3.

28. *Medical Journal of Australia*, September 1976, pp. 433–4.

29. Submission 215, Dr Spiro Moraitis.

I have had a fellow bring his fiancée to me for examination to determine whether she was indeed still intact and if not, why not and when, where and how, and by whom?

This sort of practice seems quite strange to us in this country. It is not common, but it still does occur here in 1975 in Australia. It is however accepted by many migrant families as being acceptable and not unreasonable.<sup>30</sup>

25. Australian doctors, nurses, teachers and other social service personnel need to receive both original and in-service training on the social and cultural background of migrant groups and the ways this background affects migrant understanding of Australian social, legal and medical services.<sup>31</sup>

26. Information should be distributed to migrants about health, legal aid and social and community services in their own languages. The Department of Social Security has produced a pamphlet 'Know your social security' in several migrant languages; and this example should be followed by other departments. Industrial safety information was particularly mentioned as being necessary in migrant languages.<sup>32</sup> This information should be presented in easy-to-understand, attractive form and must take into account that many migrants, especially those from southern Europe, have only a primary school education and are barely literate even in their own language.<sup>33</sup> Ethnic radio and television programs in foreign languages can help reach those migrants whose lack of English and literacy effectively cuts them off from information about accessible social community services.<sup>34</sup>

27. Ethnic agencies should be funded to provide social workers, child care workers, educational and youth counsellors who share the cultural backgrounds of their clients and understand the particular problems of migrants in Australia.<sup>35</sup> Migrants tend to go to their own ethnic agencies where they can more easily communicate their problems and needs. The Australian Greek Welfare Society, the Australian Jewish Welfare and Relief Society and Co-As-It, the Italian Welfare Society, are examples of successful ethnic organisations.

28. It is necessary that ethnic people themselves be included in decision-making bodies and be included in the selection procedures for welfare workers among migrant communities. A social worker told us:

I was responsible for helping to set the selection procedures up for ethnic liaison officers (Medibank). It was the first time that any government department had used ethnic people themselves in selection committees. Usually an Australian committee picks a Yugoslav worker to work with Yugoslav people. This committee wouldn't know whether the language was appropriate to deal with the people or whether the person was seen favourably by those people, or could relate to them warmly and directly. The Medibank team is a highly effective group of people, with six individuals disseminating information throughout Sydney. I think that the people chosen had access to the press and were particularly effective.<sup>36</sup>

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30. Dr A. J. Tahmindjis, Medical problems of migrant women (unpublished paper presented at the 'Womens health in a changing society' conference, Brisbane, August 1975).

31. Interview report, NSW, 1; Submission 591, ACOSS; *Social/medical aspects of poverty in Australia*, p. 198.

32. Interview report, NSW, 285.

33. Evidence, p. 2807, Mrs N. Leggas.

34. Evidence, p. 2883, Professor B. Hetzel; *Social/medical aspects of poverty in Australia*, p. 202-3; Franca Arena, A statement for International Womens Year, May 1975.

35. Submission 215, Dr Spiro Moraitis; *Poverty in Australia*, pp. 276-9.

36. Interview report, NSW, 285.

## Migrant children and education

29. The problems of migrant children in the education system have been discussed in a number of reports and publications.<sup>37</sup> Most of the evidence we received relates to southern Europeans, particularly Greek children.

30. Migrant children face many difficulties in acquiring an education and in their development in Australia. The period of greatest difficulty is during adolescence when the conflict between the strict home environment and the more relaxed Australian school system puts children under great pressure.<sup>38</sup> Migrant parents, out of a sense of insecurity, often reinforce the values of the home society in a more extreme and rigid manner than they would in Greece.<sup>39</sup>

31. Children also come under pressure from the school and their peer group to conform to Australian values. Migrant parents seldom let children participate in social and sporting activities that Australian teenagers take for granted. Dr Moraitis said:

Children object to the strong discipline of their parents. This is especially so of the girls who envy their Australian counterparts.<sup>40</sup>

32. Many children come to enjoy a sense of power over their parents as they become the family interpreters.<sup>41</sup> This is both humiliating and frustrating for the parents and it is, of course, undesirable and even dangerous to rely on young children as interpreters in a medical situation.<sup>42</sup>

33. There is a lack of contact between the school and migrant parents because of the language barrier and because migrant parents, in addition to being poorly educated themselves, do not understand Australian schools. Mrs E. Eyles, a teacher, explained that:

Teaching methods in Greek schools, however, emphasise drill and rote learning. Teachers are authoritarian and are free to use corporal punishment.<sup>43</sup>

Migrant parents often think that children become rude and cheeky at Australian schools and blame the teacher for lack of discipline in the schools.<sup>44</sup>

34. The ACOSS submission suggested that many inherent difficulties could be mitigated if migrant parents were told more about Australian education and society and if there were more bilingual counselling facilities for adolescents and the family group.<sup>45</sup>

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37. *Report on the survey of child migrant education in schools of high migrant density in Melbourne* (Dept of Immigration, Canberra, 1973); *Survey of youth in Victoria* (Good Neighbour Council, Melbourne, 1971); *Migrant education survey* (Victorian Department of Education, Melbourne, 1970); *Education of migrant children survey* (NSW Dept of Education, Sydney, 1970); J. S. Smolica and R. Wiseman, 'European migrants and their children', *Quarterly Review of Australian Education* (Australian Council for Educational Research, June 1971); J. I. Martin, 'The education of migrant children in Australia 1945-75', in C. A. Price and J. I. Martin (eds), *Australian immigration: a bibliography and digest* no. 3, 1975 (Department of Demography, Institute of Advanced Studies, Australian National University, Canberra, 1976).

38. Evidence, p. 2838, Mr D. Cox; Committee on Community Relations, *Interim report*, p. 39; *Contact 15*; *Personal development in secondary schools* (NSW Department of Education, 1976); *Report of the inquiry into schools of high migrant density*, 1974 study, p. 21.

39. Evidence, p. 142, Miss V. Koutsounadis; p. 2837, Mr D. Cox; Interview report, Vic., 26.

40. Submission 215, Dr Spiro Moraitis.

41. Submissions 812, Mrs E. Eyles; 215, Dr Spiro Moraitis; *Law and poverty in Australia*, p. 219.

42. Evidence p. 147, Miss V. Koutsounadis; p. 3100, Professor R. Shearman.

43. Submission 812, Mrs E. Eyles.

44. Evidence, p. 2832, Mr W. Lippman.

45. Submission 591, ACOSS; *Report of the inquiry into schools of high migrant density*, 1974 study, pp. 23-5.

35. Mrs Eva Byrne, chief social worker with the Migrant Services Section of the Department of Social Security, detailed the success of a program in Sydney to introduce ethnic liaison officers to schools with a high concentration of migrant pupils. The liaison officers did individual casework and also interpreted sociocultural aspects of ethnic grouping to the school system and explained the school system to ethnic group parents. Officers gave talks in their own language to parents and explained to teachers and counsellors the social and cultural background of their pupils. The welfare officers found that:

... lack of understanding by the school of the cultural background of the children often caused misunderstanding of the children's behaviour.<sup>46</sup>

36. Dr Moraitis told us that:

One of the most motivating forces for migration to Australia is that the migrant parents want a future for their children. They measure success in terms of a tertiary education, and they encourage their children to study so that they will climb above the poverty line. Tragically, parents' expectations are not often realised because of the appalling state of migrant education. It is my opinion that there is discrimination in our education system against the migrant child and for that matter any child who attends the inner suburban migrant schools.<sup>47</sup>

37. Migrant children have a poor record in scholarship. This is attributed to poor schools, lack of specialist support services, misuse of migrant teachers and lack of remedial teaching.<sup>48</sup> Few teachers have knowledge of the background of ethnic, social or cultural groups other than their own.<sup>49</sup>

38. Lack of educational achievement prevents migrant communities from producing professionals able to service their own communities.<sup>50</sup>

39. Ethnic teachers, i.e. native speakers of the child's own language and English, are needed to keep the child up with his ordinary subjects and teach English.<sup>51</sup> The lack of migrant English teachers often means that children leave school speaking both languages poorly.<sup>52</sup>

40. The teaching of ethnic culture and language is regarded as essential by migrant communities. Greeks have set up ethnic schools which the children attend several times a week after school. Parents send their children to these schools to preserve their Greekness.<sup>53</sup> It was suggested that the government should support the ethnic school system and make funds available to train and pay teachers and produce textbooks suitable for the Greek child in Australia. It was also proposed that Education Departments should allow the use of existing school buildings for their after-hours schools.<sup>54</sup> We understand, however, that this may put extra pressure on young people and it seems that it should be seen as an interim measure only until changes are made in the ordinary schools.

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46. Submission 1051, Mrs Eva Byrne.

47. Submission 215, Dr Spiro Moraitis.

48. *ibid.*; D. Cox, *Welfare of migrants*, Poverty Commission research report (AGPS, Canberra, 1975), p. 14; *Social/medical aspects of poverty in Australia*, p. 195.

49. Submission 147, SALT.

50. Evidence, p. 754, Dr Spiro Moraitis.

51. Evidence, p. 1297, Ms C. McNaughton.

52. Evidence, p. 755, Dr Spiro Moraitis.

53. Submission 812, Mrs Enid Eyles.

54. Submission 215, Dr Spiro Moraitis; *Report of the inquiry into schools of high migrant density*, 1974 study, p. 24, para. 76.

41. The need for ethnic school systems would be diminished if Greek or ethnic-speaking teachers were more widely introduced into state primary and high schools and a greater attempt was made in Australian schools to give ethnic pupils a knowledge of and pride in their own language, history and culture. Miss C. McNaughton, vice-president of the South Australian Institute of Teachers, said:

We feel that pride in their ethnic history is a very important thing; also the knowledge of their culture. We try to get the situation in some schools where all children have experience of Greek dancing or Greek or Italian cooking, Yugoslav cooking or any other thing of that sort. We are looking very much to see further appointment of ethnic teachers who will be able to convey these things.<sup>55</sup>

42. Australian children would benefit from being exposed to a different culture.<sup>56</sup>

43. The question of sex education in schools poses difficulties for many migrant groups. Children grow up without even basic factual information because many migrant groups are opposed to instruction and discussion of these matters.<sup>57</sup> To ignore the cultural and religious objections of migrant groups is to create conflicts within the family and a strong opposition to authority.<sup>58</sup> Sex education programs in communities with large migrant concentrations have to take into account factors like the following: for many migrant groups virginity on marriage is absolutely essential for girls and entwined with the concept of family honour<sup>59</sup>; many marriages are still arranged; among the Greek community divorce is still relatively rare<sup>60</sup>; many Greek, Italian and Turkish girls are not allowed to go out without a chaperon.<sup>61</sup>

### Learning English

44. The greater frequency of problems among migrants who are not fluent in English was a marked feature of the 1973 Immigration Survey results. Most of those with little English also had a low level of formal education and work qualifications. Many of these migrants appeared to have made little or no progress in learning English, and more than half had not attended English classes.<sup>62</sup>

Migrants have not been successfully encouraged to learn English. Class times are unsuitable. A factory worker is too tired to attend a course at night. The classes often do not relate to the practical needs of their students, i.e. how to cope when shopping or visiting the hospital or how to read the safety signs at work.<sup>63</sup> Classes are not geared to a range of abilities. Mr George Kokoti, a community development officer, talked about classes set up for migrants by the South Australian Department of Further Education:

... these classes are so set up it is almost impossible for migrants to attend. They are run on a fairly formal basis—regular hours, regular times every week, say Tuesday and Thursday nights, seven to nine. Classes are particularly large in some cases. The range of people varies from fairly illiterate people to fairly educated people. There is a variety of background. For example, people from Greece and Italy ... have different language backgrounds and different language needs. So all in all it becomes very difficult for the general

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55. Evidence, p. 1297, Ms C. McNaughton.

56. Evidence, p. 143, Miss V. Koutsounadis.

57. Evidence, pp. 757–8, Dr Spiro Moraitis.

58. Submission 591, ACOSS; Evidence, p. 2883, Professor B. Hetzel; Interview report, Vic., 26.

59. Evidence, p. 2883, Professor B. Hetzel; Submission 812, Mrs Enid Eyles; G. Watkins, 'The meaning of pregnancy to the single Greek migrant girl in Australia', *Australian Journal of Social Work*, March 1971, pp. 23–7.

60. Evidence, pp. 1069–70, Professor C. Price; Submission 812, Mrs Enid Eyles.

61. Evidence, p. 1073, Professor C. Price.

62. *A decade of migrant settlement*, p. 124.

63. Evidence, p. 144, Miss V. Koutsounadis.



family man, a migrant who has a couple of kids, works in a factory, works overtime, shift work. In some cases both husband and wife work and by the end of the day they are both exhausted, both mentally and physically, so they cannot attend classes. There is also the other problem, that many of the migrants either did not attend school or attended for a limited time, or had experienced failure at school. As a result they feel quite insecure about attending formal classes, and in fact never have been bothered to enrol.<sup>64</sup>

45. A social worker from NSW said:

Language classes at factories should be held during lunch hours or during factory hours, so that workers are not expected to stay on late, nor lose pay. Leylands ran informal English classes, using Australian workers as the teachers. The response was overwhelming. Again, a dual function was served, education plus social communication.<sup>65</sup>

46. Cox and Martin found that apart from problems associated with fatigue, housework and child care migrant women also faced objections from their husbands in attending after-work English lessons:

Men threatened by the values of a new society and their women's economic contributions see restriction of language proficiency as an additional 'hold' on the women. They usually oppose the women making contact with Australian women, for example, joining in community activities such as the P & C. Finally, they also oppose the women going out at night, thus making attendance at classes almost impossible.<sup>66</sup>

47. The home tutor scheme is particularly valuable to women who are often timid and unable to leave their homes to attend classes. The use of non-professional but paid Australians to teach English in the home to individuals in small groups helps to break down social isolation.<sup>67</sup>

48. Mr Kokoti suggested that migrants should be given the opportunity to attend full intensive English courses on an adequate wage for 6 months and that follow-up courses in the home and in the factory should be available.<sup>68</sup> Mr Cox proposed that ethnic groups should be given government grants to organise language classes among their own people.<sup>69</sup>

## Women and the family

49. In their research report Cox and Martin found that:

Women who emigrate to Australia from countries bordering the Mediterranean are trebly disadvantaged. As migrants they suffer from the prejudices of the receiving society. As women they are victims of the inequalities and discriminations which affect the lives of women in Australia. As workers they enter Australian society at its least privileged level.

To compound their problems they bring with them traditional values and life experiences more suited to rural societies than Australia's highly industrialised cities. Their situation as women in their countries of origin equips them poorly for coping with the stress and pressure of the workforce, as they lack either experience or training.<sup>70</sup>

50. Migrant women often find the adjustment to life in Australia most difficult. The contrast between home life in a rural village and the new life in industrial urban Australia falls heavily on them.<sup>71</sup> Women are often not consulted in decisions to come

64. Evidence, p. 1457, Mr George Kokoti; Centre for Urban Research and Action, *'But I wouldn't want my wife to work here . . . ' a study of migrant women in Melbourne industry*, research report for IWY (CURA, Melbourne, 1976), p. 20.

65. Interview report, NSW, 1.

66. Cox and Martin, Commission research report, no. 13, p. 79.

67. Evidence, pp. 144-5, Miss V. Koutsounadis; p. 1458, Mr G. Kokoti.

68. Evidence, p. 1461, Mr G. Kokoti.

69. Evidence, p. 2839, Mr D. Cox.

70. Cox and Martin, Commission research report, no. 13, p. 1.

71. Submission 812, Mrs E. Eyles; Evidence, p. 141, Miss V. Koutsounadis.

to Australia and they become physically and mentally isolated by language and the restrictions of family. Traditionally the women have been dependent on the husband for all outside contact and are greatly dependent for emotional satisfaction on the family.<sup>72</sup> A social worker thought that:

We should investigate the isolation of migrant women, particularly those who do not work. They came from a background where the man has been (and still is) the dominant partner, but in their home country they had a network of female relatives for companionship. Here they have none. Yet the old power structure means that husbands forbid their wives to go out.<sup>73</sup>

51. To help break down the isolation of these women, community services, language classes and family planning information need to be available to women in their own homes or at least within their own suburb.<sup>74</sup>

52. The health problems of migrants were considered at length by the Poverty Commission.<sup>75</sup> The delivery of family planning services is an area in which communication is more than a matter of language. An understanding of cultural background is vitally important as the gulf between Australian and southern European attitudes to sexual matters and contraception and childbirth<sup>76</sup> is very wide. For instance many migrants refuse to let their wives use any contraceptives in case of infidelity.<sup>77</sup> In Greece abortion is a major method of controlling family size. Contraception is seen as the husband's responsibility and withdrawal is the only method used in many groups.<sup>78</sup>

53. Sister G. Brooking, education officer with the South Australian Family Planning Association, said that migrant women need access to oral and written family planning information in their own language and presented in the framework of their own cultural background.<sup>79</sup> Family planning clinics need the services of interpreters familiar with the social customs of migrant source countries. Doctors and nurses also need instruction on cultural background. There is a need for women from the ethnic communities themselves to be trained to give information at a grass roots level<sup>80</sup> on what is often an alien idea.

54. In contrast to life in the old country the majority of migrant women work outside the home.<sup>81</sup> The family has to borrow to finance the journey to Australia.<sup>82</sup> It has high economic expectations, many needs and few resources. Dr Moraitis said:

As the migrant is relatively illiterate, speaks no English, and is unskilled, the only employment available is the most menial, the hardest in a physical sense, the lowest paid and the most economically precarious . . . As a result of their poverty it is vital that both husband and wife work. In my practice, over 70 per cent of mothers work (compared with 36 per cent of Australians) . . .

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72. Franca Arena, IWY statement, May 1975, p. 1; Cox and Martin, Commission research report, no. 13, p. 69; Submission 812, Mrs E. Eyles.

73. Interview report, NSW, 1.

74. *ibid.*; Evidence, pp. 144–5, Miss V. Koutsounadis; *Social/medical aspects of poverty in Australia*, p. 205.

75. *Social/medical aspects of poverty in Australia*, pp. 182 ff.

76. Submission 591, ACOS: Evidence, pp. 146–7, Miss V. Koutsounadis.

77. Interview reports, NSW, 1; Vic., 26.

78. Evidence, p. 2880, Professor B. Hetzel; Tahmindjis, pp. 5–6; J. Caldwell and H. Ware, 'Australian attitudes towards abortion' in *Abortion: repeal or reform* (Australian National University, Centre for Continuing Education, Canberra, 1972), pp. 71, 90.

79. Evidence, p. 1435, Sister G. Brooking.

80. Evidence, p. 145, Miss V. Koutsounadis.

81. Submissions 812, Mrs E. Eyles; 215, Dr Spiro Moraitis.

82. Evidence, p. 1065, Professor Charles Price; *Welfare of migrants*, p. 15.

It is impossible to live on the basic wage. They need money for the bare essentials—food, board, clothing, furniture and education.<sup>83</sup>

A Melbourne survey conducted by the Centre for Urban Research and Action found that 80 per cent of the migrant women interviewed worked out of economic necessity.<sup>84</sup>

55. Cox and Martin found that:

Migrant women, particularly those from southern European and Middle Eastern countries, appear to be over-represented in blue collar occupations in manufacturing industries. In 1971, they were 49 per cent of the female manufacturing workforce and predominated in those industries most susceptible to economic fluctuations such as textiles and footwear. Within these industries they are located in those low prestige semi- and unskilled occupations that their Australian counterparts have rejected.<sup>85</sup>

On the migrant woman also falls the care of home and family.<sup>86</sup> It is not surprising that many migrant women have neither the time nor the energy to attend English classes at night.

56. Child care services to the migrant population are inadequate. Parents have to rely on relatives, friends and neighbours for child care.<sup>87</sup> Ms V. Koutsanadis outlined this point:

. . . the migrant woman in the village . . . will have the extended family group on whom to draw. For example, the other relatives will look after her children if she is sick whereas here she is forced to leave the children with people she does not know and then, because she cannot find anybody, the children sometimes are sent back to their own countries so their relatives can care for them. This has a disruptive influence on the family . . . In other cases if there are older children in the family they will be kept back from school to look after the younger ones and this is a problem.<sup>88</sup>

Our research report revealed that access to child care services is limited, especially in the early morning or in the hours of shift work (see Annexe VI.C).

57. However, even when child care centres are available, many migrants prefer informal arrangements to centres where staff have no knowledge of their child's language and cultural background.<sup>89</sup> In Dr Moraitis's view child care centres in factories or adjacent areas are essential to the migrant population.<sup>90</sup> Centres should be staffed by people familiar with the child's ethnic background. Child care is an area in which ethnic groups themselves should be involved. We support this proposal for all working mothers.

58. The woman's pay packet, while necessary to the family's economic survival, can have a disturbing effect on traditional family relationships. The wife's new role as co-breadwinner threatens the husband's status, and marital discord is often the result.<sup>91</sup>

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83. Submission 215, Dr S. Moraitis; see also Australian Bureau of Statistics, *Social indicators*, no. 1 (1976), p. 53.

84. '*But I wouldn't want my wife to work here . . .*', p. 109.

85. Cox and Martin, Commission research report, no. 13, p. 9.

86. Submission 215, Dr Spiro Moraitis; Cox & Martin, Commission research report, no. 13, pp. 73-5.

87. *Welfare of migrants*, p. 16; '*But I wouldn't want my wife to work here . . .*', pp. 37-8; Cox & Martin, Commission research report, no. 13, pp. 48-9.

88. Evidence, p. 141, Miss V. Koutsounadis.

89. Submission 591, ACOS; Cox & Martin, Commission research report, no. 13, p. 65.

90. Submission 215, Dr Moraitis; Interview report, NSW, 1.

91. Evidence, p. 138, Miss V. Koutsounadis.

Some husbands oppose their wives working and their children being cared for by others. They rarely help with the housework.<sup>92</sup> We were told:

The employment of many migrant men in industries paying low wages leads to a dependence on overtime or working in two jobs. This leaves the man with little time to give to his family, and the wife with a minimum of social life. The low wages themselves are detrimental to family relationships because of the common tendency to measure success in Australia by economic gains, and by educational opportunities for the children. The family's status here and in their place of origin is directly affected, and is an additional cause for concern, particularly if return to the home country is contemplated. It is far harder for a failure to return than for a family which has been 'successful'.<sup>93</sup>

59. The concept of the family varies from culture to culture. Australian immigration rules that exclude brothers and sisters, parents, in certain circumstances, and other relatives, strain family relationships. In the view of ACOSS it is desirable that migrants understand immigration rules before they come to Australia.<sup>94</sup>

60. Another source of stress to migrant families can be the maintenance guarantee system. This system allows aged parents, handicapped relatives and children to enter Australia on condition that they do not become eligible for pension or disability benefits. This situation can lead to grave financial stress and emotional tension for the sponsoring family if circumstances change and they are unable to continue to support such a person.<sup>95</sup>

61. Many problems arise when migrants marry established Australians and also between migrant parents and children brought up in Australia. Some of the reasons for the cross-cultural friction are explained at Annexe VI.D in the evidence of Charles Price.

### **Discrimination at work**

62. Migrant labour has been a mainstay of Australian secondary industry. Non-recognition of foreign trade qualifications, and the fact that the majority of southern European migrants are only semi-literate and unskilled, condemn them to the precarious life of labourer and assembly line worker. There is a need for training and bridging courses for migrants so that they can escape from the status of simple process worker.<sup>96</sup>

63. The interests of migrant workers have been neglected by both the trade unions and employers. For instance, although migrants are prone to industrial accidents, industrial safety signs and talks are not produced in foreign languages.<sup>97</sup> Neither unions nor employers have made enough effort to understand the background and needs of migrant workers.

64. The Committee to Advise on Policies for Manufacturing Industry found that:

There appeared to be little appreciation in some of the plants visited by our consultants of differences in the ethnic origins of migrants and little tolerance of differences between their respective cultures and the Australian culture. There were up to twenty ethnic groups in some large industrial plants, all lumped together under the term 'migrant workers'. Our

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92. Cox & Martin, Commission research report, no. 13, pp. 67 ff.

93. Submission 591, ACOSS.

94. *ibid.*; Evidence, p. 2833, W. Lippman.

95. Submission 591, ACOSS.

96. Interview report, NSW, 285; Submission 215, Dr Moraitis; Committee on Community Relations, *Interim report*, p. 27.

97. *Social/medical aspects of poverty in Australia* gives an explanation of why migrants are prone to back injuries; 'But I wouldn't want my wife to work here . . .', p. 20; *Welfare of migrants*, p. 11.

consultants commented also on the lack of understanding and intolerance displayed by Australians in supervisory roles towards the customs and behaviour patterns of migrants, on insensitivity of union officials and managers to the range and depth of migrants problems and the lack of institutional means for dealing with them.<sup>98</sup>

65. Migrants who are injured in industrial accidents are treated with suspicion by employers and insurance companies. Dr Moraitis told us that:

Adequate rehabilitation of injured workers is also required. At present, injured workers are rejected by the profession as people who are trying to exploit insurance companies.<sup>99</sup>

66. A research report of the Commission of Inquiry into Poverty indicates that migrants have less chance than other Australians of being accepted for rehabilitative training by the Australian Government Rehabilitation Service.<sup>100</sup>

67. The *Racial Discrimination Act* 1975 has not been fully implemented. The Government has announced that a Human Rights Commission is to be established, which will absorb the function of the Commissioner for Community Relations. It is to be hoped that it will have power not only to deal with individual cases but also to investigate systematic discrimination in working conditions, and elsewhere, and to promote positive remedial action.

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98. Report to the Prime Minister by the Committee to Advise on Policies for Manufacturing Industry, *Policies for the development of manufacturing industries: a green paper*, vol. I (AGPS, Canberra, 1975), p. 84.

99. Submission 215, Dr Spiro Moraitis.

100. E. J. Le Sueur, The Australian Government Rehabilitation Service, a research report of the Commission of Inquiry into Poverty (AGPS, Canberra, in press).

## 6. Discrimination against homosexuals

### Introduction

1. Many of the social issues covered by our terms of reference were almost universally accepted as problems: there was a large measure of agreement that something must be done about them. Usually there was agreement about the direction which government action might take, and recommendations could be made to give support to those affected. Domestic violence and discrimination were two of these areas. Discrimination was seen to be unfair to women, Aboriginals, migrants or whichever minority group was claiming to be a victim of prejudice or ignorance.

2. Another group of issues presented no such consensus, even as to whether there was a social problem involved at all. Homosexuality is one such issue, on which there are two distinct and opposing views. One group considers that the government and the law not only have a right but an obligation to restrict such practices, which are seen as depraved or perverted. A submission from the Anglican Diocese of Sydney stated:

Homosexuality is regarded in the standard psychiatric textbooks as deviancy, and, sharing this view, we resist current moves in society to accept or even encourage it as an alternative life style . . . homosexual behaviour, male and female, is an activity which affects the public good, and therefore must never be given the status of an accepted form of sexual activity by society.<sup>1</sup>

3. The contrasting view believes this is a matter of private and personal behaviour; there is no issue of public morals involved, and the law has no business to interfere. To seek an emotional or sexual relationship with a person of the same sex is simply an indication of an alternative life style and nothing more. The homosexual needs to feel welcomed and encouraged. This point of view was well put by Dr Lex Watson, of the University of Sydney, in his evidence to us:

An effort is being made to instil into the homosexual a sense of his own worth, of pride in his homosexuality; of confidence in a way of life as rewarding and satisfying to him as heterosexuality to the heterosexual, not only harmless to society, but one in which the homosexual can potentially live a life useful and productive to society if society will allow him to do so.<sup>2</sup>

4. We interpreted our terms of reference to include all aspects of human relationships with as wide a range of interactions between people as possible. Homosexuals were not seen by us as constituting a social problem, but rather as people who might justly claim to be discriminated against by society at large, and even in law. Therefore, for us, homosexuality was considered in this context of discrimination.

5. At our opening hearing, several people made known their intention to make submissions about homosexuality, and we agreed to accept them. Later there was some dispute from the Catholic hierarchy about the relevance of such submissions to our terms of reference, but, after consideration, we decided that the issue of homosexual relationships could not be divorced from human relationships in general. We said:

The issue of homosexuality crops up at many points. For example, it cannot sensibly be excluded from any consideration of the individual's growing sexual awareness, of the

1. Submission 611, Anglican Diocese of Sydney, section 6.

2. Submission 1128, Dr Lex Watson, citing Frank Kameny, 'Homosexuals as a minority group' in *Gender and sex*.

effect of family relationships on this awareness or of formal or informal education in personal development and sex. Nor is it possible to exclude from the inquiry the effect of homosexuality on the individual's ability to form family, social and sexual relationships.

These matters are themselves dependent to a large extent on current social attitudes to homosexuality and to the position of the homosexual in society. It would be impractical and it would lead to an unbalanced account of relationships if it were necessary to dissect current social issues relating to homosexuality and to exclude from our consideration part of the material put before us. We have received some submissions dealing exclusively with homosexuality; in addition a number of submissions dealing with general aspects of the inquiry include sections on or references to homosexuality.

For these reasons we have reached the view that to give practical effect to the inquiry it is necessary to interpret 'male and female relationships' as including 'male relationships' and 'female relationships' of a homosexual nature. We are also of the view that much of the material put before us on the question of homosexuality, including social attitudes to homosexuality, comes within one or other aspect of 'male and female relationships' and that the reference to sex education includes homosexuality within its scope.

We therefore propose to continue to receive written submissions and oral evidence relating to homosexuality and relating to social attitudes which may lead to discrimination on the ground of homosexuality.<sup>3</sup>

### **Definition of homosexuality**

6. The term 'homosexuality' is derived from the Greek adjective 'homo—of the same kind' and not, as is often supposed, from the Latin 'homo—a man'. The wide scope of the word 'sexuality' is considered in Part IV; it includes not only behaviour but a person's perception of himself as a sexual person.

7. The term homosexual carries a social and emotional meaning which varies with the context in which it is used. The colloquial alternatives of 'queer' or 'poofster' for the male homosexual and 'butch' or 'dyke' for the female homosexual are indicative. To label a person as 'a homosexual' carries for many social disapproval which sometimes provokes violence. For example, when Dr Watson, who had given evidence to us, appeared on a national television program ('Monday conference') and spoke of discrimination against homosexuals, members of the audience called out remarks such as 'Why don't you call yourself a poofster or a pervert straight out, instead of covering up?' A bucket of slops was later thrown over him, on the stage.<sup>4</sup> This is typical of violent acts which were reported to us.

### ***The medical definition***

8. The medical definition of homosexuality refers to nothing specifically clinical, but to certain distinguishing characteristics of homosexuality, such as disposition and practices. The Gould medical dictionary defines homosexuality as:

. . . the disposition to be attracted to, or fall in love with, members of one's own sex and the practice of sexual relations with members of one's own sex.<sup>5</sup>

### ***The legal definition***

9. There is no legal definition of homosexual because the law does not use the term in Australia. The law proscribes certain sexual actions, some of which are exclusively homosexual, and some of which include heterosexual and bestial acts.

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3. Statement relating to the scope of the terms of reference, RCHR, *Interim report* (AGPS, Canberra, 1976), Annex K, p. 43.

4. ABC television, 'Monday conference', Mt Isa, 1976; see the *Bulletin*, 16 October 1976, p. 25.

5. *Blakiston's Gould Medical Dictionary* (3rd edn, McGraw-Hill Book Company, NY), pp. 708–9.

10. The law, however, in proscribing homosexual behaviour is often extremely vague and, unlike other areas of the law, uses emotive terminology. For example, the act of buggery (heterosexual, homosexual and any sexual connection with an animal) is referred to in the NSW and Vic. Crimes Acts and the ACT Ordinance as the 'abominable crime' of buggery. In Queensland, WA and Tasmania, it is referred to as 'carnal knowledge against the order of nature'.

### **The causes of homosexuality**

11. A point often overlooked is that sexual characteristics are distributed unevenly and very few people are 100 per cent male or 100 per cent female. Dr Court, of the School of Social Sciences at Flinders University, sent us a submission, together with an appendix entitled 'Homosexuality: a scientific and Christian perspective'. It says:

No longer is it possible to consider that two categories of people exist—homosexuals and heterosexuals . . . [There is] a continuum of sexual orientation rather than categories<sup>6</sup>

and the paper goes on to illustrate how the sexual orientation is age related, sex related (there are significantly fewer female homosexuals than male homosexuals in the population) and culture related.

12. The exact reason why some men and women are homosexual is by no means certain. A variety of explanations have been given, including environment, genetics and the family situation. Whatever may have brought a homosexual to that condition is a given fact, to be accepted like any other fact. Some think it is a congenital condition, others see it as the result of such psychological pressures as excessive mother love in early childhood or unhappy or virtually non-existent relations with the person's father.

13. Whatever the cause, it would seem that most homosexuals do not really wish to be otherwise. What they want is to be assisted in making the best of their condition, and to enjoy relationships which are as rich and rewarding as possible. Of course, some homosexuals do wish to change. Dr Court, in his submission to us, said:

Even with a totally accepting society, there will still be those who wish to reject their homosexual tendencies. They should have the freedom to do so.<sup>7</sup>

On the other hand, our evidence suggests that those who approach psychiatrists for 'cures' achieve success only when the patient is dissatisfied with his condition and has a strong desire to be different. A Melbourne psychiatrist, in an interview, emphasised the importance of treating families as a whole, especially where homosexuality was concerned, to remove misunderstanding and prejudice.<sup>8</sup>

### **Medical opinions**

14. The medical profession, and especially psychiatrists, are not clear as to the nature of homosexuality. The Wolfenden report, in England, considered carefully the question and concluded:

The evidence put before us has not established to our satisfaction the proposition that homosexuality is a disease.<sup>9</sup>

Contemporary psychiatric and psychological opinion similarly rejects the view that it is a disease.

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6. Submission 22, Dr J. M. Court.

7. *ibid.*

8. Interview report, Vic., 20.

9. *Report of the Committee on Homosexual Offences and Prostitution* (HMSO, London, 1957), p. 15.



15. In a survey in England in 1973, of 150 psychiatrists, a small minority regarded homosexuality as a disease, about one-third considered it a normal developmental variant and almost two-thirds thought it 'an aberrant behaviour pattern'.<sup>10</sup>

16. One hundred and ten Australian psychiatrists and four clinical psychologists were questioned in 1973, and while one-third of the respondents thought that 'there is something seriously wrong with a homosexual', two-thirds thought that either 'homosexuality is merely a matter of personal preference but should be kept strictly private' or that 'homosexuality is as natural as heterosexuality and should be freely expressed'.<sup>11</sup>

17. A paper by Dr Ron Barr, of the School of Psychiatry, University of New South Wales, traced some of the views of psychiatrists, from the writings of Freud to statements by the Federal Council of the Australian and New Zealand College of Psychiatrists in 1973.<sup>12</sup> Freud had said:

Inversion [homosexuality] is found in people who exhibit no other serious deviations from normal. Psycho-analytic research is most decidedly opposed to any attempt at separating off homosexuals from the rest of mankind as a group of special character.<sup>13</sup>

Current psychiatric opinion is close to this view.

18. In 1973 Dr Barr carried out a survey of 100 psychiatrists and ninety-three trainee psychiatrists in NSW. The statement that 'homosexuality is a neurotic disorder' was agreed to by 34 per cent of the psychiatrists and 18 per cent of the trainees, while more than half (52 per cent of psychiatrists and 59 per cent of trainees) endorsed the view that:

Homosexuality is a developmental anomaly not necessarily or commonly associated with neurotic symptoms.<sup>14</sup>

The remaining 14 per cent of psychiatrists and 23 per cent of trainees thought that 'homosexuality is a normal variant like left-handedness'.<sup>15</sup>

19. The Australian and New Zealand College of Psychiatrists issued a statement, in October 1973, which concluded by saying:

The acceptance of homosexuals by society is slowly increasing, but could and should be facilitated by reform of existing laws against homosexual acts by consenting adults in private.<sup>16</sup>

The submission from Dr Court, however, sounded a warning note against over-encouragement of homosexuality:

The considerable pressure to accept the homosexual adult will tend to reduce the likelihood of younger people seeking actively their heterosexual role. This may appear desirable to committed young homosexual adults. But it is notable clinically how often the person who has initially accepted a homosexual life style in early adulthood presents for help after he is 40—lonely, disillusioned and angry.<sup>17</sup>

10. P. Morris, 'Doctors' attitudes to homosexuality', *British Journal of Psychiatry* 122 (1973), p. 435.

11. Attitudes and therapeutic goals (unpublished masters degree thesis, School of Psychology, Uni. of NSW, 1973).

12. R. E. Barr, G. P. Grunberg, M. S. Dalton, 'Homosexuality and psychological adjustment', *Medical Journal of Australia* 1 (1974), pp. 187-9.

13. *ibid.*, p. 188.

14. *ibid.*, p. 189.

15. *ibid.*, p. 189.

16. *ibid.*, p. 189.

17. Submission 22, Dr J. M. Court.

## **The law and homosexuality**

20. The law concerning homosexuality in Australia varies between the States and Territories. There is no common description of homosexual acts and no common penalty. In addition to the variations in the law, much of it is archaic. Galbally states his view that:

Many laws are attended by harsh penalties which apparently achieve no useful purpose other than revenge. They are thus more appropriate to the 19th century, in that they are backward oriented and not compatible with modern scientific and humanistic progress.<sup>18</sup>

Until reforms were introduced in some jurisdictions in recent years, the general rule throughout Australia was that homosexual acts were criminal offences. The laws of the various States and Territories had their origins in English law. It is therefore important to compare the legal situation in England where the publication of the Wolfenden report suggested a more humane and tolerant approach.

### **The Wolfenden report**

21. This was inspired by pressure brought upon the British Parliament by the Church of England Moral Welfare Council. The Committee to Report on Homosexual Offences in the United Kingdom was chaired by Sir John Wolfenden, the Vice-Chancellor of Reading University, in 1957. That report led to changes in the law in Britain which decriminalised some homosexual acts between consenting adult males in private; these changes represented a major step towards public acceptance of homosexuals.

22. It elucidated many of the issues surrounding the relation between homosexuality and the law. There was a clear distinction made between 'homosexuality' and 'homosexual offences', and it was stated that:

Homosexuality is a state or condition, and as such does not, and cannot, come within the purview of the criminal law.<sup>19</sup>

23. The conclusion reached at the end of the discussion on homosexuality was as follows:

Especially are we concerned that the principles . . . of the function of the law should apply to those involved in homosexual behaviour no more and no less than to other persons.<sup>20</sup>

24. None the less, statistics show that the number of prosecutions for homosexual offences in Great Britain increased by 160 per cent for the 2 years following the passage of the 1967 Sexual Offences Act, with the result that this Act has been called a negative reform in the sense that:

. . . it merely removed this limited category of male homosexual behaviour from the criminal area, leaving intact the basic assumption of the law that homosexuality should be treated as more anti-social and generally criminal than heterosexuality.<sup>21</sup>

25. The movement to end discrimination in law against some forms of sexual conduct may be partly due to 'the new morality' and modern thought on sexual permissiveness, but it is also strongly related to the rights of minority groups in a democratic society, and to the idea that discrimination may be personally destructive to the individuals who comprise the minority groups.

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18. Frank Galbally, *Criminal law as an instrument of social control* (paper presented at ANZAAS Conference, 1974).

19. *Report of the Committee on Homosexual Offences and Prostitution*, p. 11.

20. *ibid.*, p. 20.

21. Sexual Law Reform Association, *Report of the Working Party on the Law in Relation to Sexual Behaviour* (HMSO, London, 1972), p. 16.

26. We have already noted the difference of attitude amongst the younger psychiatrists who regard homosexuality as being a normal variant like left-handedness. The churches' attitudes also are changing. The Roman Catholic bishops in Australia deplore:

... discrimination against any minority group, and affirm the obligation on those responsible for administering laws to ensure just and fair treatment of homosexuals.<sup>22</sup>

Melbourne and other Anglican dioceses in Australia, in contrast to Sydney, which demanded that homosexuality should never be given the status of an accepted form of sexual activity, have urged changes in the law, as have also the NSW Presbyterian Assembly, the Methodist Church in WA and the Society of Friends.

27. The Synod of the Episcopal Church, in the Diocese of New York, put it well:

In matters of private morality, the state rightly seeks to give the protection of the law to the young, the innocent, the unwilling and the incompetent. However, while adultery, fornication, homosexual acts and certain deviant sexual practices among competent and consenting adults may violate Judeo-Christian standards and moral conduct, we think that the penal law is not the instrument for the control of such practices which are privately engaged in, where only adults are involved, and where there is no coercion. We favour repeal of those statutes that make such practices among competent and consenting adults criminal acts.<sup>23</sup>

28. In the same vein, the Executive Council of the Young Lawyers of the American Bar Association, in May 1971, resolved:

To diminish mental anguish and to improve the mental health of segments of society, we recommend the abolition of all existing laws concerning sexual behaviour between consenting adults, without sacrificing protection for minors or public decorum.<sup>24</sup>

29. A task force of the National Institute of Mental Health in the USA investigated the issue of homosexuality and recommended repeal of discriminatory clauses. The report stated:

We believe that most professionals working in this area—on the basis of their collective research and clinical experience and the present overall knowledge of the subject—are strongly convinced that the extreme opprobrium that our society has attached to homosexual behaviour, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency.<sup>25</sup>

30. In January 1976 a law became effective in California which removes criminal sanctions from specific sexual practices between consenting adults in private. It might be noted that the Californian legislation was supported by the American Psychiatric Association, the California State Bar, the California National Organisation of Women, the Friends Committee on Legislation, the American Civil Liberties Union of Southern California and the League of Women Voters of San Francisco. It is noted that, in spite of this, the changed Californian law did not grant equality, but only certain rights to consenting adults in private.

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22. Press statement, National Committee for Justice and Peace (organisation sponsored by Catholic bishops of Australia), 21 July 1969.

23. Quoted in 'Recommendation and report to the House of Delegates by the American Bar Association Section of Individual Rights and Responsibilities, concerning consenting adult sexual conduct'; this report is presented in full in *Journal of Human Rights* 4, 71 (1974), pp. 71–6.

24. Quoted *ibid*.

25. Quoted *ibid*.

## **The WA report on homosexuality**

31. In 1974 the Royal Commission Appointed to Inquire into and Report upon Matters relating to Homosexuality in Western Australia presented its report, throwing light on attitudes current in Australia. Some of the terms of reference of the Commission were:

- (c) to take evidence as to the public attitude towards homosexuals within the State;
- (d) to inquire into and make recommendations in respect of the prevention of the victimisation of homosexuals;
- (e) to inquire into and make recommendations in respect of the proliferation of homosexuality by the soliciting activities of some homosexuals;
- (f) to examine whether suitable medical and mental facilities are available within the State to help those homosexuals who have a genuine desire to discontinue their present methods of sexual gratification.<sup>26</sup>

32. The Commission took oral evidence from fifty-three witnesses and received sixty-three written submissions and reported that 'of these only two condemned the practice of homosexuality outright', although this did not mean that all the rest were in favour of homosexual practices.

33. Many of the churches submitted evidence which stated their view that homosexuality should not be considered a crime between consenting adults; it is not a sphere where the law should be concerned. This does not mean that they necessarily approved of it, but felt this was a matter for moral judgment, not criminal action.

34. In its summary of evidence, the Commission reported evidence of discrimination, physical assault and blackmail, and evidence of one dismissal by a public service department of a convicted homosexual:

. . . although he was only put on a good behaviour bond and the offence itself did not occur in the pursuit of his profession.

**On the question of physical assault against homosexuals:**

. . . there was abundant and sickening proof that this did occur. The assaults can only be described as vicious and brutal and, as one witness put it, were regarded as the sport of 'poofster-bashing'.<sup>27</sup>

Similar evidence has come to us and reveals a state of affairs that can only be deplored.

35. The WA report emphasised the need for education and stated that:

The community could well benefit in its formal education programs at schools, tertiary institutions and university medical schools, by including in their programs 'total sexuality courses'. There is no need in our opinion to sweep homosexuality under the mat. It is a pattern of sexual behaviour which has to be explained to remove doubts and dispel fears held in the community over the centuries. Ignorance of these matters only proliferates these fears to the ultimate disadvantage of the community as a whole.

The report stated that the Commission objected to the words 'against the order of nature' as being archaic and euphemistic and also that 'against the order of nature' presupposes that nature has ordained and commended the whole of our sexual lives, and whilst in a narrow sense this may have been true:

. . . the sexual liberation in the past two decades has implied a more precise definition as to various sexual practices without the use of jargon of Victoriana.

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26. Report of the Hon. Royal Commission Appointed to Inquire Into and Report upon Matters Relating to Homosexuality (WA, 1974).

27. *ibid.*

36. The Commission thus was of the opinion:

. . . that acts of homosexuality between two consenting adults in private should not constitute an offence and that certain portions of the Act should be rewritten while other sections should be struck out.<sup>28</sup>

The report has not been implemented.

### Recent reforms

37. In South Australia since 1972 homosexual acts do not constitute an offence if committed between consenting male adults (i.e. over 21) in private. Under the Criminal Law (Sexual Offences) Amendment Act, 1975, homosexual acts between consenting adults (male or female) are no longer offences.

38. In the Australian Capital Territory, the *Law Reform (Sexual Behaviour) Ordinance* 1976 removed sexual acts in private with another person (whether of the same or different sex) of 18 years or more from the category of being an offence. Charges can be laid only if the person did not consent to the commission of the offence, had not attained the age of 18 years, was related to the defendant or was of unsound mind. Acts of buggery in a public place, or where a person under the age of 18 is involved, would retain a maximum penalty of life imprisonment and a minimum penalty of 5 years gaol.

39. The New South Wales government has announced plans to investigate the possibility of decriminalising certain activities known as 'victimless crimes' and that homosexual acts are in that category. In both Victoria and Tasmania possible changes to the homosexual laws are currently under investigation.

40. Although there was opposition from the members of some churches, including the intervention to which we have already referred, and from some members of the community towards the acceptance of homosexuality as an alternative set of human relationships, there was a good deal of support for law reform, and a willingness to accept homosexuals as persons with equal rights to love and fellowship. The National Commission for Justice and Peace, an organisation sponsored by the Roman Catholic bishops of Australia, issued a press statement which said in part:

The Catholic Commission for Justice and Peace . . . does not oppose the repeal of criminal legislation punishing homosexual activity between consenting male adults in private; believes that the distinction between moral and legal condemnation can be maintained in this instance, as in the case of female homosexuality or adultery which, whilst also censured as immoral by the church, are not criminal offences.<sup>29</sup>

41. The Anglican Diocese of Canberra and Goulburn sent us papers, including resolutions by its Synod in 1971, viz.

That the Bishop be asked to communicate to the Attorneys-General of the Commonwealth and of the State of New South Wales the opinion of this Synod—

- (a) that while this Church's traditional teaching on homosexuality has strong foundations in scripture and history and hence it does not condone homosexual practice, it considers nevertheless that the Christian faith as now understood makes no claim on the civil power to treat homosexual acts between consenting adults in private as criminal offences;
- (b) that our experience in the Church of pastoral concern for persons-in-community would predispose us to believe that an understanding society is more likely to help homosexuals than one which rejects, isolates and punishes them;

28. *ibid.*

29. Press statement, National Commission for Justice and Peace, 21 July 1969.

- (c) that the civil powers should be encouraged to consult with the Churches and expert opinion in order to find more effective ways in which (i) minors and those at special risk may be protected from homosexual assault; (ii) harmful and aggressive homosexuals may be treated or confined; and (iii) therapeutic help may be made available to homosexuals.

42. The Anglican Diocese of Melbourne's Social Questions Committee held a day seminar before writing their report on homosexuality in 1971.<sup>30</sup> At the seminar they considered a paper by Dr Richard Ball, director, Institute of Mental Health Research Post-graduate Training, and chief clinical officer for the Mental Health Authority, Victoria, in which he said:

There are many misconceptions about homosexuals and homosexuality. In particular, it is easy to denigrate the intensity and the quality of the feelings which one homosexual has for another. It is easy to say that, by definition, it must be of a lesser degree, a lesser quality, less meaningful etc. than heterosexuality. I would challenge this. A lot of homosexuality may be cheap and nasty, but so is much heterosexuality. It is grossly unfair to compare the average homosexual with the rare heterosexual, which is what our society tends to do. This is less than honest, and is a perversion of the truth, which is used to belabour homosexuals.<sup>31</sup>

43. Later, when asked the question, 'If you could say to the laws and to the church respectively "change the law" and "change your attitudes", what would you say?' Dr Ball replied:

As far as the law is concerned, I would implement something like the United Kingdom law; I would suggest that what happens in a person's bedroom is his own business, and the law should have no interest in it, and, if it does, it is an infringement of civil liberties. Consenting behaviour between adults has nothing to do with the law. However, any society must preserve the right to protect its children, even though there is *no* evidence that homosexual seduction of a child makes it a homosexual, and there have been several major studies carried out in this area. But I would suggest that the law be between consenting adults; where you define 'adult' is determined by all sorts of things, but I would suggest within the 16 to 18 age range; and if 16 seems young, I would remind you that a 16-year-old is now biologically where your fathers and grandfathers were at 21.<sup>32</sup>

44. The Lutheran Church of Australia issued a statement in October 1975 which illustrates an understanding of the human needs of the homosexual and shows its objection to unfair treatment. It stated:

The church, while rejecting on the one hand the movement which claims tolerance of homosexual behaviour in the name of freedom of the individual and of moral progress, must also resist the popular reaction of persecution and ostracism. The church must exhibit understanding and sympathy for the homosexual, show love and pastoral concern, being ready to give help and encouragement in whatever way possible. It must proclaim to homosexuals, as it does to all men, the judgment of God against sin, above all the forgiveness of sin for Christ's sake, and the possibility of a new life through the power of the Holy Spirit, and must assure them of complete acceptance into the people of God.<sup>33</sup>

45. Dr Court's submission concluded as follows:

To advocate *changes* in the law relating to homosexual acts between consenting adults can be quite consistent for the Christian who at the same time accepts the plain biblical condemnation of the same acts. In particular there is a real need to seek measures which are humane and constructive in contrast to much repressive and punitive practice. To frame

30. Report on homosexuality, 1971 (Anglican Diocese of Melbourne, Social Questions Committee).

31. Seminar paper, Commission correspondence, file S048.

32. *ibid.*

33. Press statement, Lutheran Church of Australia, Social Questions Committee, 29 October 1975.

such laws, which retain the traditional protections but do so more humanely, would appear not only better for society in the long run, but also a truer expression of Christian concern than to support abolition of the law.<sup>34</sup>

Dr Court believes the moral issues are distinct from the legal ones.

46. This position has long been recognised in relation to pre-marital intercourse and adultery, which he says are clearly condemned in scripture but do not come under the law. A similar approach was adopted by the General Assembly of the Presbyterian Church in NSW in 1967. The resolution of the 102nd session of this Assembly declared:

While it believes that homosexuality is contrary to man's ethical development—that homosexuality is productive of personal moral disintegration rather than any true personal well-being and happiness—it none the less supports the Wolfenden report that homosexual behaviour between two consenting adults in private should no longer be a criminal offence, and that the appropriate authorities be advised accordingly.

### **Conclusion**

47. Whatever the various moral views that may be put forward, it seems unnecessary to include homosexuality under the criminal code. A homosexual act should not constitute an offence as such, but only in circumstances where a heterosexual act would amount to an offence, e.g. in cases of rape and indecent assault, or where it offends against laws relating to public decency and order.

### **Examples of discrimination**

48. In evidence to us referring to homosexuals, discrimination against them was the main area of concern. So much so that we have included this chapter under the general heading of discrimination. Homosexuals are a minority, like migrants or Ab-origines, who suffer discrimination and persecution. In February 1974 the Australian Psychological Society stated:

The Society condemns discrimination against homosexuals, and supports moves to counter discrimination against them.<sup>35</sup>

49. The parents of a homosexual can also suffer. As we were told in evidence:

When a parent discovers his or her child is homosexual the parent thinks they have failed, because society is always telling them you must bring up your child to fit into the nuclear family model. If all of a sudden they discover their children are not going to do that, this causes a great deal of suffering to them.<sup>36</sup>

50. Much of this discrimination appears to be inadvertent rather than deliberate. A survey by the Rev. Alan Scott, in Melbourne, on attitudes of young people showed that there was less discrimination amongst them than their elders.

. . . a surprisingly high 79 per cent for males and 82 per cent for females would not seek to exclude homosexuals from any occupation. The only significant objections were raised by those (10 per cent) who felt they should be excluded from jobs which brought them into contact with children.<sup>37</sup>

34. Submission 22, Dr J. M. Court.

35. See Wills, Cox and Antolovich, *Attitudes to sexuality*, Sydney, Commission research report, no. 8, 1976, p. 13.

36. Evidence, p. 3209, Mr Michael Clohesy.

37. A. J. Scott, *Attitudes to sexuality*, Melbourne, Commission research report, no. 7, 1976, p. 28.

51. Homosexuals believe they are entitled to be covered by legislation which would outlaw discrimination in employment on the grounds of race, colour or sex. Although governments have willingly accepted the ILO Covenant, they have been slow to take action on employment discrimination against homosexuals when this is reported to them. It is significant that governments, both Commonwealth and State, and whatever their political affiliations, appear to be the most reluctant to employ homosexuals in the public service, as teachers or in the media. We appreciate that some parents resent children being taught by those who advertise their gay liberation enthusiasms, but there seems to be no ground for automatically excluding them from the Education Departments, diplomatic service or, above all, the armed services. Their employment should be judged on the same qualifications and criteria as heterosexuals. Submissions from Campus CAMP Queensland and CAMP NSW drew our attention to such discrimination<sup>38</sup>, as did additional documents submitted by CAMP NSW.<sup>39</sup>

52. An inquiry by a tribunal on homosexuality and discrimination took place in Sydney on 27 and 28 November 1976: it found legal discrimination in application of the Crimes Act, superannuation, stamp duties, probate and income tax; but more distressing seemed to be the social discrimination shown by public and private employment authorities, churches and the general public. It recommended the enactment of a human rights bill at both Federal and State levels, the inclusion of the issue of homosexuality in education programs and the ending of persecution of homosexuals in gaols and similar institutions.<sup>40</sup>

53. Homosexuals complained to us that there is discrimination involved in the inability of homosexuals living in a 'couple' relationship to be recognised as such: for example, in terms of superannuation benefits, as compared with a heterosexual couple—either married or de facto—where benefits go to one partner on the death of the other. Homosexuals are regarded as single people in the matter of superannuation; also in wills and other instruments of inheritance they are not considered as 'next-of-kin'. This also applies in cases of accident or injury, and we were told of a case where two women had been living together for 20 years and, when one was involved in a car accident, the other was denied access because only the immediate family were allowed to see her in the hospital. A male teacher complained that hospital authorities would not allow him to see his lover who was desperately sick, because he was not family. A working visa was refused for him to go with this lover who had been awarded sabbatical leave for a PhD in Chicago.<sup>41</sup> Another area where homosexuals feel discriminated against, because they are always regarded as single people, is in the matter of income tax where no dependants allowance is granted when one member of the couple is homemaker and is supported by the other.

54. Other submissions and evidence told of the discrimination against female homosexuals in the matter of custody of their children. We were told that one lesbian mother was allowed custody of her children on the condition that she discontinued her sexual relationship with her partner.<sup>42</sup>

55. We received evidence that there is discrimination in employment because of homosexuality, but it was frequently stated that this is usually impossible to prove, because employers do not state the real reason when dismissing or refusing to employ a

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38. Submissions 558, CAMP NSW; 430, Campus CAMP, Queensland.

39. Commission correspondence, file 75/1351.

40. Evidence, pp. 3217 ff, Ron (name withheld).

41. Submission 1026, Mr Brian Lindberg.

42. Evidence, p. 2121, Ms Vivienne Cass.



homosexual person. The Discrimination Committee of the Dept of Employment and Industrial Relations was approached in Queensland by Campus CAMP, to be told that no action would be undertaken unless they could conclusively prove their case. A submission from Victoria told of:

. . . a highly intelligent and capable government employee of almost twenty years of service, with an impeccable record, who was fired from his job when his private and discreet homosexual life was discovered.<sup>43</sup>

56. Dr Watson details cases where men had been dismissed from the navy and women from the WRAAF for alleged homosexual behaviour<sup>44</sup>, whilst Mr Michael Clohesy, in his evidence on behalf of CAMP NSW, said he had been dismissed from his teaching post in a Roman Catholic school because he had defended homosexuality on a TV program.<sup>45</sup>

57. Although it may be difficult to produce evidence of discrimination in employment, when homosexuality is still regarded by so many people as a psychiatric illness, and while some psychiatrists are prepared to offer treatment to 'cure' the disease, the basis is laid for homosexuals to be:

. . . excluded from certain employments, discharged from military service . . . deprived of various legal rights, sometimes confined to mental hospitals against their will and discriminated against in countless other ways.<sup>46</sup>

Another submission said:

Certain employers and government departments will not hire homosexuals . . . low-paid jobs are accepted by many to prevent the investigation of personal history attached to high-paid, status jobs. There is also higher income taxation of 'single' people (economic discrimination) . . . homosexuals are frequently denied housing or evicted.<sup>47</sup>

## **Education about homosexuality**

58. Evidence given to us pleaded for education to be given to children in schools, to parents, teachers and medical students about homosexuality as a possible alternative life style and that selected homosexuals should be involved in such programs. Wills, Cox and Antolovich in their research project organised a series of groups to study reactions to homosexuality and their report shows how common are ignorance and prejudice.

Much of the discussion in the groups showed the stereotyping process. Homosexuals were discussed as 'them' and the generalisations were readily accepted in most cases by other group members. They can be broadly categorised into: those which ascribed certain characteristics of behaviour to homosexuals, which were not overtly perjorative but rather condescending; those which saw the homosexual as somehow threatening 'straights' or the young, or other aspects of society; those which related to 'causes'.<sup>48</sup>

59. Dr Elaine McKinnon, giving evidence on behalf of the Adolescent Education Committee of Independent Schools in NSW, told us:

At the moment there are a tremendous number of questions through the media, homosexuality and transvestism and so forth. There always have been a certain number of questions, but there are more questions on these now from even 12-year-olds, asking what will happen if a baby is reared by two men or two women . . . We have always included homosexuality. We have regarded it always as an immature form of sexuality in that all

43. Submission 447, Mr Ron P. Critchlow.

44. Submission 1128, Dr Lex Watson.

45. Evidence, pp. 2745-6, Mr Michael Clohesy.

46. Submission 447, Mr Ron P. Critchlow.

47. Submission 1026, Mr Brian Lindberg.

48. Wills, Cox and Antolovich, Commission research report, no. 8, p. 67.

human beings have the capacity to love both males and females . . . we all go through a normal homosexual stage of development in which we do actually prefer to be with our own sex . . . with the present publicity about homosexuality and lack of understanding they may well consider . . . because they do enjoy the company of their own sex . . . that indeed they are homosexual.<sup>49</sup>

60. Schools are thus including the topic as part of their sex education programs, but there still need to be education programs for parents. The mother of a homosexual son wrote:

I make a special plea to the Commission on behalf of the parents and relations of homosexuals, that more information and education be encouraged in the training of the medical and educational fields. Also information given to the community in general. This would enable parents and relatives to help the individual homosexual with his problem by giving him acceptance and reassurance within the family circle.<sup>50</sup>

61. It is of vital importance that educational programs on homosexuality, whether designed for children or adults, should be factual, balanced and non-judgmental, otherwise discrimination will continue to be a problem.

62. Dr Watson rightly pointed out to us:

Under our present system the vast bulk of information about homosexuality comes from loose talk of fears and schoolkids' general 'behind the toilets' talk. The homosexual is inevitably given a very negative self-image as a result, and develops a fear of others knowing of his/her sexual orientation. This . . . is not conducive to mental health . . . The homosexual is driven out of the family and peer group system to find like-minded people elsewhere . . . heterosexuals acquire through the informal school system their present intolerant attitudes to homosexuals . . . [they] are believed to be bad and therefore suitable objects for aggression<sup>51</sup>

63. We strongly support an open approach to children and parents on this issue. Education is one of the surest ways of eliminating prejudice.

64. Ms Col Eglington, giving evidence on behalf of CAMP NSW, felt that education in the family itself was the most obvious field for improving attitudes to homosexuals:

Obviously if the boy is homosexual this will cause a conflict in his realisation of self as against his conditioned realisation of self. Again this will apply of course to women. It is a bit subtler for women in that any woman who fights against her conditioned role, who wants to go into a career despite whatever her sexuality is, is already bucking the system, and hence women do not have the power to easily opt for what they want and most do of course follow the family conditioning; they marry, settle down, do not follow a career, and this of course also impedes their sexual self-expression again, that they are conditioned to be heterosexual, to marry and have children.

. . . in this [nuclear] family, [it is] the socialising methods the family uses that affect the children, and therefore affect the children's development. A child is assigned a gender, male or female, and then all the other conditions come in as to what fits that role of male or female, and it is in the confusion over accepting this role of course that many children have a lot of trouble working out their personality and working out themselves. It is most intimately associated with the working out of a person's sexuality, obviously, because if they have been told they are a boy, therefore there are a lot of things attached to being a boy, part of which is having a career, marrying, being a father, having children.<sup>52</sup>

49. Evidence, pp. 2380-1, Dr Elaine McKinnon.

50. Submission 605, name withheld.

51. Submission 1128, Dr Lex Watson.

52. Evidence, pp. 3198-9, Ms Col Eglington.

## Counselling services

65. It is important that well-informed and sympathetic counselling services should be available for homosexuals. The Albany Trust in London has a skilled staff available for counselling, and each year over 500 men and women apply to the Trust for aid and advice; it lacks adequate funding, but on its Board has men of distinction in literature, politics, the arts, religion and academic pursuits. It organises conferences attended by social workers, medical personnel, psychiatrists, clergy and social workers; it provides speakers for groups who need information on the subject; above all it has experts for personal counselling. The Glide Foundation in San Francisco has done similar work. The secretary of the Albany Trust has declared that the basic need of every homosexual is to learn that he is accepted as a human being.

66. The Anglican Diocese of Sydney thought that any homosexual who came before the courts:

... should be directed to receive qualified psychological help, provided that such help has the co-operation of the person directed to receive it.

The submission went on to urge:

Governments should provide facilities for psychological help and rehabilitation for those who wish to avail themselves of these facilities.<sup>53</sup>

67. On the other hand, many homosexuals have expressed their opposition to aversion therapy, which they have described as 'clockwork orange' technique:

It has created a great deal of mental illness, and caused suicides. Psychosurgery—the use of surgical destruction of sections of the brain—has been performed in Sydney as a 'cure' . . . drugs have been developed which are alleged to cure homosexuals. They usually have known side effects of a major order, and are in the experimental stage, yet groups such as prisoners and homosexuals have been offered them as experimental procedures.<sup>54</sup>

68. Dr Court, on the other hand, believes that counselling should aim at changing homosexual attitudes, and defends some methods of psychotherapy, although he criticises the use of electric shock and of the drug apomorphine. He states:

It is now possible to refute categorically the view that the homosexual cannot be effectively treated

and he adds:

It is worth re-emphasising that the idea that homosexuals are born different will not stand up to scrutiny. This deterministic view encourages a nihilistic view of the possibility of change. Though widely canvassed, it is indefensible. The overwhelmingly important influences are environmental, especially within the family constellation. Hence the Commission's recommendation could have far-reaching consequences for the potential homosexual.<sup>55</sup>

69. Where a homosexual desires change, therapy may have advantages. We do not, however, accept that all homosexuals want or should be encouraged to undergo treatment. We see homosexuality not as a disease or disadvantage to be cured, nor as a life style to be promoted, but as a human condition, entitled to recognition and acceptance.

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53. Submission 611, Anglican Diocese of Sydney.

54. Submission 1128, Dr Lex Watson.

55. Submission 22, Dr J. M. Court.

## **Adoption and marriage**

70. Some of our witnesses urged legal recognition of homosexual unions and the right to adopt children.<sup>56</sup> On the latter point, in the chapter on adoption in Part V of our report, we declare that, while there is no evidence that homosexuals or bisexuals are ineffective parents, we cannot support the proposal that homosexual couples, male or female, should be entitled to adopt children, except in the case of natural relationships. To do so, in the present social climate and in the absence of long-term research, would be to risk imposing an additional source of stress on a child who may already be vulnerable. We also do not feel able to recommend amendments to the marriage law to recognise homosexual marriages.

## **Research**

71. We initiated a series of projects to examine attitudes to sexuality in order to check the value of information given to us in submissions or other evidence. A team of consultants in Sydney and Melbourne was involved. We have already alluded to the work in Sydney of Wills, Cox and Antolovich who stressed that widespread public debate and discussion will best serve the needs of society and of the homosexual, by encouraging realistic discussion and greater understanding, for misconceptions of homosexuality start early in life.<sup>57</sup>

72. • The Melbourne study was in the hands of the Rev. Alan Scott, research coordinator of the Interchurch Industrial Mission. He urged, as a result of group investigation, that sex education programs should start from an emotional base rather than an anatomical one, and that legal sanctions against adult sexual activity in private should be repealed.<sup>58</sup>

73. The third consultant was Mr Simon Hasleton, a research psychologist of the University of Sydney, who had conducted a national opinion poll in 1973, in which respondents were asked to check their attitudes on a five-point scale, over a range of variables, concerning the permissiveness of Australian society. On the question of whether they agreed or not that homosexuality between consenting adults should be legalised, slightly more people (47.9 per cent) favoured law reform than did not, but these figures tend to obscure a very important aspect of public opinion, which relates to the strength with which the opinion is held. Forty-eight per cent of the sample took a liberal view, made up of 25.4 per cent who agreed strongly and 22.5 per cent who agreed mildly. Of those who disagreed with the proposition (45.9 per cent) 9.3 per cent disagreed mildly and 36.6 per cent disagreed strongly. Thus 10 per cent more of the sample disagreed strongly than agreed strongly.<sup>59</sup> All opinion polls in Australia, except the first in 1967, have favoured liberalisation of the law. For example, the Melbourne *Age* poll surveys have shown a 10 per cent swing towards tolerance of homosexuality in the past 3 years, 1973–76.<sup>60</sup> The Commission's material also showed that those who were opposed to a greater acceptance of homosexuality as a valid life style tended to be very strongly opposed indeed.

74. There was little difference between the studies in the overall picture, with high levels of agreement that homosexuals should be free to express their needs, free of legal constraints and free to work in any occupation.

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56. e.g. Submission 557, CAMP NSW.

57. Wills, Cox and Antolovich, Commission research report, no. 8.

58. Scott, Commission research report, no. 7.

59. Simon Hasleton, 'Permissiveness in Australian society', Commission correspondence, file 75/894.

60. Melbourne *Age*, 11 November 1976, p. 4.

75. Possibly the most important point to emerge from the studies was the indication of two levels of feeling about homosexuals. At the superficial level, most people wanted to see homosexuals with the same rights and responsibilities as heterosexuals, but at a deeper level was the proviso 'so long as they keep away from us and our children'. The importance of this finding is that it shows that, while changing the law will be generally acceptable, treating homosexuality as a valid alternative life style, as most homosexuals wish, may still raise public anxiety.

### *Conclusion*

76. We believe that there is no such entity as 'homosexuality' but rather that there are people in our society who, for reasons known or unknown, prefer members of their own sex as emotional or sexual partners. We have received no evidence which suggests that there are substantial numbers of homosexuals who wish to 'discontinue their present methods of sexual gratification' or that sexual gratification is any more significant a part of homosexual relationships than of heterosexual relationships. On the other hand, we have received a great deal of evidence from homosexuals and non-homosexuals that they have a genuine desire to change the legal and social consequences of being a homosexual in Australia.

77. The issues surrounding homosexuality are complex and are mixed with many other attitudes; we have endeavoured to disentangle these, to measure the strength with which they are held and where they fit in a hierarchy of values. We realise that the activists of CAMP do not necessarily speak for the views and wishes of all homosexuals; but equally that there is a new sympathy and understanding evidenced by many submissions we received which supported changes in the law though not necessarily approving homosexual acts. While this may fall short of full acceptance of homosexuals, it is an important step. Once people begin to realise that change in the law does not necessarily imply moral judgments, and that removal of discrimination does not mean a complete change in social structures, the public will become more amenable to reform movements. At the moment, people are afraid because they are ignorant, education has not helped them to see that their own basic life patterns will not be adversely affected. As Ms Eglington told us:

What is really destructive to homosexuals themselves is not society's view of them so much, as when they see these roles as the only roles they can adopt and so in fact put themselves into them because it is better to be accepted as something than nothing at all.<sup>61</sup>

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61. Evidence, p. 3209, Ms Col Eglington.

## 7. Handicapped people

### Introduction

1. Throughout history society has treated handicapped people as outcasts or as objects of pity, but attitudes are now changing. Advances in medical and social research have created a surge of general optimism about human disabilities. It is now possible to overcome many of the social consequences. Thinking on human rights has led to international recognition that handicapped people should be accorded the same status and treatment as the rest of society. Yet our evidence indicates that the treatment of handicapped people in Australia still leaves much to be desired, as the following quotation from a submission sadly illustrates:

If I am a cripple but feel I have value intrinsically as a human being, not just as a curiosity or the grateful recipient of handouts, then something can be done. Then I can look at myself as I actually am and grow to accept and know that I am not a freak but a person like everybody else.<sup>1</sup>

2. The description 'handicapped' covers mental and physical handicaps. It includes people who are deaf, blind, paralysed or epileptic, people who are severely mentally retarded or 'slow learners', people who are suffering from Down's Syndrome (mongolism) and people who have lost their limbs.

3. In a sense, 'handicapped' is an artificial grouping. It is simply that some characteristics have been called handicaps. Frequently they have nothing in common except the label.

4. In our report we use the term 'handicapped' to describe people with a mental or physical disability which limits their self-dependence, education or employment. Most of our evidence was concerned with mental handicaps, but our observations about this kind of handicap are often also relevant to physical handicaps.

5. Our concern with handicapped people and their families arises directly out of our terms of reference which require us to examine the pressures on women in determining whether to proceed with unplanned or unwanted pregnancies, having regard to, inter alia, the disabilities of families with handicapped children.

6. We are concerned that male and female relationships take on special dimensions when a person is handicapped. Particular needs may have to be met if a handicapped person is to enjoy a full life. Our evidence indicates that families of handicapped children are subject to severe strains which are aggravated by a lack of appropriate services. Similar findings were also reflected in the third main report of the Poverty Inquiry.<sup>2</sup>

7. We have included this chapter in Part VI, Equality and discrimination, because handicapped people are thought to be different, even lesser human beings. Adverse discriminatory attitudes often, in themselves, impose additional handicap or reinforce existing ones.

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1. Submission C753, confidential.

2. Commission of Inquiry into Poverty, third main report, *Social/medical aspects of poverty in Australia* (AGPS, Canberra, 1976), pp 52-60.

8. There are still many barriers to the acceptance and integration of handicapped people into the mainstream of life. Children are denied their basic right to education. Society continues to construct buildings inaccessible for wheelchairs. Education of the handicapped has not kept pace with the requirements of industry. Prejudice and ignorance limits potential.

If you ask me to pick the most significant problem I would say it is the fact that handicapped people are devalued.<sup>3</sup>

### **Incidence**

9. In 1971 the Senate Standing Committee on Health and Welfare expressed deep concern at the almost complete lack of information on the numbers and kinds of handicapped people in Australia.<sup>4</sup> The Committee recommended surveys in each State to be funded through the Commonwealth Department of Health, but this has not yet been implemented.<sup>5</sup>

10. In the absence of such information, we can only guess the extent of physical and mental handicap in Australia. A recent estimate, based on Canadian figures, is that 400 000 people in Australia have some degree of mental retardation.

Add on to the 400 000 the parents or other family members and we have well over one million people affected—about 10 per cent of the population.<sup>6</sup>

11. Thus a sizeable proportion of the Australian population is involved. The 1976 census set out to find the number of people in Australia who are handicapped by a serious long-term illness or physical or mental condition. It did not differentiate between the kinds of handicap. A follow-up survey was planned which would have given this and other detailed information. This survey has since been cancelled for financial reasons. We believe that it is important to obtain further information about the handicapped and that the follow-up survey should be carried out. Absence of comprehensive information must seriously limit the ability of governments to plan effective services.

### **Families with handicapped children**

12. A handicapped child may be born to anyone; genetics is no respecter of persons. Any child may become physically or mentally handicapped after birth, either through illness or accident.

13. Our evidence spanned issues ranging from community attitudes to a shortage of services. We were told that there has been a dramatic increase in the number of handicapped children living at home.

We have very correctly come to accept that whenever possible the handicapped should live with their own families . . . However, it sometimes appears that we have over-interpreted this principle to the point that we tend to leave the family to meet this challenge entirely through its own resources. Frequently this has led to unfortunate consequences . . . Handicapped people and their families no less than any other group in

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3. Alan Jennings, 'Overcoming adverse attitudes to the intellectually handicapped', *Mental Health in Australia* 3, 3 (1969), p. 138.

4. Report of the Senate Standing Committee on Health and Welfare of Mentally and Physically Handicapped Persons in Australia (May 1971), p. 3.

5. *ibid.*, p. ix.

6. *Australian Institute on Mental Retardation: proposal to establish*, produced by Australian Association for the Mentally Retarded Inc. and Australian Group for the Scientific Study of Mental Deficiency (Summit Press, Canberra, 1976), p. 3.

society have the right to share in normal social expectations as far as they can, and the right to the range of help that makes this possible.<sup>7</sup>

The National President of the Federation of Autistic Childrens Associations of Australia graphically described the pressures of living with an intellectually handicapped child:

It is unbelievable. It is like living in an Alice in Wonderland world . . . I do not think you can live in a house in which taps are turned on regularly at midnight, and the gas is turned on, and in which there are constant scenes of smashing of furniture, breaking television screens, windows and so on, I do not think any family unit, unless it is a very strong unit, can survive in those circumstances.<sup>8</sup>

14. The Australian Association for the Mentally Retarded pointed out that very little attention has been paid to the incidence of marriage breakdown and stress in families with a handicapped member.<sup>9</sup> A Western Australian mother wrote:

The effect our young son has on our marriage and family is a constant strain on our nerves and patience, plus the expense involved.

He continually disrupts the normal running of the household. He must be constantly watched as he is forever touching light switches and power points etc. . . .

He upsets his older brother by messing up his games and generally annoying him while doing his school homework.

We find it very difficult to go on outings as a family, as he runs away as soon as one's back is turned and as he has no fear of traffic will run straight onto the road . . . We do not often have a break from him as relatives find it very awkward to mind him . . . When visiting friends who have small children I am constantly on edge expecting him to hurt the children as he is gentle one moment then aggressive the next.<sup>10</sup>

15. The Country Womens Association of New South Wales said that fathers of handicapped children often refuse to believe that their child is not perfect.<sup>11</sup> A Western Australian woman related:

I'd tried every possible way to get him [her husband] to accept his son, but he never did, and the marriage collapsed. He was determined to go his own way unencumbered. The farm was sold and he lived in numerous hotels in Perth, with me doing all the care of the children.<sup>12</sup>

16. Other parents spoke about retarded children being aggressive to younger children in the family, and of siblings being reluctant to bring friends in to play because of the disruptive effect an intellectually handicapped child has on their games. Some referred to the fear their older 'normal' children harbour of having a retarded child themselves.

17. On the other hand, a senior social worker of the Queensland Spastic Welfare League wrote that in many homes families have been unified and have gained greater understanding of human relationships and values.<sup>13</sup> Nor do all handicapped children show behaviour disorders, and sometimes a family's biggest struggle is in the very acceptance that they have a different kind of child.

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7. Exhibit 110.

8. Evidence, pp. 463-74, Dr A. Vern-Barnett.

9. Submission 1, Aust. Assoc. for Mentally Retarded.

10. Submission 469, WA Watchdog organisation.

11. Submission 407, CWA of NSW.

12. Submission 469, WA Watchdog organisation.

13. Submission 972, Barbara Scoles.



18. In order to study the effect on families of having an intellectually handicapped child living at home, we surveyed a group of 270 adults in 129 households in Sydney. The households had an intellectually handicapped child or young person between the ages of 5 and 25. A control group of 270 adults, matched for age, sex and social status, was also interviewed.<sup>14</sup>

19. The study showed that the needs of families with a handicapped child were for social and community services rather than medical care. The most commonly expressed needs were for more professional help, holiday care, emergency care and baby-sitting services.

20. There was little difference in the health of the two groups of adults, possibly because sampling difficulties precluded the inclusion of very young children in the age range 0-5 (usually the most difficult years). The adults had had at least 5 years to adapt to the stress of having a handicapped child, and usually longer since the average age of the child was 14 years.

21. Families with a handicapped member tended to have lower incomes than those in the control group and this difference was due to the fact that significantly fewer women had paid employment (34 per cent compared with 52 per cent in the control group). This has implications for the financial well-being of the family, particularly since having a handicapped member often imposes additional financial burdens. The Poverty Commission gives a thorough review of the financial hardships of such families.<sup>15</sup>

22. An organisation for handicapped children in Perth, named Watchdog, told us the stress on mothers was both physical and mental:

The physical stress is the difficulty of coping with a child who is dependent for a long period of time and who needs extra attention with feeding and with toilet training . . . The mental stress, of course, is the continuing acceptance that your child is not going to achieve the potential which you may have expected of him at birth.<sup>16</sup>

A particular instance was mentioned:

She could hardly sleep at night and would scream and kick walls and swing on the curtains so that I got no rest. My nerves became tattered. I suffered severe headaches. The pain would begin at about 9 a.m. and by 12 noon I would be frantic with pain.<sup>17</sup>

23. A woman with a Down's Syndrome child, unable to find suitable child care, wrote:

Sometimes it seems to me that it will take a much wiser mother than I am at present to cope with and anticipate my daughter's needs, still remembering that I have a husband whose needs might sometimes be overlooked. My own needs will have to wait.<sup>18</sup>

### Services

24. In Australia services for the handicapped are provided by a wide range of public and private agencies that have varying policies and overlapping functions. Edward St John, QC, the father of a handicapped young man, said:

There has never been a unified effort in Australia to survey the whole field and to devise adequate policies to cover the areas of greatest need. Instead responsibility is divided

14. R. Barr & H. Molony, Families with an intellectually handicapped child, Commission research report, no. 10, 1976.

15. *Social/medical aspects of poverty in Australia*, pp. 56-8.

16. Evidence, p. 1935, Joanne Delaney and Jenny Ghul.

17. Submission 469, WA Watchdog organisation.

18. *ibid.*

between State and Federal governments, and a host of departments and agencies. In addition, there is a heterogeneous collection of private organisations varying enormously in the standard and quality of their buildings and equipment and their teaching and nursing staff.<sup>19</sup>

25. The government became involved in the issue in the 1960s when it passed legislation supporting services for the handicapped. In 1974 all such earlier Commonwealth legislation was replaced by the Handicapped Persons Assistance Act. In 1971 the Senate Standing Committee on Health and Welfare issued a report on mentally and physically handicapped persons in Australia and in 1974 a National Advisory Council for the Handicapped (NACH) was established which works closely with a Standing Interdepartmental Committee on Rehabilitation (SIDCOR). The handicapped were also the concern of the National Committee of Inquiry into Compensation and Rehabilitation in Australia (the Woodhouse Committee), the Commission of Inquiry into Poverty and the Royal Commission on Australian Government Administration. Lack of co-ordination of facilities and services was a general complaint of these various reports.

26. It was suggested to us that the government needs to set long-term goals in a similar manner to the work of the US President's Committee on Mental Retardation. For example, one of the American goals is to reduce the occurrence of mental retardation by one-half before the end of the century, and to return one-third of the people in mental institutions to useful lives in their communities. The President's Committee mobilises national planning by working with federal and state agencies and departments, initiates and funds research, conducts public and professional education programs and co-ordinates prevention efforts.

27. At present the National Advisory Council's role is purely advisory and it is hampered even in that task by severe financial and staff shortages. There is no focal point for leadership, no comprehensive data base on which to formulate policy and plan for services, and no monitoring agency to ensure that the annual expenditure of millions of dollars is effective. While monitoring is perhaps best done by an outside body, we can see a real need to strengthen the role of the National Advisory Council and SIDCOR.

28. We believe there is also need for a body outside government, similar to the Canadian National Institute on Mental Retardation<sup>20</sup>, to act as a watchdog and to provide a focal point for leadership, research and information. The Canadian Institute (in Toronto), which was visited by one of the Commissioners, is sponsored by the Canadian Association for the Mentally Retarded, funded by the government and voluntary donations. Initial backing for the Institute came from a service organisation, the Association of Kinsmen Clubs. The Institute is concerned with research, training, consultation and the planning and development of a broad range of programs for the mentally handicapped. One of the main thrusts of the Institute has been to urge that better use be made of existing resources to press for community-based services, and to implement a wide range of training programs for lay people including students, parents and citizen volunteers. Plans have already been drawn up to establish an Australian Institute, with funding from State and Commonwealth governments as well as private sources.<sup>21</sup> We support such a proposal.

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19. *National Times*, 4 October 1976.

20. National Institute on Mental Retardation, Kinsmen NIMR Building, York University Campus, Toronto, Ontario, Canada.

21. *Australian Institute on Mental Retardation: proposal to establish*.

29. The policy area was not one which we were able to explore, but, at the consumer end, our evidence indicated that services to handicapped people and their families fall short of basic needs, especially in diagnosis and counselling, education, family services and residential care. Planning in the past has tended to be based on crisis situations and immediate needs, rather than on long-range overall planning for all handicapped persons.

### Diagnosis and counselling

30. Parents told of trekking from one doctor to another trying to find a diagnosis for their child. One mother had been told that she was being 'over-protective' but, when her child was 8 years old, cerebral palsy was diagnosed.<sup>22</sup> It was felt that many children were missing out on diagnosis until they reached school age, and that parents were not being given the help they required.<sup>23</sup>

31. The need for a multidisciplinary approach was stressed. The president of the Autistic Childrens Association, South Australia, told of autistic children being thought to be deaf because they were examined by people unfamiliar with autism.<sup>24</sup> Deaf children also miss out on diagnosis. The vice-president of the Federation for Junior Deaf Education told us that deaf children in country areas are particularly disadvantaged, due to distance from specialists and a lack of knowledge by general practitioners of diagnostic procedures.

. . . it may be some precious wasted years later, when the entire family unit has been disrupted by a frustrated, retarded child with severe behaviour problems and inability to speak, communicate and hear, that the parents or the doctor are forced to do something.<sup>25</sup>

32. According to the Shepherd Centre at Sydney University, most deaf children have the potential at birth to be taught to speak and lip-read but less than 5 per cent achieve this goal—the average deaf person attains the reading age only of a 9-year-old.<sup>26</sup>

33. We learnt that the 'considerable scientific knowledge about the handicapped is often not used, because it is widely diffused.'<sup>27</sup> Sometimes only by chance a parent goes to a group which has the knowledge to help.<sup>28</sup> We were told of cases where brain-damaged children had been pronounced incurable 'vegetables', who should be confined to institutions, yet techniques to help had been in existence for at least 10 years.<sup>29</sup>

34. Professor Marie Neal, of Monash University, spoke about children being shuffled from one specialist to another 'in the chase for information when the information lies somewhere between the different disciplines'.<sup>30</sup> The principal of Bunbury (WA) Training Centre for the Handicapped felt that doctors could do more by warning parents that their child might be intellectually handicapped.<sup>31</sup>

22. Submission 1058, name withheld.

23. Submission 586, Catholic Womens League, NSW.

24. Evidence, pp. 1348-54, Mrs Dymphna Eszenyi.

25. Submission 1120, Mrs Leone Healy.

26. *ibid.*

27. Commission consultation, Norma Rigby, National Advisory Council for the Handicapped.

28. Evidence, p. 712, Professor M. Neal, Monash University.

29. Interview report, NSW, 138.

30. Evidence, p. 712, Prof. M. Neal.

31. Evidence, p. 1852, Andrew Thompson.

35. Diagnosis is available mainly through private paediatricians, yet many doctors are unaware of the various services that are available or needed. Our evidence suggests that doctors, hospital and baby health personnel should be better educated in this field, both in terms of diagnosis, treatment and help for the family as well as the child.

36. In 1971 the Senate Standing Committee on Health and Welfare recommended that at least one comprehensive diagnostic clinic be established in each State. This has been achieved, but we also need regional centres and mobile teams linked to the main centre. For example, of the thirteen health regions in NSW, only three have provisions for diagnosis. Country parents should be given travel and living subsidies and living accommodation should be available.

37. Diagnostic centres need to be linked with treatment and training centres. Public education programs, like those for heart disease or cancer, could assist early diagnosis and assessment. Booklets outlining facilities should be freely available.

38. In most cases, severe mental retardation becomes evident by the age of 12 months, moderate mental retardation before school age, deafness by the age of 2, and most other handicaps are evident before the age of 3 years.<sup>32</sup> The Senate Standing Committee made the point that, if infants are taken regularly to baby health clinics and if clinic nurses are suitably trained, handicapping conditions can be detected from an early age. However, if a child is not taken to a clinic it may be 5 or 6 years before the child is medically examined. This gap is critical. Early detection of defects could affect a child's whole future.<sup>33</sup> There are conflicting views about the best way of achieving this.

39. One way would be to introduce compulsory screening at regular intervals of every child under the age of 5. Not all infants are taken to baby health clinics, hence the suggestion of compulsion to ensure that no child is missed. Screening through blood tests for specific disorders like phenylketonuria (PKU) is already carried out in many hospitals in Australia.

40. Another approach would be to offer inducements to encourage parents to have their children checked. This could be by way of bonus payments in addition to the ordinary child endowment.

41. Another suggestion is that maternity hospitals should keep registers of infants born with the risk of a handicapping condition, and that this information should be made available to parents on request, and to doctors and health authorities subject to parental approval. This would help ensure that a check is kept on vulnerable children, and that their early medical history is not lost.

42. An informal 'at risk' register already operates in the ACT, whereby hospitals refer all 'at risk' infants to a Handicapped Assessment Clinic for assessment and subsequent therapy if necessary. This scheme works well, although obviously fails to 'catch' those children born outside the ACT and those children whose handicaps do not show up till a later date. The Australian Association for the Mentally Retarded favours the concept of regionalised multidisciplinary assessment centres, located in the same buildings as child guidance and educational clinics. Such centres would collect information from the various agencies concerned with identification, make diagnoses and assessments, and provide counselling and remedial services. We support such a concept.

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32. Senate Standing Committee report (1971), pp. 17-18.

33. *ibid.*, p. 17.

43. We heard much evidence from parents of handicapped children about the failure of health professionals to inform them and give adequate counselling. The Watchdog organisation reported that some doctors show a lack of patience when dealing with a retarded child and little understanding of the effect of the child on the family:

On the one hand some parents spoke of the 'paternalistic' doctor who was so loath to deliver the bad news that everyone around except the mother knew the diagnosis. On the other hand, the 'brash' doctor was even more distressing. One mother has spoken of the doctor who came to see her and without any preliminaries said: 'The baby is a mongol'—another relates the doctor's comments: 'The kid's an idiot—put it in a home'.<sup>34</sup>

44. A woman who works as a telephone counsellor in Victoria, for the Nursing Mothers Association of Australia, wrote:

Parents have often complained to me of the seeming indifference and/or inability of the medical profession to provide sympathetic and constructive advice in coping with the day-to-day problems faced by the family . . .

Children are frequently discharged from hospital with little or no information given to the parents on how to cope in a practical way at home . . . Advice on social services available, special equipment, suggestions for play activity and the chance to express fears and anxieties are desperately needed by most parents, who often do not know who to consult about these matters.<sup>35</sup>

45. Parents told us of finding their own way to diagnostic centres and to community organisations. One mother of a blind mentally retarded child with a hairlip and cleft palate told of being discharged from a major Sydney hospital with the baby, a feeding formula and a plate for the cleft palate. The only advice she was given was to come back to have the plate refitted. Family and friends stopped calling because the child's physical appearance distressed them. Her general practitioner prescribed sedatives for her depression but gave no other assistance, and she and her husband found their own way to the Royal Blind Society by asking, in desperation, a blind man they saw outside a supermarket.<sup>36</sup>

46. Dr Shirley Stapleton, who has worked in paediatrics and who has a severely mentally handicapped child, reported:

I am a doctor. I can be critical of my own profession. Our training leaves much to be desired at this point, . . . in handling the emotional problems of the parents, even knowing the facilities available . . . I learnt about where my child could go by meeting the social worker in the toilet.<sup>37</sup>

47. Dr Robert Andrews, of the Schonell Educational Research Centre, University of Queensland, said:

We could instance the still very frequent occurrence of having a parent tell us that a medico, in consultation with them on the birth of a handicapped child, will still advise institutionalisation, that there is nothing at all that can be done for a child such as this, to take him home and treat him as a pet, or something like this, without any apparent understanding and recognition, even to the parent, that this handicapped child is a human being and has a life ahead of it, and has potential as an individual within our society.<sup>38</sup>

34. Submission 469, WA Watchdog organisation.

35. Submission 10, Mrs Anne Hapke.

36. Commission consultation, Early Childhood Special Education Conference, Macquarie University, 17–18 July 1976.

37. Evidence, p. 728, Dr Shirley Stapleton.

38. Evidence, p. 1730, Dr R. Andrews.

48. Ethel Temby, executive officer of the Star Victorian Association for the Retarded, who has a 17-year-old retarded son, spoke of a recent case where a baby was born with Down's Syndrome:

It was not until the child was 3 days old that the parents were advised that it had this condition. In those 3 days the mother had begun to build up feelings of rejection of the baby because she felt something was wrong.<sup>39</sup>

49. Another young Sydney mother of a Down's Syndrome baby said:

At no stage in those first crucial weeks did anyone give us any advice or guidance in what lay ahead of us, what we could expect of Annie or what we had to do.<sup>40</sup>

50. For most people the doctor is the first and most easily available source of information concerning the handicapped child. Nurses also play an important role, yet no time in a nurse's training is spent specifically with mentally retarded people.<sup>41</sup> The education of professionals likely to come into contact with handicapped people and their families is important, and needs to be cross-disciplinary. Professor Neal said that professional people are often ignorant of material on the fringe of their discipline:

Therefore they fall between the cracks. They fall between the spaces between social workers, between counsellors and between educationists.<sup>42</sup>

51. Education needs to begin by helping people to come to terms with their own attitudes to the handicapped. Otherwise their counselling will not be effective. Education should involve an understanding of the emotional needs of the families concerned:

Emotional problems of parents include feelings of irrational guilt about a handicapped child . . . lack of feeling towards a baby when illness or prematurity has resulted in prolonged separation at birth. These feelings need to be aired and explained to the parents if they are not to feel abnormal.<sup>43</sup>

52. Education needs to embrace a knowledge of the support services available.

In the situation where the diagnosis is for a long time unclear and investigations lengthy, it is generally helpful for each aspect to be as fully discussed with the parents as possible. Parents can assimilate the possibility of a poor prognosis gradually and most would prefer to know the possibilities and ramifications of tests as they are being done. Additionally, often insufficient information is given to parents concerning the tests themselves . . . Perhaps in large hospitals there can be some written information concerning the more simple procedures which would be helpful, so that parents could take this home, read it, and then follow up with questions that may still worry them . . . parent participation both in planning and implementing services is essential for their ultimate success.<sup>44</sup>

53. Our evidence also raised the issue of counselling services, which need to embrace the needs of the family as a whole, including father and siblings.<sup>45</sup>

54. One suggestion put to us was that advisory bodies should move into action in the first week after a child's birth, to help and counsel the parents and to make sure that appropriate local organisations get in touch.<sup>46</sup> Further suggestions included the appointment of ombudsmen to all large hospitals, and explanatory leaflets in several languages indicating points of contact for information about the handicapped child.<sup>47</sup>

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39. Evidence, p. 734, Mrs Ethel Temby.

40. Submission 626, Mrs M. Barrow.

41. Submission 469, WA Watchdog organisation.

42. Evidence, p. 716, Prof. M. Neal.

43. Submission 10, Mrs Anne Hapke.

44. Submission 469, WA Watchdog organisation.

45. Evidence, p. 2227, C. M. Alexander.

46. Submission 347, Sub-normal Childrens Welfare Association, Nepean district branch.

47. Submission 10, Mrs Anne Hapke.

55. A number of people spoke about the value of self-help groups. The executive director of the Mentally Retarded Childrens Society of South Australia described support groups organised by the South Australian Department of Health whereby mothers are brought together to share experiences.<sup>48</sup>

### **Conclusions**

56. The issue of early diagnosis is of such importance that every effort should be made by health services to explore and evaluate different methods of developmental screening. Consideration should be given to the use of baby health nurses or health visitors to extend early childhood screening. Hospital registers of children 'at risk' could provide information for ensuring subsequent regular health checks of the child. We believe that the health and future welfare of children should override objections to compulsory testing and that the rights of a child to physical and mental well-being should be protected by screening at birth, and then at yearly intervals until school age when the school medical service screening would take over.

57. Our evidence illustrates the fears and frustrations of parents of handicapped children. To give a handicapped child love and security, parents need to feel secure themselves.

58. It is particularly important that the medical and nursing professions should have an understanding of the needs of families with a handicapped member, and that obstetric hospitals should hold seminars where staff will express and discuss their feelings and exchange information.

59. We believe that whenever a child is diagnosed as handicapped, counselling should be available to the family which should be put in touch with support services. Information booklets on support services are needed and should be available to doctors, nurses, social workers and parents, when a diagnosis is made or when a parent applies for a handicapped childrens allowance. The booklets should also be available in languages other than English.

60. We further support the idea of ombudsmen being appointed in large hospitals so that parents of a handicapped child have access to an independent person should this be required. We believe that self-help groups should be supported.

### **Prevention**

61. The incidence of mental handicap can be reduced by helping women likely to bear a mentally handicapped child to avoid pregnancy. Half the Down's Syndrome babies are born to mothers over 35.<sup>49</sup> This syndrome is the cause for one of the largest groups of mentally handicapped people. It can be detected from early in pregnancy by amniocentesis (withdrawal of some of the amniotic fluid from the uterus) and chromosomal analysis.<sup>50</sup> If the condition is diagnosed, a decision can be made whether or not to terminate the pregnancy. Pregnancy termination is also a possibility where the foetus is damaged during pregnancy, for example by german measles.

62. We feel it is important that, where applicable, amniocentesis be available to pregnant women who are concerned that they might give birth to a handicapped child. Counselling should be offered to assist such women to come to a decision.

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48. Evidence, p. 1373, Mr J. S. McLachlan.

49. Anne M. Clarke (ed.), *Mental deficiency: the changing outlook* (Methuen & Co., London, 1974), p. 59.

50. Dr S. Sax, Mental handicap: public responsibilities (address to Australian Group for the Scientific Study of Mental Retardation, 19 October 1974).

63. Genetic counselling should be available so that couples can find out if either has an hereditary condition which could cause handicaps in any of their children.<sup>51</sup> Couples who have had a handicapped child should seek genetic counselling to find out whether hereditary factors are involved. This information is also necessary for siblings. It should have a place in school human relationships programs.

64. Governments can help people to avoid giving birth to children with a handicapping condition, for example by providing contraceptive facilities to women over the age of 35 (the most vulnerable group) and by providing adequate genetic counselling facilities. Clinics and school health services should encourage girls to be immunised against rubella. Good medical care can minimise brain damage at birth. Malnutrition, particularly prevalent in Aboriginal children, is thought to be a cause of retardation and other handicapping conditions, and could be prevented by health and welfare programs.

## Education

65. Handicapped children, no less than other children, have a right to be educated. While responsibility for their education rests primarily with Education Departments, in some States children in hospitals and institutions are provided for by health and welfare authorities. Education Departments provide a range of special schools. They provide special classes in some schools for mildly and moderately retarded children. Churches and other organisations also provide educational facilities, supported by some government subsidy; parents assist in raising funds.

66. Day training centres are run by voluntary groups with some government subsidy.<sup>52</sup> Fees are usually charged and fund raising is a necessary factor. There is usually a waiting list to obtain grants and a waiting list of children to attend.<sup>53</sup> Dr Andrews said in evidence that there are handicapped children not getting education, mostly children in government institutions. He said that, in one Queensland institution for 190 mentally handicapped children, only 14 per cent are receiving full-time education services. Some receive part-time services, but almost half receive no training at all.

I think that over the years governments in Australia have shown lack of motivation in giving appropriate services, particularly to mentally handicapped children in institutions.<sup>54</sup>

67. Professor Neal told us about spina bifida children who have undergone as many as fourteen operations by the time they are 12 and who, in many hospitals in Victoria, are still receiving no attention to their education:

... what kind of education is offered to that child? He is rejected by parents because of a physical condition and no one is there to plead for his education ... I would think most people see these things as medical problems but they are not just medical, they are social.<sup>55</sup>

68. As recommended by the Karmel Committee, Education Departments should assume responsibility for educating children in institutions and in hospitals<sup>56</sup> and greater subsidies should be given to voluntary schools. Education Departments also need to assume responsibilities for handicapped children from the time when they can first benefit from educational programs.<sup>57</sup>

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51. Evidence, p. 2192, P. M. Beckitt.

52. Via the Handicapped Persons Assistance Act.

53. *Social/medical aspects of poverty in Australia* p. 55.

54. Evidence, pp. 1718-31, Dr R. Andrews.

55. Evidence, p. 713, Prof. M. Neal.

56. *Schools in Australia*, report of the Australian Schools Commission (AGPS, Canberra, 1975), p. 11.

57. Exhibit 110.



69. Working with the child from infancy has proved to be important. Professor Neal told us:

We know from studies of intelligence that, given early stimulation and appropriate styles of coping, the child's intelligence can develop, so that at a later stage he can be included in the normal stream or in special schools rather than be a liability to his family and to the community.<sup>58</sup>

70. The Medical Superintendent of Marsden Hospital, NSW, referred to early educational intervention as being one of the most dramatic advances in the handicapped field.<sup>59</sup> The Right to Life Association quoted Ms Dmitriev, originator and director of the Washington program in the USA:

The idea is to begin educating them just like other children as soon as possible. We have no evidence that their comprehension is any less than other children. They are in fact excellent at understanding language. They cannot always express themselves mostly because of muscle weakness. We work on this with the infants.<sup>60</sup>

71. Among the few Australian programs of this nature is one for Down's Syndrome children at Macquarie University, where a small group of children are achieving remarkable progress. A mother of a child attending this program said:

She is beautiful. She is nearly 2 and she walks. She has about six or seven words that she says . . . she is very sociable and she is very curious. We take her everywhere and our friends accept her . . . I think there should somehow be a way that parents can find out what the chances are for their child.<sup>61</sup>

72. We were informed, however, that early education for most handicapped children 'is still only a dream'.<sup>62</sup>

73. Education can begin through play groups, by home visits and by instructing the parents. For example, faced by the shortage of speech therapists, the Canberra College of Advanced Education trains parents to be language therapists for their intellectually handicapped children. Early intervention capitalises on the fact that the period of most rapid development of language is between 1 and 4 years.<sup>63</sup>

74. With the backing of a multidisciplinary team, the Autistic Childrens Association in New South Wales provides a clinical psychologist and two parent counsellors to work with parents and children under school age. They claim 'some . . . spectacular examples of . . . amazing improvements'.<sup>64</sup>

75. In Victoria the Noah's Ark Toy Library for handicapped children lends toys, runs group activities for parents and children, acts as a resource and advisory centre and runs a small Down's Syndrome group based on the early intervention program designed by Macquarie University in Sydney. The toy library is based in a house in Prahran and has a van to cover suburban and country areas.<sup>65</sup> We understand that toy libraries have now been established in other parts of Australia.

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58. Evidence, p. 713, Prof. M. Neal.

59. Evidence, p. 109, Dr Alan Jennings.

60. Submission 585, NSW Right to Life Association.

61. Evidence, pp. 2358-66, Mrs M. Barrow.

62. Exhibit 110.

63. R. J. Rees, Parents as language therapists for intellectually handicapped children (paper given at AGSOM conference, first joint national conference: Australian Association for Mentally Retarded and Australian Group for Scientific Study of Mental Deficiency, Canberra, 13-19 August 1976).

64. Evidence, p. 470, Dr A. Vern-Barnett.

65. Evidence, p. 2958, Mrs A. Forell.

76. We were told about the need for pre-school education and the general lack of funds for it.<sup>66</sup> At a conference on the mentally retarded in Canberra, in August 1976, it was recognised that early intervention is vital for retarded children, and that professional resources for this are insufficient. The conference recommended that television programs should instruct parents how to stimulate and develop mentally handicapped children.<sup>67</sup>

77. The Australian Association for the Mentally Retarded is developing 'teaching packages' for parents of older children to help them prepare for independent living and working. Similar kits could be developed for early childhood development programs, provided professional back-up were available.

78. We heard evidence on the issue of integration. For example, the Australian Council of State School Organisations told us:

Specific disabilities such as physical or mental handicaps often require exceptional consideration. However, this has been used to isolate such children from the mainstream of society and in so doing severely limits their experience and development. It also limits the experience of other members of society and thus promotes prejudice because of failure to understand those who are not 'normal'.<sup>68</sup>

79. A number of projects for handicapped children are now funded through the Commonwealth Office of Child Care and we strongly endorse the principle of such services being seen as part of a total range of childrens services.

80. A Queensland mother of a deaf child said that separate education makes handicapped children more isolated.<sup>69</sup> The Watchdog organisation in Western Australia told us that not every school is willing and able to take mildly retarded children and very few schools will take moderately retarded children.<sup>70</sup> All schools and play centres (and indeed all public buildings) should be accessible to handicapped people. Architectural barriers should not keep a handicapped person out of the mainstream of life.

81. Professor Neal talked about programs at Monash University where normal children and handicapped children work and play together, so that the handicapped child is progressively integrated rather than suddenly being thrust into a normal school.<sup>71</sup> The South Australian Autistic Childrens Association have a scheme whereby autistic children attend normal kindergartens accompanied by a special teacher who works with them on a one-to-one basis. It has been found that these children do better than the children who are segregated.<sup>72</sup>

82. Handicapped children need to be educated in human relationships, including sexual relationships. Normal children acquire skills in social behaviour in the course of their ordinary life, but handicapped children and adults do not have the same facility<sup>73</sup> and lack the same range of opportunities to learn.

83. Some children who have normal intelligence but medical conditions such as epilepsy or hyperkinesia are often not accepted in schools.<sup>74</sup> A Sydney woman, with a 4-year-old epileptic son requiring constant care, said that the only special schools

66. Submissions 469, WA Watchdog organisation; 407, CWA of NSW; 1104, NSW Dept of Education; Evidence, p. 2224, C. M. Alexander.

67. AGSOM conference, Canberra, 13-19 August 1976.

68. Submission 1062, Australian Council of State School Organisations.

69. Interview report, Qld, 33.

70. Submission 469, WA Watchdog organisation.

71. Evidence, pp. 714-5, Prof. M. Neal.

72. Evidence, p. 1351, Mrs Dymphna Eszenyi.

73. Evidence, p. 1099, D. Roden.

74. Submission 566, Mrs S. Christensen.

which will take him are those for mentally or severely physically handicapped children. There are none available for children who have normal intelligence and physical functions but who need additional medical care.<sup>75</sup> Smaller classes and extra resource staff would do much to reduce the need for special schools.

84. Handicapped adolescents require vocational training and work experience. At the moment many handicapped adolescents and their parents are left to their own devices when it comes to getting employment or placement in sheltered workshops.

85. A follow-up study of one class of mentally handicapped adolescents, who left a Canberra school at the age of 15, revealed that immediately after leaving school only one in ten secured employment. One year later, all the young people were receiving the invalid pension. It was estimated that the cost to the community of maintaining each child on a pension, from the age of 16 to 65, would be about \$100 000.<sup>76</sup> Money spent on counselling and training these young people to hold down a job would have been well worthwhile.

86. The fact that these young people all left school at 15 raises the issue of education for life which we believe is central to the debate about education and handicapped people (and, indeed, all people). We believe that education should not be seen as a measured commodity, available only at certain times in a person's life, but that, ideally, education should be an ongoing process, starting from birth and extending to old age. With handicapped people it is particularly important to extend opportunities beyond the school age as many only reach a stage of intellectual development when they are ready to learn in their late adolescence. Vocational training, job experience programs, education in life skills such as self-care and human relationships, should be integrated within the general educational program, and, once the handicapped person reaches the normal school leaving age, should be available through technical schools or night classes at high schools, just as for any other member of society.<sup>77</sup>

87. We were told that there is a need for more teachers to be trained in specialist or remedial education and to be appropriately used afterwards. The president of the ACT Association for the Advancement of Slow Learners said that the shortage of remedial teachers impeded the progress of many children:

As a personal example I sent my daughter to a trained remedial teacher a number of years ago. It cost five dollars an hour. Many people might not be able to afford it. In 6 weeks she learnt to read a simple book. She had been something like 6 or 7 years at school and had never learnt to read.<sup>78</sup>

88. Dr Alan Jennings of Marsden Hospital spoke of the need for a new kind of teacher:

... someone who can visit the home, counsel the parents, who is indeed a specialist in child development, in atypical development and in special educational needs ... a person who can devise remedial and prescribe remedial means to meet other handicaps ... It seems to me that we do not have at the present time very much in the way of training for professional people in this area of special education.<sup>79</sup>

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75. Interview report, NSW, 135.

76. Evidence, p. 939, Mr Lawrence Killeen.

77. Evidence, p. 741, Mrs Ethel Temby.

78. Evidence, p. 939, Mr Lawrence Killeen.

79. Evidence, p. 107, Dr Alan Jennings.

## **Conclusions**

89. Handicapped children have a right to a free and appropriate education. The aims of this education should be the same as for any child: to give him opportunities to develop his capacities and, as far as possible, to become a mature, autonomous and responsible individual.

90. Wherever possible, education for handicapped people should be integrated within normal education programs.

91. We would like to see far more attention and resources given to developing early intervention programs, with the aim of giving all handicapped children such programs from infancy and extending to play groups and pre-schools. Home visiting programs should be extended and supported, and ways and means sought to involve parents as co-therapists. We would like to see more use made of the media and more 'educational kits' prepared for the use of parents at home.

92. Education for handicapped people should also extend into adult life. Social and living skills, including education in human relationships and sexuality, are important.

93. Vocational training, work experience programs and follow-up programs should be available for handicapped adolescents and adults.

94. We are concerned about the apparent lack of educational facilities for children of normal intelligence who are receiving long-term medical care in hospitals or institutions. We are equally concerned about the lack of schooling for many children in institutions for the mentally handicapped. Education Departments should ensure that no one child is missing out on appropriate schooling.

## **Family services and residential care**

95. As we have shown, the demands of caring for handicapped children are constant. On the one hand, it is now generally agreed that handicapped children should live as normal a life as possible, ideally living within the family; on the other hand, we were told by many people that services to families are totally inadequate.

96. The Australian Association for the Mentally Retarded said that an increase in supportive community services would not only reduce the waiting lists for State residential accommodation, it would also make for healthier families and better adjusted handicapped people.<sup>80</sup>

97. The Country Womens Association of NSW and, almost without exception, all the parents we interviewed urged the need for short-term homes where parents can place their children while they enjoy a much needed holiday.<sup>81</sup> A Perth mother wrote:

A baby-sitting service seems to many mothers of severely retarded children a necessity, as even the ordinary task of shopping becomes an ordeal.<sup>82</sup>

Some said that home help, especially when the children were very young, would relieve the stress:

I have so many small ones to feed it is very tempting to continue spooning food into her rather than to teach her to help herself. Extra help at meal times would be of infinite value.<sup>83</sup>

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80. Submission 1, Australian Association for Mentally Retarded.

81. Submission 407, CWA of NSW.

82. Submission 469, WA Watchdog organisation.

83. *ibid.*

A woman who cares for her 11-year-old autistic grandson suggested that, to help parents keep their children at home, special centres should be established where the child can receive occasional care and allow the parents to have relief and some kind of normal social contact.<sup>84</sup>

98. Dr Jennings said there was a need for 'personal help':

I think there are many times that the burden on the mother could be relieved just by help say at meal times, some baby-sitting, helping the child with bathing, when the mother wants to go shopping . . . but I think it has to be predictable. I think it has to be organised. I think it has to be recompensed, and I would like to think of the possibility of something like an assistant in nursing . . . or a mothers help . . . so that the mother would be able to rely on it rather than receiving this just out of the goodness of someone's heart.<sup>85</sup>

99. Our own research pointed up the fact that families with a handicapped child not only need medical, nursing and psychiatric services, but also have a strong need for community services.<sup>86</sup>

100. A significant percentage of families in the study expressed the need for emergency care, holiday care and child-minding services for their handicapped child.

101. One approach towards helping families of handicapped children is a home help service operated by the Victorian government. Home help staff are trained to work with handicapped children and their families, and the schemes operate out of local councils.<sup>87</sup>

102. We have not addressed ourselves to the financial needs of families with handicapped children because these have been dealt with in the Poverty Inquiry reports, but on the basis of our own evidence it does appear that great financial burdens are often placed upon families and that schemes such as the handicapped childrens allowance should be maintained and tied to increases in the cost of living.

103. While parents increasingly keep their handicapped children at home, residential accommodation is still required when family life becomes too intolerable; there are some children who will always need it. We were told there is a grave shortage of such accommodation. In most States there are long waiting lists for this kind of care.

104. Dr Andrews said that too few places exist in all types of community residential services to meet the needs of children and adults requiring long-term placement—while short-term, emergency and family respite accommodation is virtually non-existent.<sup>88</sup> We were told that at Grosvenor Diagnostic Centre, in Sydney, some 300 to 350 children were on the high priority list:

. . . this meant these children were actually coming from families at risk and there was nowhere for these children to be placed, from anywhere to 2½ to 5 years.<sup>89</sup>

105. We heard of similar situations in other States. For example, we were told that there are no residential facilities for the severely handicapped in Tasmania other than the large government institution attached to a mental hospital and inconveniently located some distance out of Hobart.

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84. Submission 141, Mrs F. E. Stahl.

85. Evidence, pp. 104–5, Dr Alan Jennings.

86. Barr & Molony, Commission research report, no. 10.

87. *The Age*, 10 November 1975.

88. Exhibit 110; see also Evidence, p. 473, Dr A. Vern-Barnett; Submission 617, Mrs J. H. Youngsmith.

89. Evidence, p. 465, Dr A. Vern-Barnett.

If we had smaller homes where retarded children could live in the community, where mothers and fathers could visit frequently, that terrible wrench of putting a child into institutional care could be cut down tremendously. Fathers have said to me if only they could be closer they could visit the children in their lunch hour. It takes them 2 hours to visit their child in residential care.<sup>90</sup>

106. A Queensland woman, who lives 110 kilometres from Brisbane, wrote about the lack of suitable permanent accommodation for severely retarded adults:

'Challiner' at Ipswich offered to put my 21-year-old son on a waiting list to enter 'Blair House'—it housed 176 men, mostly fit and independent but with some totally dependent, and the building had four attendants. Waiting time at least 9 months. I think we should be able to do better than this for these men and women.<sup>91</sup>

107. Lack of appropriate residential care means that many adult handicapped people do not leave home. This often places a burden on elderly parents and encourages over-protection of the handicapped adult.

108. Although some institutions provide good quality care, the standard of others was criticised. We were told in 1975:

One filthy porcelain toilet and urinal placed at one end of each dormitory is not adequate or convenient. Some night staff change beds at 12 midnight, but the boys are not toileted and they can and do lie in urine and faeces all night. The stench is indescribable . . . these children are not animals, they are human beings . . .

The ward for more handicapped young boys and girls and for the more handicapped older girls includes a number of immobile children who spend all day either in bed or confined to chairs in draughty corridors. Some have poor circulation and some have bed sores. They are not walked or stimulated in any way.<sup>92</sup>

One problem is that often the authority or authorities conducting such institutions are also the licensing bodies.

109. A further view was that, with the training techniques now available, many intellectually handicapped people could go back into the community living in flats and houses with an appropriate amount of supervision. This would be cheaper than institutional care.<sup>93</sup>

110. We heard evidence from a non-profit-making group, called the Total Care Foundation, which leases two normal suburban houses in Petersham, Sydney, on behalf of two groups of severely handicapped people. Total Care sublets to the residents who pay their rent and food from their invalid pension or from salaries if they work. Dr Fred Ehrlich, of the NSW Health Commission, who initiated the idea, says that therapy consists in people looking after themselves and each other.<sup>94</sup> The residents (in 1975) included two people in wheelchairs, one person with cerebral palsy, one very elderly person, one mildly mentally retarded person and one blind person.

In the sense that this is a family group, each person is expected to contribute to the overall running of the place. A person who is physically able can do something, and a person who has got the ability to stimulate other people either intellectually or mentally can go in and each will contribute to the other, and in that sense there has to be a certain degree of ability to give in each person.<sup>95</sup>

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90. Evidence, p. 2223, C. M. Alexander.

91. Submission 50, Mrs F. Sedgwick.

92. Exhibit 110.

93. Evidence, p. 1895, Dr G. J. L. Hamilton.

94. Interview report, NSW, 235.

95. Evidence, p. 3031, John Gilroy.

## ***Conclusions***

111. A shortage of support services for families of handicapped children sometimes results in these children being put into residential care when otherwise they could have stayed at home. This is unsatisfactory. Home help services, baby-sitting, child care centres, holiday care and emergency care are all needed.

112. More residential care is also urgently required, both on a long-term and short-term basis. Residential care is sometimes more appropriate for certain children and their families. At present, some of these children are kept at home because the alternatives are non-existent or substandard. It is wrong that handicapped children are put in large institutions, often alongside psychiatric and geriatric patients, or sent 160 kilometres away because there is nothing suitable near home.

113. We were disturbed by accounts of the quality of care in some institutions. The situation needs to be investigated immediately and conditions substantially improved. Nationally recognised standards need to be developed and licensing should be tied to funding arrangements.

114. Children should be accommodated in small cottage homes run by trained house-parents and located so that parents have ready access. Adults should be offered a range of hostel accommodation and moved into normal housing or flats, under supervision if required.

115. We were impressed by the concept of the Total Care Foundation, primarily for the dignity and independence it affords handicapped people, and secondly because it appears to be far cheaper than relying on more structured care. We feel that this scheme could well be adopted by other organisations concerned with the handicapped and by governments. Self-help is the best kind of help.

116. We acknowledge the valiant efforts that have been made in this country by some government departments and by private and voluntary organisations to improve the range and quality of family support services, but we believe the situation will improve only if governments really address themselves to the problems we have outlined.

## **Handicapped people and human relationships**

117. All the evidence we received showed that human relationships is the real issue underlying the criticisms of services, the hurt and frustration of parents and the stories of children denied their basic rights.

118. Discrimination against the handicapped exists in many forms. Their problem stems from a failure to treat them as people. Handicapped people are not subhuman and do not want to be treated that way. They ask only that 'normal' social welfare systems be modified to accommodate their needs. Their position must be seen in terms of increased social justice, rather than increased social welfare benefits, and one of the main ways to achieve this is through integration into the mainstream of society.

119. We must ensure that handicapped children and adults are not denied their legal and human rights: the right to a stimulating environment, the right to education, the right to work and the right to lead lives which are as close to normal as possible. To be handicapped and to be deprived of these rights is unjust. While the ensuing economic costs are serious in terms of wasted potential, the human costs, to themselves and their families, are even more distressing.

# Recommendations

We recommend that:

1. The Commonwealth and State governments should adopt a joint and comprehensive policy against discrimination on the grounds of sex and marital status, and should set up national and State machinery to put the policy into effect.
2. The policy should apply to agencies of Commonwealth, State or local government, to industry and commerce, employers and unions, as well as to education authorities and to the supply of goods and services.
3. The policy should be implemented by way of legislation providing for conciliation, compulsory powers of investigation, enforcement through legal procedures and penalties and the award of damages.
4. Public education programs should be initiated on the nature and effects of discrimination, and positive action programs should be provided for and pursued.
5. Equal employment opportunity for males and females should be the required policy of government departments, Commonwealth corporations, agencies set up under Commonwealth law, agencies requiring government licensing, agencies which are publicly funded and organisations obtaining government contracts.
6. The government should allot funds annually to promote the education of girls and women.
7. An expert advisory committee on the education of girls and women should be set up to advise the Schools Commission and to promote curriculum research, vocational guidance for girls and women, and public awareness of their educational needs.
8. The Schools Commission should fund remedial programs in schools to develop equal educational opportunities for girls.
9. Research should be undertaken into the effects of sex role prejudice on teaching practices and on pupils, and the results of this research should be incorporated into teacher-training programs and disseminated among teachers.
10. Women should be given encouragement to advance to high level positions in schools, tertiary institutions and Departments of Education.
11. The organisation of schools should be examined with a view to removing unnecessary sex distinctions.
12. Boys and girls should have equal course options and should be encouraged to learn basic practical skills and to share sporting activities so far as possible.
13. School books should be revised to ensure that men and women are portrayed in a full range of working roles and domestic responsibilities.
14. Vocational guidance programs and literature should be reviewed to ensure that there are no sex-based restrictions.
15. Men and women should have equal opportunities to enter further education courses for apprenticeships, as well as colleges and universities.
16. Adult educational opportunities should be expanded for women whose access to education has been restricted, with training allowances in cases of need, specialised counselling and orientation courses.



17. A committee should be appointed to monitor government publications to ensure that they contain no unnecessary sex stereotyping in text or illustration.
18. The Department of Employment and Industrial Relations should collaborate with State departments, employers and trade unions to develop programs to remove the imbalance in the numbers of men and women in particular categories of employment.
19. Job advertisements excluding applicants of a particular sex without bona fide justification should be prohibited.
20. The Commonwealth Employment Service should establish units in major centres to advise women on employment and to foster new employment opportunities for women in commerce and industry.
21. Government programs related to employment and training should be open to all without discrimination on the grounds of sex or marital status.
22. Training allowances should be made available to dependent women, or women without training, and training programs should be planned to take account of the possible need for child care and flexible hours.
23. The Trade Union Training Authority should give instruction on the working problems of women, especially migrants, and it should encourage female participation in courses.
24. Trade unions should integrate women into all levels of trade union activity and should seek to ensure a better level of participation by women. They should actively seek out women to be trained for union office and should encourage women to stand for election.
25. The government should contribute financially to the Working Womens Centre, Melbourne, the Womens Trade Union Commission, Sydney, and other similar working womens centres; in particular these should be assisted in developing child care schemes.
26. The government should develop foreign-language illustrated information leaflets on employment, unions, industrial legislation and social services addressed to migrant women.
27. The government should set up an inquiry into the working conditions of migrant women, their health, their child care arrangements, language problems and need for education.
28. The government should investigate public and private superannuation schemes and move to ensure that men and women are given equal terms.
29. The government should enter into discussion with State governments, trade union and employer organisations on ways and means of ratifying and implementing ILO Convention no. 103, concerning Maternity Protection, to extend to all employed women the benefits now applied to women in the Commonwealth public service, and to give fathers parental leave.
30. The government should invite discussions with organisations of employers and employees to examine work patterns, flexible working hours and part-time work; part-time employment should be introduced as part of the public service career structure.

31. The government should move to set up multiple-shift child care centres, should provide subsidies for these services and should seek to involve trade unions and employers in planning and providing child care facilities.
32. The director of the office of equality in public service employment should publish accounts of activities and research.
33. Full-time child care facilities should be provided for public service employees.
34. Vocational guidance materials used by the government should be reviewed to ensure that they encourage both men and women to consider a wide range of occupations.
35. Public service recruiting policies should be reviewed to ensure that job advertisements and recruiting programs encourage women applicants from within and outside the public service, and that qualifications required for appointment to senior positions do not exclude suitable women applicants.
36. Special steps should be taken to ensure that women are available for training for senior positions in the public service.
37. Programs for retraining and re-entry into the public service should give credit for experience acquired in family and home management and in voluntary work.
38. Where a job classification within the public service is now dominated by persons of one sex, preference should be given to persons of the other sex.
39. There should be no discrimination between men and women in public service conditions of employment and in superannuation.
40. Legislation should prohibit discrimination between men and women in the terms upon which insurance is offered.
41. Clubs should re-examine their conditions of eligibility to remove unnecessary restriction or distinction between members on the grounds of sex or marital status.
42. Anti-discrimination legislation should prohibit the exclusion of males or females from membership of large business, sporting, social or professional clubs which provide major facilities for entertainment, recreation or refreshment, and which receive any public benefit such as tax remission or the favoured use of public property.
43. Girls and boys should have equal opportunities to participate in athletic and sports activities.
44. The government should examine and revise legislation to remove discrimination between males and females.
45. Womens legal advice and resources centres should be funded.
46. Juries should be composed of at least four persons of each sex.
47. Legislation and government forms and documents should be reviewed to ensure that women are not required to describe themselves by their marital status unless essential to the purpose of the form or document.
48. Federal estate duty on estates passing between spouses should be abolished.
49. Conditions for eligibility for unemployment, sickness and other benefits should be reviewed particularly with regard to the effect of dependency on entitlement to benefits.

50. Government financial and social policies should provide for the single person who is a breadwinner responsible for the support of dependent relatives.
51. Legislative drafting and official documents should substitute so far as possible the word 'person' for 'man' or 'woman', and the male and female personal pronouns with a new word such as 'id'.
52. As part of its policies on employment in its own offices, the media should encourage employment of women, adopt part-time work and flexible hours, and ensure a balance between the number of men and women.
53. The Australian Press Council, the Australian Broadcasting Tribunal, the Media Council of Australia, the Australian Journalists Association and the Advertising Standards Council should collaborate to publish and promote guidelines for the media on the treatment and portrayal of women.
54. The major political parties should involve women in party activities at all levels and include them as party delegates proportionately to their membership.
55. The political parties should ensure that women take part in preselection for Commonwealth, State and local government elections, and that women candidates are given a fair chance of selection.
56. The political parties should enter into an agreement to select a minimum percentage of women as their candidates for Commonwealth, State and local government elections; the percentage should be increased progressively.
57. Governments should appoint women to judicial office from the various branches of the legal profession.
58. Government appointments to statutory bodies and other agencies, councils, committees and commissions should include a substantially increased number of women; the goal should be equal representation.
59. Voluntary organisations and associations should involve women in policy making, encourage women to seek election to office, and make such changes as are necessary to enable women to participate fully.
60. It should be no longer regarded as a criminal activity to be a prostitute.
61. The activities of prostitutes should be regarded as offences only to the extent that they cause public nuisance or annoyance; soliciting should be no longer an offence as such.
62. It should be no longer an offence to be on premises used for the purposes of prostitution or to permit premises to be used as a brothel except to the extent necessary to protect minors or prevent a general nuisance.
63. Places used for prostitution or as brothels should be subject only to such restrictions as are required by planning laws relating to business premises or by-laws relating to public health and safety.
64. The offence of living off the earnings of prostitution should be related to some element of coercion or force.
65. Education authorities should encourage and provide courses in schools, tertiary institutions and through adult education to educate and inform white Australians about Aboriginal tribal life and customs, the impact of white settlement on Aboriginal culture and the process of adaptation to social change.

66. The education of Aboriginals should aim to reinforce their identification with the Aboriginal community while providing adequate opportunities for them to live and work among the white community should they choose to do so.
67. The government should subsidise and support adult education for Aboriginals to learn about urban life and tribal life and to learn language and literacy.
68. Aboriginal people should be involved in planning and presenting the education programs referred to above.
69. Health and medical workers involved with Aboriginals should have training in Aboriginal customs and, wherever possible, in Aboriginal languages.
70. Health education for Aboriginals should be developed and carried out by community health services using members of the Aboriginal community.
71. Health and medical services should employ Aboriginal health workers or liaison officers to help Aboriginal people to use and understand the services.
72. Contraceptive services should be widely available to Aboriginal people; where possible they should be provided by Aboriginal Medical Services.
73. Members of the Aboriginal community should be involved in planning contraceptive services for members of the community.
74. Contraceptive services for the Aboriginal people should use Aboriginal health workers and community workers, in addition to community health nurses.
75. Australian descendants of South Sea Islanders should be considered eligible for health, education and welfare benefits available to Australian Aboriginals and Torres Strait Islanders.
76. Government departments should assess whether their services meet the special needs of Aboriginals; members of Aboriginal communities should be consulted and involved in planning services to meet their needs.
77. Health, education and welfare services providing for the needs of Aboriginal people should employ Aboriginal liaison officers to help Aboriginals to use those services.
78. Special programs of assistance to Aboriginals should continue to be provided. Self-help programs aimed at developing independence and confidence among Aboriginal people should be supported and encouraged.
79. The government should support and encourage programs to educate and inform migrant people about Australian society and its cultural values, and to educate and inform Australians about ethnic groups and their culture.
80. Education authorities should encourage and provide courses in schools, tertiary institutions and through adult education to enable established Australians to learn the languages and culture of ethnic communities.
81. Members of ethnic communities should be involved in the planning of the education courses and programs mentioned above.

82. (a) The government should subsidise migrants who wish to attend full- or part-time courses to learn English, and should fund voluntary organisations to provide such courses.
- (b) Special language programs should be developed by educational authorities and voluntary organisations and provided to unions and management; the workplace should be used for program delivery and for the distribution of information about community services.
83. The government should support the home tutor plan for teaching English to migrants, especially to women.
84. The government should actively promote the recognition of overseas professional and technical qualifications.
85. (a) Government departments should assess whether their services meet the special needs of ethnic communities.
- (b) Members of ethnic communities should be consulted and involved in specifying their special needs and in planning services to meet them.
86. Family planning services should plan for the special needs of ethnic communities in consultation with members of those communities; they should employ migrants as counsellors and they should use interpreters.
87. (a) Government departments and agencies should ensure that information about their services is available in significant ethnic languages.
- (b) A working party including ethnic representation should be established to ensure that this is done and to ensure that translations and information are adequate to inform and educate migrants about services.
- (c) Information should be distributed widely in all areas of migrant concentration, including the workplace and clubs.
88. The government should encourage and support programs to train and employ social workers in ethnic voluntary organisations.
89. Migrant women should be employed as detached workers by authorities such as local councils, community health centres, government departments and ethnic groups, to disseminate information and assist in establishing community networks.
90. The Government should support ethnic broadcasting including radio and TV, which should be expanded to provide information services to migrants and to provide contact with women who are isolated in their homes.
91. The government should encourage and support, by funding or otherwise, programs by State or voluntary agencies to train and employ professional interpreters with special attention to health services and hospitals.
92. The government should support the telephone interpreter service and enable it to expand to country areas where there are significant numbers of migrants; information about the service should be distributed to professions and organisations likely to need it.
93. Sexual acts between persons of the same sex should be no longer classed as a criminal offence in circumstances where a sexual act between persons of different sexes would not constitute an offence.

94. Homosexual offences should be treated in the same manner as heterosexual offences so far as penalties, age of consent and questions of public decency are concerned, and, if possible, there should be uniformity of laws throughout Australia.
95. Every effort should be made to enable homosexuals to be accepted by society and violence and blackmail against them should be strongly suppressed.
96. The Public Service Board should set an example to employers generally in Australia by implementing a policy of non-discrimination against homosexuals and similar minority groups.
97. Committees on discrimination should include discrimination on the ground of homosexuality as part of their provision for discrimination on the ground of sex.
98. The Defence Department should remove automatic discrimination against homosexuals in the services and judge their qualifications on the same criteria as would be applied to heterosexuals.
99. Sex education authorities should include homosexuality as a component in programs of sex and human relationships education both in schools and for adults. Such programs should be factual and balanced not condemnatory or judgmental; selected homosexuals should be involved in these programs.
100. Adequate attention to the issue of homosexuality should be included in medical, paramedical and social welfare training courses.
101. Public health authorities should show due care for the health of homosexuals by reaching them in publicity campaigns against venereal disease.
102. Consideration should be given to allowing certain rights and benefits to partners of the same sex living together, e.g. in housing loans, inheritance, income tax, probate duty and next-of-kin rights.
103. At this stage, recognition should not be given to homosexual unions as legal marriages, or to allowing homosexual couples to adopt children except in cases of natural relationship.
104. The use of aversion therapy in the treatment of homosexuals should be investigated by the Department of Health.
105. Schools, churches and the media should join in a campaign to change public attitudes to homosexuals.
106. The government should determine and publish a policy for the development of services for handicapped people.
107. Services to the handicapped should be multidisciplinary and integrated within services for the general population.
108. The government should proceed with the follow-up survey of handicapped people based on the 1976 census.
109. The government should support the establishment of an Australian Institute on Mental Retardation similar to the Canadian Institute.
110. The government should encourage and support media and educational programs about the handicapped which show their potentials and abilities.

111. The Department of Health should investigate various methods of developmental screening; an intergovernmental committee should be established to report on the best means of ensuring that every child in Australia between the age of 0 and 5 is regularly screened.
112. Contraceptive programs should pay attention to the woman over 35; such women should be fully informed of their special risk of having a Down's Syndrome child.
113. Where such techniques are appropriate, amniocentesis and counselling should be available to all women who are considered to be at risk of bearing a handicapped child.
114. Genetic counselling should be discussed in school human relationships programs.
115. Genetic counselling facilities should be available throughout Australia.
116. Health authorities should ensure that girls are immunised against german measles.
117. The education of medical, nursing and other professionals likely to come into contact with handicapped people should include counselling techniques, an understanding of the needs of handicapped people and their families and a knowledge of support services available.
118. Maternity hospitals, diagnostic centres and doctors making diagnoses should assist families of handicapped children to receive counselling and support.
119. The Department of Health, in collaboration with the Department of Social Security and relevant State government and private bodies, should write and distribute information booklets on handicaps for professional workers and for families.
120. Ombudsmen should be appointed to all large hospitals to receive and investigate complaints; such ombudsmen should have a full understanding of the needs and problems of handicapped people and their families.
121. Handicapped people should be given an education to enable them to reach their full potential. This should begin in babyhood and extend into adult life.
122. Education Departments should assume responsibility for the education of handicapped children in institutions and hospitals.
123. Education Departments, in conjunction with Health and Social Welfare Departments, should develop early education programs—domiciliary, playgroup and pre-school—suited to local needs.
124. Ways should be investigated of fostering the integration of handicapped children into the normal school system.
125. Handicapped children should receive education in human relationships and sexuality, appropriate to their development.
126. Vocational training and job experience programs should be made available to handicapped adolescents.
127. More specialist teachers should be recruited, trained and used.

128. The government should make more funds available to State governments to enable them to develop support services for families with handicapped members. Such services should be locally available and integrated within the normal range of community services and should include residential accommodation.

129. Handicapped children and adults should be moved out of large institutions into smaller units, cottage homes or hostels.

130. Standards should be fixed and applied to institutions which accommodate handicapped children and adults.

131. Staff caring for handicapped people should be trained.

132. The government should investigate ways of developing, assisting and evaluating self-help movements (such as the Total Care Foundation).



## Annexe VI.A

### List of recent Commissions and Inquiries which have reported on Aboriginal issues

Commission of Inquiry into Poverty, first main report, *Poverty in Australia* (AGPS, Canberra, 1975), pp. 259–60

Commission of Inquiry into Poverty, *A study of Aboriginal poverty in two country towns* (AGPS, Canberra, 1975)

Commission of Inquiry into Poverty, second main report, *Law and poverty in Australia* (AGPS, Canberra, 1975)

Aboriginal Land Rights Commission, *Second report, 1974* (AGPS, Canberra, 1975)

Australia. Parliament. Senate Select Committee on Aborigines and Torres Strait Islanders, *The environmental conditions of Aborigines and Torres Strait Islanders and the preservation of their sacred sites* (AGPS, Canberra, 1976)

Australia. Parliament. House of Representatives Standing Committee on Aboriginal Affairs, *Alcohol problems of Aborigines: Northern Territory aspects* (AGPS, Canberra, 1976)

Commission of Inquiry into Poverty, third main report, *Social/medical aspects of poverty in Australia* (AGPS, Canberra, 1976), pp. 210–50

Office of the Commissioner for Community Relations, Report on inquiries by the Office of the Commissioner for Community Relations into the existence of racial discrimination in northern New South Wales and north Queensland and the combat of that discrimination (June 1976)

## Annexe VI. B

### Recognition of Aboriginal tribal marriages

1. It was submitted to us that recognition should be given to Aboriginal tribal marriages. The question arises from time to time, especially in relation to adoption. At present adoption is usually limited to married couples.

2. Aboriginal tribal marriages are not legally recognised in Australian law. The relationship of the parties may be recognised as a *de facto* relationship for purposes such as social security. Where children are born within such a marriage they are, however, recorded for statistical purposes as nuptial children. They are not otherwise recognised as legitimate and do not come within the *Family Law Act 1975*. There are several problems to be considered in relation to the recognition of tribal marriages. These include:

- (a) the determination that a tribal marriage is a valid marriage (e.g. age, eligibility etc.);
- (b) the recording or procedure for recognition of such marriages;
- (c) the incidents of such marriage (i.e. the obligations between the parties);
- (d) the polygamous nature of some tribal marriages;
- (e) the dissolution of tribal marriages (i.e. whether under tribal law or the *Family Law Act 1975*).

#### *Tribal marriages*

3. Aboriginal marriage customs have been described by A. P. Elkin<sup>1</sup> and by other writers.<sup>2</sup> They include arranged marriages, betrothal of young girls to older men, and the taking of second wives. The rules as to correct marriage and kinship ties are strict in the tribal situation though they cannot always be followed in modern times. The husband usually assumes responsibility for his wife's mother. Some aspects of Aboriginal marriage would not be considered acceptable in the white community, e.g. marriage of very young girls, the taking of second wives and the 'lending' of wives. These factors complicate the question of recognition.

#### **Recognition**

4. The principal problem involved in recognition of tribal marriage would be to establish some authorities to determine whether the marriage was, in fact, a marriage recognised as valid in tribal law. If this question arose for consideration in court, evidence would be required from persons familiar with tribal customs to confirm that the parties were eligible to marry and that any forms, ceremonies or other necessary rituals were complied with. In the absence of court proceedings it might be difficult to determine whether and in what circumstances a tribal marriage had been entered into. It might be possible to raise a presumption from the circumstances of cohabitation<sup>3</sup>, though it may not be appropriate to limit such a rule to Aboriginals.

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1. A. P. Elkin, *The Australian Aborigines* (5th edn, Angus and Robertson, Sydney, 1975), pp. 140 ff.

2. e.g. Ronald M. Berndt, 'They are not men from the stone age', *National Times*, 4 March 1974; R. M. Berndt, 'Tribal marriage in a changing social order', (1960-62) *Uni W & L Rev.* vol. 5, pp. 324 ff.

3. David M. Walker, *Principles of Scottish Private Law* (Oxford Clarendon Press, 1975), pp. 210-12: Marriage by repute.

5. It would be necessary to establish whether a marriage was valid if one party was below the marriageable age fixed by the Marriage Act and whether recognition should be confined to persons living according to tribal conditions. The purposes for which recognition is to be established need consideration. To be consistent, recognition of tribal marriages should be for all purposes, even though proof may sometimes be difficult. Recognition for limited purposes might give rise to fewer problems, but it seems that this may not be a satisfactory solution to all concerned.

### **Recording or registration**

6. The problem of recognition might be simplified if there were provision for recording a tribal marriage by a local registrar on the declaration of both parties. At the least such a record could give rise to a presumption of validity of the marriage.

### **Consequences of recognition**

7. If tribal marriages were recognised generally then it would follow that, for all purposes, the parties would be considered as married to each other. Neither would be free to marry validly another person during the existence of the marriage (except possibly in the case of a polygamous tribal marriage).

8. Would it be necessary to recognise the obligations and rights of married persons according to tribal law? An equally difficult question is whether the parties to a tribal marriage should be regarded as having the obligations prescribed by the Family Law Act. It seems difficult to argue otherwise since there would be little point in providing for recognition unless this consequence were to follow. The imposition of these obligations on parties to all valid tribal marriages might not, however, be welcomed. This suggests that it may be preferable to restrict recognition to cases where the parties apply to record the marriage.

### **Polygamy**

9. Some Aboriginal tribal marriages are monogamous. Others are polygamous.<sup>4</sup> The fact that a tribal marriage is polygamous need not necessarily be a bar to the recognition of the marriage. Polygamous marriages are already recognised for some purposes; under the *Family Law Act* 1975, section 6:

... a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.

The effect of this provision is that proceedings for divorce can be instituted in Australia in respect of the marriage and the court can deal with questions of property and maintenance of the parties, and custody and maintenance of the children of the marriage.

10. While polygamy may not be a bar to recognition of a marriage, there are some difficult questions of policy to consider. Many may think it undesirable to acknowledge or encourage marriages which are invariably polygamous (i.e. where a husband may have more than one wife) because it is contrary to the interests of women and entirely inconsistent with the social values accepted by the community. On the other hand it would seem inconsistent with the general approach of recognising tribal law to refuse recognition to a marriage which tribal law considers valid. We do not know to what extent hardship may be caused to tribally married women who are unable to claim maintenance for themselves. Further evidence would be needed before the recognition of all polygamous marriages could be recommended.

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4. Berndt, 'Tribal marriage in a changing social order', p. 337.

## **Divorce**

11. In some cases Aboriginal marriages are brought to an end by a kind of divorce or repudiation by the husband. If such a marriage had been recorded, problems might then arise as to recognition of the divorce. This is another reason for suggesting that recognition be limited to cases where both parties apply to record the marriage, acknowledging that they propose to be bound by the Australian law of marriage and divorce.

## ***Conclusion***

12. The principal difficulties in the recognition of tribal marriages are, first, the proof of marriage and, secondly, the consequences of such recognition for marital obligations and divorce. Some aspects of family obligation among tribal communities would not readily be recognised or enforced by the white community.

13. It is not entirely satisfactory to recognise one aspect of tribal law without recognising the other incidents which flow from it. To recognise the fact of tribal marriage without recognising other tribal laws relating to family relationships could lead to inconsistencies and anomalies. These would be reduced if recognition were limited to cases where both parties applied to record the marriage. The failure to recognise that parties are married because their marriage is tribal can also lead to anomalies, though there is not a great deal of evidence of this. Where two cultures live side by side, with differing values, it is inevitable that clashes will occur. Nevertheless the fact and status of marriage seem to be an element common to both cultures. Steps could be taken to provide for the recording and recognition of tribal marriages.

## Annexe VI.C

Extract from research report, no. 13 Stress amongst migrant women

*prepared by Eva M. Cox and Jeannie A. Martin for the Royal Commission on Human Relationships, August 1976*

### 1.1 Summary of findings

Women who emigrate to Australia from countries bordering the Mediterranean are trebly disadvantaged. As migrants they suffer from the prejudices of the receiving society. As women they are victims of the inequalities and discriminations which affect the lives of women in Australia. As workers they enter Australian society at its least privileged level.

To compound their problems they bring with them traditional values and life experiences more suited to rural societies than Australia's highly industrialised cities. Their situation as women in their countries of origin equips them poorly for coping with the stress and pressure of the workforce, as they lack either experience or training.

#### 1.1.1 The main findings

##### Workforce participation (4.1)

1. Up to 90 per cent of the migrant women from the ethnic groups we interviewed will spend a substantial part of their lives in the Australian blue collar workforce.
2. They will usually enter it as young married women with children of less than school age.
3. Their highest workforce participation will be in their first 10 years in Australia. However, most will not enter until 2 years have elapsed from their time of arrival.

##### Workforce commitment (4.2)

4. The primary pressure to enter the workforce is economic but the women give a range of other reasons for working. These indicate that working satisfies many non-economic needs. Despite poorly paid occupations with few advancement prospects, many migrant women prefer a working to a solely domestic life.
5. Where women do prefer not to work, the reasons are more likely to indicate a rejection of the work than a desire to stay at home, as work in these cases is likely to be defined as monotonous. This agrees with findings on the male labour force in so far as the work itself is the criterion of satisfaction.

##### Future workforce participation (4.4)

6. Most of the women under 40 who are not working now intend to work in the future. As some have no previous workforce experience or training their entry into the workforce will present problems.
7. The main reasons for non-workforce participation relate to domestic pressures, particularly to lack of child care.

##### Cultural differences (5)

8. The view of the parent role is culturally determined and for some of the groups it differs in style from the prevailing Australian norms. Given adequate surrogate care,

women with children under school age are as likely to want to work as those with older children. Those whose children are in their teens are least likely to want to work. This and other evidence suggests a view of child rearing relatively uninfluenced by the theories of maternal deprivation but expressing a very real concern for the children's physical well-being.

#### **Child care (6)**

9. Migrant women's access to child care services is very limited. The most often used care, private minding, is not their choice but is the most accessible and flexible care available. The preferred form of child care for all groups is government-controlled, professionally run centres. They recognise their children's needs for some language programs at the pre-school stage, which are not met in private minding.

10. Neither pre-school child care centres nor out-of-school centres are open during the hours in which surrogate care is needed by children of shift workers. The early morning period between 6 a.m. and 9 a.m. is not provided for.

#### **Spouse attitudes (7)**

11. The problems of the women are often exacerbated by the attitudes of their husbands. Some of these oppose their wives working and/or their children being cared for by others. They rarely help with housework or child care despite their wives having to work.

#### **Language (8.3)**

12. English language deficiencies limit the options available to these women. This is exacerbated for some groups by their husbands' opposition to their developing language competence. The lack of 'classes' or 'survival skills in English' geared to the needs of women with limited formal education additionally disadvantages them.

# Annexe VI.D

Summary of evidence by Professor Charles Price of the ANU, Demography Department (Evidence pp. 1064–75; Exhibit 60)

*Miscellaneous tables (immigration and settlement) submitted to the Royal Commission on Human Relationships by Charles Price, Department of Demography, Australian National University*

Table I	Settler arrivals and loss and proportions assisted, 1.7.47–30.6.74
Table II	Occupational skill of settlers (per cent) (males only: based on settler arrivals 1949–51, 1967–68, 1971–73)
Table III	Industry groups—30.6.71 (males per cent)
Table IV	Concentration in major urban areas—1971
Table V	Australia—marital status—1971 (population aged 25 and over) per cent
Table VI	Second generation intermarriage, 1965–68
Table VII	Australia—religions—1947, 1971
Table VIII	Marriages in Australia 1947–73 (per cent)
Table IX	Birthplace by highest level of schooling attained, persons not currently attending school, omitting pre-school children, census 1971
See also	Charles A. Price, Research report of the National Population Inquiry, <i>Australian immigration</i> (AGPS, Canberra, 1975)

## *Pattern of migration (tables I & II)*

Since the post-war program began we have had well over 3 million new settlers of whom about 40 per cent have been from the British Isles and over one-fifth have come from southern Europe and another 12 or 13 per cent from eastern Europe. The cultural and family differences between the eastern, southern European and western European/Australian cultural customs provide many of the problems that sociologists, demographers and others who work with immigrants are aware of. Table I gives the number of settlers arriving from each of the main groups and the number who have gone away again. There is a considerable departure of settlers.

Table II shows the occupational skill of the settlers. The ‘unskilled’ column has a high proportion from Malta, Italy, Greece and Yugoslavia. Those southern and eastern European members come largely in the unskilled bracket and many of them have had to finance their own migration. Because of this they immediately hit very big problems on arrival. This is one reason why they have tended to cluster in the inner city areas of Sydney and Melbourne in pretty cheap living conditions. It raises problems and it means that many of the wives are working. There is a considerably higher proportion of eastern and southern European wives working than Australian-born women. We are dealing with families who are trying to cut corners financially. It will be different under the new medical scheme, but up to date many of them have not been insuring themselves medically because they are so short of money. You get the problem of the double and treble jobs. These are immigrant groups who have had a fairly tough time economically because of the way they have been coming in.

**Table I Settler arrivals and loss and proportions assisted, 1.7.47-30.6.74**

Birthplace	1 Settlers arriving	2 %	3 Settler loss	4 SL/SA (3/1)	5 % arriving assisted
British Isles	1 279 550	39.9	273 830	21.4	85
Germany	122 850	3.8	39 840	32.4	77
Netherlands	144 470	4.5	36 650	25.4	68
Italy	356 900	11.1	85 290	23.9	20
Greece, Cyprus	224 430	7.0	50 760	22.6	34
Malta	74 420	2.3	11 500	15.4	62
Yugoslavia	165 860	5.2	24 000	14.5	63
Other east Europe	217 960	6.8	14 260	6.5	76
Others	621 690	19.4	109 860	17.7	35
Total	3 208 130	100.0	645 990	20.1	62
Refugees (Children born in Australia)	385 000	12.0	26 500 (72 000)	6.9	68

Price-Pyne, Demography, ANU

Column 4 shows the settlers lost as a proportion of settler arrivals. Column 5 shows the effects of the government-assisted program. Only 20 per cent of Italian settlers have been assisted; most of them have had to finance their own migration.

**Table II Occupational skill of settlers (per cent) (males only: based on settler arrivals 1949-51, 1967-68, 1971-73)**

Birthplace	Professional, admin.	Skilled crafts	Semi- skilled	Unskilled	Total	
					%	Numbers
1949-51						
Baltic states	7.4	15.1	7.8	69.7	100.0	1 458
Czechs	7.6	24.9	21.7	45.8	100.0	603
Hungarians	7.0	29.3	10.7	53.0	100.0	615
Poles	4.3	24.2	14.2	57.3	100.0	2 601
Russians	4.2	21.9	17.1	56.8	100.0	961
Yugoslavs	4.5	29.0	18.8	47.7	100.0	1 224
Total	5.5	23.4	14.4	56.7	100.0	7 462
1967-68, 1971-73						
Canada	48.1	16.2	25.9	9.8	100.0	2 163
USA	60.0	14.0	19.8	6.2	100.0	6 412
New Zealand	36.0	25.5	28.4	10.1	100.0	6 979
UK & Eire	22.2	34.5	33.5	9.8	100.0	96 574
Germany	16.7	44.8	25.9	12.6	100.0	5 670
Netherlands	21.5	36.6	30.9	11.0	100.0	3 260
Malta	9.2	30.8	22.5	37.5	100.0	3 385
Italy	7.8	31.8	14.9	45.5	100.0	17 039
Greece	6.1	10.8	8.1	75.0	100.0	12 646
Yugoslavia	3.4	14.9	20.0	61.7	100.0	19 384
Total (including others)	19.8	29.1	27.0	24.1	100.0	226 664

Price-Pyne, Demography, ANU



Many of the southern and European wives working still have very strong family customs in which it is important to maintain the family unit. The working wives do not really like the situation and many of them I know would be much happier if there were proper creches at factories for the working wives. Where it has been tried it has worked very well and it makes a great difference to them because they like to be able to pop in and see the kids for morning tea.

At the 1971 census there were about 300 000 eastern Europeans of both sexes, about 550 000 southern Europeans compared with about 280 000 northern Europeans and a bit over a million from the United Kingdom, and so on. Migration from the middle east and further east in Asia has been going up in the last 5 or 6 years quite considerably. That brings the same kind of family problems as with the southern and eastern Europeans, because again the family loyalties are very strong.

Table III shows the concentration of certain migrant groups in industry. This puts in statistical form what everybody knows in general, the big proportion of people from Italy and Greece, for example, in manufacturing, and in the case of the Italians, in the construction industries, far more than with other groups.

### *Concentration of migrants (tables III & IV)*

**Table III Industry groups—30.6.71 (males per cent)**

Industrial group	Australia	UK Eire	Italy	Greece	Germany	Yugo- slavia	Other
Primary	10.7	2.7	8.3	2.2	2.2	3.1	3.0
Mining	2.0	2.1	0.9	0.5	2.6	1.7	2.0
Manufacturing	21.3	31.0	33.8	44.0	35.3	47.9	33.4
Construction	9.9	11.6	20.6	9.1	15.7	16.9	11.8
Transport	7.0	5.9	4.1	4.6	4.8	3.0	5.5
Commerce	23.2	21.8	14.8	19.8	18.7	9.2	20.1
Public services	11.3	10.0	5.1	3.6	8.0	4.2	7.9
Recreation etc.	9.2	10.4	5.1	6.7	7.9	4.1	10.3
Other	4.0	2.9	6.2	7.6	3.2	8.0	4.2
Unemployed	1.4	1.6	1.1	1.9	1.6	1.9	1.8
Total in workforce	100.0	100.0	100.0	100.0	100.0	100.0	100.0
(Nos—000s)	2 643.7	380.2	127.2	66.4	45.5	57.4	318.2

Census 1971

Table IV shows the concentration in the major urban areas. All the immigrant groups are more concentrated in the cities than the native born, particularly eastern Europe, southern Europe, western Asia (Egypt, Lebanon, Turkey etc.) and 'other Asia'. They are very concentrated in the major urban areas.

Urban areas are the capital cities plus Newcastle, Wollongong and Geelong.

Sex ratios are normally calculated on the number of males per hundred females.

For Australia the sex ratio is 98; it means that there are more women than men. The eastern European figure is 133.1, this is very large because of some of the old displaced persons who came out; there was a surplus of males. Some of them found settlement and assimilation difficult and never got married. It raises problems of the lonely old eastern European man who is now getting on and has not many family ties.

**Table IV Concentration in major urban areas—1971**

Birthplace	Numbers	% of foreign born	Sex ratio males (per 100 females)	% in major urban areas
Australia	10 176 320	..	98.0	60.5
New Zealand	80 466	3.1	105.7	72.3
Other Pacific	17 026	0.7	101.5	71.5
British Isles	1 088 210	42.2	107.1	77.0
Northern Europe	281 874	10.9	115.1	74.7
Eastern Europe	301 407	11.7	133.1	86.5
Southern Europe	538 254	20.9	118.8	86.3
West Asia <sup>(a)</sup>	70 078	2.7	128.3	96.3
Other Asia	112 107	4.3	120.0	83.7
Africa <sup>(a)</sup>	33 709	1.3	107.7	83.0
USA & Canada	42 873	1.7	126.1	71.4
Total foreign	2 579 318	100.0	114.3	80.5
Total	12 755 638		101.1	64.5

(a) West Asia = Turkey, Syria, Lebanon, Israel, UAR (Egypt); Africa excludes UAR.  
Price-Pyne, Demography, ANU

***Marital status, intermarriage and religion (tables V, VI, VII and VIII)***

Table VII: the three religions most affected by immigration are Catholic, Lutheran and Orthodox. Both Catholic and Lutheran faiths were well established here before the big migration began. Many of their welfare and charitable organisations and so on were able to expand to cope, at any rate to some extent, but by no means all.

In the Orthodox religion there must be well over 350 000 now, which is a tremendous increase. The churches' welfare organisations were quite inadequate to meet with this huge increase. That is why the Orthodox were hit with so many welfare problems associated with churches. The Orthodox are very loyal to their church communities and tend to look to them for a lot of help. They are not equipped to give it. A great deal of the old Department of Immigration grants-in-aid social work programs were directed to Orthodox peoples because they had least resources of their own.

One of the factors involved in intermarriage is religious affiliation. Table VIII shows the proportion of intermarriage and the marriage patterns over a period. The broad picture is that there is a considerable amount of intermarriage between the Australian-born population and migrants from north-western Europe, particularly the United Kingdom.

When we come to eastern Europe, roughly one-third marry within their own group, about one-third marry Australian and about one-third marry other European. I think this is reflecting the way the displaced persons and other refugee groups find they have a lot in common, and there tends to be intermarriage there. If you look at the Italian and Greek you see the high rates of marriage within the group and low rates of marriage with others, particularly for women. Basically speaking, the southern European groups are not breaking up very fast through intermarriage. They are maintaining their ethnic homogeneity through their marriage system.

In the case of the Greeks who have the lowest intermarriage rate of all, this again reflects very largely their Orthodox religion, because although some of them may not be very outwardly loyal nevertheless they have this feeling that they belong to the Orthodox world and want to marry within their church if they can. There is this big connection between the marriages and religious faith that we have to take into account.

Table V shows marital status figures. The divorced and separated figures are probably higher because it looks as if people who are actually living in de facto relationships return themselves in the census as being married. The Italian and Greek figures under divorced and separated are much lower than the other groups. That reflects their particular religious and cultural background. Divorce and separation are far less acceptable. Separation in southern European groups is usually far more traumatic altogether than with people to whom divorce and separation are rather more familiar.

Wherever you get a high 'never married' male figure with non-British migrants, there are likely to be difficult problems. These are the lonely men who gamble and drink a lot and live in hostels in rather unhappy conditions. That is a familiar welfare problem to those of us who work in the immigration area. You can get some clue to it from there.

**Table V Australia—marital status—1971 (population aged 25 and over) per cent**

Birthplace	Never married		Divorced, separated	
	M	F	M	F
Australia	12.7	8.2	4.3	4.7
New Zealand	17.6	11.3	6.2	6.1
British Isles	9.5	5.7	4.0	4.1
Germany	15.0	4.2	4.8	6.2
Netherlands	8.5	3.1	3.3	3.4
Poland	12.4	2.4	6.7	5.3
Yugoslavia	14.0	3.1	3.8	3.7
Italy	9.5	2.1	1.6	1.3
Greece	9.8	3.2	1.3	1.5
Malta	12.4	4.2	2.1	2.1
Other Europe	16.0	4.0	6.8	6.3
Other countries	16.4	8.1	3.5	4.1
Total	12.1	7.4	4.2	2.3

Census 1971

**Table VI Second generation intermarriage 1965–68**

Origin	Bridegrooms			Brides		
	Same origin	Aus-tralian	Other	Same origin	Aus-tralian	Other
Greek	43.5	36.5	20.0	61.6	14.9	23.5
Italian	30.6	49.8	19.6	62.5	23.6	13.9

Price-Pyne, Demography, ANU

**Table VII Australia—religions—1947, 1971**

Denomination	Numbers			Percentages			Per cent increase
	1947	1971	Increase	1947	1971	Inc.	
Anglican	2 957 032	3 953 204	996 172	39.0	31.0	19.2	33.7
Methodist	871 425	1 099 019	227 594	11.5	8.6	4.4	26.1
Presbyterian	743 540	1 028 581	285 041	9.8	8.1	5.5	38.3
Baptist	113 527	175 969	62 442	1.5	1.4	1.2	55.0
Congregational	63 243	68 159	4 916	0.8	0.5	0.1	7.8
Churches of Christ	71 771	97 423	25 652	1.0	0.8	0.5	35.7
Salvation Army	37 572	65 831	28 259	0.5	0.5	0.5	75.2
Catholic	1 570 446	3 442 634	1 872 188	20.7	27.0	36.2	119.2
Lutheran	66 891	196 847	129 956	0.9	1.5	2.5	194.3
Orthodox	17 012	338 632	321 620	0.2	2.7	6.2	1 890.5
Seventh Day Ad.	17 550	41 617	24 067	0.2	0.3	0.5	137.1
Other Christian <sup>(a)</sup>	142 927	482 463	339 536	1.9	3.8	6.6	237.6
Hebrew	32 019	62 208	30 189	0.4	0.5	0.6	94.3
Moslem	e 2 500	22 311	e 19 811	..	0.2	0.4	793.4
Other	e 2 043	14 404	e 12 361	..	0.1	0.2	605.0
Indefinite	18 708	29 413	10 705	0.3	0.2	0.2	57.2
No religion	26 328	855 676	829 348	0.4	6.7	16.0	3 150.1
No reply	824 824	781 247	-43 577	10.9	6.1	-0.8	-5.3
<b>Total</b>	<b>7 579 358</b>	<b>12 755 638</b>	<b>5 176 280</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>68.3</b>

(a) 1971: includes Brethren 22 963, Jehovahs Witnesses 35 752, Protestant undefined 243 202, other Christian 180 546.

e = estimate

Price-Pyne, Demography, ANU

**Table VIII Marriages in Australia 1947-73 (per cent)**

Birthplace		Bridegrooms marrying brides born in				Brides marrying grooms born in			
		Same country	Aus- tralia	Other	Nos	Same country	Aus- tralia	Other	Nos
England and Wales	A	16.0	76.7	7.3	44 779	22.9	62.0	15.1	31 216
	B	18.0	69.7	12.3	15 447	20.3	62.5	17.2	13 674
	C	19.2	69.3	11.5	24 353	21.8	61.3	16.9	21 441
	D	19.0	68.8	12.2	40 539	23.0	59.5	17.5	33 434
Netherlands	A	42.3	44.5	13.2	7 728	61.7	20.2	18.1	5 301
	B	30.2	55.2	14.6	4 785	37.5	39.7	22.8	3 852
	C	20.0	62.2	17.8	5 999	24.4	51.5	24.1	4 938
	D	12.8	69.8	17.4	8 360	17.1	59.3	23.6	6 258
Germany and Austria	A	41.3	37.8	20.9	9 742	47.0	14.7	38.3	8 552
	B	33.4	43.4	23.2	6 119	38.6	28.9	32.5	5 301
	C	22.0	55.0	23.0	8 422	22.6	46.1	31.3	8 214
	D	13.9	64.6	21.5	12 084	18.5	51.3	30.2	9 093
Czechoslovakia	A	17.0	46.1	36.9	2 980	46.3	10.1	43.6	1 092
	B	10.9	47.6	41.5	651	24.1	26.1	49.8	295
	C	16.1	45.8	38.1	583	25.3	38.2	36.5	372
	D	29.7	39.0	31.3	1 012	45.7	18.5	35.8	656

Birthplace	Bridegrooms marrying brides born in				Brides marrying grooms born in				Nos
		Same country	Aus- tralia	Other	Nos	Same country	Aus- tralia	Other	
Baltic States	A	44.5	32.6	22.9	3 648	55.6	13.2	31.2	2 917
	B	31.0	43.1	25.9	1 091	37.7	32.1	30.2	897
	C	21.4	49.8	28.8	1 052	34.1	37.4	28.5	660
	D	22.1	46.8	31.1	666	36.5	31.3	32.2	403
Poland	A	40.1	30.9	29.0	8 573	67.2	7.3	25.5	5 121
	B	43.5	28.6	27.9	1 948	56.0	11.8	32.2	1 514
	C	36.2	28.6	35.2	1 653	48.7	17.2	34.1	1 231
	D	34.0	35.4	30.6	1 665	39.1	20.3	40.6	1 450
USSR and Ukraine	A	24.1	21.9	54.0	2 870	37.5	10.3	52.2	1 841
	B	25.4	28.2	46.4	735	33.1	16.0	50.9	564
	C	20.4	30.6	49.0	614	30.5	19.7	49.8	410
	D	17.2	31.0	51.8	477	24.0	18.5	57.5	341
Yugoslavia	A	43.6	26.4	30.0	5 700	64.1	6.9	29.0	3 882
	B	43.0	24.9	32.1	4 090	73.3	6.3	20.4	2 401
	C	45.1	26.6	28.3	4 742	75.1	6.8	18.1	2 848
	D	66.2	18.9	14.9	8 948	83.4	6.3	10.3	7 099
Malta	A	58.2	33.3	8.5	3 075	75.8	11.2	13.0	2 361
	B	54.7	33.3	12.0	2 178	65.8	17.7	16.5	1 811
	C	58.7	30.0	11.3	3 314	64.4	20.8	14.8	3 018
	D	43.3	44.0	12.7	4 077	51.1	29.3	19.6	3 454
Italy	A	66.2	26.1	7.7	23 169	90.4	4.6	5.0	16 964
	B	70.9	20.3	8.8	14 089	91.2	3.5	5.3	10 957
	C	65.8	23.7	10.5	13 367	86.8	7.4	5.8	10 122
	D	52.9	34.8	12.3	17 165	79.1	12.7	8.2	11 481
Greece and Cyprus	A	84.6	11.4	4.0	13 577	89.7	2.1	8.2	12 803
	B	91.8	5.3	2.9	12 505	91.9	1.6	6.5	12 500
	C	91.9	5.0	3.0	15 313	92.4	1.7	5.9	15 095
	D	81.0	12.6	6.4	12 176	88.6	4.2	7.2	11 131
Asia <sup>(a)</sup>	A	27.3	55.7	17.0	6 663	33.8	37.8	28.4	5 381
	B	28.2	55.1	16.7	2 797	35.5	37.0	27.5	2 224
	C	31.7	50.4	17.9	3 635	34.8	33.6	31.6	3 305
	D	40.4	41.9	17.7	6 988	42.2	30.7	27.1	6 687
North America	A	2.9	82.6	14.5	2 553	7.5	61.2	31.3	969
	B	5.2	76.0	18.8	805	11.6	56.2	32.2	363
	C	7.9	73.2	18.9	1 524	13.3	62.2	24.5	905
	D	10.4	70.0	19.6	3 396	17.5	55.4	27.1	2 017

A=1947-60 B=1961-64 C=1965-68 D=1969-73

(a) Excluding Indonesia, Cyprus, Israel and Lebanon.

Price-Pyne, Demography, ANU.

Table IX Birthplace by highest level of schooling attained, persons not currently attending school, omitting pre-school children, census 1971

Highest level of schooling	Birthplace							Total population
	Aus- tralia	UK and Eire	Italy	Greece	Germany	Yugo- slavia	Other	
	per cent							
<i>Males</i>								
1-5 Primary	21.9	17.6	58.9	62.0	9.4	39.6	21.1	27.5
6-8 Lower secondary	47.2	31.0	25.0	19.3	45.6	33.5	28.1	29.3
9-10 + Higher sec. & tertiary	23.5	43.7	12.5	16.0	38.0	23.5	38.9	35.2
Degree	6.7	7.5	1.0	0.6	6.8	1.6	10.5	6.9
0 Never attended school	0.7	0.2	2.6	2.1	0.2	1.8	1.4	1.1
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Nos	3 002 864	445 009	140 289	71 831	49 438	59 521	357 314	1 123 402
								4 126 266
<i>Females</i>								
1-5 Primary	23.0	19.2	65.0	71.5	11.6	49.9	24.0	30.4
6-8 Lower secondary	50.2	34.2	20.8	13.2	49.2	28.8	30.1	30.5
9-10 + Higher sec. & tertiary	21.7	42.4	8.1	9.5	34.2	16.6	37.1	33.1
Degree	4.6	4.0	0.6	0.3	4.9	1.0	6.7	4.1
0 Never attended school	0.5	0.2	5.5	5.5	0.2	3.7	2.1	1.9
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Nos	3 196 148	415 164	113 112	65 464	48 786	42 619	292 203	977 348
								4 173 496

*Note:*

1-5 Primary is schooling up to age 12 years.  
 6-8 Lower secondary schooling age 12-15 years with no certification at end of time.  
 9-10+ Higher sec. and tertiary is attending secondary with certification and attending tertiary.  
 Degree is obtaining a tertiary degree.

### *Educational level (table IX)*

Both the male and female southern Europeans have been the lowest working class people. Their level of education is very much lower, they have had far fewer years of schooling; 58 per cent Italian-born and 62 per cent Greek-born males had no more than primary school. The Germans and so on are very high; quite a large proportion in the high secondary and tertiary. This is a very good indicator of the kinds of problems that are affecting the different immigrant groups.

### **Conclusion**

The level of assistance, the skill, the urban concentrations, the education and the other things mentioned show why so many problems are hitting the eastern and southern Europeans. It is a bit too early to talk about Asia.

### *Children*

Immigrant children can be divided into two general groups; first, the children of mixed marriages, one Australian and one foreign-born parent; and the other, the children of two foreign-born parents.

There are nearly 300 000 of mixed parentage now: one Australian born, one foreign born. The number of children where the mixed marriage concerns southern and eastern European is probably about 70 per cent. Some of those children have difficult problems because very often there is a real cultural difference between the husband and the wife. The young couple often think when they get married that they are going to make allowances for each other's cultural and language differences. Sometimes problems crop up that they had not foreseen. For example, an Egyptian-Greek man marrying an Australian girl of Presbyterian origin; they thought they could cope with cultural differences, but as soon as the first child arrived, the Greek father felt the pull of the old Greek family system which the Australian girl could not take. There is tremendous pressure from the wider family group with the mother-in-law dictating how the children are to be brought up. This happens quite often. There are some successful marriages. Some Australian girls make a point of learning Greek or Italian and really fit into their husband's group and have very successful marriages. There are, however, a lot of difficult marriages with this background.

Children have a rough time because they are being brought up in homes which will either break up altogether or else there is this colossal antagonism going on the whole time between two cultures. For example, chaperonage; the Italian father says, 'No, my daughter is not to go out to the pictures with this young man by herself'. The mother waits until he is doing night work and says to the daughter, 'Off you go fast'. If the husband happens to come back early and finds out there is a most fearful row.

This kind of situation arises quite often. I think we are going to see more of it. Marriage guidance organisations seem to be getting more of these marriages and more children come from this background.

The other group of children who are from foreign-born parents have quite a different set of problems. They are not faced so much with disunity between the parents, they are faced with the difference between the parental views in the home and the wider society around them. The southern European parents tend to want to run the home in the traditional southern European way. There are about 300 000 of these.

In the United States, in the early part of the century after the big migrations, many of the children rebelled against their parents and formed delinquency gangs. There is a great deal of literature on it. The children expressed their indignation against the old-fashioned and irrelevant, as they thought, ways of life of their parents. We do not seem to have had quite so much of that form of delinquency. We have had pockets of

second generation delinquency but not in that way, not on such a large scale. Nevertheless there are all sorts of stresses and strains here and children are sometimes in a real quandary to know which set of values they are going to follow.

Suppose one is in the Greek area in Redfern, Sydney. Corporal punishment is traditional in the Greek home but not in the schools in Redfern. The only person in the school normally who is allowed to administer corporal punishment is the headmaster, so Greek children have enormous respect for the headmaster because he has the same powers as the father in the home. They have very little respect for the other teachers because they cannot just wallop them straight off the cuff. I do not think education authorities have realised this but in fact it makes a big difference to the way Greek children regard their teachers.

There are many other things. Some of the second generation children have handled the matter extremely well. They realised the position they were in. They are caught between two worlds. They found their own compromise solution and they formed their own Australian-Greek, Australian-Italian clubs where they have a mixture. There is one Australian-Greek club which is very successful in Melbourne where they said to the parents: 'We are not going to live in your old-fashioned ways, we want to have ours, more Australian style, but we will undertake to see things are properly done. Cousins will chaperone cousins, there will be no hanky-panky and people going out to cars.'

The parents found to their dismay many of their sons were marrying Australian girls and tending to be lost to the Greek community because they could not be bothered to go through the long business of courting in the old Greek style, going and sitting in the living room with the aunt and mother clad in black watching them the whole time.

The parents decided it might be worth trying to keep their sons within the Greek community by letting them have a bit more freedom. They worked this compromise; it was not like Australia, not nearly as free, but it was still within the Greek cultural tradition. Things like that work very well but not all immigrant children find these kinds of compromise solutions to their problems. You get very tragic cases of children breaking away and leaving deserted old parents. The traditional support has vanished overnight. Considerable numbers of families have gone back to southern Europe particularly recently; one of the major reasons they give is this:

We want to get out of Australia before our children reach high school because we know we are going to have these frightful rows and disagreements. They are not so bad in primary school but we will go back to Greece before they go to high schools.



**Part VII**

**Rape and other sexual offences**



# 1. Introduction

1. This part is concerned not only with rape, but also with incest, statutory rape and other sexual assaults falling short of rape. These offences raise similar questions of principle and need to be considered together.

2. The terms of reference require the Commission to inquire into, and report upon, *inter alia*, 'the legal and sexual aspects of male and female relationships'. To fulfil these terms we consider the place of the criminal law in sexual relationships, and analyse those sexual activities which are, or should be, proscribed by law. We received submissions on many issues related to the social and legal aspects of rape and other offences.

3. Rape has become one of the most controversial of all crimes in recent years, and we have examined the reasons for this. Undoubtedly the main factor has been the emergence and the rapid development of groups concerned with the status of women in the community. To many of these groups, the concept of rape, and the treatment of rape victims, epitomises the way our society tends to relegate women to the position of chattels. Other organisations take a less extreme view, but nevertheless express concern at the extent to which the victim of rape becomes in practice the victim of the society which has professed to set its face against rape, and which in fact imposes very heavy penalties on those convicted of the crime. The reform of the laws relating to rape, and the education of the community in its attitudes towards the crime, has become one of the main aims of many women's organisations and other concerned groups. These groups have also established rape crisis centres in several cities. We examine in some detail the criticisms which have been levelled at the existing laws and procedures relating to rape, the extent to which these criticisms are justified, and the manner in which they might be met without making unwarranted inroads into the rights of the person accused of committing rape.

4. Another aspect of rape is the increasing community concern at the extent to which this crime goes unreported. This concern may well be due, at least in part, to the increased community awareness of the crime engendered by the women's movement. Whatever the basis for it, the concern is clearly justified. In this part some of the estimates of unreported rape will be examined, together with possible reasons for failure to report the crime. Dr Paul Wilson carried out a research project for the Commission on the incidence and circumstances surrounding unreported rape.<sup>1</sup>

5. The growing interest and concern in the subject of rape has resulted in investigations and reports into rape laws and procedures, both in England and in a number of Australian States. These reports and papers will be examined, as will some of the sexual offences laws which have recently been enacted in the US.

6. The main theme which we pursue is that there is a need for a completely new approach to sexual offences. Both in the legal and the social context, too much emphasis has been placed upon the sexual aspect of rape offences, and too little attention has been given to the acts of aggression which frequently accompany them. We will be suggesting that, except in those areas where the unique position of the victim of sexual offences requires that special protective measures be provided, sexual offences should be treated, as nearly as possible, in the same way as non-sexual offences.

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1. P. Wilson, *The other side of rape*, Commission research report, no. 9, 1977.

## *Terminology*

### **The victim**

7. In most recent texts on rape, the woman is described as the victim, although in legal contexts she is more frequently called 'the complainant' or 'the prosecutrix'. It would strictly be more accurate, particularly when dealing with legal processes, to refer to her as 'the alleged victim'. As this is a cumbersome phrase, we propose to adopt the simple description of 'the victim'. This does not denote our acceptance that in every case the complaint is justified.

### **The offender**

8. We will describe him as 'the accused' or 'the defendant' when dealing with his trial and with legal processes leading up to his conviction. In other contexts he will be referred to as 'the offender'.

## 2. Rape and society

1. Attitudes towards rape, and the parties involved in it, vary greatly from those who believe that rape is an act of male aggression towards women to those who believe that there is no such thing as rape and that any woman who complains of rape must have been co-operating with her attacker.
2. Community attitudes are important because they can contribute to the commission of the crime itself and because they may aggravate the distress and humiliation of the victim. We consider separately attitudes which contribute to the occurrence of rape and those which aggravate its effects. There is, however, some overlap; the attitude that women want to be raped can affect the commission of the offence as well as the treatment of the victim.

### **Contributory or causative factors**

3. There is a substantial lack of understanding about rape in our community. Rape is often seen to be a sexual act, rather than a violent one: the offender is perceived as giving vent to his uncontrollable sexual lusts in a way that cannot wholly be condemned. Similarly, the victim is seen to be less of a victim and more of a partner, if not a completely voluntary one, in an act which is essentially sexual in its nature.
4. This may be true in some situations. Just as sexual behaviour itself develops progressively in the growing adolescent, a sexual relationship between a couple develops sometimes rapidly and sometimes more slowly. The man and woman may see the situation differently. A woman may be prepared to take part in sexual activity short of intercourse, a man may expect that her willingness will extend the whole way. The law is concerned with the question whether she actually consented to intercourse or whether he reasonably thought she consented. Where parties have a consensual sexual relationship, whether it develops in the course of one evening or over a period, there are real problems in disentangling the legal issues.
5. The situation described is, however, only one aspect of rape and probably represents only a minority of cases. Most rape cases involve some degree of aggression and violence.
6. Part of the difficulty surrounding rape is that the law provides only the one offence to deal with situations which range on the one hand from a consensual relationship between parties known to each other, where the male goes further than the woman intended (or thought she intended), to, on the other hand, the situation where a stranger attacks a woman and uses violence or weapons to force intercourse with her. Since women are not inherently averse to sexual relations and do consent to such relations which are not in themselves unlawful, it is important to be sure the victim did not consent. However, consent is obviously of little relevance when the woman has been brutally attacked. Thus the term 'rape' covers too much—it does not distinguish serious cases from slight ones.

7. The view that many rape cases involve aggression and violence is supported by such studies as those considered by Menachem Amir in his book *Patterns in forcible rape*, a substantial survey of reported rapes listed in the Philadelphia police files in 1958–60; it correlates and discusses various other studies dealing with rape offences and rape offenders. In relation to the latter, Amir said:

These studies indicate that sex offenders do not constitute a unique clinical or psychopathological type; nor are they as a group invariably more disturbed than the control groups to which they were compared. The typical rapist . . . was found to have a normal personality and normal sexual instincts as measured by his choice of victim for sexual gratification. However, almost all of the studies show that he has a pronounced tendency to be impulsive, aggressive and violent. It is this fact which makes him a danger to the community.<sup>1</sup>

Other factors mentioned as important are the social environment, peer encouragement and alcohol.

8. According to the psychiatric theory of rape causation, which is now falling into disrepute, the commission of sexual offences, including rape, is the expression of some personality disturbance. Various types of disturbances have been suggested, with various different causes. It is difficult, however, to find statistical support for any of them, and there is a tendency in recent times to look to social factors, rather than psychological ones, in searching for the causes of rape.<sup>2</sup>

9. Rape is not a new phenomenon but there is some evidence of an increase in its occurrence and there is certainly greater concern about the social factors contributing to the commission of it. Among those suggested as relevant are changing social patterns and values in much of modern urban society; secondly, the emphasis on stereotyped sex roles in society; and thirdly, the growth of permissiveness, and in particular the increasing availability of pornography accompanying the relaxation of censorship laws.

### *Changing social patterns and values*

10. Amir contends that subcultures oriented towards violence, aggression and similar anti-social activities have become increasingly active in modern urban society. Although these subcultures are not uniquely oriented to rape, they are prone to violence, including sexual violence against women, and a large number of rapes are committed by these groups or by their members.<sup>3</sup>

11. In spite of major differences between Australian and American society, there is much to support the proposition that similar breakdowns in our own society are at least contributing to the apparent upsurge here in the commission of rape. Statistics of reported rape show a significantly higher rate in the city than in the country. We appreciate that this might partially reflect the fact that victims in small rural communities might be more reluctant to report the offences than victims in cities. Other statistics support the general proposition that the rape offender is usually young, single, ill educated and socially deprived. It is also supported by such information as we have relating to 'pack' rape. This appears to be a relatively recent phenomenon, having been almost unheard of only 20 years ago. The intervening years have seen the formation and growth of various groups, amongst them the 'bikies'. Group sex has become an established practice amongst some of these groups.

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1. Menachem Amir, *Patterns in forcible rape* (University of Chicago Press, 1971), p. 314.

2. See e.g. *ibid.*, p. 320.

3. *ibid.*, p. 322.

It is clear that group sex and 'pack' rape are inextricably connected: a survey conducted at Melbourne University showed that whereas 64 per cent of 'pack' rapists had previously been involved in group sexual activities, only 17 per cent of 'solo' rapists had any group sexual experience.<sup>4</sup>

### *The emphasis on stereotyped sex roles*

12. The traditional roles set for men and women in our society are said to be not only conducive to rape situations, but to be a major cause for the commission of this crime. The male is expected to be dominant, aggressive and the initiator of sexual activity. The female is:

. . . taught to conceive of herself as more or less permanently passive, weak, childlike, mindless, and in need of economic and emotional dependence upon men.<sup>5</sup>

13. Sexual aggression is seen to be not only a legitimate expression of masculinity, but in some situations a laudable one, enhancing the offender's status amongst his peers. Mr H. F. Purnell, QC, senior public defender for NSW, who has been involved in 'hundreds' of rape cases<sup>6</sup>, said in his written submission:

Rape is an offence these days usually associated with youth. Involvement of youths on many occasions results from an attempt to gain status within the peer group.

Frequently the youth involved is a person of grossly deprived background and very frequently he is a person of little or no moral training. In addition one often finds he is a person of little sexual experience.<sup>7</sup>

14. In contrast to the acceptance of the overt nature of masculine sexuality, both men and women are socialised into thinking that 'good girls' do not respond too readily or eagerly to a man's sexual demands. It follows that a woman who reacts adversely to a man's sexual advances is thought to be conforming to her role rather than expressing her real wishes in the matter.

15. When this already ambiguous framework is superimposed onto a system of dating, in which it is more or less expected that certain sexual favours will be exchanged for material benefits, a potentially explosive situation emerges. Amir shows that amongst rapes which were 'victim precipitated', in the sense that the victim was perceived by the offender as inviting sexual contact, there was significantly more 'roughness' used against the victim, and she was substantially more likely to be subjected to sexual humiliation than was the victim in other cases.<sup>8</sup>

16. This supports the view that rape is not merely an expression of the offender's sexual desires, but is an aggressive act, frequently aimed at degrading and humiliating the victim.

17. The ambivalence of our society about sexual matters, and particularly about female sexuality, must have much to do with the myth about rape fantasies.

18. It is a common notion that women secretly want to be raped, and that they express this desire by indulging in rape fantasies, with themselves as the victim. Whether or not this is so, and there is some evidence to the contrary,<sup>9</sup> the rape fantasy is totally unrelated to the violence and humiliation of an actual sexual attack.<sup>10</sup>

4. E. J. Hodgins, I. H. McFadyen, R. J. Failla and F. M. Daly, 'The offence of rape in Victoria', *Australian and New Zealand Journal of Criminology* 5, 4 (1972), p. 225.

5. Weis and Borges, 'Victimology and rape: the case of the legitimate victim', *Issues in Criminology* 8, 2 (1973), p. 81.

6. Evidence, p. 2642, Mr H. F. Purnell, QC.

7. Submission 1206, *ibid*.

8. Amir, p. 274.

9. Wilson, Commission research report, no. 9, pp. 6-8.

10. Dr Judy Gilley, 'New society' no. 28, ABC broadcast, 13 August 1974.

19. A lack of understanding about rape itself, and about the victim's role in it, may have a part in the rape joke which reinforces the view that women, although not wanting to consent to intercourse, really want to be raped. Ms Alicia Lee, who gave evidence on behalf of the Sydney Rape Crisis Centre, raised this issue and gave the following as an example:

It was midnight when the phone rang at police headquarters. The desk sergeant answered and a shrill voice reported: 'There's a sex maniac in my house'.

'Try to be calm, lady', the cop said reassuringly. 'We'll have a patrol car there in a few minutes'. 'Oh, that's not necessary', the caller chimed. 'Just send somebody around to pick him up in the morning'.<sup>11</sup>

In her view, and in ours, the general reaction to such a joke shows how readily we accept the view that women enjoy being sexually attacked. Ms Lee also considered that the media depiction of women reinforces the general attitude about the availability of women for men to use.

20. Ms Jenny Pausacker, from the Rape Crisis Centre in Melbourne, thought that attitudes towards sexuality constituted the main cause of rape and that rape might be eliminated altogether by the removal of preconceived sexual roles. She said:

I think the main cause of rape is precisely the existing relationship between men and women in our society. A changing of that attitude is the only way rape will be stopped. I am confident it can be stopped. There is no other system that can promise that in any way. Really nice people say: 'After all, rape is natural. It has always happened and always will happen'. Our group refuses to believe this. It is nasty and it can be stopped.<sup>12</sup>

21. While it may be over-optimistic to hope for the elimination of rape, a better understanding by men and women of each other's sexual nature and an easing of tension between the sexes must be desirable goals. To this end, a better system of sex education is seen as an urgent need<sup>13</sup>, with emphasis on communication and human relationships. Many young people do not understand fully the content of rape laws or the effect of overbearing the girl's will in the matter; aspects of the law should be included in education.

22. Ms Pausacker thought that sex education should include information about rape and its consequences:

You get a situation where everybody knows they should not get into cars with strange men. They do not know what the strange men are going to do with them afterwards. It is always strange men—you do not get the idea that the 21-year-old captain of the football team, taking you out to the commencement ball, might be able to get you into a car. In not including rape as part of the spectrum of sexuality the whole sex education system is perpetrating a great wrong.<sup>14</sup>

Education should concentrate on the roles and relationships of male and female and on what is involved in a sexual relationship from both sides. Girls need to learn about the male response and what the effect is on him if the girl declines to go past a certain stage. Boys need to learn that girls who are willing to take part in sexual activity may nevertheless not want to have full intercourse. Both need to learn that 'rape' as now defined includes not only situations where the male goes too far or too fast, but also the situations where the girl is attacked unexpectedly and without provocation. This was supported by an 'open house' discussion in Canberra in which we were told about a visit by members of the Rape Crisis Centre to one of the local schools. The

11. Evidence, p. 76, Ms Alicia Lee.

12. Evidence, p. 499, Ms Jenny Pausacker.

13. Submission 1206, Mr H. F. Purnell, QC.

14. Evidence, p. 498, Ms Jenny Pausacker.



subject of rape was met initially with snickering and joking amongst the male students. They were told about the humiliation and trauma suffered by rape victims, and were shown a film which illustrated the violence with which the crime is associated. By the end of the session their attitude had visibly changed to one of sympathy and concern.

23. Any discussion about education, and about the possibility of averting rape, must include a consideration of the value of self-defence. Opinions vary greatly as to whether a woman, confronted with a sexual aggressor, should submit to the attack or should try to defend herself. If she does the latter, she might be subjected to even more violence than otherwise; Amir found that in the majority of cases involving brutal beatings the victim either resisted or fought her attacker.<sup>15</sup> On the other hand, it is possible that many women are too submissive when apprehended by an assailant. This is probably largely due to fear, partially due to lack of knowledge of self-defence techniques, and partially due to an instinctive reaction.<sup>16</sup>

24. This was supported by our discussions with a woman who had been threatened at gunpoint, and had submitted to her assailant. He was later acquitted of rape. Subsequently she learnt of another woman who had been threatened by the same man, but who had stood up to him. He had run away and left her unharmed.<sup>17</sup>

25. Our research report considers some recent American studies which reach differing conclusions about the value of resistance and concludes as follows:

It might well be that effective physical resistance—that suggested by feminist groups or karate experts—is the best position for potential rape victims to take. But the problem still remains of providing women with sufficiently accurate indicators of different types of rapists to permit them, when confronting a rape situation, to take appropriate preventive measures. Until clear data are available on this issue advice on the use of physical resistance in rape attacks must be given cautiously.<sup>18</sup>

26. A woman who is sexually attacked is very much on her own. She would often be helped by previous information or advice about the effects of resistance, but she alone has to assess the situation. Often she has no choice as she has no skill in self-defence.

27. Ms Pausacker considered that self-defence should be taught to girls in more schools.<sup>19</sup> We agree that women would gain substantially by acquiring skills in self-defence. This would enable them to use their discretion, if the occasion were to arise, on whether to fight back or to submit.

### *Pornography*

28. The Commission received submissions suggesting that there is some link between the availability of pornography and the incidence of sex crimes, particularly rape. The Rev. Fred Nile of the Festival of Light gave evidence supporting the existence of such a link.<sup>20</sup> He relied upon two sources. One was contained in a document entitled 'Rape Violence! Pornography'<sup>21</sup>, and the other consisted of research which had been carried out by Dr John Court, a clinical psychologist at Flinders University in South Australia.

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15. Amir, p. 170.

16. Weis and Borges, p. 83.

17. Submission C1013, confidential.

18. Wilson, Commission research report, no. 9, p. 26.

19. Evidence, p. 498, Ms Jenny Pausacker.

20. Evidence, pp. 2593–5, Rev. Fred Nile.

21. Exhibit 197 (L).

29. Dr Court himself has made a detailed submission to this Commission on the subject of pornography.<sup>22</sup> In it he refutes the suggestion that there can be a direct causal relationship between pornography and sex crimes. He does, however, postulate some link between the two, which he is unable to define, but which he says is a complex one. His submission deals with the incidence of rape in Denmark and other countries, including Australia. Dr Court's submission seems more concerned to refute the assertion that ready availability of pornography leads to a decrease in sex crimes; it does not establish an affirmative relationship between pornography and rape.

30. Rev. F. Nile tendered to the Commission the full text of the Longford report on pornography. Appendix V to that report contains a research survey by Maurice Yaffe, a research psychologist at the London Institute of Psychiatry, in which he discusses the available research on the subject.<sup>23</sup> He concludes that no useful findings can be made from existing research as to possible relationships between pornography and sex crimes, and that further research in the area is needed. The studies he mentions do, however, tend to support the proposition that sexual offenders are less prone to sexual arousal than other groups, and that sexual offenders generally had less exposure to sexually explicit material during childhood than had other groups.

31. In 'Rape Violence! Pornography', K. B. Harrison sets out rape statistics in Australia, and appends newspaper articles and other material relating to rape. The material provides no basis for the assertion that there is a positive link between pornography and rape. One submission put the view that sex crimes decrease when pornography is more widely available.<sup>24</sup>

32. The available rape statistics offer no assistance on this matter, and we therefore do not know whether the incidence of rape increases or decreases with the availability of pornographic material. We can only support Mr Yaffe's suggestion that further research should be carried out.

### **Aggravating factors**

33. We received many submissions complaining about the treatment of rape victims after the offence. How they fare at the hands of the police, and of medical and legal practitioners, is discussed in this part. While the attitudes of the medical and legal professions are often representative of community attitudes towards rape, we are concerned here with more general reactions to rape.

34. Dr Paul Wilson, who gave evidence before us in Brisbane, said:

What has come out from our research is that society tends to, if you like, retrospectively interpret the character and personality of the rape victim; prior to the rape a woman is seen as being an ordinary girl, a girl with good morals, and after the rape she is looked on as being what is popularly known as an easy lay, that she asked for it. This is the way that society reacts to her.

I would also add that there is nothing in our research to indicate that victims initiate rape.<sup>25</sup>

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22. Submission 23, Dr J. H. Court.

23. Exhibit 197 (D).

24. Submission 732, G. & C. Somssich.

25. Evidence, p. 1664, Dr Paul Wilson.

35. This assignment of blame to the victim can be particularly damaging in that it can react upon her own guilt feelings about the rape. It appears that many victims go through intense periods of self-doubt about the rape, about whether it could have been avoided, and about their own part in it.<sup>26</sup> Quite unnecessarily they often take upon themselves at least partial responsibility for the event.

36. These harmful reactions to the rape victim stem from the same misconceptions about the offence, and about the victim's role in it, which we dealt with under the heading of causation. We see the solution as being a twofold one: the first is an educative process. The second involves a shifting of the emphasis away from the sexual aspect of rape and onto the aggressive nature of the offence. Later in this part we recommend that rape be graded into a number of offences, of varying degrees of severity, in line with existing non-sexual assaults, and that the offence be determined according to the degree of violence or the kind of threats involved, rather than by the presence of a sexual act. This formula has a number of advantages, which we shall mention later, and which include the removal of rape from the level of a purely sexual offence. We think that this should do much to alleviate the victim's position in society: no longer will she be seen as a participant, no matter how unwilling, in a sexual act. Instead, she will be perceived to be what she is, namely the victim of an act of violence.

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26. Wilson, Commission research report, no. 9, p. 43.

### 3. Existing rape laws in Australia

1. States and Territories in Australia have their own legislation dealing with criminal law and procedure. The only exception is the ACT, which has adopted the NSW Crimes Act with certain amendments. The laws relating to rape and the other sexual offences with which this section is concerned are at Annexe VII.A. Although there is substantial variation between the wording of the various sections dealing with rape<sup>1</sup>, they nearly all fall back upon the basic common law definition, namely having sexual intercourse with a woman, not one's wife, without her consent. The only exception occurs in South Australia, where a 1975 amendment to the Criminal Law Consolidation Act has extended the definition of rape to include 'penetratio per anum of a male or female without his or her consent'.

2. The NSW and Victorian provisions are particularly brief, merely providing that the penalty for the commission of rape will be life imprisonment (in NSW) and up to 20 years' imprisonment (in Victoria). On the other hand, the Queensland and Western Australian codes contain quite explicit statements of the circumstances in which rape can be committed. These provisions, which are essentially identical, are:

Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind; or by fear of bodily harm or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

3. One defect which is immediately apparent is that the definition does not cover cases where consent is induced by fraudulent representations not going to the nature of the act, or not involving the impersonation of a married woman's husband. This loophole has been remedied by the creation of a separate offence of inducing a woman to have intercourse by means of false representations or false pretences. Other deficiencies in the definition of rape, such as its failure to cover intercourse which is procured through the administration of intoxicating drugs, are similarly remedied. However the end result could be described as piecemeal and unsatisfactory.

4. The definition of rape might be easy to state, but its application has not always been simple. Apart from the deficiencies which we consider later in this part, major questions of interpretation have arisen from time to time. The issue relating to intercourse procured through false pretences is one of these. A more recent, and controversial, question has arisen from the House of Lords decision in *D.P.P. v. Morgan*.<sup>2</sup> The question there was whether an accused was entitled to an acquittal if he honestly thought the victim was consenting, even if his belief was unreasonable, or whether he had to show reasonable grounds for such a belief in order to establish a defence. A detailed consideration of this ruling, and a discussion of its possible application and effect in Australia, is contained in Annexe B to this part.

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1. The specific sections dealing with rape are: NSW Crimes Act, 1900, s. 63; Victorian *Crimes Act* 1958, s. 44; South Australian Criminal Law Consolidation Act, 1935-75, s. 48; Tasmanian *Criminal Code Act* 1924, s. 185; Queensland *Criminal Code Act* 1899, s. 347; West Australian *Criminal Code Act*, 1913, s. 325. Northern Territory *Criminal Law Consolidation Act and Ordinance*, 1876-1974, s. 60.

2. [1975] 2 WLR 913.

## 4. Rape statistics

### Reported rape

1. Rape is the least reported of all serious crimes. The extent to which this crime goes unreported, and some of the suggested reasons for it, are dealt with later in this chapter. The conclusions reached are that the statistics of reported rape do not necessarily present the full picture and that it is impossible to tell whether patterns which emerge from an analysis of reported rapes are valid for all rape offences.

### Australian statistics

2. It has proved impossible to obtain reliable Australian-wide statistics relating to rape. Table VII.1 shows rape offences known by the police to have occurred between 1964 and 1973 inclusive, broken down by reference to each State and Territory. There are, however, inherent problems in these figures: they include not only rape, but also attempted rape and assault with intent to rape; the NSW statistics for 1971 and later years are not necessarily comparable with those of earlier years, because of changes in reporting procedures; and it is likely that the figures are also distorted because of differing police procedures relating to reporting.<sup>1</sup>

**Table VII.1 Rape offences known to police**

Year	NSW	Vic.	Qld	SA	WA	Tas.	NT	ACT
1964	91	94	33	21	6	11	2	4
1965	67	93	46	23	13	8	2	5
1966	72	107	38	16	7	2	8	1
1967	72	138	32	43	5	17	2	2
1968	95	168	34	43	5	7	7	4
1969	126	144	35	32	6	7	7	7
1970	136	160	42	21	6	17	29	5
1971	204	191	74	44	21	23	17	4
1972	172	180	59	57	42	21	8	5
1973	242	188	98	75	27	17	21	12

*Source:* 'Crimes reported or becoming known to the police', Australian year books.

3. As the figures in table VII.1 suggest, there has been a marked increase in rape offences in Australia, and this cannot be explained in terms of population increase. Table VII.2 shows the total number of rape offences in Australia, between 1964 and 1973, together with the mean population and the rate of offences per 10 000 population. Once again, the figures include rape, attempted rape and assault with intent to rape.

4. Most of the Australian statistical material which we have been able to obtain has been compiled on a State rather than a national basis. The most detailed statistical data available to us relate to NSW.

1. Wilson, Commission research report, no. 9, pp. 7-8.

**Table VII.2 Rape offences, Australia (1964-73)**

Year	No. of offences	Mean population	Rate per 10 000
1964	262	11 163 429	0.23
1965	257	11 390 202	0.23
1966	261	11 604 282	0.22
1967	311	11 817 413	0.26
1968	353	12 010 577	0.30
1969	364	12 257 807	0.30
1970	416	12 503 776	0.33
1971	573	12 755 928	0.46
1972	544	12 992 200	0.42
1973	680	13 168 452	0.52

Source: Australian year books.

### **New South Wales**

#### **General statistics**

5. The number of rape offences known to the police between 1964 and 1973 are set out in table VII.1. These reflect a rate per 10 000 people which varied from 0.16 in 1965 to 0.51 in 1973. Throughout this period the NSW rate has been lower than the national rate.

6. It is interesting to compare these police figures with the number of persons tried and convicted of rape and attempted rape as revealed by the *Statistics of higher criminal courts*<sup>2</sup>, shown in table VII.3.

**Table VII.3 Rape cases in NSW known to police and proceeded with, 1969-75**

Year	Police figures	Persons dealt with by higher courts	Persons convicted
1969	126	108	67
1970	136	52	38
1971	204	70	59
1972	172	77	64
1973	242	70	56
1974	..	81	69
1975	..	92	74

Note: Magistrates cannot impose sentence for these offences; therefore these figures represent most cases which come before the NSW courts, apart from the small proportion which are discharged at committal stage or are 'no billed' by the Attorney-General. Persons pleading guilty are included as 'persons dealt with'.

#### **Conviction rate in rape**

7. Dealing only with the offence of rape, and omitting all reference to attempted rape, the *Statistics of higher criminal courts* show the pattern as revealed in table VII.4.

8. This represents a lower conviction rate for rape than for any property offence. On the other hand, in some years, it is similar to or higher than the conviction rate for murder and the more serious non-sexual assaults. The only offences which invariably have a lower conviction rate than rape are the indictable offences arising out of the use of a motor car (manslaughter and culpable driving).

2. Yearly bulletin published by Australian Bureau of Statistics, Sydney.

**Table VII.4 Rape conviction rate, NSW, 1969-75**

Year	Persons tried	Persons convicted	Rate %
1969	90	58	64
1970	39	26	67
1971	42	36	86
1972	64	52	81
1973	60	46	77
1974	70	59	84
1975	69	54	78

Source: ABS, *Statistics of higher criminal courts, NSW* (Sydney).

### Age of offender

9. The *Statistics of higher criminal courts* show the age patterns as in table VII.5 for persons convicted of rape.

**Table VII.5 Age of rape offenders, NSW, 1972-75**

Year	Under 20	20-24	25 and over	Not stated	Total
1972	25	22	5	..	52
1973	16	22	8	..	46
1974	22	24	12	1	59
1975	30	9	15	..	54

Source: ABS, *Statistics of higher criminal courts, NSW*.

10. These figures confirm the generally stated proposition that most rapists tend to be in their late teens or early 20s. Kraus shows that the increase in the rate of rape committed by juvenile offenders (between 14 and 17) was very much greater between 1956 and 1969 than was the increase in the rate of adult rape. During that period, the rate of juvenile rape increased eightfold, from 2.2 to 19.3 offenders per 100 000 male juvenile population.

During the same period the rate of adult (18 to 34) rape trebled, from 8.5 to 24.8 per 100 000 adult male population. A significant proportion of the juvenile increase was accounted for by multiple or 'pack' rapes.<sup>3</sup>

### Age of the victim

11. The NSW Bureau of Crime Statistics and Research conducted a survey of 169 rape complaints accepted by the police as genuine during 1973.<sup>4</sup> Table VII.6, taken from this survey, shows the age of the victims in the 156 cases in which age was established.

3. J. Kraus, 'Trends in the rates of murder, manslaughter and rape among male juveniles (NSW 1956-69)', *Australian and NZ Journal of Criminology* 5, 3 (1972), p. 146.

4. NSW Bureau of Crime Statistics and Research, *Rape offences*, Statistical report 21 (1973).

**Table VII.6 Age of rape victims, NSW, 1973**

Age	Number	Percentage (rounded)
Under 16	21	13
16-20	61	39
21-29	39	25
30-39	16	10
40 +	19	12
	156	99

Source: NSW Bureau of Crime Statistics and Research, *Rape offences*, Statistical report 21 (1973), p. 2.

### Marital status of offender

12. Most persons convicted of rape are unmarried. This presumably reflects the youthfulness of most rape offenders.

**Table VII.7 Marital status of rape offenders**

	1972	1973	1974	1975
Never married	36	28	45	38
Married	7	12	11	10
Separated	3	2	2	1
Widowed	2	..	..	..
Divorced	1	..	..	1
De facto relationship	3	4	1	4
Total	52	46	59	54
Percentage never married	69	61	76	70

Source: ABS, *Statistics of higher criminal courts, NSW*.

### Educational level of offenders

13. The *Statistics of higher criminal courts* show that from 1972 to 1974 about 80 per cent of those convicted of rape did not complete secondary school. This compares with about 70 per cent of the male population as a whole who did not complete secondary education.<sup>5</sup>

### Country of origin of offenders

14. Most rape offenders are classified as Australians. From 1972 to 1974 nearly 90 per cent were so classified. There is no other significant country of origin.

### Multiple rape

15. It seems that multiple rape is a relatively recent phenomenon: Kraus's study of juvenile rape, between 1956 and 1969, showed no charges of 'pack' rape being laid against 14 to 17-year-olds at all between 1956 and 1959. By 1969, 73 per cent of all rape charges laid against juveniles related to multiple rape.<sup>6</sup> Kraus does not show the incidence of multiple rape amongst adults, but it is reasonable to assume that it

5. 1971 census.

6. Kraus, p. 150.



decreases with age. Studies in other places have shown that the multiple rapist tends to be younger than the single rapist.<sup>7</sup>

16. Woods conducted a survey of multiple rape in the Sydney area between 1958 and 1967. He found that most of the offences occurred in the western and south-eastern suburbs of the city. He also showed a higher conviction rate for persons charged with multiple rape than for persons charged with single rape.<sup>8</sup>

17. We have no figures of the incidence of 'pack' rape since 1969. The *Statistics of higher criminal courts* do not contain any breakdown which would provide this information. The only remaining study which might assist is the 1973 study by the Bureau of Crime Statistics. This shows that 68.9 per cent of the rapes examined were single rapes; 16.9 per cent were pair rapes; and the balance (14.2 per cent) involved three or more offenders. In two related cases there were thirty-five offenders.

**Relationship between offender and victim**

18. The only source of information on this important aspect of rape is the 1973 study conducted by the Bureau of Crime Statistics. The results of this are shown in table VII.8.

**Table VII.8 Relationship of rape offenders to victims**

Relationship	Number	Percentage (rounded)
Family	7	4
Friend	25	15
Acquaintance	34	20
Estranged lover	2	1
Neighbour	4	2
Stranger	95	57
	167	99

*Source:* NSW Bureau of Crime Statistics and Research, Statistical report 21 (1973).

19. The category of 'stranger' includes sixteen cases in which the victim either 'hitched' a ride or accepted a lift with the offender, who was otherwise unknown to her.

**Level of violence**

20. The only source of information in NSW is the 1973 study by the Bureau of Crime Statistics. This shows that, of the 169 cases studied, twenty-two (13 per cent) were accompanied by assaults causing injuries sufficiently serious to require medical treatment. These ranged in seriousness from shock and severe bruising to two cases where death resulted. In nineteen of these cases some kind of head injury was involved; in the majority of cases the offender used only his own fists.

21. In fifty-four other cases the offender threatened his victim with a weapon. The weapons involved in these threats are set out in table VII.9.

22. This contrasts markedly with the weapons actually used to inflict injury; no fire-arms were in fact used, and a knife was used in only three of the twenty-two cases in which injury resulted.

7. See e.g. R. Barber, 'An investigation into rape and attempted rape cases in Queensland', *Australian and NZ Journal of Criminology* 6, 4 (1973), p. 217; Amir, p. 202.  
8. G. D. Woods, 'Some statistics relating to individual and pack rape offences in metropolitan Sydney', *Australian and NZ Journal of Criminology* 2 (1969), p. 105.

**Table VII.9 Weapons used by rape offenders**

Weapon	Number
Knife	28
Firearm	14
Fists	5
Blunt instrument	1
Other	6

*Source:* NSW Bureau of Crime Statistics and Research, Statistical report 21 (1973).

### **Distribution of rape**

23. Generally rape is more likely to occur, or to be reported, in the city than in the country. This is consistent with the general pattern for all crimes, for which there could be a number of explanations. The 1973 study by the Bureau of Crime Statistics revealed the following number of rapes per 100 000 of female population:

Sydney	0.83
Newcastle	0.76
Wollongong	0.66
Rest of NSW	0.52

24. The Bureau has also compared the rate of reported rape in Sydney with that in eight American cities of the same size. Sydney had only one-sixth the average number of rapes of the American cities. (It compares less favourably in relation to other types of offences.) The Sydney rape figures were found to be almost identical with those of Montreal and Toronto, in Canada.

### **Victoria**

25. The general police figures for Victoria are set out in table VII.1. In 1974 the Victorian rate was the same as the national rate, but in all previous years it was higher than the national rate.

26. As for court figures, Appendix D to the Victorian Law Reform Commissioner's report on rape prosecutions sets out the conviction rate for rape offences in 1973 and 1974. Of the total of 185 persons committed or presented for rape offences, 138 (75 per cent) were convicted of some offence, whether rape or a lesser offence.<sup>9</sup>

27. In 1969 four students from Melbourne University's Criminology Department conducted research into sixty-nine rape offences in Victoria which had led to convictions during the previous 9 years.<sup>10</sup> Transcripts of court proceedings and pre-sentence reports were examined, and thirty-seven of the offenders were interviewed. Twenty of the offenders had been involved in single rapes, and forty-nine in multiple rapes.

28. Broadly the results were similar to the NSW studies, and to the results obtained by Barber in his Queensland study. Dealing with some of the more important characteristics of the offenders: the mean age of the single rapist was 26.8, whereas that of the multiple rapist was 20.6. Offenders generally came from low socio-economic levels, and had received minimal education. The impression was gained, by the researchers, that there was a history of family instability in their background. Forty-nine per cent had lost a parent during childhood, either through death or desertion.

9. Victorian Law Reform Commissioner, *Report on rape prosecutions*, report no. 5 (Melbourne, 1976), p. 48.

10. Hodgens et al., p. 225.

29. Generally the offenders had a strong self-gratifying approach to sex, with little or no moral motivation towards abstinence. They attributed similar attitudes to women, considering that there was no real reason why a woman would want to abstain, except for the fear of pregnancy. Sixty-four per cent of the multiple rapists had previously been involved in group intercourse, as opposed to only 17 per cent of the single rapists. Very few of them had read pornographic literature, or had any interest in doing so. Thirty per cent had no prior convictions at all, and only 16 per cent had prior convictions for offences involving sexual assault.

30. The study contains some information about the circumstances of the attack. This shows that 64 per cent of victims initially accepted the company of the offender or offenders voluntarily. Further analyses are made of the extent to which the victim 'led the offender on', the degree of persuasion which had to be used to procure the intercourse, and the amount of violence involved. A picture emerges which is generally more favourable to the offender and less favourable to the victim than one might have expected. This finding of the study has been questioned.<sup>11</sup>

### **South Australia**

31. Police figures for South Australia are given in table VII.I. In some years, such as 1966 and 1970, the SA rate was well below the national rate; in other years, such as 1967 and 1973, it was considerably higher.

32. Schedule 4 to the Mitchell report lists all cases of rape dealt with in the South Australian Supreme Court between January 1965 and December 1975.<sup>12</sup> It indicates the pleas entered, the verdict and the composition of the jury. It also brackets those who were indicted together for multiple rape offences.

33. The number of rape indictments increased greatly during the 10-year period: from two in 1965 to twenty-six in 1975. Of the 120 people presented during the total period, thirty-two pleaded guilty and eighty-eight defended their cases. Of that eighty-eight, half were convicted of rape, and half acquitted. Some of the forty-four who were acquitted of rape may have been convicted of lesser offences but this is not shown. The conviction rate appears to have decreased during the 1970s.

### **Queensland**

34. Police figures for Queensland are set out in table VII.1. The rate of rape in Queensland has been consistently lower than the national rate since 1966.

35. In 1973 Ross Barber published a survey of the Queensland rape cases which had led to convictions between 1957 and 1967.<sup>13</sup> In all, 155 people had been convicted during that period; 115 of rape, and forty of attempted rape. One hundred and three victims were involved, seventy of whom were found to have been raped.

36. Barber gave profiles of 'pack', 'solo' and 'pair' offenders; briefly, he found that the typical 'pack' rapist was under 21 years old, Australian born, white, single and engaged in manual labour. There was a slight tendency for him to have a previous record, although not normally for a sexual offence. Seventy-five per cent of 'pack' rapists had consumed some alcohol prior to the commission of their offences, but very few were drunk at the time. Seventy-two per cent of them committed their crimes on complete strangers.

11. Wilson, Commission research report, no. 9, pp. 4-6.

12. Criminal Law and Penal Methods Reform Committee of South Australia, *Special report on rape and other sexual offences* (Government Printer, South Australia, 1976), p. 76.

13. Barber, *ANZ J of Criminology* 6, 4 (1973).

37. The 'solo' offender tended to be older than the 'pack' rapist (40 per cent were 30 or over); 79 per cent were Australian-born whites, and 11 per cent were Aboriginals. More of them were married than were 'pack' offenders. Seventy-nine per cent of them had prior criminal records, 22 per cent involving sexual offences against females. Sixty-four per cent of the victims were unknown to the offenders. Generally, single rape involved the use of greater violence and resulted in more severe injuries than did multiple rape.

38. 'Pair' offenders were found to share some of the characteristics of both 'solo' and 'pack' offenders; they fell between them in age and marital status, and were more likely to have a criminal record than were 'pack' offenders. Alcohol was generally not involved in this type of offence.

39. As for the victims, they tended to be between 12 and 21 years old. Most were Australian-born whites; 12 per cent were Aboriginals. Almost all were single. Twenty-one per cent suffered injuries which could be described as substantial or severe. In 63 per cent of cases the offence was committed by strangers, but in most of these cases the victim had willingly entered the offender's company; in only 25 per cent of cases was she forced to associate with him or them against her will.

### *Other States and Territories*

40. The general rape figures for Tasmania, Western Australia and the two Commonwealth Territories are set out in Table VII.1. The Tasmanian rate has fluctuated in relation to the national rate. The rate in Western Australia has consistently been significantly lower than the national rate and, for that matter, lower than the rate in any other State.

### *Overseas statistics*

41. It is only relatively recently that Australian researchers have discovered rape as a phenomenon worthy of investigation. In this respect we have lagged far behind other countries, particularly the United States, which has been conducting research into various aspects of rape for many years and has accumulated a vast amount of information on the subject. We have not embarked upon any systematic or comparative study of overseas statistical material, although we mention a number of overseas studies.

### **Unreported rape**

42. There has been an increasing concern over recent years at the number of unreported rapes, and various attempts have been made to explain why victims are reluctant to report this crime. Dr Paul Wilson and his team interviewed seventy rape victims in Queensland who had made no complaint to the authorities. They were asked why they had failed to report the crime, and their responses have been analysed. The largest single reason given was that the victim wanted to put the rape behind her and forget all about it. Fear of having to give evidence in court played an unexpectedly small part in their decision not to report the crime.<sup>14</sup> A summary of the reasons given for not reporting rape cases is contained in Annexe VII.C.

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14. Wilson, Commission research report, no. 9, chapter 5.

43. The Sydney Rape Crisis Centre has given us statistics relating to the first 20 months of its operation, namely from October 1974 to June 1976. During that period 318 victims approached the centre, of whom only 108 complained to the police. The centre has systematically taken and recorded details of all the rapes reported to it, and its analysis is at Annexe VII.D.

44. The sample is, of course, a special one. Nevertheless it is possible to make some comparisons with the NSW statistics quoted earlier. The victims appear younger than those in the Bureau study (30 per cent under 17 as compared with 13 per cent under 16). The pattern of single rape, pair rape and multiple rape was similar. A higher percentage of the attackers (10 per cent) were relatives than in the Bureau study (4 per cent), and fewer were strangers (33 per cent compared with 57 per cent). Forty per cent of the attacks occurred at the home of the victim, the rapist or a friend. The findings of our research report on unreported rape are comparable. (See Annexe VII.C.)

45. It is not possible to draw any general conclusions about the incidence of unreported rape or the reasons why rape is unreported. It does appear that there are substantial numbers of victims who do not report rapes and that the alleged offences have characteristics comparable with reported cases. There is probably an undetermined and indeterminable number of unreported rapes which will not appear in rape crisis centre figures or in research studies.

## 5. Police procedures in dealing with rape complaints

1. A woman who has been through the trauma of rape needs sympathetic and sensitive treatment. She is emotionally vulnerable, and questioning by the police in an insensitive and aggressive way could have a profound effect, both on her own emotional recovery and on the course of the inquiry into the rape itself.<sup>1</sup>
2. Police insensitivity towards rape victims was a matter which concerned a number of the witnesses who presented evidence to the Commission.<sup>2</sup> Some people who approached the Commission and much of the available literature have been critical of police attitudes toward rape victims. We do not mean to imply, of course, that this is a universal problem. At least one victim found the police sympathetic. Women police officers who discussed rape with us were helpful in their approach.<sup>3</sup> There are, however, situations where the police appear to over-react to rape complaints.
3. The problem appears to be a twofold one: some police officers apparently consider that, unless there is physical injury, rape is not sufficiently serious to merit police intervention.
4. The other factor is that some police have a tendency to doubt the genuineness of rape complaints. In research carried out for the Commission forty-four experienced Queensland police officers were interviewed. Twenty-eight said that when they first received a rape complaint, the possible falsity of the complaint was uppermost in their minds.<sup>4</sup>
5. Not surprisingly, there are no statistics of false complaints; the fact that a conviction is not obtained by no means indicates that the complaint was fabricated. Nor does the fact that the complaint was not accepted by the police necessarily imply fabrication. We do not have precise figures for the proportion of complaints rejected by the police, but the Victorian Rape Investigation Squad reports that of twenty-two complaints received during its first 5 months of operation, only twelve were accepted as rape cases. This is consistent with the Victorian Law Reform Commissioner's analysis into the job books of four police districts, covering the period between January 1974 and November 1975, which showed that 50 per cent of rape complaints were accepted as genuine.<sup>5</sup>
6. This appears to be much higher than the US rejection rate for rape. The FBI Uniform Crime Reports show that in 1971 the average rejection rate was 18 per cent. We do not know, however, whether similar research techniques were used, or whether police practices were in any way comparable.<sup>6</sup> It appears from Dr Wilson's research that published figures might be quite misleading, and the 'unfounding' rate might be even higher than official figures indicate; at least some police officers apparently do not bother to record complaints of rape which they do not accept.<sup>7</sup>

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1. Mary L. Keefe & Henry T. O'Reilly, in *The Police Chief*, November 1975.

2. Evidence, pp. 63 ff., Anne (name withheld); p. 69, Ms Alicia Lee; Submission C1013, confidential.

3. Interview reports, Tas., 61; NT, 44.

4. Wilson, Commission research report, no. 9, p. 70.

5. *Report on rape prosecutions*, appendix C.

6. For US practice see Camille LeGrand, 'Rape and rape laws: sexism in society and law', *California Law Review* 61 (1973), p. 919.

7. Wilson, Commission research report, no. 9, p. 72.

7. Underlying police attitudes are sometimes reflected in the way complainants are questioned by the police; while this is a necessary step, it is important that no element of hostility should enter into the questioning. This does not generally occur in relation to other criminal offences, and should not do so in relation to rape complaints.

8. Our opinion is that rape and other sexual offences should be treated, as nearly as possible, in the same way as non-sexual offences. Nevertheless we think that there are some respects in which the position of the victim of sexual offences necessitates special protection. For this reason we support the establishment of special sexual offences squads. Such squads have already been formed in some Australian States, but there are two aspects in which we think that they could be improved. The first relates to the number of policewomen holding senior rank in these squads. There are very few policewomen with sufficient experience to carry through the investigation of a sexual offence.<sup>8</sup> There are many situations, involving not only complaints of rape, but also sexual offences against children, where it would be an advantage to have a woman police officer participating. Although we received one complaint about the attitude of some women police officers<sup>9</sup> this does not affect our opinion. Our interviews with women police officers confirm our view about the need to make further provision for women of suitable rank and authority to be involved in rape and other sexual cases.

9. We conclude that special squads should be established to deal with sexual offences, including rape, in the main population areas. Ideally, half the membership of these squads should consist of women, equal in status and experience to their male counterparts. The needs of these squads should be borne in mind when recruiting and training new police.

10. Great care should be taken in selecting officers, both men and women, with appropriate attitudes towards the people and offences with which they are likely to come into contact. By 'appropriate attitudes' we mean non-judgmental attitudes, and the ability to avoid taking moral stances when confronted with situations of a sexual or 'deviant' nature. Education in psychology or crisis intervention will not necessarily change the attitudes of people who cannot believe that rape can be an extremely traumatic and humiliating experience.

11. Members of the sexual offences squad need special training, not only in the skills necessary to enable them to carry out their investigative duties, but also in the fields of psychology and crisis intervention. Members of the squad will constantly be dealing with adults and children in a state of emotional crisis, and will have to meet the needs of those people and their families.

12. The length of time that women are subjected to questioning by the police before being taken for medical treatment was the subject of comment to us.<sup>10</sup> We appreciate that the prime concern of the police is to ascertain what offence, if any, has been committed, and to obtain sufficient information regarding identification to enable them to search for and arrest the alleged attacker. This should be kept to the minimum, and lengthy questioning should be postponed until the victim has had an opportunity to recover from the trauma of the rape. She should be taken for a medical examination as soon as possible.

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8. Evidence, p. 1669, Dr Paul Wilson.

9. Evidence, p. 1907, Ms June Rankin-Wilson; Confidential exhibit 132.

10. e.g. Evidence, p. 494, Ms Jenny Pausacker.

13. Our view, discussed later, is that rape victims should be cross-examined in court on their sexual history only in restricted situations. This change should be reflected in police questioning which should avoid personal and intimate questions relating to their past sexual history.
14. Whether or not the trial procedures are altered, we consider it important that a victim be told of the various steps in the legal processes. Our inquiries indicate that the Canberra police are already doing this, and we think it should become standard practice.
15. We believe that rape crisis centres can play an important part, especially if there is a co-operative relationship between them and the police.
16. Sometimes victims of sexual assault cannot or will not confide in their family. In many cases victims have a great need to talk about their situation, not only in a legal sense, but also in relation to their family and friends. Police officers cannot be expected to provide the time and companionship which might thus be needed. It is at this level that members of the rape crisis centres can serve a useful purpose. We think it desirable that the police should be prepared to call in the rape crisis centres. We also think that the police should inform rape victims of the existence of a rape crisis centre.
17. Although it may not be feasible to set up a sexual offences squad in remote rural communities, country police do have immediate telephone access to the specialised city squads. This should include the sexual offences squad which should be able to give advice on the investigative procedures involved, and also on the appropriate ways of meeting the victim's emotional needs.



## 6. Medical procedures for dealing with rape victims

1. Although we cannot determine the proportion of rape victims who obtain medical attention, we believe that many either present themselves at public hospitals or consult with their own doctor. Some require medical treatment for injuries received during the assault; in addition all those who complain to the police, and whose complaints are taken seriously, are taken to hospital, whether or not they have any physical injuries, so that they can be medically examined and evidence obtained for the purpose of any court proceedings. In rural areas where there is no local hospital, the victim will normally be taken to the government medical officer.

2. We have received a number of submissions suggesting that medical services for dealing with rape victims are inadequate.

3. Objectives for the medical treatment of rape victims have been defined as follows: (1) to diagnose and treat any physical trauma; (2) to obtain all tests necessary for court proceedings; (3) to help the victim cope with the resulting psychological trauma and prevent the development of serious emotional problems; (4) to deal with a possible pregnancy; and (5) to perform tests for venereal disease and treat if necessary.<sup>1</sup> Our information is that the first two functions are generally performed adequately in large city hospitals, although in outlying areas there can be difficulty in obtaining the services of a doctor with sufficient expertise. The AMA's submission stressed the desirability of 'ensuring that in any district there are available medical personnel who are trained in the special requirements of handling rape patients'.<sup>2</sup> We agree with this, and think that all large public hospitals should have a panel of doctors, trained in the examination and treatment of rape victims, available to attend at any time of the day or night. In country areas the problem is more difficult. As a minimum requirement we think that local doctors who might be involved in the examination of rape victims, no matter how infrequently, should be supplied with some document setting out the procedures to be followed, and the matters to be investigated. The 'Message to house staff' issued by the Harbor General Hospital in Los Angeles is a useful model (see Annexe VII.E).

4. Rape victims are sometimes reluctant to be examined by men so soon after the trauma of rape, especially when, as is usual, a vaginal examination is required; they would prefer women to examine them. We agree with the South Australian Committee which recommended that the victim should be examined by a woman doctor if she wished, and that the panel should therefore include a sufficient number of women doctors.<sup>3</sup>

5. In addition to treatment of any injuries and obtaining evidence for the purpose of court proceedings, the victim should obtain appropriate advice and follow-up care in relation to her mental health, venereal disease or pregnancy.

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1. Rape and the treatment of rape victims in Georgia (A study by the Georgia Commission on the Status of Women), p. 7.

2. Submission 1101, AMA.

3. *Special report on rape and other sexual offences*, p. 38.

### ***Mental health***

6. There is the possibility that the victim may suffer shock and/or severe emotional disturbance following the attack. While this is not always the case, procedures should aim to minimise the trauma and to support the victim at the time when she may be most in need of help. She should be kept separate from other patients presenting at the hospital casualty department. If she wishes, she should be accompanied by a person of her choice, friend or relative. It is probably advisable that she also be accompanied by a woman police officer; but if the victim objects to this, her objection should be respected and, unless there is some compelling reason for the policewoman to remain, she should leave. If no one else is in attendance, she should be accompanied by a sympathetic member of the nursing staff. She should not be left on her own.

7. The hospital social worker should see each rape victim as a matter of course, although a prolonged interview may not be necessary if the victim has already had counselling, or is accompanied by a counsellor from the rape crisis centre. The victim should be guided to available supportive facilities, and arrangements should be made for follow-up visits. This should be done in all cases, as shock is sometimes delayed.

### ***Venereal disease***

8. Many rape victims fear venereal disease but sometimes they are too embarrassed to mention it.

9. As it takes 1 week to diagnose gonorrhoea, and 6 weeks to diagnose syphilis, she should be asked to return in 2 weeks, and again in 6 weeks. She should be reassured as to the effectiveness of early diagnosis and treatment. Medical opinion is divided about giving preventive treatment in the meantime; this is a subject which deserves attention by the profession.

### ***Pregnancy***

10. Rape sometimes results in pregnancy. In the Preterm study of 1007 abortion patients, six claimed to have become pregnant as a result of rape.<sup>4</sup> This possibility should be discussed with the victim. In the US, some hospitals give the victim diethylstilboestrol or DES (the 'morning-after pill'). However there is concern as to the use of this drug, which can have substantial side effects. In Australia it is rarely used. A more recent method used in the US consists of the insertion of a 'copper T' IUD within 48 hours after intercourse.<sup>5</sup> Whether or not any immediate action is taken the woman should be asked to return if her period is more than a week overdue. If she is pregnant then she should be referred for appropriate counselling to help her to decide what action to take.

### ***Medico-legal aspects***

11. We do not think that hospitals or doctors should be compelled to report a rape to the police, nor should they press a victim to do so. Counselling should be available to her.

12. Most rape victims attend at hospitals and these institutions are therefore best equipped for giving information about supporting services. We consider that so far as practicable doctors should follow similar procedures.

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4. Emmi Snyder & Susan Wall, *Abortion in Sydney: a perspective on change* (Preterm Foundation, Sydney, 1976).

5. *Family Planning Perspectives* 7, 4, p. 151.

13. We think that a guide similar to the 'Message to house staff' referred to earlier should be made available to hospital medical staff, and to all doctors in country areas and elsewhere who might come into contact with rape victims. This guide covers the emotional reaction of the victim; how to help her; the goals of management; clinical management; venereal disease testing; pregnancy; checklist for purposes of evidence; referral services, including rape crisis, legal and health.

14. We also would like to see a pamphlet about rape handed to victims that they can take away and study. A model for this is annexed, covering such matters as VD testing, pregnancy, reporting to police and emotional reactions. It is distributed as part of the counselling service and also has the phone number of the counsellor (see Annexe VII.F).

15. Some doctors are unwilling to become involved in the examination and treatment of rape victims because of the probability of having to attend court later on. We question whether court appearance is always necessary. Thus although there are occasions when medical evidence can be critical to a case, in the majority of committal proceedings and trials the medical evidence is not seriously tested at all. We therefore think that in straightforward cases the written report of a medical practitioner should be admitted into evidence without requiring the practitioner to attend at court, unless either the Crown or the defence specifically request that he or she attend and give evidence. We think that this should apply in all sexual offence cases. Adequate instructions to doctors and a proper checklist should reduce to a minimum the number of cases where they might be required to attend.

## 7. Rape crisis centres

1. Rape crisis centres are of relatively recent origin. They are largely the product of concerted activity by women concerned for the rape victim. Before these centres were formed, there was no organisation providing support for the rape victim; indeed there was a general lack of awareness of her needs.
2. The first rape crisis centre in Australia commenced operations in Sydney in 1974. It was started by a group of women, some of whom had personal experience as rape victims, and all of whom worked on a purely voluntary basis. A 24-hour telephone service was maintained.
3. Before long women in other capital cities followed suit. When this Commission was holding its public hearings in the various State capitals in 1975, rape crisis centres were being formed in Melbourne, Adelaide, Brisbane and Perth. These centres are now in operation, as is a more recently established centre in Canberra.
4. In most cities the rape crisis centre is housed together with other enterprises organised by the womens groups. In Adelaide, for instance, it operates from the same premises as the Womens Health Centre.
5. Only in Sydney does the crisis centre have its own separate premises, this having been made feasible by the provision of Commonwealth government funds. Financial assistance is also provided by the Commonwealth government, through the NSW Department of Youth and Community Services. This enables a number of the people who maintain the telephone counselling service to be paid on a part-time basis. Some counsellors still work without payment.
6. Annexe VII.D gives statistics of the Sydney Rape Crisis Centre's first 20 months of operation. Most of the 318 complaints received were by telephone; there was a reluctance to attend in person. Many calls were from people who had been raped some time before; only a small proportion of complaints came from women with recent experiences of rape. The centre has been called upon only infrequently to assist a woman through the processes involved in complaining to the police, being medically examined and participating in court proceedings. No complaints were referred to the centre by the police.
7. Other activities conducted by the Sydney Rape Crisis Centre include weekly consciousness-raising groups, and lessons in self-defence techniques. In addition, the women involved with the running of the centre are dedicated to achieving reform in rape laws. To this end they mount activities, and also speak to groups and organisations about their activities and about the position of the rape victim in the community.
8. One of the main problems of the Sydney centre, probably shared by other centres, is that the counsellors have received no training in crisis counselling. Nor do they include amongst their number anyone trained in psychology or psychiatry. They have a panel of experts, including psychologists, psychiatrists and sex counsellors, to whom they might refer the more obviously disturbed people who seek their help. We believe that some minimum level of training should be required before placing them in the extremely sensitive position of counselling rape victims.

9. Rape crisis centres were established because a rape victim can suffer trauma for some time after the crime. This trauma can be exhibited in widely diverging symptoms, and different approaches might be required according to the needs of different cases.<sup>1</sup> Without some prior training in rape crisis intervention, the crisis centre counsellors could not be expected to appreciate the complexities of the trauma they have to deal with.

10. There needs to be a better relationship between the rape crisis centres and the police; at present there appears to be some suspicion between them. Good liaison should be established to enable victims to receive support as soon as they need it. The police should be encouraged to inform all rape complainants of the existence of the rape crisis centre. In addition, if the victim seems to be in need of immediate support, the police should call in a crisis centre representative to assist her. For similar reasons rape crisis centres should establish good relationships with hospitals and with the medical profession.

11. Rape crisis centres are not without their critics. Some complain of their radical feminism and anti-male outlook. While not necessarily agreeing with the criticisms in all cases we note that these are obstacles to the full development of co-operation between rape crisis centres and the police and the medical profession. These could be overcome if the centres were to become more broadly based. At present they are staffed and maintained almost entirely by young women of radical orientation. These are the women who created the centres, and their efforts should not be belittled in any way. Nevertheless some of them have shown hostility towards the police and also towards the medical profession. This reaction can be understood in view of past attitudes to rape but we think the time has now come for co-operation and the exchange of ideas and information. As well as this problem, many rape victims may find it difficult to relate to the groups because of their age and outlook. Rape, although primarily committed by young men against young women, also claims middle-aged and elderly women amongst its victims. If such women are to gain real benefit from crisis counselling, they need to be able to relate to and understand the outlook of the counsellor. We think it desirable that the rape crisis centres include amongst their counsellors a broader cross-section of ages and outlooks. While these proposals would change the profile of rape crisis centres we believe that this could lead to more effective services for rape victims.

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1. A. W. Burgess & L. L. Holstrom, 'Rape trauma syndrome', *American Journal of Psychiatry* 131, 9 (1974), p. 981.

## 8. Committal proceedings

1. It is a principle of our legal system that, before a person can be tried for any serious offence, there should be a preliminary hearing to determine whether there is, in fact, a *prima facie* case against him. If a *prima facie* case is made out at the preliminary hearings, the defendant is committed for trial to a superior court. This system of criminal justice has been given statutory recognition in each Australian State and Territory.
2. Committal proceedings are generally conducted in the same way as judicial proceedings and they are presided over by a magistrate, who enforces the rules of evidence. The Crown is represented, usually by a police prosecutor, and the defendant is entitled to legal representation.
3. At the end of the proceedings the magistrate either discharges the defendant or, more usually, commits him for trial.<sup>1</sup>
4. The committal proceeding is important to the defendant in two respects: first, it exposes defects in the prosecution case at an early stage so that, if there is insufficient evidence against him to establish a *prima facie* case, he can be discharged then, before being put to the expense, the publicity and the emotional trauma of a jury trial. Secondly, it provides the defence with an opportunity to probe the Crown case by cross-examining prosecution witnesses.
5. The main disadvantage of the committal proceedings for the rape victim is that she has to endure the ordeal of giving evidence twice, once before a magistrate, and again before a judge and jury. Many victims find this public recounting of the intimate details of the story a particularly trying ordeal. We also feel concern for children who are victims of sexual crimes other than rape.
6. One proposed solution is to abolish committal proceedings altogether in rape cases. This would, however, deprive the defence of an important and deeply entrenched safeguard, and we could not support such a drastic measure.
7. The Victorian Law Reform Commissioner recommended the use of the 'Hand-up brief procedure' for the taking of the victim's evidence in committal proceedings for rape offences, unless a magistrate otherwise orders.<sup>2</sup> By this procedure the prosecution serves the defence with a statement made by the proposed Crown witness. It is then incumbent upon the defence to notify the prosecution in writing if the witness will be required for cross-examination. In the absence of such a notification, the statement can be tendered in evidence at the committal proceeding without the witness having to attend at all.
8. The Victorian Rape Offences (Proceedings) Act (No. 8950 of 1976) reflects these recommendations. They have the defect that the defence retains the right to require the victim's presence for the purpose of cross-examination without giving reasons. They relieve the victim only when the accused proposes to plead guilty or in the unusual case where the defence lawyer decides not to ask any questions in cross-examination.<sup>3</sup>

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1. The NSW Bureau of Crime Statistics and Research showed that in 10.6 per cent of rapes accepted by the police, in 1973, the defendant was discharged at the committal hearing.

2. *Report on rape prosecutions*, p. 19, para. 40.

3. *ibid.*, p. 18, para. 35.

9. We prefer the solution adopted by the South Australian Committee which recommended that the evidence of the victim be given by statement verified by affidavit unless the presiding magistrate orders otherwise. Such an order can be granted on the application of the prosecution or the defence, upon special circumstances being shown.<sup>4</sup>

10. The Committee further recommended that, when the victim's evidence is given by the production of her statement, the defence should be supplied with copies of all statements made by her to the police. This suggestion has considerable merit: the various statements of the victim are not admissible as evidence, and cannot be used against the accused; for various technical reasons the defence is frequently reluctant to try to obtain them. Nevertheless they can, on occasions, be of considerable value to the defence, particularly if the victim has given inconsistent accounts to the police. This device is attractive in its fairness; at the same time as it deprives the accused of his right to cross-examine the victim, it confers upon him a legitimate benefit, namely the means to ascertain whether the victim has been consistent in her statements to the police. She, of course, is relieved of her obligation to attend court at all during the committal stage.

11. If our recommendations are implemented, sexual crimes will largely be assimilated with non-sexual assaults. However they will still be distinguishable by the fact that the Crown will have to prove that the defendant either attempted or achieved sexual penetration. It is our view that at committal proceedings for any offence in which it is part of the Crown case to prove that sexual penetration was effected or attempted, the evidence of the victim should be given by the production of her statement. The presiding magistrate should have power to order, upon application by the prosecution or the defence, that the victim attend and give oral evidence, but only if special circumstances are shown to justify the making of such an order. Where the evidence of the victim is given by the production of her statement the defence should be supplied with copies of all statements made by her to the police.

12. In those exceptional cases when the victim is required to give evidence at the committal proceedings, we think that her evidence should be given privately rather than publicly. During the victim's evidence, therefore, only the parties and their representatives, and essential court staff and police officers should be allowed to remain in the court. The presiding magistrate should retain the right to allow other persons to remain, but only on special circumstances being shown, for example the parents or guardians of a minor.

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4. *Special report on rape and other sexual offences*, p. 45, para. 15.5.2.

## 9. The procedure at rape trials

### Legal representation for the victim?

1. A rape trial is frequently seen as a personal confrontation between the victim and the accused. This approach has led a number of rape reformers to query why the accused should be entitled to legal representation when the victim is not. In many ways, they say, the victim is more in need of protection than the accused, as she can be questioned on her past activities, whereas he cannot.
2. This approach clouds the real issues involved in a rape trial. It is not, in fact, a personal battle between the victim and the accused: it is a criminal prosecution instituted by the Crown, and conducted on its behalf by a Crown prosecutor. The adversaries are the prosecutor and the accused.
3. Certainly the victim is usually the central Crown witness and the principal target for the defence. In this her position is comparable with that of the main witness in any other criminal trial. In some respects, however, the victim in a rape trial is in an invidious position. Rape is unlike other forms of criminal violence in that it involves an intrusion of a most intimate and personal kind.<sup>1</sup>
4. In the witness box the victim will inevitably relive the humiliation and degradation she suffered during the offence. This cannot be avoided; our adversary system of justice provides no alternative method for eliciting the facts in criminal trials. Her position can, however, be alleviated.
5. Most rape victims have had no previous experience of court proceedings, and are bewildered by the process, especially when they are questioned on intimate details relating to the offence, and on their past sexual activities.
6. The victim is surely entitled to sympathetic advice about the likely course of the proceedings. We believe she is also entitled to protection against the random searching of her sexual past.
7. In spite of her special position, however, we do not think that the victim in a rape trial should be entitled to separate representation. To allow this would, in some cases, place her in an even more hazardous position than she now occupies: unless legal aid were to be provided to all rape victims, a victim would face the possibility of having to pay for her own representation. This could only add to the factors which might discourage a victim from reporting this crime.
8. Nor do we think that a case can be made out for urging that she be entitled to legal aid. In a sense the State already provides the victim with a representative, in the person of the Crown prosecutor, one of whose duties is to ensure that Crown witnesses are not harried or abused by the defence.
9. Nevertheless, one victim we interviewed spoke of her isolation from the Crown prosecutor.<sup>2</sup> We think this may be a common reaction in those places, such as NSW, where Crown prosecutors generally do not speak to Crown witnesses before the trial. This unwritten rule is followed so that they can retain their appearance of objectivity: their duty is not to obtain a conviction at all costs, but to ensure that all relevant material is placed before the court.

1. See e.g. Morton Bard & Katherine Ellison, 'Crisis intervention and investigation of forcible rape', *The Police Chief*, May 1974, p. 71.

2. Submission C1013, confidential.



10. While appreciating the sound basis for this practice, we think that the position of the rape victim requires that she be given special consideration.

11. If our recommendations are adopted, rape will cease to exist as a separate offence. Our present comments are therefore addressed to any situation where a sexual attack has taken place, no matter what the offence may be called. In these circumstances, prosecutors should seek out a victim prior to the trial, and assure her that they are there to protect her interests, and to advise her of the likely course of the proceedings.

### **Cross-examination of the victim on her prior sexual history**

12. Of all the existing rape laws and procedures, the rule which allows the victim to be cross-examined about her prior sexual history has met with the most trenchant and consistent criticism. It is argued that the victim truly becomes the accused rather than the accuser.

13. In order to understand the complexities surrounding the rule which allows a rape victim to be cross-examined on her sexual history, it is necessary to examine some of the legal origins of this rule.

14. It has long been a principle of the common law, inherited in Australia, that an accused or his counsel may cross-examine a Crown witness, not only on matters which are relevant to the issue before the court, but also on matters which, although not directly relevant to the charge, reflect on the credibility or 'credit' of the witness. In an effort to avoid spending time on matters which are seen to be peripheral to the main issue, the law has devised a system whereby cross-examination on matters which are relevant to the charge is treated differently from cross-examination on matters which go only to the credit of the witness. The difference is seen, not in the rules relating to the cross-examination itself, but in the extent to which the questioner can call further evidence to contradict the answers given by the witness. If cross-examination on matters which are directly relevant to the proceedings produces answers which are unfavourable to the questioner, and which he is in a position to refute, then he may call other evidence to refute those answers. On the other hand, a person cross-examining a witness on matters which go only to the witness's credibility or credit is bound by the witness's answers. This means that he is obliged to treat the answers as final, and is not entitled to call other evidence to refute them. The justification for this restriction is one of expedience; without it, the courts would be swamped by subsidiary issues relating to the past behaviour of witnesses.

15. This distinction has particular significance in rape trials. The accused in a rape case has always been permitted to cross-examine the victim on her past sexual activities in an endeavour to show that she is a woman of loose morals. In the last century the rule was further developed so that, unless the questioning was directed to prior acts of intercourse with the accused, or to showing that she was a 'common prostitute', the victim's answers could not be contradicted. It was only in these two situations that the questioning was perceived as being relevant to the charge, namely as going to the issue of consent. In all other situations where the victim was cross-examined as to her prior sexual history, it was considered to be relevant only to her credibility, and not to the matter before the court.

16. The nineteenth century judges described this rule as being for the benefit of the victim. In one case it was said, in the course of refusing to admit evidence that the victim had previously had intercourse with men other than the accused:

It is obvious, too, that the results of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of (a sexual) nature.<sup>3</sup>

Undoubtedly the rule, in practice, does work for the benefit of the victim, although it is unlikely that she would be aware of its existence. Nevertheless the assumption which underlies it is a strange one, namely that the chastity or otherwise of a rape victim can affect her veracity as a witness.

17. It is not surprising that a law which proceeds on such an outmoded assumption should founder. A defence counsel who questions a rape victim on her past sexual history is not doing so for the purpose of convincing the jury that she is a person of dubious veracity. Clearly he is trying to show that, having consented before, she is more likely to have consented on this occasion. Nevertheless the law continues to allow this line of questioning upon the supposition that the issue goes only to the credibility of the witness.

18. The procedure has also been subjected to adverse comment by those who see it as revealing a double standard: whereas rape victims can be, and frequently are, subjected to the closest and most intimate examination of their sexual past, the men who are accused of the crime cannot have their past histories raised at all.<sup>4</sup>

19. It cannot be said, however, that there is a unanimous call for abolition of the right to cross-examine a victim on her prior sexual history. The Commission received both oral and written submissions from Mr H. F. Purnell, QC, the senior public defender for NSW. Although he was expressing his own views and not those of the State, Mr Purnell has wide experience in the criminal law.<sup>5</sup> He wrote:

It is my opinion that the sexual conduct of the complainant is most relevant. You cut out such evidence and you will do the highly respected housewife, the virginal girl a great disservice. She is entitled as a matter of credit to assert her virtue.<sup>6</sup>

In evidence he said:

I would like to see an extension of cross-examination of women plaintiffs. I have had the personal experience, and my confreres have had the experience, of course, of being limited in cross-examination by the rules of evidence, knowing very well that a complainant was telling absolute lies and being prevented, by her denial that she had had sexual intercourse with some particular young man other than the accused, from bringing evidence which would show clearly that she had.<sup>7</sup>

20. Certainly the trend of law reform and opinion appears to be in the opposite direction to that proposed by Mr Purnell. Almost without exception, the various bodies which have inquired into rape laws and procedures have recommended at least some curtailment of the defence right to cross-examine the victim on her prior sexual history. The Heilbron Committee in England recommended that the previous sexual history of the complainant with men other than the accused should be inadmissible, except with the leave of the trial judge. The Committee further recommended that the trial judge's discretion should only be exercised if he is satisfied: (a) that the evidence

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3. Coleridge C.J. in *R. v. Riley* (1887) QBD 481 at 484.

4. Susan Griffin, 'The politics of rape', *Ramparts Magazine*, September 1971, p. 4.

5. Evidence, p. 2642, Mr H. F. Purnell, QC.

6. Submission 1206, *ibid*.

7. Evidence, p. 2644, *ibid*.

relates to behaviour on the part of the complainant which was strikingly similar to her behaviour in the alleged offence; *and* (b) that the relevance of the evidence is such that it would be unfair to the accused to exclude it.<sup>8</sup>

21. In Australia papers on rape laws and procedures have recently been released in three Australian States; and reform measures have been introduced into the Parliaments of four States.

22. In Victoria the Law Reform Commissioner's report on rape prosecutions recommended that a judge or magistrate should permit the cross-examination of the victim as to her previous sexual acts only on matters of substantial relevance to facts in issue otherwise than as showing a general propensity, or to be proper material for cross-examination as to credit. The Commissioner also recommended that the defence should be allowed to rebut the victim's answers on matters not going to credit by calling evidence of her prior sexual activity, and that she should be able to reply.<sup>9</sup>

23. The Rape Offences (Proceedings) Act (No. 8950 of 1976) in Victoria inserts a new section (37A) into the Victorian Evidence Act, forbidding any evidence to be given or any questions to be asked as to the victim's general reputation for chastity. It also provides that no evidence shall be given and no questions asked as to the victim's prior sexual activities with persons other than the accused, without the leave of the court.

24. In Tasmania the Law Reform Commission adopted the Victorian suggestions with only one variation, namely that the accused's right to cross-examine the victim as to her past sexual activities should be restricted to the trial itself.<sup>10</sup> The Tasmanian Evidence Act (No. 3), which was passed in December 1976, only partially implements this recommendation. It adds a new section (102A) to the *Evidence Act* 1910, prohibiting a magistrate or a judge from allowing cross-examination of a rape victim on her prior sexual behaviour with persons other than the accused, unless such cross-examination is relevant to an issue before the court (as opposed to the victim's credibility).

25. In South Australia the Criminal Law Reform Committee agreed with the Victorian Commissioner that it would be unwise to specify the precise situations in which cross-examination as to the victim's prior sexual experience should be allowed. It recommended that such cross-examination should be allowed only when the fact of her prior sexual experience is relevant to the defence, and that this question should be resolved at a pre-trial conference with the trial judge. It further recommended that the general reputation or moral character of the victim should be deemed not to be relevant to the defence.<sup>11</sup>

26. This recommendation was partially implemented by the South Australian Evidence Act Amendment Act, passed at the end of 1976. Section 4 of that Act provides that in proceedings involving charges of a sexual nature, no evidence shall be adduced (whether by way of cross-examination or otherwise) as to the prior sexual experiences of the victim or as to her sexual morality, except with the leave of the judge.

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8. *Report of the advisory group on the law of rape* (HMSO, London, 1975), p. 36.

9. *Report on rape prosecutions*, paras 64, 68.

10. Law Reform Commission report, *Recommendations for reducing harassment and embarrassment of complainants in rape cases* (Tasmanian Government Printer, 1976), p. 8.

11. *Special report on rape and other sexual offences*, p. 52.

27. Late in 1976 the Evidence Act Amendment Bill (No. 1), 1976 was introduced into the WA State Parliament. The Bill differentiates between the position at committal proceedings and that at the trial. It provides that no evidence as to the victim's sexual history, disposition or reputation shall be adduced, by way of cross-examination or otherwise, without the leave of the court. At committal, leave can only be granted if the evidence has 'such relevance to issues arising in the hearing that it would be unfair to the defendant to exclude it'. At the trial, leave can only be granted if the evidence has substantial relevance to the facts in issue or to the credit of the victim.

28. If our proposals for redefining rape are accepted, the issue of consent will not arise in any case involving violence or threats of violence. In such cases we think there should be no cross-examination on the victim's prior sexual history. We do not consider that this line of cross-examination is relevant to the question of her credibility.

29. In cases where no threats or violence are alleged to have been used, the defence of consent will still be available. In such cases there are situations in which this line of cross-examination should be permitted.

30. We are reluctant, however, to leave the matter to the discretion of the trial judge without setting any guidelines as to how the discretion should be exercised. We do not agree that prior sexual contact between the victim and the accused is necessarily relevant to the issue of consent, although it often will be. Accordingly we think that cross-examination on this matter should remain at the discretion of the trial judge.

31. We believe that the victim in a trial in which consent is in issue should be cross-examined relating to her prior sexual acts only with leave of the trial judge. Such leave should be granted only where the evidence sought to be introduced is so closely relevant to the issues before the court that it would be unfair to the accused to exclude it, and, in any case, only in the following situations:

- (a) where the prior sexual acts are alleged to have taken place between the victim and the accused;
- (b) where the prior sexual acts were part of a pattern of behaviour which was strikingly similar to her alleged behaviour at or about the time of the alleged offence; or
- (c) where evidence of the prior sexual acts is relevant to explain the source or origin of semen, pregnancy or disease.

Any such application should be made in the absence of the jury. In no circumstances should cross-examination be allowed, or evidence introduced, to show that she is generally of bad reputation or moral character.

32. In no circumstances should there be cross-examination of the victim about her sexual history during the committal proceedings. This should be restricted to the trial. If cross-examination of the victim is thus restricted to matters which are clearly relevant to the defence, this will make it clear that the defence can call evidence to rebut her denials and that the Crown can call further evidence in reply.

33. Any discussion on the subject of the victim's sexual history must also mention the situation where the victim wishes to raise her lack of sexual experience as an aggravating factor in a rape prosecution. Strictly speaking, if the prior sexual experience of a victim is irrelevant to the issue of consent, her lack of experience should be equally irrelevant and inadmissible. Nevertheless the courts have, as a matter of practice, frequently allowed this type of evidence. We think that this is unfair to the accused, and that if he is to be debarred from raising the prior sexual experience of the victim as part of his defence, the Crown should similarly be debarred from raising her

lack of experience as part of its case against him. In very many cases where the victim was in fact a virgin prior to the offence, the medical evidence will reveal this fact. In such a situation the evidence is clearly relevant to the issue of whether intercourse had taken place, and no objection can be taken to it. However we think that it should be made clear that the Crown is not entitled to raise the prior chastity of the victim on the issue of consent. If such evidence does come before the jury, and the defence wishes to give evidence in rebuttal, it should be allowed to do so. This should be the only situation in which evidence of the victim's prior sexual activities should be admitted, outside the guidelines already set out.

### **Cross-examination of the accused on his prior sexual history**

34. It is an established tradition that the accused should not, except in special circumstances, have his past misdeeds revealed to the jury. This rule applies regardless of the nature of the offence involved. Its foundation lies in the belief that it would fundamentally prejudice the accused if the jury were allowed to assess his guilt in the immediate case by reference to his misdeeds on other occasions.

35. Substantial criticisms have been levelled at this rule by groups concerned with rape law reform. Those attacks, however, are directed less at the rule itself and more at the inequality between the victim and the accused. This inequality is illustrated by the fact that the accused can cross-examine a victim on her prior sexual history and still remain immune from questioning about his own past behaviour.

36. This is particularly strange when the position in rape trials is compared with the general rules relating to cross-examination of an accused on his past misbehaviour: as already indicated, the basic rule provides that an accused cannot be cross-examined on his prior convictions or antecedents. One of the few situations in which he loses this immunity is if the nature and conduct of his defence is to cast aspersions on the prosecution or prosecution witnesses. Although cross-examination of a rape victim as to her prior sexual activities may carry the suggestion that she is an immoral person, the courts have ruled that the accused in a rape case can put the victim's sexual history to the court without having his own past exposed. The reason for this is said to be that the victim's past activities are relevant to his defence of consent. The contradictory nature of this proposition becomes apparent when one compares it with the assumption, dealt with earlier in this chapter, that cross-examination as to a victim's prior sexual history goes only to her credibility or credit.

37. It is clear that the present situation is anomalous and unfair. However the unfairness has been caused more by the latitude given to the accused in his questioning of the victim than by the restrictions placed upon the Crown in its questioning of the accused. We think that the implementation of the recommendations we make in this part, both in relation to the redefinition of rape and in relation to the curtailment of the accused's right to question the victim on her past activities, should be sufficient to rectify this inequality. We do not think that this should be accompanied by any extension of the Crown's right to cross-examine the accused on his prior convictions.<sup>12</sup>

38. One further matter relates to the accused's right to make a statement from the dock, without going into the witness box and giving sworn evidence. He cannot be cross-examined at all upon this statement. This has given rise to some criticism. There has been a move to abolish this right in NSW, in relation to all criminal offences, upon the ground that it gives the accused an unfair advantage.

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12. Evidence, pp. 2648–9, Mr H. F. Purnell, QC.

39. The statement from the dock grew up when parties to litigation were considered incompetent to give evidence. This was thought to be unduly prejudicial to the accused, who was thereby debarred from presenting his defence. In order to counteract this, he was permitted to make a statement to the court without giving evidence. When, late in the nineteenth century, parties (including the accused) were permitted to give evidence in their own cases, the accused's right to make a dock statement continued. It has continued up to the present time in most of the Australian States. An attempt in 1974 to abolish it in NSW failed.

40. The third report of the South Australian Criminal Law and Penal Methods Reform Committee recommended the total abolition of the statement from the dock. This recommendation was restated in the Committee's special report on rape and other sexual offences.<sup>13</sup>

41. We are reluctant, however, to make such a recommendation. Although we appreciate the strength of the argument relating to the rape victim's inequality with the accused, the other recommendations in this part should do much to alleviate that position, without depriving the accused of one of his basic rights. It frequently happens that accused are for a variety of reasons unable to express themselves adequately, and incapable of doing themselves or their cases justice in the face of skilful cross-examination from experienced Crown prosecutors. We do not think that there is a sufficient case for treating rape trials differently from other trials in this respect.

### **Evidence of complaint by victim**

42. In earlier times a charge of rape was dependent upon the victim making 'hue and cry' shortly after the event. In the absence of an early public complaint by her, no prosecution would lie. This rule has been relaxed, but its effect can still be seen in the rule relating to 'early complaint'.

43. This rule allows evidence to be given of any complaint made by any victim of a sexual crime provided the complaint was made within a reasonably short time. It seems to us that the presence or absence of a complaint, and the terms in which it was made, is relevant evidence particularly where there is a dispute as to whether the victim consented.

44. However the combined effect of the hearsay rule and the rule against prior consistent statements (which prohibits evidence that a witness had previously made a statement which was similar to the version given in the witness box) would normally make evidence of such a complaint inadmissible. Complaints in sexual cases form an exception to the second of these rules, but not to the hearsay rule. As a result, a complex situation has emerged: evidence can be given of any complaint made by the victim shortly after the incident, but the jury must be warned that it can only use this complaint when considering the consistency of the victim's actions at the time she made it with her story in the witness box. It must ignore the complaint when considering the issue of corroboration, and it is not entitled to use it as evidence of the facts complained of; the latter because of the hearsay rule. In other words, the jury can use the complaint when considering the credibility of the victim, but must ignore it when determining the substance of the charge.<sup>14</sup>

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13. *Special report on rape and other sexual offences*, p. 53.

14. See also *Kilby v. R.* (1973) 1 ALR 283.

45. This device of allowing the jury to consider a piece of evidence for one purpose, but requiring it to ignore it when determining other aspects of the case, is used in a number of situations in criminal trials. However, it seems to us to be unrealistic: it is difficult to imagine a juror remembering the evidence when considering one issue, but ignoring it in another.

46. The solution is either to create a statutory exception to the hearsay rule so that complaints can be used for all purposes, or, on the other hand, to disallow the evidence of complaints altogether.

47. South Australia has adopted the second course.<sup>15</sup> The Evidence Act Amendment Act, 1976 effectively reduces the situations in which complaints can be admitted to cases where they were made in the presence of the accused. One of the Committee's reasons for recommending this approach was that the system which allows evidence of early complaints is based on a false assumption, namely that a person who delays before reporting a sexual assault is less trustworthy than one who complains immediately.

48. We agree with these reasons. No evidence of complaint can be given in cases relating to non-sexual assaults. Retention of complaint evidence is therefore inconsistent with our general aim of equating rape offences with non-sexual assaults.

49. We accordingly recommend that, unless a complaint in a sexual case is admissible under the general rules of evidence, evidence of such complaint should no longer be admissible. This will have the same effect as the South Australian legislation, namely to reduce the situations in which complaints can be admitted to cases where they were made in the presence of the accused.

### **Corroboration**

50. Corroboration of the victim's evidence in rape cases is not generally mandatory in Australia. This means that a jury is entitled to convict a person accused of rape even though the only evidence against him is that of the victim. However, a rule of practice has developed whereby a judge instructs a jury that it would be dangerous to convict upon the uncorroborated evidence of the rape victim. This rule applies not only in rape cases, but in all charges involving offences of a sexual nature.

51. The situation in the United States is quite different. Some states have enacted legislation requiring that the victim's evidence be corroborated in rape cases. The effect of this requirement is that if, at the end of the prosecution case, there is no independent evidence to support the victim's allegations as to penetration, identification and lack of consent, then the jury should be directed to acquit the accused. Here, in Australia, the jury is entitled to convict him, but must be informed of the dangers of doing so.

52. The dangers are said to arise from the fact that it is easy to allege rape but difficult to refute it. Men accused of these offences therefore need special protection. It cannot be denied that false complaints of rape are made from time to time, for a variety of reasons. The more fanciful complaints are unlikely to reach the stage of court hearing. The theory that many rape complaints are the products of distorted, neurotic fantasies and the psychiatric evidence on which it is based have now been discredited.<sup>16</sup>

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15. *Special report on rape and other sexual offences*, p. 48.

16. J. Wigmore, *Evidence*, vol. 3 (Chadbourn, rev. 1970), p. 736; Glanville Williams, 'Corroboration—sexual cases', *Criminal Law Review* (1962), p. 662.

53. The US experience has shown that a mandatory corroboration requirement substantially affects the conviction rate for rape. In New York State it was recently found necessary to relax the previous strict corroboration requirement, as it was virtually impossible to obtain a rape conviction. However it is at least questionable whether the corroboration warning, as it is given in Australian courts, has any effect at all upon the outcome of rape trials. By this warning the jury should be told that, although it is dangerous to convict a person charged with a sexual offence on the uncorroborated evidence of the victim, the law does not forbid them to do so. Nevertheless, they ought not convict unless they are clearly convinced that the victim's evidence is true. In all criminal trials, no matter what offence is involved, the Crown bears the burden of proving its case beyond reasonable doubt. This means that if a jury has any real doubt as to any component of the Crown case, then it must acquit. It is adding little to tell the jury not to convict unless it is convinced of the truth of the victim's evidence.

54. The South Australian Committee<sup>17</sup> and the Victorian Law Reform Commission<sup>18</sup> recommended the retention of the corroboration warning. Despite their views we see little advantage in the warning and little effect in it. We have some doubt about whether the corroboration warning should be abolished in all sexual cases, including those involving children and persons with mental incapacity. If we considered that it gave any real protection to the accused, we would be uneasy about recommending its abolition. However, since the warning exhorts the jury to do precisely what it is bound to do in any case, it appears to lack any real substance at all. Its retention would conflict with our general aim to equate sexual and non-sexual cases as much as possible.

55. We accordingly recommend that the requirement that the trial judge give a corroboration warning in sexual cases be abolished.

### **Composition of court**

56. Rape is unique amongst criminal offences in that, as presently defined, it can only be committed by a man upon a woman. The judges, prosecutors and defence counsel are almost invariably men, and in many States most people called up for jury service are men. This predominance of men in the legal processes in rape cases has been criticised by rape reformers. One witness before us, Ms Alicia Lee, urged that the opposite extreme was more desirable. She 'would like to see the whole thing being run by women . . . [with] policewomen, female detectives, a female judge'.<sup>19</sup>

57. We are quite unable to agree with this suggestion which, in its own terms, would replace one bias with another. Another witness, Jenny Pausacker, considered that the attitudes of the people involved were more important than their sex.<sup>20</sup> While we agree with this view we think that a better balance of attitudes is more likely to result from a better balance of the sexes in the legal process. It is unfortunate that there is only one woman judge in Australia who presides over criminal trials and that there are no women Crown prosecutors and few women barristers. In principle women should be much more involved in all the processes of the law but this must await an improvement in the status of women and a corresponding advance in this and other professions.

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17. *Special report on rape and other sexual offences*, p. 46.

18. *Report on rape prosecutions*, p. 34.

19. Evidence, p. 74, Ms Alicia Lee.

20. Evidence, p. 494, Ms Jenny Pausacker.



58. The position in relation to juries is quite different. Although in many States women are substantially under represented in jury panels, there is no reason in principle for this. The experience of South Australia shows that it is possible to arrange for a fair balance of the sexes in criminal trials, without special rules applying to sexual or any other offences. Unfortunately this is not the prevailing practice.

59. We received a number of submissions supporting the proposition that women should comprise at least half of juries sitting on rape trials.<sup>21</sup>

60. If our recommendations for redefining rape are adopted, rape will no longer exist as a separate offence. It will be possible to distinguish between sexual and non-sexual offences by considering the nature of the charge, but it will not be possible to distinguish rape from other sexual offences. It follows that any recommendation we make as to the composition of juries should apply to all sexual offences, not only to rape.

61. We have already expressed our view that sexual offences should, as much as possible, be treated in the same way as non-sexual offences. We have therefore thought very carefully about recommending that there be a minimum number of women jurors in the trial of sexual offences: to do so can only add to the number of respects in which sexual offences are treated differently from other criminal offences. Our basic position is that there should be a balance of the sexes in all criminal trials of whatever kind. Ideally it should not be necessary to make special provision—the ordinary rules of selection of qualified persons should ensure a reasonable mix of the sexes as in South Australia.

62. The area where reform is most needed however is that of sexual offences, not so much to change the outcome of the trial<sup>22</sup> but to ensure participation of women in the process and a broader range of attitudes. In trials involving sexual allegations, different attitudes might well be taken by people of different sexes according to their own preconceptions. It seems to us to be undesirable that these cases are dealt with by one sex exclusively. It would be difficult, however, to impose a rule that half of all juries in sexual offence cases are women. The Heilbron Committee in England proposed that there should be at least four people of each sex on any jury dealing with a sexual offence—that is that there could be no more than eight people of either sex on such a jury.

63. We are aware that the implementation of such a recommendation might necessitate substantial changes in existing procedures for selecting jury panels. It might become necessary to repeal the rule, which exists in some States, whereby women can gain exemption from jury service without having to give reasons. This would be desirable in all cases and not only in sexual cases. Though they are our main concern, we think that the need for greater representation of women on juries generally gives weight to our proposal.

64. We accordingly favour a minimum of four men and four women on juries dealing with sexual cases.

## **Publicity**

65. Until recently there has been little legal restriction on the right of the media to publish either the names of the parties or the details of the evidence of any cases not heard in closed court. Most States have provisions similar to section 578 of the NSW

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21. e.g. Submission 234, Mrs J. Brown.

22. *Special report on rape and other sexual offences*, p. 67.

Crimes Act, which empowers the trial judge to forbid the publication of evidence in sexual cases. In the absence of a judge's order in a particular case, there is no general prohibition on publication, but in practice the identity of victims of rape offences is not published.

66. However, it is desirable that legislation be passed forbidding publication.<sup>23</sup> The only objection to a general prohibition on the publication of the victim's name is the possibility that its publication might lead to the accused obtaining information which would assist him in his defence. These cases must be rare indeed.<sup>24</sup> South Australia and Western Australia recently forbade publication of material identifying the victim of sexual offences, except by leave of the court.<sup>25</sup>

67. The concealment of the identity of the victim would be of little benefit where her identity is already well known. Therefore we think that the trial judge or presiding magistrate should ask the victim if she seeks additional protection, such as could be afforded by ordering that the whole of the evidence be not published.

68. We believe that the publication of any material which might identify the victims of sexual offences should be prohibited and that judges and magistrates should have discretion to order that any part of the evidence in trials or committal proceedings for sexual offences not be published.

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23. Evidence, p. 2651, Mr H. F. Purnell, QC.

24. See also *Report of the advisory group on the law of rape*, p. 29.

25. Evidence Act Amendment Act, 1976 (South Australia) inserting section 71A (4) into the Evidence Act, 1929; *Evidence Act Amendment Act (No. 1)*, 1976 (Western Australia) inserting section 36c into the Evidence Act, 1906.

## 10. Sentencing in rape cases

1. Most people convicted of rape in Australia can expect to receive lengthy prison sentences. Very few are given the benefit of a bond, and the majority of sentences exceed 5 years. Table VII.10 shows the sentences imposed by NSW courts between 1969 and 1975; the proportion of sentences in excess of 5 years ranged from 59 to 85 per cent.

**Table VII.10 Sentences imposed by NSW courts, 1969-75**

Sentence	1969	1970	1971	1972	1973	1974	1975
Bond	2	..	2	3	5	2	3
1-2 years	..	..	..	..	..	..	1
2-3 years	2	..	..	1	3	..	..
3-4 years	15	2	1	5	5	6	7
4-5 years	5	2	3	4	4	4	4
5-10 years	22	15	27	30	26	34	30
10 years and more	12	7	3	9	3	13	9
Total	58	26	36	52	46	59	54

*Source: Statistics of higher criminal courts, NSW, 1969-75.*

2. Mr Purnell, QC, said in his evidence that NSW courts tend to impose much heavier sentences for rape than do English courts.<sup>1</sup> This is amply supported by a comparison between the sentences imposed in NSW in 1975 and those imposed by English courts in the same year. Whereas in NSW 72.2 per cent of offenders were sentenced to over 5 years' imprisonment, only 14.3 per cent of English offenders received such sentences. In NSW only 7.4 per cent of all convicted rapists received sentences of less than 3 years' imprisonment, compared to 57.3 per cent of those convicted in England.<sup>2</sup>

3. The NSW sentences, however, should not be considered in isolation from their accompanying non-parole periods. On most occasions when prison sentences are imposed, the judge stipulates a minimum non-parole period. There is a tendency to regard this as the real sentence, in the sense that it is this period which will in very many cases be the measure of the actual time spent in prison. The stipulation of a non-parole period is a direction by the judge that the prisoner's release on parole should not be considered before the expiration of that period. Nevertheless, if a prisoner behaves well in custody, he can usually hope to be released on parole at about the end of his non-parole period.

4. Table VII.11 shows the non-parole periods fixed by the NSW courts between 1969 and 1975.

1. Submission 1206, Mr H. F. Purnell, QC.

2. The English Criminal Statistics show that of 328 persons sentenced for rape, 260 were given prison sentences, nineteen of which were suspended. Of the 241 offenders sent to prison, eight were sentenced to less than 1 year, thirty-five to between 1 and 2 years, fifty-eight to 2 to 3 years, forty-three to 3 to 4 years, fifty to 4 to 5 years, thirty-four to 5 to 7 years, and thirteen to periods in excess of 7 years, including five who were sentenced to life imprisonment.

**Table VII.11 Non-parole periods fixed by NSW courts, 1969-75**

	1969	1970	1971	1972	1973	1974	1975
No non-parole period fixed	..	1	..	..	..	1	..
Less than 1 year	..	..	1	7	8	6	7
1-2 years	22	7	7	13	14	12	16
2-3 years	14	2	8	8	10	17	8
3-4 years	4	7	11	8	5	9	9
4-5 years	6	2	3	6	3	1	3
5 years and more	10	7	4	7	1	11	8
<b>Total</b>	<b>56</b>	<b>26</b>	<b>34</b>	<b>49</b>	<b>41</b>	<b>57</b>	<b>51</b>

*Source: Statistics of higher criminal courts, NSW, 1969-75.*

5. Although we have not had access to sentencing statistics from States other than NSW, we believe that there is no great disparity between the sentences imposed in NSW and those in other States.

6. A recent study by J. E. Newton of factors affecting sentencing decisions in rape cases concludes that the primary matter considered by Australian judges in their sentencing decisions is that of deterrence.<sup>3</sup> We assume that this means deterrence of the public at large, rather than deterrence of the individual offender against a repetition of the offence.<sup>4</sup> Insofar as this study refers to total sentences, as opposed to non-parole periods, Newton's conclusion is supported by the substantial discrepancy between the two, as revealed by a comparison between tables VII.10 and VII.11. Although deterrence can be taken into account in the determination of the non-parole period, it is generally considered to be a more appropriate factor in the fixing of the total sentence. On the other hand, as the High Court commented, the determination of the non-parole period is largely dictated by a consideration of what should constitute the minimum punishment for the particular crime.<sup>5</sup>

7. Newton's study of sentencing decisions in rape cases discusses the various factors which influence judges in the fixing of sentences. Apart from the deterrence aspect, he found that the matters which are likely to increase the severity of the sentence include the presence of violence, the fact that there are a number of offenders, the fact that the victim was attacked in her own home, and the psychological abnormality of the offender (insofar as this constitutes a danger to the public). On the other hand, any provocative or foolish behaviour on the part of the victim is likely to lead to a reduced sentence, as is, to a lesser extent, the youth of the offender. With some minor variations, this is largely consistent with the findings of Barber, who studied the factors influencing sentencing decisions in 135 Queensland rape cases, being all the cases in which convictions were recorded between 1957 and 1967.<sup>6</sup>

8. Two submissions called for more severe penalties for rapists, including castration or sterilisation.<sup>7</sup> We could not accept such a vindictive approach.

3. J. E. Newton, *Factors affecting sentencing decisions in rape cases* (Australian Institute of Criminology, Canberra, 1976), p. 23.

4. The recidivism rate in rape is very low; see chapter 4.

5. Per Barwick C. J., Menzies, Stephen and Mason JJ. in *Lyons and others v. The Queen* (1974) 3 ALR 553 at 556.

6. R. Barber, 'Judge and jury attitudes to rape', *Australian and New Zealand Journal of Criminology* 7 (1974), p. 157.

7. Submissions 1088, Mr S. Demasson; 110, Mr & Mrs Scrivener.

9. The studies and statistics show that rape has serious consequences for the victim and for the offender. We do not know how many offenders repeat or are likely to repeat their crime; it seems however that the opportunity for rehabilitation and for education in human relationships should be taken with offenders, many of whom are young and have shown a propensity to violence against women. The need to deter and to punish should not obscure the need to strengthen the individual's ability to cope with personal relationships.

# 11. Compensation to victims of rape and other sexual assaults

1. Victims of crime in Australia are generally in a worse position than victims of negligence. Whereas the latter can recover money in civil actions from those responsible, victims of crime can often recover only limited compensation. The reason for this is largely because of the lack of insurance cover. Insurance against crime, particularly crime involving physical injury, as opposed to property loss, is rare.

2. Victims of crime who suffer physical injury may claim compensation under State or Territory legislation.<sup>1</sup> The ACT has no such legislation.<sup>2</sup> An upper limit is usually imposed on the amount which can be recovered. The maximum amounts of compensation vary from \$2000 in South Australia to \$10 000 in Tasmania.<sup>3</sup> The methods of applying for and awarding compensation also differ from State to State. In all States except Victoria and Tasmania the offender is ordered to pay the compensation, but the State underwrites these orders. Where no offender has been brought to trial or convicted, the State is primarily liable for the compensation, except in NSW and in the Northern Territory, where there is no right to apply for compensation at all unless the offender has been apprehended. 'Ex gratia' systems operate in both places. In Victoria and Tasmania, the State is primarily liable to pay all awards of compensation.

3. Our concern is to ensure that victims of sexual crimes, including rape, are afforded the opportunity to obtain realistic levels of compensation with a minimum of formality and delay. This was the subject of submissions to the Commission: concern was expressed that too much emphasis is placed on the offender, and insufficient attention is given to the plight of the victim.<sup>4</sup>

4. We are concerned at the disparity between the various States which can lead to widely differing results.

5. The Victorian scheme under which a special tribunal hears all applications for criminal compensation appears to have many advantages, including consistency of approach, informality of procedure and a minimisation of delays. In Victoria the victim can be compensated for expenses and pecuniary losses, as well as for pain and suffering, including mental anguish and physical injury. Compensation can be allowed for any pregnancy resulting from the offence.

6. The average awards under the scheme have been well below the maximum. In these days of civil negligence awards of damages of well over \$100 000 in cases of severe injury, it seems unrealistic to restrict criminal compensation to the present small sums of \$2000 to \$10 000. Even if these limits are not exceeded in many cases

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1. NSW Criminal Injuries Compensation Act, 1967, and Crimes Act, 1900; Victorian *Criminal Injuries Compensation Act* 1972; SA Criminal Injuries Compensation Act, 1969-1974; Queensland *Criminal Code Amendment Act* 1968-1975; WA *Criminal Injuries (Compensation) Act, 1970-1976*; see Law Reform Commission of WA, *Report on criminal injuries compensation*, project no. 46; Tasmanian *Criminal Injuries Compensation Act* 1976; NT *Criminal Injuries (Compensation) Ordinance* 1975.

2. There is, however, an 'ex gratia' system of paying compensation to some victims of crime.

3. The following limits apply in each State: NSW \$4000 (section 437) \$600 for offence tried summarily (section 554); Victoria \$3000 (section 16); South Australia \$2000 (section 4 (1)); Queensland \$5000 (section 663A); Western Australia \$7500 (section 4 (1)); Tasmania \$10 000 (section 6 (1)); Northern Territory \$4000 (section 3).

4. e.g. Submission 234, Mrs J. Brown.

we believe that they could lead to unfair results. While we do not consider it practicable to remove the upper limit, we consider that there should be a more realistic limit, in the order of \$20 000.

7. The present situation in the ACT and in the Northern Territory is unsatisfactory. There is apparently an 'ex gratia' system for paying victims in the ACT. In the Northern Territory there is a compensation scheme in case of conviction and 'ex gratia' payments can be made when there is no conviction. We consider that a right to compensation should be conferred by legislation, with the advantages of legal certainty and public information which that would entail.

8. We think that legislation should be enacted in the ACT and the Northern Territory along the lines of the Victorian *Criminal Injuries Compensation Act* 1972 and providing for a limit of \$20 000. Another problem of criminal compensation schemes is that victims are often unaware of their existence. We consider that some steps should be taken to inform the public and to place information before victims of crime, particularly crimes of violence.

## 12. The need to redefine rape

1. This chapter examines some of the defects in the laws of rape, and explores how they might be remedied.

### **The consent standard**

2. Absence of consent is basic to the crime of rape. As a concept this cannot be criticised, but its over-emphasis has created difficulties. One problem which arose was the controversy about whether consensual intercourse, procured through false pretences, amounted to rape. Another was the complex issue of the cross-examination of the victim on her prior sexual history. Yet another problem is that of mistaken belief in consent, as raised in *D.P.P. v. Morgan*<sup>1</sup> and discussed in Annex VII.B.

3. In no other crime is the action of someone other than the accused so critical to the question of whether an offence has taken place. This focus on the actions of the victim, rather than the accused, has been responsible for many of the injustices in rape cases. This emphasis on consent is necessary if rape remains a purely sexual offence, with sexual intercourse as the forbidden act.

4. We question the basis of rape laws. We believe that the act of intercourse should not be singled out as the illegal act. Intercourse without consent is certainly a violation of the person which the law must condemn and punish. However rape often involves much more than a mere absence of consent. The violence and threats of violence, by means of which intercourse is procured, are themselves anti-social and unlawful. We think the law should be changed to emphasise these unlawful means, rather than the non-consensual intercourse itself, and so shift attention away from the victim and onto her assailant.

5. Our recommendations involve the repeal of most existing sections of the NSW Crimes Act (in force in the ACT) relating to sexual offences, and the enactment of a number of new sections. In relation to rape we recommend that, wherever possible, it be assimilated with non-sexual assaults. A framework is set out in chapter 18.

6. There are two main difficulties here. The first arises in the minority of cases where the victim is subjected to intercourse without consent, but without the use of threats or violence. In some cases the actual circumstances of the woman when she encounters her attacker or attackers will force her submission without overt threats or violence. In such cases the consent of the victim must remain the deciding issue. This cannot be avoided.

7. The second problem arises in those cases where intercourse is accompanied by sadism and masochism. The framework suggested in chapter 18 eliminates consideration of the issue of consent in all cases where violence, threats, false pretences or drugs are used to procure intercourse. It is possible, however, that even though one of these means is used to procure intercourse, this is done with the full consent of the so-called victim or even, on occasions, at her request. The elimination of the issue of consent would rob the accused of his only effective defence. It is difficult to conceive, however, that these cases would ever come before the criminal courts and, in the rare cases which might do so, the matter should be left to the trial judge when imposing sentence.

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1. [1975] 2 WLR 913.



8. There are therefore inherent difficulties in eliminating the issue of consent, even in cases involving violence. We do not think, however, that these difficulties should stop a necessary shift in the emphasis of the law: namely a shift away from a consideration of the victim's actions and attitudes, necessary when consent is in issue, towards a greater emphasis upon the actions and intentions of the offender.

### **The scope of the offence**

9. The offence of rape encompasses an especially wide range and variety of criminal actions. At one extreme it covers brutal and sadistic attacks, and the infliction of appalling injuries. At the other extreme it covers intercourse arising from petting which runs out of control, in which no physical harm is suffered by the victim.

10. The offence has generally been treated as a serious one: rape and murder were, in the days of capital punishment, the two main capital offences. They are still the only offences in NSW which are automatically tried in the Central Criminal Court, the highest criminal court in the State, presided over by a Supreme Court Judge. Long jail sentences are imposed on rape offenders, even those who cause no injury to their victims, and whose offences fall within the lower, more equivocal range of rapes.

11. Non-sexual assaults are divided into various grades of offences according to the intent with which they were committed and to the seriousness of resultant injuries. We can see no reason for treating sexual assaults any differently, and we propose to recommend accordingly.

### **Rape between spouses**

12. At present a woman, upon entering into marriage, loses her right to accuse her husband of rape. She is presumed to have consented to acts of intercourse which then take place between them.

13. On rape within marriage, it is argued on one hand that society needs to protect the institution of marriage, and that to allow complaints of rape within marriage would be destructive of this institution. On the other hand, existing laws are labelled as biased and unrealistic.<sup>2</sup>

14. We think that the law should aim to balance the two interests, namely to protect privacy within marriage, and to protect the individual against unwanted intercourse. This entails a change in the law.

15. A number of states in the United States have recently changed their laws to make rape an offence between spouses who are no longer living together.<sup>3</sup> A similar recommendation was made by the South Australian Committee.<sup>4</sup> The original Bill introduced to implement the recommendation went further and would have made rape an offence between spouses, whether living together or not. The Act, as finally passed, provides that a person shall not be convicted of rape or indecent assault on his spouse unless the offence was associated with: (a) the infliction of actual bodily harm, or the threat of such, upon the spouse, or (b) an act of gross indecency, or the threat of such an act, against the spouse, or (c) an act calculated seriously and substantially to humiliate the spouse, or the threat of such an act, or (d) the threat of the commission of a criminal act against any person.<sup>5</sup>

2. LeGrand, p. 919.

3. See e.g. 1974 amendments to Ohio Criminal Code; Michigan Enrolled Senate Bill No. 1207 (1974).

4. *Special report on rape and other sexual offences*, p. 15.

5. Criminal Law Consolidation Act Amendment Act, 1976, section 12 (inserting section 73 (5) in principal Act).

16. If our recommendations are implemented, violence, the threat or the intimidation used to procure intercourse will constitute the main element in the criminal act, rather than the intercourse itself. We do not believe there should be any immunity between spouses for violence or threats. Where there are no threats or violence, however, we are inclined to the view that the existing immunity should be maintained in respect of non-consensual intercourse for spouses living together. In relation to spouses living separately, however, we can see no justification for providing any immunity from rape prosecutions and we would not restrict the circumstances in which a person could be convicted of rape upon his spouse.

### **Other forms of sexual abuse**

17. In all States, except South Australia, rape relates to heterosexual vaginal intercourse. This excludes all other forms of sexual abuse, however damaging and humiliating. It also means that rape is a heterosexual offence, committed by a man upon a woman. This does not accord with the facts: it is clear that homosexual rapes do occur, and we can see no reason to exclude them from consideration of the criminal law.

18. We consider that a punishable offence, defined as 'sexual penetration', should include all forms of vaginal, anal and oral intercourse, including the insertion of foreign objects into the victim's anal or vaginal cavities.

### **The presumption relating to boys under 14**

19. A presumption exists that no boy under 14 is capable of having sexual intercourse, and therefore of committing rape. This is a conclusive presumption, which means it cannot be displaced by evidence to the contrary. It applies in all Australian States and Territories except South Australia, where it was recently abolished by section 12 of the Criminal Law Consolidation Act Amendment Act, 1976.<sup>6</sup>

20. There is no biological justification for this rule, and no social justification. It does not accord with reality and has been held not to apply to a boy charged with buggery of a male.<sup>7</sup> It should in our view be abolished.

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6. See also *Special report on rape and other sexual offences*, p. 13.

7. *R. v. Packer*, [1932] VLR 225.

## 13. Attempted rape

1. Each Australian State and Territory except Tasmania has an offence of attempted rape, with penalties ranging from 7 years to 14 years.<sup>1</sup> In some places the same sections create a similar offence of 'assault with intent to commit rape', carrying the same penalties.<sup>2</sup> In Tasmania there is no separate offence of attempted rape, and situations which might fall within this category are apparently dealt with as 'indecent assaults'.<sup>3</sup>

2. The emphasis on the sexual act in attempted rape has caused much the same difficulties as it has in relation to completed rape, principally because the issue of consent raises so many problems. As with completed rape, the issue of consent leads to the focus being placed less on the actions of the person accused of the crime, and more on those of the victim. Attempted rape should be redefined in precisely the same way as completed rape.

3. The emphasis on the sexual act, in both rape and attempted rape, has created a situation where the type of crime depends upon whether or not sexual penetration was achieved. If it was, the crime becomes rape, punishable with life imprisonment. If it was not, it is attempted rape, with a maximum penalty, in some States, of only 7 years' imprisonment. This ignores the fact that the victim can suffer injuries, indignities and humiliation whether or not the sexual act is completed, and that the actions of the accused can be equally vicious. As with completed rape, the whole actions of the accused rather than merely the sexual act should be decisive. The degree of violence used, the nature and extent of the intimidation or threats, and the seriousness of any resultant injuries: these are the important questions.

4. The division between completed and attempted rape can aggravate the position of the victim at the trial. It is in the interests of the defence to test the evidence as to penetration: if doubt can be shown on this issue, the accused might gain an acquittal on the serious charge of rape. To be convicted of the lesser crime of attempted rape could, in such situations, be seen as a victory for the defence. As a result, the issue of penetration can assume some magnitude during the trial, and this can deepen the distress of the victim.

5. We see no justification for treating cases where sexual penetration was completed any differently from cases where it was attempted, but not completed. We therefore recommend, in relation to the more serious assaults, that the existing offence of attempted rape be equated with that of completed rape.

6. In relation to the less serious assaults, we see no justification for retaining an offence of 'attempted rape' at all. In these cases, where there is no allegation that violence was used or threatened, and intercourse has not resulted, we think that the offence of indecent assault would be appropriate. This should be a summary offence, thereby relieving the victim, in these relatively minor cases, of the ordeal of a jury trial.

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1. The relevant sections of the Crimes Acts are: NSW Crimes Act, section 65 (incorporated into the ACT); Victorian Crimes Act, section 45; Queensland Criminal Code, section 349; South Australian Criminal Law Consolidation Act, section 49; Western Australian Criminal Code, section 327; Northern Territory Criminal Law Consolidation Act and Ordinance, section 61.

2. NSW, ACT, Victoria and Northern Territory.

3. Tasmanian Criminal Code, section 127.

## 14. Statutory rape and consent to sexual relations

1. 'Statutory rape' refers to offences which consist of sexual intercourse with a person below a certain age; the offence can be committed whether or not the other person consents to intercourse. If there is no consent the offence of rape is committed as well. Statutory rape is commonly called 'carnal knowledge', the phrase used in the statutes. The Mitchell Committee in South Australia<sup>1</sup> thought this an archaic expression, which carries unwarranted implications. We use the phrase 'sexual penetration' where appropriate.

2. The offences commonly known as 'carnal knowledge' do not necessarily involve any element of force. On the contrary, they cover activities which are proscribed by law to protect females considered too young and immature to appreciate the implications of their actions. They are therefore assumed to be incapable of giving consent to intercourse.

3. These offences in their existing form are generally heterosexual in nature. No special provision was made for homosexual acts involving children, since all homosexual acts were unlawful, whatever the age and whether or not consented to. Where homosexual acts between consenting adults are decriminalised it would be appropriate for 'carnal knowledge' laws to extend to homosexual intercourse involving children, as they do now in South Australia.

### Age of consent

4. A distinction must be maintained between 'carnal knowledge' offences and offences involving very young, pre-pubertal children. Quite different considerations apply in relation to the latter, and these will be discussed in the next chapter. This distinction is recognised in the laws of the various States, although there is substantial variation in the lower age limit of 'carnal knowledge', as well as in the upper age limit. The following is a list of the upper and lower age limits of 'carnal knowledge' offences throughout Australia:

NSW (and ACT) (section 71)	10 to 16 years
Victoria (section 48)	10 to 16 years
South Australia (section 49)	12 to 16 years
Tasmania (section 124)	12 to 17 years
Queensland (section 215)	12 to 17 years
Western Australia (section 187)	13 to 16 years
Northern Territory (section 65)	12 to 13 years

5. Some States provide immunity from liability for 'carnal knowledge' on an age differential basis. The prime example of this is in Tasmania, where three different exculpatory situations are provided in the relevant section, according to the relative ages

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1. *Special report on rape and other sexual offences*, p. 19.

of the male and the female.<sup>2</sup> Victoria and South Australia provide more limited defences according to the age of the offender.<sup>3</sup> In Western Australia the penalty is reduced if the offender is under 21.<sup>4</sup> Some States, specifically NSW, Queensland, South Australia and Western Australia, provide defences if the defendant believes the girl is over the age of consent, although the extent of this defence varies between these States: in some it is of very limited application.<sup>5</sup> Victoria provides an additional offence which occurs if a man over 21 has 'carnal knowledge' of an unmarried virgin between the ages of 16 and 18.<sup>6</sup>

6. Considerable dissatisfaction has been expressed about this area of the law. Both upper and lower age limits seem to have been determined in a random manner, with little regard to their social and biological implications.<sup>7</sup>

7. Some groups regard the existing laws as paternalistic<sup>8</sup>, and consider that:

The arbitrary determination of an age level below which willing participants in a sexual act are deemed incapable of consenting to that act is inconsistent with contemporary socio-logical and psychological thought.<sup>9</sup>

These critics suggest a new concept to take account of the circumstances of each individual case, and particularly of the maturity of the girl, the relative ages of the parties and the relationship between them.

8. We agree that age limits are arbitrary; no matter how carefully social, biological and psychological factors are taken into account in setting the limits, there will always be cases where the limit is inappropriate to the circumstances. Flexibility would be desirable in many ways, but in our view it is outweighed by the need for certainty in the criminal law. We could not propose a system in which a person's liability to a criminal prosecution would depend on a number of variable factors. We consider that the principle of fixed age limits should be retained, with some changes.

9. Most criticism of the existing law, as it operates in NSW and the ACT, relates to the high age of consent and to the failure to take account of age disparity.

10. We deal first with the age of consent. We do not have reliable information about the sexual activities of adolescents in today's society. Such information as is available to the Commission is discussed in Part II (social sexual behaviour) and Part IV (young people and fertility control). The numbers of teenage confinements and abortions show a level of sexual activity among girls under 16. There appears to be an increasing awareness of sexual matters among young adolescents, but we do not know whether this leads to an increase in sexual activity. It should be remembered that in exceptional circumstances the law allows girls of 14 to marry. While there is no

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2. By section 124, consent of the girl is a defence in the following situations:

(a) when the accused is under 21, and the girl is over 16;  
(b) when the accused is under 15, and the girl is over 12;  
(c) when the accused is under 16, and the girl is the same age or older than he.

3. Victorian Crimes Act, section 49; South Australian Criminal Law Consolidation Act, section 187.

4. Western Australian Criminal Code, section 187.

5. In NSW, for example, section 77 of the Crimes Act provides a defence if the defendant reasonably believed that the girl was over 16, but only if she was, in fact, either over 14 or was a common prostitute; in South Australia, section 55 (2) provides a defence if the girl was in fact over 16, and the defendant reasonably believed her to be over 17.

6. Victorian Crimes Act, section 50.

7. Anthony Grey, 'Sexual Law Reform Society working party report', *Criminal Law Review* (1975), p. 326.

8. Submission 1046, Council for Civil Liberties.

9. Grey, p. 325.

necessary connection between the age of consent and the age of marriage there seems to us to be an inconsistency in recognising that a 14- or 15-year-old girl may enter into a lifelong commitment but may not validly consent to sexual relations.

11. 'Carnal knowledge' law 100 years ago applied only to girls under 13. Now it applies to girls under 16 in NSW. Yet during that 100 years the age of the menarche 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 Child Welfare Acts as being in moral danger. This can be a quite inappropriate way of treating a youthful relationship.

12. The Solicitor-General for NSW in 1969, Mr H. A. R. Snelling, remarked:

It is usually very difficult to secure a conviction by a jury where the girl is 15 and the accused is only several years older. Does this indicate that as regards such girls the existing law is largely out of harmony with public opinion and ineffective? Would it be realistic and desirable to lower the age to 15, except perhaps in certain more heinous types of cases?<sup>10</sup>

13. The Council for Civil Liberties proposed that the age of consent should be reduced to 14 years and that in addition an age disparity factor should be built into the legislation.<sup>11</sup> This echoed the English Sexual Law Reform Society Working Party report.<sup>12</sup>

14. Richard Card recommended that the age of consent should remain at 16, but with age differential provisions designed to meet the situation of a younger girl having intercourse with a boy of roughly her own age.<sup>13</sup>

15. For our part we consider that the general age of consent should be reduced to 15. We think this would be a more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions. At this age children can leave school, get jobs, and start playing a responsible role in society. We also consider that the same rule should apply to boys as to girls.

16. We appreciate that the present law aims to protect young girls from the advances of older men and that there are some situations where special protection is needed both for girls and boys. Legislative recognition is usually given to the fact that a schoolteacher has considerable influence over his or her pupils. In order to discourage sexual exploitation by teachers, some legislatures have provided a higher age of consent in relation to them<sup>14</sup>; in others, the penalty is greater if the offender is the child's teacher.<sup>15</sup>

17. We share some of the doubts expressed to us on whether these matters are best dealt with under the criminal law, but we believe it is consistent, within present forms, that the principle of applying a special rule to sexual intercourse between schoolteachers and their pupils should continue, and that the age of consent in this case

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10. H.A.R. Snelling, QC, 'Sexual offences involving female children', *Proceedings of the Institute of Criminology*, no. 6 (University of Sydney, Faculty of Law, 1969), p. 67.

11. Submission 1046, Council for Civil Liberties.

12. Grey, p. 327.

13. Richard Card, 'Sexual relations with minors', *Criminal Law Review* (1975), p. 377.

14. e.g. NSW and ACT, where the general age of consent is 16, but it is 17 in relation to schoolmasters, teachers and stepfathers (Crimes Act, s. 73).

15. e.g. Victoria, where the maximum penalty for 'carnal knowledge' is 10 years, but if committed by a teacher it is 15 years (Crimes Act, section 48).

should be 17. We have the same view in relation to other people who exert influence over a child, such as parents, stepparents, adoptive parents or others standing *in loco parentis*.

18. The object of 'carnal knowledge' laws is to protect young girls from seduction and exploitation at the hands of someone who, through superior age and experience, can influence or manipulate the younger person. This is different from the situation of a boy and a girl who develop a sexual relationship, particularly if there was already closeness between them. We think it is inappropriate for boys in this situation to face charges that carry prison sentences of up to 5 to 10 years.

19. We have considered the issues related to teenage sexual behaviour with concern here and in other parts of the report. We understand the anxieties many feel and the dangers inherent in early sexual experience; nevertheless we do not believe that criminal sanctions are the appropriate community response to teenage sexuality. Education to promote responsible sexual behaviour is, in our view, preferable to a system which makes teenage sexuality into a furtive affair and which punishes the few who are unlucky enough to be caught.

20. The situation of the young offender particularly concerned the Council for Civil Liberties. The Council recommended that, in relation to girls under the age of consent, to be fixed at 14, provision for age equivalence of up to 7 years should apply. Thus consensual intercourse should not be an offence in their view if the boy was less than 7 years older than the girl.<sup>16</sup> As no minimum age was proposed we assume that the Council's proposal would apply no matter what the age of the female.

21. We agree that a system of liability on a relative age basis provides an acceptable method of meeting the problems which occur when young people have consensual intercourse with each other. We think, however, that a maximum differential of 7 years is too great and that there would still be a danger of exploitation within these age limits.

22. Taking into account the fact that adolescent girls are generally more mature than their male counterparts, we think that an age difference of 5 years would be more appropriate. We also consider that there should be a minimum age of 13 for the application of this rule.

23. Although the age of attaining puberty varies substantially between individuals, it generally occurs at about 13. Any intercourse involving a person below that age is substantially more likely to be exploitive in nature, and damaging to the person concerned, both physically and emotionally.<sup>17</sup> While we believe that intercourse between people of essentially the same age should in principle be free from criminal sanctions, even where one party is under 13, we do not consider it appropriate to formulate a precise recommendation on this issue. Where children are close to each other in age and there is no coercion or undue influence, common sense should dictate that criminal proceedings are a quite inappropriate way of dealing with the matter. We have in mind no more than a 2- or 3-year difference in age.

24. We do not think that intercourse involving a child under 10 should be permissible, no matter what the age of the other party.

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16. Submission 1046, Council for Civil Liberties.

17. Card, p. 372.

## **Male and female offenders and victims**

25. South Australia is the only State which has removed sexual discrimination from its 'carnal knowledge' laws. There it is an offence for any person to have unlawful 'carnal knowledge' of any other person under the age of 17 years, regardless of the sex of either. This change was made in 1975, when homosexuality was decriminalised. All references to the sex of both the offender and the victim were removed in all sexual cases, and the law relating to sexual offences now applies also to homosexual situations. In relation to 'carnal knowledge', an older female is now liable to be charged if she has intercourse with a young male. We agree with this and propose the removal of all references to the sex of the offender or the victim in sexual offences within the parameter of the age limits we recommend in this chapter. We can see no reason why older men (or for that matter women) should be allowed to seduce young boys in circumstances where they would be liable to criminal prosecution if they did the same with young girls.

## **Reasonable belief in age**

26. In Queensland and Western Australia the defendant can escape conviction if he can show that he reasonably believed that the girl concerned was over the relevant age of consent. Some other States provide similar defences, but these are limited according to the age of the girl (in NSW, ACT and South Australia) and to the age of the defendant (in Tasmania). We think that this defence should be available in all 'carnal knowledge' charges, and without age restriction. We also think that, once the issues of mistaken belief in the other person's age has been raised by the defence, the Crown should bear the burden of disproving this allegation.<sup>18</sup>

## **Proceedings**

27. 'Carnal knowledge' was exclusively an indictable offence in NSW until 1974, and it still is in most other States, if the offender is no longer a juvenile. As a result, there are normally two court hearings, the committal proceedings and the trial. The inappropriateness of this was recognised in NSW when, in 1974, it amended section 476 of the Crimes Act to enable 'carnal knowledge' to be taken to finality by a magistrate when the girl was over 14 and the defendant agreed. We agree with this but we think that the age limit of the victim should be reduced to 13 and the consent requirement abolished.

28. Until recently, many cases of 'carnal knowledge' came to the notice of the authorities in NSW because the Registrar-General regularly reported all cases where particulars of birth indicated that the girl was under 16 at conception. After complaints this practice has now been discontinued. The Council for Civil Liberties submitted that some hospitals and hostels have recently taken upon themselves to report the matter to the police.<sup>19</sup> It is difficult to see any justification for such a practice. It is most unlikely to lead to a decrease in the sexual activity of young people, or in the number of resultant pregnancies. It would in our view be appropriate to set a limitation period for the commencement of 'carnal knowledge' proceedings of 6 months.<sup>20</sup> This would ensure that the parties would not be prosecuted after the birth of the child.

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18. Snelling, p. 68.

19. Submission 1046, Council for Civil Liberties.

20. Such a limitation period already exists in Queensland and Western Australia.



## **Indecent assault**

29. Sexual activities between young people falling short of intercourse are presently dealt with by the law as 'indecent assaults' or 'indecent dealings with a girl'.<sup>21</sup> In general, the consent of the girl is no defence to such a charge if she is under the age where she can consent to intercourse. These offences carry maximum penalties which vary from 1 to 5 years' imprisonment.

30. It seems highly probable that only a tiny proportion of actual occurrences ever come before the courts. Furthermore, as mentioned in Part IV, sexual behaviour develops in stages in fairly well-defined patterns. Some consensual activities are unlikely to be injurious to either party. The law itself may be brought into disrepute when it provides for offences which are consistently ignored.

31. In our view the law does not accord with the realities of young people engaging in sexual activities short of intercourse. Even the age limits we have proposed may be inappropriate. We think that those activities which would constitute 'indecent assaults' if committed without consent should, if consented to, be offences only if one party is under 13 or he or she is between 13 and 15 and the other party is more than 8 years older. The principle mentioned earlier as to relations between persons of essentially the same age, one of whom is under 13, should also apply here but we have not formulated a precise recommendation.

## **Education and information**

32. With increasing mobility between States, uniformity in the laws of the States and Territories would be desirable. The differences between the laws may contribute to the lack of knowledge of young people about the law.

33. In any event it is important to ensure that young people are aware of the law and how it affects them in their sexual behaviour. One submission advocates that lawyers should give lectures in high schools about common legal pitfalls for young people.<sup>22</sup> We agree with this suggestion, which we think has great merit. We have already referred in Part II to the need for young people to understand their legal and moral responsibilities in sexual relationships.

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21. The relevant sections of the Crimes Acts are: NSW (and ACT), sections 76, 77; Victoria, section 55; South Australia, section 57B; Tasmania, section 127; Queensland, section 216; Western Australia, section 189.

22. Submission C292, confidential.

# 15. Sexual offences involving young children

1. In this chapter we are concerned with those sexual relationships which we think should always be offences because one party involved is too young to be able to consent validly to the acts performed or because the acts are performed without the consent of the young person. We are concerned with the protection of children who, through having been victims of sexual molestation, become participants in our criminal justice system.

## Carnal knowledge of young children

2. All Australian States and Territories impose penalties identical to those for rape<sup>1</sup> for the crime of having 'carnal knowledge' of a young girl, the upper age varying from 10 to 13. The offender is punished for an offence equivalent to rape, without any inquiry into the consent or otherwise of the victim since it is conclusively presumed that any act of intercourse with such a young girl must be a coercive one.

3. Intercourse by an adult with a very young child is likely to inflict emotional damage on the child, and it can also result in physical injury. It should be deterred by the provision of substantial penalties.<sup>2</sup> Such intercourse is, almost invariably, either not consented to, or procured through coercion or intimidation.

4. A criminal offence which depends on the age of the victim is arbitrary, but we know of no alternative: devices which might provide flexibility deprive the law of its certainty.

5. We believe that all children under 10 years of age should be entitled to special protection. Offences against children of 10 years or over should be dealt with according to the laws of rape and statutory rape. Where the child is under 10, a special offence, carrying penalties equivalent to the most serious rape offences, will be complete upon proof of sexual penetration.

## Indecent assault

6. Sexual molestation of children short of sexual intercourse is at present treated as a separate offence, and is classified as either 'attempted carnal knowledge' or 'indecent assault'. The penalties for the former range from 7 to 14 years. 'Indecent assault' is treated as a lesser offence, carrying a maximum of 2 to 7 years' imprisonment.<sup>3</sup>

7. In rape the degree of violence should be the measure of the gravity of the offence, rather than the act of penetration. In relation to the sexual molestation of young children, however, different principles apply: although some attacks are accompanied by

1. Life imprisonment in all States except Victoria, which provides for 20 years' imprisonment.

2. Dr Vincent J. de Francis, J.D., *Protecting the child victim of sex crimes committed by adults* (American Humane Association, Children's Division, Colorado, 1969).

3. The penalties are:

	<i>attempted carnal knowledge</i>	<i>indecent assault</i>
NSW and ACT	14 years	6 years
Victoria	10 years	5 years
South Australia	7 years	5 years
Queensland	14 years	5 years
Western Australia	14 years	7 years
Northern Territory	7 years	2 years

violence or threats of violence, in many cases the pressure on the child is more subtle, especially from a relative of the child. In addition, the act of intercourse itself is damaging to a child, both physically and emotionally.

8. We therefore support the retention of the existing classification of offences involving young children, according to whether sexual penetration was completed. The definition of 'sexual penetration' should, however, be widened as recommended earlier. This would mean that some crimes which are now 'indecent assaults' would fall within the main offence.

9. There is however no need to retain the distinction between 'attempted carnal knowledge' and 'indecent assault'. We think it would be preferable to abolish 'attempted carnal knowledge' as an offence, and to treat all sexual attacks on young children in which penetration is not effected as 'indecent assaults'. Where there is violence or other aggravating circumstances they should be dealt with under the main offence as equivalent to rape.

### **Summary trial**

10. All 'indecent assaults' should be treated as summary offences. The widening of the definition of 'sexual penetration' will remove the more serious sexual molestations from this category. In addition, any offences involving violence or threats of violence will fall within the appropriate category of assault. As a result, 'indecent assault' will cover only those cases where no sexual penetration was effected, no violence was used and no injury was suffered. It will therefore comprise only the lowest range of sexual assaults. In NSW 'indecent assault' is triable summarily if the defence consents and if the victim is over 14. We think that the qualifications as to both age and consent should be removed. It is in the interests of the victim, as well as those of the defence, for the proceedings to be disposed of with a minimum of delay and formality.

### **Protection of child victims**

11. This brings us to the most difficult questions in relation to sexual offences against children, namely the problems which arise because the child becomes the pivot in prosecution. It is axiomatic that children are entitled to protection under the law from criminal sexual attack. But, having already become victims of sexual attack, real questions arise as to the extent to which they should have to be involved in the system of criminal justice, attend at court and give evidence against the aggressor. The legal procedure may do more harm to the child than the original offence, and in some cases it may be the only cause of serious upset.<sup>4</sup>

12. This concern about the child's role in legal prosecutions is not new. In 1925 a UK Departmental Committee on Sexual Offences against Young Persons reported:

A large number of witnesses desire to spare the child the prolonged strain involved in waiting for the trial. A committal for trial necessitates the child's having to relate the facts over and over again to different people, and on at least four different occasions. It involves more formality in the proceedings of the court of trial, and the likelihood of a more trying cross-examination than was undergone at Petty Sessions. And, lastly, the details have to be kept in mind during a waiting period which may be as long as 5 months, the child being thus obliged to remember what, in its own best interests, it should be allowed to forget.<sup>5</sup>

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4. T.C.N. Gibbens & J. Prince, *Child victims of sex offences* (ISTD, London), p. 5.

5. Committee on Sexual Offences against Young Persons, Command Paper 2561 (HMSO, London), p. 27.

13. In spite of comments such as these, little has been done to alleviate the position of the child victim in the criminal justice system. Here we refer to child victims of all sexual offences, including incest, rape and statutory rape.

14. We think that victims under 15 should be entitled to special protection under the law. This is consistent with the age of consent we recommend. Court proceedings can be particularly harmful to incest victims, and we therefore think that these protective measures should be available for them up to 17 years, the age at which we consider it appropriate for consent to be a defence to a charge of incest.

15. It appears from studies in the United States and England that there is a pattern of pathology in many families containing child victims of sexual crimes. The sexual molestation is a symptom of deeper problems. In a major survey of 250 sexual offences involving children, in two areas in the United States 10 years ago, it was found that one-third of the children came from broken homes, half the families received welfare funds and 40 per cent of the parents showed signs of disturbance. In 33 per cent of the families the current sexual offence was not the first, some household member having been involved either as offender or victim in a prior sexual offence; child neglect existed in 79 per cent of the cases studied. In 72 per cent of the cases the parents contributed to the circumstances of the sexual molestation and, in 25 per cent of cases, a parent or parent substitute actually committed the offence. In only 25 per cent of the cases was the offence committed by a stranger. In general it was found the greater the family pathology, the greater the tendency for the offender to be more closely related to the family.<sup>6</sup>

16. Similar results came from a survey conducted by Gibbens and Prince in London and Liverpool. They used a random sample of eighty-two cases of sexual offences involving children, and a selected sample of forty-six other such cases which resulted in criminal prosecutions. They found that 66 per cent of the families had some existing disturbances or problems; 17 per cent were classed as 'problem families', as against a community average of less than 1 per cent. Among the cases which occurred in 'problem families', the great majority of offenders consisted of fathers and neighbours. The authors commented that:

Most of these families were so lacking in recognition of normal social controls and constraints that the event seemed to pass largely unnoticed by the family until some additional crisis drew attention to it.<sup>7</sup>

17. These surveys suggest that most families whose children become victims of sexual offences are urgently in need of assistance in a social sense. Many child victims of sexual offences should be considered in much the same light as victims of parental abuse. Some of them, of course, are in fact victims of such abuse: father-daughter incest is one of the worst kinds of parental abuse. But even those children whose parents are not the direct perpetrators of the offence are, in many cases, victims of their family pathology.

18. Sexual offences against children are more likely to be reported to the police than are non-sexual abuses, and criminal prosecutions are more likely to follow.<sup>8</sup> Prosecutions are usually instituted without regard to the welfare of the child. In one of the two areas studied by Dr de Francis, the local intervention by a child protection agency to deter prosecution, as a protective measure for the child, led to a substantial reduction in the number of prosecutions.

6. de Francis.

7. Gibbens and Prince, p. 13.

8. Michael Wald, 'State intervention on behalf of neglected children: a search for realistic standards', *Stanford Law Review* 27 (1975), p. 1024.

19. It is in the public interest for the offender to be prosecuted, to avoid repetition of the offence. But there are cases where repetition is unlikely. There are also cases where, because of a paucity of corroborative evidence, combined with the rule that the unsworn evidence of children should be corroborated, the proceedings are unlikely to lead to a conviction.<sup>9</sup>

20. Certainly it is often in the child's interests for the offender not to be prosecuted. The studies of Dr de Francis and Gibbens and Prince support the view that a child is more likely to suffer long-term emotional damage if the original offence is followed by court proceedings in which it is necessary to confront the attacker and recount the incident.

21. In Australia the police usually decide whether or not to arrest and prosecute the offender<sup>10</sup>; there is little intervention by child welfare or child protection agencies. The police, however, are not equipped to balance the two competing interests involved: that of the child in allowing the matter to be forgotten and that of the public in having a proved offender dealt with. In their principal role in the enforcement of law, the police incline towards the public interest in prosecuting the offender. In our view, however, the interest of the child is also a legitimate public concern.

22. Apart from the legal procedures themselves, we see a need for the introduction of two measures. The first is the automatic involvement of a social agency in all reported cases of sexual offences against children. The second is the establishment of a body equipped to assess the competing interests involved in determining whether to prosecute the offence.

### **Child protection service**

23. Child victims of sexual offences should be treated in much the same way as child victims of family abuse, whether sexual or non-sexual. Part V of this report contains a detailed analysis of the services now available to the abused child and its family, and, amongst other measures, recommends that a child protection service be established. We think that this service should be available for the child victim of sexual offences and its family. The police should report to the child protection service all cases of sexual offences involving children which have been reported to and accepted by the police.

24. The child protection service would provide assistance and support for the child and its family. It would also enable, where necessary, an experienced social worker to assess the impact of the offence upon the child and the likely effect of court action. The service should have power to intervene on the child's behalf and request that no criminal action be taken. The child protection service should also have power to remove the child from the family for a stipulated period of time pending assessment and investigation of the family, but without, at this stage, making the child a ward of the State.

### **Child protection tribunal**

25. When a request for no criminal action is made, we envisage that in many cases, particularly those involving minor offences, an approach to the police might be all that is required. The police, however, cannot be expected to act as final arbiters in

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9. Snelling, p. 63.

10. An exception occurs in NSW where section 78F of the Crimes Act provides that no incest offence will be prosecuted without the approval of the Attorney-General.

such matters. In many cases they may feel compelled to prosecute no matter how damaging the effect on the child. In cases such as these an independent body should have power to determine the issue.

26. We should like to see the establishment of a body equipped to assess the competing interests involved in determining whether to prosecute the offence. This type of measure was apparently contemplated by Mr Snelling:

The police officer dealing with this type of offence should promptly report the case to a magistrate or Children's Court who should have power to recommend to the Attorney-General that, primarily in the interests of the child, criminal proceedings be not instituted or be discontinued if already instituted.<sup>11</sup>

27. While agreeing in principle with Mr Snelling, we question whether a magistrate is an appropriate person to exercise this power. One of the objections to a magistrate undertaking this task is that, in rural areas where only the one magistrate is available, substantial difficulties could arise. In dealing with the preliminary question of whether a prosecution should lie, he would frequently learn matters prejudicial to the offender, which would be inadmissible in any legal proceedings. If he were then to recommend that criminal proceedings ensue, the defence could legitimately object to his sitting on the case. This could give rise to quite unacceptable expenses and delays.

28. The solution, as we see it, is to establish a special tribunal for this purpose. This tribunal should consist of a judge, or, if a larger tribunal is preferred, it should be presided over by one. It should conduct its proceedings *in camera*, and should receive only written evidence and submissions. We consider that the following general procedures should apply.

29. A social worker or a parent who considers that a prosecution could substantially affect the mental health of a child victim of a sexual offence should be entitled to apply to the tribunal for a recommendation that no proceedings be instituted, or that any existing proceedings be discontinued. The application should include a report, setting out the child's version of the offence, and the reasons for the application. Parties to be notified should include the police and the parents or guardians (if not applicants). The police should provide a report about the offence and their attitude to the application. Details of the offender's criminal record should be included.

30. There should be power to call for a welfare report if not already provided. As speed is essential, especially where a prosecution follows, the scope for further inquiry should be kept within limits. The tribunal might request psychiatric reports but we would not envisage a compulsory power.

31. The lodgment of an application should operate as a stay of the proceedings against the offender. Appropriate exceptions should be made when it is feared that an offender will abscond or commit further offences if he is allowed to remain at large. If legal proceedings do ensue, it is in the child's interests that they be disposed of as quickly as possible. Therefore it is imperative that the tribunal should complete its deliberations as expeditiously as possible.

32. Although we are reluctant to place any time limit on the application, we think that it should be made before the completion of the proceedings in the Magistrate's Court. After the magistrate has committed the offender for trial, the Attorney-General already has an overriding discretion to order that the matter should not proceed.

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<sup>11</sup> Snelling, p. 63.

33. The tribunal should have power to recommend to the Attorney-General that no proceedings be instituted against the offender, or that any existing proceedings be discontinued; alternatively the application may be refused. There could be cases where the tribunal might seek an undertaking as a condition of its recommendation. We envisage that such applications would arise most often in cases where the offender was related to the victim. An undertaking to seek counselling or treatment or simply to avoid contact with the child might be desirable. The legal status of such an undertaking would need careful consideration in case of later breach.

### **Court procedures**

34. We now turn to those cases that result in criminal proceedings. A child old enough to give a rational account of his or her actions has to attend at court and give evidence. The only concession made to the fact that the victim is a child is that, in some states, the Magistrate's Court proceedings are dealt with by a Children's Court<sup>12</sup>, and are therefore heard in camera.<sup>13</sup> Nevertheless the defendant is always entitled to be present, and has the right to cross-examine the child. If the offence is an indictable one and the defendant is committed for trial, the child will have to attend again at the higher court, and give evidence before a judge and jury, in open court. Once again the defendant is entitled to cross-examine the child, and will normally do so. There can be substantial delays before the hearing of the trial.

35. Under a system introduced in Israel in 1955, a 'youth examiner' has power to interview the victim, to investigate the crime, and to determine whether criminal proceedings should be instituted. He also decides whether the child should be permitted to give evidence and can himself give evidence in lieu of the child. No person can be convicted on his uncorroborated evidence. The system led to a reduction in the number of young children giving evidence.<sup>14</sup>

36. We do not consider that this proposal would be acceptable in this country: it runs counter to the basic protections provided under the law for those accused of crime and deprives them of all rights to confront their accusers. The problem is that the right to confront one's accuser is in conflict with granting a child immunity from court attendance. As the basic rights of the accused must be preserved, the only way to alleviate the position of the child is with the consent and co-operation of the defence in each case.

### **Indictable offences**

37. In chapter 8 we recommended that, except on special circumstances being shown, victims of sexual offences should not be required to attend committal proceedings. Instead their evidence should be given by the production of their appropriately verified statements. This system is particularly apt in relation to child victims of sexual offences. A similar provision exists in the United Kingdom, although there the child can be forced to attend if the defence requests it.<sup>15</sup>

38. On the rare occasions that the victim is required to give evidence, the magistrate should allow the child protection service to remain in court and, if necessary, to comfort or encourage the child during the course of the evidence. The magistrate should also have power to order that the defendant remain outside court during the taking of the victim's evidence, provided his lawyer is present in court.

12. e.g. NSW Child Welfare Act, 1939, section 12 (1).

13. e.g. *ibid.*, section 16.

14. Judge David Reiffen, 'The sexual offender and his victim', *International Child Welfare Review* XII (1958), p. 109.

15. UK Children and Young Persons Act 1963, section 22.

39. No substantial problems are expected to arise in committal proceedings. When the accused faces his trial by jury, however, the child may be intimidated by the ceremony and formality. There is a need to protect the child and, if possible, there should be minimum participation by the child without unduly hampering the defence.

40. A pre-trial conference flexible in procedure and attended by the trial judge, the Crown prosecutor, defence counsel and the child protection service should be held to try to establish the best *modus operandi* for the conduct of the trial: it might be possible to dispense with the child's attendance altogether, by accepting his or her written statement. Direct confrontation between the accused and the child should be avoided. To this end the judge should be entitled to ask defence counsel (if necessary in the absence of the prosecutor) about the nature of the defence case. The judge should also have power to order that the evidence of the victim be taken in the absence of the accused, provided the latter's counsel is present.

41. The pre-trial conference should be flexible in procedure. Its success would depend on the co-operation of the parties involved. If this could be secured it could represent a major advance in the protection of children.

42. Mr Snelling suggested that, in cases involving child victims of sexual offences, the following measures might be considered:

That the judge may dispense with the wearing of wigs and gowns by judge and counsel; that the judge shall have a discretion to hear the child's evidence in his chambers in the presence of the jury, or, if this is not practicable, shall exclude the public from the court while the child gives evidence.<sup>16</sup>

We agree with these suggestions, and think that these matters should be raised at the pre-trial conference.

### *Summary offences*

43. A child would generally suffer fewer harmful effects in a hearing involving summary offences than in the prosecution of indictable offences. In the normal course of events, a summary offence is disposed of in a Magistrate's Court more promptly than is involved in the trial of an indictable offence.

44. Nevertheless, if the case is defended, the child still has to give evidence.

45. We think that the same type of pre-trial conference as we recommended in relation to indictable offences should be held in relation to summary offences. The same policy should apply, namely the need to minimise the child's involvement in the proceedings without prejudicing the conduct of the defence case. As with indictable offences, the magistrate should have power to order that a child's evidence be taken in the absence of the accused, provided his lawyer is present. Notwithstanding the exclusion of the public from the hearing, the social worker should be allowed to remain in court to provide support, if necessary, for the child.

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16. Snelling, p. 65.



## 16. Sexual offences involving people with mental incapacity

1. In NSW, ACT, Queensland and Western Australia it is an offence to have or attempt to have unlawful carnal knowledge (meaning intercourse outside marriage) with a woman who is known by the offender to be an idiot or imbecile.<sup>1</sup> In Tasmania a similar offence exists, but the 'insanity' or 'defectiveness' of the woman constitutes the relevant criterion.<sup>2</sup> In Victoria an offence can only be committed by an official or employee of a mental institution, or by someone having charge of a female mental patient.<sup>3</sup> In South Australia an offence exists if the person is 'known to be so mentally deficient as not to understand the nature or consequences of the act'.<sup>4</sup>

2. There is no statutory definition of 'idiot or imbecile' in New South Wales. The Tasmanian *Mental Health Act* 1928 (as amended) provides that idiots are:

... persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers.

Imbeciles are:

... persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy yet so pronounced that they are incapable of managing themselves or their affairs or in the case of children of being taught to do so.

South Australia has a similar definition of idiots, and a definition of imbeciles which depends upon whether persons are incapacitated by mental defect from earning their own living.<sup>5</sup>

3. These provisions were no doubt intended to be protective in nature. It is probable also that the undesirability of procreation by women who may not be capable of caring for their offspring was taken into account when the offences were created. The effect of these laws, however, is to deprive a woman within one of these definitions of all sexual freedom. The law contains assumptions which we do not think are warranted, namely that any intercourse with such a woman is likely to be exploitive in nature, and possibly damaging in its effects. These laws do not admit the possibility that the woman may want to enter into a sexual relationship.

4. The South Australian Committee recommended that the criminal law should intervene only when the mental state of a person rendered him or her incapable of giving true consent to sexual intercourse.<sup>6</sup> This recommendation has been implemented and should, in our view, be followed in principle elsewhere.

5. We recommend that the existing 'idiot or imbecile' provision be repealed and be replaced by a provision prohibiting intercourse with a person, female or male, who is known by the offender to be unable to understand the nature and consequences of the act, and therefore to be able to give true consent to it. This concept of knowledge of the other person's incapacity also means that, if both parties to intercourse are so mentally defective that neither is aware of the other's incapacity, no offence will be committed. These offences should be triable summarily at the option of the defendant.

1. NSW (and ACT), section 72A; Queensland, section 215 (2); Western Australia, section 188.

2. Section 126.

3. Section 54.

4. Section 49 (6), SA Criminal Law Consolidation Act Amendment Act (1976), which replaces section 55 (1) (6) of the principal Act.

5. South Australian Mental Defectives Act, 1935, as amended (section 4).

6. *Special report on rape and other sexual offences*, p. 25.

## 17. Incest

1. In this chapter we discuss the role of the law in relation to incest, and consider how the young victim of incest can best be protected, both from a repetition of the offence and from a perpetuation of the psychological trauma caused by the offence.

### **Current law relating to incest**

2. Incest has not always been proscribed by law: in England it was an ecclesiastical offence in the middle ages, but was not thereafter forbidden by law until 1908, when the Punishment of Incest Act was introduced. It is an offence in all Australian States and Territories, although there is no uniformity in the content of the law. The penalties vary from 7 years to life imprisonment and there are other differences. There are some anomalies in incest laws. We refer to two of these.

3. The first relates to the forbidden degrees of consanguinity. In all States and Territories, except South Australia, Western Australia and the Northern Territory, a male is forbidden to have intercourse with his granddaughter, and a corresponding proscription exists against a female consenting to intercourse with her grandfather. On the other hand, it is not an offence for a male to have intercourse with his grandmother, or for her to have intercourse with him.<sup>1</sup> Presumably this is a reflection of the fact that intercourse between a grandmother and her grandson is most unlikely to occur and that, if a substantial age disparity exists between the parties to intercourse, the older party is more likely to be the male. Nevertheless there seems little justification for the distinction.

4. The other anomaly relates to the substantial difference between the way men and women who commit incest are treated under the law. This constitutes a very real discrimination against men. In all States except South Australia and the Northern Territory it is a different, and more serious, offence for a man to commit incest within his family than it is for a female to do so.<sup>2</sup> The most extreme discrimination occurs in Queensland and Western Australia, where the male is liable to be imprisoned for life and the female for a maximum of only 3 years. This cannot be justified on the hypothesis that the female may have been coerced into the situation; both States provide a defence to the female if she was coerced into intercourse. No similar defence is available to the male; on the contrary, it is specifically provided that the female's consent is no defence to a charge against him. If a male coerces a female member of his family into a sexual relationship, he is liable to a maximum penalty of life imprisonment, and she is not punished. On the other hand, if she coerces him into such a relationship, she is liable to a maximum of 3 years' imprisonment, and he is still liable to be imprisoned for life. It goes without saying that a law which creates such unequal situations, and which appears to be based upon such outdated notions of sexuality, requires substantial reappraisal.

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1. NSW (and ACT), section 78A; Victoria, sections 52, 53; Tasmania, section 133; Queensland, sections 222, 223.

2. NSW (and ACT), section 78A; Victoria, sections 52, 53; Tasmania, section 133; Queensland, sections 222, 223; Western Australia, sections 197, 198.

## Social aspects of incest

5. In the large majority of the cases which come to the notice of the authorities, the offence was committed by a father (or stepfather in those jurisdictions which treat this as incest) on his daughter (or stepdaughter). In a British study of sixty-eight incest cases considered for parole purposes, 53 per cent of offences were committed by the victim's father, and in 21 per cent of other cases the offender was a father substitute. Sister-brother relationships constituted only 9 per cent of the cases.<sup>3</sup> This was partially supported by the South Australian statistics; schedule 3 to the report on rape and other sexual offences sets out a list of every incest offence in which a conviction was obtained between 1950 and 1973. Of the eighty cases in which it is possible to determine the relationship between the offender and the victim, sixty-five were committed by fathers and fifteen by brothers.<sup>4</sup> Mother-son incest appears to be very rare indeed.

6. There is a consistency in the age patterns in father-daughter incest. Generally the father is in the vicinity of 40 and the girl is in her early adolescence when incest first occurs. In Maisch's study of seventy-eight parent-child incest cases which came before the German courts, the victim's average age at the start of incest was 12.3, and two-thirds of all victims were between 9 and 15.6 years of age. Two-thirds of all offenders were between 33 and 48 when incest first occurred.<sup>5</sup> Hall Williams's British study showed remarkably similar results; 60 per cent of victims were between 10 and 16, and the average age was 12.5. The majority of offenders were aged between 30 and 50 years, with a clustering round about 40.<sup>6</sup> Other studies have shown similar age patterns.

7. In Maisch's survey, symptoms of disorganisation of the family were already apparent before the incest was committed in 88 per cent of cases; only 12 per cent of families were relatively free from disturbance. The disorganisation ranged from the total social destruction of the family through to:

The kind of marriage which is merely a facade to the outside world with more or less overtly expressed hostilities and a family atmosphere of constant tension, or . . . the complete interpersonal indifference of the married couple one to another.<sup>7</sup>

8. This background of family pathology has been consistently shown to exist in recent studies on incest, and is supported by studies of sexual offences generally, such as those of de Francis and Gibbens and Prince.<sup>8</sup> These studies show a generally higher incidence of disruption among families containing victims of sexual offences. In addition, both the degree and the likelihood of disruption are higher according to the closeness of the relationship between the offender and the victim.

9. Many of the incestuous relationships which come to the notice of the authorities have continued over a period of some years; in 71 per cent of the cases studied by Maisch, the relationship had lasted for over a year.<sup>9</sup> Molnar and Cameron conducted a small survey based on ten families presenting to a Canadian hospital psychiatric unit as a result of incestuous behaviour between father and daughter. They found that the mean duration of the incest was 4.5 years, with a range of between 1 month and

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3. J. Hall Williams, 'The neglect of incest: a criminologist's view', *Medicine, Science and the Law* 14, 1, p. 65.

4. *Special report on rape and other sexual offences*, pp. 64-5.

5. Herbert Maisch, *Incest* (André Deutsch, 1973), pp. 102-4.

6. Hall Williams, pp. 65-6.

7. Maisch, p. 138.

8. See chapter 15.

9. Maisch, p. 109.

12 years. Various precipitating factors had led to the disclosure of the relationship, normally by the daughter herself.<sup>10</sup> It would be reasonable to assume that many cases are never disclosed.

### **Interests protected by incest law**

10. The prohibition of incestuous behaviour is based partly on genetic considerations and partly on the need to protect family relationships and young children.

11. Dealing first with the genetic considerations: the question of the health of the offspring of incestuous unions has interested psychiatrists for some time. There is an instinctive feeling that the product of such an unnatural coupling must itself be unnatural and unhealthy. In more recent years, however, researchers have challenged earlier assumptions as to the genetic effect of human inbreeding. It is now established that incest itself does not cause damage to offspring.<sup>11</sup>

12. The South Australian Committee in its report on rape and other sexual offences concluded that the genetic argument does not justify the intervention of the criminal law in adult incestuous behaviour.

The law in South Australia does not intervene to prohibit the marriage and subsequent procreation of issue by persons who are not related but who both exhibit unhealthy traits, nor does it permit compulsory sterilisation of the unhealthy. It seems to the Committee that the retention of the crime of incest cannot be justified on genetic grounds alone, and further that where the evil of incest between consenting adults exists, the deterrent effect of the retention of incest as a crime is probably slight.<sup>12</sup>

13. Our view is that justification for laws prohibiting incest lies not in genetic factors but in the need to protect family relationships. It seems to us that the principal purpose of the law of incest is to protect the sexually immature person from sexual advances of members of the family with whom that young person is, of necessity, in a close relationship. The proscription of sexual relationships within the family is a necessary protection of the growing child and such relationships are generally considered socially undesirable, whatever may be the legal position.

14. Incest is highly disruptive of the family unit. Not only does it impair the individual's capacity for general social relationships but it also disorganises the relationships within the family, leading to a confusion of roles. As Professor Graham Hughes puts it:

The very kernel of the social complex, the family unit from which outgoing relationships are developed with others in society, is thus gravely threatened by the incest situation.<sup>13</sup>

15. It is clear, however, that the majority of families in which incest occurs are already disturbed, and the incestuous behaviour appears to be a symptom, rather than a cause, of the disturbance. Imposing criminal sanctions on one of the overt signs of disruption may not alleviate the disruption itself.

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10. G. Molnar and P. Cameron, 'Incest syndrome: observations in a general hospital psychiatric unit', *Canadian Psychiatric Association Journal* 20, 5 (1975), pp. 373-4.

11. S. K. Weinberg, *Incest behaviour* (Citadel Press, New York, 1955), p. 255.

12. *Special report on rape and other sexual offences*, p. 30.

13. Graham Hughes, 'The crime of incest', *Journal of Criminal Law, Criminology and Police Science* 55 (1964), p. 327.

## Issues for consideration

16. The questions for consideration are first, whether the sanction of the criminal law serves any purpose where incest occurs between adults; whether special laws are needed to deal with incestuous sexual offences against minors; and whether further measures are needed to protect young persons in incestuous relationships.

### *Incestuous relationships between adults*

17. It is difficult to see what purpose is served by imposing criminal sanctions on incestuous relationships between consenting adults. Where violence or coercion is used other offences apply. Where both parties are consenting, their relationship may be seen as immoral by many. But it is not necessarily harmful to either person or to society. There are few prosecutions and even fewer convictions, in comparison with the cases which actually occur.

18. Research suggests that adult incestuous behaviour, and brother-sister incest, is considerably less harmful than incest between a father and his young daughter.<sup>14</sup> Some of our submissions thought that incest between adults should not be a crime<sup>15</sup>, though this was not unanimous.<sup>16</sup> The ACT draft Crimes Ordinance makes incest an offence only where one party is under 18.<sup>17</sup>

19. We conclude, as did the South Australian Committee, that there is no justification for the intervention of the criminal law into adult incestuous behaviour. This does not mean that such behaviour is to be encouraged or condoned, only that it is not appropriate for the law to impose criminal sanctions.

### *Incestuous relationships with minors*

20. Most incestuous behaviour in the family unit is between the father and his young daughter. Subject to what is said below about age limits, existing sexual offences would cover all forms of incest directed against young people. When a father forces himself on his young daughter the act may amount to rape, or to statutory rape, or to sexual penetration of a young child, depending on the age. As we have shown, laws other than those on incest can be applied in these cases. Nevertheless, if all existing incest laws were repealed, the remaining laws would not in our view be sufficient to protect young girls from sexual advances by their fathers, because the age of consent which is appropriate for extra-family sexuality may be too low for sexuality within the family. We have recommended that the general age of consent be lowered to 15.

21. Some incestuous relationships between fathers or father substitutes and their daughters commence after the girl has turned 15.<sup>18</sup> We do not think that the law's protection should be withdrawn from girls of this age in relation to such advances, which can be both exploitive and harmful.

22. We think that the age of consent should be 17 in relation to sexual intercourse (and indecent assault) with members of a person's own family. Below 17 the same age differential provision should apply as recommended in chapter 14. This would have the effect of prohibiting all father-daughter incest where the girl is under 17 and all brother-sister incest where one party is under 17 and there is more than 5 years' age difference between them. Brother-sister incest where the parties are roughly the

14. *ibid.*, p. 329; see also R. M. Scarles, M.D., 'Incest', *Paediatric Clinics of North America* 22, 3 (1975), p. 634.

15. Submissions 1128, Mr Lex Watson; 639, name withheld; 1180, IWY, Darwin Committee.

16. Evidence, p. 2256, Mrs Tina Dobber.

17. Attorney-General's Department, Report of the Working Party on Territorial Criminal Law (1975) s. 70.

18. Maisch, p. 102.

same age or where both are over 17 would not come within the purview of the law. While it is not for us to make moral judgments on this issue, we consider such activity should be discouraged. In our view, however, it is not appropriate for the law to punish it with criminal sanctions.

23. Although most existing laws in Australia prohibit only incestuous behaviour between blood relations<sup>19</sup>, it is clear that girls are equally in need of protection from father substitutes. The same opportunities for exploitation can exist in relation to father substitutes, and the same harmful results can follow. We therefore propose that the age of consent of 17 should apply in relation to adoptive parents, guardians, foster parents, stepparents and de facto husbands and wives of the child's mother and father. The same age should also apply in relation to boys, as a protection against sexuality with mother substitutes, although statistics indicate that such offences are rare.

### **Procedure in cases of incest**

24. A principal difficulty in dealing with sexual offences of an incestuous nature is that, unless there is some kind of intervention, the relationship may continue after the criminal law has taken its course. This problem will remain whether or not the law is changed as we have recommended. At present the tendency is to charge the father with a criminal offence, which may or may not result in his being removed from the family. We think that a more flexible approach should be adopted, so that each family situation can be assessed according to its own particular problems and needs. It may be that the situation would be better served by removing the daughter from the family. This was the assessment of Molnar and Cameron, who found that, in almost every case, the disclosure of the incest necessitated separation, and that the survival of the family unit and the well-being of the daughter seemed to depend upon her departure from the family.<sup>20</sup> This also accords with the mother's role in relation to the incest; in most cases the mother was aware of the relationship before its public disclosure, and in some cases she seems to have actively condoned and even encouraged it.<sup>21</sup> One can readily envisage the difficulties involved in leaving the mother and daughter together in the home, particularly if the father has been removed as a result of the daughter's disclosure.

25. On the other hand, removing the daughter from the home and leaving it otherwise intact might constitute a danger to younger daughters; Molnar and Cameron concluded that the disclosure of the incest by one daughter was likely to protect younger daughters from similar sexual approaches.<sup>22</sup>

26. No general solution can be propounded in this area; it must depend on the particular needs of each family which comes under notice. It is here that the intervention of a child protection agency social worker, as recommended in chapter 15, would be of value. The social worker could assess the family situation, and decide how the child's interests would be best served. In some cases it might seem appropriate for the child to be removed from the home; in some cases it might be necessary to apply for a recommendation that criminal proceedings not ensue. When bail is being considered, a report from the social worker should be available; conditions may be necessary to give the daughter protection against having to face her father before the hearing of the prosecution. In addition the daughter should have all the protections recommended in chapter 15 for child victims of sexual offences.

19. Victoria is the only State which treats stepfather-stepdaughter sexuality as incest; see Victorian Crimes Act, section 52.

20. Molnar & Cameron, p. 374.

21. Scarles, p. 637.

22. Molnar & Cameron, p. 374.

## **18. Restructuring laws relating to sexual offences**

1. Our recommendations in this part involve a restructuring of the laws relating to sexual offences. This can be achieved in our view at least in the ACT (and in NSW) by repealing most of the existing sections relating to sexual offences, and making appropriate amendments to sections dealing with non-sexual assaults.
2. This chapter sets out our suggestions for changing the substantive law to give effect to our recommendations, using NSW and the ACT as examples. We model our suggestions on the NSW Crimes Act, although we note that the substantial amendments made in it in 1974 were not reflected in the ACT. The changes we suggest involve the repeal of all sections of the Act dealing with sexual molestation or assault, namely sections 62 to 81B inclusive. This leaves intact existing laws relating to abortion and laws relating to abduction and procuring.

### **The grades of rape and other sexual offences**

#### **Point one**

3. Section 33 of the NSW Crimes Act creates the most serious non-sexual assault short of murder or attempted murder. Briefly, it imposes a maximum penalty of life imprisonment for maliciously wounding, inflicting grievous bodily harm, or shooting at a person with intent to do grievous bodily harm or to resist arrest.
4. We propose that the section be amended by adding words to the following effect: 'or with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected)'. The section would then read:

33 Whosoever—maliciously by any means wounds or inflicts grievous bodily harm upon any person, or maliciously shoots at, or in any manner attempts to discharge any kind of loaded arms at any person, with intent in any such case to do grievous bodily harm to any person, or with intent to resist, or prevent, the lawful apprehension or detainer either of himself or any other person, or with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for life.

5. Into this section would fall the most serious of existing rape offences, namely those where substantial injury is caused to the victim. In such cases, all that would need to be proved would be that the victim suffered severe injury, and that sexual penetration was either effected or attempted. There would be no scope for a defence of consent. It is appropriate that the maximum penalty for this offence is life imprisonment, the same as the existing maximum penalty for rape.

#### **Point two**

6. Section 33B of the NSW Crimes Act (not in force in the ACT) makes it an offence for any person to threaten to use a weapon, or threaten injury to any person, for the purpose of avoiding arrest or preventing a police officer from conducting investigations. We do not propose any change here. However, a new section 33C should be added to provide:

33C Whosoever—uses, attempts to use or threatens to use any firearm or any offensive weapon or instrument; or threatens injury to any person or property; or inflicts actual

bodily harm upon any person, with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for 10 years.

7. Into this category would fall a number of the rape cases which came to our notice during the course of our inquiry. These include cases where guns were brandished in an attempt to obtain the victim's submission, and cases where the victim suffered some injury, but not such serious injury as would bring the offence within section 33.

8. Probably the definition of 'actual bodily harm' should receive legislative clarification. This is particularly important in cases where pregnancy results. We do not think that pregnancy should be treated as an injury which aggravates the nature of the offence. To do so would create injustice for the offender, particularly in a case where no violence, threats, false pretences or drugs were used. In such a case, under the scheme proposed by us, he should be entitled to raise consent as a defence. It would be unjust to deprive him of this defence because the victim's subsequent pregnancy placed the offence into this more serious category, where consent is treated as irrelevant.

### **Point three**

9. Section 37 of the NSW Crimes Act creates an offence of attempting to choke or strangle a person with intent to commit an indictable offence. Similarly, section 38 applies when chloroform or some other stupefying drug is used for the same purpose. The present definition of rape would almost invariably cover the situation where intercourse was procured through such means; if such extreme measures were necessary to achieve the victim's submission, there would be a strong inference that she was not consenting.

10. However, with the abolition of rape as a separate offence, these sections should be amended to make them applicable to rape situations. We therefore suggest that the same type of 'intent' clause be added to these sections as we proposed in relation to section 33. They would then read:

37 Whosoever—by any means attempts to choke, suffocate or strangle any person, or by any means calculated to choke, suffocate or strangle, attempts to render any person insensible, unconscious or incapable of resistance, with intent in any such case to enable himself or another person to commit, or with intent in any such case to assist any person in committing, an indictable offence, or with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for life.

38 Whosoever—unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or cause to be taken by, any person, any chloroform laudanum or other stupefying or overpowering drug or thing, with intent in any such case to enable himself, or another person, to commit, or with intent to assist another person in committing, an indictable offence, or with intent to effect sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for life.

11. We have some reservation about the severity of the penalty for these offences: we think that 14, or even 10, years would be more appropriate as a maximum penalty. However, it is outside the scope of our inquiry to comment on provisions relating to non-sexual offences, so we have not attempted to alter these existing penalties.

12. The provisions proposed above, namely sections 33, 33C, 37 and 38, exhaust the areas where the existing sections of the Crimes Act can be adapted or amended to cover rape situations. The balance of our proposals largely involve the formulation of new provisions, to be inserted in lieu of the sections 62 to 81B of the Crimes Act.



#### **Point four**

13. The concept of the reality of consent in rape has created such problems that the common law offence of rape had to be augmented by statutory provisions making it an offence to procure intercourse through the means of false pretences or the use of intoxicating drugs. These provisions were contained in section 66 of the NSW Crimes Act (also in force in the ACT). Strictly applied, the provision could mean that a man who spent an evening drinking with his girlfriend, and then had intercourse with her, might fall within this provision. However, the offence has existed for a long time, and as far as we are aware problems of this nature have not arisen. Accordingly, with some reservations, we propose a similar provision along the following lines:

Whosoever—makes or uses any false pretence or false representation or uses any other fraudulent means, or administers, or causes any person to take, any intoxicating drug for the purpose of effecting sexual penetration by himself or by some other person of any person (whether or not sexual penetration is in fact effected) shall be liable to penal servitude for 7 years.

Although section 66 in its present form contains an additional offence of procuring intercourse by leading a woman to believe that the offender is her husband, this situation seems to be sufficiently covered by the 'false representation' portion of the above section. We have therefore not included it here.

#### **Point five**

14. We now reach those rape offences where intercourse was not consented to, but was not procured through any of the means in the more serious categories. These would include cases where threats were unnecessary because the victim was so intimidated by the offender's superior strength or other advantage. It would also include most multiple rapes where superior numbers force the victim's submission without having to resort to any of the means which would invoke the more serious offences. For this reason we propose that this offence should be divided into two categories: simple assault, carrying a maximum penalty of 5 years, and aggravated assault, carrying a maximum penalty of 14 years. The latter would comprise all cases involving two or more offenders.

15. We therefore suggest the insertion of a new provision along the following lines:

- (1) Whosoever assaults any person, and thereby effects sexual penetration of that person, shall be liable to penal servitude for 5 years, or, in the event of an aggravated assault, to penal servitude for 14 years.
- (2) It is an aggravated assault within the meaning of this section if two or more people act together in committing the assault.

Whereas the more serious offences are drafted in such a way as to make consent irrelevant, it is impossible to dispense with the issue of consent in relation to this offence. We discuss the extent to which consent can constitute a defence under this section later in this chapter.

16. We should mention here the problem relating to alternate counts. We believe that legislation should not provide for convictions to be entered on alternate counts, but that it should be left to a prosecutor to decide which charge to lay in each case. This is important because one of the objects of our amendments is to reduce the number of cases where consent is an issue. If in cases of serious sexual assaults the jury could convict of the lesser offence, this would destroy that object. The accused, being liable to be convicted on the lesser charge, would be permitted to raise the issue of consent in relation to that charge, and the practical effect would be that consent would remain a potential issue in every case.

### **Point six**

17. Children under 10 should be afforded the fullest protection of the law; upon proof only of intercourse with such a child, the offender should be liable to the maximum possible penalty, namely life imprisonment. We therefore propose that intercourse with a child under 10 should be deemed to cause grievous bodily harm. This would accord with the reality of the situation and would bring the offence within section 33 with the penalty of life imprisonment. We therefore propose a new section:

Any sexual penetration of a child under the age of 10 shall be deemed to cause grievous bodily harm to that child.

Alternatively, a new section could simply make it an offence punishable with life imprisonment to effect sexual penetration on any child under the age of 10.

### **Point seven**

18. We think that 'sexual penetration' should include sexual interference with the orifices of another's body. We accordingly propose a definition section:

Sexual penetration means:

- (a) the insertion, however slight, of a person's sexual organ into another person's genital, anal or oral cavity;
- or
- (b) the insertion, however slight, of any part of a person's body, or any object, into another person's genital or anal cavity, except for medical purposes.

### **Point eight**

19. We see no need to retain attempted rape as a separate offence. Any offence which involved the use of threats or the infliction of injury would render the offender liable under one of the more serious offences, whether or not penetration was effected. Any attempt at intercourse which neither achieved its end nor fell within one of those provisions should in our view be treated as 'indecent assault', and should be tried summarily.

20. Section 76 of the NSW Crimes Act creates an offence of 'indecent assault', which seems to have withstood the test of time. Although we propose that this section be repealed, we think that it should reappear as follows:

Whosoever assaults any other person and, at the time of or immediately before or after such assault, commits any act of indecency upon or in the presence of such person shall, on conviction in a summary manner, be liable to imprisonment for 2 years, or, if such other person is under the age of 10 years, to imprisonment for 4 years.

21. As with other assaults not resulting in injury, consent would constitute a defence to this offence.

### **Consent**

22. One of our main objectives is to reduce those areas where consent can be raised as a defence. In our view there should be no scope for the defence of consent where sexual acts cause physical injury to the victim, or involve the use of threats, drugs or false pretences. This accords with the common law relating to non-sexual assaults, where consent is available as a defence to minor assaults, but not generally to assaults which cause physical injury. We do not equate unwanted intercourse with a minor assault; intercourse constitutes a much greater intrusion into the individual's freedom and equality. Nevertheless they share a common legal foundation; both consist of acts which, if consented to by people capable of doing so, are not inherently unlawful.

23. In referring to the 'defence of consent' we do not mean that the defence should bear the burden of proving the victim's consent. In those cases in which consent remains an issue, we think that the existing rule should continue, namely that the Crown should bear the burden of disproving consent.

24. We propose the enactment of new sections along the following lines:

- (a) Consent shall not be a defence to any offence under sections 33, 33C, 37 or 38 or in para. 13, nor shall it be a defence to any offence under sections in paras 15 or 20 if the complainant is incapable of consenting.
- (b) A person is incapable of consenting to an offence under section in para. 15 if:
  - (1) he or she is under 13 years of age;
  - (2) he or she is under 15 years of age and the defendant is more than 5 years older;
  - (3) he or she is under 18 years of age and the defendant is more than 5 years older and is his or her brother, sister, parent, adoptive parent, foster parent, stepparent, guardian or schoolteacher, or is the de facto husband or wife of his or her mother or father; or
  - (4) he or she is known by the defendant to be so mentally deficient as not to understand the nature or consequences of the act complained of.

A person is incapable of consenting to an offence under section in para. 20 if:

- (c) (1) he or she is under 13 years of age;
- (2) he or she is under 15 years of age and the defendant is more than 8 years older;
- (3) he or she is under 18 years of age and the defendant is more than 8 years older and is his or her brother, sister, parent, adoptive parent, foster parent, stepparent or guardian, or is the de facto husband or wife of his or her mother or father; or
- (4) he or she is known by the defendant to be so mentally deficient as not to understand the nature or consequences of the act complained of.

### *Miscellaneous provisions*

25. We also propose the enactment of sections along the following lines:

- (1) Except as provided in this section, it shall not be a defence to any charge under sections 33, 33C, 37, 38 or in paras 13, 15 or 20 that the complainant and the defendant were spouses.
- (2) It shall be a defence to any charge under sections in paras 15 or 20 that at the time of the alleged offence, the complainant and the defendant were spouses voluntarily living together under the same roof.
- (3) The presumption that a boy under the age of 14 is incapable of having sexual intercourse is abolished.
- (4) All charges under section in para 15 (1) shall be tried summarily before a Stipendiary Magistrate if the following conditions apply:
  - (a) the complainant is over the age of 13; and
  - (b) the defendant is not one of the persons mentioned in section (b) (3) in para. 24; and
  - (c) the prosecution case is dependent upon the complainant being incapable of consenting to the offence by reason of section (b) (2) or section (b) (4) in para. 24.
- (5) All charges for offences tried summarily under (4) shall be laid within 6 months of the alleged offence.

26. The proposals in this chapter are to detail how our suggestions might be implemented. We appreciate that our proposals are not polished legislative drafting.

## Recommendations

The following are our recommendations for this part. The detailed suggestions for substantive changes in the law which are made in chapter 18 of this part are intended to be suggestions rather than recommendations.

We recommend that:

1. Special police squads should be established consisting of equal numbers of men and women of each rank to deal with sexual offences, including rape, in the main population centres.
2. Police questioning of rape victims should be kept to a minimum until the victim has had such medical examination and treatment as is necessary, and should not be conducted in a hostile fashion.
3. Members of the squad should be given special training in psychology and crisis intervention.
4. All large public hospitals should have a panel of doctors, trained in the examination and treatment of rape victims, available to examine rape victims at any time.
5. Such panels should include a sufficient number of women to enable any victim to be examined by a woman doctor if she so requests.
6. Country doctors who might be involved in the examination of rape victims should be kept adequately informed of the procedures to be followed and the matters to be investigated.
7. A pamphlet containing guidelines for the medical treatment and management of rape victims should be prepared and made available to all hospitals and to all doctors who may be called on to deal with rape victims.
8. Appropriate steps should be taken to care for the rape victim's mental health, and also to deal with venereal disease or pregnancy resulting from rape.
9. A pamphlet containing information about medical treatment, counselling and legal services should be prepared and made available to rape victims.
10. Legislation should be passed providing that, in all cases where it is part of the Crown case to prove that sexual penetration was either effected or attempted, the evidence of any medical practitioner relating to medical matters may be given by the production of his or her report unless the Crown or the defence apply for the practitioner to attend and give evidence, in person.
11. Legislation should be passed providing that, at committal proceedings for any offence in which it is part of the Crown case to prove that sexual penetration was effected or attempted, the evidence of the victim should be given by the production of her appropriately verified statement.
12. The presiding magistrate may order, upon application by the prosecution or the defence, that the victim should attend and give oral evidence, but only if special circumstances are shown to justify the making of such an order.
13. Where the evidence of the victim is given by the production of her statement, the defence should be supplied with copies of all statements made by her to the police.

14. If the victim does attend and give oral evidence, only the parties and their representatives, essential court staff and police officers should remain in court during her evidence, except with the leave of the presiding magistrate on special circumstances being shown.

15. Legislation should be passed providing that the victim in a trial in which consent is in issue should be cross-examined relating to her prior sexual acts only on leave being granted by the trial judge.

16. Such leave should be granted only where the evidence sought to be introduced is so closely relevant to the issues before the court that it would be unfair to the accused to exclude it, and, in any case, only in the following situations:

- (a) where the prior sexual acts are alleged to have taken place between the victim and the accused;
- (b) where the prior sexual acts were part of a pattern of behaviour which was strikingly similar to her alleged behaviour at or about the time of the alleged offence; or
- (c) where evidence of the prior sexual acts is relevant to explain the source or origin of semen, pregnancy or disease.

17. Any such application should be made in the absence of the jury.

18. In no circumstances should evidence be adduced as to the victim's sexual reputation or moral character, whether by way of cross-examination or otherwise.

19. No cross-examination as to the victim's prior sexual history should be allowed at committal proceedings.

20. If the Crown or the victim raises the issue of her own sexual experience, or lack of it, the accused should be entitled to refute such evidence by cross-examining her and/or by introducing evidence of specific acts of the victim.

21. Legislation should be passed providing that, unless a complaint in a sexual case is admissible under the general rules of evidence, evidence of such complaint should no longer be admissible.

22. The requirement that the trial judge give a corroboration warning in sexual cases should be abolished.

23. Legislation should be passed providing that all juries sitting on cases involving allegations that sexual penetration was either effected or attempted should consist of at least four men and four women.

24. The publication of any material which might identify the victim of sexual offences should be prohibited.

25. Judges and magistrates should have a discretion to order that any part of the evidence in trials or committal proceedings for sexual offences should not be published.

26. Provision should be made in the ACT and Northern Territory along the lines of the Victorian *Criminal Injuries Compensation Act* 1972 providing for a maximum amount of \$20 000 to be payable to victims of crime whether or not a conviction is recorded.

27. The existing offence of rape should be abolished and should be replaced by a series of offences, along the lines suggested in chapter 18 of this part, and consent should be irrelevant in relation to offences involving the use of violence, threats, false pretences or drugs.
28. There should be no immunity between spouses in relation to offences involving the use of violence, threats, false pretences or drugs, and, in relation to offences to which consent is a defence, there should be no immunity between spouses who are living separately and apart.
29. Sexual penetration should be defined to include all forms of vaginal, anal and oral intercourse, including the insertion of foreign objects into the victim's anal or vaginal cavities.
30. The presumption that boys under the age of 14 are incapable of having sexual intercourse should be abolished.
31. In relation to the more serious sexual assaults involving the use of violence, threats, false pretences or drugs, there should be no distinction in law between cases where sexual penetration was effected and those where it was attempted.
32. In relation to the less serious sexual assaults, where there is no allegation of violence, threats, false pretences or drugs, the offence of attempted rape should be abolished and replaced with the summary offence of indecent assault.
33. Subject to special rules as to parents, guardians, teachers and others *in loco parentis*, the age of consent of both males and females to sexual intercourse should be 15.
34. No person should be convicted of statutory rape on a male or female aged between 13 and 15 years if that person is less than 5 years older than the said male or female.
35. All charges of statutory rape relating to sexual intercourse alleged to have taken place between the defendant and a person over the age of 13 should be tried summarily.
36. A 6-month limitation period should apply to all cases mentioned in recommendation 35 hereof.
37. The age of consent to indecent assault should be 15.
38. No person should be convicted of indecently assaulting a male or female aged between 13 and 15 years if the alleged assault is consented to and that person is less than 8 years older than the said male or female.
39. The age of consent to sexual intercourse should be 17 in relation to a person's schoolteacher.
40. In relation to children under 10 years of age a special offence, carrying penalties equivalent to the most serious rape offences, should be complete upon proof only of sexual penetration.
41. The offence of 'attempted carnal knowledge' should be abolished, and all sexual assaults on young children in which penetration is not effected, and which do not fall within any of the categories of aggravated sexual assault, should be treated as 'indecent assault', triable summarily.

42. All complaints of sexual offences involving children under 15 (or under 17 if the offender is the child's mother, sister, parent, adoptive parent, foster parent, step-parent, guardian or schoolteacher, or is the de facto husband or wife of the child's mother or father) which are reported to and accepted by the police should be reported by the police to a child protection service.

43. A child protection service should provide a social worker to work with the child and its family, to provide assistance as recommended in Part V in cases of parental abuse, and, if necessary, to represent and assist the child through the process of the courts.

44. A special tribunal should be established presided over by a judge, to determine applications that, in the interest of the child victim of sexual offences, no prosecution should lie against the alleged offender, or any existing prosecutions should be discontinued.

45. The tribunal should conduct its proceedings in camera, and should receive only written evidence and submissions.

46. Application should be made to the tribunal by the parents or by a social worker appointed by the child protection service. The police should place a report before the tribunal and reply to the application. The tribunal should have power to call for welfare reports.

47. Subject to appropriate safeguards as to the position of the alleged offender, an application should operate as a stay of all criminal proceedings against him in relation to the alleged offence.

48. Any application to the tribunal should be made prior to the completion of proceedings in the Magistrate's Court (if the offence is an indictable one) or prior to the taking of the victim's evidence in the Magistrate's Court (if the offence is a summary one).

49. The tribunal should have power to recommend that no proceedings should be instituted against the alleged offender, or that any existing proceedings should be discontinued, or to refuse the applications.

50. If the child victim of sexual offences is required to attend and give evidence during committal proceedings, the child's social worker should be permitted to remain in court. The magistrate should have power to order that the defendant remain outside court during the taking of the child's evidence, provided his lawyer is present in court.

51. Before the trial of any person for a sexual offence involving a child victim, a conference should be held between the trial judge, the Crown prosecutor, defence counsel and the child's social worker with the purpose of agreeing on a method of minimising the child's role at the subsequent proceedings.

52. The trial judge should have power to make the following orders:

- (a) that during the proceedings or any part of them, the wearing of wigs and gowns by the judge and counsel should be dispensed with;
- (b) that the child's evidence should be taken in the judge's chambers or some other place outside the court, in the presence of the jury;
- (c) that the public should be excluded from the court during the taking of the child's evidence;
- (d) that the evidence of the child should be taken in the absence of the accused, provided the latter's counsel is present.

53. Prior to the hearing of any summary offence, being a sexual offence involving a child victim, a similar conference to that proposed in recommendation 51 should be held between the magistrate, the police prosecutor, defence counsel or the defendant and the child's social worker.
54. During the hearing of any summary offence, being a sexual offence involving a child victim, the magistrate should have the same powers as referred to in recommendation 52.
55. Existing provisions making it an offence to have carnal knowledge with an idiot or imbecile should be repealed, and replaced by a provision prohibiting intercourse with a person who is known by the offender to be unable to understand the nature and consequences of the act.
56. Existing criminal prohibitions against incestuous behaviour should be repealed.
57. The age of consent in relation to sexual intercourse and indecent assault should be 17 if the other party is more than 5 years older than the victim and is the victim's brother, sister, parent, stepparent or guardian, or is the de facto husband or wife of his or her mother or father.



## Annexe VII.A

### Extracts of relevant portions of Crimes Act of each State and Territory

- NSW Crimes Act, 1900–1974, sections 62–81A.
- ACT Crimes Act of NSW 1900 as amended in its application to the ACT, sections 62–81; *Law Reform (Sexual Behaviour) Ordinance* 1976; Report of the Working Party on Territorial Criminal Law, section 70.
- Vic. *Crimes Act* 1958 (as amended), sections 44–70.
- Qld Criminal Code, sections 208–23.
- SA Criminal Law Consolidation Act, 1935–75 (as amended 1976).
- WA Criminal Code, Sections 181–98, 325–8, 596–596A.
- Tas. Criminal Code, sections 122–36, 185, 335–7.
- NT *Criminal Law Consolidation Act and Ordinance* 1876–1974.

## **NSW Crimes Act, 1900–1974**

### *Rape and similar offences*

**62.** “*Carnal knowledge*” shall, in every case under this Act, be deemed complete upon proof of penetration only.

**63.** Whosoever commits the crime of rape shall be liable to penal servitude for life.

The consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this section.

**64.** Where on the trial of a person for rape the jury are satisfied that the female was a girl under the age of sixteen years, but above the age of ten years, and that the accused had carnal knowledge of her but with her consent, they may acquit him of the rape charged and find him guilty of an offence under section seventy-one of this Act, and he shall be liable to punishment accordingly.

**65.** Whosoever attempts to commit, or assaults any female with intent to commit, the crime of rape, shall be liable to penal servitude for fourteen years.

**66.** Whosoever—

by any false pretence, false representation, or other fraudulent means, or by the use of any intoxicating drug, induces, or procures, a woman to have illicit carnal connection with a man, or by any such means has such connection with a woman; or,

having by his language or conduct induced any woman to believe that he is her husband, when in fact he is not, has carnal knowledge of such woman with her consent while she is under such belief;

shall be liable to penal servitude for fourteen years.

**67.** Whosoever carnally knows any girl under the age of ten years shall be liable to penal servitude for life.

**68.** Whosoever attempts carnally to know any girl under the age of ten years, or assaults any such girl with intent carnally to know her, shall be liable to penal servitude for fourteen years.

**69.** Where on the trial of a person for carnally knowing a girl under the age of ten years, the jury are satisfied that she was of or above that age, but under the age of sixteen years, and that the accused had carnal knowledge of such girl, they may acquit him of the offence charged and find him guilty of an offence under section seventy-one of this Act, and he shall be liable to punishment accordingly.

**70.** Where on the trial of a person for carnally knowing a girl under the age of ten years, the jury are satisfied that she was of or above that age, but under the age of sixteen years, and that the accused had not carnal knowledge of such girl, but was guilty of an offence under section seventy-two of this Act, they may acquit him of the offence charged and find him guilty of an offence under the said last-mentioned section, and he shall be liable to punishment accordingly.

**71.** Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years.

**72.** Whosoever attempts unlawfully and carnally to know any girl above the age of ten years, and under the age of sixteen years, or assaults any such girl with intent carnally to know her, shall be liable to penal servitude for five years.

**72A.** Whosoever knowing a woman or girl to be an idiot or imbecile has or attempts to have unlawful carnal knowledge of her shall be liable to penal servitude for five years.

**73.** Whosoever, being a schoolmaster or other teacher, or a father, or step-father, unlawfully and carnally knows any girl of or above the age of ten years, and under the age of seventeen years, being his pupil, or daughter, or step-daughter, shall be liable to penal servitude for fourteen years.

**74.** Whosoever, being a schoolmaster or other teacher, or a father, or step-father, by any means attempts unlawfully and carnally to know any girl of or above the age of ten years, and under the age of seventeen years, being his pupil, or daughter, or step-daughter, or assaults any such girl with intent carnally to know her, shall be liable to penal servitude for seven years.

**75.** Nothing in section seventy-three or section seventy-four shall prevent such schoolmaster, teacher, father or step-father from being prosecuted under section seventy-one or seventy-two of this Act.

**76.** Whosoever assaults any female and, at the time of, or immediately before or after such assault, commits any act of indecency upon or in the presence of such female, shall be liable to imprisonment for three years, or, if the female be under the age of sixteen years, to penal servitude for five years.

**76A.** Any person who commits any act of indecency with or towards any girl under the age of sixteen years, or incites a girl under that age to any act of indecency with him or another, shall be liable to imprisonment for two years.

**77.** The consent of the woman, girl, pupil, daughter, or step-daughter shall be no defence to any charge under sections sixty-seven, sixty-eight, seventy-one, seventy-two, 72A, seventy-three, or seventy-four of this Act, or, if the female be under the age of sixteen years, to any charge under section seventy-six of this Act:

Provided that it shall be a sufficient defence to any charge which renders a person liable to be found guilty of an offence under sections seventy-one or seventy-two of this Act, or if the female be under the age of sixteen years to any charge under section seventy-six of this Act, if it be made to appear to the court or jury before whom the charge is brought—

- (a) that the girl was over the age of fourteen years at the time of the alleged offence; and
- (b) that she consented to the commission of the offence; and
- (c) either—
  - (i) that she was at the said time a common prostitute or an associate of common prostitutes; or
  - (ii) that the person so charged had at the said time reasonable cause to believe, and did in fact believe, that she was of or above the age of sixteen years.

**77A.** Any proceedings or any part of any proceedings in respect of an offence under section sixty-three, sixty-five, sixty-six, sixty-seven, sixty-eight, seventy-one, seventy-two, 72A, seventy-three, seventy-four, seventy-six or 76A shall, if the Court so directs, be held in camera.

**78.** No prosecution in respect of any offence under sections seventy-one, seventy-two, or seventy-six of this Act shall, if the girl in question was at the time of the alleged offence over the age of fourteen years and under the age of sixteen years, be commenced after the expiration of twelve months from the time of the alleged offence.

**78A.** Whosoever, being a male, has carnal knowledge of his mother, sister, daughter, or grand-daughter, or being a female of or above the age of sixteen years, with her consent permits her grandfather, father, brother, or son to have carnal knowledge of her (whether in any such case the relationship is of half or full blood, or is or is not traced through lawful wedlock) shall be liable to penal servitude for seven years.

**78B.** Whosoever, being a male, attempts to commit any offence under section 78A, shall be liable to imprisonment for two years.

**78C.** (1) It shall be a sufficient defence to a charge under section 78A or section 78B that the person charged did not know that the person with whom the offence is alleged to have been committed was related to him or her, as alleged.

(2) It shall be no defence to a charge under section 78A or section 78B that the person with whom the offence is alleged to have been committed consented thereto.

**78D.** On the conviction of a father or step-father of an offence under section seventy-three or section seventy-four of this Act or of a male person of an offence under section 72A or under section 78A or under section 78B of this Act, the court may divest the offender of all authority over the female with whom the offence has been committed, and, if the offender is the guardian of such female, may remove the offender from such guardianship, and in any such case may appoint any person or persons to be the guardian or guardians of such female during her minority, or for any greater or less period.

**78E.** If on the trial of any male person for an offence under section sixty-three or under section sixty-five of this Act the jury are not satisfied that he is guilty of the offence charged, but are satisfied that he is guilty of an offence under section 78A or under section 78B of this Act, they may acquit such person of the offence charged, and find him guilty of an offence under section 78A or under section 78B of this Act, and he shall be liable to punishment accordingly.

**78F.** (1) No prosecution for an offence under section 78A or 78B shall be commenced without the sanction of the Attorney-General.

(2) All proceedings under the said sections shall be held in camera.

### *Unnatural offences*

**79.** Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for fourteen years.

**80.** Whosoever attempts to commit the said abominable crime, or assaults any person with intent to commit the same with or without the consent of such person, shall be liable to penal servitude for five years.

**81.** Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years.

81A. Whosoever, being a male person, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of indecency with another male person shall be liable to imprisonment for two years.

**Crimes Act of the State of NSW, 1900, as amended in its application to the Australian Capital Territory**

*Rape and similar offences*

62. “*Carnal knowledge*” shall, in every case under this Act, be deemed complete upon proof of penetration only.

63. Whosoever commits the crime of rape shall be liable to imprisonment for life.

The consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this section.

64. Where on the trial of a person for rape, the jury are satisfied that—

(a) the female was a girl under the age of sixteen years, but above the age of ten years; and

(b) the accused had carnal knowledge of her, but with her consent,

they may acquit him of the rape charged and find him guilty of an offence under section seventy-one of this Act.

65. Whosoever attempts to commit, or assaults any female with intent to commit, the crime of rape, shall be liable to penal servitude for fourteen years.

66. Whosoever—

by any false pretence, false representation, or other fraudulent means, or by the use of any intoxicating drug, induces or procures a woman to have illicit carnal connection with a man, or by any such means has such connection with a woman; or

having by his language or conduct induced any woman to believe that he is her husband, when in fact he is not, has carnal knowledge of such woman with her consent while she is under such belief;

shall be liable to penal servitude for fourteen years.

67. Whosoever carnally knows any girl under the age of ten years shall be liable to imprisonment for life.

68. Whosoever attempts carnally to know any girl under the age of ten years, or assaults any such girl with intent carnally to know her, shall be liable to penal servitude for fourteen years.

69. Where, on the trial of a person for carnally knowing a girl under the age of ten years, the jury are satisfied that—

(a) she was of or above that age, but under the age of sixteen years; and

(b) the accused had carnal knowledge of her,

they may acquit him of the offence charged and find him guilty of an offence under section seventy-one of this Act.

70. Where, on the trial of a person for carnally knowing a girl under the age of ten years, the jury are satisfied that—

(a) she was of or above the age of sixteen years; and

(b) the accused did not have carnal knowledge of her, but was guilty of an offence under section seventy-two of this Act,

they may acquit him of the offence charged and find him guilty of an offence under that section.

**71.** A person who unlawfully and carnally knows a girl of or above the age of ten years but under the age of sixteen years is liable to penal servitude for ten years.

**72.** A person who attempts unlawfully and carnally to know, or assaults with intent unlawfully and carnally to know, a girl of or above the age of ten years and under the age of sixteen years is liable to penal servitude for five years.

**72A.** A person who, knowing a woman or girl to be an idiot or imbecile, has, or attempts to have, unlawful carnal knowledge of her is liable to penal servitude for five years.

**73.** A teacher, father or step-father who unlawfully and carnally knows a girl of or above the age of ten years and under the age of seventeen years, being his pupil, daughter or step-daughter, is liable to penal servitude for fourteen years.

**74.** A teacher, father or step-father who attempts unlawfully and carnally to know, or assaults with intent unlawfully and carnally to know, a girl of or above the age of ten years and under the age of seventeen years, being his pupil, daughter, or step-daughter, is liable to penal servitude for seven years.

**75.** Nothing in the last two preceding sections prevents a teacher, father or step-father from being prosecuted under section seventy-one or seventy-two of this Act.

**76.** A person who assaults a female and at the time of, or immediately before or after, the assault commits an act of indecency upon or in the presence of that female is liable to imprisonment for three years, or, if the female is under the age of sixteen years, to penal servitude for five years.

**77.** It is a defence to a charge under section seventy-one or seventy-two of this Act, or, if the female is under the age of sixteen years, to a charge under section seventy-six of this Act, if it appears to the court or jury that, at the time of the alleged offence—

- (a) the female was over the age of fourteen years;
- (b) she consented to the commission of the offence; and
- (c) either—
  - (i) she was a common prostitute or an associate of common prostitutes; or
  - (ii) the person charged had reasonable cause to believe, and did believe, that she was of or above the age of sixteen years.

**77A.** The consent of the woman, girl, pupil, daughter or step-daughter is no defence to a charge under section sixty-seven, sixty-eight, seventy-one, seventy-two, seventy-two A, seventy-three, or seventy-four of this Act, or, if the female is under the age of sixteen years, to a charge under section seventy-six of this Act.

**78.** If the girl was, at the time of the alleged offence, over the age of fourteen years and under the age of sixteen years, no prosecution under section seventy-one, seventy-two or seventy-six of this Act shall be commenced after the expiration of twelve months from the time of the alleged offence.

**78A.** A male who has carnal knowledge of his mother, sister, daughter or granddaughter (whether the relationship is of half-blood or full blood, or is or is not traced through lawful wedlock) is liable to penal servitude for seven years.

**78B.** A male who attempts to commit an offence under the last preceding section is liable to imprisonment for two years.

**78C.** A female who, with her consent, permits her grandfather, father, brother or son to have carnal knowledge of her (whether the relationship is of half-blood or full blood, or is or is not traced through lawful wedlock) is liable to penal servitude for seven years.

**78D.** (1) It is a defence to a charge under any of the last three preceding sections that the person charged did not know that the person with whom the offence is alleged to have been committed was related to him or her, as alleged.

(2) The consent of the person with whom the offence is alleged to have been committed is no defence to a charge under section seventy-eight A or seventy-eight B of this Act.

**78E.** On the conviction of a father or step-father of an offence under section seventy-three or seventy-four of this Act or of a male of an offence under section seventy-two A, seventy-eight A or seventy-eight B of this Act, the court may—

- (a) divest the offender of all authority over the female with whom the offence is committed or, if the offender is her guardian, remove the offender from that guardianship; and
- (b) appoint a person or persons to be her guardian or guardians during her minority, or for a greater or less period.

**78F.** Where on the trial of a male for an offence under section sixty-three or sixty-five of this Act, the jury are not satisfied that he is guilty of the offence charged, but are satisfied that he is guilty of an offence under section seventy-eight A or seventy-eight B of this Act, they may acquit him of the offence charged and find him guilty of an offence under section seventy-eight A or seventy-eight B of this Act.

**78G.** (1) A prosecution for an offence under section seventy-eight A, seventy-eight B or seventy-eight C of this Act shall not be commenced without the sanction of the Attorney-General.

(2) All proceedings under section seventy-eight A, seventy-eight B or seventy-eight C of this Act shall be held *in camera*.

#### *Unnatural offences*

**79.** Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for life or any term not less than five years.

**80.** Whosoever attempts to commit the said abominable crime, or assaults any person with intent to commit the same, shall be liable to penal servitude for five years.

**81.** Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years.

#### **Law Reform (Sexual Behaviour) Ordinance 1976**

**1.** This Ordinance may be cited as the *Law Reform (Sexual Behaviour) Ordinance 1976*.

**2.** (1) In this Ordinance—

“commits” includes attempts to commit, and “commission” has a corresponding meaning;

“Crimes Act” means the Crimes Act 1900, of the State of New South Wales in its application to the Territory.

(2) For the purposes of this Ordinance, two persons are related to each other only if one is the mother, sister, daughter, grand-daughter, father, brother, son or grandson of the other, whether the relationship is of the half-blood or the full-blood or is or is not traced through lawful wedlock.

(3) For the purposes of this Ordinance, an act done in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise, shall be taken to have been done otherwise than in private.

3. (1) Subject to this Ordinance, a person who, with the consent of another person (whether of the same or different sex) and in private, commits an act of a sexual nature upon or with that person is not, by reason only of the commission of that act, guilty of an offence.

(2) Sub-section (1) does not apply where a person commits an act upon or with a person to whom he is related.

4. (1) The consent of a person who has not attained the age of 16 years is not effective for the purpose of section 3 or section 5.

(2) The consent of a person who has attained the age of 16 years but has not attained the age of 18 years is not effective for the purpose of section 3 or section 5 unless the defendant proves that he had reasonable grounds for believing, and did believe, that the first-mentioned person had attained the age of 18 years.

(3) The consent of a person is not effective for the purpose of section 3 or section 5 if the consent is induced by means of a threat, by force, by means of a false pretence or representation or by the use of intoxicating liquor or a drug.

(4) The consent of a person of unsound mind is not effective for the purpose of section 3 or section 5 if the person to whom it is given knows, or has reason to suspect, that the first-mentioned person is of unsound mind.

5. Where a person is charged with an offence against section 79, 80 or 81 of the Crimes Act, the court shall not find that the offence has been established unless it is proved—

- (a) that the person upon or with whom the act alleged to constitute the offence was committed did not give an effective consent to the commission of the act;
- (b) that the person was related to the defendant; or
- (c) that the act alleged to constitute the offence was committed otherwise than in private.

6. Proceedings in respect of an offence against section 79, 80 or 81 of the Crimes Act shall not be instituted after the expiration of a period of 12 months after the date on which the offence was committed.

7. (1) Subject to sub-section (2), this Ordinance has effect notwithstanding any other Ordinance, any regulations made under an Ordinance or any Act of the State of New South Wales in its application to the Territory.

(2) Nothing in this Ordinance affects the liability of a person to be prosecuted for, and convicted of, an offence against the *Police Offences Ordinance* 1930.



## Report of the Working Party on Territorial Criminal Law on incest

### 70. Incest

- (1) A person who has sexual intercourse with a person under the age of 18 and to whom he or she is related commits an offence.

Penalty classification—Division V.

- (2) For the purposes of subsection (1) two persons are related to each other only if one is the mother, sister, daughter, granddaughter, father, brother, son or grandson of the other, whether the relationship is of the half-blood or the full-blood or is or is not traced through lawful wedlock.
- (3) It is a defence under this section that the person charged:
  - (a) did not know that the person with whom the offence is alleged to have been committed was related to him or her; or
  - (b) believed, on reasonable grounds, that the other person was of or above the age of 18.

Cf. ss. 10 and 11 Sexual Offences Act 1956 (Eng.).

*Note:* Only applies where person under 18.

### Victorian Crimes Act 1958 (as amended)

#### (8) *Rape and Similar Offences. Defilement of Women. Abduction.*

**44.** (1) Whosoever is convicted of rape shall be guilty of felony and except as herein provided shall be liable to imprisonment for a term of not more than twenty years.

(2) If on the trial of any person charged with rape the jury are satisfied that the offence charged has been committed but that there were circumstances connected with the commission of the crime which appear to mitigate the offence the jury may return as their verdict that such person is guilty of the offence so charged with mitigating circumstances.

(3) A person convicted of rape with mitigating circumstances shall be liable to imprisonment for a term of not more than ten years.

(4) If on the trial of any person charged with rape the accused person pleads that he is guilty of rape with mitigating circumstances and the prosecutor for the Queen agrees to accept a plea of rape with mitigating circumstances the trial judge may thereupon direct that an entry of "Guilty of Rape with Mitigating Circumstances" be made upon the record in respect of the charge of rape and every such entry shall have effect as if it were the verdict of a jury upon the trial of the accused person on the charge of rape.

**45.** Whosoever is convicted of an attempt to commit or of an assault with intent to commit the crime of rape shall be liable to imprisonment for a term of not more than ten years.

**46.** Whosoever unlawfully and carnally knows and abuses any girl under the age of ten years,<sup>(a)</sup> shall be guilty of felony and shall be liable to imprisonment for a term of not more than twenty years.

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(a) As to proof of age, see section 411.

**47.** Whosoever is convicted of any attempt or assault with intent unlawfully and carnally to know and abuse any girl under the age of ten years<sup>(a)</sup> shall be liable to imprisonment for a term of not more than ten years.

It shall be no defence to any such charge that such attempt or assault with intent was made with the consent of such girl.

**48.** (1) Whosoever unlawfully and carnally knows any girl of or above the age of ten and under the age of sixteen years<sup>(a)</sup> shall be guilty of felony, and shall be liable to imprisonment for a term of not more than ten years; but if he is a schoolmaster or teacher, and such girl his pupil, he shall be liable to imprisonment for a term of not more than fifteen years.

(2) Whosoever attempts to have unlawful carnal knowledge of any girl of or above the age of ten and under the age of sixteen years,<sup>(a)</sup> or assaults any such girl with intent unlawfully and carnally to know her, shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than three years; but if he is a schoolmaster or teacher, and such girl his pupil, he shall be liable to imprisonment for a term of not more than five years.

**49.** It shall be no defence to a charge for unlawfully and carnally knowing, or for attempting or for assaulting with intent unlawfully and carnally to know any girl under the age of sixteen years<sup>(a)</sup> that such carnal knowledge or attempt to have carnal knowledge or assault with intent was or was made with the consent of such girl unless such girl is older than or of the same age as the defendant.

**50.** (1) If any person of or above the age of twenty-one years unlawfully and carnally knows any unmarried female of or above the age of sixteen and under the age of eighteen years <sup>(a)</sup> he shall be guilty of an indictable offence and shall be liable to imprisonment for a term of not more than twelve months.

(2) It shall be no defence to any charge for an offence under this section that such carnal knowledge was with the consent of such female.

(3) In this section the expression “female” does not include a female who with her consent has previously had intercourse with a male person other than the accused.

**51.** No prosecution for an offence against a girl of or above the age of twelve years under the provisions of section forty-eight or against a female of or above the age of sixteen years<sup>(a)</sup> under section fifty shall be commenced more than twelve months after its commission.

**52.** (1) Whosoever unlawfully and carnally knows a woman or girl of or above the age of ten years<sup>(a)</sup> such woman or girl being to his knowledge his daughter or other lineal descendant or his step-daughter shall be guilty of felony, and shall be liable to imprisonment for a term of not more than twenty years.

(2) Whosoever attempts to have unlawful carnal knowledge of a woman or girl of or above the age of ten years,<sup>(a)</sup> or assaults any such woman or girl with intent unlawfully and carnally to know her, such woman or girl being to his knowledge his daughter or other lineal descendant or his step-daughter shall be guilty of felony, and shall be liable to imprisonment for a term of not more than ten years.

(3) Whosoever unlawfully and carnally knows a woman or girl of or above the age of ten years such woman or girl being to his knowledge his sister or mother shall be guilty of felony, and shall be liable to imprisonment for a term of not more than seven years.

(4) Whosoever attempts to have unlawful carnal knowledge of a woman or girl of or above the age of ten years,<sup>(a)</sup> or assaults such woman or girl with intent unlawfully and carnally to know her, such woman or girl being to his knowledge his sister or mother, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than five years.

(5) It shall be no defence to a charge for any offence against this section that such carnal knowledge or attempt or assault with intent to have unlawful carnal knowledge was or was made with the consent of such woman or girl.

**53.** (1) Any woman or girl of or above the age of eighteen years<sup>(a)</sup> who consents to her father or other lineal ancestor or step-father or her brother or her son having carnal knowledge of her and permits him (knowing him to be her father or other lineal ancestor or her step-father or her brother or her son as the case may be) so to do shall be guilty of felony, and shall be liable to imprisonment for a term of not more than five years.

(2) It shall be sufficient to prove in support of a charge for any offence against this or the last preceding section that the woman or girl on whose person or by whom the offence is alleged to have been committed is or is reputed to be the daughter or other lineal descendant or step-daughter or sister or mother of the person charged or with whom the offence is alleged to have been committed, and it shall not be necessary to prove that such woman or girl (or any person being her parent or ancestor and descendant of the person charged or with whom the offence is alleged to have been committed) was born in lawful wedlock.

(3) In all proceedings under this or the last preceding section knowledge on the part of the accused of the relationship or affinity existing between the woman or the girl on whose person or by whom the offence is alleged to have been committed and the person charged or with whom the offence is alleged to have been committed shall unless or until evidence to the contrary is given be presumed to have existed at the time at which the offence is alleged to have been committed.

(4) In all proceedings against any woman or girl for an offence against this section, it shall be a sufficient defence to prove that such woman or girl was at the time she consented to her father or other lineal ancestor or step-father or her brother or her son having carnal knowledge of her or permitted him so to do acting under his coercion.

(5) In this and the last preceding section “brother” and “sister” respectively include half-brother and half-sister.

(6) The provisions of this and the last preceding section shall apply whether the relationship between the person charged with an offence under either of the said sections and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock.

**54.** (1) Whosoever being—

- (a) a superintendent deputy-superintendent medical practitioner medical officer medical attendant officer nurse attendant or other person employed in any institution within the meaning of the *Mental Health Act* 1959 or a benevolent asylum or charitable institution; or
- (b) a person having the care or charge of any female being a patient within the meaning of the *Mental Health Act* 1959 or intellectually defective within the meaning of that Act—

carnally knows or attempts or assaults with intent to carnally know that female or any female under care treatment supervision or control as a person who is mentally ill or intellectually defective in any institution within the meaning of the *Mental Health Act* 1959 or a benevolent asylum or charitable institution shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years and no consent or alleged consent of the female shall be a defence to any charge for the offence.

(2) No person shall be convicted of an offence against this section upon the evidence of one witness only unless such witness is corroborated in some material particular by evidence implicating the accused.

**55.** (1) Whosoever unlawfully and indecently assaults any woman or girl, shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years.

(2) It shall be no defence to a charge for an indecent assault on a girl under the age of sixteen years<sup>(a)</sup> that such assault was made with the consent of such girl.

(3) Whosoever having been convicted of such misdemeanour as in this section mentioned afterwards commits such misdemeanour as in this section mentioned, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than 10 years.

**56.** (1) Whosoever—

- (a) procures or attempts to procure any woman or girl under the age of twenty-one years<sup>(a)</sup> to have carnal connexion within or without Victoria with any other person or persons;
- (b) procures or attempts to procure any woman or girl to become within or without Victoria a common prostitute; or
- (c) procures or attempts to procure any woman or girl to leave Victoria with intent that she may become an inmate of a brothel elsewhere; or
- (d) procures or attempts to procure any woman or girl to leave her place of abode in Victoria, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Victoria—

shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years.

(1A) Whosoever knowingly induces or persuades any male person to have unlawful carnal connexion with any woman or girl under the age of eighteen years shall be guilty of a misdemeanour and shall be liable to imprisonment for a term of not more than five years.

(2) No person shall be convicted of any offence under this section upon the evidence of one witness only unless such witness is corroborated in some material particular by evidence implicating the accused.

**57.** (1) Whosoever—

- (a) by threats or intimidation procures or attempts to procure any woman or girl to have unlawful carnal connexion within or without Victoria; or
- (b) by any false pretence or false representation or other fraudulent means procures or attempts to procure any woman or girl to have any unlawful carnal connexion within or without Victoria—

shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than five years.

(2) Whosoever applies administers to or causes to be taken by any woman or girl any drug matter or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl, shall be guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than ten years.<sup>(a)</sup>

(3) No person shall be convicted of an offence under this section upon the evidence of one witness only unless such witness is corroborated in some material particular by evidence implicating the accused.

**69.** (1) Any male person who in public or in private—

- (a) commits any act of gross indecency with or in the presence of any girl under the age of sixteen years;<sup>(a)</sup> or
- (b) incites or procures or attempts to procure the commission by any such girl of any act of gross indecency with the accused or in the presence of the accused or with any other person in the presence of the accused; or
- (c) is otherwise a party to the commission of any act of gross indecency by or with or in the presence of any such girl or by or with any other person in the presence of such girl or by any such girl with any other person in the presence of the accused—

shall be guilty of a misdemeanour and shall be liable for a first offence to imprisonment for a term of not more than two years and for a second or any subsequent offence to imprisonment for a term of not more than three years.

(2) It shall be no defence to a charge for a misdemeanour under this section that the act of indecency was committed with the consent of such girl.

(3) No prosecution for any offence under sub-section (1) shall be commenced without the sanction of a law officer.

(4) Any male person who in public or in private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour and shall be liable to imprisonment for a term of not more than three years.

(14) *Carnal Knowledge.*

**70.** Whenever upon the trial for any offence punishable under this Division it is necessary to prove carnal knowledge it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge; but the carnal knowledge shall be deemed complete upon proof of penetration only.

## **Queensland Criminal Code**

### **Chapter XXII—Offences against Morality**

**208. Unnatural Offences.** Any person who—

- (1) Has carnal knowledge of any person against the order of nature; or
- (2) Has carnal knowledge of an animal; or
- (3) Permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.

**209. Attempt to commit Unnatural Offences.** Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

The offender cannot be arrested without warrant.

**210. Indecent Treatment of Boys under Seventeen.** Any person who unlawfully and indecently deals with a boy under the age of seventeen years is guilty of a crime, and is liable to imprisonment with hard labour for five years.

The term “deal with” includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.

If the boy is under the age of fourteen years, he is liable to imprisonment with hard labour for seven years.

**211. Indecent Practices between Males.** Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

The offender may be arrested without warrant.

**212. Defilement of Girls under Twelve.** Any person who has unlawful carnal knowledge of a girl under the age of twelve years is guilty of a crime, and is liable to imprisonment with hard labour for life, with or without whipping.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of twelve years is guilty of a misdemeanour, and is liable to imprisonment with hard labour for seven years, with or without whipping.

In the case of an offender whose age does not exceed sixteen years, the Court, instead of sentencing him to any term of imprisonment, may, in addition to the sentence of whipping, or without such sentence, order him to be sent to an industrial or reformatory school, and to be there detained for a period not exceeding three years.

A prosecution for either of the offences defined in this section must be begun within six months after the offence is committed.

A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness.

The wife of the accused person is a competent but not a compellable witness.

**213. Householder permitting Defilement of Young Girls on his Premises.** Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control of any premises, induces or knowingly permits any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any man, whether a particular man or not, is guilty of an indictable offence.

If the girl is under the age of seventeen years, he is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years, with or without whipping.

If the girl is under the age of twelve years, he is guilty of a crime, and is liable to imprisonment with hard labour for life, with or without whipping.

It is a defence to a charge of any of the offences defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of seventeen years.

The husband or wife of the accused person is a competent but not a compellable witness.

**214. Attempt to Abuse Girls under Ten.** Any person who attempts to have unlawful carnal knowledge of a girl under the age of ten years is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, with or without whipping.

The offender cannot be arrested without warrant.

The wife of the accused person is a competent but not a compellable witness.

**215. Defilement of Girls under Seventeen and of Idiots.** Any person who—

- (1) Has or attempts to have unlawful carnal knowledge of a girl under the age of seventeen years; or
- (2) Knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her;

is guilty of a misdemeanour, and is liable to imprisonment with hard labour for five years.

It is a defence to a charge of either of the offences firstly defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of seventeen years.

A prosecution for either of the offences firstly defined in this section must be begun within six months after the offence is committed.

A person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness.

The wife of the accused person is a competent but not a compellable witness.

**216. Indecent Treatment of Girls under Seventeen.** Any person who unlawfully and indecently deals with a girl under the age of seventeen years is guilty of a misdemeanour and is liable to imprisonment with hard labour for two years.

If the girl is under the age of twelve years he is liable to imprisonment with hard labour for five years, with or without whipping.

It is a defence to a charge of the offence defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of seventeen years.

The wife of the accused person is a competent but not a compellable witness.

The term “deal with” includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.

**221. Conspiracy to Defile.** Any person who conspires with another to induce any woman or girl, by means of any false pretence or other fraudulent means, to permit any man to have unlawful carnal knowledge of her is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

**222. Incest by Man.** Any person who carnally knows a woman or girl who is, to his knowledge, his daughter or other lineal descendant, or his sister, or his mother, is guilty of a crime, and is liable to imprisonment with hard labour for life.

Any person who attempts to have carnal knowledge of a woman or girl who is, to his knowledge, his daughter or other lineal descendant, or his sister, or his mother, is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

It is immaterial that the carnal knowledge was had, or that the attempt was made, with the consent of the woman or girl.

The wife of the accused person is a competent but not a compellable witness.

**223. Incest by Adult Female.** Any woman or girl of or above the age of eighteen years who permits her father or other lineal ancestor, or her brother, or her son, to have carnal knowledge of her, knowing him to be her father or other lineal ancestor, or her brother, or her son, as the case may be, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

It is a defence to a charge of the offence defined in this section that the woman or girl was, at the time when she permitted her father or other lineal ancestor, or her brother, or her son, to have carnal knowledge of her, acting under his coercion.

The husband of the accused person is a competent but not a compellable witness.

**South Australia Criminal Law Consolidation Act, 1935–1975 (as amended 1976)**

*Amendment Act 1976*

2. Section 3 of the principal Act is amended by striking out the item “*Child-stealing* (Section 80)” and inserting in lieu thereof the item “*Abduction of Children* (Section 80)”.

3. Section 5 of the principal Act is amended—

- (a) by striking out the definition of “carnal knowledge”; and
- (b) by striking out the definition of “rape” and inserting in lieu thereof the following definition:—

“sexual intercourse” includes—

- (a) the introduction of the penis of one person into the anus of another;
- (b) the introduction of the penis of one person into the mouth of another.

*Act as amended to 1976*

48. (1) A person who has sexual intercourse with another person without the consent of that other person—

- (a) knowing that that other person does not consent to sexual intercourse with him;

or

- (b) recklessly indifferent as to whether that other person consents to sexual intercourse with him,

shall be guilty of the felony of rape and liable to be imprisoned for life.

(2) Any person who attempts to commit rape shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

49. (1) A person who has sexual intercourse with any person under the age of twelve years shall be guilty of a felony and liable to be imprisoned for life.

(2) A person who attempts to have sexual intercourse with a person under the age of twelve years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

(3) A person who has sexual intercourse, or attempts to have sexual intercourse, with a person of or above the age of twelve years and under the age of sixteen years shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

(4) It shall be a defence to a charge under subsection (3) of this section to prove that—

- (a) the person with whom the accused is alleged to have had, or to have attempted, sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years;

and



(b) the accused—

(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years;

or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had, or to have attempted, sexual intercourse was of, or above, the age of seventeen years.

(5) A person who, being the guardian, schoolmaster, schoolmistress, or teacher of a person under the age of eighteen years who has sexual intercourse, or attempts to have sexual intercourse, with that person shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

(6) A person who has, or attempts to have, sexual intercourse with another person knowing that other person to be so mentally deficient as not to understand the nature or consequences of the act shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

(7) Consent to sexual intercourse is not a defence to a charge of an offence under this section.

(8) This section does not apply to sexual intercourse between persons who are married to each other.

**56.** Any person who indecently assaults any person shall be guilty of a misdemeanour, and for a first offence, liable to be imprisoned for any term not exceeding five years, and may be whipped, and for any subsequent offence to be imprisoned for any term not exceeding seven years, and may be whipped.

**57. (1)** No person under the age of eighteen years shall be deemed capable of consenting to any indecent assault committed by any person who is his or her guardian teacher or schoolmaster/mistress.

(2) Subject to subsection (3) no person under the age of seventeen years shall be deemed capable of consenting to any indecent assault.

(3) Where the person is between the age of sixteen and seventeen years his or her consent shall be a defence to a charge of indecent assault if the accused proves that at the time of the said indecent assault—

(a) he or she was under the age of seventeen years; or

(b) he or she believed on reasonable grounds that the person was of or above the age of seventeen years.

**57a. Power to take plea without evidence—**

(1) When a person is charged with sexual intercourse with, or an indecent assault upon, a person under the age of seventeen years, the justice sitting to conduct the preliminary examination of the witnesses may, without taking any evidence, accept a plea of guilty and commit the defendant to gaol, or admit him to bail, to appear for sentence.

(2) The justice shall take written notes of any facts stated by the prosecutor as the basis of the charge and of any statement made by the defendant in contradiction or explanation of the facts stated by the prosecutor, and shall forward those notes to the Attorney-General, together with any proofs of witnesses tendered by the prosecutor to the justice.

(3) The Attorney-General shall cause the said notes and proofs of witnesses to be delivered to the proper officer of the court at which the defendant is to appear for sentence, before or at the opening of the said court on the first sitting thereof, or at such other time as the judge who is to preside in such court may order.

(4) This section shall not restrict or take away any right of the defendant to withdraw a plea of guilty and substitute a plea of not guilty.

**58.** (1) Any person who, in public or in private—

- (a) commits any act of gross indecency with or in the presence of any person under the age of sixteen years:
- (b) incites or procures or attempts to procure the commission by any such person of any act of gross indecency with the accused or in the presence of the accused, or with any other person in the presence of the accused:
- (c) is otherwise a party to the commission of any act of gross indecency by or with or in the presence of any such person or by or with any other person in the presence of such person or by any such person with any other person in the presence of the accused—

shall be guilty of a misdemeanour, and liable for a first offence, to be imprisoned for any term not exceeding two years, and for any subsequent offence to be imprisoned for any term not exceeding three years.

(2) It shall be no defence to a charge under this section that the act of indecency was committed with the consent of the person concerned.

**69.** (1) Any person who commits buggery with an animal shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding ten years.

(2) Any person who attempts to commit buggery with an animal shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding seven years.

**70.** (1) Any person who—

- (a) attempts to commit buggery either with mankind or with any animal:
- (b) assaults any person with intent to commit buggery:
- (c) indecently assaults any male person:

shall be guilty of a misdemeanour and liable to be imprisoned for any term not exceeding seven years and may be whipped.

(2) No male person under the age of seventeen years shall be deemed capable of consenting to any indecent assault.

**71.** Any male person who, in public or in private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person, of any act of gross indecency with another male person shall be guilty of a misdemeanour, and liable to be imprisoned for any term not exceeding three years.

**72.** Any persons being related either as parent and child or as brother and sister who have sexual intercourse with each other shall be guilty of the felony of incest and liable to be imprisoned for a term not exceeding seven years.

**73.** (1) For the purposes of this Act, sexual intercourse is sufficiently proved by proof of penetration.

(2) No person shall, by reason of his age, be presumed incapable of sexual intercourse.

(3) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.

(4) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.

(5) Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with—

- (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
- (b) an act of gross indecency, or threat of such an act, against the spouse;
- (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;

or

- (d) threat of the commission of a criminal act against any person.

**74.** When any hearing or trial takes place in relation to any sexual offence punishable under this Act, it shall be lawful for the court or justice to direct that all persons not directly interested in the case shall be excluded from the place where such hearing or trial is being heard or conducted.

**75.** If upon the trial of any information for any felony or misdemeanour under sections 48 or 49 of this Act the jury is satisfied that the accused is guilty of an indecent assault, or of a common assault, but is not satisfied that the accused is guilty of the felony or misdemeanour charged, the jury may acquit the accused of such felony or misdemeanour and find him guilty of an indecent assault, or of a common assault, as the case may be, and thereupon the accused shall be liable to be punished in the same manner as if he had been convicted upon an information for an indecent assault, or for common assault, as the case may be.

**77. (1)** In every case where there is reason to suspect that an offender guilty of an offence to which this section applies is suffering from a venereal disease, the court or judge sitting for the trial of that offence shall direct that two or more legally qualified medical practitioners, named by the court or judge, inquire whether the offender is so suffering.

(2) The medical practitioners shall conduct the enquiry by personal examination of the offender and shall give their report on oath to the court or judge.

(3) If the medical practitioners report that the offender is so suffering, the court or judge shall, as part of his sentence, declare that he is suffering from a venereal disease.

(4) Every offender so declared to be suffering from a venereal disease, shall, at the expiration of the term of his imprisonment, unless the Governor is then satisfied upon the report of two legally qualified medical practitioners that the offender is no longer suffering from venereal disease, be detained during His Majesty's pleasure and subject to the regulations in some place of confinement set apart by the Governor by proclamation for that purpose.

(5) If the Governor, upon a report by two or more legally qualified medical practitioners is satisfied that any offender so detained is no longer suffering from any venereal disease, the Governor may, by his warrant, direct the release of the offender.

(6) In this section “court” means the Supreme Court or a court of summary jurisdiction constituted by a special magistrate, and “venereal disease” means syphilis or gonorrhoea.

(7) This section shall apply to offenders under eighteen years of age as well as to other offenders; and an offender who is under eighteen years of age when he is sentenced may be detained pursuant to this section notwithstanding that the detention commences or continues after he attains the age of eighteen years.

The period during which an offender is detained in a reformatory school or kept in the custody and under the control of the Children’s Welfare and Public Relief Board pursuant to the Maintenance Act, 1926–1937, shall be deemed to be the term of his imprisonment within the meaning of this section.

(8) This section applies to—

(a) an offence under section 48, 49, 56, 58, 59, 63, 64, 65, 69, 72 or 255 of this Act;

and

(b) an offence under section 23 of the Police Offences Act, 1953–1975.

77a. (1) In any case where a person has been found guilty of an offence to which this section applies the court or judge sitting for the trial of that offence may at its or his discretion direct that two or more legally qualified medical practitioners named by the court or judge, inquire as to the mental condition of the offender, and in particular whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts.

(2) The medical practitioners shall conduct the inquiry by means of personal examination of the offender and by reference to the depositions and such other records relating to him as they think necessary, and shall give their report on oath to the court or judge.

For the purpose of conducting the said examination and making their report the medical practitioners may obtain the assistance of any psychologist, social worker, probation officer, or other person whose assistance they deem necessary.

(3) If the medical practitioners report to the court or judge that the offender is incapable of exercising proper control over his sexual instincts the court or judge may, either in addition to, or in lieu of imposing any other sentence, declare that the offender is so incapable and direct that he be detained in an institution during His Majesty’s pleasure: Provided that the offender shall be entitled to call evidence in rebuttal of such report, and no such order shall be made unless the court or judge shall consider the matters reported to be proved.

Every offender in respect of whom such a direction is given—

(a) shall be detained in such institution as the Governor directs, and until the Governor gives a direction as to such institution, in any gaol;

(b) shall not be released until the Governor is satisfied on the report of two legally qualified medical practitioners, that he is fit to be at liberty.

(4) If the medical practitioners report to the court or judge that the offender is not incapable of exercising proper control over his sexual instincts, but that (i) his mental condition is subnormal to such a degree that he requires care, supervision, and control in an institution either in his own interests or for the protection of others, or (ii) for any other reason it would be expedient for him to be detained in an institution and the

court or judge after considering the report and any evidence submitted in rebuttal thereof is of opinion that the offender requires such care, supervision, and control, or that it is expedient that the offender be so detained, the court or judge may—

- (a) direct that the offender be detained in an institution either for such period as the court or judge directs or during His Majesty's pleasure; or
- (b) pass sentence on the offender and in addition direct as mentioned in paragraph (a).

Every offender in respect of whom such a direction is given—

- (a) shall be detained in such institution as the Governor directs, and until the Governor gives a direction as to such institution, in any gaol:
- (b) where the detention ordered is during His Majesty's pleasure shall not be released until the Governor is satisfied on the report of two legally qualified medical practitioners, that he is fit to be at liberty.

(5) Where the court or judge orders detention during His Majesty's pleasure in addition to imprisonment, the detention shall commence forthwith upon the expiration of the term of the imprisonment.

(6) An offender detained under this section shall be examined at least once in every three months by the Superintendent or deputy superintendent of the Mental Hospital, Parkside, or by some other person appointed by the Governor to conduct examinations under this section. The person making an examination under this subsection shall forthwith furnish a report of the examination to the Director-General of Medical Services.

(7) An offender detained in an institution pursuant to this section may be removed at any time to another institution by order of the Chief Secretary.

(8) In this section "court" means the Supreme Court or a court of summary jurisdiction constituted by a special magistrate; and "institution" means—

- (a) an institution as defined by the Mental Defectives Act, 1935–1939:
- (b) any gaol or labour prison:
- (c) any other institution proclaimed by the Governor for the purpose of this section:
- (d) in the case of an offender under the age of eighteen years, an institution as defined by the Maintenance Act, 1926–1937, or any such institution as mentioned in paragraph (a) or (c) of this definition.

(9) The offences to which this section applies are—

- (a) an offence under section 48, 49, 56, 58, 59, 63, 64, 65, 69, 72 or 255 of this Act;
- (ab) an offence under section 23 of the Police Offences Act, 1953–1975;
- (b) any other offence where the evidence indicates that the offender may be incapable of exercising proper control over his sexual instincts:

## **Western Australia Criminal Code**

### **Chapter XXII—Offences against Morality**

**181.** Any person who—

- (1) Has carnal knowledge of any person against the order of nature; or
- (2) Has carnal knowledge of an animal; or
- (3) Permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, with or without whipping.

**182.** Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for seven years, with or without whipping.

**183.** Any person who unlawfully and indecently deals with a child under the age of fourteen years or who incites such a child to so deal with him or another is guilty of a crime, and is liable to imprisonment with hard labour for seven years, with or without whipping.

The term “deal with” includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.

**184.** Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years, with or without whipping.

**185.** Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a crime, and is liable to imprisonment with hard labour for life, with or without whipping.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, with or without whipping.

A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness.

The wife of the accused person is a competent and compellable witness.

**186.** Any person who, being the owner or occupier of any premises, or having, or acting or assisting in the management or control of any premises, induces or knowingly permits any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any man, whether a particular man or not, is guilty of an indictable offence.

If the girl is under the age of sixteen years, he is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years, with or without whipping.

If the girl is under the age of thirteen years, he is guilty of a crime, and is liable to imprisonment with hard labour for life, with or without whipping.

It is a defence to a charge to any of the offences defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years.

The husband or wife of the accused person is a competent and compellable witness.

**187. (1)** Any person who has or attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a crime, and is liable to imprisonment with hard labour for five years with or without whipping:

Provided that if the offender’s age does not exceed twenty-one years he is guilty of a misdemeanour and liable to imprisonment with hard labour for two years, with or without whipping.

(2) It is a defence to a charge of either of the offences defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen.

(3) A prosecution under this section for the offence of having unlawful carnal knowledge must be begun within six months, and for the offence of attempting to have unlawful carnal knowledge within three months, after the offence has been committed.

(4) A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness.

(5) The wife of the accused person is a competent and compellable witness.

**188.** (1) Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her is guilty of a crime, and is liable to imprisonment with hard labour for five years with or without whipping.

(2) A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness.

(3) The wife of the accused person is a competent and compellable witness.

**189.** (1) Any person who unlawfully and indecently deals with a girl or woman—

(i) who is under the age of sixteen years; or

(ii) who is to the knowledge of the accused person an idiot or imbecile; or

(iii) who is under the age of seventeen years, and of whom the accused person is a guardian, employer, teacher, or schoolmaster,

or who incites such a girl or woman to so deal with him or another, is guilty of a crime, and is liable to imprisonment with hard labour for four years with or without whipping:

Provided that if the offender's age does not exceed twenty-one years he is guilty of a misdemeanour and liable to imprisonment with hard labour for two years with or without whipping.

(2) If the girl dealt with is under the age of thirteen years he is guilty of a crime, and liable to imprisonment with hard labour for seven years with or without whipping.

(3) If a person accused of the offence of unlawfully and indecently dealing with a girl under the age of sixteen years proves that the act committed was done with the consent of the girl, that she was in fact of or over the age of thirteen years, and that he believed at the time on reasonable grounds that her age was greater than stated in the indictment, he shall be in the same position as if her age had in fact been such as he so believed it to be.

(4) The wife of the accused person is a competent and compellable witness.

(5) The term "deal with" includes doing any act which if done without consent would constitute an assault as hereinafter defined.

(6) A prosecution under this section for the offence of unlawfully and indecently dealing with a girl under the age of sixteen years must, if she is of or over the age of thirteen years, be commenced within three months after the offence has been committed.

**190.** Any person who, being a guardian, employer, teacher, or schoolmaster of any girl or woman under the age of seventeen years, unlawfully and carnally knows, or attempts to have unlawful and carnal knowledge of such girl or woman, is guilty of a crime and is liable to imprisonment with hard labour for five years with or without whipping.

The wife of the accused person is a competent and compellable witness.

**197.** Any person who carnally knows a woman or girl who is, to his knowledge, his mother or daughter or other lineal ancestress or descendant, or his sister or half-sister, is guilty of a crime, and is liable to imprisonment with hard labour for life.

Any person who attempts to have carnal knowledge of a woman or girl who is, to his knowledge, his mother or daughter, or other lineal ancestress or descendant, or his sister or half-sister, is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

It is immaterial that the carnal knowledge was had, or that the attempt was made, with the consent of the woman or girl.

The wife of the accused person is a competent and compellable witness.

The mention of any relationship herein shall include any such relationship whether natural only or legitimate.

**198.** Any woman or girl of or above the age of eighteen years who permits her father or son or other lineal ancestor or descendant, or her brother or half-brother, to have carnal knowledge of her, knowing him to be her father or son or other lineal ancestor or descendant, or her brother or half-brother, as the case may be, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

It is a defence to a charge of the offence defined in this section that the woman or girl was, at the time when she permitted her father or son or other lineal ancestor or descendant, or her brother, or half-brother, to have carnal knowledge of her, acting under his coercion.

The husband of the accused person is a competent and compellable witness.

The mention of any relationship herein shall include any such relationship whether natural only or legitimate.

**325.** Any person who has carnal knowledge of a woman or girl, not his wife, or of his wife whilst he is separated from her and they are not residing in the same residence, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime which is called rape.

**326.** Any person who commits the crime of rape is liable to imprisonment with hard labour for life, with or without whipping.

**327.** Any person who attempts to commit the crime of rape is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years, with or without whipping.

**328.** Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment with hard labour for four years.

**596.** Upon an indictment charging a person with the crime of rape, or with the crime of having unlawful carnal knowledge of a girl under the age of thirteen years, he may be convicted of any offence which is established by the evidence, and of which



the unlawful carnal knowledge of a woman or girl, whether of a particular age or description or not, is an element, and blood relationship is not an element, or of which procuring the woman or girl to have unlawful carnal connection with any man is an element:

Or he may be convicted of any of the offences following, that is to say:—

- (a) Administering to the woman or girl, or causing her to take, any drug or other thing, with intent to stupefy or overpower her in order to enable any man to have unlawful carnal knowledge of her; or
- (b) Unlawfully and indecently assaulting the woman or girl; or
- (c) Unlawfully and indecently dealing with a girl under the age of thirteen years or a girl under the age of sixteen years;

if any such offence is established by the evidence.

**596A.** Upon an indictment charging a person with having or attempting to have unlawful carnal knowledge of a girl under a particular age, he may be convicted of unlawfully and indecently assaulting or dealing with her (she being a girl under that particular age, or a girl or woman of or over that age) if such offence is established by the evidence.

## **Tasmanian Criminal Code**

### **Crimes against Morality**

**122.** Any person who—

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or
- (c) consents to a male person having carnal knowledge of him or her against the order of nature,

is guilty of a crime.

Charge: Unnatural carnal knowledge.

**123.** Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

Charge: Indecent practice between male persons.

**124.** (1) Any person who has unlawful carnal knowledge of a girl under the age of seventeen years is guilty of a crime.

Charge: Defilement of a girl under seventeen years of age.

(2) In any case in which the accused person is under the age of eighteen years, it is a defence to a charge under this section to prove that he in fact believed on reasonable grounds that the girl was over the age of seventeen years.

(3) In any case in which the accused person is under the age of twenty-one years, and the girl is over the age of fifteen years, the consent of the girl shall be a defence to a charge under this section.

(4) In any case in which the accused person is under the age of fifteen years and the girl is over the age of twelve years, the consent of the girl shall be a defence to any such charge.

(5) In any case in which the accused person is under the age of sixteen years, and the girl is of the same age or older than such person, her consent shall be a defence to any such charge.

(6) Except as hereinbefore provided the consent of the girl shall in no case be a defence to any such charge.

**125.** Any person who, being the owner or occupier of any premises, or having or acting or assisting in the management or control of any premises, induces or knowingly permits any girl under the age of seventeen years to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any other person, whether a particular person or not, is guilty of a crime.

Charge: Permitting the defilement of a young girl on premises.

**126.** (1) Any person who, knowing a female to be insane, has unlawful carnal knowledge of her, is guilty of a crime.

Charge: Defilement of an insane person.

(2) Any person who, knowing a female to be a defective within the meaning of the *Mental Deficiency Act* 1920, has unlawful carnal knowledge of her, is guilty of a crime.

Charge: Defilement of a defective.

**127.** (1) Any person who unlawfully and indecently assaults a female is guilty of a crime.

Charge: Indecent assault.

(2) In any case in which it is provided that the consent of a girl to the act charged shall be a defence to a charge under section one hundred and twenty-four, the like consent to an act charged under this section given under the like conditions as to the age of the parties shall be a defence to a charge under this section.

(3) Except as hereinbefore provided, the consent of a person under seventeen years of age shall be no defence to a charge under this section.

**128.** Any person who—

- (a) procures a female under the age of twenty-one years, who is not a common prostitute or of known immoral character, to have carnal connection with any other person, either in this State or elsewhere;
  - (b) procures a female to become a common prostitute, either in this State or elsewhere;
  - (c) procures a female to leave this State with intent that she may become an inmate of, or frequent, a brothel elsewhere; or
  - (d) procures a female to leave her usual place of abode in this State, such place not being a brothel, with intent that she may for the purposes of prostitution become an inmate of, or frequent, a brothel, either in this State or elsewhere,
- is guilty of a crime.

Charge: Procuration.

**129.** Any person who—

- (a) by threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection, either in this State or elsewhere;
  - (b) by any false pretence or false representation procures a female, who is not a common prostitute or of known immoral character, to have unlawful carnal connection, either in this State or elsewhere; or
  - (c) administers to a female, or causes her to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her,
- is guilty of a crime.

**Charge:** Procuring defilement of a female.

**131.** For the purposes of this chapter a defective, within the meaning of section one hundred and twenty-six, is incapable of giving a consent.

**132.** (1) Any person who, having the custody, charge, or care of a girl under the age of seventeen years causes or encourages the seduction, prostitution, or unlawful carnal knowledge by any person, of such girl, is guilty of a crime.

**Charge:** Causing or encouraging defilement of a girl under seventeen years of age.

(2) For the purposes of this section and section four hundred and twenty-eight, a person shall be deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge, as the case may be, of a girl who has been seduced or become a prostitute or been unlawfully carnally known if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, a prostitute or person of known immoral character.

**133.** (1) Any male person who has carnal knowledge of a female who is to his knowledge his grand-daughter, daughter, sister, or mother, is guilty of a crime.

**Charge:** Incest.

(2) The consent of any such female as aforesaid shall be no defence to a charge under subsection (1) hereof.

(3) Any female of or above the age of sixteen years who, with consent, permits her grandfather, father, brother, or son to have carnal knowledge of her, knowing him to be her grandfather, father, brother, or son, as the case may be, is guilty of a crime.

**Charge:** Permitting incest.

(4) In this section the terms "brother" and "sister" respectively include half-brother and half-sister; and the provisions of this section apply whether the relationship between the person charged with a crime under this section and the person with whom such crime is alleged to have been committed is or is not traced through lawful wedlock.

(5) In any proceedings against any person in respect of a crime under this section the husband or wife of such person shall be a competent and compellable witness.

**136.** (1) No person shall be convicted of any crime under the provisions of any of the foregoing sections of this chapter, or of an attempt to commit the same, on the evidence of the person in respect of whom the crime is alleged to have been committed or attempted, unless the evidence of such person is corroborated in some material particular by other evidence implicating the accused.

(2) The provisions of subsection (1) hereof shall not apply to any proceedings under section one hundred and twenty-three or section one hundred and thirty-three if the person in respect of whom the crime is alleged to have been committed was not a consenting party to, or an accomplice in, such crime.

#### **Rape: Abduction.**

**185.** Any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime, which is called rape.

**Charge:** Rape.

**335.** Upon an indictment for rape the accused person may be convicted of—

- (a) defilement of a girl under seventeen years of age;
- (b) procuring defilement of a female;
- (c) defilement of an insane person;
- (d) defilement of a defective;
- (e) incest;
- (f) indecent assault; or
- (g) assault.

**335A.** Upon an indictment for forcible abduction or abduction the accused person may be convicted of assault.

**336.** Upon an indictment for defilement of a girl under seventeen years of age the accused person may be convicted of—

- (a) procuring defilement of a female;
- (b) defilement of an insane person;
- (c) defilement of a defective;
- (d) indecent assault; or
- (e) assault.

**336A.** Upon an indictment for indecent assault the accused person may be convicted of assault whatever may have been the age of the female against whom the offence is alleged to have been committed.

**337.** Upon an indictment for incest the accused person may be convicted of—

- (a) defilement of a girl under seventeen years of age;
- (b) defilement of an insane person;
- (c) defilement of a defective; or
- (d) indecent assault.

## **Northern Territory Criminal Law Consolidation Act and Ordinance 1876–1974**

### **Rape, Defilement, and Abduction of Women and Girls:**

**60.** Whosoever shall be convicted of the crime of rape shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for life with hard labor.

**61.** Whosoever shall be convicted of any attempt to commit, or of an assault with intent to commit, the crime of rape, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

**62.** Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl to have any illicit carnal connection with any man, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

**63.** Whosoever shall unlawfully and carnally know and abuse any girl under the age of twelve years shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for life with hard labor.

**64.** Whosoever shall be convicted of any attempt, or assault with intent, unlawfully and carnally to know and abuse any girl under the age of twelve years, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

65. Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

66. Whosoever shall be convicted of any indecent assault upon any woman or girl, shall be liable to be imprisoned for any term not exceeding two years, with hard labor.

67. No child under the age of twelve years shall be deemed capable of consenting to any indecent assault.

*Unnatural Offences:*

71. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for life with hard labor.

72. Whosoever shall attempt to commit, either with mankind or with any animal, the abominable crime of buggery, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

73. Any persons being related, either as parent and child, or brother and sister, who shall unlawfully intermarry with each other, or who shall commit fornication or adultery with each other, shall be deemed to have been guilty of the crime of incest.

74. Whosoever shall be convicted of the crime of incest shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding seven years, with hard labor.

75. Whenever upon the trial for any offence punishable under this Act, it shall be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

## Annexe VII. B

### A discussion of *D.P.P. v. Morgan* and its possible effects in Australia

1. The decision in *D.P.P. v. Morgan*<sup>1</sup> (referred to hereafter as *Morgan's Case*) excited interest and discussion amongst lawyers and non-lawyers alike. This case raised the issue of whether an accused is entitled to an acquittal if he believed the victim was consenting, notwithstanding that his belief was unreasonable, or whether he had to show reasonable grounds in order to rely on a defence of 'mistaken belief'. The House of Lords, by a three-two majority, held that a mistaken belief in the consent of the victim would constitute a defence even if there was no reasonable basis for it.

2. This issue had previously been debated in various Australian courts, with little accompanying publicity. These cases served to illustrate the divisiveness of the issue: the views of the courts varied considerably between States. To determine the impact *Morgan's Case* had on laws in Australia it is necessary to examine the position as it stood prior to that decision.

#### *New South Wales*

3. The necessity for reasonable grounds for an accused's mistaken belief as to the victim's consent was upheld by the NSW Court of Criminal Appeal in *R. v. Flaherty and others*<sup>2</sup> and *R. v. Sperotto*.<sup>3</sup> In the latter case a special court was convened, consisting of five judges including the Chief Justice and the President of the Court of Appeal. Apparently the issues were considered so important that there was a departure from the normal forum of three judges. The court, in a unanimous judgment, confirmed that it is open to the accused to show that he believed that the victim was consenting to intercourse, and that it is necessary for the Crown to disprove the existence of such a belief. However, the issue can arise only if the accused can point to circumstances which provide him with reasonable grounds for this belief. If he cannot do so, he cannot avail himself of any defence of mistaken belief.

#### *Victoria*

4. It has been said that the Victorian courts differ from the NSW courts in not requiring objective grounds for a mistaken belief in a woman's consent. However, this is not clear from the cases. The question was partially raised in two cases: *R. v. Daly*<sup>4</sup> and *R. v. Flannery and Prendergast*.<sup>5</sup> In the second of these, the Full Court stated that the burden rests upon the Crown to prove that the accused did not believe that the victim was consenting to intercourse. It also said that the existence of a mistaken belief as to the victim's consent negatives an intention to rape. This implies that the court did not consider that reasonableness was an essential element of such a belief. However, the Court then quoted Lord Reid in *Warner v. Metropolitan Commissioner*<sup>6</sup> as saying:

The absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.

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1. [1975] 2 WLR 913.

2. (1968) 98 WN (part 1) 141.

3. (1970) 92 WN 223.

4. [1968] VR 257.

5. [1969] VR 31.

6. [1968] 2 All ER 356 at 384.

5. This is the only passage in the judgment which specifically refers to the reasonableness or otherwise of the accused's belief, although the tenor of the rest of the judgment is that reasonableness is not an essential element. The position therefore remains ambiguous, despite statements to the contrary.

### *South Australia*

6. The South Australian Supreme Court supported the 'subjective' view in *R. v. Brown*.<sup>7</sup> Each of the three judges in that case gave a lengthy judgment, and although there was some divergence in reasoning between Bray C.J. and the other two judges, all three agreed that where an honest but mistaken belief held by the accused negates the requisite intent or '*mens rea*' to commit the crime, it matters not whether such belief was based upon reasonable grounds.

### *Queensland and Western Australia*

7. In these States the position is probably regulated by identical sections in their respective criminal codes, which provide:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.<sup>8</sup>

8. Although these sections have sometimes been interpreted so as to exclude a defence of mistaken belief unless it is based on reasonable grounds, at least one text writer considers that they would not preclude a defence of unreasonable mistaken belief in a rape case.<sup>9</sup> This is because the mistake, whether or not it is reasonable, negatives the guilty intention which must be established in rape, namely the intention to have intercourse without the consent of the victim. If the accused genuinely believes she is consenting, no matter how unreasonable that belief, he does not have that intention.

### *Tasmania*

9. Sections 13 and 14 of the Tasmanian Criminal Code make provision as to the mental element necessary to constitute a criminal offence.<sup>10</sup> Any ambiguity arising from the wording of these sections as to whether an honest but unreasonable belief might negate intention under section 13, or whether any belief, in order to constitute a defence, should be 'honest and reasonable' as in section 14, was resolved by the Tasmanian Court of Criminal Appeal in *Snow v. The Queen*.<sup>11</sup> In that case the majority judgment made it clear that in order for mistake to constitute a defence to rape, it must be reasonable as well as honest. Although later courts have expressed some reservations about the decision in *Snow's Case* this remains the law at the present time.

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7. [1975] 10 SASR 139.

8. Queensland Criminal Code, section 24; Western Australian Criminal Code, section 24.

9. Colin Howard, *Australian criminal law*, 2nd edition (Australian Law Book Co., Melbourne, 1970), pp. 160-1.

10. Section 13 (1): No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.

Section 14: Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.

11. [1962] Tas SR 271.

### *Morgan's Case*

10. The facts of this case have been well ventilated. Briefly they are that Morgan invited three younger men, with whom he had been drinking, to have intercourse with his wife. He told them to ignore her protests, as this was the way she obtained sexual gratification. Subsequently, each of the four accused, including Morgan himself, had intercourse with Mrs Morgan, who, according to her evidence, made it quite clear that she was not consenting. Morgan was charged with aiding and abetting rape, and the others were charged with rape. They were all convicted, and were sentenced to varying terms of imprisonment. They appealed against their convictions upon the ground that the trial judge erred in directing the jury that any mistaken belief they might have held that Mrs Morgan was consenting must, in order to exonerate them, be reasonable as well as honest. The House of Lords, by a three–two majority, upheld this submission, but refused to quash the convictions.

11. Without going into the intricacies of the law relating to the mental element in crime, it seems that the majority judgment in *Morgan's Case* is, when looked at in its historical perspective, legally correct. It is inconsistent to provide, as the criminal law always has, that a person cannot be guilty of a serious offence unless he intended to commit it, and on the other hand to say that a mistaken belief in facts which would render his actions innocent can only be used as a defence if it is reasonable as well as honest. The essence of the criminal law has been, and should be, a subjective assessment of each set of facts. As Bray C.J. said in *R. v. Brown*:

. . . [it is a] fundamental principle that the criminal law is designed to punish the vicious, not the stupid or the credulous.<sup>12</sup>

### *Morgan's Case in Australia?*

12. Although decisions of the House of Lords do not compulsorily bind Australian courts, they are persuasive. There have been only two occasions on which the Australian High Court has chosen to ignore rulings of the House of Lords. In one of these<sup>13</sup> the House of Lords decision<sup>14</sup> was so unpopular that that House itself subsequently reversed it. In the other<sup>15</sup> the House of Lords decision<sup>16</sup> was an innovative one which flew in the face of precedent, and which was subjected to considerable criticism. In both cases the Australian courts had formulated propositions which were contrary to those inherent in the House of Lords decisions.

13. It seems probable that the High Court would follow the Morgan decision. That case has not made new law (as had both *D.P.P. v. Smith* and *Rookes v. Barnard*), nor is there any line of Australian cases which is in conflict with the Morgan principle: on the contrary, the Australian courts have shown lack of unanimity on the subject.

14. Assuming, then, that the principles of *Morgan's Case* are likely to be applied in Australia, a number of questions emerge: Could this affect the number of convictions for rape, and, if so, could it affect the incidence of the crime itself? Should the Australian States and Territories introduce legislation to counteract the effect of this decision?

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12. [1975] 10 SASR 139 at 147–8.

13. *Parker v. The Queen* (1963) 111 CLR 610.

14. *D.P.P. v. Smith* [1961] AC 290.

15. *Uren v. John Fairfax* (1966) 117 CLR 118.

16. *Rookes v. Barnard* [1964] AC 1129.



15. When the House of Lords handed down its decision in *Morgan's Case* there was an immediate outcry, not only in England, but also in Australia and other countries which follow the English common law system. This was spearheaded by womens groups, who were concerned that the decision would become a 'rapists' charter', and would result in offenders producing spurious defences under the guise of 'honest mistake', thus, in turn, reducing the conviction rate for rape and increasing its incidence as potential offenders felt a growing sense of immunity.

16. This concern was reinforced by the case of *R. v. Cogan*<sup>17</sup> which was heard in the English Court of Appeal shortly after the House of Lords decision in *Morgan's Case*. The facts of *Cogan's Case* were surprisingly similar to those of *Morgan*. One Leak, who had previously assaulted his wife on a number of occasions, brought Cogan to his home and told his wife that Cogan wanted to have sexual intercourse with her and that he, Leak, would see that they did. Eventually Cogan, who was apparently intoxicated at the time, did have intercourse with Mrs Leak. Although she was sobbing at least part of the time, he later said that he had thought she was consenting. It seems that alcohol had much to do with this belief. He was subsequently charged with rape, and Leak with aiding and abetting rape. At the time of their trial, the Court of Appeal had recently given its decision in *Morgan's Case*, and the appeal to the House of Lords was pending. The Court of Appeal decision, which was later reversed by the House of Lords, had required that mistaken belief as to consent, in order to exonerate a person accused of rape, should be reasonable as well as honest. Applying the law as it then stood to the facts before it, the jury convicted Cogan of rape. However, in view of the fact that an appeal was pending in *Morgan's Case*, the trial judge asked the jury to make a special finding as to Cogan's belief in Mrs Leak's consent. The jury said that Cogan had believed that Mrs Leak was consenting, but that he had no reasonable grounds for such belief. Accordingly, as soon as the House of Lords handed down its decision in *Morgan's Case*, Cogan appealed to the Court of Appeal, which was compelled to quash his conviction.

17. One of the real problems associated with this case is that it appeared to give a completely new dimension to a possible defence based on drunkenness. Previously it had been established in a number of leading cases that in a crime such as rape, which does not have a specific intention included in its definition, self-induced drunkenness can only provide a defence if it renders the person temporarily insane in a legal sense. It is rare indeed that a person becomes intoxicated to this extent. Nevertheless, the decision in *Cogan's Case* appears, at first sight, to provide a back door way of allowing drunkenness as a defence in rape, in situations where the accused, through intoxication, is unable to appreciate that the victim is not consenting. This extension of the defence of drunkenness would be significant in rape, as many offenders are affected by alcohol at the time of the offence.

18. The problem is complicated by the fact that the House of Lords has recently affirmed<sup>18</sup> that self-induced intoxication cannot be used as a defence to 'crimes of basic intent', of which rape is one. In that case Lord Simon of Glaisdale (one of the dissenting Lords in *Morgan's Case*) illustrated, as an example of the unwarranted consequences of allowing drunkenness as a defence in such crimes, the situation where the accused in a rape case could escape blame because he had 'an erroneous belief, brought about by self-induced intoxication, that a woman is consenting to sexual intercourse'.<sup>19</sup>

17. [1975] 3 WLR 316.

18. *D.P.P. v. Majewski* [1976] 2 All ER 142.

19. [1976] 2 All ER 142 at 152.

19. The only answer seems to be that *Cogan's Case* was wrongly decided. Cogan should not have been allowed to rely on any mistaken belief that Mrs Leak was consenting, no matter how honestly held, if that belief was induced by his own state of intoxication. This aspect of the case was given insufficient attention probably because the law was, at that time, in a state of flux. Now that the law has been resolved, it seems unlikely that such a situation would recur.

20. Assuming that drunkenness cannot be used as a defence if it renders the accused incapable of appreciating that the victim is not consenting to intercourse, the question remains as to how the decision in *Morgan's Case* is likely to affect future rape prosecutions. At this early stage, any attempted answer can be conjectural only, but it does appear to be unlikely to have the results foreshadowed by its critics. The decision does not mean that the reasonableness of an accused's belief as to the victim's consent is irrelevant: what it does mean is that the accused does not have to point to objectively reasonable grounds for such a belief in order to put this defence before the jury. He still has to persuade the jury to give him the benefit of the doubt on the basis that he honestly believed the victim was consenting, and it seems unlikely that he would be able to do so if the belief was a wholly unreasonable one.

21. One can envisage some situations where the Morgan decision, and the controversy engendered by it, might make the lot of the victim giving evidence in a rape case less invidious than it previously was; this is because the discussion following *Morgan's Case* has focused attention on the fact that a belief as to the victim's consent, although erroneous, can constitute a defence to rape whereas the prior emphasis was on whether the victim had consented in fact. Where the accused concedes that the victim did not consent and attempts to show that he had erroneously believed that she was consenting, the case may take a different course from one in which the question of consent is itself in issue. Of course, there may be cases where the accused alleges that the behaviour of the victim led him to believe she had consented even though she had not in fact done so.

22. It is said that most rapes are premeditated. One of the dangers we see arising from the Morgan decision and its resultant publicity is that the premeditation might extend to arranging for the rape to occur in such a way that the offender can subsequently say: 'perhaps she was not consenting in fact, but at the time I honestly thought she was'.

23. Although we appreciate the problems which could arise, we do not recommend that legislation be passed to counteract the decision in *Morgan's Case*. It would be difficult, if not impossible, to frame an enactment which would be effective without unwarrantedly curtailing the rights of the accused.

## Annexe VII.C

Extracts from Paul Wilson, *The other side of rape*, Commission research report, no. 9, 1977

### *Unreported rape*

This short summary profile of unreported rape allows us to make some cautious general comments about the nature of the phenomenon. To begin with, unreported rape is not a singular easily classifiable crime. Nonetheless, in comparison with reported rape, victims were slightly older and offenders likely to come from higher socio-economic positions.

Unreported rape generally occurred on Friday and Saturday night during the hours of darkness. Although rapes involving hitch-hiking were prominently featured in the newspapers only four cases of unreported rape through this form of transportation were recorded in the study. Fifty per cent of all unreported rapes that could be determined involved other sexual acts in addition to vaginal intercourse. With nearly 70 per cent of all unreported rapes committed by relatives or acquaintances the proportion of rapes involving non-strangers is higher than in most official rape studies, although these figures are not dissimilar to those collected by the Sydney Rape Crisis Centre.<sup>1</sup> Our study differs most significantly from the Sydney research in that our proportion of pack rapes was relatively small (14 per cent) while the Sydney centre had a figure of 32 per cent.

Physical force was employed in twenty-one of all unreported rapes but weapons were used in only seven of the seventy cases. The vast majority of victims did not attempt to use all their physical force in attempting to repel the rapists as they assumed that such resistance would lead to offender retaliation threatening their lives. Although numbers were small the data tended to confirm a United States study demonstrating that physical resistance increased the probability of victim injury. However, this should not be taken necessarily as support for an argument reinforcing the advantages of 'passive resistance' for rape victims. Some evidence suggests that complete submissiveness often leads to a most chilling end for the victim. An admittedly extreme but still salutary example of this situation can be seen in the case of Richard Speck. Seven of his eight victims allowed him to tie and gag them without a sound. They offered no resistance as he took them one by one into a room and cold-bloodedly slashed their throats. Chronologies of the Speck killings invariably make the point that at least some of the victims could have been saved if they had scratched, screamed or tried to get assistance.

In addition two fairly recent American studies suggest that rapists themselves consider that they are likely to be deterred by some resistance. Stanley Brodsky's data tentatively support the proposition that 'active verbal attack or discouragement, successful interpersonal contact, and arousal of sympathy were the most successful deterrents, depending upon the nature of the rapist'.<sup>2</sup> As well, a study by Chappell and

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1. Based on figures for the period October 1974–September 1975 supplied by the Rape Crisis Centre to the Commission.

2. S. C. Brodsky, 'Prevention of rape: deterrence by the potential victim', in M. J. Walker and S. L. Brodsky, *Sexual assault* (Lexington, Massachusetts, 1976), pp. 75–90.

James with rapists from the more violent end of the offender spectrum revealed some tentative data suggesting that both verbal and physical resistance will have a higher degree of success in preventing rape and minimising injury among less violent and repetitive rapists.<sup>3</sup>

It might well be that effective physical resistance—that suggested by feminist groups or karate experts—is the best position for potential rape victims to take. But the problem still remains of providing women with sufficiently accurate indicators of different types of rapists to permit them, when confronting a rape situation, to take the appropriate preventive measures. Until clear data are available on this issue advice on the use of physical resistance in rape attacks must be given cautiously. All that can be clearly pointed out is that this study, together with the far larger Battelle study, was carried out amongst victims (as distinct from questioning rapists) and both found that physical resistance increased the probability of victim injury.

Public authorities, including the police, assume that women should report sexual attacks to them. They consider that greater reportability will mean in turn a higher rape clean-up rate and that women have both a quasi-legal and moral duty to co-operate with police in rape investigations.

Such a view fundamentally conflicts with the realities of rape as seen by the victims. For many of them it is highly irrational to report rape to the police. To be sure few victims state that they are afraid of hostile chauvinistic police officers. On the other hand a considerable number of women feel that the police will be unable or unwilling to thoroughly investigate allegations of rape. In a very real sense the victims are right. The clean-up and conviction rate for rape is remarkably small. As well, law enforcement officers are often sceptical about some allegations of rape.

Many women fail to report rape, not because they anticipate police inaction, but more because they fear that society at large will punish them for becoming rape victims. Such a position is essentially a rational one. In chapter seven we will note the relatively harsh and punitive attitudes held by a wide cross-section of the community towards women who have been violently attacked. If the victim and the offender are part of the same social matrix and belong to a group where everybody knows everybody else, it is reasonable for her to refrain from reporting to the police and relating the incident to others in the social matrix. Shared social contacts often judge raped women very moralistically and reject them from their social life and experiences. Besides, knowledge of the attack at the common level of everyday social interaction greatly increases trauma for the woman because she is subtly reminded of the attack even if no one explicitly mentions it.

Even at the level of the family it is rational for the victim not to report the crime to the police, or indeed to other family members. Fathers and mothers are often likely to judge their daughters as partly responsible for initiating the attack and to physically discipline them or, at the very least, to emotionally withdraw from them. Rapes of young females by relatives—father, brothers, uncles, cousins and so on—are particularly likely to go unreported. The female child is both emotionally and financially dependent upon adults who have committed the attack or have a very real vested interest in discouraging her from reporting or relating the incident to others outside the family. Incest—a particularly predominant form of rape—probably has the lowest

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3. D. Chappell and J. James, Victim selection and apprehension from the rapist's perspective: a preliminary investigation (mimeographed paper presented at the 2nd International Symposium on Victimology, Boston, Massachusetts, September 1976) pp. 22–4.

reportability rate of any other type of rape.<sup>4</sup> As Weis and Weis put it: 'fear of retaliation by those more powerful upon whom she depends precludes a direct report of victimisation'.<sup>5</sup>

Our survey has shown that the most predominant reason for not reporting rape is that women 'just want to forget' the crime.<sup>6</sup> Those who have suffered both emotionally and physically can hardly be blamed for not wanting to prolong their pain. For women, like men, have internalised the social stereotypes surrounding rape and are well aware that the community and its institutions consider females legitimate objects of sexual victimisation. Such a position is heavily entrenched and is continuously supported by victim precipitation views perpetrated by scholars, lawyers and politicians.

Given this social climate it is perhaps not unexpected that our survey results find that many women turn to other women and not to public authorities to unburden themselves about their personal sexual and social conflicts resulting from rape. In this situation it is perhaps unfortunate, to put it mildly, to see the gradual dissipation of womens centres and rape crisis organisations through the erosion of public funding and, in some States, through overt government hostility towards such groups. Regardless of what innovations occur in police force or hospitals regarding the handling of rape victims substantial numbers of women will not directly report rape to government instrumentalities—our survey has made that fact abundantly clear. And organised womens groups offer, in many cases, the only viable alternative for victims of rape who wish to share with other women the torment of a violent sexual attack.

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4. Some of these points can be found in a recent study of incest in Australia. See Judy A. Williams, 'The phenomenology of incest' in A. R. Edwards and P. R. Wilson (eds) *Social deviance in Australia* (Cheshire, Melbourne, 1975), pp. 122–35.
  5. K. Weis and S. Weis, 'Victimology and the justification of rape', in I. Drapkin and E. Viano (eds) *Victimology: a new focus*, vol. 5 (Lexington, Massachusetts, 1975), p. 22.
  6. The reasons given by the victim not to report her rape differ in the Brisbane study both in priority and nature from those presented by American researchers. The reasons for these differences are not at this time readily explainable. See L. G. Schultz, *Rape victimology* (Charles C. Thomas, Springfield, 1975), pp. vii–ix.

## Annexe VII.D

### Sydney Rape Crisis Centre statistics

Total number of victims 318

Age	Number	%	Relationship of attackers	Number	%
Under 12	11	3.4	Father	18	5.7
12-16	87	27.3	Uncle	6	1.8
17-21	77	24.0	Other relative	12	3.6
22-29	45	14.0	Family friend	10	3.1
30-39	12	4.0	Contemporary friend	28	8.8
40+	12	4.0	Lover/boyfriend	11	3.4
Other (unknown)	74	23.3	Other friend	4	1.2
	318	100.0	Police	1	0.3
			Employer	1	0.3
			Other authority figures	1	0.3
			Contemporary acquaintance	62	19.4
			Neighbour	5	1.5
			Driver (victim when hitch-hiking)	14	4.4
			Other acquaintances	10	3.1
			Stranger	93	29.2
			Unknown	42	13.9
				318	100.0
			In other words, 29.2 per cent of victims were raped by strangers; 54 per cent knew their rapist and in 13.9 per cent of the cases the relationship between the victim and attacker is unknown.		
Number of attackers	Number	%	Time of attack	Number	%
1	180	56.6	6 a.m.-12 noon	16	5.0
2	36	11.3	noon-6 p.m.	27	8.4
3	24	7.5	6 p.m.-10 p.m.	32	10.1
4	17	5.3	10 p.m.-2 a.m.	115	36.2
5	11	3.4	2 a.m.-6 a.m.	16	5.0
6	7	2.2	Various times	29	9.1
7-10	4	1.2	Unknown	83	26.2
10+	11	3.4		318	100.0
Unknown	28	9.1			
	318	100.0			
Others present	Number	%			
Victim's friends	31	9.7			
Rapist's friends	24	7.6			
Others, e.g. victim's children	29	9.2			
No one else present	50	15.7			
Unknown	184	57.8			
	318	100.0			

Place of attack	Number	%
Victim's home	91	28.6
Rapist's home	32	10.1
Friend's home	9	2.8
Street/car	77	24.2
Beach/bush/park	40	12.5
Other	17	5.3
Unknown	52	16.5
	318	100.0

Area of attack	Number	%
City	9	2.8
Inner suburbs	33	10.3
Eastern suburbs	11	3.4
Southern suburbs	23	7.2
Western suburbs	61	19.1
North shore	6	1.8
Sydney (unknown)	32	10.1
Outside Sydney	62	19.4
Unknown	81	25.9
	318	100.0

Legal	Number	%
Reported to the police	108	34.0
Charges pressed	55	50.0
Charges withdrawn	3	2.8
No charge	32	29.6
Outcome of report un- known	18	16.6
Rapist convicted	15	13.8
Case pending	25	23.1
Case dropped	4	3.7
Outcome of court un- known	28	25.9
Police sympathetic	30	27.7
Police unsympathetic	45	41.6
Police attitude unknown	22	20.3
Victim undecided	10	9.2

*N.B.* The above percentages are percentages of cases reported to the police and not percentages of the total number.

## **Annexe VII.E**

### **Message to house staff concerning rape**

#### ***Harbor General Hospital***

Rape is legally defined as forcible entry (penetration, carnal knowledge) of a woman without her consent. Most women do not react to the sexual aspect of rape nor solicit it but rather respond more to the terror and fear involved. The rapist's attack is not really a sexual one, as we often imagine, but a brutal, often sadistic assault. It is an act of hostility, like a stabbing or beating. Often the immediate reaction of the victim at the time is, 'I am going to be killed if I do not do what he says'. The intense terror of not knowing whether or not the rapist will kill her may cause the victim to come to the hospital in a state of emotional shock. She may act in a way which seems to be bizarre or inappropriate. She may be withdrawn, aggressive, belligerent but underneath she is frightened. Her emotional needs of the moment call for support, comfort, and warm understanding and a non-judgmental attitude. Preoccupation with the sexual aspects of the crime by hospital personnel often causes the victim great difficulty in dealing with her feelings.

#### ***Hospital personnel can aid the rape victim by:***

1. Treating her with dignity and sensitivity, and warm concerned understanding; (never refer to her as 'the rape' or question whether she was raped or not).
2. Try to get her seen as quickly as possible to obtain relief from her physical and emotional suffering and to obtain pertinent legal specimens which may help convict the rapist; (if there is a delay because of more seriously ill patients, kindly explain it to her).
3. Inform the victim of the availability of a patient advocate (adviser) who may be called to help her from the ***RAPE HOTLINE***—653 6333.
4. Allow a relative or friend to wait with the patient before being examined or questioned.

#### ***Guidelines for personnel to help manage the rape victim***

##### **A. The goals of management of the sexually assaulted female are:**

1. Immediate treatment of physical injuries.
2. Proper medicolegal examination with appropriate documentation for law enforcement authorities.
3. Prevention or alleviation of permanent psychological damage.
4. Prevention of venereal disease.
5. Prevention of pregnancy.

##### **B. Clinical management**

1. The repair of lacerations may be done in the emergency room but general anaesthesia may be necessary with a child or post-menopausal woman. (Make appointment for follow-up in Gynae. clinic).



2. The purpose of the medical examination (in addition to actual treatment) is to provide medical information for legal investigation and action. The physician cannot and should not state whether the patient has been *raped* since *rape* is a legal not a medical definition. The physician cannot judge the unlawfulness of an act. A checklist has been provided, which will remind the physician of all necessary information and which should be photocopied if possible and attached to the patient's medical records. (Incomplete and inaccurate records from the emergency room often result in a courtroom appearance by the physician which is time consuming and costly).

3. The patient often experiences considerable psychic trauma and should be treated in a kind, sympathetic manner with much reassurance. The physician should bear in mind that the brunt of the damage may not occur until months after the event but that brief, 'on the spot' psychotherapy helps. If indicated, psychiatric help should be provided by the on-call psychiatry resident. Follow-up evaluation of emotional status should be done when the patient returns for VD and pregnancy checks at 2 and 6 weeks. Often, if overlooked, the psychic damage may cause permanent problems with interpersonal relations and sexual function. A mild tranquilliser might be indicated for acute anxiety.

**4. Management should include:**

- (a) Baseline cultures for GC and a VDRL.
- (b) Acute treatment for any pre-existing vaginal infection or lice.
- (c) Prophylaxis against possible gonorrhoea or syphilis with a large IM dose 2.4 million units bicillin of penicillin (if not allergic) or prolonged oral dose of tetracycline or erythromycin (500 mg QID) for 7–10 days or equivalent newer drug.
- (d) Follow-up appointments at 2 and 6 weeks in the Gynae. clinic to check the GC cultures and VDRL (which should be repeated at 6 weeks unless adequate Rx for primary syphilis had been given initially).

5. The patient should be advised of the likelihood of pregnancy if adequate contraception was not utilised. (The pelvic exam will reveal obvious pre-existing pregnancy or a pregnancy test should be done if suspected). The following possibilities exist and should be discussed with the patient:

- (a) DES (diethylstilbestrol 25 mg BID x 5 days) 'the morning after pill' if elected by the patient, the major side effects and possible dangers should be explained and documented in the patient's chart before it is given.
- (b) Menstrual extraction—if menses delayed will be picked up at either the 2 or 6 week return visit.
- (c) Suction abortion—if patient is pregnant at 6 week check-up or later.

*Note:* If these procedures are followed, they will assure to both the physician and patient adequate emotional, medical, and legal attention and provide maximum utilisation of the physician's time. The initial time in the emergency room with the rape victim is well spent since, in addition to helping her, it may insure the physician that he will not be called to the courtroom to testify to an event which occurred months or years in the past.

## A checklist to use in examination for alleged rape

Name of patient \_\_\_\_\_ Age \_\_\_\_\_

Address \_\_\_\_\_ Phone \_\_\_\_\_

Date examined \_\_\_\_\_ Hour \_\_\_\_\_ Location \_\_\_\_\_

Brought to hospital by whom \_\_\_\_\_

Name of peace officer \_\_\_\_\_ Badge No. \_\_\_\_\_

Department \_\_\_\_\_ Phone \_\_\_\_\_

Name and signature of R.N. assisting with examination \_\_\_\_\_

### I. Circumstances of alleged rape

Details of attack—when, where, how (date and time) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Who? \_\_\_\_\_ Known? \_\_\_\_\_ Name(s) \_\_\_\_\_

Unknown, more than one assailant, description of assailant(s) \_\_\_\_\_

\_\_\_\_\_

Most recent coitus \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

### II. Post alleged rape activities—douched, bathed, changed clothing, medications, other treatment (circle appropriate and note time)

### III. Physical evidence

Extragenital areas \_\_\_\_\_

Genital area \_\_\_\_\_

Evidence of drug influence \_\_\_\_\_

Evidence of venereal disease \_\_\_\_\_

Evidence of pregnancy \_\_\_\_\_

Last known menstrual period \_\_\_\_\_

### IV. Emotional attitude: appropriate or inappropriate to findings

### V. Laboratory evidence obtained (circle appropriate)

A. Clothing: damaged, suspicious stains, given to peace officer, not applicable

B. Hair samples

1. Loose hairs adhering to patient or clothing

2. Semen-encrusted pubic hair

3. Clipped pubic hair of victim (at least ten, labelled pubic hair)

C. Semen specimen (2 or 3)

1. Swab or swabs from any suspicious stains (thigh, abdomen, elsewhere)
2. Vaginal pool
  - (a) Wet smear examined by examiner: sperm present, sperm absent, motile, non-motile
  - (b) Pap smear—to pathologist—labelled and sealed
  - (c) Acid phosphatase (if available)

D. Blood, urine or other specimen for drug analysis (if indicated or requested)

VI. Physician's clinical impression

Signed \_\_\_\_\_ MD State Licence No. \_\_\_\_\_

VII. Treatment and disposition \_\_\_\_\_

VIII. Disposition of evidence

Delivered by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

Received by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

IX. Emotional support—drugs, and/or psychiatric consultation if needed.

X. Venereal disease—(gonorrhoea, syphilis) prophylaxis.

XI. Pregnancy—prophylaxis—counselling.

XII. Schedule return visits Gynae. Clinic at 2 and 6 weeks.

XIII. Give victim list of telephone numbers for legal assistance.

## **Rape Crises Hotline—653 6333**

### **Referral Telephone Numbers**

#### **Health—Physical**

Feminist Health Center—936 7219  
L.A. Free Clinic—938 9141  
East Valley Free Clinic—330 7248  
Long Beach Free Clinic—437 2245  
Foothill Free Clinic—792 5141  
Public Health (State) Info.—620 2900  
Public Health (County) Info.—635 3212

#### **Legal**

Lawyers Referral Service—624 8571  
Legal Aid—L.A.—628 9126  
Neighborhood Legal Services—483 3176  
Western Center on Law and Poverty—483 1491  
L.A. County—Public Defender—629 2451  
L.A. County—District Attorney—624 2761

#### **Health—Emotional**

L.A. Free Clinic—938 9141  
Bay Cities Mental Health—477 1021  
Central City Mental Health—232 2441  
East Valley Free Clinic—330 7428  
Benjamin Rush Clinic—392 4905  
Psychological Center of L.A.—933 8477  
Suicide Prevention—381 5111  
Tri-City Mental Health (714)—622 1307  
U.C.L.A.—N.P.I.—825 0111

#### **Hotlines**

Arcadia—445 4357  
Palisades Brentwood—454 0331  
Palos Verdes—375 8014  
San Gabriel—331 7318  
Westchester—645 3333  
Torrance—320 2020

### **References**

1. Root, I. et al., 'The medical investigation of alleged rape', *The Western Journal of Medicine* 120, 329–33, no. 4, April 1974.
2. Massey, J. B. et al., 'The management of sexually assaulted females', *Obstetrics and Gynecology* 38, 29–36, no. 1, July 1971.
3. Brochures from The L.A. Commission on Assaults against Women—Rape Crisis Hotline.

M. L. Friedman, M.D.  
Harbor General Hospital  
May 1974

## Annexe VII.F

### Information for rape victims

**Call your counsellor if you have questions or problems.**

Your Counsellor:\_\_\_\_\_ Home phone:\_\_\_\_\_ Work phone:\_\_\_\_\_

#### **Tests for infection**

Tests done during your exam today won't show whether you caught an infection. Please have these tests repeated, whether you have any sign of illness or not. These diseases often have *no symptoms* in the early stages, so you can't count on getting a discharge or a sore to tell you if you have an infection. You can have an infection with no symptoms at all.

**In one–two weeks:** Repeat the vaginal exam and test for gonorrhoea (Clap). Test is called 'Gc culture'.

**In six–eight weeks:** Repeat blood test for syphilis. Test is called 'VDRL' or 'RPR'.

For both repeat tests you can see your private doctor or go to the Fulton or DeKalb Health Departments. Health Department exams are free. In Fulton County call 572 2201. In De Kalb County call 371 2626.

**Lab results from today's exam:** Results from today's tests will tell you *only* whether you had syphilis or gonorrhoea before you were attacked. You will be notified by your county health department if any of your lab tests show any abnormal cells.

You can call 659 1212, ext. 4460 and be told all of your pap test results by phone at any time after two weeks. Call between 8.30 a.m. and 5.00 p.m. Results will *only be given to you personally*.

**Bills from Grady:** Today's exam is free. If you should get a bill from Grady by mistake, call Dr Ann McAllister at 659 1212, ext. 4460 to have it straightened out.

#### **Pills to prevent pregnancy**

Some—not all—women are given pills at Grady to prevent pregnancy as a result of the attack. Please *read this section carefully if you are taking the pills*.

You will be given two bottles of pills. One contains DES, which is a hormone called diethylstilbestrol. DES prevents pregnancy. The other bottle contains Phenergan, a drug to prevent nausea.

#### **Follow the instructions on the bottle labels exactly**

DES is very effective for preventing pregnancy in most women, but only if you follow the pill-taking schedule exactly. If you miss a pill, or if you vomit after taking a pill, call Grady at 659 1212, ext. 535, and ask to speak to the nurse on duty.

Possible side effects: DES may cause nausea and vomiting, headache, breast tenderness, and may get your menstrual period off schedule. If you go six weeks without a period, get a pregnancy test.

DES works by temporarily changing the lining of your uterus (womb) so a fertilised egg can't grow there. Phenergan controls nausea so DES won't make you sick at your stomach. DES does not change in any way your ability to get pregnant in the future.

**Important warning:** if you take DES and get pregnant anyway, you should strongly consider having an abortion. This is because DES has caused vaginal cancer in daughters of a small number of women who took the drug during pregnancy. For further information on abortion you can call Grady at 659 1212, ext. 4112.

**Contacting the police:** It's up to you. Both the DeKalb County and Atlanta Police have special numbers for reporting an attack if you decide to do so.

Sex Crimes Unit, Atlanta Police Department	658 6893
DeKalb County Police Department	294 2570

**Emotional reactions:**

Many women experience emotional difficulties after an attack. This is perfectly normal. Women find that they may experience strong anxiety, fear, anger, disgust or depression. This makes it very difficult for them to carry out their normal daily activities.

Often when they feel they have gotten over these reactions, some incident such as going to court, seeing the place of the attack etc. will bring back these feelings and memories of the assault.

Many women found that talking to a counsellor during these difficult periods helps them handle the situation. One of our counselling staff will be contacting you by phone or letter if you said that you would like to be contacted when you had your exam. You should expect to hear from either Ann, Eve, Betsy or Jayne. They will be happy to talk with you and help you in any way they can.

You can also call one of them at 659 1212, ext. 4460 between 8.30 a.m. and 5.00 p.m., Monday through Friday.





Date Due

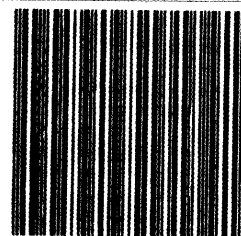
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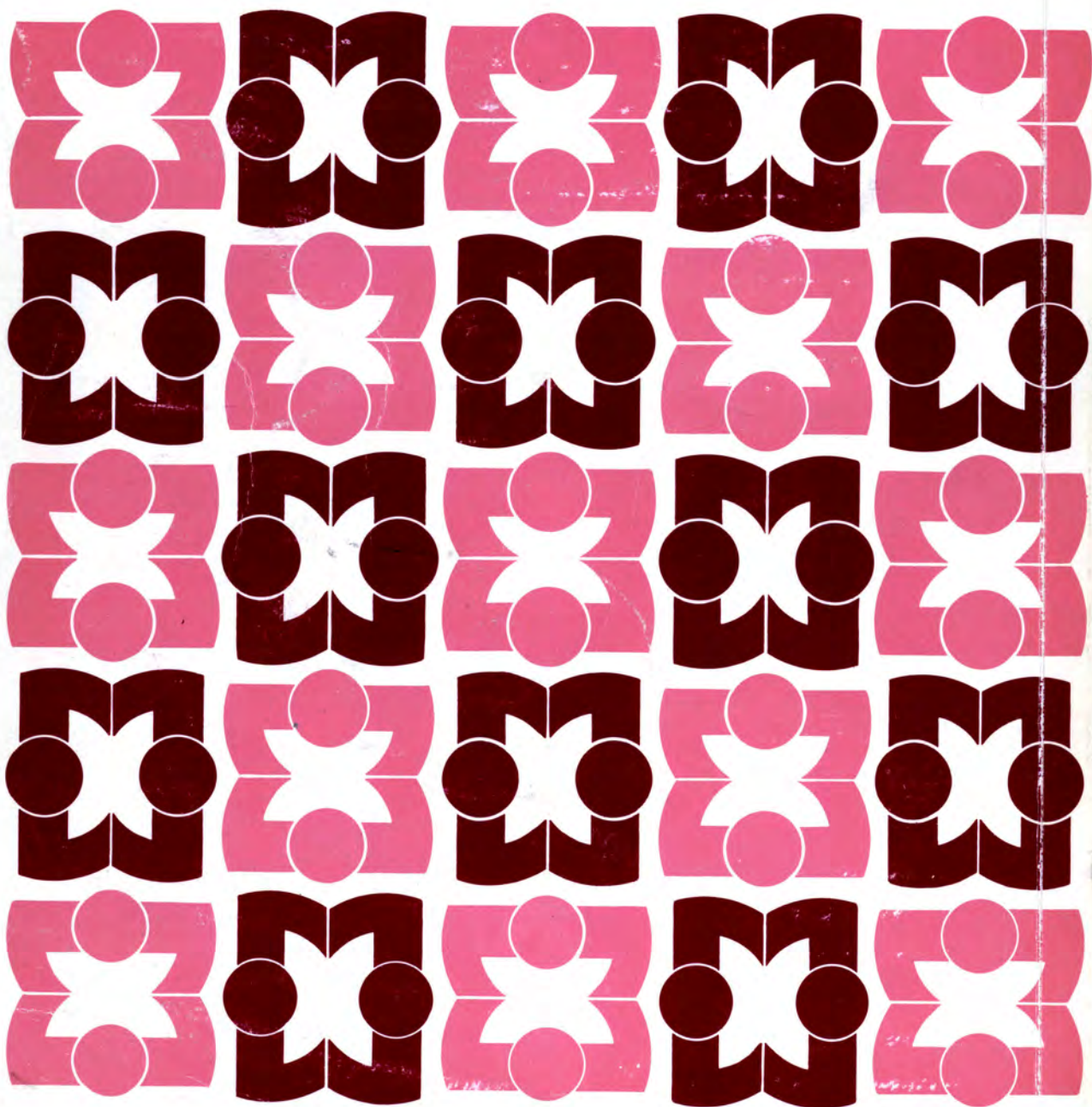
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Recommended retail price \$4.00