



BY APPOINTMENT

Report of the  
Advisory Group on the  
Law of Rape

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*From the Chairman  
To the Rt Hon Roy Jenkins MP, Secretary of State  
for the Home Department.*

I have the honour to submit to you the report of the Advisory Group on the Law of Rape.

When you appointed us in July, you invited us to consider whether early changes in the law of rape were necessary. We came to the conclusion that certain changes were required and we have dealt within the available time-scale with those matters which seemed to us to be the most urgent.

I am happy to report that our recommendations are unanimous.

Yours very sincerely

(Signed) ROSE HEILBRON  
*Chairman.*

## MEMBERS OF THE ADVISORY GROUP

The Hon Mrs Justice Heilbron DBE (Chairman)

Professor Trevor Gibbens MBE

Dr Mia Kellmer Pringle CBE

Professor A W Brian Simpson JP

Mrs Alison Wright

Secretary: Miss K A O'Neill OBE  
Assistant Secretary: Mr H D Hillier } Home Office

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ACQUISITIONS

# REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE

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*For "Lord Morris of Borth-y-Guest" read "Lord Morris of Borth-y-Gest".*

The estimated cost of the preparation of this report (including the expenses of the Advisory Group) is £9,500 of which £2,100 represents the estimated cost of the printing and publishing.

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## REPORT OF THE ADVISORY GROUP ON THE LAW ON RAPE

### I INTRODUCTION

1. This enquiry originated as a result of the widespread concern expressed by the public, the media and in Parliament in regard to the decision of the House of Lords in *Director of Public Prosecutions v Morgan & Others*.<sup>1</sup>

2. The Home Secretary appointed us in July 1975 with the following terms of reference:

“To give urgent consideration to the law of rape in the light of recent public concern and to advise the Home Secretary whether early changes in the law are desirable.”

While we were asked to consider, in particular, whether any change in the law of rape was desirable as a result of the judgment in *Morgan*, our terms of reference were sufficiently wide to enable us, if we wished, and if it would not unduly prolong our deliberations, to advise the Home Secretary of any other amendments that we thought to be urgently necessary. This allowed us to examine other aspects of the law and practice in rape cases which have also caused anxiety.

3. Since we were asked to report within a short time we have had to confine ourselves to those aspects which seemed to us to require particularly urgent attention and which could be adequately dealt with in the time scale available.

4. Again because of the limited time at our disposal we have had to rely mainly on written rather than oral evidence. However, we have been greatly helped by the overwhelming response from all those we consulted. We canvassed a broad spectrum of organisations and individuals in this country and abroad: a full list is given in Appendix 1.

5. In view of the fact that our consultations had to take place mainly during the summer vacation, we are particularly indebted to those who responded.

6. We have paid special attention to the Bill produced by Mr Jack Ashley, MP and to proposals made in the House of Commons by Mr Petre Crowder, QC, MP. (For details of these see Appendix 2). To Mr Jack Ashley we owe a particular debt of gratitude, for it was through his humane concern and his efforts in Parliament and elsewhere that public interest was aroused.

7. We also had the advantage of perusing a draft Bill on the law of rape prepared by Lord Hailsham which was of very real assistance to us in our discussions.

#### Guiding principles

8. In approaching our task we have started from two basic assumptions. First, we were concerned only with problems which are peculiarly and

<sup>1</sup>(1975) 61 Cr.App.R. 136.

specially applicable to the crime of rape. Second, that we ought not to recommend changes in the law which would treat rape differently from other offences, and possibly distort other areas of criminal law, unless there were strong grounds for so doing—in other words, that rape should remain within the general body of the criminal law, unless there were special reasons to the contrary.

9. However, the crime of rape does raise particular difficulties and this for a number of reasons. It involves an act—sexual intercourse—which is not in itself either criminal or unlawful, and can, indeed, be both desirable and pleasurable.

10. Whether it is criminal depends on complex considerations, since the mental states of both parties and the influence of each upon the other as well as their physical interaction have to be considered and are sometimes difficult to interpret—all the more so since normally the act takes place in private.

11. There can be many ambiguous situations in sexual relationships; hence however precisely the law may be stated, it cannot always adequately resolve these problems. In the first place there may well be circumstances where each party interprets the situation differently, and it may be quite impossible to determine with any confidence which interpretation is right.

12. Secondly, although in a criminal case it is the accused who is on trial, there is a risk that a rape case may become, in effect, a trial of the alleged victim.

13. Thirdly, whatever the outcome, the very fact of having been involved is liable, at present, to have embarrassing or even damaging consequences for the woman.

#### Our approach to the problems

14. One further general consideration perhaps hardly needs emphasis, namely that we should always have in mind the vital and fundamental rights of an accused person to have a fair and impartial trial. Whilst attempting to rectify any balance of unfairness to the complainant or the alleged victim, we must ensure, so far as humanly possible, that no innocent man is wrongly convicted. We further believe that it is highly undesirable that guilty men should be wrongly acquitted. If there are defects in the law which contribute to either, in our view, to be changed.

#### The elements of a crime

15. That which is prohibited by law usually consists of a number of elements, including the conduct, ie the acts or omissions, of the accused, the relevant surrounding circumstances and the consequence or result of this conduct. These elements are known as the *actus reus*, ie the prohibited or criminal act.

16. Before a man can be convicted of a grave crime the prosecution has additionally to establish that the perpetrator was morally blameworthy ie that he had a certain state of mind (the mental element). This mental element is the *mens rea*—the guilty mind.

17. It is, of course, fundamental that it is for the prosecution to prove all the elements of the offence, both the *actus reus* and the *mens rea*, ie it is for the prosecution to prove guilt and not for the accused to prove his innocence. As Viscount Sankey LC in his classical statement in *Woolmington v DPP*<sup>2</sup> said:

“Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the Prosecution to prove the prisoner’s guilt.”

#### The crime of rape

18. There is no modern definition of the crime of rape and although it is an offence under s.1. of the Sexual Offences Act 1956, the statute contains no attempt at a definition. The traditional common law definition, derived from a 17th Century writer<sup>3</sup> and still in use, is that rape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud.

19. This definition can be misleading, since the essence of the crime consists in having sexual intercourse with a woman without her consent and it is, therefore, rape to have intercourse with a woman who is asleep or with one who unwillingly submits without a struggle.

20. As Smith and Hogan point out in their text book on the Criminal Law<sup>4</sup>: “Earlier authorities emphasised the use of force; but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not ‘was the act against her will?’ but ‘was it without her consent?’”

21. It is, therefore, wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it.

22. The *actus reus* in rape, which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman’s consent.

23. The mental element, which the prosecution must additionally establish is an intention by the defendant to have sexual intercourse with a woman either knowing that she does not consent, or recklessly not caring whether she consents or not. (Hereafter in the report we will refer to recklessness in this sense.) Although this was probably always the law, as we shall see, this

<sup>2</sup>[1935] AC 462 at p.481.

<sup>3</sup>1 Hale 627 et seq. 1 East PC 434.

<sup>4</sup>Third Edition p.326.

alternative of recklessness as an aspect of the guilty mind in the crime of rape does not appear to have been emphasised before the decision in *Morgan*.

24. One further point needs explanation. If the defence contend in a rape case (as has always been possible and as they did in *Morgan*) that the accused genuinely believed, albeit wrongly, that the woman consented to sexual intercourse, this is commonly called the "defence" of mistake or mistaken belief. But strictly speaking in this type of case the accused is not putting forward a positive defence—he is arguing that the prosecution has not proved one of the essential elements in the offence, namely that he acted with the required guilty intention.

## II THE DECISION IN MORGAN

### The case of Morgan

25. As this Enquiry emanated from the decision in *Morgan* we will now outline the facts and then state the actual decision. This we do in summary form, since the full law report occupies well over 30 pages and covers much of the history of the legal principles eventually enunciated.

26. We would like to point out at the outset that it is not so surprising that the decision in a case of this nature, whose factual features were quite extraordinary and bizarre, should give rise to certain misunderstandings and misgivings in regard to its actual significance and its possible future implications for other cases.

27. It should be stressed, however, that the facts were exceptional—so exceptional that no reasonable jury could have failed to convict all the accused whether they had been directed in the way the trial Judge directed them or as the majority in the House of Lords thought they ought more correctly to have been directed (see per Lord Edmund-Davies).

28. The facts were as follows:— Morgan, aged 37, and his three co-defendants, McDonald, aged 21, McClarty, aged 27, and Parker, aged 20, had spent the evening of 15 August 1973, together. They were all members of the RAF but Morgan was older than the other three and senior to them in rank. Morgan was a married man and he invited the three men, all strangers to his wife, to come home with him and have intercourse with her. The three men asserted, but Morgan denied, that he told them that his wife might struggle a bit, as this excited her, because she was "kinky"—but she would welcome intercourse with them. When the four men arrived at the house Mrs Morgan was asleep in a bedroom with one of her sons, aged 11.

29. She was awakened and her husband seized her and pulled her out of bed. She struggled violently and shouted and screamed to her sons to call the

police, but one of the men put a hand over her mouth. She was dragged to another room, and held on the bed by her arms and legs whilst each of the three men had intercourse with her in turn by force and without her consent.

30. They then left the room and her husband forced her to have intercourse with him. When it was all over she grabbed her coat, ran out of the house, drove straight to the hospital and made an immediate complaint of rape.

31. The details of Mrs Morgan's evidence were corroborated by more detailed and lurid statements made by the accused to the police.

32. However when giving evidence at their trial the defendants all repudiated their statements and asserted that after Mrs Morgan arrived in the neighbouring bedroom she not merely consented to, but actively co-operated and enjoyed the intercourse and other indecencies.

33. As was stated by the House of Lords, the choice for the jury was whether Mrs Morgan not merely consented to, but took an active and enthusiastic part in a sexual orgy, or whether she was forcibly raped in a most atrocious manner.

34. The defence of the three younger defendants, therefore, was that Mrs Morgan actually consented to intercourse; alternatively, if she did not consent that they genuinely believed she did and that, although to start with she manifested some unwillingness, when it came to the point she co-operated with some relish.

35. As the trial Judge pointed out "But you have to face up to it, Members of the Jury. . . . If you are sure that she did not consent, that must mean that you have rejected the whole of the evidence of the defendants to the contrary. You have listened to them all say she did consent, and you have said to yourselves: That is a lie. You may consider—it is a matter entirely for you—it is a desperate defence to put forward." He went on to point out that, despite having thus rejected so much of their evidence, the jury were being asked to accept that the defendants may yet have had a genuine belief in her consent.

36. The jury did reject their defences and all four men were sentenced to substantial terms of imprisonment, Morgan to ten and the three younger men to four years each.

37. They all appealed to the Court of Appeal, on the grounds that the trial Judge was wrong in law when he directed the jury that they were only entitled to acquit the three men if they decided not only (1) that they honestly held the belief that Mrs Morgan had consented to intercourse but also (2) that they found that such belief was held by them on reasonable grounds.

38. In the Court of Appeal, Counsel for the Appellants argued that the defendants were entitled to an acquittal, even if the jury found the victim did not consent, so long as the appellants honestly believed she did, whether the grounds for their belief were reasonable or not.

39. The Court of Appeal approved the direction of the trial Judge and, therefore, rejected the Appeals. They reduced the sentences, however, to three years imprisonment for each of the three men and to seven years for Morgan. While the Court of Appeal held that the trial Judge's approach to sentencing was right in regard to the sort of differential which he imposed, they thought that his scale was somewhat too high. None of the younger men had previous convictions and Morgan only one previous conviction of a different character.

40. All the men were given leave to appeal to the House of Lords. For this to happen the Court of Appeal has to certify that a point of law of general public importance is involved. The point of law so certified was "whether in rape the defendant can properly be convicted notwithstanding that he, in fact, believed that the woman consented if such belief was not based on reasonable grounds".

41. The majority of their Lordships (Lord Cross of Chelsea, Lord Hailsham of St. Marylebone and Lord Fraser of Tullybelton) answered the question in the negative. Lord Simon of Glaisdale dissented. Lord Edmund-Davies took the view that the direction given by the trial Judge was in accordance with established law but would have preferred the approach which met with the approval of the majority. The case has been fully reported and it is unnecessary therefore for us to repeat their Lordship's Speeches.

42. When the matter reached the House of Lords, their Lordships made it plain that the real or primary "defence" at the trial was one of consent. But in their view it would have been unlikely in the extreme that any jury would have accepted such a "defence" in view of all the circumstances and the overwhelming evidence against it and as they pointed out "the jury were clearly unimpressed by such a defence, and they did not accept it".

43. As Lord Hailsham in his Speech pointed out, if the jury (as seemed a moral certainty) accepted Mrs Morgan's statement in substance, not only did they accept that she did not consent (ie by implication also rejecting the real or primary defence of the accused men), but it was just as certain that the jury would have also rejected their assertion that they held any genuine belief that Mrs Morgan was consenting, when she was not, whether on reasonable or unreasonable grounds.

44. Nevertheless, the House of Lords had to consider the point of law which had been submitted for their consideration. The majority of the House reached the conclusion that a man ought not to be convicted of rape unless the prosecution proved that he intended to do what the law forbids, ie have intercourse with a woman without her consent—or being reckless

as to whether she consented or not. As Lord Hailsham went on to explain if the intention of the accused was to have intercourse recklessly not caring whether the victim be a consenting party or not, that was equivalent on ordinary principles to an intent to do the prohibited act without the victim's consent.

45. It inevitably followed from this conclusion that a genuine belief that she had consented must exonerate the accused, because the existence of such a belief was inconsistent with what the prosecution had to prove. This did not mean that the reasonableness of the belief was irrelevant to the outcome of the case or to the practical realities of the trial. Indeed, it was emphasised that the more reasonable were the grounds put forward for this belief, the more likely would a jury be to accept its genuineness, and the more unreasonable the grounds, the less likely would a jury be to accept that it was true.

46. In short the House of Lords decided that the reasonableness or otherwise of the belief was one of the factors, but only one, which the jury should take into account in deciding whether the belief was real or genuine. The jury can, and indeed they should, be directed that in considering what the defendant did intend they should take into account and draw all relevant inferences from the totality of the evidence.

47. After detailed consideration of the problems with which we were confronted, we concluded that even if the decision in *Morgan* formed part of a logical and rational development of fundamental legal principles, nevertheless, if it appeared to us that it would be likely to weaken or cloud the real issues in rape trials or encourage juries to accept bogus defences, then it would be necessary to recommend some alteration in the law, which would result in a reversal of that decision.

### Historical background

48. Leading cases like *Morgan* cannot be considered in isolation from the general development of the criminal law whose fundamental principles have their roots in a long and continuous history evolving from statutes and from precedent. We therefore considered *Morgan* both in its historical setting and in relation to the practical handling of rape trials, bearing in mind not only the case itself but subsequent decisions such as *Cogan*<sup>5</sup>, *Stapleton*<sup>6</sup> and *Clark*<sup>7</sup>.

49. These vital concepts which have been shaped and refined over centuries by Parliament and the Courts to accord with the changing moral standards of society include a very important principle which has developed gradually, namely the principle that a man must be morally blameworthy before he can be found guilty of a crime—that is to say that he must have meant to do what the law forbids or been reckless in not caring whether he did it or not.

<sup>5</sup>[1975] 3 WLR 316.

<sup>6</sup>Unreported. Central Criminal Court 26 September 1975.

<sup>7</sup>Unreported. Sheffield Crown Court 15 October 1975.



50. Centuries ago a man might have been found guilty merely because it was his conduct which caused the harm, even though his acts or omissions were quite accidental or even unintentional. This archaic and very harsh doctrine was gradually ameliorated, and the test of guilt became moral blameworthiness, with the accompanying assumption that any harm which a man had brought about must have been intended by him or caused by his recklessness, if he was to be held criminally responsible for it.

51. This principle has, we appreciate, been to a considerable degree eroded in relation to certain (less serious) statutory offences known as offences of strict or absolute liability. "These are only quasi-criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence": Lord Reid in *Warner v Metropolitan Police Commissioner*<sup>8</sup>. And there are cases where negligence is a basic concept as, for example, traffic offences, or is a subsidiary element in certain other offences, but we are here concerned with a grave crime carrying with it liability to imprisonment for life and, in the case of such a crime, this principle is generally maintained.

52. It therefore follows that to convict a man who did not have a guilty mind of some kind would gravely offend this principle of law and of justice. This was strongly emphasised in the case of *Sweet v Parsley*<sup>9</sup> when Lord Morris of Borth-y-Guest said at p.152

"My Lords, it has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence."

53. Once it is conceded that the jury, to convict, must find that the accused had a guilty mind, the question then arises as to how the jury is to decide what the accused's intention was. One test to apply is to ask what a reasonable man would have thought in the circumstances. From saying this it seems but a slight step to go further and say what the accused himself actually thought does not matter at all, and that what is really in issue is the intention of a purely hypothetical reasonable man. This was the step taken by the House of Lords in *DPP v Smith*<sup>10</sup>, a decision which led to a great deal of adverse criticism. It was a case which involved the death of a policeman and the question at issue was whether the accused could be convicted of murder even though he did not intend to kill or cause serious bodily injury. The House of Lords held that he could, so long as a reasonable man in the same circumstances would have foreseen death or bodily injury; what the accused himself foresaw did not matter.

54. *Smith's* case was a highly controversial decision. As a result of the debate surrounding it and following a recommendation of the Law Commission, Parliament enacted section 8 of the Criminal Justice Act 1967, which provides that—

<sup>8</sup>[1969] 2 AC 256 at p.272.

<sup>9</sup>[1970] AC 132.

<sup>10</sup>[1961] AC 290.

"A court or jury, in determining whether a person has committed an offence,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances".

This section had the result of reversing the effect of *Smith's* case. It was an important landmark in the development of the criminal law with its concern for the liberty of the subject.

55. It is important to note that *Smith's* case and section 8 of the Criminal Justice Act were concerned with the question of foresight of the consequences of the defendant's actions, whereas *Morgan's* case centred on the circumstances surrounding those actions and (in particular) on the states of mind of the defendants with regard to the victim's consent. *Morgan's* case dealt with a different crime and a different aspect of that crime but both *Smith's* case and *Morgan's* case involved the same basic issue—whose mind must be guilty, the mind of the defendant or that of a hypothetical reasonable man?

### Mistake and intent

56. The law recognises that man is susceptible to error and does not demand that he may never be mistaken in his mental appreciation or perception of the actual circumstances surrounding his actions. In the case of rape the man who makes a mistake fails to appreciate the woman's lack of consent, or misinterprets her actions but he does not intend deliberately nor recklessly to commit the crime. A mistaken, though erroneous, belief is inconsistent with and negatives the requisite mental element ie either an intent to have sexual intercourse with the complainant knowing she does not consent, or recklessly, not caring whether she was a consenting party or not. Conversely if the jury were to find that the accused did have sexual intercourse either with such intent or recklessly, this should have the effect of negating the existence of any mistake, for if he intended to have non-consensual sexual intercourse, there could be no question of mistake, and if he did not care whether she was consenting or not, he could hardly be said to have held any genuine belief, one way or the other.

### The dispute surrounding the decision

57. The dispute surrounding the decision is whether it is sufficient that the accused mistakenly believed or (since the jury have to be sure of guilt before conviction) whether he may have so believed, and even on grounds which appear unreasonable, that the woman was consenting, or whether there should also be an additional requirement that such belief must not only in fact be held, but that it should also be held on reasonable grounds.

### Reasonable grounds as an additional requirement

58. In other words, it is said that this additional requirement is necessary because women should be protected from the carelessness or negligence of men in ascertaining their wishes, and that if the conduct of the accused fell short of the standard of a reasonable man, he should be found guilty of rape, ie the accused should not be judged by what he himself believed, but by the standard of a hypothetical reasonable person.

59. We have given this aspect of the controversy a very great deal of thought, but we have come to the conclusion that it is not a tenable suggestion. Apart from the basic principle to which we have already referred, namely, that a man should not be found guilty of a grave offence unless he has the requisite guilty mind, and that a genuine mistake negatives such *mens rea*, there are also matters of practical expediency.

60. If it were to be accepted that a man could be found guilty of rape when he did not mean to commit the offence, ie when there was no deliberate or reckless violation, then it seems very likely that juries, who have a strong sense of fairness might be reluctant to convict.

61. Moreover the approach to, and the circumstances surrounding, sexual relationships are imprecise and varied. There are many diverse situations and the boundary lines are often unclear. By the very nature of such relationships, they involve differing degrees and types of persuasion, encouragement and many other imponderables. These differences might present the jury with a somewhat unrealistic problem in having to decide whether the defendant's conduct fell below the standard of some hypothetical reasonable man.

62. This consideration would, we believe, open up confused and difficult areas of controversy in this sort of case.

63. We take the view that conflicts arising from such human relationships must present very different problems from those involved in other types of cases eg motoring cases, in which the evidence before the court would be of a different character and would be based on definite and well-established codes of conduct and legislative enactments which set out certain requisite standards of care. We cannot find any real parallel in this suggested line of comparison.

64. We tend to wonder, however, if those who wished to introduce the concept of negligence into the crime of rape might not feel, in the light of a more detailed examination of *Morgan* and the attention which had been focused on the doctrine of recklessness emerging from that decision, that it is now no longer necessary or helpful to do so, particularly in view of the other procedural and evidential changes which we suggest.

### Further arguments about the case

65. A number of further criticisms have been levelled at *Morgan*. We appreciate the anxieties which have prompted them and we have given them

careful thought, but we do believe that certain misconceptions and misunderstandings have arisen, possibly from the undue emphasis that has been put, out of context, on certain phrases stemming from the wording of the question certified for their Lordships' consideration.

66. *Morgan's* case did not decide, as some critics seem to have thought, that an accused person was entitled to be acquitted, however ridiculous his story might be, nor did it decide that the reasonableness or unreasonableness of his belief was irrelevant. Furthermore it is a mistaken assumption that a man is entitled to be acquitted simply because he asserts this belief, without more.

67. Such an assertion is a part only of the evidence. The jury will be told that they may or may not accept it, but that in deciding whether to do so or not they are entitled to take the view that the less reasonable they find it to be, the less likely is it to be true. A jury is unlikely to be misled by, or to accept, a bare assertion in the face of convincing evidence to the contrary.

68. It was also suggested that it is impossible for a jury to determine the state of a man's mind or his belief, but it is hardly necessary to point out that juries have long been concerned in considering the state of a man's mind, and do so by drawing inferences from and taking into account the whole of the surrounding circumstances as disclosed in the evidence.

### Mistake as a claim—practical considerations

69. It is also urged that it will be particularly easy for an accused, in a case where the woman did not consent, to advance the defence that he believed, quite unreasonably, that she did. We are not persuaded that in terms of the practicalities of a trial this is true. In many cases this "defence" would be a 'desperate defence' to advance. This is particularly so when the signs of lack of consent are obvious, as when it is established that the man has used violence or threats of violence, or has been armed with a weapon. Furthermore, it will usually be extremely difficult for the accused to contend that he genuinely believed that the victim consented, without also contending that she did in fact consent, and saying so, for example, in any statement he makes to the police. Once the jury has reached the conclusion that she did not consent, the accused will normally appear a liar, and his claim that he nevertheless believed in consent is likely to be rejected. We appreciate that in very exceptional circumstances the accused may succeed in treading what amounts to a tightrope; what we doubt is whether such cases will occur at all frequently.

### Morgan's case and the jury

70. It has also been feared that juries will be confused and misled by the ruling in *Morgan's* case and that this will lead to perverse acquittals.

71. Not only do we not take so pessimistic a view of the common sense and inbuilt reasonableness of the average British jury, properly directed by the judge, when the relevant evidence has been adduced before them, but we think that this distrust of the jury's ability to distinguish between the genuine and the specious or spurious, is largely unfounded. Fanciful and unmeritorious defences are not confined to rape trials; and juries are usually able to recognise them.

72. That there are wrongful acquittals in rape as well as in other crimes, is beyond question. Though, naturally, regretting this, we doubt that the causes can be eradicated by a departure from fundamental principles of fairness and justice.

73. We believe that the causes of such acquittals are complex and in the next part of this Report we refer to some evidentiary and procedural matters which we feel are likely to have been responsible for some of the problems which have arisen.

#### The question of culpability

74. There remains a further line of criticism which raises an issue of basic principle. It is said to be unfair to the woman that there should ever be a situation in which she has been subjected to sexual intercourse without her consent, and yet the man may be found not guilty of raping her. She has suffered a gross form of harm; the perpetrator of that harm, so critics say, should be liable to conviction for inflicting it. To this criticism there is, we feel, a real objection. If carried to its logical conclusion the argument would lead to the abandonment entirely of any requirement of a guilty mind, for the harm suffered by the victim is the same whatever the man's intention may be. We are concerned with criminal not civil law, not only with harm, but with culpability.

75. It seems to us to follow that the law should insist upon some form of guilty mind before rendering the accused liable to punishment as a rapist, which will normally involve deprivation of liberty with all the serious consequences which follow.

76. We think that the appropriate *mens rea* must include an intention to rape, or the alternative element of recklessness, since there seems to us to be no significant moral difference between the intentional rapist and the man who does not care whether he rapes or not. To go further would be to extend the definition of a grave crime to include conduct which, however deplorable, does not in justice or in common sense justify branding the accused as a guilty man.

#### Recklessness

77. It seems to us that the most important aspect of the *Morgan* judgment, and one which has been almost wholly overlooked in comment on it, is that for the first time it has been stated clearly and unambiguously that

recklessness as to whether the woman was consenting or not was sufficient *mens rea* for a conviction. This was a matter of very considerable significance, not only in strengthening the law relating to the crime of rape, but also in having very important wider implications for the criminal law as a whole, particularly in regard to crimes of personal violence. We believe that the emphasis on recklessness will in future cover a considerable range of cases. For example where a burglar has sexual intercourse with an occupant against her will, and the claim of belief in consent is raised, a direction as to recklessness in regard to the lack of consent will no doubt be included in the summing-up.

#### Morgan and drunkenness

78. Before leaving the case of *Morgan* we must mention another and very difficult matter—the relevance of evidence that the accused has taken drink or drugs in cases where a guilty mind must be present. We do not feel that we can usefully advise on this at the present moment, since the case of *Majewski*<sup>11</sup> which deals with this matter is currently *sub judice* and about to be considered by the House of Lords. However, the problem is general to the criminal law and not special to the crime of rape and it has recently been considered by the Butler Committee<sup>12</sup>. We have, therefore, excluded the matter from our considerations as inappropriate. However, we do think it worth drawing attention to the possibility that the emphasis on recklessness which we wish to see, may well solve at least some of the problems.

#### A possible lesser offence

79. It would be possible to construct a lesser offence to cover the accused who genuinely believed that he was not committing rape but who behaved unreasonably in acting as he did. In effect, this is the man whom many critics of *Morgan* wish to catch. We have very carefully considered the possibility, but advise against it. If introduced into the law, the new offence would greatly complicate the trial of rape cases, since the judge would have to direct the jury not only on intention and recklessness and the requirements of rape, but also on the requirement of the new offence. This would not only make the task of the jury even more difficult, but as we have explained we are extremely doubtful whether any satisfactory account of the behaviour of the reasonable man could be formulated to cover personal sexual relations. We are also persuaded that juries might well be tempted to convict of the lesser offence as a compromise solution, or as an act of misguided kindness, with the result that convictions for rape would become more difficult to achieve and the result would be to weaken not strengthen the law.

#### Is a separate offence of rape needed?

80. We have not overlooked the suggestion which is sometimes made that rape should be abolished as a separate offence, and the conduct involved

<sup>11</sup> [1975] 3 WLR 401.

<sup>12</sup> Report of the Committee on Mentally Abnormal Offenders [Cmnd 6244].

treated as a form of assault or wounding as appropriate. To deal with cases where there was no actual injury it would, of course, be necessary to treat non-consensual intercourse as a form of criminal harm. We are not persuaded that there would be much to be gained by the radical rearrangement of the law which would be required. Firstly, all the existing problems in rape cases—problems for example about proof of consent—would emerge in the new system. Secondly, the proposal would involve a general consideration of all offences of violence which we could not undertake in the time available. Thirdly, we think that the concept of rape as a distinct form of criminal misconduct is well established in popular thought, and corresponds to a distinctive form of wrongdoing. The law in our view, should, so far as possible, reflect contemporary ideas and categorisations.

### Recommendations for declaratory legislation

81. Notwithstanding our conclusions that *Morgan's* case is right in principle, we nevertheless feel that legislation is required to clarify the law governing intention in rape cases, as it is now settled. We think this for two principal reasons. The first is that it would be possible in future cases to argue that the question of recklessness did not directly arise for decision in *Morgan's* case, in view of the form of the question certified: to avoid possible doubts the ruling on recklessness needs to be put in statutory form.

82. Secondly, it would be unfortunate if a tendency were to arise to say to the jury "that a belief, however unreasonable, that the woman consented, entitled the accused to acquittal". Such a phrase might tend to give an undue or misleading emphasis to one aspect only and the law, therefore, should be statutorily restated in a fuller form which would obviate the use of those words.

83. We think that there would be advantage if this matter could also be dealt with by a statutory provision which would—

- (i) declare that (in cases where the question of belief is raised) the issue which the jury have to consider is whether the accused at the time when sexual intercourse took place believed that she was consenting, and
- (ii) make it clear that, while there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief.

84. Finally, as rape is a crime which is still without a statutory definition, the lack of which has caused certain difficulties, we think that this legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter.

### III EVIDENCE IN RAPE CASES

85. Much of the criticism we have received is directed not so much against the substantive law of rape or the particular decision in *Morgan* as against the practice and procedure followed in rape cases.

86. Thus it is said that attitudes to a woman who complains that she has been raped are not always as sympathetic or understanding as they might be—unless she has been subjected to obvious brutality. Complaint is also made that the laws of evidence, and the procedures and practice of the courts, subject women to searching, irrelevant cross-examination, resulting in unnecessary and hurtful revelations of their private life.

87. Similar grievances are being voiced in other parts of the world and these problems are currently being tackled in several countries where the remedy is being found in changes in pre-trial and trial procedures.

88. It may not generally be appreciated that once a woman sets in train a complaint that she has been raped, she has to undergo a prolonged ordeal. In the first place there will be a police interrogation, one of the purposes of which is to ensure, as far as possible, that she is not making a false charge; indeed unfounded allegations are often cleared up at this stage. Next she has to answer further questioning by the police surgeon (though the amount and type appears to vary and we deal with this briefly later) and to undergo a thorough as well as an intimate and inevitably distasteful gynaecological examination. Furthermore, if her story of the rape is true she will, at this stage, probably be in a state of shock and possibly also have suffered painful injuries; yet she may have to spend many hours at the police station before she is able to return home.

89. At the trial, which will take place some considerable time later, she has to relive the whole unpleasant and traumatic experience. In many cases she will be cross-examined at length. It appears that procedures have developed in regard to cross-examination and to a much lesser degree the admission of evidence generally which many now regard as not only inimical to the fair trial of the essential issues but which may also result in the complainant suffering humiliation and distress.

90. We are not unaware of the fact that from time to time women do make false charges from a variety of motives and that every precaution must be taken, in and out of court, to protect the accused, and indeed the existing law contains rules specially designed to give added protection to the accused, eg the jury are warned to look for corroboration of the complainant's evidence.

91. We start from the position that all relevant and proper cross-examination, even though it distresses, must be permitted in order to ensure a fair trial. But we have come to the conclusion that, unless there are some restrictions, questioning can take place which does not advance the cause of justice but in effect puts the woman on trial. Such procedure often tends

unjustly to stigmatise the woman. This may result in the jury feeling that she is the type of person who either should not be believed, or else deserves no protection from the law, or was likely to have consented anyway.

92. In particular, we are concerned about the extent to which, in a rape trial, the personal history and character of a rape victim can be introduced. It is very dubious whether it is today of very much relevance and often it serves only to cloud the real issues. Some aspects of the law are, however, complex and somewhat uncertain in operation.

## ORIGINS AND DEVELOPMENT

### Evidence as to "notorious bad character"

93. With regard to adducing evidence, or the cross-examination aimed at revealing, that a woman was living the life of a prostitute or, as is sometimes described, was of "notoriously bad character", the authorities in cases of rape are clear, they are long established, and have recently been confirmed and followed.

94. In *R v Clarke*<sup>13</sup> it was held that general evidence could be called to establish that a woman was a prostitute, "a woman of abandoned character", in that it might be relevant and was, therefore, admissible as tending to prove consent.

95. This was confirmed in *Tissington*<sup>14</sup> where it was decided that evidence of solicitation ("general want of decency") by the complainant could be called by the accused. And in *R v Clay*<sup>15</sup>, on a trial of rape, evidence was held admissible to show "general bad character" in that the woman was a reputed prostitute. *R v Riley*<sup>16</sup> confirmed the admissibility of such evidence where the woman was a "common prostitute".

96. These earlier cases have been more recently followed in *Greatbanks*<sup>17</sup>, *Bashir*<sup>18</sup> and in *Krausz*<sup>19</sup> where the Court of Appeal held that the defendant could call evidence and give reasons for saying that the prosecutrix was a prostitute, or was a woman of "notoriously loose morals" in the habit of having sexual intercourse with first acquaintances for money, as tending to prove not merely consent but consent in *special circumstances* and as being probative of the defendant's account that the sexual intercourse with him was followed by a demand for money.

<sup>13</sup>(1817) 2 Stark 241.

<sup>14</sup>(1843) 1 Cox 48.

<sup>15</sup>(1851) 5 Cox 146.

<sup>16</sup>(1887) 18 QBD 481 at p.485.

<sup>17</sup>[1959] Crim. LR 450.

<sup>18</sup>[1969] 3 All E.R.692.

<sup>19</sup>(1973) 57 Cr. App. R 466.

### Cross-examination as to "notorious bad character"

97. Just as the defence can call evidence to establish that a woman is of "notoriously bad character" so it has long been the law that she herself can be cross-examined to the same effect, because such evidence is relevant to the issue of consent, as showing a person more likely to consent to sexual intercourse.

98. One of the earliest cases illustrating this principle is *R v Barker*<sup>20</sup> where counsel was held entitled to ask the celebrated question, "Were you not, on (a date subsequent to the alleged offence) walking in the High Street at Oxford, to look out for men?"

99. It is significant that in these cases the descriptive phrases such as "notoriously loose or bad character" which were there used referred to a prostitute or woman behaving in a similar manner.

### Cross-examination as to the complainant's relationship with accused

100. The complainant can also be asked questions as to her previous relationship with the accused, and evidence is admissible, and therefore can be called, to contradict her, if necessary, on the basis that such evidence could be relevant to an issue, in that it might tend to prove consent (*R v Cockcroft*<sup>21</sup> and *R v Riley*<sup>22</sup>) the theory in these cases being that the development of the relationship between the parties might well throw some light on the matters and events before the jury.

### Cross-examination as to the complainant's relationship with other men

101. This type of cross-examination (as distinct from allegations of prostitution or similar), or, as we prefer to call it, cross-examination as to the woman's private sexual history, has always stood on a different footing, and understandably so. There is much debate and confusion as to what that basis is, or should be, but the distinction has important consequences. This is the type of cross-examination which we believe causes the real problem.

102. The reason sometimes advanced for pursuing this line of questioning has been that it casts doubt on the credibility of the woman, ie that the fact that she has had prior sexual experiences, it is said, tends to prove she is an untruthful or unreliable witness, or as it is sometimes put "it tends to destroy her credit".

103. In general, a witness for the prosecution, or a witness for the defence (other than the accused himself, who is in a different position), may be asked questions in cross-examination aimed at impugning his testimony by casting doubt on the accuracy or truthfulness of his evidence

<sup>20</sup>(1829) 3 C & P 589.

<sup>21</sup>(1870) 11 Cox 410.

<sup>22</sup>(1887) 18 QBD 481.

in chief, or by showing that he is of bad character in order to discredit him. Because such matters put in cross-examination are normally collateral to the main issues, the defendant cannot call evidence to contradict any denials the witness may make (save for a few exceptions).

104. In cases of rape, allegations against a woman that she has had sexual intercourse with men other than the accused appear to have fallen into this pattern, ie to have been an attack on her credibility and, therefore, collateral to the main issue. As Veale J pointed out (*R v Bashir* 1969 referred to *supra*) at p.693 "Previous intercourse with the accused is, one would think, relevant to the question of consent although sexual intercourse with other men is not".

105. In consequence the woman's denials have always to be accepted, and no evidence can be called to contradict her, which is a very different position from that obtaining in those cases concerning women of so-called "abandoned character". This principle, which is of considerable importance for our enquiry into this matter, was clearly enunciated in *R v Cockcroft*<sup>23</sup> and in *R v Holmes*<sup>24</sup> where Kelly CB observed that there was no doubt about this very important question "whether on an indictment for rape . . . if the prosecutrix is asked in cross-examination whether she has had connection with another person not the prisoner, and denies it, evidence can be called to contradict her". He said it cannot because the point was collateral to the main issue and "the answer must be taken for better or for worse. And the reason is obvious. If such evidence as that here proposed were admitted, *the whole history of the prosecutrix's life might be gone into*; if a charge might be made as to one man it might be made as to fifty, and that without notice to the prosecutrix".

106. This principle was confirmed by Lord Coleridge CJ (with whom Pollock B., Stephen, Mathew and Wills JJ all agreed) when he said in *R v Riley* (referred to *supra*) at p.483 that evidence to show that the woman has previously had connection with persons other than the accused, when she has denied that fact, must be rejected, not only upon the ground that to admit it would be *unfair and a hardship* to the woman, but also upon the general principle that it is *not evidence which goes directly* to the point in issue at the trial. The question in issue being whether or not a criminal attempt has been made upon her by A, evidence that she has *previously had connection with B and C is obviously not in point*. It is obvious, too, that the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature. These judgments were of great weight and authority—they were clearly concerned with the injustice that might ensue if evidence were called in rebuttal. They did not, however, restrict the actual cross-examination. That was not a matter for decision in those cases.

107. The woman might, therefore, be asked questions as to her previous sexual activities with particular men, or on particular occasions, but if

<sup>23</sup>(1870) 11 Cox 410.

<sup>24</sup>(1871) LR 1 OCR 334 at p.336.

she denied such instances, evidence could not and cannot be called to rebut what she says. The difficulty in practice, however, is that her denials, even though true, may not be believed by the jury, and they may react adversely to her demeanour which may possibly be caused by the shock and dismay of this line of questioning. They may also react critically to any admissions she may make on the assumption that any prior sexual experience, however unrelated to the charge, shows her to be a person more likely to consent to sexual intercourse, even with a stranger.

108. If, however, one considers now the rationale of these older cases against the background of their own contemporary standards over a hundred years ago, it can readily be appreciated that an allegation against a woman (unlike a similar allegation against a man) that she had had sexual experience before marriage might suggest that she was unreliable and untruthful as a witness. This assumption is now an anachronism and this line of cross-examination is surely no longer needed to protect an innocent man—but it may and often does still serve to distress the complainant and confuse the jury.

109. The relevance therefore of this line of questioning to any issue before the court seems weak and the rule that, though it can be introduced, denials have to be accepted, indicates that its basis was probably always that of credibility only. The critical question is, whether it can be said that that type of cross-examination can, in general, have any material relevance to credibility now—unless it has some bearing on something previously said in a statement or in evidence in chief. This is the essence of the problem and we return to it later.

110. Whilst we believe, therefore, that some curtailment of unnecessary cross-examination of the woman is probably one of the most important and urgent reforms now required, we have also looked at the question of the disclosure of the accused's character and the principles upon which that may be introduced into the trial.

#### Character and previous convictions of the accused

111. Where the defendant wrongly asserts either by cross-examination or by giving evidence or by the calling of witnesses that he is a man of good character the prosecution can (in most cases) prove his previous convictions.

112. If, however, the defendant has not put his own character in issue but has attacked that of the complainant or a witness for the prosecution and does not himself give evidence, the prosecution cannot then call evidence of his own bad character or previous convictions *R v Butterwasser*<sup>25</sup>.

113. This latter restriction, however, is of less consequence in rape trials as the accused normally will give evidence; he would be unlikely in most cases to succeed if he did not.

<sup>25</sup>[1948] 1 KB 4.



114. If the accused goes into the witness box and gives evidence, his cross-examination is, in general, governed by the terms of the Criminal Evidence Act 1898. Under section 1(f) (ii) of that Act the general rule in all crimes is that the accused is liable to be cross-examined as to his previous convictions or his own bad character, if "the nature or conduct of his defence" is such as to involve imputations on the character of the prosecutor or witnesses for the prosecution.

115. In all cases (other than rape) this normally means that the section permits cross-examination of the accused as to character, not only when imputations are cast on the character of the prosecution witnesses in order to show their unreliability as witnesses, independently of the evidence given by them, but also where the nature of the defence necessarily involves the making of such imputations, *Selvey v DPP*<sup>26</sup>.

116. In the case of rape, however, there is an important exception, namely that if the defence is that the woman consented to sexual intercourse, and the questions asked in cross-examination are directed to proof of that defence, then they do not let in the accused's record or his own bad character.

117. The origin of this special rule, though not necessarily its present extent, is to be found in *R v Sheean*<sup>27</sup> where the accused, in dealing with the issue of consent, merely stated that the woman was willing to have sexual intercourse with him on the occasion in question. Jelf J held that though this necessarily involved an imputation on the woman's character, it did not expose him to cross-examination about his own.

118. It was, however, emphasised that if the accused had gone out of his way to make an attack on the woman based on matters outside the substance of the charge it would have been otherwise. (Approved in *Selvey* at p.334 by Viscount Dilhorne).

119. It is important to note in *Sheean* that there was no suggestion of misconduct with other men or on other occasions.

120. The reasoning in *Sheean* was later approved by the Court of Criminal Appeal in *R v Turner*<sup>28</sup> (heard by a full court of five judges) where it was held that if the questions asked in cross-examination were directed to the proof of the issue of consent, the accused's record ought not to go in.

121. The facts of *Turner* are worthy of mention, for not only do they have an important bearing on the consideration of subsequent cases, but their limited nature does not always appear to have been fully appreciated. *Turner* was accused of raping a woman whom he had met casually. The defence was consent. She was asked in cross-examination whether just prior to sexual intercourse with the accused she had not behaved indecently with him.

<sup>26</sup>[1970] AC 304 at p.339.

<sup>27</sup>(1908) 21 Cox 561.

<sup>28</sup>[1944] 1 KB 463.

122. Here again the question of consent was a narrow one and related only to the *actual incident* and no question of misconduct with other men, or on other occasions, was involved.

123. The trial Judge had ruled that this allegation permitted the prosecution to put his previous convictions to the accused. The Court of Criminal Appeal held he was wrong.

124. In the Court of Criminal Appeal the appellant's counsel argued that the accused's character should not be put, because the cross-examination of the complainant had been based on facts relevant to the defence in that they were part of the *res gestae*, ie the conduct and circumstances surrounding "the actual incident". Humphreys J in giving the Judgment of the Court said that though an allegation that a woman permitted a man other than her husband to have sexual intercourse with her would be regarded by most persons as an imputation on her character, the accused did not lose the protection of the section so long as his questions and the evidence were directed to proof of consent, and *were so closely connected with that defence as in effect to form part of it* because (in his words), [The] "evidence, in our view, did no more than state the details or particulars of the woman's conduct which, according to the witness's version of the facts, showed that the act of connexion was not against her will or without her consent" and was directly related to the issue of consent.

125. *Turner's* case, though open to review by the House of Lords, has not been doubted and currently represents the law. How far it goes, however, is obscure. In all probability its scope is fairly limited.

126. The rule in *Turner's* case was stated somewhat more generally in *Stirland v DPP*<sup>29</sup> by Viscount Simon LC when he said at p.327 "An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses". Similarly in *Selvey* it was commented by Viscount Dilhorne at p.339 that "In rape cases the accused can allege consent without placing himself in peril of such cross-examination".

127. We have received evidence which suggests that in practice the rule in *Turner's* case has come to be very widely interpreted in favour of the accused, so that where the defence is consent, the cross-examination can go to considerable lengths with no risk of letting in the accused's record, if there is one.

128. We have come to the conclusion that there are now considerable discrepancies in practice in relation to the extent to which cross-examination in rape cases may go, there being a natural reluctance by the Court to interfere with the conduct of the Defence where there are no clearly defined boundaries or guidelines.

<sup>29</sup>[1944] AC 315.

129. Notwithstanding the somewhat restrictive limitations imposed by the case of *Turner*, the defendant may be allowed to probe into the victim's sexual history without danger of having his own character attacked.

130. The general problem of the introduction of the accused's character and convictions is a very controversial one; it has recently been very fully considered by the Criminal Law Revision Committee, whose members adopted differing views as to the ideal solution. Thus, it is thought wrong by many, that evidence of the accused's bad character and his antecedent convictions, should be admissible against him, because their effect upon the jury can be very prejudicial. Others take the opposite view, and consider that he should not be entitled to claim by implication and with impunity, a good character which he does not possess, whilst attacking the character and credibility of prosecution witnesses. The Criminal Law Revision Committee reached the compromise conclusion that if the main purpose of the cross-examination was to attack the credibility of the prosecution witnesses the accused's character should be let in, whereas if the attack was necessary to put forward the defence by asking questions relevant to the issues in the trial, it should not.

#### Our approach to the problem

131. Our own approach to the problem is to start by considering the extent to which the woman's previous sexual history ought to be admitted into the trial, whether or not the accused has a record. In re-assessing this problem the Group has taken into account the widespread changes in society since the present practice came to be established. We have reached the conclusion that the previous sexual history of the alleged victim with third parties is of no significance so far as credibility is concerned, and is only rarely likely to be relevant to issues directly before the jury. In contemporary society sexual relationships outside marriage, both steady and of a more casual character, are fairly widespread, and it seems now to be agreed that a woman's sexual experiences with partners of her own choice, are neither indicative of untruthfulness nor of a general willingness to consent. There exists, in our view, a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today's law.

132. We conclude that some general restriction needs to be placed on the introduction of the complainant's private sexual history, and this can only be achieved by a direct regulation of the matter and not by the indirect threat of the introduction of the accused's bad character. Such a threat is of no avail if the accused has no previous record, as is frequently the case.

133. Our aim in recommending a restriction is twofold. First, we wish to reduce the ordeal of the genuine victim of rape, so long as this can be achieved with fairness to the accused. This ordeal will be reduced to some extent by our recommendation as to anonymity; we believe that it can further be reduced by restricting the extent to which her private life is

canvassed in court proceedings. We think that this improvement in the victim's lot is justifiable, both on humanitarian grounds and on the ground that it will encourage victims to come forward and give evidence which leads to the conviction of the guilty. Secondly, we take the view that the exclusion of irrelevant evidence at the trial will make it easier for juries to arrive at a true verdict.

#### Admissibility of the cross-examination of the complainant

134. Having reached the conclusion that the existing law is not in a satisfactory state we think that the appropriate course is to adopt a new approach to the problem. As we have said the primary question is the extent to which the complainant's previous sexual history ought to be canvassed in rape trials. We think that questions and evidence as to the association of the complainant with the accused will, in general, be regarded as relevant to the issues involved in a trial for rape, subject always to the power of the judge to control improper questioning. However, we think that in general the previous sexual history of the complainant with other men (including general evidence of bad reputation) ought not to be introduced.

135. In terms of court procedure, we recommend that questions ought not to be asked, nor evidence admitted, except with the leave of the trial Judge on application made to him in the absence of the jury. In recommending that it should be possible, with the judge's consent, to allow the history in, we compromise with the more extreme view which would exclude the complainant's sexual history completely. We do so because we think there are certain types of cases where a total ban would be unjust to the accused. One example is the case of *Krausz* which has been discussed in paragraph 96 above. Others are to be found in the cases of *Tissington*, *Clay*, *Riley*, *Greatbanks* and *Bashir*.

136. The reason why such cross-examination should be allowed, and such evidence ought to be admitted in such cases, is not simply because prostitutes are involved (for prostitutes ought also to be protected) but because such evidence would be relevant to issues arising in the trial in that it relates to a previous incident (or incidents) which is or are strikingly similar (so the accused alleges) to what happened in the case before the court. This situation will not only arise in cases of prostitution; other examples will occur depending on particular facts and circumstances, though we envisage that such cases will probably be exceptional.

137. We therefore recommend that the trial Judge's discretion to admit such evidence be guided by, and based on, principles set out in legislation. This should permit the Judge to admit cross-examination and allow evidence in rebuttal dealing with the complainant's previous sexual history with persons other than the accused if the Judge is satisfied—

- (a) that this evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion



of, or in relation to, events immediately preceding or following, the alleged offence; and

- (b) that the degree of relevance of that evidence to issues arising in the trial is such that it would be unfair to the accused to exclude it.

138. There is the further possibility that the prosecution may adduce evidence as to the previous sexual history of the complainant—for example by bringing out in evidence in chief that the complainant is a happily married woman or that she is a virgin, or there may be a prior statement to that effect or prosecuting counsel may so describe her in his opening speech. If such evidence were to be challenged, the Judge should also have a discretion to allow cross-examination and the calling of evidence in rebuttal, and we recommend that this situation should also be covered by legislation.

#### Admissibility of the character of the accused

139. We now turn to the question of the circumstances in which the accused's own character should be admitted. Here we appreciate that general issues of criminal procedure are involved though rape has been considered an anomalous exception. As we have explained the general problems have been very fully and extensively considered by the Criminal Law Revision Committee. We have not had time to look into all the complex general issues involved and their implications, nor indeed have we had the time to consider the many other aspects relating to the admissibility of the accused's character in the law of rape, but we have considered those which we thought required urgent attention, and we have paid particular regard to the arguments set out in the Committee's Eleventh Report, which we do not repeat.

140. We think that the conclusion reached by that Committee is appropriate to the crime of rape, and we start therefore from the assumption that the accused's character where relevant to his credibility as a witness should be let in, at the discretion of the Judge, if the main purpose of the imputation was directed to the credibility of the prosecution witnesses, but not if the attack is necessary in order to put forward the defence (see pages 80-81 of their Report).

141. As, according to the recommendations we have made, the sexual history of the complainant with other men will be admissible only when it is directly relevant to issues before the court, it follows that where the Judge allows such evidence in he would not allow the accused's record or character to be placed before the jury. For the same reason where questioning or the introduction of evidence relates to the previous sexual history of the complainant with the accused, we think that the appropriate rule is that it should not let the accused's character or previous convictions in.

142. As is apparent, we take the view that the character of the accused should be let in in certain limited circumstances following the pattern set

by the Criminal Law Revision Committee's Report. This would have what we believe to be the desirable effect of remedying the anomalous position of the law of rape in this regard, ie we recommend that, in cases of rape, if the main purpose of the attack is directed to the credibility of the complainant or the witnesses for the prosecution, such attack should, where relevant to his credibility, let in the accused's character or previous convictions, subject to the discretion of the Judge.

#### IV ANONYMITY

143. We are satisfied that one of the greatest causes of distress to complainants in rape cases is the publicity which they sometimes suffer when their names and personal details of their life are revealed in the Press. Examples of this have occurred recently and support for the view that there should be anonymity for the complainants in these cases is very widespread among those whom we have consulted. We therefore decided to seek views and look into the case for restricting publication of the woman's name, either as a general rule or subject to such exceptions as might be appropriate in particular cases.

##### The present position

144. We know that already in some courts (principally at the Central Criminal Court) Judges, when an application is made, ask the Press not to publicise the name or particulars of the woman and some newspapers (even if the Judge has not requested that the name should not be disclosed) do not do so.

145. However, in most courts no such general practice applies, nor do all newspapers respect a woman's privacy to a sufficient degree, consequently a victim of rape who goes to the police cannot rely upon anonymity, nor can the police properly assure her of it.

##### The existing law

146. Where trials are held in camera no question of publicity can arise; such trials are, however, exceptional. The general rule is that criminal proceedings must be conducted in public apart from certain exceptions which were laid down in *Scott v Scott*<sup>30</sup> when Lord Shaw explained that at that time:—

“The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is the essence of the cause . . . But I desire to add this further observation with regard to all of these cases that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed.”

<sup>30</sup> [1913] AC 417 at 482.

147. There are also certain statutory exceptions. For example section 57(3) of the Magistrates' Courts Act 1952 provides that Press representatives, among others, may be excluded during the taking of indecent evidence. Section 39 of the Children and Young Persons Act 1933, as amended by section 57 of the Children and Young Persons Act 1963, allows a court to direct that no newspaper report or picture or sound or television broadcast may be published which might lead to the identification of any child or young person concerned as a party or witness in the case or in respect of whom the proceedings are taken. Under section 8(4) of the Official Secrets Act 1920 the public may be excluded during any part of the hearing, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the national safety. More recently the Criminal Justice Act 1967 implemented the proposals in the Tucker Report<sup>31</sup> by prohibiting newspaper reporting of evidence given in committal proceedings. This step was taken to eliminate the risk of prejudice to trials through the publication of committal evidence, although the defence was given the right to opt for publicity.

148. We would not support the drastic step of holding rape trials *in camera*, nor did many of the bodies or persons we consulted suggest this. There are, however, less extreme restrictions on publicity which nevertheless retain the open nature of criminal trials.

149. Where trials are open to the public, courts have some discretion at common law to suppress the name and/or the address of a witness where to reveal them would hinder or defeat the course of justice.<sup>32</sup> In such cases the witness is not referred to by name in court, and publication of the name or identity in the Press is restricted. This applies in cases where there is particular anxiety for the safety of the witness, or threats of intimidation. In addition courts exercise this discretion in blackmail cases where it is the general rule that the name of the complainant is not disclosed. In *R v Socialist Worker Printers and Publishers Ltd and Another*<sup>33</sup> the position in blackmail cases was clarified recently, and in the course of his judgment the Lord Chief Justice, remarking on recent suggestions that perhaps the victim in rape should also be protected in this way, said:

"All I would say about that for my part is that there are, I think, significant differences between the complainant in blackmail and in rape respectively, but perhaps more important is the fact that the complainant in rape has never up to now been recognised as being entitled to this protection, and I would have thought that if it was now to be given here it would be more proper for it to be done by Parliament than by the courts".

This being the position under existing law, it would be necessary to have legislation if the practice in rape cases was to be altered generally.

<sup>31</sup>Report of the Committee on Proceedings before Examining Justices 1958 [Cmnd 479].

<sup>32</sup>*R v Gordon* (1913) 8 Cr App.R. 237.

<sup>33</sup>[1975] 1 All ER 142 at p.151.

#### Arguments for and against anonymity for the complainant

150. We have looked at this question of anonymity not only from the points of view of the complainant and the defendant, but also from the point of view of the public interest, for in our view the latter should prevail.

151. It is our belief that in general it should be possible to report criminal proceedings accurately and fully, and that any exception needs special justification.

152. We have reached the conclusion that it is in the public interest that complainants in rape cases should, in general, be given anonymity in the sense of protection from identification in the Press and on radio and television. We have reached the conclusion for much the same reasons as have led the courts to restrict publicity in blackmail cases. It is in the public interest that blackmailers should be convicted, and the peculiar nature of the crime of blackmail is such that this end would be severely frustrated if the victim was not granted anonymity.

153. The same is true, though to a lesser degree, in the case of rape, because of the special character of the offence. Even in the case of a wholly innocent victim whose assailant is convicted, public knowledge of the indignity which she has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings. Furthermore since in a criminal trial guilt must be proved to the satisfaction of the jury, an innocent victim can never be sure that a conviction will follow her complaint. If the accused is acquitted the distress and harm caused to the victim can be further aggravated, and the danger of publicity following an acquittal can be a risk a victim is not prepared, understandably, to take. We think that if an exception is made for blackmail victims even though they often have committed some criminal or reprehensible act, then it ought to be made for victims of rape, who have not. And since there is no way of distinguishing in advance between genuine victims and others, the protection—subject perhaps to exceptions—must be a general protection.

154. We are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as women would be less unwilling to come forward if they knew that ~~there~~ was hardly any risk that the judge would allow their name to be disclosed.

155. But the point of view of the accused cannot be overlooked. He may in exceptional cases have reason to suppose that had the Press or other media been able to disclose the woman's name or identifying particulars, witnesses would have come forward to assist his defence with important evidence. In general we are satisfied that rape, which is usually committed in private and only exceptionally when a third person, whether a party to the rape or other witness, is present, does not require the name of the

complainant or her identifying particulars to be disclosed. As there may be situations where there is a real possibility of witnesses coming forward if there is pre-trial publicity, we suggest in paragraph 165 a procedure which we hope will allow sufficient discretion for a Judge to decide whether the woman's name may be publicised.

156. We have had a few representations that the complainant should not remain anonymous or at least that there should be no statutory restrictions inhibiting publicity, on the basis that the woman in a rape case is not always innocent and at the trial may even be found to be partly responsible for the event which occurred or guilty of perjury or attempted blackmail. It has also been suggested that if the complainant is fully protected by anonymity then the defendant is put at a disadvantage in the adversarial contest. Further it has been contended that the humiliation of a complainant in a rape trial is no different nor more severe than arises from public exposure in legal proceedings of all kinds.

157. We take note of those views and we respect them, but we are not convinced by them. The balance of argument seems to us to be in favour of anonymity for the complainant other than in quite exceptional circumstances. While fully appreciating that rape complaints may be unfounded, indeed that the complainant may be malicious or a false witness, we think that the greater public interest lies in not having publicity for the complainant. Nor is it generally the case that the humiliation of the complainant is anything like as severe in other criminal trials: a reprehensible feature of trials of rape (which we hope our suggestions above about evidence in these cases will serve to curb to some extent) is that the complainant's prior sexual history (by any standards essentially her own private concern) may be brought out in the trial in a way which is rarely so in other criminal cases. We do appreciate, however, that there may be other related fields, e.g. some other sexual offences like indecent assault, where, on an analysis of the facts by some other committee with more time at its disposal, it may be thought that some degree of protection from disclosure of witnesses' names and identifying particulars might be appropriate. Such matters however lie outside our terms of reference.

158. Many have suggested that the trial Judge should have a discretion at the end of the trial to release the name of the complainant where she has in his view lied or behaved in a discreditable way. Whilst having superficial attractions this suggestion has some basic objections.

159. Firstly, the release of the woman's name can only be viewed as a penal measure and the woman is surely entitled to a regular trial before being so penalised. A rape trial in our view should not be a trial of the complainant. Lying accusations of rape of a serious or malicious nature, supported by false testimony by the complainant in evidence, can in appropriate cases be reported to the Director of Public Prosecutions with a view to proceedings being considered for perjury or a lesser offence, for example wasteful employment of the police contrary to section 5(2) of the Criminal Law Act 1967, which carries a maximum penalty of six months imprisonment, or a fine of up to £200, or both.

160. Secondly, as the jury do not give reasons for their verdict such a proposal might have the tendency to result, by implication, in two classes of acquittal, ie when the alleged victim's name was ordered to be published a true verdict of "Not Guilty", but if not disclosed "Not Proven".

161. Thirdly, the issues involved in the reasons for disclosure would rarely have been thoroughly investigated and the decision to lift anonymity or not might work unfairly against either party. It would be difficult to find satisfactory criteria and the practice, being discretionary, might operate somewhat unevenly.

162. Fourthly, the risk of publicity might encourage complainants to embroider their evidence and give them a stake in the outcome of the proceedings to the detriment of justice.

#### **Proposals for anonymity**

163. We recommend accordingly that there should, in general, be anonymity for complainants in rape cases with a strong presumption against lifting it, unless there are exceptional circumstances to which we refer below.

164. We subscribe to the view that the name and identity of the victim will not usually be of importance in seeking witnesses, and even in claims of mistaken identity it is likely to be the accused's identification rather than that of the complainant which will be in issue.

165. But provision must be made for those cases where the complainant's name may have to be revealed in order that justice may be done. We think the best course to adopt is to have a statutory ban on the publication of the name or identifying particulars of the complainant, but with a discretionary power in the Judge, upon application in chambers, to raise the restriction, where there are sufficient grounds in the interests of justice for so doing, before, at or after the committal stage, but not later than the commencement of the trial; such discretion should be limited to cases where the complainant's identity is necessary for the discovery of potential witnesses, the Judge being satisfied that there are real grounds for supposing that the proper conduct of the defence is likely to be substantially prejudiced by a refusal.

166. For the protection to be fully effective it must start from the moment when the allegation is made to the police (or in the rare case of a private prosecution, when the proceedings are formally started by complaint to a magistrate). As we have already indicated for reasons set out in paragraphs 159-162 it should not be lifted at the conclusion of the trial.

167. If the complainant's husband happens to be one of the defendants in a rape trial, disclosure of her name is inevitable as it is inherent in the trial situation once her husband's identity is revealed. Unfortunately, we cannot think of any way to avoid her name becoming known in these circumstances.

### **Anonymity where other offences are concerned**

168. We recognise that there are many problems even with such a procedure. One is that some allegations of rape never reach the criminal courts as rape charges but are prosecuted as a lesser offence, such as indecent assault (for example where there is not sufficient evidence to support a charge of rape). Further, it is possible that in the course of the proceedings the charge of rape may be dropped or reduced to a lesser charge.

169. There is an argument for giving the protection of anonymity to the complainant in these cases from the beginning, and then preserving it notwithstanding that there are no proceedings for rape but a lesser charge is proceeded with. At the same time we want to avoid the slight risk that the victim will suggest that she has been raped, where only an indecent assault is committed, so as to avoid the publication of her name.

170. The best compromise that we are able to suggest (and we hope that its implications will in due course be looked at by some other committee, which will consider whether any further extension of the principle of anonymity in sexual cases is desirable) is as follows: complainants who allege rape should be anonymous unless a Judge directs otherwise (under the procedure and for the reason we have suggested) or until proceedings are commenced for some offence instead of rape, when the normal procedure should be followed.

171. Where, however, a charge of rape is reduced during the trial to some lesser offence the complainant, where anonymous, should remain so throughout the proceedings; we do not think it would be right by a side wind to put a premium on continuing with a rape charge (when the defendant might be willing to admit to a less serious offence) merely to protect the complainant who would be distressed if her name were publicised. In cases of indecent assault there is less risk in any case of widespread Press coverage.

172. Another problem arises when the indictment includes rape together with some exceptionally serious offence (such as attempted murder). We think that the victim should still ordinarily be protected by the cloak of anonymity. If rape was one charge in an indictment with some offence less grave (for example burglary with intent to rape) it would, we suggest, be best, again that anonymity should be preserved throughout the proceedings in respect of all the charges.

### **Further considerations**

173. We have also considered the possibility that the complainant might, in some cases, prefer to receive publicity, but we do not think that special provision needs to be made for so exceptional a situation, particularly as there appears to be no argument in public policy to cater for such a wish.

174. We suggest that a breach of anonymity should be a criminal offence (as in the case of illegal publication of a child's name or identifying

particulars under the Children and Young Persons Act 1933) and that reliance should not be placed on contempt of court to punish those who fail to respect the anonymity rule. A suitable penalty for the offence should be devised.

### **The accused—should he be anonymous?**

175. Another matter which has caused us concern is whether the accused ought also to be anonymous in these cases. We are aware of the views expressed by some that it would be quite unfair that the complainant should be anonymous (even if her complaint prove to be unfounded) and not the accused. Though we appreciate the force of this argument the implications of anonymity for defendants are extremely wide.

176. In the first place the present position is that defendants are generally named, even in the case of murder and other most reprehensible crimes; there is no question of the name of the defendant being concealed whatever the circumstances of the case. Even in blackmail cases where the complainant is invariably anonymous it is always the practice for the defendant's name to be disclosed and we have said at the outset of this report that we do not think it desirable to recommend changes in the law of rape which would make it more anomalous than it is at present, without strong justification.

177. The reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists do not escape prosecution. Such reasoning cannot apply to the accused. The only reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be with her—it should be with other accused persons and an acquittal will give him public vindication.

178. While appreciating that there may be a case for giving all accused persons anonymity before conviction we feel that such a radical proposal would more appropriately come, if at all, from a committee concerned with criminal law generally rather than one concerned specifically with the crime of rape.

## **V WOMEN ON JURIES**

179. We have given consideration to the question of women serving on juries in rape cases and we are satisfied that some change in the present procedure is required to ensure that there is a better balance of the sexes. We understand from consultations with the Lord Chancellor's Office that there are three steps in the present procedure governing the summoning of

jurors which are designed to give effect to the principle of random selection. They are as follows:

- (a) the initial selection of names from the electoral roll, which is by strictly random choice (ie without regard to the sex of the elector or to any other factor which the electoral register might disclose—save that any person who is shown as under 18 or over 65 is not qualified);
- (b) a ballot, involving the names of all jurors who attend court for service during a particular period, to produce a jury-in-waiting for each courtroom;
- (c) a second ballot, which takes place in the courtroom after the defendant has been arraigned, and which produces from the jury-in-waiting the names of the twelve who, subject to challenges, will serve.

In order to give effect to the proposal to provide for a minimum number of women it would be necessary to make certain changes in each of these three steps.

180. It has been customary to attach great importance to the random selection of jurors as the best means of guaranteeing that the jury is both impartial and representative of the community as a whole, subject to the rules about ineligibility, disqualification and excusal from jury service. Our proposal might be held to infringe the principle of random selection but it seems to us less important to cling strictly to random selection than to seek to achieve a genuinely impartial and representative jury. In cases of rape we believe it to be crucial that both sexes should be adequately represented. The principle of random selection taken together with the scope for peremptory challenge is not able to guarantee this in every case and, therefore, we believe that a change is essential (see paragraph 188 below).

181. We are advised by the Lord Chancellor's Office that generally speaking more women than men request, and are granted, excusal from jury service and that this is due in some measure to the fact that married women with young children are amongst those summoned. Thus it would be necessary, allowing for the possibility of jurors being challenged, in order to provide for a given minimum number of women on the final jury to select from the electoral roll a greater number of women than men. It follows that, having by this means attempted to provide for the attendance at court of sufficient women, the names of the jurors would need to be segregated into male and female before conducting the first ballot, which would then be in two parts, one for male and one for female. This would ensure that sufficient women were included in the jury-in-waiting attending in the courtroom to allow for a minimum of their number to appear on the final jury; the proportion of each sex in a jury-in-waiting would otherwise be purely a matter of chance.

182. Similarly, as in the second ballot the names of the final 12 jurors are selected from the whole of the jury-in-waiting and any person challenged is replaced by random balloting, the segregation of names necessary in the

first ballot would need to be continued in the second until such number of women were sworn in as to ensure a minimum number of women.

183. If the number of women included on juries were to be increased, more women than at present would, therefore, need to be summoned, not only to provide for the requisite minimum but also to provide for a woman replacement if any of those constituting that minimum were challenged. This would be a particularly heavy burden in multi-defendant cases because of the possible number of challenges (each is entitled to seven peremptory challenges, as well as being allowed challenges for cause). All this would have the effect of placing an increased burden on the women who were free to serve on a jury and would, of course, increase the cost.

184. It might be thought that if only rape cases had a fixed minimum complement of women the effect would be slight since they form only a small part of the Crown Court's case load. But we are advised that this is not so, because as jurors are summoned in batches some six weeks in advance and the cases due to be listed are not known so far ahead, it would be necessary to summon on the basis that there would be at least one rape case during each juror's period of service. Alternatively, if such special arrangements were not made at the summoning stage, the procedures would need to be changed when a rape case came into the list to ensure that the jury-in-waiting for that case contained sufficient women. In centres where there was more than one court this could, we recognise, lead to an excessive number of male jurors serving in the other court rooms.

185. Although it would (in theory) be possible always to allocate a fixed date for each rape case this might in some cases delay the hearing and it might also tend to make some listing arrangements less flexible.

186. Another risk is that if a defendant in a rape case pleaded guilty at the last moment, defendants in other cases might be unwilling to accept a jury produced by a special summoning procedure applicable to rape cases, and the jurors' attendance would then have been abortive.

187. We are fully conscious of all these difficulties and we respect them, but we are faced by the dilemma that in rape (as, no doubt, in many other sexual cases to a greater or lesser degree) a proper balance of the views of both sexes is of importance, indeed we feel of paramount importance, in reaching a proper view about the attitude of the man and of the woman. While rape cases are not unique in every respect, in rape there is the particular difficulty that the alleged consent of the woman to sexual intercourse is a vital factor, as well as the behaviour of the defendant himself and his own intention. While we recognise that this is a problem wider than rape, we think that a start should be made somewhere.

188. In our view the right course is to aim at altering the procedures, so as to ensure that in rape trials there is a minimum of four women and also four men on a jury, in order to keep the balance of the sexes within reasonable bounds (with appropriate exceptions for the occasional case where the jury falls below twelve during the trial due to the sickness

of a juror or for some other reason). As regards the use of the peremptory challenges (which are, undoubtedly, often used to exclude women or to get other age groups) we suggest that challenges should not be capable of being used so as to frustrate the minimum numbers, and therefore if the number of either sex falls below four then we think that the juror should be replaced by another of the same sex.

189. Our reasons for choosing a minimum of four men and women on the jury in rape trials, is that we think that equal numbers would be too difficult to achieve and the smaller number would allow for the possibility that less women are willing to serve (because more seek excusal) in any event.

## **VI INCHOATE OFFENCES**

190. We have not dealt specifically with attempts or inchoate offences concerning rape but we feel that any suggestions we have made in regard to the law of rape would apply, where appropriate, to these as well.

## **VII POLICE AND MEDICAL INVESTIGATION**

191. It is most important in the interests of justice that complainants should report to the police as soon as possible. This may obviously increase the chance of early arrest of the assailant in some cases but it also provides irreplaceable evidence about injuries, the demeanour of the complainant and the fullest account of the circumstances.

192. Complainants vary widely, from the angry and resentful to the stunned and deeply distressed, but all expect help and many are probably reluctant to complain, but feel that they have a public duty to perform. Tactful and sympathetic interrogation is necessary. Experience and sympathy in the interrogator are more important than his or her sex.

193. A medical examination will soon follow. We have been given to understand that facilities for such examinations in police stations vary—in some cases they are inadequate and unsuitable whilst others are much better equipped.

194. We appreciate that there may be many, and sometimes there may even be insuperable, difficulties in the way of having such examinations elsewhere. If it were possible for them to take place in a clinical environment such as in a hospital or in a surgery, this would, naturally, reduce distress, produce an atmosphere of care and concern, and provide for immediate treatment when it was desirable.

195. Such examinations should, however, always be made by an experienced police surgeon who would be familiar with the evidence that might be required.

196. All medical examinations need to be comprehensive and systematic and include physical examination and medical history, as well as the fullest account of the circumstances of the offence, and not limited to matters of obvious relevance. It is an axiom of medicine that one cannot tell in advance what may turn out to be relevant. However, if our recommendations are accepted with regard to the irrelevance of the private sexual history of the complainant, then the details of her personal sexual background hitherto elicited would no longer seem to be required.

197. We understand that apart from providing for any immediately necessary treatment or sedation, the police surgeon normally advises the complainant to go to her own doctor if there are further emotional or physical symptoms. This appears to us to be an admirable practice.

198. When a full account has been obtained police attention will, naturally, tend to be transferred to tracing the assailant. When the complainant is going to be required to give evidence, police contact with her will be maintained, if only to establish that she is available. It would, of course, be an added advantage if it were possible, and if time permitted, for them to ensure that the complainant was referred to the appropriate services whether medical or social.

199. These problems were not strictly within our terms of reference, though we felt unable to ignore their importance, and we did not have the opportunity within the time limits which we set ourselves, to go into them thoroughly enough to make confident recommendations.



## VIII SUMMARY OF RECOMMENDATIONS

### Declaratory legislation

1. The time has come for the definition of rape to be set out in statutory form, and this would provide the opportunity to clarify the existing law and in particular to bring out the importance of recklessness as a mental element in the crime. Such a definition would also emphasise that lack of consent (and not violence) is the crux of the matter (paragraphs 81 and 84).

2. A statutory provision which would obviate any undue or misleading emphasis being given to one aspect only of the accused's belief should:

- (i) declare that (in cases where the question of belief is raised) the issue which the jury have to consider is whether the accused at the time when sexual intercourse took place believed that the woman was consenting, and
- (ii) make it clear that, while there is no requirement of law that such a belief must be based on reasonable grounds, the presence or absence of such grounds is a relevant consideration to which the jury should have regard, in conjunction with all other evidence, in considering whether the accused genuinely had such a belief (paragraphs 82 and 83).

### Evidence

3. The previous sexual history of the complainant with men other than the accused should be inadmissible, except with the leave of the trial Judge on application made to him in the absence of the jury (paragraphs 134 and 135).

4. The trial Judge's discretion should be guided by and based on principles set out in legislation. This should permit him to admit cross-examination and allow evidence in rebuttal dealing with the complainant's previous sexual history with persons other than the accused, if the Judge is satisfied—

- (a) that this evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following, the alleged offence; and
- (b) that the degree of relevance of that evidence to issues arising in the trial is such that it would be unfair to the accused to exclude it (paragraph 137).

### Character of the accused

5. Following the pattern of the Criminal Law Revision Committee's recommendations in their Eleventh Report we recommend that, if the main purpose of the attack is directed to the credibility of the complainant or the witnesses for the prosecution, such attack should, where relevant to his credibility, let in the accused's bad character or previous convictions (paragraph 142).

6. As the sexual history of the complainant with other men will (under our recommendations as set out above) only be admissible when it is directly relevant to issues before the court, such evidence (when allowed by the Judge) should not let in the accused's bad character or previous convictions (paragraph 141).

7. The introduction of evidence relating to the previous sexual history of the complainant with the accused should not let in the accused's bad character or previous convictions (paragraph 141).

### Anonymity

8. Complainants who allege rape should be and remain anonymous. However, a Judge should have power to dispense with restrictions on publication in exceptional circumstances, namely where the actual identity of the complainant is essential for the discovery of potential witnesses (paragraphs 163-166).

9. Application to lift the restriction on publication should be made to a Judge of the Crown Court in chambers before or not later than the commencement of the trial (paragraph 165).

10. Consequential and related matters should also be dealt with (paragraphs 170-172).

11. Breach of anonymity should be a criminal offence and a suitable penalty should be devised (paragraph 174).

### Juries

12. There should be a minimum of four men and four women on the jury in rape trials with suitable provision where the jury falls below twelve during the trial (paragraph 188).

13. Challenges should not be capable of being used so as to frustrate these minimum numbers. If the number of either sex falls below four, the juror should be replaced by another of the same sex (paragraph 188).

### Inchoate offences

14. It should be considered whether the suggestions we have made should also apply to attempts and other inchoate offences concerned with rape (paragraph 190).

## Final remarks

The Group could not have produced this Report in the time available without the invaluable and tireless support provided by Miss K A O'Neill, our Secretary, and Mr H D Hillier, our Assistant Secretary, of the Home Office. The time scale imposed an exceptionally arduous burden on Miss O'Neill and we cannot praise too highly the outstanding and cheerful manner in which she performed this task. We are deeply grateful.

ROSE HEILBRON (*Chairman*)

T C N GIBBENS

MIA KELLMER PRINGLE

A W BRIAN SIMPSON

ALISON WRIGHT

K A O'NEILL (*Secretary*)

H D HILLIER (*Assistant Secretary*)

## APPENDIX 1

### THE ADVISORY GROUP RECEIVED WRITTEN EVIDENCE FROM

Professor J A Andrews	Mr V J Lissack
Mr Jack Ashley MP	Lord Chancellor's Office
Association of Chief Police Officers	Medical Women's Federation
of England, Wales and Northern	Members of the House of Lords
Ireland	Metropolitan Police
Association of Police Surgeons of	Mothers Union
Great Britain	National Council for Civil Liberties
British Academy of Forensic	National Council of Women of
Sciences	Great Britain
British Broadcasting Corporation	National Joint Committee of Work-
Mr Richard Card	ing Women's Organisations
Community Relations Commission	National Union of Journalists
Council of HM Circuit Judges	Newspaper Publishers Association
Criminal Bar Association	Police Federation
Professor Sir Rupert Cross	Police Superintendents' Association
Director of Public Prosecutions	of England and Wales
Professor D W Elliott	Press Council
Professor E J Griew	Prosecuting Solicitors' Society of
Guild of British Newspaper Editors	England and Wales
(Joint Memorandum with the	Rape Counselling and Research
Law Society)	Group
Professor B Hogan	Royal Arsenal Co-operative Society
Home Office	Royal College of Obstetricians and
Independent Broadcasting Authority	Gynaecologists
Institute of Journalists	Royal College of Psychiatrists
HM Circuit Judges	Runnymede Trust
HM Judges of the Supreme Court of	Mr A Samuels JP
Judicature	Mr P J Seago
Justice	Professor J C Smith
Justices' Clerks' Society	Professor Glanville Williams QC
Law Society (Joint Memorandum	Women in Media
with the Guild of British News-	Women's National Commission
paper Editors)	

The following were kind enough to give us oral evidence in regard to certain specific aspects of our Enquiry.

Mr Jack Ashley MP  
Criminal Bar Association  
Lord Hailsham of St Marylebone

Metropolitan Police  
Dr David Paul

A number of local organisations and other people wrote informing us of their views, or assisted us in other ways.



THE ADVISORY GROUP RECEIVED WRITTEN EVIDENCE FROM  
THE FOLLOWING COUNTRIES

Australia  
Belgium  
Canada  
Denmark  
France  
Holland  
Italy  
New Zealand  
Scotland  
Sweden  
United States of America  
West Germany

APPENDIX 2

RECENT BILLS BY MR JACK ASHLEY MP AND  
MR PETRE CROWDER MP

1. We have had a full and most useful discussion with Mr Jack Ashley MP about the Bill he successfully sought leave under the 10 minute Rule to introduce in Parliament last May and we were grateful for the opportunity to pursue with him the various proposals he made.

2. The main object of his Sexual Offences (Amendment) Bill was to reverse the decision of the House of Lords in *Morgan* by providing that a man who has sexual intercourse with a woman without her consent, and without reasonable belief in her consent, is guilty of rape. The Bill included two further provisions to make the position of the victim more tolerable. First, it provided that if a woman is asked questions in cross-examination by the defence which amount to an attack on her character the defendant is required to answer questions tending to show that he has committed, or been convicted of, or been charged with any offence, or is of bad character. Secondly, the Bill provided for anonymity for both complainant and defendant in the proceedings, except that the trial Judge or a High Court Judge might, when all proceedings have been completed, order that the prohibition on publication of either or both of their names be removed. The Bill has not since then made further progress, but our Advisory Group was in the meantime appointed.

3. Although we were not able to agree with section 1 of Mr. Ashley's Bill, we are pleased to be able to say that we are able to go much further than he suggests in some respects.

4. Another Bill of which we have taken note is that which Mr Petre Crowder successfully sought leave to introduce under the 10 minute Rule in Parliament last June: this Bill likewise has made no further progress since then. In formulating our own recommendations we have taken his proposals fully into account.

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