The Protection of Women in the Administration of Criminal Justice in Australia

Australian High Commission Colombo

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A little over a decade ago, Radhika Coomaraswamy wrote of the insensitivity of the administration of criminal justice in South Asia[1]. Her focus was the treatment of women victims of violence. She reported the relatively poor response by police to reports of domestic violence. In relation to this, she referred to the results of a survey of judges in the South Asian region which showed that 48 per cent of the respondents agreed that it was justifiable for men to beat their wives and 74 per cent endorsed the view that, even in cases of violence, the preservation of the family should be the primary concern.

With respect to the prosecution of offences of sexual violence, Coomaraswamy identified the need to move away from the law's preoccupation with penile penetration in favour of a broader definition of sexual assault, to remove the requirement for corroboration and to exclude the admission of evidence of the

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[1] Coomaraswamy, "Human Security and Gender Violence" (2005) 40 *Economic and Political Weekly* 4729 at 4731.

complainant's sexual history. She observed that feminists in the region had long advocated the need to do away with the idea that proof of non-consent required evidence of bruises or the like.

While I acknowledge the differences between the systems Coomaraswamy was describing and the administration of criminal justice in Australia, the tenor of her remarks had a familiar ring to me. When I commenced practising law in New South Wales in the late 1970s, it is fair to say that the administration of criminal justice was generally insensitive to women victims of sexual and other violence.

The police were largely uninterested in investigating domestic violence, which at the time was not perceived as real crime. As many police officers saw it, when they did charge the perpetrator, all too often the victim would refuse to give evidence and the whole exercise would be a waste of their time. A woman who complained of rape but who did not have signs of physical injury was likely to find her account treated with suspicion by the police and the courts.

Over the course of my professional life, there has been radical change for the better in the investigation of domestic and sexual violence and in the prosecution of these offences in the courts. The reforms are the product of cultural change, which has seen the role of women in society redefined. The impetus for reform stemmed from the "second wave" of feminism in the 1970s. Women's

groups agitated for changes to the law of rape along the same lines as those that feminists in this region were calling for. In New South Wales, the government, in response to this pressure, set up a Sexual Assault Committee which proposed wholesale re-working of the sexual offence provisions of the Crimes Act.

The crime of rape was abolished and in its place the offence of sexual assault without consent was enacted. Sexual intercourse was defined broadly to include the penetration to any extent of the genitalia of a female person or the anus of any person by any part of the body of another person or by any object manipulated by another person save where the penetration is carried out for a proper medical purpose; and sexual connection occasioned by the introduction by any part of the penis into the mouth of a person[2]. Criminal liability no longer depended upon proof of penile penetration of the vagina; the new offences recognised the violence that is at the heart sexual offending. In the case of offences against adults, where absence of consent is an element of liability, consent was defined in terms that make clear that liability attaches to a person who is reckless as to whether another consents to sexual intercourse and silence was considered insufficient to amount to consent.

The criminal law in Australia is largely the responsibility of the State and Territory Governments. The pressure in the last quarter of

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[2] *Crimes Act* 1900 (NSW), s 61H(1).

the last century to make the administration of the criminal law take account of the reality of sexual and domestic violence led to innovations in each jurisdiction. Over time, the worthwhile innovations of one jurisdiction have been adopted in the others, a useful by-product of our federal system.

The cultural change driving these reforms has been accompanied by an increased awareness of the incidence of sexual offending and its disabling long-term effects. Over the same period, there has been marked improvement in the recruitment and training of police. The police now treat allegations of sexual offending and domestic violence as a priority. These offences are no longer the poor cousins of break and enters and robberies. A police officer's career is likely to be enhanced by having worked in a specialist sexual assault unit. The changed face of policing is perhaps most evident in the investigation of sexual offences against children. Police officers are trained to, and do, treat children's allegations sensitively. Children are interviewed in a suitable, non-threatening environment by officers who have specialist skill in eliciting the child's account in a non-leading fashion. The interview is video-recorded and serves as the child's evidence in chief in subsequent court proceedings[3]. The cross-examination of the child is conducted by closed circuit television at a hearing in advance of the trial[4]. In

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[3] See, ie, *Criminal Procedure Act* 1986 (NSW), s 306U.

[4] See, ie, *Criminal Procedure Act* 1986 (NSW), s 306ZB.

this way the jury see the child as she or he was at a time that is close to the offending. And importantly, the child's participation in the proceedings is complete and she or he can try to get on with life without the shadow of the court case intruding.

Juries, reflecting the makeup of society, used to be cautious about convicting an accused on the word of a child. Child sexual abuse was covered up in the families in which it occurred and those fortunate enough not to have experienced it were all too inclined to think that children were fantasising. Perceptions of that kind are now rare. For the past three years, a highly publicised Royal Commission has been inquiring into institutional responses to the phenomenon of child sexual abuse throughout the Australian jurisdictions. The light that the Royal Commission has shone on the issue has led to increased reporting of offences including those that occurred many years ago. The prosecution of individuals for sexual offences alleged to have occurred as long as 40 years ago presents its own problems but is no longer uncommon.

The complainant's experience of giving evidence used to be gruelling. First there was a preliminary hearing before a magistrate at which defence counsel was free to cross examine unconstrained by a jury which might be unimpressed by a hectoring style. There followed the trial at which the complainant might be subject to a lengthy and offensive examination about her sexual history. The adversarial nature of our criminal trial procedure made judges

reluctant to intervene to restrain counsel's zeal in the absence of objection.

The ordeal was made worse by the view which held sway when I was first in practice that the Crown prosecutor and his instructing solicitor should not confer with the complainant before the trial. In this way there could be no suggestion that the witness had been coached. The complainant would be summoned to give evidence and, with little or no understanding of the conduct of criminal trials, would find herself sitting in the public area of the court waiting to give her evidence, quite possibly surrounded by the accused's supporters. It is not surprising that 30 years ago reputedly it was common for women not to report a sexual crime rather than face the experience of the courtroom.

While I have no doubt it is never easy to give evidence of the intimate details of a sexual assault, the stress of giving evidence as a complainant in each of the Australian jurisdictions has been significantly reduced. Procedural changes have largely been the product of legislative reform; common lawyers engaged in the practice of criminal law as a general rule approach any suggestion of change with suspicion.

In outlining reforms that have been affected in trial procedure I will refer to the practice in New South Wales. The procedures are largely mirrored in the other jurisdictions. The complainant in the

trial of a sexual offence may choose to give her evidence by means by closed-circuit television from a location that is outside the court complex. This ensures that she does not run into the accused or his supporters. It is a more relaxed and pleasant environment than the courtroom. The complainant is free to have a support person present with her when she gives her evidence[5]. If she chooses to give her evidence in the courtroom, she may be screened from the accused's view[6]. She is no longer exposed to the risk of being cross-examined by her alleged abuser at a trial at which the accused chooses to represent himself. In such a case, the court is empowered to appoint a person to question the complainant[7].

The evidence of complainants given at the trial is generally video-recorded. Should the trial be aborted, or a new trial ordered

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[5] *Criminal Procedure Act* 1986 (NSW), s 291(1). See also *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 39; *Evidence Act* (NT), ss 21A(2)(d), 21F; *Criminal Law (Sexual Offences) Act* 1978 (Q), s 5; *Evidence (Children and Special Witnesses) Act* 2001 (Tas), ss 8(1)(b), 8(2)(b)(iii); *Criminal Procedure Act* 2009 (Vic), s 133.

[6] *Criminal Procedure Act*, s 294B(3); *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 38C; *Evidence Act* (NT), ss 21A(2)(a)-(b), 21B, 21C; Evidence Act 1977, ss 21A(2)(a)-(c); Evidence Act 1929 (SA), ss 13A(1), 13A(2)(a)-(d); *Evidence (Children and Special Witnesses) Act* 2001 (Tas), ss8(1)(b), 8(2)(b)(ii)-(iic); *Criminal Procedure Act* 2009 (Vic), ss 360-364; *Evidence Act* 1906 (WA), ss 106R(3)(a), 106R(4)(c).

[7] *Criminal Procedure Act*, s 294A; *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 38D; *Sexual Offences (Evidence and Procedure) Act* (NT), s 5; *Evidence Act* 1997 (Q), ss 21L-21S; *Evidence Act* 1929 (SA), s 13B; *Evidence (Children and Special Witnesses) Act* 2001 (Tas), s 8A; *Criminal Procedure Act* 2009 (Vic), ss 353-358; *Evidence Act* 1906 (WA), s 25A.

following a successful appeal, a number of Australian jurisdictions now provide for the recording of the evidence given at the first trial to be tendered at the new trial, relieving the complainant of the stress of giving evidence a second time[8].

Importantly, the complainant may no longer be cross-examined about her sexual history[9]. And, equally importantly, if she has sought counselling following the assault, her confidential communications made to the counsellor about the offence and the harm occasioned by it are privileged[10].

In most Australian jurisdictions, the law now imposes a duty on the trial judge to disallow a question if it is harassing, intimidating, offensive, oppressive or humiliating. The duty extends to the disallowance of a question which the judge considers in the

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8 *Criminal Procedure Act*, ss 306L-306J; *Evidence Act* (NT), ss 21E(4)-(6); *Evidence Act* 1977 (Q), s 21A(6)(b); *Evidence Act* 1929 (SA), ss 13(1), 13D; *Evidence (Children and Special Witnesses) Act* 2001 (Tas), s 7B; *Criminal Procedure Act* 2009 (Vic), ss 378-387.

9 *Criminal Procedure Act*, s 293(2); *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 51; *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(1); *Criminal Law (Sexual Offences) Act* 1978 (Q), ss 4, 4A(4); *Evidence Act* 1929 (SA), s 34L(1); *Evidence Act* 2001 (Tas), s 194M; *Criminal Procedure Act* 2009 (Vic), ss 342-343, 352; *Evidence Act* 1906 (WA), ss 36B-36BC.

10 *Criminal Procedure Act*, ss 297-298; *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 54-67; *Evidence Act* 1929 (SA), ss 67D-67F; *Evidence Act* (NT), ss 56-56G; *Evidence Act* 2001 (Tas), s 127B; *Evidence (Miscellaneous Provisions) Act* 1958 (Vic), ss 32AB-32G; *Evidence Act* 1906 (WA), ss 19A-19M.

manner or tone in which it is put to be belittling, insulting or otherwise inappropriate[11].

The common law required judges to give directions to the jury in sexual offence trials that were misconceived and demeaning in the light of modern understanding[12]. Judges were required to warn the jury that it was dangerous to convict on the uncorroborated testimony of the complainant. As recently as 1968, Salmon LJ explained the rationale for the warning as that[13]:

> "It is dangerous to convict on the evidence of the complainant in a sexual case because experience shows that in such cases people do sometimes tell 'an entirely false story which is very easy to fabricate, but extremely difficult to refute'".

Juries were instructed that any delay in making a complaint of a sexual offence may be taken into account adversely in assessing the credit of the complainant[14]. At a trial in which the defence

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[11] *Evidence Act* 1995 (NSW), s 41(1)(b); *Evidence Act* 2011 (ACT), s 41(1)(b); *Evidence (National Uniform Legislation) Act* (NT), ss 41(2), 41(3)(b); *Evidence Act* 1977 (Q), s 21; *Evidence Act* 1929 (SA), ss 25(1)(c), 25(3), 25(4)(e); *Evidence Act* 2001 (Tas), s 41(1)(b); *Evidence Act* 2008 (Vic), s 41(2), 41(3)(b), 41(4)(c)(iii)(B); *Evidence Act* 1906 (WA), s 26(1)(b).

[12] *R v Henry; R v Manning* (1969) 53 Cr App R 150 at 153-154 per Salmon LJ; *Kelleher v The Queen* (1974) 131 CLR 534 at 541-543 per Barwick CJ, 553 per Gibbs J, 559-560 per Mason J.

[13] *R v Henry and Manning* (1968) 53 Crim App R 150 at 153.

[14] *Longman v The Queen* (1989) 168 CLR 79.

makes an issue of the absence of complaint or delay in making complaint, the judge is now required to instruct the jury that either circumstance does not necessarily indicate that the allegation is false, and that there may be good reasons why a victim of a sexual assault hesitates in making, or refrains from making, a complaint[15]. The judge must not warn the jury that the delay in making a complaint is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning[16]. And the judge must not suggest that complainants as a class are unreliable witnesses[17].

The Director of Public Prosecutions takes into account the wishes of the complainant in determining whether to prosecute. However, those wishes are not viewed as determinative[18]. This is to recognise that the public interest may favour the prosecution of a person for a serious sexual offence notwithstanding that the complainant does not wish the prosecution to proceed. As a matter

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15 See, ie, *Criminal Procedure Act,* s 294.

16 See, ie, *Evidence Act* 1995 (NSW) s 165B.

17 *Criminal Procedure Act*, ss 294(2)(c), 294AA; *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), ss 68-73; *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(5); *Evidence Act* 1929 (SA), ss 34L(5), 34M-34N; *Criminal Code* (Tas), ss 136, 371A; *Crimes Act* 1958 (Vic), s 61; *Evidence Act* 1906 (WA), ss 36BD, 50.

18 Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines*, (2007) at 8-10, 33-34, issued under s 13 of the Director of Public Prosecutions Act 1986 (NSW); Corns, *Public Prosecutions in Australia: Law, Policy and Practice*, (2014) at 277-279 [8.200]-[8.220].

of practice, the Director is sensitive to the wishes of complainants in sexual offence matters. In cases of domestic violence, the police and the Director may be more inclined to proceed with a charge notwithstanding that the victim does not support the prosecution. Experience has tended to show that women who are subjected to domestic violence may be under pressure to ask to have the prosecution dropped and their interests are better protected by the matter being seen to be out of their hands.

In summary, I believe that we have made significant progress in adapting our criminal trial procedures to ensure the sensitive treatment of women and child victims of sexual and other offences of violence without trenching on the accused's right to a fair trial. I would hope that few people familiar with the system would counsel complainants against reporting sexual offences or offences of domestic violence today.