Ruining a Good Boy for the Sake of a Bad Girl

False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods — Gone But Not Forgotten

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Abstract

An historical examination of the law can sometimes explain why the irrational is accepted for a time as conventional wisdom. It can also explain why an archaic proposition retains currency long after the assumed evidence for that proposition has been discredited. This paper explores the history of false accusation theory regarding the testimony of women particularly in sexual assault cases. The paper uses the *Crimes (Girls' Protection) Act* 1910 section 2, which created a limitation period barring prosecution of sexual assault offences committed against girls between the age of fourteen and sixteen, as a vehicle to explore why elaborate protections for defendants accused of sexual assault offences were thought necessary. The historical explanation which is proffered provides an insight as to why some members of the Australian judiciary in the 1990s still seem to give credit to the view that women's testimony in sexual assault cases is suspect.

Media attention has lately focused on some recent judicial perceptions of the credit-worthiness of female sexual assault complainants and the reliability of their evidence. Such perceptions suggest that even in the 1990s, archaic[1] stereotypical behaviour traits attributed to women who are victims of sexual assault offences continue to be accepted. These views might be dismissed as mere aberrations if they were the only manifestations of these notions. However this paper discusses another manifestation of false accusation theory which was enshrined in legislation in the form of a time limitation against prosecution of certain sexual offences.

Because the validity of stereotypical behaviour traits attributed to women was accepted, section 2 of the *Crimes (Girls' Protection) Act* 1910 provided protections for male offenders. The protection was in the form of a time limitation against prosecution of certain sexual offences where the victims were girls between the ages of fourteen and sixteen years. The history of the limitation period is explored and the reasons why this prosecution

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1 *Longman v The Queen* (1989) 168 CLR 79 per Deane J at 91–93.

bar was thought necessary are examined. This discussion brings into stark relief how opinions and beliefs about stereotypical behaviour traits associated with women were certified by medico-legal jurisprudence and enforced by the law.

Though this time limitation was finally repealed in New South Wales in March 1992 similar provisions continue to exist in some other Australian jurisidictions.[2] Further, recent comments made by some members of the Australian judiciary suggest that the jurisprudence underpinning the *Crimes (Girls' Protection) Act* 1910 still has currency and credibility. The paper accordingly uses section 2 of the *Crimes (Girls' Protection) Act* 1910 as a case study to explore the effect that medico-legal jurisprudence has had on court procedures. Analysis of this case study reveals a methodology which overtly asserted protection for girls and at the same time covertly provided wide protections for male defendants on the basis that there were certain female complainants who could not be trusted to testify truthfully.

In 1910 the scope of carnal knowledge and related offences was increased to embrace female complainants who were under sixteen years of age.[3] This had the effect of raising the age of consent for girls from fourteen to sixteen years. Such a recognition of the vulnerability of girls in this age group was hedged with "protections" for alleged offenders. It included an absolute defence where it could be shown to the court that the complainant was a prostitute or an associate of prostitutes or where the defendant had reasonable cause to believe that the complainant was older than sixteen years of age. A statutory limitation barring prosecution if it was not brought within six months from the date of the alleged offence was also included. The limitation period and the defence were only applicable where the female complainant was above the age of fourteen but below the age of sixteen. In 1911 consent was included as part of the elements of the defence and in 1924 the limitations period was increased from six months to one year. Despite the broad changes which were made to sexual offences in 1981 and in later years, the limitations period and the defence, albeit in an modified form, remained. The time limitation for prosecution was only removed in March of 1992 and the modified defence still remains.

Legislatures sometimes prescribe periods of time in which actions must be initiated. These limitation periods have been developed to serve various overlapping purposes. One of the main reasons has been to discourage litigation in which the means of proof have become old and unreliable, evidence has been lost, witnesses have forgotten the details of the incident or have died. A further reason for a limitation period is the policy that a person

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2 In relation to sexual offences: in Queensland s215 of the *Criminal Code* requires the consent of a Crown Law Officer if a prosecution of carnal knowledge of a girl under 16 has not been commenced within two years after the offence is committed; in Western Australia s187 of *The Criminal Code* (repealed by *Acts Amendment (Sexual Offences) Act* 1992) required a prosecution of a carnal knowledge offence to be commenced within six months, an attempted carnal knowledge offence to be brought within three months and an indecent dealing offence where the child was between the age of 13 and 16 years within three months after the respective offences had been committed; in South Australia s76a of the *Criminal Law Consolidation Act* 1935 (repealed by amendment No 98 of 1985) provided that no information could be laid for various sexual offences more than three years after the commission of the offence; in Victoria s359A(1) of the *Crimes Act* 1958 requires the trial of a person charged with certain prescribed sexual offences and where the complainant is under the age of 16 years to commence no more than three months after being directed to be tried or charged (as the case may be). Section 259(2) provides for an extension of this limitation period not exceeding a further three months.

3 Section 2 of the *Crimes (Girls' Protection) Act* 1910.

should not be surprised by claims arising from the distant past: "Long dormant claims often have more cruelty than justice in them".[4] Also, limitation periods are intended to discourage people who "sleep on their rights" or at least, to provide an incentive not to do so.

In fact limitation periods in the criminal law are rare,[5] perhaps because the balance of interest is struck differently from those found in the civil law. Public confidence in the criminal justice system might be adversely affected if serious criminal offences committed, albeit years before, were not prosecuted. Where the criminal law specifies a limitation period, as in respect of certain sexual assault offences, it would seem that different interests are served.

Early History of the Limitation Period

Women in New South Wales received the vote in 1902[6] and feminists lobbied to have the age of consent raised to sixteen or seventeen in parity with England and other Australian States. Sir Charles MacKellar drafted and tabled the *Crimes (Girls' Protection) Amendment Bill*, in the New South Wales Legislative Council in 1903. The Bill, in its original form, proposed to increase the scope of carnal knowledge and related offences to include complainants up to seventeen years of age. It was supported by administrators of charitable institutions, who lodged petitions to the government.[7] B R Wise, the Attorney General, acknowledged the Bill's popularity, asserting that the Bill was "ardently desired by so large a number, probably by a majority, of the newly enfranchised sex, who have not the experience ... which enables them to deal with a question of this class". He opposed the Bill because he was "convinced now, by long experience and considerable reflection, of the undesirability and injustice of this measure".[8]

Wise claimed that defendants in carnal knowledge cases were more often youths rather than men and that there was an urgent need to protect youths from "vicious" women.

> I do not believe in the existence of any large number of men who go about seducing girls. I think the good sense and natural feeling of honour that there is amongst men not only restrains them as individuals, but the idea is repulsive and has a social stigma attached to it which prevents the commission of a crime of that kind. I believe in the majority of women and girls, the instinct of chastity is stronger than any other instinct, and those girls do not need protection; but where there is a lapse from virtue ... it occurs where the girls are themselves vicious.[9]

The Bill was again debated in 1905, when Wise was no longer Attorney General. It was redrafted and debated intermittently until 1910 when despite fears of increasing the

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4 *A'Court v Cross* (1825) 2 Bing 329 per Best CJ.

5 For summary offences, no information can be laid outside a limitation period of six months from the date of the incident (s56 *Justices Act* 1902 (NSW), s51 *Justices Act* 1902 (Vic)). "This rule is an acknowledgement of the relative minor nature of summary offences." Aronson, M I, Hunter, J B and Weinberg, M S, *Litigation Evidence and Procedure* (4th edn, 1988) at 520. The same policy apparently is applicable for Commonwealth offences where a 12 month limitation period for prosecution of offences where the penalty is less than six months applies (s15B(1)(b) *Crimes Act* 1914 (Cth)).

6 *Women's Franchise Act* 1902 (NSW).

7 Allen, J A, *Sex and Secrets: Crimes Involving Australian Women since 1880* (1990) at 77; Rickard, J, *Class and Politics: New South Wales, Victoria and the Early Commonwealth* (1976) at 147.

8 *NSW Parliamentary Debates*, 2nd Series, vol XI, 30th July 1903 Legislative Council at 1156.

9 Id at 1159.

scope of blackmail and a suggestion from Chief Justice Madden that a curfew bell be used to keep girls indoors after a certain hour, the *Crimes (Girl's Protection) Act* 1910 (NSW) was finally enacted and proclaimed. Section 2[10] extended the reach of various carnal knowledge and related offences by increasing the upper age of complainants from fourteen to sixteen years of age. The preamble summarised the purpose of the Act

> to extend to girls of and above the ages of fourteen and sixteen years respectively, and under the ages of sixteen and seventeen years respectively, the protection given to girls under the age of fourteen and sixteen respectively, by certain provisions of the criminal law relating to offences against the person.[11]

The Act had the effect of broadening carnal knowledge and related offences to include prescribed offences committed against girls between the age of fourteen and sixteen years of age. However, section 2 also provided a defence and a limitation period for prosecutions regarding:

> any charge which renders a person liable to be found guilty of an offence described in sections seventy-one, seventy-two, seventy-seven or seventy-eight ... where the girl in question was over the age of fourteen years (and consented to the commission of the alleged offence)[12] if it shall be made to appear to the court[13] or jury before whom the charge is brought that the girl was at the time of the alleged offence a common prostitute, or an associate of common prostitutes, or that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years;[14] and provided also that no prosecution may be commenced for any such offence more than six months after the commission of the offence.[15]

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10 Amended ss64, 69, 70, 71, 72, 77 and 78 of the *Crimes Act* 1900.

11 Preamble to Act No II, 1910. The limitation period in an initial draft of the *Crimes (Girls' Protection) Bill* prescribed three months instead of six months for the limitations period. The New South Wales Legislative Assembly finally agreed to extent the time period over the objections of some members of the Assembly who argued that "to extend the period from three months to six months would be to set the whole machinery of blackmail into operation", and it would also "initiate a system of victimising innocent men" (Mr Norton (Member for Darling Harbour) supported by C Onslow (Member for Waverley) *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 7 September 1909 Legislative Assembly at 1771–1772). The amendment was eventually carried based on the argument that six months was preferable to allow "[t]he physical condition of the girl" (pregnancy) to be made "manifest, and parents would be able to find out where the wrong had been committed, and by whom" (Dr Arthur (Member for Middle Harbour) *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 7 September 1909 Legislative Assembly at 1172). It was also argued that "[i]f the time for prosecution ended within three months, there would be a danger that hasty parents would take precipitate action. Six months would possibly be the cause of fewer cases coming to court than would be the case with a limit of three months" (Mr Trefle (Member for The Castlereagh) *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 7 September 1909 Legislative Assembly at 1777).

12 An amendment made in 1911 by s2 *Crimes (Girls' Protection) Act* 1911 Act No XXI) despite the argument which disputed that carnal knowledge offences could not in fact be committed upon a prostitute (or any other women) without her consent (the Hon C E Pilcher made this argument. *NSW Parliamentary Debates*, 2nd Series vol XLIII, 15 November 1911 Legislative Council at 1688).

13 The question is one of fact for the jury, subject to the determinations of the court as to whether there is any evidence fit for the jury's consideration: *R v Forde* (1923) 2 KB 400.

14 A direction that as the person charged has not made out his defence he must be found guilty is erroneous. The failure of the jury to agree whether he had done so or not does not mean that the defendant failed on this issue. It means that the jury cannot agree: *Sparre v R* (1942) 66 CLR 149.

15 Section 2 Act II 1910.

This provision was ill defined in a number of ways. First, the provision as it stood applied to the prescribed offences committed against girls between the age of ten and fourteen as well as girls between fourteen and sixteen. Thus prosecutions of all such offences had to be commenced within six months. Secondly, section 2 provided a defence even though there had been no consent where the girl was alleged to be a prostitute or an associate of prostitutes or was reasonably believed to be of or above the age of sixteen (though a rape charge could be brought pursuant to section 64). Thirdly, section 78 of the *Crimes Act* 1900, amended by section 2 of the *Crimes (Girl's Protection) Act* 1910, required the indecently assaulted female to be of or above the age of sixteen. However section 2 at the same time provided a defence if the accused had reasonable cause to believe that she was above the age of sixteen. These consequences were unintended by the legislature and they were later rectified in 1911 by amendments contained in section 2 of Act XXI.[16] In 1924 section 5 of the *Crimes (Amendment) Act* 1924 (NSW) again amended section 2 of the *Crimes (Girl's Protection) Act* 1910 (NSW) and the *Crimes Act* 1900 (NSW). The effect of such amendments, for the purposes of this discussion, was to extend the limitation period from six to twelve months.

Female Seducers and Temptresses

What was the reason for providing a limitation period? The Parliamentary debates of the Bill are quite revealing on this subject. Mr Arthur Griffith, the Member for Stuart, cited to the New South Wales Legislative Assembly a book recently published by Doctor Block MD of Berlin entitled *Sexual Life of Our Time*. The following passaged was read to the Assembly:

> We find definite types of early-ripe girls which we must regard as a peculiar acquirement of the twentieth century. We distinguish without difficulty the simple, hot-blooded, sensual variety from the thoroughly developed perverse types. They lace very tightly to display their already strongly-developed breasts all the more imposing — while not more than 15 years old they would appear eight years older. Their abnormal development displays their mental corruption, especially when undeveloped shoulders and thin arms show that they are really of very tender years.[17]

The Assembly thereafter discussed (with what appears to be general consensus) the existence of a "class" of "unduly matured girls" who would not hesitate "to use their seductive powers upon young men to rob them of their virtue".[18] Broughton warned the Assembly "not to enact a law which brands the mark of criminality upon a man who may perhaps — a single, unattached young fellow — allow himself to be seduced by a girl of this class".[19] Further arguments about "the fact that, in a warm climate like Australia, men and women come to maturity at an earlier age than colder climates"[20] were used to support the assertion

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16 Section 2(c) of the 1911 amendment, refined the proviso in relation to the six months limitation period to apply exclusively to where offences under ss71, 72 and 77 had been committed upon a girl above the age of 14 and under the age of 16. Section 2(b) inserted the words "and consented to the alleged offence" in ss71, 72 and 77. The legal effect of s2(b) was to include consent as part of the defence where the girl upon whom the prescribed offences had been committed was shown to be a prostitute or an associate of prostitutes or where the accused reasonably believed that she was of or above the age of 16.

17 *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 24 August 1909 Legislative Assembly at 1438.

18 Mr Broughton (Member for King) *NSW Parliamentary Debates*, 2nd Series vol XXXIV 24 August 1909, Legislative Assembly at 1440.

19 Id at 1439.

20 Id at 1441.

that fourteen to sixteen year old girls, "the cunning and clever one, the one who is abnormally developed, will take advantage of the provisions of the bill" and that raising the age of consent would "be putting in the hands of certain abnormally developed young females in the community a power which will be exceedingly dangerous for them to have".[21]

It was conceded in the Legislative Assembly that the Bill fixed the age in a "rough and ready way". Mr Neilson, the Member for Yass, suggested a more scientific method. He proposed that the legislature provide for "the issue of a medical certificate as to the condition of development of the person who may have been criminally assaulted, and allow the decision of the judge to rest upon that medical certificate".[22] Other members of the Assembly asserted that "a girl between the age of 15 and 16 was more liable to tempt a man" and that "men's lives were placed in jeopardy by the number of false charges made by these little female reprobates".[23]

Mr Carmichael, the Member for Leichhardt, revealed the reasoning for the first proviso regarding prostitutes and associates of prostitutes. "It was recognised that underdeveloped youths should have protection against prostitutes and those associating with prostitutes." However Carmichael believed that such "protection" did not go far enough. He proposed:

> in the same clause the hon. gentleman might go a little further and give that protection, not only with regard to a girl, who at the time of the alleged offence was a common prostitute, or an associate of common prostitutes, but also with regard to girls of loose character. That would very largely protect unthinking youths from the attacks of that most unfortunate part of the community.[24]

This proposal was not successful.

These aspects of the parliamentary debate on the Bill disclose the concern to ensure that men, particularly young men, be insulated from the increase in the scope of carnal knowledge and related offences. Indeed the Member for Bega, Mr Wood, identified the main objective of the legislation as being "deterrent and not punitive".[25]

These concerns and views are also likely to have been the reason behind section 4 of the *Crimes (Girls Protection) Act* 1910. That section proposed that where a person between the age of fourteen and sixteen was found guilty of an offence under sections 71, 72 or 77 of the *Crimes Act* 1900 and the jury was satisfied that the girl upon whom the offence was committed was at the time of the commission of the offence above the age fourteen and under the age of sixteen, the court might in its discretion defer passing sentence and render a good behaviour bond or send that person to a reformatory.

One member of the Assembly[26] thought it "unfair to make a criminal of a lad who accidently fell into one of these scrapes", and the same member indicated that the Bill was really "intended to deal more with a person who was actually a professional seducer". Curiously the same member contended that on this basis "a provision should be made whereby the girl and the boy should be liable to the same penalty". He also said

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21 Mr Nielsen (Member for Yass) *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 24 August 1909 Legislative Assembly at 1443.

22 Above n17 at 1443.

23 Mr Arthur Griffith (Member for Sturt) and Mr Norton (Member for Darling Harbour) *NSW Parliamentary Debates*, 2nd Series vol XXXIV, 7 September 1909 Legislative Assembly at 1766–1767.

24 *NSW Parliamentary Debates*, id at 1770.

25 Id at 1776.

26 Mr Stuart-Robertson (Member for Camperdown) above n23 at 1781.

> [W]e should deal severely with these cases, and not have any half-measures in connection with them. But if the Committee were not prepared to take that course, the next best thing was to lighten the burden on those who happened to fall into this temptation. We have to look after the interests of our sons as well as of our daughters.

These sentiments of equality of treatment between the complainant and the offender were repeated by another member using a different argument of justification for the provisos in section 2 and for section 4:

> As we were making criminal what had never been criminal before, we ought to make allowance on the other side, and give, not absolute protection to these boys, who were equally guilty with the girl, no more and no less, but allowing the court in its discretion to use a humane jurisdiction. We ought to realise the enormous difference between a girl of 16 and a girl of 14. Most girls at 14 were children. The natural impulse was not there with most of them, but now we were dealing with mature developed girls, and making it a criminal (sic) to have relationships with girls between 14 and 16.[27]

It is clear from the parliamentary debates in both 1909 and 1910 as well as the amending legislation of 1910, 1911 and 1924, that the defence and limitation period were enacted to protect men against fabricated complaints of sexual assault by seductive fourteen to sixteen year old girls. What is interesting is that this limitation period was developed in addition to the existing frame-work of protections in the trial process which had already been devised. "Protections" from complaints made by female sexual offence victims already existed, in the form of the "recent complaint" rule, the common law which allowed evidence of the history of the complainant's prior sexual history to be given in open court and the mandatory requirement for a judge to give a warning to the jury about the dangers of convicting on the uncorroborated evidence of a sexual assault complainant. Such protections were inclusive of, but non-specific to, girls of fourteen to sixteen years of age.

The Prosecution of Sexual Offenders and Traditional Rules of Evidence

Prior Consistent Statements and "Recent" Complaints in Sexual Offences

As a general rule in examination-in-chief a witness is not permitted to give evidence in court about his/her own out-of-court statement which is consistent with his/her testimony. Such statements are inadmissible either to prove the truth of their contents or to support the credibility of the witness. This kind of evidence has been said to have no probative value and the rule "keeps the evidence to the main issues in dispute and tends to avoid deception of the court by resourceful witnesses".[28] The general rule forbidding prior consistent statements has exceptions, presumably because in some circumstances the reliability or relevance of the evidence is increased.[29]

An exception to the prior consistent statement prohibition is that of "recent complaint" in sexual offences. This exception seems to have been developed because of a widely held view that females complaining about sexual offences are likely to lie. Lord Hale, for example, an English jurist of the 17th century, declared in his Pleas of the Crown "it must be

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27 Griffith above n23 at 1784.

28 *Corke v Corke and Cook* [1958] 1 All ER 224 per Sellers LJ.

29 Aronson et al above n5 at 752.

remembered, that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent".[30]

In Blackstone's Commentaries, referring to the time when Bracton wrote, in the reign of Henry III, the following reason for the exception was given:

> But in order to prevent malicious accusations it was then the law that the women should immediately after, dum recens fuerit maleficium, go to the next town and there make discovery to some credible persons of the injury she has suffered ... And, first, the party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender ... these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evilfame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain ... these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.[31]

In the Middle Ages, it was a defence to an allegation of rape that a woman had not raised the "hue and cry".[32] While this defence eventually disappeared evidence of a recent complaint remained admissible in relation to the complainant's credibility.[33] The assumption in the law was that in sexual offences a female victim who is worthy of belief will complain as soon as possible and that those who delayed in making a complaint are not worthy of belief. If the female victim complained at the first reasonable opportunity the evidence of that complaint would be admissible. Failure to make a complaint soon after the alleged sexual assault would be a matter that, the defence would argue, should persuade the jury that the complainant was manufacturing the allegation.

When a complaint was made, to be admissible it was required to be made by the complainant voluntarily. If it was made as a result of a leading or inducing or intimidating question, evidence of the complaint would be inadmissible.[34] The judge was also required to consider whether the complaint was made as speedily as could reasonably be expected.[35] If the complaint was admitted the same arguments based on delay and lack of voluntariness as were urged unsuccessfully against admissibility could be put to the jury as relevant for their consideration as to the weight that the complainant's evidence should receive when arriving at their verdict.

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30 Hale, M, *Pleas of the Crown* vol 1 1678 at 635.

31 *Blackstone's Commentaries*, vol iv; c15 at 211 and 213; cited in *R v Lillyman* (1896) 2 QB 167 at 171.

32 Under the statutes of the Middle Ages which regulated the preservation of the peace eg the Assizes of Clarendon (1166) and Northampton (1176) and the Statute of Winchester (1285), the duty of apprehending criminals devolved upon the inhabitants at large. The *hue and cry* was a method used to alert all free men in a district to their obligation to pursue a criminal. Holdsworth, W, *A History of English Law* vol 1 Goodhart, A L and Hanbury, H G (eds), (1966) at 294–5.

33 Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence* (March 1987) at 23.

34 *R v Osborne* (1905) 1 KB 551 at 561; *R v McNeil* (1907) VLR 265 per Madden CJ at 268; *R v Norcott* (1917) 1 KB 347 in agreement at 350–1; applied in *R v Stewart* (1920) 21 SR (NSW) 33. The doctrine was developed in later cases for example *R v Freeman* [1980] VR 1 and *R v Adams and Ross* [1965] Qd R 255, however *McNeil* was clearly the law when the Amendments of 1910 and 1911 were debated and proclaimed.

35 *R v Cummings* [1948] 1 All ER 551.

Until *Lillyman's* case[36] in 1896 the actual words of the complaint were inadmissible. The jury were merely told that the complainant made a complaint. After *Lillyman* the jury could hear the details of the complaint and the circumstances surrounding it. However the judge had the duty to impress upon the jury in every case that they were not entitled to use the complaint as evidence to prove the truth of the contents of the complaint.

A complaint could not corroborate the complainant's evidence because corroborative evidence must be independent of the witness whose evidence requires corroboration.[37] Evidence of a recent complaint merely supported the credibility of the complainant's evidence and in that way supported the consistency of the complainant's version of the facts. "The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that to which she complains."[38]

Evidence of recent complaint was not restricted to sexual offences where consent was in issue, it could also be relevant where consent was not in issue.[39] However if the complainant did not testify, no evidence of the complaint could be given, since there would be no evidence of the complainant to which the complaint could be consistent.[40] So, for example when a five year old child went into the witness-box but could not give evidence, it was held that the child's grandmother had been improperly allowed to give details of the complaint made to her by the child. It was also held that if evidence of the bare fact of a complaint being made had been given this would have been permissible.[41] But it was also argued that since the complaint could not be admitted as either evidence of the facts complained or as evidence of consistency, evidence of the complaint could only prejudice the accused. On this basis evidence of the complaint should be inadmissible.

The simple point of this discussion is that at the time the protections prescribed in section 2 of the *Crimes (Girls' Protection) Act* 1910 were enacted, the admissibility of recent complaints made by females complaining of sexual offences was already part of the court's armoury of procedure. This procedure was used to support the credibility of a class of testimony which was considered lacking in reliability.

Credit Impeachment

At common law at the beginning of the nineteenth century a complainant's bad general moral character and her prior sexual relations with the defendant were considered matters which were relevant to the issue of consent as well as a matter to determine the complainant's veracity and character as a witness.[42]

Where absence of consent was an element of the offence charged, evidence of the complainant's bad moral character and her prior sexual contact with the defendant were considered relevant and admissible to the issue of consent. Because consent was a fact in issue, evidence from other witnesses contradicting the answers given by the complainant

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36 *Lillyman*, above n31 at 171.

37 *Lovell* (1923) 17 Cr App R 163.

38 *Lillyman* above n31 at 171, *Kilby v R* (1973) 129 CLR 460.

39 For example in *Osborne* above n34 a 13 year old girl was alleged to have been indecently assaulted and consent was not material.

40 *Guttridge* (1840) 9 C & P 471.

41 *Wallwork* (1958) 42 Cr App R 153; see also *Lillyman* above n31 per Hawkins J at 178–9.

42 *R v Gibbons* 31 LJMC 98 at 99–100.

in cross-examination regarding her prior sexual history could be adduced by the defence.[43] Such evidence was admissible both as to the fact in issue that is consent, and to the complainant's credit as a witness.

Where the elements of a sexual offence did not include absence of consent (for example carnal knowledge), although questions in cross-examination which related to the complainant's sexual relations with other men were permitted, the defence was prevented from adducing additional evidence from other witnesses which contradicted the complainant's answers to questions asked in cross-examination (the finality principle).[44] The complainant's prior sexual history was regarded as a collateral issue thus evidence regarding that issue was only relevant to the complainant's veracity-credit as a witness.[45] Wigmore, writing at the beginning of the twentieth century, asserted that admissibility in this context is

> not because it is logically relevant where consent is not in issue, but because a certain type of feminine character predisposes to imaginary or false charges of this sort and is psychologically inseparable from a tendency to make advances, and its admissibility to discredit credibility ... cannot in practice be distinguished from its present bearing.[46]

The trial process for sexual offences at the time section 2 of the *Crimes (Girls' Protection) Act* 1910 were enacted, was summarised aptly in this way:

> [T]he defence in a rape trial was free to cross-examine about any prior sexual behaviour, whether with the defendant or with anyone else. [The complainant's] experience with any party was thought to be relevant to her credibility: the law of evidence seemed to reflect an assumption that women involved in rape cases were likely to be untruthful as a direct result of their sexual "immorality". Furthermore, any evidence that she was promiscuous, had a questionable sexual reputation or, indeed, that she was a prostitute was also admissible ... [This] gave the defence a virtually unconstrained licence to sling sexual mud.[47]

Thus, general traits of character raised by evidence of the prior sexual history of the complainant included whether the complainant had the *"habits of a prostitute"*.[48] In a trial where absence of consent was not an element of the offence, the finality principle prevented the answers given by the complainant in cross-examination being contradicted by other witnesses. The defence created in section 2 of the *Crimes (Girls' Protection) Act* 1910 relating to claims that the complainant was a prostitute or an associate of prostitutes made the assertion of prostitution or association with prostitutes a fact in issue. The 1911 amendment which inserted consent as an element of the 1910 defence consequently put

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43 *R v Clarke* (1817) 2 Stark 241, 171 ER 633 (NP); R *v Martin* (1834) 6 Car & P 562. 172 ER 1364 (Ass); *R v Riley* (1887) 16 Cox CC 191 (CCR).

44 *R v Cargill* (1913) 2 KB 271 a case where a defendant was charged with carnal knowledge. The complainant was cross-examined as to whether she had previously had connection with other men whose names were mentioned and also as to whether she was a "loose girl". The English Court of Appeal held that the judge had correctly prevented the defence from adducing evidence to contradict the complainant's denials.

45 *R v Cockroft*, 11 Cox 410; *R v Hodgson* (1812) Russ & Ry 211, 168 ER 765 (KB); *R v Holmes and Furness* (1871) 12 Cox CC 137 (CCR).

46 Wigmore, J H, *Evidence in Trials at Common Law* (1979) no 62 vol 1 at 466–467.

47 Adler, Z, "Rape — The Intention of Parliament and the Practice of the Courts" (1982) 45 *Mod LR* 664 at 666.

48 *R v Barker* (1829) 3 Car & P 589, 172 ER 558 (Ass); *R v Holmes* 12 Cox Cr 143 per Kelly CB "the associate of common prostitutes, and such evidence of general loose character".

consent in issue where such defence was argued. Accordingly the finality principle did not prevent the defence from adducing evidence from witnesses which contradicted the complainant's denials of prostitution or being an associate of prostitutes. The finality principle also did not prevent the defence from adducing evidence which contradicted the complainant's denials of bad moral character and prior sexual contact with the defendant since they were matters held to relate to consent.

Mandatory Warning to the Jury

The common law recognises classes of witnesses whose evidence could hold some inherent risk of unreliability. Judges were therefore charged with the duty to warn the jury of the dangers of acting on the uncorroborated evidence of those witnesses. Evidence given on oath by children of tender years, evidence given on behalf of the prosecution by accomplices of the accused and evidence given by complainants of sexual offences were the three judicially identified classes of witnesses who as a matter of practice judges were required to warn the jury about.[49] In *Spencer* Lord Ackner identified the rationale for these categories:

> In the three established categories where the "full warning" is obligatory, the inherent unreliability of the witness may well not be apparent to the jury. Hence the phrase often used in a summing up — it is the experience of the courts accumulated over many years etc. etc. Complainants of sexual offences do on occasions give false evidence for a variety of reasons, some of which may not have occurred to a jury... .[50]

The origin of the corroborative warning requirement for sexual offences is not clear. Writers in the seventeenth and eighteenth centuries referred generally to the unreliability of complainants of sexual offences. However, it was not until the late nineteenth and early twentieth centuries that a firm rule of practice emerged.[51] The warning was not based on the circumstances of the particular case. It was based upon the belief that, as a class, uncorroborated complainants in sexual matters were dangerous and unreliable witnesses.[52] The warning therefore developed explicitly to protect those accused of sexual offences from being unjustly convicted and there was no similar warning requirement in the case of the testimony of a complainant alleging non-sexual assault.[53] The warning requirement constituted a discriminatory generalisation upon the credibility of female complainants. Indeed the English Criminal Law Revision Committee in 1972 summarised some of the reasons for false accusations as being "sexual neurosis, jealousy, fantasy, spite".[54] This summary aptly typified the attitude of the courts to sexual complainants and was supported by the "scientific discoveries" of the early twentieth century.

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49 *Baskerville* [1916] 2 KB 658; *Davies v Director of Public Prosecutions* [1954] AC 378.

50 [1987] AC 128 at 141.

51 In *Hargan v R* (1919) 27 CLR 13 at 24 Isaacs J said that "the practice is well established as to have, as we said of the analogous case of accomplices, 'almost the reverence of a rule of law'".

52 Above n1 per McHugh J at 107.

53 Above n33 at 18.

54 Criminal Law Revision Committee, Eleventh Report on *Evidence* (general) (1972) Cmnd 14991.

Science, Sexual Precocity and Perspectives of Women in the early 20th Century

The defence and limitation period for prosecutions, created in the 1910 amendment, disclosed the legislature's desire to create a trade-off for the increase in the age of consent.[55] Identifying the fact that a trade-off was made, however does not explain the reason why a trade-off was thought to be necessary. An elaborate framework of protections for defendants charged with sexual offences existed. The "trade-off" created new and additional protections particularly for the benefit of those charged with prescribed sexual offences where the complainant was above fourteen and below sixteen years of age. This was despite the fact that it was acknowledged that no other serious offence at that time was known to have any period of limitation. What was it about girls in this age group that necessitated this special precaution?

Adolescence: A Dangerous Phase

It is sometimes claimed that adolescence was discovered in the nineteenth century.[56] A proliferation of writing about "youth" from around the 1890s onwards testifies to the increasingly common assumption that adolescence as a phase posed developmental problems, while adolescents as a group might well constitute something of a social problem.[57] Hall, a noted American author on the subject of adolescence in the early 1900s, maintained that the term had a very different meaning for females and males. For the boy, it was a time of ambition, growth and challenge. For the girl, it was a time of instability; a dangerous phase when she needed special protection from society. During adolescence, boys grew toward self-knowledge. Girls, on the other hand, could never really attain self-knowledge. This was because their lives were ruled by "deep unconscious instincts". Hall describes adolescent girls variously as "buds", "missies" or "coy maidens". He marshaled together testimony from doctors who believed puberty involved special hazards for the female sex. Such views subscribed to the physiological vulnerability of the adolescent female.[58] Hall's work was widely read in England as well as Australia and America. It provides an example of a growing consensus early this century amongst a wide range of groups — medical authorities, evolutionary thinkers, social psychologists and others — all of whom were keen to argue that adolescence constituted a period of extreme difficulty for girls.

In England the Board of Education commissioned a Report of (its) Consultative Committee on the Differentiation of the Curriculum for Boys and Girls Respectively in Secondary Schools.[59] This report suggested that menstruation for adolescent girls posed

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55 McKillop, B, "Case Note on *R v Saraswati*" (1992) 16 *Crim LJ* 186 at 189. This assertion is certainly supported by the Parliamentary debates for both the 1910 and 1911 amendments.

56 Demos, J and V, "Adolescence in Historical Perspective" (1969) 31 *Journal of Marriage and the Family* 632 at 632–8; Kett, J, "Adolescence and Youth in 19th Century America" (1971) 2 *Journal of Interdisciplinary History* at 283.

57 For example the mammoth tract on the "biological psychology" of the young: Hall, S G, *Adolescence: Its Psychology, and its Relation to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education* (1904).

58 Hall, G S, "The Budding Girl" (1911) in *Educational Problems* at 16; also discussed in Edwards, S, *Female Sexuality and the Law* (1981) at ch3.

59 Board of Education London HMSO, *Report of Consultative Committee on the Differentiation of the Cur-*

problems: "The periodic disturbances to which girls and women are constitutionally subject, condemn many of them to a recurring if temporary diminution of general mental efficiency".[60] With the onset of puberty, the calcium metabolism in females was believed to become unstable and a deficiency in calcium, it was suggested, might be considered at least partly responsible for the "greater nervous excitability of the female sex".[61]

Such theories gave the imprimatur of science to traditional Victorian views of women as weak, impressionable, emotional and erotically impassive.[62] These theories helped shape many writers' assumptions that by the time girls reached puberty the most promising time for shaping their character had long since gone.[63] Such a view in terms of the law and policy was translated into the notion that a class of adolescent females existed who were intractable and dangerous.[64]

The Medical Model and the Law

Historically, the law in relation to sexual offences identified the sexual behaviour of men as the primary focus of control. The exclusion of women from the array of unlawful sexual offences helped to enshrine the Victorian belief in female passivity.[65]

In the nineteenth century, women were typically considered to be totally without sexual motivation or feeling. This conviction was reinforced and developed by the medical profession. Women who displayed anything other than total sexual passivity and ignorance in relation to sexual matters were considered "sick". Working-class prostitutes were explained away by being sufferers of an over-production of male hormones and sometimes a genetic disturbance. Behaviour of "aberrant" middle-class women was explained in terms of suffering from a gynaecological disorder or a mental abnormality.[66]

The view that women of the upper and middle classes especially suffered from hysteria that often led to sexual aberrations found considerable support in the nineteenth century. Discoveries which asserted that virgins and gentlewoman were particularly prone to hysterical fits were made.[67] Sexual fantasies, delusion and hallucinations were thought to accompany hysteria. Assertions by women, of assault and rape, seduction or incest, were said to have arisen not from real events, but from either imagined sexual longings or from sexual excess. Savage in 1884 wrote:

> [A]mong younger women we occasionally meet with those who imagine that they have been injuriously affected by some men; and such will write compromising letters, or make

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riculum for Boys and Girls Respectively in Secondary Schools (1923).

60 Id at 86.

61 Id at 84.

62 Klein, D, "The Nature of Female Criminality" (1973) 8 *Iss Crim* at 3; Hoffman-Bustamante, D, "The Nature of Female Criminality" (1973) 8 *Iss Crim* at 117.

63 See Bronner, A, "Effect of Adolescent Instability on Conduct" (1915) 7 *Psychological Clinic* at 249; Paddon, M, "A Study of Fifty Feeble-Minded Prostitutes" (1918) 3 *Journal of Delinquency* at 1; Dorr, R, "Reclaiming the Wayward Girl" (1911) 26 *Hampton's Magazine* at 67; Mxcey, M, *Girlhood and Character* (1916).

64 For example Mercier, C A, *Sanity and Insanity* (1890) at 213 describes the period post-onset of menstruation as a "tumultuous revolution" and "a time of danger".

65 Edwards, S S M, *Female Sexuality and the Law* (1981) at 23–24.

66 Ibid.

67 See above n64 at 228.

> accusations against gentlemen, demanding satisfaction, or that their characters shall be cleared before the public.[68]

False accusation theories were not limited to upper and middle class women. Working-class women were thought to make allegations of a sexual nature out of malice, spite or for monetary gain. Their allegations were all the more morally culpable because they were thought to have a guilty intent.

From the mid-nineteenth century the belief in false accusation theories gathered increasing momentum. It was supported by the disciplines of medicine, psychology and legal jurisprudence. Eminent medical practitioners like Dr Tait, a gynaecologist and police surgeon in England asserted "I am perfectly satisfied that no man can effect a felonious purpose on a woman in possession of her senses without her consent".[69] He also described complainants as "vile conspirators and blackmailers".[70] Tait was also critical of the *Criminal Law Amendment Act* 1885 which raised the age of consent in England from 14 to 16, considering that it would result in a greater number of women bringing charges of sexual offences against men and it would increase the possibility of blackmail. Such assertions were later echoed in the New South Wales Parliament.

From the beginning of the twentieth century the burgeoning medical model of the false accusation theories gained sophistication with the assistance of psychiatry and psychoanalysis. In the early twentieth century psychiatrists stressed that psychiatric ideas and policies were the proper domain for the treatment of delinquency and crime. They argued that their expertise was relevant to particular areas of social reform. Psychiatrists in this period believed that mental defectiveness was at the root of such problems as crime, delinquency, poverty and insanity. The extensive overseas research of those like Krafft-Ebing[71] and Havelock Ellis[72] added an array of sexual fixations and practices to the debates about moral imbecility and psychopathology.[73] These were patients who suffered from a defect not of intelligence but of their "moral constitution". Eugenicists like Sir Charles MacKellar were attempting to redefine the old "dangerous classes" as the "defective classes", and psychiatric theories of predisposition provided a rationale for state intervention before social problems had manifested themselves. Such views were influential among doctors and a number of social reformers. MacKellar was one such reformer.[74] Delinquency and deficiency among girls who were believed to make false accusations of sexual abuse were now almost entirely diagnosed in terms of sexual "depravity".

Psychoanalysis made its contribution to the expatiation of stereotyping female behaviour. Freud's lectures given in 1915 and 1916 suggested that the former belief, that the source of female neurosis occurred at the "pubertal stage", was far less important to neurosis in females than the stage when infantile masturbation occurred.[75] Freud's reference highlights the fact that the age at which girls reached puberty was widely accepted as a

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68 Savage, G H, *Insanity and Allied Neuroses* (1884) at 258.

69 Tait, L, *Diseases of Women and Abdominal Surgery* (1889) at 56.

70 Tait, L, "An analysis of the evidence in seventy consecutive cases of charges made under the new *Criminal Law Amendment Act*" 13 *Provincial Medical Journal* 1 May at 226.

71 Krafft-Ebing, R von, *Psychosis Menstrualis* (1902).

72 Ellis, H, *The Criminal* (1st edn, 1890); (2nd edn, 1901); (3rd edn, 1907).

73 See Weeks, J, *Sex, Politics and Society* (1981) at 141–51.

74 Garton, S and MacKellar, C, "Psychiatry, Eugenics and Child Welfare in New South Wales 1900–1914" (1986) 22 *Historical Studies* 21 at 28.

75 Freud, S, "The Psychology of Women" (1946) *New Introductory Lectures* at 169.

time at which many females became neurotics. Freud also referred to the accepted view that there was a significant and real distinction between the roles of the sexes — the male being sexually active and the female being passive.[76] Freud, in fact, did not totally support this. He did however support what I have referred to as the false accusation theories. Freud maintained that hysterical and neurotic women manifest symptoms of sexual delusion and fantasy, which were often the result of jealousy and imagined events. Many female patients reported to Freud that they had been sexually assaulted by their fathers. Freud's response was "I have been driven to recognise in the end that these reports were untrue and so came to understand that hysterical symptoms are derived from phantasies and not from real occurrences".[77]

Medico-Legal Jurisprudence and Sexual Assault Complainants

The belief that women might bring false allegations of sexual complaints was also fostered by medico-legal jurisprudence from the beginning of the twentieth century. Poore asserted in 1901 that it was quite common for female patients to make false accusation of sexual impropriety about their doctors and dentists. He presented such complainants as sufferers of a form of insanity.[78] Arnold similarly asserted that such complainants made false allegations, though conceded that women "sometimes really [do] believe subsequently that she did not consent to sexual intercourse at the time".[79]

In 1902 the 5th edition of Wills' "essay" on *The Principles of Circumstantial Evidence* explained[80] in a passage introduced by the editor "there is often very great temptation to a woman to screen herself by making a false or exaggerated charge, and supporting it with minute details of evidence of a kind, which the female mind seems particularly adapted to invent".

Professor Gross, a police magistrate and professor of law, in 1911, believed that many women were hysterics and liars. His published work warned the judiciary to be cautious about the female's lack of credibility.[81] He also asserted that the onset of the menstrual cycle in young women gave rise to particular concern regarding false accusations about sexual offences. This was the same kind of assertion made by many gynaecologists and medical practitioners of the 1890s.

An indication of Gross's conviction regarding the validity of the false accusation theories is his taxonomy of female types according to their tendency to bring false charges. He wrote:

> It is important for us to know that menses begin, in our climate, from the thirteenth to the fifteenth year ... Never is a girl more tender or quiet, never more spiritual and attractive, nor more inclined to good sense, than in the beginning of puberty, generally a little before the menstrual periods have begun, or have become properly ordered ... Unused spiritual qualities, ennui, waking sensitivity and charm, make a dangerous mixture, which is expressed as a form of interest in exciting experiences, in the romantic, or at least the unusual. Sexual things are perhaps wholly, or partly not understood, but their excitation is

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76 Freud, S, *New Introductory Lectures* (1974) at 115.

77 Above n75 at 154.

78 Poore, G V, *A Treatise on Medical Jurisprudence* (1901) at 321.

79 Arnold, G F, *Psychology Applied to Legal Evidence* (1906).

80 Edited by the late author's son who was at the time the senior puisne judge of the Kings' Bench Division at 364.

81 Gross, H, *Criminal Psychology for the Judiciary and Legal Practitioners* (1911).

> present and the results are harmless dreams of extraordinary experiences. The danger in these, for from them may arise fantasies, is insufficiently justified principles and inclination to deceit. Then all the requirements are present which give rise to those well-known cases of unjust complaints, false testimony about seduction, rape, attempts at rape and even arson, accusing letters and slander.[82]

Probably one of the most influential and eminent jurists of his time was John Henry Wigmore. His work on evidence and the criminal law has an influence up to the present day. Wigmore's reference to complainants of sexual offences for this discussion is interesting not so much for the proposals he made, but for the psychiatric studies he used to support his views. Wigmore's views were made in a period later than 1910. However they were initiated and developed with values which were in existence at the time the *Crimes (Girls' Protection) Act* 1910 was debated and passed.

Wigmore cited Dr Wm Healy and Mary Tenney Healy's case summary account of *Pathological Lying, Accusation, and Swindling* published in 1915. It provides an example of a typical form of categorising of young women who alleged that they were victims of sexual offences.

> A girl of 13 during the last year or more had been lying excessively and in uncalled-for ways. She also obtained money by misrepresentation and had made false charges of sexual assault against a stranger. To be thought of as causative factors were defects of environment and possibly heredity, marked imperfect vision, improperly obtained sex knowledge, and a distinct mental conflict.[83]

Such "psychiatric evidence" was used by Wigmore to support this assertion:

> There is, however, at least one situation in which chastity may have a direct connection with veracity, viz when a woman or a young girl testifies as complainant against a man charged with a sexual crime — rape, rape under age, seduction, assault. Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man.[84]

Wigmore concluded by proposing that all sexual complainants should be the subject of a psychiatric examination and a report of such examination should be admissible at the trial. This proposal was hardly original, it had been touted in both the English and New South Wales Parliaments some ten or fifteen years before.

I have argued that women in general and pubescent girls in particular presented what would seem, in view of the literature written at the end of the nineteenth and the beginning of the twentieth centuries, a significant threat to men. Science, during this period,

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82 Id at 313.

83 Healy, W and M, *Pathological Lying, Accusation, and Swindling*, c4 Cases of Pathological Accusation, 172 1915 Case 14 cited in Wigmore, J H, *Evidence in Trials at Common Law* vol 2 (1979) IIIA para 924a at 740.

84 Wigmore, id at para 924a at 736. He proposed that complainants in sexual offences cases should undergo a psychiatric examination and a report of this examination should become evidence in the trial.

confirmed that the female gender was prone to make false accusations of sexual offences. Perhaps this is why section 2 of the *Crimes (Girls' Protection) Act* 1910 proposed such a wide range of protections for defendants in addition to those which already existed within the framework of the trial process. The reason for the "trade-off" seems clear — to pacify those who accepted the conventional wisdom advocated by eminent scholars such as Wigmore and Freud.

In view of the existing protections in the trial process, an observer from a later era could reasonably comment that the additional protection of a limitation period suggests that an hysteria of its own existed in the first decade or two of the twentieth century. Such hysteria did not evaporate quickly. In the course of the twentieth century the false accusation theories remained and seem to have been affirmed by later scholars and commentators. Wigmore's views also continued to have currency. A cursory review of legal texts after 1920 certainly supports this. For example, a contribution to a 1970 Crime and Criminology text reveals the following extract. The assertions contained within it were supported by the then current literature regarding psychiatric analysis:[85]

> In sex offences, what often times appears, on the surface, to be a convincing story is often pure fabrication ... Many victims are nothing more than aiders and abettors, if not offenders themselves, and should be examined psychiatrically along with the offender ... .[86]

Indeed in the very recent case of *R v Muhs*[87] a Justice sitting in the New South Wales Court of Appeal, said:

> I have in purely subjective terms a feeling of anxiety and discomfort about the verdicts of guilty that were returned against the present appellant. I have those subjective qualms because, again broadly speaking, of two related factors.
>
> First, and as has been recognised consistently by authorities as old as Hale's Pleas of the Crown, a complaint of sexual assault: "is an accusation easily to be made and hard to be proved, and harder to be defended by the party concerned, though never so innocent". [as quoted by Barwick CJ in *Kelleher v The Queen* (1974) 131 CLR 532 at 543] Immediately after the passage just cited, Barwick CJ goes on to quote with approval the statement of Lord Salmon in a 1968 decision,[88] that "human experience has shown that in these Courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute"... When ... an allegation of child sexual abuse is wholly uncorroborated, it must be, in my opinion, a matter of anxious concern to this Court that a miscarriage of justice might have occurred.

This extract shows that around 1970 the false accusation theory regarding the testimony of women and pubescent girls in sexual offences cases was not only validated by legal texts but by the High Court of Australia. It also illustrates how the validation of medico-legal jurisprudence can be perpetuated by like minded members of the judiciary[89] even into the 1990s.

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85 Machtinger, F S J, "Psychiatric testimony for the Impeachment of Witnesses in Sex Cases" (1949) 39 *J Crim LC & PS* 750; Ehrmann, W W, *Premarital Dating Behavior* (1959); Bender, L and Blau, A, "Reaction of Children to Sexual Relations with Adults" (1937) 7 *Am J Ortho* at 500; Bender, L, "Offended and Offender Children" in Slovenko, R (ed), *Sexual Behavior and the Law* (1965) at 687.

86 Schultz, L E, "The Victim-Offender Relationship" in Knudtem, R D (ed), *Crime, Criminology and Contemporary Society* (1970) at 142–143.

87 A case where the appellant was charged with various sexual offences against his thirteen year old daughter, (unreported) 12 May 1993 [CCA 60174/92] per Sully J at 32.

88 This decision was *R v Manning*; *R v Henry* (1968) 53 Cr App R 150 at 153.

89 In *Muhs* above n87 Cripps JA (Finlay J agreeing) explicitly expressed disagreement with the views ex-

More Recent History

In 1981 major changes were made to the law relating to sexual offences in New South Wales. The common law offence of rape was abolished. It was replaced by sweeping changes to the *Crimes Act* 1900 (NSW), with a series of offences based on differing degrees of seriousness. The offences created by the 1981 reforms by virtue of the *Crimes (Sexual Assault) Amendment Act* 1981, sought to emphasise "the violent rather than sexual component of the offence".[90] In recognition of this aim the term sexual assault rather than rape was used. These offences broadened the definition of sexual intercourse.[91]

What has been referred to as the framework of protections in the trial process were changed and modified. Restrictions were introduced to limit the scope of matters on which the victim-complainant could be questioned. Section 409B(2) of the *Crimes Act* 1900 (NSW) for example, prohibited the introduction of any evidence relating to the sexual reputation of the complainant and section 409B(3)-(8) limited the circumstances in which evidence of the complainant's prior sexual experience could be raised. Section 405B modified the law in relation to "recent complaint", requiring that the jury be warned that the absence of or delay in making a complaint does not indicate that a false complaint is being made and that such delays may occur for "good reasons". This modification was said to recognise "the reluctance of many victims to report sexual assault" and was designed to ensure that "genuine victims should not be deterred from coming forward and reporting offences".[92] Section 405C was also introduced. It dispenses with the mandatory duty by judges developed through the common law to give a corroboration warning where a prescribed sexual offence was charged. In such cases the warning requirement became a matter of discretion.

The rationales for the changes made in 1981 were:

> [T]o protect victims of rape from further victimisation under the legal process; to encourage rape victims to report offences to the authorities; to facilitate the administration of justice and the conviction of guilty offenders; [and] at the same time, to preserve the rights of the accused; and to serve an educative function in further changing community attitudes to sexual assault.[93]

However the important changes made in the 1981 legislation did not specifically address the situation of children and the benefits of these reforms was not extended to child sexual assault cases until 1986. On 23 March 1986 the *Crimes (Child Assault) Amendment Act* 1985 came into force. The Act introduced a new range of sexual offences against children which generally applied to both male and female children. It abandoned the use of the term carnal knowledge and replaced it with the definition of "sexual intercourse" introduced by the 1981 amendments.[94] The Act abolished for "prescribed sexual offences" the

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pressed by Sully J which has been extracted.

90 NSW Government Violence Against Women and Children Law Reform Task Force, *Consultation Paper July 1987* at 2.

91 Sections 61B, 61C and 61D included vaginal intercourse, and intercourse, fellatio, cunnilingus, the insertion of objects and parts of the body, into the anus or vagina and the continuation of sexual intercourse. L'Orange, H and Egger, S, "Adult Victims of Sexual Assault: An Evaluation of the Reforms" (1987) 71 *Proceedings of the Institute of Criminology: Sexual Assault Law Reform in the 1980s: To Where From Now* at 13.

92 L'Orange et al id at 14.

93 Above n90.

94 Section 61A of the *Crimes Act* 1900 (NSW).

requirement identified in section 418 of the *Crimes Act* 1900, that an accused person could not be convicted on the unsworn uncorroborated evidence of a child. It brought sexual offences against children into line with sexual offences against adults by extending to child complainants the provisions of sections 405B, 405C and 409B where the defendant was charged with a prescribed sexual offence.[95] It is to be noted that not all sexual offences are prescribed.

For those offences which are not prescribed the provisions of sections 405B, 405C and 409B have no application. In the recent New South Wales Court of Criminal Appeal decision of *R v VCH*, while discussing the application of section 405C, Smart J (Kirby P and Carruther J agreeing) said:

> The *Crimes Act* makes it clear that only some sexual offences are to be regarded as prescribed sexual offences ... The offences of carnal knowledge and homosexual intercourse (and attempts) created by ss73, 74 and ss 78N, 78O involve the offender being a schoolmaster, other teacher, or father or step father. None of these is a prescribed offence... The legislation appears to have recognised that the persons in the relationships mentioned will inevitably have a lot of contact with the child involved and are specially vulnerable to allegations of offences. Hence there is no abrogation of the requirement for a warning. This makes good common sense. I would not suggest that there should be any change.[96]

The *Crimes (Child Assault) Amendment Act* 1985 also repealed the defence (contained in section 77) which applied where the complainant was shown to the court to be a prostitute or an associate of prostitutes. Section 77 nowadays provides a defence to certain sexual offences[97] where the complainant to which the charge relates is over fourteen year of age, consented and the accused had reasonable cause to believe that the complainant was over sixteen years of age. In the face of this process of modernising New South Wales legislation relating to sexual offences the section 78 limitation period remained more or less[98] unchanged and in force until March 1992, when it was finally repealed.

The High Court of Australia decision in *Saraswati v R*[99] precipitated the repeal of the section 78 limitation period for prosecuting certain sexual offences. Saraswati was convicted on three charges under section 61E(2).[100] The Crown relied on evidence which established indecent assault under section 61E(1)[101] for two charges (that the applicant had touched the complainant's breasts, buttocks and vagina) and evidence establishing carnal knowledge of a girl under sixteen years under section 71. Section 78 of the *Crimes Act* 1900 (NSW), however, prohibited a prosecution after twelve months from the time of the commission of the alleged offences for charges brought under sections 71 and 61E(1). No such limitation affected charges brought under section 61E(2). The Crown had been driven to charge the applicant under section 61E(2) because the prosecution had not been commenced until more than twelve months after the alleged conduct in question had taken

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95 The substance of this paragraph is based on Byrne, P, "Child Sexual Assault — Law Reform Past and Present" (1987) 71 *Proceedings of the Institute of Criminology: Sexual Assault Law Reform in the 1980s: To Where from Now* at 44–45.

96 (Unreported) 11 September 1992 [CCA 60366/91] at 27–28.

97 Sections 61N, 61O, 66C, 66D, 61L and 61M.

98 It did experience minor tinkering by omitting and including different prescribed offences.

99 (1991) 172 CLR 1.

100 That is "an act of indecency with or towards a person under the age of 16 years".

101 Section 61E(1) relates to a combined assault and an "act of indecency".

place. The Crown therefore sought to avoid the statutory prosecution bar contained in section 78 by charging the applicant with the less serious offence of committing an act of indecency (section 61E(2)).

After the New South Wales Court of Criminal Appeal unanimously dismissed the applicant's appeal, he appealed to the High Court, arguing that an "act of indecency" contained in section 61E(2) should be interpreted to exclude the offences contained in sections 61E(1) and 71. The appellant argued that if this distinction was not made the Crown would be able to evade the limitation period imposed by section 78.

By a majority of three to two[102] the High Court allowed the appeal and ordered verdicts of acquittal on all three charges. The majority and minority judgments essentially disagreed about the interpretation of how the legislative provisions were constructed.

McHugh J (Toohey J agreeing, Gaudron J agreeing in substance) adopted the rule of construction that "when a statute specifically deals with a matter and makes it the subject of a condition or limitation, it excludes the right to use a general provision in the same statute to avoid that condition or limitation".[103] Thus, because sections 61E(1) and 71 were affected by a limitation period, the term "act of indecency" could not be interpreted in the same way as the term contained in section 61E(2) because this would allow the limitation period to be avoided.

McHugh J (Toohey and Gaudron JJ agreeing) also considered the history of section 61E(2) and concluded that its predecessor was enacted to create offences which were different from offences under section 61E(1). Though the term "act of indecency" was common to both sections 61E(1) and 61E(2) the term in each section had a different meaning.[104] "This means no more than that nothing can be charged under section 61E(2) which could be charged under sections 61E(1) and 71 or 72."[105]

Deane and Dawson JJ essentially interpreted the construction of the legislative provisions in terms of degrees of seriousness that is "that sexual offences were progressive rather than mutually exclusive".[106] The more serious offences of carnal knowledge (section 71) and assault before or after or at the same time committing an "act of indecency" section 61E(1), included the elements of the less serious offence of committing an "act of indecency" section 61E(2)).

Section 78 provided an enigma for Deane J who asserted that "it is all but impossible to discern any coherent legislative purpose underlying s.78"[107] and Dawson J who was unable to decide upon the legislative purpose of section 78 dismissed the enigma by saying "whatever the reason".[108] McHugh J (Gaudron J agreeing) alerted the legislature to the implications of section 78 by pointing out that the construction, which was favoured by the majority of the High Court:

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102 McHugh, Toohey and Gaudron JJ (Deane and Dawson JJ dissenting).

103 Above n99 per McHugh J at 23.

104 Id per McHugh J at 26. The offence created in s61E(2) covered the situation where the indecency with a girl under 16 years does not amount to an assault on her such as in the case of *Fairclough v Whipp* (1951) 35 Cr App R 138.

105 *Saraswati* id per McHugh J at 27.

106 Above n55 at 187.

107 Above n99 per Deane J at 6.

108 Id per Dawson J at 16.

> [M]ay lead to the situation where an accused person, charged under s.61E(2), will seek to be acquitted by proving or asserting that he was in fact guilty of an indecent assault on or sexual intercourse with the complainant. But this is the result of Parliament prohibiting any prosecution for an offence under ss.61E(1), 71 or 72 after the expiration of twelve months from the commission of the offence. It is not only those prosecutions where the accused denies the offence that are prohibited after the expiration of that period.[109]

The legislature in fact was moved by the High Court decision in *Saraswati*. The *Crimes Legislation (Amendment) Bill*[110] contained a provision which repealed section 78. The second reading speech in the Legislative Council referred to some matters which the High Court had neglected to mention:

> Section 78 of the *Crimes Act* 1900 currently provides a 12 month time limit for commencing prosecutions in respect of offences under sections 61E(1), 66C, 71 72 and 76, where the child upon which the offence was alleged to have been committed was, at the relevant time, over the age of 14 years and under the age of 16 years. An unreported(sic) High Court decision of 5th June 1991, in *Saraswati v R* has highlighted significant problems which can result from the operation of this section. The historical basis of the section was to protect the accused by limiting the time for commencement of certain sexual assault prosecutions to six months after the date of the offence. This was designed to prevent the possibility of a complainant blackmailing an innocent man. The time limit was later extended to 12 months. As we are aware, there may be many reasons why a victim might fail to complain within 12 months of the offence. Often too victims will not initially disclose all of the offences that have occurred, but may do so over a period of time ... To allow offenders to avoid prosecution because of the lack of early complaint of a child of 14 years or over is therefore unjustifiable, and section 78 will be repealed under this bill.[111]

It is interesting that the New South Wales parliament stated that the fear of blackmail was the reason for the creation of the limitations period. Historical investigation reveals, however, that this was only part of the reason. I have argued that the main reason behind protections like the section 78 time limitation period was the wide spread perception that women in general and pubescent girls in particular were likely to make false accusations regarding sexual offences. The construction of femininity created by folklore, medico-legal jurisprudence and the law was at the heart of such protections sought by men. Optimists (both men and women) in 1993 might argue that the repeal of section 78 is a concrete illustration that the "traditional" construction of femininity is in demise. The realists however would point out that the section 78 limitation period was operative until 1992 and that some members of the Australian judiciary still accept the validity of those stereotypical behaviour traits associated with women.

Concluding Comments

An interesting irony in this tale is to recall one of the main reasons for creating, what became the section 78 limitation period, as well as what became the section 77 defence. That main reason was to "protect" young men from the implications of increasing the age of consent of female complainants of sexual offences. Section 4 of the *Crimes (Girls' Protection) Act*

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109 Above n105.

110 Which became the *Crimes Legislation (Amendment) Act* 1992.

111 The Hon R J Webster (Minister for Planning and Minister for Energy) on behalf of the Hon E P Pickering, Parliamentary Debates, 6th March 1992, Legislative Council at 696.

1910 provided for a mitigated penalty for certain offences committed by male youths on consenting female youths. It was not incorporated in the *Crimes Act* 1900 or any amending Acts.

The *Crimes Act* 1900 has never provided specific protections for youths between the age of sixteen to eighteen against sexual offences committed upon consenting girls between the age of fourteen and sixteen. Indeed the *Crimes Act* nowadays does not contain any section which explicitly protects or mitigates the penalty for sexual offences committed by male youths on consenting female youths. To this day, therefore, no specific provision exists to cover non-exploitative experimental sexual experiences between youths (both female and male).

A proposal was made by a New South Wales Government Law Reform Task Force[112] in 1987 to amend the *Crimes Act* to provide a defence to a charge of having intercourse with a person between the ages of twelve and sixteen when there was no more than two years age difference between the alleged offender and the alleged victim and both parties consented to the intercourse.[113] The Task Force Consultation Paper pointed out that the Victorian *Crimes Act* 1958 had such a defence contained in section 48(4). This proposal however was withdrawn from consideration by the Premier of New South Wales in July 1987. It would seem that the issue was too controversial to allow public discussion of the matter. The irony is that the rhetoric of the parliamentary debates in 1909 and 1910 suggests that such a defence or "protection" would probably have been enacted in 1910 or 1911 and it would have entrenched a realistic recognition of sexual experimentation by consenting young people.

The New South Wales Parliament in 1910 might be forgiven for having a much broader protection in mind. Medico-legal sanctioned misogyny was undoubtedly very influential in the early part of the twentieth century. However the fact that the limitation period was allowed to survive in New South Wales until 1992 is harder to understand or to forgive. Those jurisdictions which retain a similar provision must act immediately to abrogate it. The fact that it survived for so long in New South Wales is, however, confirmation of the continued acceptance of the validity of the "false accusation theory" in regard to womens' testimony and provides evidence that the archaic comments made by some members of the judiciary recently are more than mere aberrations.

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112 Above n90 at 18–19.

113 It was also proposed that the defence should be extended to the relevant attempt offences.