## sexual assault in nsw

*nsw seminar.* A seminar entitled *Sexual Assault Law Reform In the 1980s: To Where From Now?* was conducted by the Institute of Criminology, Sydney University Law School on 18 March 1987. The seminar, chaired by Sir Laurence Street, Chief Justice of New South Wales, heard the presentation of three papers followed by general discussion. Ms Helen L'Orange, Director, Women's Coordination Unit, NSW addressed the seminar from her paper, co-authored by Sandra Egger, Ministerial Adviser to the Premier, entitled *Adult Victims of Sexual Assault: An Evaluation of the Reforms.* She concluded that:

> There are still areas where previously identified problems continue and new problems have emerged . . . law reform is not a 'once and for all' exercise. There is a demonstrated need for continued vigilance in the monitoring of the operation of the law.

Ms L'Orange said that there were 'three contentious areas that the New South Wales reforms did not modify in any substantial way', namely, 'the area of consent, the mental element and the unsworn statement'.

*unsworn statement.* In connection with the unsworn statement, Ms L'Orange proposed that:

> If such a procedure is felt to be unfair to victims of sexual asault then perhaps the direction for the future should be to consider ways in which the victim may have a similar opportunity, rather than deprive accused person's of the right. Consideration should also be given to more carefully regulating the type of statements made in the unsworn statement.

*v and d's beliefs.* In relation to the issue of consent, the Director concluded that 'the case for law reform and direction of reform requires further study'. As for reformulating the present subjective test in proof of the mental element, along lines importing some objective element in support of the reasonableness of the defendant's belief, where contended, that the victim consented to the act/s in question at the relevant time/s, Ms L'Orange submitted that:

> In practice, the evidentiary burden imposed by the subjective test requires the accused to adduce some reasonable evidence of belief, although the belief is not required to be reasonable. This evidentiary requirement has a statutory footing in England. Consideration should perhaps be given to amending the New South Wales provisions along the lines of the English provision to clarify this requirement.

Mr Paul Byrne, Commissioner, NSW Law Reform Commission spoke to the seminar from his paper entitled *Child Sexual Assault - Law Reform Past and Future.* After describing the law and law reform efforts prior to 1985, Mr Byrne identified several matters for consideration in future reform work.

*videotaping the statement of child victims of sexual assault.* Mr Byrne drew attention to the following advantages of having a videotaped form of the child's statement:

- the use of videotape allows the child's evidence to be preserved whilst recollection of the events in question is still fresh;
- it would spare the child witness the ordeal of having to recount the facts on a number of occasions;
- the videotape recording is valuable aid to both the prosecution and the defence in the preparation of a case for trial;
- the use of the videotape recording will, in many cases, convince an accused person of the fact that the

child has made a complaint and encourage an admission of guilt and the consequent avoidance of distress for all those concerned in the trial process;

- from the point of view of the accused person, the videotape recording can be used to check whether the child's version of events was unfairly prompted by improper questioning; and
- if the interview is conducted by a properly trained examiner, a complete record of relevant material in admissible form may be obtained.

*exception to hearsay.* Connected with the use of video taped statements in later court proceedings, Mr Byrne further proposed that an exception to the hearsay rule be created 'so that when a child gives evidence that an earlier recording of his or her statements was made, then the earlier statement should be received as evidence'. He said that:

> There does not seem to me to be any argument of logic or fairness which should prevent the statement of a child which has been recorded on videotape equipment being admissable in later court proceedings. This general rule should be subject to certain conditions, namely that the statement was reasonably contemporaneous with the event in question and was not induced by suggestion. It is also necessary in the interests of fairness that the admissibility of the videotape recording should be conditional upon the child being called as a witness and being liable to cross-examination. [As for an alternative mode of testimony and cross-examination see Mr Byrne's suggestion of a closed circuit television procedure below.]

Mr Byrne partly supported his proposal for a hearsay exception by reference to the ALRC's interim report on evidence.

> This proposal is consistent with the general line of reasoning adopted by the Australian Law Reform Commission when it tentatively recommended that if hearsay evidence is the best evidence available and can be shown to have reasonable guarantees of reliability, it should be admissable. This proposal would permit hearsay evidence to be received if it was made when the facts were 'fresh' in the memory of the child making it.

*closed circuit tv.* In consideration of reducing the intimidation of child victims in court proceedings in relation to sexual assault, Mr Byrne raised the possibility of introducing closed circuit television procedures. After briefly describing American and English experiences he submitted that:

> The likely prejudice caused to an accused person by procedures of this kind are their greatest drawback. If such a procedure is to be considered here, my own view is that it should be used in all cases and not restricted to those where the child is considered to be at risk. The fact that the procedure is a standard one should reduce the prejudicial impact its use may otherwise have.

*inducements to plead guilty.* In addition to the pre-trial diversion scheme that is shortly to become operative in NSW, Mr Byrne identified, without necessarily agreeing with, additional means of encouraging guilty pleas, including:

- permitting the trial judge to give a 'sentence indication' (a practice used in England);
- flat rate discounts on sentences.

The remaining matters identified in Mr Byrne's paper for possible future law reform attention included:

- the abolition of committal proceedings;
- a defence of proximate age;

- homosexual anomalies – whereby the age of consent is 16 years for heterosexuals and 18 years for male homosexuals;
- penalty guidelines on offences of wide definition;
- reorganisation and reclassification of offences;
- offences in company;
- accelerated prosecution;
- victim issues: reasons for no bill, involvement in 'plea bargaining';
- judicial control on cross-examination;
- anatomical dolls (as evidential aid in child victims' testimony); and
- private prosecutions.

## high court rules in favour of closed worship

In the recent decision of *The Council of the Municipality of Canterbury v The Moslem Alawy Society Limited* the High Court spoke out strongly in favour of freedom of worship.

*place of worship.* The Society, a small Islam sect with Syrian origins, converted a dwelling house in the Sydney suburb of Punchbowl for use by the neighbourhood congregation as a place of worship. The premises are open only to members of the Society, all males, and their sons over the age of 13 years. The Society has approximately 65 members.

The Society had to obtain permission from the local Council to use the premises as a 'place of public worship', defined in the Ordinance as 'a church, chapel or other place of public worship or religious instruction or place used for the purpose of religious training'. As the Court observed, that definition is partly circular.

*interpretation.* Canterbury Council had refused to consent, taking the view that places of public worship have to be open to the public generally. It was the Council's submission that 'place of public worship' was not practically different from 'public place of worship'.

The court rejected the Council's restrictive interpretation, taking what it regarded as an ordinary commonsense approach. 'Public worship' was to be distinguished from private or domestic worship 'in the sense of not being within the privacy of "the closet" or within the confines of close family'. This distinction between congressional and private or domestic worship could be traced back as early as a 1593 English statute and the later Conventicle Acts of 1664.

*wider meaning.* The Court was undeterred by arguments that this same term had been given a more restricted interpretation in other legislation, most notably exemption provisions in rating statutes. The court quite firmly disposed of any argument from analogy with the view that 'the considerations of context and policy which might be relevant . . . in an exemption clause in rating legislation are plainly different from those which are relevant in determining the meaning of the phrase in planning legislation.'

It was thus, in the view of the High Court, irrelevant for the purposes of a planning scheme Ordinance that the Society restricted attendance to their members.

To follow the Council's interpretation, the Court said, would lead to the absurd result that the use of premises as an open cathedral in a residential area would be permitted notwithstanding the 'regular attendance of thousands of worshippers, while use of premises as a closed church or chapel to which the members of a small local congregation came to worship together was absolutely prohibited.'

The court concluded with a stern rebuke that the effect of the Council's con-