

The Law Commission

(LAW COM. No. 205)

CRIMINAL LAW

RAPE WITHIN MARRIAGE

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RAPE WITHIN MARRIAGE

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THE LAW COMMISSION

Item 5 of the Fourth Programme

RAPE WITHIN MARRIAGE

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1 In October 1990 the Commission published a working paper¹ reviewing the rule of the common law that, except in certain particular circumstances, a husband cannot be convicted of raping his wife. In the working paper we said that we had reached the provisional conclusion that that rule should be abolished in its entirety. That conclusion was supported by the large majority of those commenting on the working paper.²

1.2 During the course of our work the question of whether this "marital immunity" still exists in the law of England and Wales was ventilated on a number of occasions in the courts. Those cases culminated in the decision of the House of Lords on 23 October 1991 in the case of *R v R* "that in modern times the supposed marital exemption in rape forms no part of the law of England".³ The House upheld the decision in the same sense by a five-member division of the Court of Appeal (Criminal Division), which had held, in a judgment delivered by Lord Lane CJ, that

"the husband's immunity . . . no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."⁴

1.3 As we pointed out in the working paper,⁵ it has long been recognised on all sides that the reason given in *law* for the marital immunity, Hale's dictum that between married partners "by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband which she cannot retract",⁶ is wholly unsupportable. Whilst it may be understandable that Hale was led to this conclusion by the state of the law with regard to marriage, and to the position of women generally, that existed at the time when he was writing, we demonstrated in the working paper⁷ that in the present-day law the legal implications of marriage are quite different from the assumptions on which Hale relied.

1.4 The House of Lords, in *R v R*, emphasised this aspect of Hale's statement as an important consideration leading them to the conclusion that it did not now represent the law, and that the marital immunity originally founded on that statement is equally no longer the law:

"the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable."⁸

¹ Working Paper No. 116, referred to hereinafter as "the working paper".

² A list of the individuals and organisations who commented on the working paper is set out in Appendix D to this report.

³ [1991] 3 WLR 767.

⁴ [1991] 2 WLR 1065, 1074B-C.

⁵ At paras. 4.1-4.2.

⁶ Hale, 1 PC 629.

⁷ Paras. 4.3-4.10.

⁸ [1991] 3 WLR 767, 770E-G.

1.5 The House thus concluded that, even though Hale's statement was once regarded as an accurate statement of the common law of England, the common law is "capable of evolving in the light of changing social, economic and cultural developments".⁹ The same view had been taken by the High Court of Justiciary in Scotland in the case of *S v HM Advocate*¹⁰ where, in reasoning that the House of Lords in *R v R* considered to be in substance no less valid in England than in Scotland, Lord Emslie said that

"A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances."¹¹

1.6 In the House of Lords' speeches, the changed legal status of women is the main consideration cited as justifying a change in the law of rape. The House however goes further than merely saying that the Hale dictum no longer represents the law. The decision in *R v R* in effect accepts that there is no possible legal view of marriage, whether expressed in the extreme terms adopted by Hale or in some more limited form, that could justify the retention of the marital immunity in rape. An understanding of the legal implications of marriage is thus very important both in appreciating the legal reasoning that led to the decision in *R v R*, and in assessing, from the point of view of policy, the abolition of the marital immunity. We have therefore set out in Appendix B to this report an account of the major changes in the legal effects of marriage, and the legal status of married women in particular, which have taken place since Hale's time.

1.7 The decision of the House of Lords in *R v R* has been widely welcomed, not only by commentators, but also by the government.¹² It clearly represents the present law of England and Wales, and in this report we confirm the provisional conclusion that we reached in the working paper, that the marital immunity should be entirely abolished: in other words, that there should be no change in the law that the House of Lords has now declared. We nonetheless think it important that we should complete our work by reporting on our enquiries, and on the grounds that have led us, independently, to the conclusion that the outcome reached by the House of Lords should be expressed in statutory form. There are four reasons for that approach, which are reflected in the separate chapters of the report that follow.

1.8 First, as we have already pointed out, it has been long recognised that the reason given in law for the marital immunity, the dictum of Hale, cannot be supported. Accordingly, recent discussions of whether, as a matter of policy, the marital immunity should be retained, including the discussion by the Criminal Law Revision Committee ("the CLRC") in its report on the subject in 1984,¹³ have concentrated not on the Hale dictum or on the way in which the courts have subsequently handled that dictum, but rather on a series of considerations of social and legal policy.

1.9 These arguments have concerned two, somewhat intermingled, types of issue: first, the consistency of the marital immunity with the modern law of, and attitudes to, marriage; and, second, more general issues of policy, including a number of practical problems that would allegedly arise if there were an unqualified law of marital rape. As we have pointed out above, the House of Lords in *R v R* founded itself on considerations falling into the former category. There remain, however, the more general issues of social and legal policy, which were discussed in Part IV of the working paper: their conclusions on some of those questions, it will be recalled, having led the CLRC to conclude as recently as 1984 that the immunity should be removed where the husband and wife were not cohabiting, but not otherwise.¹⁴ These issues were seen by the CLRC, and by the respondents to our working paper, as of substantial importance in determining the policy issues as to what the law on this difficult subject ought to be; but it is no criticism of the courts either in *R v R* or in any other of the recent cases to say that such issues lend themselves much more readily to discussion in the course of a law reform enquiry such as

⁹ *Ibid.*, at p. 770D.

¹⁰ 1989 SLT 469. The case is considered in detail at pp. 130-133 of the working paper.

¹¹ 1989 SLT 469 at p. 473, a passage cited by the House of Lords: [1991] 3 WLR 767, 771-2.

¹² In a press statement the Minister of State at the Home Office, Mr John Patten MP, indicated his support for the House of Lords' decision, and stated that he was now awaiting the final report of the Commission.

¹³ Fifteenth Report, *Sexual Offences*, Cmnd 9213.

¹⁴ Fifteenth Report, para. 2.55.

those conducted by the CLRC and by ourselves, and to resolution in the Parliamentary process to which such law reform enquiries principally look, than to debate in the context of, and through the machinery provided for the decision of, one particular case.

1.10 These issues excited very considerable interest, and a certain amount of disagreement, on consultation on the working paper, and we therefore think it necessary that, through our report, Parliament and the public should be informed of the evidence that we received and of our conclusions on it. A number of policy issues affecting rape within marriage and the abolition or continuation of the marital immunity are, therefore, reported on in Part III of the report.

1.11 Second, the creation of a law of marital rape raises some ancillary issues, including whether further provision should be made as to the anonymity of the parties to a rape trial; and whether the wife in such a case should be a compellable witness against her husband. We have consulted on both those issues, and make recommendations, supported by appropriate clauses to implement those recommendations, in Part IV of the report.

1.12 Third, the removal of the immunity in the case of rape gives rise to an anomaly if the offences under section 2 (procuring a woman to have unlawful sexual intercourse by threats or intimidation) and section 3 (so procuring a woman by false pretences or false representations) of the Sexual Offences Act 1956 are not equally extended to intercourse within marriage.¹⁵ These offences, whilst not frequently charged, are a valuable supplement to the law of rape in cases of coercion or deception that may not fall within the comparatively narrow boundaries of the conduct recognised in rape as vitiating a woman's consent.¹⁶ There is no possible reason for the existence of a marital immunity in respect of these offences once it has been removed in rape. We therefore make recommendations in paragraphs 3.65–3.66 of the report that this immunity should not apply in those offences, which recommendations are implemented by clause 1(2) of the Bill in Appendix A.

1.13 Finally, the House of Lords had to discuss whether its conclusion on grounds of principle that the marital immunity is no longer the law was consistent with the terms of section 1(1) of the Sexual Offences (Amendment) Act 1976, and in particular whether the definition in that section, that “a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it”, by its use of the word “unlawful” confined rape to non-consensual intercourse outside marriage.¹⁷ The same problem was considered at substantial length by the Court of Appeal.¹⁸ The House of Lords' conclusion was that the word “unlawful” in the statute was mere surplusage. It is, however, undesirable to leave on the statute book an enactment on a matter of this importance that contains words that have no effect. The present exercise provides an opportunity to clarify the statutory position, as is achieved by clause 1 of the Bill in Appendix A to this report. These strictly legal issues are discussed in some detail in Part II of this report, dealing with the law of rape within marriage, to which we now turn.

¹⁵ Working paper, para. 5.21. The offences are more fully explained in para. 2.28 of the working paper.

¹⁶ Working paper, paras. 2.3–2.4.

¹⁷ [1991] 3 WLR 767, 775C–776H.

¹⁸ [1991] 2 WLR 1065, 1071C–1074B.

PART II

THE LAW OF RAPE WITHIN MARRIAGE

2.1 In Part II of the working paper we gave an account of the law of rape within marriage as we believed it to be in September 1990. Briefly, we considered that the position stated by Hale, accepted throughout the nineteenth century, and incorporated in all the colonial codes that based themselves on English law, that a man could not rape his wife, remained the common law; but that the courts had recognised various exceptions to that rule, principally but not exclusively where the normal relationship within the marriage had been interrupted by a court order of, for instance, judicial separation or non-molestation, or by a decree nisi.

2.2 It would be otiose to discuss here this complex and, to some extent, inconsistent body of law, now that the House of Lords has held in *R v R* that the assumption which had been thought to make those exceptions necessary no longer existed. The House accepted¹ the view of the Court of Appeal that removal of a husband's immunity "is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it".² The law as it now stands is therefore simply that there is no immunity for husbands within the law of rape, they being subject to the same law as any other man who has intercourse with a woman without her consent.

2.3 In order to reach that conclusion, however, the House had to consider the effect of the current statutory references to the law of rape. Rape originated as a crime at common law. The penalty for that crime, and the fact that the crime was a felony, were referred to in a series of statutes,³ which were consolidated first in the Offences against the Person Act 1861 and then in the Sexual Offences Act 1956. That Act restated⁴ the maximum penalty for rape as life imprisonment, and by section 1(1) provided that

"It is felony for a man to rape a woman."

However, that provision, like its predecessors, simply attached the incidents of felony⁵ to the existing crime at common law, whatever the ingredients of that crime might be. A statutory definition of rape was not given until section 1(1)(a) of the Sexual Offences (Amendment) Act 1976 expanded on the 1956 Act by providing that

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if he has *unlawful* sexual intercourse with a woman who at the time of the intercourse does not consent to it." (Emphasis supplied.)

2.4 Where used elsewhere in the 1956 Act the expression "unlawful" sexual intercourse had previously been assumed to connote intercourse outside marriage,⁶ and it has therefore been strongly argued that, by including that word in section 1(1)(a) of the 1976 Act, Parliament intended at least in some respects to retain the marital immunity.⁷ The argument has to be put in that cautious way to take account of the exceptions to the immunity that already existed in 1976, and to indicate uncertainty as to whether Parliament intended to reverse those exceptions; or to crystallise them as they stood in 1976; or to leave the law open to further common law development.

2.5 The House of Lords reviewed this argument in some detail. They emphasised four points. First, that at least in modern times, to describe intercourse outside the bond of marriage as "unlawful" is an unnatural use of a word "which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse".⁸ Second, the argument is circular, because if the section uses the word "unlawful" to adopt an existing common law rule that the wife consents to any intercourse within marriage, then there would be no need to enact that the crime of rape is confined to

¹ [1991] 3 WLR 767, 777A-B.

² [1991] 2 WLR 1065, at p. 1074C.

³ 9 Geo 4, c. 31, s. 16; 10 Geo 4, c. 34, s. 19.

⁴ Sect. 37, and Second Schedule, para. 1.

⁵ The distinctions between felonies and misdemeanours were abolished by the Criminal Law Act 1967, s. 1.

⁶ This was specifically decided in relation to s. 19 of the 1956 Act in *Chapman* [1959] 1 QB 100.

⁷ This argument was accepted by Rougier J in *R v J* [1991] 1 All ER 759.

⁸ [1991] 3 WLR 767, 775C.

intercourse without consent outside marriage.⁹ Third, as to *Chapman*,¹⁰ the Court of Criminal Appeal in that case had been able to point to a positive reason why in the offence under section 19 of the 1956 Act¹¹ the word “unlawful” did mean “outside the bond of marriage”, and was not merely surplusage, namely that otherwise a man would commit the offence if he took a girl with the bona fide intention of marrying her.¹² Fourth, the existence of the common law exceptions to the marital immunity¹³ at the time of the 1976 Act meant that, if the word “unlawful” had any effect, it either had abolished those exceptions, or required the section to be construed as meaning “outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption”.¹⁴ The House concluded that it was inconceivable that Parliament should have had the former intention; and that the latter construction of “unlawful” would “give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion”.¹⁵

2.6 In the event, therefore, the House concluded that the word “unlawful” was mere surplusage, as had been previously held in *McMonagle v Westminster City Council*¹⁶ of the same word as used in a schedule to the Local Government (Miscellaneous Provisions) Act 1983. That solves the problem as far as rape is concerned, but it is not satisfactory that the law as stated by the House of Lords should have to be at least in part based on, or at least leave open, the possibility that a word apparently very deliberately introduced into a recent Act of Parliament is in fact surplusage. Further, if the word “unlawful” is allowed to remain in section 1, though without there meaning “outside marriage”, that perpetrates on the face of the statute an unnecessary element of uncertainty about the word’s meaning, if any, in those other sections of the 1956 Act that have not yet been the subject of specific judicial decision. Those sections include not only sections 2 and 3, referred to in paragraph 1.12 above, but also section 5 (unlawful sexual intercourse with a girl under the age of thirteen); section 6 (unlawful sexual intercourse with a girl under the age of sixteen);¹⁷ and sections 7 and 9 (unlawful sexual intercourse with a defective).

2.7 These problems can be met, without altering the law as stated by the House of Lords, by restating as section 1 of the 1956 Act the statutory definition of rape with the omission of the word “unlawful”; and similarly, since we wish to extend sections 2 and 3 of the 1956 Act to intercourse within marriage, by omitting the word “unlawful” from those sections. Those steps are achieved by clauses 1(1) and 1(2) respectively of the Bill in Appendix A.

2.8 The Bill re-enacts section 1(2) of the Sexual Offences Act 1956,¹⁸ which provides that

“A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.”

Our study did not directly address this provision, or ask for comments on it, and an alteration of it is not a necessary consequence of our main proposals. In our view, the fact that the woman believes she is married to the man is such an important factor in her decision whether or not to consent to intercourse with him that this provision should be retained, however rarely the question may arise in practice.

⁹ *Ibid.*, at p. 775D.

¹⁰ See n. 6, para. 2.4, above.

¹¹ To “take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man”.

¹² See [1959] 1 QB 100 at p. 105.

¹³ See para. 2.1 above.

¹⁴ [1991] 3 WLR 767, 776D. This construction was thought to be the only possible interpretation of the section by Rougier J in *R v J*, n. 7, para. 2.4, above.

¹⁵ [1991] 3 WLR 767, 776E.

¹⁶ [1990] 2 AC 716.

¹⁷ If “unlawful” here does not connote “outside marriage”, it is possible to conceive of an accused who was lawfully married according to his own proper law but who was nonetheless potentially susceptible to a charge under s. 6 or, less obviously, s. 5. The view that in s. 6 at least the word “unlawful” introduces reference to the married state is persuasive not only on grounds of common sense but also because s. 6(2) makes special provision to exempt from the offence under s. 6(1) the male partner to an invalid marriage who reasonably believes that he is having intercourse with his wife. If s. 6(1) were not limited to extra-marital intercourse it would seem that s. 6(2) beats the air, or at least introduces a puzzling and illogical saving, but there is no part of s. 6(1) that limits it to extra-marital intercourse except the word “unlawful”.

¹⁸ Originally enacted by s. 4 of the Criminal Law Amendment Act 1885.

2.9 The effect of enacting the new section 1 of the 1956 Act and of the amendments proposed to sections 2 and 3 of that Act will be that thereafter the statutory definition of rape and that of the connected offences plainly exclude any element that could even suggest that they are subject to a marital exemption, thus removing any even arguable tension between the law as stated by the House of Lords and the terms of the statute book. And that amendment of sections 1-3 of the 1956 Act leaves open the meaning of the word "unlawful" where it is used in other sections of that Act.

PART III

THE ISSUES

A. INTRODUCTION

3.1 In the working paper we raised various issues that, we believed, affected our provisional policy conclusion that the marital immunity should be abolished in its entirety, and asked for comment on those issues, and also for comment on any relevant matters that we might have overlooked.¹ In fact, no such further issues were raised on consultation, and a large majority of those who commented on the policy issues raised in the working paper strongly supported our conclusion that the immunity should be abolished.

3.2 As we have already indicated, however, the consultation covered a range of matters that were seen by respondents to be of importance, but which cannot easily be discussed within the confines of a particular case. In order, therefore, to give a full picture of opinion on this matter we think it important not merely to report the broad outcome of the consultation, but also to give a more detailed account of the views expressed. The response included contributions from many individuals and organisations concerned with the social and practical implications of rape, and with the consequences of disagreement and violence within family relationships, and we found the comments of such individuals and groups of value in enabling us to form a broader-based view of the social and moral implications of the immunity. We pay particular attention to such views in the account of the consultation that follows. In addition, however, we think it right to give a full indication of the concerns expressed by the small minority of respondents who dissented from our provisional conclusion, and who now presumably do not think that the view taken by the House of Lords should remain the law.

3.3 We can best discharge those tasks by first briefly summarising the general nature of the response on consultation, and then indicating points of importance made by respondents about each of the issues identified in the working paper.

B. A SUMMARY OF THE RESPONSE ON CONSULTATION

3.4 Of the 80 responses received on consultation, 68 supported complete abolition of the immunity,² with 10 opposing it.³

3.5 That support came from 12 academic lawyers; 8 judges;⁴ 10 organisations representing legal practitioners, including The Law Society, the Criminal and Family Law Bar Associations, the General Council of the Bar and the Crown Prosecution Service, and 2 individual practitioners; the 3 main police organisations (the Association of Chief Police Officers, the Police Superintendents' Association and the Police Federation), and one Deputy Chief Constable; 14 women's groups including Women Against Rape,⁵ The Mothers' Union,⁶ and the National Federation of Women's Institutes; 3 articles in legal periodicals; 11 other organisations and 4 individuals.

3.6 The 10 who opposed complete abolition of the immunity consisted of 2 organisations and 8 individuals, including one member of the judiciary.

¹ Working paper, para. 4.14.

² These responses included two organisations who had canvassed opinion widely. See nn. 5 and 6, para. 3.5 below.

³ One respondent did not comment on the working paper's main proposal. The response of the Council of Her Majesty's Circuit Judges is discussed separately in para. 3.7 below.

⁴ In addition, apart from the decisions of the Court of Appeal and the House of Lords in *R v R*, judges in a number of cases have expressed strong disapproval of the immunity. Owen J (at first instance) in that case [1991] 1 All ER 747, 749a said "... it is ... as offensive a fiction as it is senseless". Simon Brown J in *R v C* [1991] 1 All ER 755, 758e, having held that there was no marital exemption, said: "Were it not for the deeply unsatisfactory consequences of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law". Rougier J in *R v J* [1991] 1 All ER 759, 768e said: "... I would wish to add my voice to those who urge that Parliament should take steps to abrogate the general rule ...".

⁵ Women Against Rape's response contained an open letter endorsed by 413 further organisations and individuals, including rape crisis centres, women's groups, lesbian and gay groups, trades unions, student unions and members of Parliament.

⁶ The Mothers' Union consulted representatives in 50 Anglican dioceses in the United Kingdom and received comments from 1,100 individuals. The "vast majority" of responses that they received were in favour of complete abolition of the immunity.

3.7 In addition, the Council of Her Majesty's Circuit Judges said that in their view there was no difference in principle between rape within marriage and rape outside marriage. However, they identified a number of practical problems that they considered likely to be encountered in bringing a prosecution for rape within marriage where the couple were still cohabiting. This led them to favour abolition of the immunity only where the married couple were not cohabiting.

3.8 The majority of those respondents who opposed the provisional proposal favoured retention of the marital immunity in its entirety and did not support one of the alternative approaches to reform of the law in this area discussed in the working paper.⁷ The National Family Trust,⁸ however, thought that the immunity should be abolished only where the married couple were not cohabiting.⁹ Professor Glanville Williams¹⁰ suggested that the rape of a wife by her husband should be treated as a common assault¹¹ but he continued:

"If this is impossible, because it is feared that [magistrates] will sentence merely as for an ordinary assault without regard to the sexual affront, then let us have a special offence called 'marital abuse' or something, defined as penetration by a husband without his wife's consent, though I would still want the offence to be purely summary."

3.9 In addition to the responses to the working paper, a recent representative survey¹² of 1,007 married women in the United Kingdom found that 96% of them thought that rape within marriage should be made a crime.

C. THE REASONS GIVEN BY RESPONDENTS FOR SUPPORTING ABOLITION OF THE IMMUNITY

3.10 As we have indicated, those respondents who supported complete abolition of the immunity in the main agreed with the working paper's approach to the issues and its conclusions.¹³ No respondent suggested that the reason given by Hale for the immunity was now anything other than untenable. Respondents directed themselves to more current arguments which have been put forward against complete abolition, including those discussed by the CLRC.¹⁴ No respondent raised issues substantially different from those discussed in the working paper.

1. The significance of non-consensual intercourse within marriage

3.11 The (narrow) majority of the CLRC did not consider non-consensual intercourse within marriage to be as grave an offence as non-consensual intercourse outside marriage.¹⁵ In the working paper,¹⁶ however, we stated that we found this view hard to accept. We agreed with the minority of the CLRC who said that "a woman like a man was entitled on any particular occasion to decide whether or not to have sexual intercourse, outside or inside marriage"¹⁷ and thus considered that this right should be protected both inside and outside marriage by the criminal law, unless there were cogent reasons of policy for taking a different course. This approach is, we suggest, strongly supported by the House of Lords' analysis in *R v R* of the implications of modern marriage: see paragraph 1.4 above.

3.12 The other considerations that we advanced were that it was by no means necessarily the case that being subjected by her husband to intercourse against her will was physically, emotionally or psychologically less disturbing for a woman than the case of non-consensual intercourse with a stranger; that the rape of a wife by her husband was

⁷ Paras. 5.5-5.20.

⁸ As indicated in para. 3.7 above, the Council of Her Majesty's Circuit Judges favoured abolition of the immunity only where the couple were no longer cohabiting.

⁹ This option is discussed in the working paper in paras. 5.5-5.13.

¹⁰ "The problem of domestic rape", Parts 1 and 2, (1991) 141 NLJ 205 and 246.

¹¹ He therefore proposed a reversal of the decision in *Henry* (reported in the working paper, at pp. 97-108).

¹² *Wife Rape, Marriage and the Law* (1991), by Kate Painter, Faculty of Economic and Social Studies, Manchester University, commissioned by Granada Television's "World in Action" programme.

¹³ Part IV.

¹⁴ See paras. 1.8-1.9 above.

¹⁵ Fifteenth Report, para. 2.64.

¹⁶ Paras. 4.16-4.25.

¹⁷ Fifteenth Report, para. 2.64.

particularly offensive in that it was an abuse of an act which has been or should have been his means of expressing love for his wife; and that a wife would often be living in the same house as her husband or be in some other way dependent on him, and it would therefore be hard for her to avoid her husband's insistence on intercourse.

3.13 In general, many respondents welcomed the recognition that non-consensual intercourse within marriage could be as serious as non-consensual intercourse outside marriage, and thus strongly disagreed with the approach that sees the supposed less serious effect of non-consensual intercourse within marriage as a reason for leaving it outside the criminal law. For instance, as regards the first of the points mentioned above, one respondent said:

"The principle that a woman, married or unmarried, should enjoy the unchallenged right to sovereignty over her own body appears . . . to be so self-evident as barely to need re-stating."

3.14 The traumatic effect of marital rape was stressed by the women's groups. Women Against Rape said that women interviewed in a survey on rape, undertaken by them in 1985,¹⁸ "made it clear that rape by husbands is just as painful and traumatic as rape by strangers, in some ways worse . . .". Similarly, The Mothers' Union said that most of the comments they received agreed that marital rape was "no less damaging than rape by a stranger".

3.15 A number of respondents agreed that one reason why marital rape was as serious as, if not more so than, rape by a stranger was that it was an abuse of an act used to express love and an abuse of trust. One respondent said:

"It seems to me to be mistaken to approach the issue from the standpoint of whether wife-rape is as bad as 'stranger'-attack. Surely a spouse is entitled to look to her partner for better, not worse, behaviour than she might expect from another: such coercion should be seen as the antithesis of love, as well as of sex. It is accepted that child sex abuse is at its most wicked when perpetrated within the family; perhaps the same reasoning should apply to attacks on adult members."

The Mothers' Union said: ". . . sexual intercourse without the wife's consent is not showing love as contained in the Biblical view of marriage."

3.16 It was also stressed by many respondents, including many women's groups, that quite apart from the breach of trust and of the proper relations between man and wife that were involved in a marital rape, there were particular problems that faced a woman whose husband sought to force intercourse on her, especially when she was still cohabiting with him. The Mother's Union, for example, emphasised that it was hard for such a wife to avoid her husband's insistence on intercourse because to do so might entail her having to leave her home; and for financial reasons and because of concern for children of the family many wives could not simply depart. Respondents pointed out that this very dependency on their husbands put many wives in a very vulnerable position and, if anything, in greater need of the protection afforded by the law of rape than women outside marriage or a cohabiting relationship. Women Against Rape drew our attention to the particular position of the immigrant wife, whose right to stay in Britain may be dependent on the immigration status of her husband, and who may therefore have difficulties in retaining her right to stay in this country if she leaves him and the matrimonial home. And, more generally, Women Against Rape said that their survey¹⁹ on rape found "79% of women trying to leave rapist husbands were trapped by lack of money and housing".

3.17 A recent survey, referred to in paragraph 3.9 above, examined the extent, frequency and impact of rape within marriage. The survey found that one woman in seven said that she had had sexual intercourse with her husband without her consent. In almost half of these cases (44%) violence was threatened or used. A large majority of these women said that the rapes had occurred on a number of occasions. Half of the women who were raped with violence said that they had been raped six times or more. The major psychological and emotional effects for these women were anger, depression, feelings of humiliation and degradation, fear, sickness and shock. The survey found that 84% of all

¹⁸ Hall, *Ask Any Woman: A London Inquiry into Rape and Sexual Assault* (1985).

¹⁹ *Ibid.*

the women interviewed believed that rape by a husband was just as serious as rape by a boyfriend, acquaintance or stranger (12% thought rape by a stranger was more serious).

3.18 These responses, coming as they did from a wide range of bodies and persons well-qualified to speak as to the effect on the woman concerned of a rape that takes place within marriage, confirmed us in our view that such conduct ought to be viewed by the criminal law on the same basis as extra-marital rape.

2. The sufficiency of matrimonial remedies

3.19 The CLRC said that "Where the parties are cohabiting . . . most of us regard matrimonial law as the main protection for married women against the unreasonable demands of their husbands" and "the majority of us would not wish to see this jurisdiction complicated or eroded by the criminal law".²⁰

3.20 The working paper,²¹ however, raised other considerations. First, without the power to arrest, non-molestation or ouster injunctions, obtained in the High Court or a county court, and personal protection orders or exclusion orders, obtained in a magistrates' court, were difficult to enforce either speedily or effectively; and violence was a prerequisite of the grant of an order in a magistrates' court and to the attachment of a power of arrest in any court. Divorce and judicial separation also took time to obtain but (more importantly) entailed much wider, and not necessarily welcome, consequences than the avoidance of unwanted intercourse. Second, the existence of criminal sanctions did not exclude the use of matrimonial remedies. Third, and more fundamentally, the argument ignored the different functions of criminal and family law. An important function of the criminal law was deterrence, and the clear indication of the categories of conduct that society regarded as too dangerous or offensive to be tolerated. Fourth, since we did not consider the effects of rape within marriage to be sufficiently different from those outside marriage, to claim that non-consensual intercourse within marriage could be dealt with by matrimonial remedies alone is to undervalue the seriousness of marital rape.

3.21 A number of respondents, particularly women's groups, expressly agreed with these points. For example, Women's Aid Federation said:

"Our own experience, backed up by recent research, demonstrates that matrimonial remedies are *not* by any means sufficient to ensure a wife's safety: the majority of injunctions and personal protection orders are ignored by the men against whom they are made; and . . . powers of arrest are attached relatively rarely; and it is only after repeated breaches that an offender may finally be sent to prison for contempt of court. Moreover, if a wife has experienced rape but *not* physical assault or buggery, then she will not normally be able to obtain an injunction or a personal protection order."

One respondent, a solicitor working in the field of family law, pointed out that many women who did not qualify for legal aid cannot afford to obtain matrimonial remedies.

3.22 We consider these points to be well taken. Although some respondents, notably the Council of Her Majesty's Circuit Judges, doubted whether a law of marital rape would have much deterrent effect, others stressed that once it is accepted that an act of rape within marriage is not significantly different from rape outside marriage, that act must be prohibited by the *criminal* law, at least as a demonstration of what society will and will not tolerate.²² That role cannot be played by matrimonial remedies designed for other and more general ends. And the inappropriateness of such remedies as the law's only response to marital rape is reinforced if, as we are informed, they are not wholly effective in providing protection for the wife.

3.23 The two issues just discussed, whether there is any significant difference between rape outside and within marriage to justify the two categories of act being treated differently by the criminal law, and whether marital rape is sufficiently dealt with by matrimonial remedies alone, may be described as being of general principle. The other issues that were discussed in the working paper were, to a large extent, more issues of

²⁰ Fifteenth Report, para. 2.79.

²¹ Paras. 4.35-4.42.

²² See, for instance, the comments of the Police Superintendents' Association and of a judge of the Family Division, cited in para. 3.39 below.

practicality, or of the possible collateral effects of a criminal law of marital rape. We now indicate the response given on consultation concerning those issues. Although these issues were, somewhat briefly, touched on in the Scottish case of *S v HM Advocate*,²³ it is right to point out that they were not argued in the English case of *R v R*.

3.24 We think it important to stress that once it is accepted, as the House of Lords in *R v R* and the great majority of respondents to our consultation accepted, that in principle marital rape should be a criminal offence, the question in respect of the other issues discussed is whether the practical or other difficulties that they would cause are so serious and pressing as to make imprudent a crime of marital rape that is justified on grounds of principle. Whilst we carefully considered all the objections that were put to us, in no case were we persuaded that the perceived problems were of that serious a nature or, we have to say, came anywhere near being of a nature that would justify us in recommending that there should be marital immunity.

3. Detriment to the parties' marriage and the institution of marriage

3.25 Before *R v R*, it was argued against removal of the immunity that to allow a wife to bring a prosecution for rape against her husband inhibits any chances of reconciliation, and might be detrimental to the institution of marriage. This in effect involves two different points: first, that the wife may change her mind but be unable to halt the process which may destroy the marriage; and second, that she should not be permitted to put her own interests before those of her family by invoking the protection of the criminal law, if to do so may put her marriage at risk.²⁴

3.26 As regards the first of these arguments, we found helpful the comments of the Crown Prosecution Service, who said that they were frequently faced with victims, many in a domestic violence situation, who wished to withdraw their evidence. They said:

"The Code for Crown Prosecutors . . . states that the victim's attitude, in cases where he/she wishes to withdraw, should be taken into account. A Crown Prosecutor will consider whether or not the evidence still offers a realistic prospect of conviction without the victim's evidence before deciding whether the trial should proceed. Furthermore, at paragraph 8 of the Code, Crown Prosecutors are reminded that the more serious a case the more likely that it will be in the public interest to pursue the prosecution. Each case will of course be considered on its merits weighing the evidential and public interest factors for and against prosecuting."

3.27 As regards the second argument, respondents pointed to the incongruity of primacy being given to the saving of a marriage which has already broken down to the extent of one partner forcing intercourse on the other. As The Mothers' Union said, ". . . if a husband had intercourse with his wife without her consent then the marriage was already in difficulties and any subsequent court case would not make matters significantly worse".

3.28 We find these arguments compelling. As many respondents pointed out in a more general context, a man who forces intercourse upon his wife has broken the very trust and mutual respect that ought to exist within marriage. The view of The Mothers' Union seems to us to adopt a convincingly pragmatic approach, that it cannot be right to withhold criminal sanctions from such conduct because of unrealistic fear that criminal prosecution may significantly worsen the existing relations between spouses.

4. Sentencing issues

3.29 In the working paper²⁵ we suggested that because the Court of Appeal had recently stressed the importance of sentences in rape cases reflecting the seriousness with which rape was viewed by society, and had said that five years should be taken as a starting point in contested cases, it might be thought that this approach would cause difficulty or inconsistency in marital rape cases. However, we doubted whether the problems would be so great as to render a law of marital rape impracticable. In marital rape cases, as elsewhere, the court would have to assess the seriousness of what had occurred bearing in

²³ See 1989 SLT 469, at p. 474.

²⁴ The argument was discussed in paras. 4.26–4.34 of the working paper.

²⁵ Paras. 4.43–4.46.

mind that the accused had been convicted of an offence which the law regards as potentially of considerable gravity.

3.30 Justice said:

“We accept that the emotional trauma for a domestic victim can be no less than for someone raped by a stranger, and a custodial sentence may well be appropriate . . . On the general approach to sentencing we found the judgment of Casey J. in the New Zealand Court of Appeal²⁶ . . . helpful.”

3.31 The Council of Her Majesty’s Circuit Judges were less sanguine, though not to the extent of thinking the problems to be insoluble. The Criminal Bar Association also said they were concerned about sentence. Although they appreciated that this could not be legislated for, they did not think present guidelines would be applicable in some cases. The General Council of the Bar said that the Court of Appeal should lay down guidelines for sentence in cases of rape within marriage, emphasising that there is no minimum sentence for the offence.

3.32 Apart from these views, the issue of sentencing attracted little comment. There was, however, no significant dissent from the view expressed in the working paper that, whilst sentencing in the varied range of cases that might arise in marital rape could cause problems, those problems are not of a different order from the problems already encountered by the courts in the far from easy task of sentencing in the varied range of cases that can arise in non-marital rape; and that these are in any event problems that the courts are able and equipped to solve. In particular, there was no dissent from the view expressed in the working paper²⁷ that sentencing in marital rape cases was not likely to present difficulties of an order that would cast doubt on the wisdom of extending the law of rape to cases within marriage.

5. Devaluation of the deterrent effect of the crime of rape

3.33 The CLRC said:

“For rape between cohabiting spouses . . . immediate imprisonment might not be appropriate; where no physical injury was caused to the wife, imprisonment would be most unlikely. A category of rape that was dealt with leniently might lead to all rape cases being regarded less seriously . . .”²⁸

3.34 In the working paper,²⁹ we suggested that cases involving cohabitants indicated that the courts would treat each case on its merits, and not automatically place marital rape in a separate and lesser category of offence. Even if some cases of marital rape were to receive lower sentences, the offence of rape would not necessarily lose its deterrent effect, since any such sentence would be accompanied by a rational explanation of the particular features of the case which merited the lower sentence.

3.35 The Council of Her Majesty’s Circuit Judges, however, believed that the majority of the CLRC had identified a real problem. They pointed out that the cases referred to in the working paper involving cohabitants were all cases where cohabitation had ceased, and that therefore none raised the problem of sentencing for rape in the context of continuing uninterrupted cohabitation.

3.36 Other respondents took a different view. Because of the wide variety of possible types of cases falling under both marital and extra-marital rape it could not be assumed that practice would be uniformly different in the former case; and others indeed stressed that the “devaluation of the crime of rape turned on more than sentencing practices”. Thus, in respect of sentencing, The Mothers’ Union said that their members considered the fears of the CLRC “unfounded. Some argued that sentences might be different, to meet differing circumstances, not necessarily more lenient”. Another respondent said that “it is

²⁶ *R v N* [1987] 2 NZLR 268, discussed at pp. 129–130 of the working paper. Casey J giving the judgment of the Court observed that “Parliament has made no distinction in the penalties between spousal and other kinds of rape, and the sense of outrage and violation experienced by a woman in that position can be equally as severe”. (Footnote added.)

²⁷ Para. 4.46.

²⁸ Fifteenth Report, para. 2.65.

²⁹ Paras. 4.47–4.49.

difficult to see how you would devalue a unique and grave offence by abolishing the right of a section of the community to commit it with impunity”.

3.37 We see force in this latter view. If it is accepted that there is no difference in principle between rape within marriage and rape outside marriage,³⁰ it would seem, if anything, to uphold and stress the seriousness with which society views non-consensual intercourse if cases of such intercourse that do not differ in principle from those already punishable by the law are brought within the crime of rape. Certainly, we cannot regard this argument as one that would justify our recommending that there should be marital immunity.

6. Difficulty of proof of events in the matrimonial home

3.38 In the working paper,³¹ we suggested that the argument concerning the difficulty of proof had led to two somewhat contradictory concerns. First, that there might be a danger of husbands being wrongly convicted of a serious offence. Second, that proof to the standard required by the criminal law would be so difficult that it would be impossible to get a conviction, and therefore a law of marital rape would be futile and would provide no protection for women. We specifically invited comment on these points especially from those involved in the administration of the criminal law.³²

3.39 A number of respondents doubted that there would be significantly more problems of proof in relation to rape within marriage than rape outside marriage. For example, the Crown Prosecution Service said:

“Many of the problems that are envisaged if the immunity is removed are difficulties which the prosecution may already face when prosecuting an allegation of rape on a woman who is or has been intimate with the defendant.”

The Council of Her Majesty’s Circuit Judges also agreed that the difficulties of proof were the same in all sexual cases. Other respondents added that even if there were practical difficulties in bringing a prosecution for rape within marriage, there would be symbolic and deterrent value in the fact that rape within marriage had been made a crime. For example, a judge of the Family Division said:

“Whatever may be the difficulties, actual or imagined, foreseen by lawyers, the criminal law should as a general proposition at least aim to demonstrate and to delineate what conduct is or is not to be tolerated.”

The Police Superintendents’ Association of England and Wales said:

“Of course, all the problems that are inherent in bringing a successful prosecution for domestic assault and/or injury will also be present in trying to prove an offence of marital rape. But that is no excuse for failing to provide the appropriate legislation. The police role in trying to prevent injury and misery is weakened by the absence of appropriate legislation. Indeed, we hope that the very existence of such a law might serve as a deterrent.”

7. Investigation of the history of the marriage

3.40 The majority of the CLRC were concerned that the prosecution for rape might necessitate a “complicated and unedifying investigation of the matrimonial history . . .”.³³ Thus,³⁴ investigation of the intimate details of the couple’s lives was contrary to the interest of marriage as an institution; and the process might be distressing to the parties themselves. As regards the first, we commented that a public investigation of the matrimonial history took place at present where there was an allegation of a non-sexual offence of violence, and more importantly, the institution of marriage was not necessarily helped by a failure to provide adequate remedies for wrongful conduct. As regards the second, so far as it affected the wife, we accepted that it would be one of the many disincentives she would face in coming forward, but her position would not, we thought, be significantly different from that of other victims of rape. As for the husband, we said that it

³⁰ See paras. 3.7 and 3.11–3.18 above.

³¹ Paras. 4.50–4.55.

³² Working paper, para. 4.50.

³³ Fifteenth Report, para. 2.69.

³⁴ Working paper, paras. 4.56–4.60.

was difficult to see that this would be a problem where he was found guilty, but that different considerations might apply when he was innocent. It was therefore for consideration whether if the immunity were to be removed, a husband ought to have anonymity.

3.41 Apart from the question of whether a husband ought to have anonymity, which is discussed in paragraphs 4.32–4.44 below, no respondent except the Council of Her Majesty’s Circuit Judges discussed these points; or dissented from our suggestions in the working paper. The Circuit Judges considered that the investigation in a marital rape case would be different in kind from any carried out in a violence case for two main reasons: “sexual misconduct gives more room for falsehood, spite and malice on either or both sides and whilst violence is a fairly simple concept, sexual practices are not”. These considerations however led them to the conclusion that the immunity should be abolished *except* where the parties were cohabiting. We are unable to agree with that view: see paragraphs 3.52–3.56 below.

8. The risk of false accusation or blackmail

3.42 Another possible objection to complete abolition of the immunity³⁵ is the possibility that a wife on the breakdown of a marriage might threaten to report an alleged rape to the police in order to secure an advantage in negotiations for financial provision. We invited comment and criticism of the view that, first, a wife could make a similar threat in respect of an alleged non-sexual crime of violence, although a threat to make an allegation of rape may be considered more potent; second, that it is unlikely that such a threat could be successfully carried out, and that a husband would probably be advised to that effect; and third, that such a threat would constitute the offence of blackmail.

3.43 In the case of allegations made out of spite we suggested for comment that, if the risk existed, it existed also in the context of rape outside marriage. Furthermore, we said that the investigation of an allegation of rape was a notoriously difficult process for a complainant. A wife would have to be very determined to go through with a false allegation. The police would be likely to scrutinise with extreme care allegations that emerged from an obvious background of dispute and bitterness.

3.44 The Islington Women’s Advice Group, a group made up of solicitors, barristers and legal advice workers, felt that “the process of reporting rape and seeing the matter through to a Crown Court case is in itself daunting and unlikely to be taken lightly”. And a solicitor experienced in family law matters said:

“Rape within a permanent relationship (whether it be marriage or long-term cohabitation) is a fact that is frequently brought to my attention by women seeking protection from their partner through the medium of divorce, separation or injunctive relief.

“ . . .

“ . . . it has, in the majority of cases, been the women’s choice not to mention the rape in the divorce petition or statement in support of an injunction. This has been the case even where the parties to the divorce have been particularly vindictive towards each other.”

3.45 The Family Law Bar Association, however, although supporting complete abolition of the immunity, said:

“Family lawyers have noticed that, in recent years, there has been a significant increase in the number of allegations of sexual abuse of children made by wives endeavouring to prevent their husbands having access to those children.

“ . . .

“It is submitted that allegations of ‘marital rape’ might well be resorted to much more readily than allegations of child abuse and in a much wider variety of circumstances.”

This led them to think that a special “filter process” was necessary before a prosecution for marital rape could be initiated.³⁶ We recognise that, in family cases, many wild allegations can be made, extending to a wide range of various types of behaviour. We do not see,

³⁵ Working paper, paras. 4.61–4.65.

³⁶ See paras. 4.2–4.11 below.

however, that to make *criminal* the practice of non-consensual intercourse within marriage would significantly increase the number of such allegations in family cases, nor, if such did occur, that the conduct or outcome of such family cases would be significantly affected thereby. We also doubt whether the problem, if it did exist, would be met by a filter system for prosecutions; which, for other reasons explained in paragraphs 4.2–4.11 below, we are not able to recommend.

3.46 The Council of Her Majesty's Circuit Judges said:

“ . . . having regard to the number of acquittals in rape trials, many allegations of rape are or may be both untruthful and persisted in with considerable determination . . . This is the position in non-matrimonial cases. Our experience suggests that anger and bitterness are no less prevalent inside the matrimonial relationship.”

Again, however, this led them to support the retention of the immunity in cohabitant cases, but not otherwise.

9. Would a law of marital rape be used?

3.47 Another argument discussed in the working paper³⁷ was the fear that abolition of the immunity would have no practical importance because of the reluctance of wives to make complaints. However, in the working paper we said, first, that this argument overlooked the fact that even if the law is not used, the existence of the offence may of itself have some deterrent effect and would be a forceful expression of society's disapproval of such conduct; and second, that such protection as the criminal law did provide should be potentially available to all women even if many, for one reason or another, were inhibited from setting the criminal process in motion. Recognition of the difficulties faced by victims of rape generally had not led to doubts about the appropriateness of the existence of a law of rape. Also, recent Home Office³⁸ figures suggested an increase in the number of reported cases of rape by “intimates” (including parental figures, other relatives, friends, ex-partners and lovers).

3.48 Only The Mothers' Union commented specifically on whether a wife would be significantly more deterred from pursuing a complaint than a victim of non-marital rape.³⁹ They said that, in the majority of responses received by them, the view was expressed that a wife would be more deterred. The reasons given were “fears for the loss of her children's innocence” and “the fear of having the ultimate responsibility for destroying the marriage”. Generally respondents thought there were problems common to all women in coming forward and making complaints. There was general dissatisfaction with the way victims of rape were treated in the criminal justice system.

3.49 As we stated in the section on difficulty of proof,⁴⁰ many respondents thought that, regardless of any practical difficulties in bringing prosecutions, there was symbolic and deterrent value in non-consensual intercourse being a crime. For example, Derby Rape Crisis Group said:

“ . . . recognising marital rape as a crime would be a signal to all men contemplating marital rape that society no longer tolerates the medieval idea of marriage as the wife signing away her rights over her own body. It would greatly help those women feeling trapped in violent marriages, to know that society does not condone sexual violence within marriage.”

3.50 The Council of Her Majesty's Circuit Judges, although they doubted the deterrent value of having a crime of marital rape,⁴¹ agreed that the “use” of a law allowing a husband to be prosecuted for the rape of his wife was not a prime consideration.

³⁷ Paras. 4.66–4.70.

³⁸ Home Office Research Study No. 105 (1988).

³⁹ A recent survey, referred to in para. 3.9 above, found that 91% of women who had said that they had had sexual intercourse with their husbands without their consent had never discussed the matter with any official agency such as a police officer, doctor, social worker or Rape Crisis Centre.

⁴⁰ See paras. 3.38–3.39 above.

⁴¹ See para. 3.22 above.

D. ALTERNATIVE SOLUTIONS TO COMPLETE ABOLITION OF THE IMMUNITY

3.51 In paragraphs 5.5–5.20 of the working paper we canvassed various possible amendments to the law as it existed before *R v R* that however would have stopped short of complete abolition of the immunity. We indicated that we did not find any of those solutions attractive, and only a minority of those replying to the consultation commented on them in any detail. However, we briefly report the views that were expressed, because they help further to illustrate the reasons why the great majority of respondents saw the solution adopted in *R v R*, of complete abolition of the immunity, as the only acceptable state of the law.

1. Rape only where the married couple are not cohabiting

3.52 The CLRC, although divided on the question whether the immunity should be completely abolished, were united in the proposition that the offence of rape should be extended to all cases where the husband and wife were no longer cohabiting, if a satisfactory definition could be found.⁴²

3.53 In the working paper, we said that we found this an unsatisfactory solution:⁴³ first, because there was some difficulty in formulating a definition of “not cohabiting”; and second, and more fundamentally, since we thought that women in principle should be protected against unwanted intercourse by their husbands or by anyone else, and that the effects of rape by a husband might be as grave as rape by a stranger or possibly even graver, we saw no reason why a distinction should be made between rape where the couple were cohabiting and rape where they were not. Furthermore, two special considerations applied where the married couple were cohabiting. First, where a wife was still living with her husband they might still have relations of trust which a husband would break by forcing intercourse on the wife; and second, on a practical level it would often be more difficult for her to escape his attentions. A wife, we said, should not be forced to leave her home in order to obtain the protection of the law.

3.54 It will be recalled that this solution was supported by only two respondents.⁴⁴ Of those who opposed it, a number of respondents saw difficulties in defining “cohabiting”, but the majority’s main objection to this proposal was that they saw no reason in principle to distinguish between rape when the couple were cohabiting and when they were not. The Crown Prosecution Service said “. . . if it is recognised that married women need the protection of the law in this field it is not appropriate for a particular class of them to be excluded simply because of ancillary domestic arrangements”. Another respondent wrote:

“What would be intolerable in principle is that protection would be granted or denied a wife on the basis of where the parties were living. Criminal protection should not be denied a wife whose husband refuses to leave the home, and nor should a wife be forced to separate, and risk losing the roof over her and her children’s heads, in order to gain that protection.”

3.55 These objections of principle, cogent enough in themselves, were reinforced by the very strong evidence that we received from a wide range of respondents, including women’s groups and practitioners, of the particular practical difficulties that face a *cohabiting* wife when threatened with unwanted intercourse. We have already indicated the nature of that evidence in paragraph 3.16 above. Respondents pointed out that it was rare for one party to be able to afford to leave the matrimonial home on the breakdown of the marriage, and that there were occasions where couples were even forced to share the same bed because there was no alternative accommodation. One respondent wrote:

“Living under these circumstances causes considerable stress for all parties and, rather than having less protection and certainty, one could argue that these women should have greater protection in view of their particularly vulnerable position.”

Similarly, the Women’s Aid Federation said: “The time at which she most needs the protection of the law is not when she has already left her husband, but whilst she and he are living in the same home.”

⁴² Fifteenth Report, para. 2.81.

⁴³ Working paper, paras. 5.5–5.13.

⁴⁴ See paras. 3.7–3.8 above.

3.56 We were impressed by this strong endorsement of the view that a cohabiting spouse is likely to be in particular need of the law's protection against unwanted intercourse. It reinforces our view that a law that retained the marital immunity in cases where the spouses were cohabiting would be not only difficult to operate in practice but also wholly wrong in principle. We cannot recommend that course.

2. Rape only when accompanied by collateral violence or other abuse

3.57 A second alternative discussed in the working paper was abolition of the immunity where the non-consensual intercourse is accompanied by violence or other abuse.⁴⁵ We did not find this an acceptable solution. We pointed out that rape outside marriage existed as a separate crime because non-consensual intercourse was recognised as, in itself, an objectionable act. We did not see why the law should be different in the case of husband and wife, by requiring something more than non-consensual intercourse to found a charge of rape; and such an approach would be inconsistent with the view expressed in *R v R*, and quoted in paragraph 1.2 above, that rape within and outside marriage should be regarded by the law in the same terms.

3.58 Respondents agreed with this view that non-consensual intercourse was an objectionable act in itself, and that wives should be protected against it regardless of whether there was collateral violence. Furthermore, the Crown Prosecution Service were concerned that such a proposal might cause evidential difficulties in having to prove that violence or abuse took place and that it had been an integral part of the rape. They said:

“It may be that a woman has been consistently beaten in the past by her husband but on one occasion he just threatens her with further violence in order to force her to have sexual intercourse against her will and without her consent. No actual violence has been used but because of her fear of a further assault she allows her husband to have intercourse with her.”

The Haldane Society of Socialist Lawyers said:

“An alleged victim may find herself in the unenviable position of having to struggle or fight to sustain injuries in order that she may incur protection from the law. This is ludicrous and contrary to the way in which victims behave when attacked.”

3. A separate crime of non-consensual intercourse within marriage

3.59 A third alternative solution⁴⁶ was the creation of a new offence, consisting in a man having intercourse with his wife without her consent. In the working paper, we rejected this solution. We said that to create a separate crime, with a view to lower sentencing, would be to underwrite the view that marital non-consensual intercourse was, as a category of offence, necessarily less serious than the acts at present covered by the law of rape, and we were not aware of any good grounds for this assumption. This solution would also fall foul of the principle enunciated by the House of Lords in *R v R* and referred to in paragraph 3.57 above.

3.60 Respondents agreed with these views. One respondent said, “Such an offence would be regarded as less serious and would only serve to perpetuate discrimination against married women”. The Haldane Society of Socialist Lawyers said: “We appreciate that many people may perceive it appropriate that the law recognises ‘degrees of rape’ although we do not subscribe to this view ourselves. However, such degrees can be . . . reflected in sentencing powers”.

3.61 The Crown Prosecution Service pointed out that a separate offence of this nature might “cause difficulties in the choice of charge if, for instance, the parties are living apart but are still married”.

E. CONCLUSION

3.62 Having given serious consideration to all the objections raised to the complete abolition of the marital immunity, we find convincing the arguments of principle accepted

⁴⁵ Working paper, paras. 5.14–5.17.

⁴⁶ *Ibid.*, paras. 5.18–5.20.

by the great majority of respondents for the abolition of the immunity; and in respect of the practical difficulties that it is suggested abolition might cause, we are not persuaded that such difficulties will come anywhere near to justifying inhibiting a reform for which there are strong arguments of principle.

3.63 We have particularly borne in mind the concerns of the Council of Her Majesty's Circuit Judges. However, we note that those concerns led them to support, not retention of the law as it existed before *R v R*, but the retention of the immunity only in cases where the parties are cohabiting. For the reasons set out in paragraphs 3.52–3.56 above we are forced to reject that solution on grounds both of principle and of policy, as did most of our other respondents.

3.64 In the light of the foregoing, therefore, we *recommend* that there should be no amendment of the law as decided in *R v R*, and thus the law should continue to be that there is no marital immunity in the crime of rape.

F. RELATED OFFENCES

3.65 In the working paper⁴⁷ we referred to two related offences under sections 2 and 3 of the Sexual Offences Act 1956. Section 2(1) of the Act provides that it is an offence “to procure a woman, by threats or intimidation, to have unlawful sexual intercourse anywhere in the world”; and section 3(1) of the Act creates a similar offence in relation to procuration by “false pretences or false representations”. We provisionally proposed the extension of these offences to marital intercourse.⁴⁸

3.66 On consultation only 22 respondents specifically mentioned these offences, all of whom supported our provisional proposal in relation to these offences. However, there is no reason to suggest that those who did not specifically comment would have thought that these offences should be treated differently from rape. We therefore *recommend* the extension of these offences to marital intercourse.

⁴⁷ Para. 2.28.

⁴⁸ Working paper, para. 5.21.

PART IV

ANCILLARY ISSUES

A. INTRODUCTION

4.1 In this Part we deal with three policy questions that arise as a result of the abolition of the marital exemption. These issues are whether special procedures are required to handle decisions as to whether to prosecute in cases where a man is accused of raping his wife; whether in such a prosecution the wife should be compellable to give evidence; and whether there ought to be special rules precluding the identification of the parties to marital rape cases. We deal with these issues in turn.

B. PROSECUTION POLICY

4.2 Some of those commenting on the working paper suggested that restrictions ought to be placed on the prosecution of marital rape. In particular, the Criminal Bar Association, the Family Law Bar Association, the General Council of the Bar, the majority of the London Criminal Courts Solicitors' Association and one individual commentator said that the consent of the Director of Public Prosecutions should be a prerequisite to a prosecution.¹

4.3 These respondents favoured limitations on prosecution because they were concerned about the possibility of false allegations.² A requirement of the Director's consent, they thought, would protect an innocent husband from false allegations of rape made by a vindictive or mentally disturbed wife in two ways. First, it would ensure that marital rape cases were more carefully scrutinised before a decision to prosecute was taken. In that respect, the Bar went further, and thought that statutory guidelines should be laid down requiring the Director to consider a number of factors, including any delay by the alleged victim in reporting the allegation. Second, a requirement of the Director's consent would stop a vindictive or mentally disturbed wife from bringing a *private* prosecution.

4.4 We have carefully considered these arguments, but have concluded that the consent of the Director should not be required. First, we do not think that, given the Director's existing powers under the Prosecution of Offences Act 1985, such a requirement would add in practice anything of significant value. Second, and more importantly, we do not think that the considerations that apply to rape within marriage are sufficiently different from those that apply to rape outside marriage or to other offences to justify such a requirement.

4.5 As regards the first of these arguments, under section 1(7) of the Prosecution of Offences Act 1985 the Director's consent can be given by a Crown Prosecutor. In practice, it is likely that cases requiring the Director's consent will be dealt with by a senior Crown Prosecution Service lawyer. However, we would hope it already to be the case that *all* rape cases, because of the seriousness of the offence, are dealt with by a senior lawyer and scrutinised with great care before a decision to prosecute is made.

4.6 The need for a private prosecutor to secure the consent of the Director would, it is true, ensure that prosecutions that are vexatious and malicious are weeded out at an early stage. A private prosecution begins with a laying of an information and the issuing of a summons.³ Where the Director's consent to a prosecution is required, that consent must be obtained before the summons is issued.⁴ However, even where the consent of the Director is *not* required, he can still stop privately instituted proceedings if he considers them to be

¹ The CLRC in its Working Paper on Sexual Offences (1980), para. 42, thought that the consent of the DPP should be a prerequisite to a prosecution of a husband for the rape of his wife.

² The problem of false allegations and the possibility that a wife on the breakdown of a marriage might threaten to report an alleged rape in order to obtain an advantage in negotiations for financial provisions, a problem which concerned the Family Law Bar Association in particular, are discussed in paras. 3.42-3.46 above.

³ The position where an individual has invoked the aid of the police and the alleged offender has been charged is unclear. It may be that the proceedings will be held to have been instituted on behalf of a police force and that under s. 3(2) of the Prosecution of Offences Act 1985 it is the duty of the Director to take over the conduct of the proceedings. The individual may then have lost any right she had to prosecute and must then abide by the decision of the CPS to prosecute or not. For a discussion of the law in this area, see Keith Vaughan, "The Changing Face of Prosecution", (1991) 88 LSG 24.

⁴ *Price v Humphries* [1958] 2 QB 353.

inappropriately brought; the effect is therefore the same, though this method is slower than the procedure if consent is required.

4.7 Section 6(2) of the Prosecution of Offences Act 1985 provides: "Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage." A similar provision in the Prosecution of Offences Act 1979 was considered in *Raymond v Attorney General*.⁵ That case held that the Director was entitled to intervene in a prosecution that had been privately instituted in order to stop it, and that unless his decision was manifestly such as could not be honestly and reasonably arrived at, it could not be impugned. By section 23 of the 1985 Act, the Director can, by giving notice to the clerk of the court, stop any case provided that the proceedings have not reached the stage where the prosecution witnesses have begun to testify in a case of a summary trial, and provided that the magistrates have not committed for trial where the case is to be tried in the Crown Court.

4.8 The Director thus has adequate discretionary powers to prevent an abusive private prosecution even in cases where his consent is not required to initiate the prosecution.

4.9 Our second reason for opposing a requirement of the Director's consent for prosecutions for marital rape is that we do not think that the considerations that apply to rape within marriage are sufficiently different from those which apply to rape outside marriage, or to other offences, to justify such a requirement. Even if the risk of false allegations is a real one, that risk also exists outside marriage. It would be anomalous for an unmarried woman to be able to bring a private prosecution against the man with whom she lived without the Director's consent while her married counterpart could not. More importantly, a requirement of consent might perpetuate the view, which we and the majority of respondents think to be mistaken, that rape within marriage is significantly different from rape outside.

4.10 A requirement of consent would also create anomalies elsewhere. The only area of the criminal law in which consent is at present required because of the relationship of the parties rather than because of the nature of the offence is found in section 30 of the Theft Act 1968, which deals with theft and criminal damage. In cases of domestic violence, which bear the closest resemblance to allegations of marital rape, a wife is entitled to bring a private prosecution against her husband without restriction. No consent is required for offences such as child abuse or buggery, in which problems of proof, or the dangers of malicious allegations, might equally be said to arise.

4.11 We have, therefore, concluded that there should be no provision requiring the consent of the Director of Public Prosecutions before a prosecution for marital rape can be brought; and that, for similar reasons, no other special restriction on prosecution would be justified.

C. COMPELLABILITY

1. Introduction

4.12 In the working paper we suggested that it should be made explicit that in a charge of rape the wife can be compelled to give evidence for the prosecution, on the basis that, if the wife has no choice as to whether or not to testify, she is protected from pressure to withdraw her allegation.⁶ Somewhat to our surprise this proved controversial. The majority of respondents who commented individually on this issue supported our view, although there was also considerable opposition to compellability, in particular from women's organisations.⁷

4.13 We can state our conclusions very shortly. First, we think it likely that the wife would be held to be compellable under the present statutory provision;⁸ but we also think it right to remove any doubt about such an important matter. Secondly, we consider that the differing views expressed to us about this issue do indeed raise very serious and important

⁵ [1982] QB 839 (CA).

⁶ Working paper, para. 4.70.

⁷ Edinburgh Rape Crisis Centre; Women Against Rape, whose views were endorsed by 413 other organisations and individuals (see n. 5, para. 3.5 above); and the majority of the members of The Mothers' Union.

⁸ See paras. 4.15-4.16 below.

questions. However, these questions apply equally to cases of violence and other offences committed by one spouse against the other, in which the wife is at present undoubtedly compellable to give evidence against her husband. To some extent, they apply also to cohabiting couples and other people in close family relationships. For us to recommend against compellability in cases of marital rape, with which this report is solely concerned, would therefore be to invite Parliament to introduce an anomaly between these and the general rule in marital and "domestic" cases. We therefore *recommend* that the law should be clarified to put it beyond doubt that the wife is similarly compellable in the case of marital rape as she is in the case of marital violence generally. We achieve this by providing, in slightly wider terms, that the wife should be compellable where the offence charged is *any* sexual offence. This generalisation may marginally affect offences beyond marital rape and the offences under sections 2 and 3 of the Sexual Offences Act 1956, with which our study has been concerned, but it is a logical step in the process that we have referred to above of avoiding possible anomalies in this branch of the law.

4.14 However, two further points should be made at the outset. First, many of the matters put to us are relevant to the operation of compellability in practice under the present law. There is obviously a concern amongst many of those whom it is principally designed to protect that it is not in practice having that effect. Secondly, the general issue does in our view merit early consideration in the wider context of all marital crime, and indeed all sexual and violent crime between cohabiting couples or other family members. Hence, after explaining our understanding of the present law and the need for clarification, we set out in some detail the arguments which emerged on consultation and relate them to the role both of the prosecuting authorities and of the courts in cases where the alleged victim proves reluctant to testify.

2. The present law

4.15 It should be remembered that the general rule is that competent witnesses who are able to give relevant evidence can be compelled to do so. The exceptional position of the wife stems from the common law rule that spouses were neither competent nor compellable to give evidence either for or against one another. This rule has been modified to such an extent that very little of it now remains. One of the earlier modifications recognised that a wife (or husband) was competent to give evidence for the prosecution in a case of violence upon her (or him) by the other.⁹ It was generally thought, until the decision to the contrary in *Hoskyn v Metropolitan Police Commissioner*,¹⁰ that the wife was also a compellable witness for the prosecution in such cases.¹¹ In a case of rape, however, it was clear that under section 39 of the Sexual Offences Act 1956,¹² a wife was not compellable. This section was repealed,¹³ and *Hoskyn* reversed, by the Police and Criminal Evidence Act 1984. Section 80 of that Act now provides that a wife is in general not compellable, but goes on in subsection (3) to create three exceptions.¹⁴ The first of these (created by subsection (3)(a)) applies if "the offence charged involves an assault on, or injury or a threat of injury to, the wife . . . of the accused".

4.16 In the working paper we felt unable to say with confidence that section 80(3)(a) would render a wife compellable in a case of marital rape. Where the rape is accompanied by violence or some degree of force, the case would clearly fall within the exception. In other cases, however, it is uncertain whether "assault" as used in the section necessarily includes rape. If one were to consider "assault" alone, that conclusion would seem difficult to deny, since assault includes any intentional touching of another person without the consent of that person and without lawful excuse.¹⁵ The acts constituting rape seem

⁹ *Lord Audley's Case* (1631) 3 St Tr 401.

¹⁰ [1979] AC 474. The majority of the House of Lords, Lord Edmund-Davies dissenting, held that even though a wife was a competent witness for the prosecution in such cases, she was not compellable.

¹¹ As had been decided in *Lapworth* [1931] 1 KB 117, which the House of Lords overruled.

¹² This provided that the husband or wife of the accused should be competent, both for the defence and the prosecution, but not compellable, on a charge of any offence under the Act (save those under ss. 12, 15 and 16). This therefore included a charge of rape contrary to s. 1(1) of the Act.

¹³ Police and Criminal Evidence Act 1984, Sch. 7, Pt V.

¹⁴ Subsection (5) further provides that in any proceedings a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married. It is quite clear, therefore, that if by the time a marital rape case comes to trial the parties are divorced, as in *R v R* itself, the wife is compellable to give evidence against her husband.

¹⁵ *Faulkner v Talbot* [1981] 1 WLR 1528, per Lord Lane CJ, at p. 1534C.

necessarily to fall within that formulation, notwithstanding that the offence of rape does not require the use of force, as opposed to the absence of the victim's consent. That, however, does not conclude the matter when one turns to the detailed construction of section 80(3)(a). The subsection extends the exception to all cases in which the assault (or injury, or threat of injury) is to a person who at the material time was under the age of 16; but a further exception created by subsection (3)(b) is for (all) cases concerning such persons under 16 if the offence charged "is a sexual offence". Moreover, paragraph (b) contains no saving words for any sexual offence cases which might otherwise be thought to have been included in paragraph (a). This arrangement of the section thus suggests a possible intended contrast between assault and "sexual" offences, so as to exclude rape (viewed as a sexual offence) from the exception in paragraph (a). We thus are forced to conclude that the law as to the application of section 80(3) to a case of marital rape is insufficiently certain, and that the point must therefore be clarified one way or the other. That is achieved by clause 3 of the draft Bill in Appendix A hereto, which provides that the wife shall be compellable in any case where the offence charged is a sexual offence committed against her.¹⁶

3. Arguments in favour of compellability

4.17 The two main arguments for compellability of the wife are first, that it would afford her some protection against pressure to withdraw her allegation and secondly, that compellability is demanded by the public interest in the prosecution of crime.

4.18 The majority of those who believed that the wife should be compellable agreed with the first of these arguments, which we identified in the working paper.¹⁷ As one respondent said, there is little point in threatening a wife in an effort to get her to withdraw her evidence if that option is not available to her.¹⁸ We also bear in mind in this connection that in the context of domestic violence, there was concern following the decision in *Hoskyn* that the possibility of intimidation would lead to greater reluctance on the part of wives to pursue their allegations, and hence greater reluctance on the part of the law enforcement agencies to take such allegations seriously. The enactment of section 80(3) was therefore welcomed by those who took that view. In the context of marital rape, it is arguable that there may be even greater possibility of intimidation, because of the serious nature of the offence, and therefore an even greater need to protect the wife who fears for her own and her children's safety if she makes a complaint and proceeds to give evidence. Also, apart from intimidation, some respondents said that if a woman is perceived as having no choice but to give evidence, it is less likely that she will be made unfairly to take responsibility for the break-up of the marriage. Removing this pressure could, as in the case of intimidation, help women who are raped by their husbands to feel less inhibited about reporting the incident to the police, with the result that fewer cases of marital rape would go unpunished.¹⁹

4.19 To the extent that the argument for compellability rests upon the protection of the wife, its validity obviously depends upon the facts of the individual case. The second, and in principle more important, reason for making a wife liable to be required to give evidence against her husband is based on the public interest in the prosecution of crime. From that public interest springs both the responsibility of the state in criminal prosecutions, with its corollary that a victim has no power to insist that the prosecution be

¹⁶ For a note of the 1984 Act, s. 80, as that section would appear after amendment in accordance with the Bill in Appendix A, see Appendix C to this report.

¹⁷ Para. 4.70.

¹⁸ Lord Edmund-Davies also made this point in his dissenting speech in *Hoskyn* ([1979] AC 474, at p. 507), arguing that reluctance to testify does not by any means necessarily denote that domestic harmony has been restored and, where a wife has already been subjected to violence by her husband, "it may well prove a positive boon to her to be directed by the court that she has no alternative but to testify".

¹⁹ Again, this was a point made by Lord Edmund-Davies in *Hoskyn* ([1979] AC 474, at p. 501). The criminal law, he said, served a dual purpose: "to render aid to citizens who themselves seek its protection, and itself to take active steps to protect those other citizens who, though grievously in need of protection, for one reason or another do not themselves set the law in motion".

dropped, and the corresponding liability of witnesses, including victims, to be required to testify for the prosecution.²⁰

4.20 In the context of this report, it could no doubt also be argued that since the whole point of our main recommendation is to treat marital rape as no less a matter for the criminal law than any other rape, and thus a matter of public sanction rather than the enforcement of private rights, the wife ought not to be made an exception to this important principle of compellability.

4. Arguments against compellability

4.21 The main argument put forward by those who opposed compellability was that it would not necessarily protect the wife from intimidation, and indeed, might have the opposite effect. Thus, if a wife was unable to stop the criminal process once she had involved the police, she might suffer further assault, especially if the husband is subsequently released on bail or acquitted. Some of our respondents, including organisations dealing with rape victims, argued that the police should respond to the wife's call for help because of the immediate danger to her and that this is more important than the certainty of a prosecution. Furthermore, in deciding whether to prosecute, the woman's assessment of risks of reprisals against herself or her children should always be taken into account. These respondents were particularly concerned that compellability would deter wives from calling the police at a time of crisis. A number of disincentives already existed, for example, her economic dependence on her husband or the effect on the children, and they feared that compellability would make the wife's decision to seek police intervention even more difficult. A wife should therefore have the right to ask for protection from the police without thereby committing herself to testifying against her husband. Some respondents also argued that, quite apart from fears for her own or her children's safety or for their future financial security, she may not in fact want him to be prosecuted.²¹ However badly she may have been treated by her husband, he may nevertheless be a good husband at other times and she may therefore not be prepared to pursue a course of action that could result in the break-up of the marriage and the loss to the children of their father. Her primary concern, once the immediate crisis is over, may be to try to preserve the marriage and the family unit, rather than to ensure that her husband is punished for his behaviour. In such circumstances, there is also a public interest in preserving the family unit which, these respondents would argue, outweighs the public interest in the prosecution of crime.

4.22 The views of these organisations, many of which have close contact with women who have been subjected to violence and/or rape by their husbands, must obviously weigh heavily with us. If a rule which was introduced principally for the protection of victims generally is having the opposite effect, there must be serious cause for concern. It is certainly true that a wife who decides to invoke the criminal law against her husband may find herself in a very vulnerable position, whether through fear for her own safety, or through economic or emotional pressures.²² The reasons why she is unwilling to give evidence against him may be many and complex.²³ Compelling her to testify against him

²⁰ The public interest in the prosecution of crime was the main argument put forward by Lord Edmund-Davies in *Hoskyn* in favour of compellability ([1979] AC 474). He approved (at p. 500) the words of Geoffrey Lane LJ in the Court of Appeal, who said—

“It must be borne in mind that the court of trial in circumstances such as this where personal violence is concerned . . . is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the state and members of the public that where that is the case evidence of that crime should be freely available to the court which is trying the crime . . .”

Lord Edmund-Davies added (at p. 507) that—

“. . . such incidents ought not to be regarded as having no importance extending beyond the domestic hearth. Their investigation and, where sufficiently weighty, their prosecution is a duty which the agencies of law enforcement cannot dutifully neglect.”

²¹ See also I. D. Brownlee, “Compellability and Contempt in Domestic Violence Cases”, [1990] JSWL 107, at p. 111.

²² As we have already pointed out (see para. 3.16 above) there are some wives, immigrant wives in particular, who are in an especially vulnerable position.

²³ One of our respondents suggested the following list of possible reasons for her unwillingness to testify: fear of appearing in court; fear of not being believed; fear of cross examination; fear of reprisals against herself, her family or her friends; fear of having to face the alleged attacker again; feelings of guilt or shame for making public what may previously have been a private matter; lack of confidence; lack of support; lack of control; financial dependence on the alleged attacker; the alleged attacker may be the father of her children.

may not, in the particular circumstances of the case, be the most appropriate course of action.

5. The role of the prosecuting authority

4.23 These arguments point to a need for considerable sensitivity on the part of the Crown Prosecution Service and the judiciary in dealing with cases where the wife is unwilling to testify.

4.24 If the wife makes it clear at any early stage that she does not wish the case to proceed, the Crown Prosecution Service will have to decide whether to go ahead with the prosecution nevertheless. As we pointed out in the working paper, the practical reality is that, in the majority of rape cases, the evidence of the wife will be essential for a successful prosecution.²⁴

4.25 As we noted in the working paper,²⁵ the Code for Crown Prosecutors already provides that in *any* case where a complainant, having reported the matter to the police, later expresses a wish that no action be taken, his/her attitude may be taken into account in deciding whether or not to prosecute, unless either there is suspicion that the change of heart was actuated by fear or the offence was of some gravity. The Crown Prosecution Service in their response said that they are frequently faced with victims, usually of domestic violence, who wish to withdraw their evidence and that these cases are always carefully scrutinised to ensure that no undue pressure has been brought to bear on the victim. Each case, they said, is considered on its merits, weighing the evidential and public interest factors for and against prosecuting. In fact, the evidence is that, in domestic violence cases, proceedings are often not initiated where wife or girlfriend victims are reluctant to give evidence.²⁶ We do not consider that special guidelines are needed in respect of cases of marital rape. What is necessary, however, is that there should be a sensitive and uniformly applied policy in all marital cases, with thorough investigation and consideration of the woman's reasons for wishing to withdraw.

6. Enforcement by proceedings for contempt of court

4.26 If it is decided to proceed with the case in spite of the victim's reluctance to testify it will eventually be for the judge to decide how to deal with matters if she is still unwilling to give evidence at the time of the trial. The only sanction available for enforcing her compellability is the undoubted discretionary power of the judge to punish her for the contempt of court that her refusal to testify constitutes. The use of this power can be controversial. The case of Michelle Renshaw, for example, who was committed to prison for seven days for refusing to testify against her former boyfriend on a charge of assault, caused considerable outcry. In fact, the decision was subsequently overturned by the Court of Appeal on the ground that the trial judge had not conducted the contempt proceedings in a fair manner so that proper account was not taken of the fact that the appellant claimed to have been threatened and to be too frightened to testify.²⁷ Nevertheless, the Court did warn that anyone who refused without adequate excuse to give evidence to a court in such circumstances was liable to find himself or herself being punished and that that punishment probably meant imprisonment.²⁸

4.27 Some respondents to the working paper felt that wives who made allegations against their husbands should be compelled to testify, whatever the circumstances of the case, and be punished for refusing to do so, not only to assist the cause of women as a class but also, according to one respondent, to avoid wasting police, Crown Prosecution Service

²⁴ At para. 4.29. It may still be possible, however, to proceed with the case on the basis of the wife's written statement, under s. 23 of the Criminal Justice Act 1988. This provides that in certain circumstances, which include where the person who made the statement "does not give oral evidence through fear or because he is kept out of the way" and provided the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders, such a statement shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by that person would be admissible.

²⁵ At para. 4.29.

²⁶ See S. Edwards, "Compelling a reluctant spouse", (1989) 139 NLJ 691, 692.

²⁷ *Renshaw* [1989] Crim LR 811 (CA).

²⁸ There have also been cases where wives have been fined for refusing to testify against their husbands (see, for example, the Newark magistrates case cited by I. D. Brownlee in "Compellability and Contempt in Domestic Violence Cases", [1990] JSWL 107, at p. 110).

and legal aid resources. However, there are good reasons for believing that this course will be rare. First, it is clear that duress exists as a defence to an allegation of contempt of court where a witness refuses to testify.²⁹ Secondly, and as we have already pointed out, the court has a discretion as to whether to take any action when a witness refuses to testify,³⁰ and in fact it is rare for judges to commit women for contempt of court.³¹ That is no doubt because most judges are aware of the need for sensitive handling of such cases, so that the wife with genuine and valid reasons for not wishing to proceed would not normally face punishment. One High Court judge who responded to the working paper, recognising that there were several reasons why a wife might be reluctant to testify, pointed out that in practice it is very difficult for the judge to make a proper enquiry into these reasons and that, without that enquiry, it would not be right to take action against her. Other members of the judiciary³² also thought that the great majority of judges would be unwilling to commit a wife for contempt if she refused to testify.

4.28 Certainly, there may be cases in which, for example, the original allegation was made out of spite or in order to blackmail, so that it would be appropriate to take action against the wife who subsequently decides not to give evidence, but there will also be many cases in which the wife's wishes will in effect be respected and the judge will feel it is inappropriate to commit her for contempt. Judges will also be conscious of the fact that the evidence of a wife who testified unwillingly and only to avoid punishment for contempt could in many cases be unsatisfactory.

7. Releasing the wife from the requirement to give evidence

4.29 It is not clear whether the judge has a discretion to override the prosecution's decision to call the wife as a witness.³³ An additional proposal that might be considered in any future review of compellability in the wider context³⁴ is to give the judge a statutory discretion to release the wife from her obligation to testify. A suggested basis for the exercise of such a discretion could be that the interests of the family outweighed the public interest in obtaining her evidence. The factors to be taken into account could include the nature of the offence charged, the likely significance of the wife's evidence, the state of the relationship between the spouses, the interests of the children and the likely impact on the family of compelling her to testify.³⁵

4.30 Since such a discretion should logically apply in *any* case in which the wife is a compellable witness for the prosecution, it would be anomalous for us to make such a recommendation in relation to marital rape cases. Nevertheless, we mention it as a possible option for the future should the question of compellability of spouses, and cohabitants, in general come under review.

8. Conclusion

4.31 As we have already indicated,³⁶ the arguments set out above are not limited to marital rape. We therefore feel that it would not be appropriate, in the context of marital

²⁹ *K* (1984) 78 Cr App R 82 (CA).

³⁰ *Ibid.*, at p. 87, *per* Watkins LJ who said: "This Court is well aware of the difficulties confronting judges who from time to time are faced with an obdurate and stubborn person who refuses to give evidence when called upon to do so. There are many ways of dealing with a situation of that kind. Sometimes inaction is as good a way as any and at other times stern measures are called for. It depends entirely upon the circumstances how best an incident of that kind is dealt with."

³¹ Prison Statistics for 1989 (Cm. 1221, Table 6.3) show that in 1981 36 women were committed for contempt; in 1982, 40; in 1983, 37; in 1984, 38; in 1985, 46; in 1986, 40; in 1987, 41; in 1988, 43 and in 1989, 22. The corresponding figures for men were 877, 933, 934, 1,020, 936, 976, 924, 810 and 798.

³² The Council of Her Majesty's Circuit Judges.

³³ However, he does not have the power to prevent the prosecution from proceeding on an indictment, for example, because he is of the opinion that there is insufficient evidence for the prosecution to succeed or because he disapproves of the course being taken, unless it amounts to an abuse of the process of the court: *R v Chairman of London County Sessions, ex parte Downes* (1953) 37 Cr App R 148.

³⁴ See para. 4.14 above.

³⁵ A discretion along very similar lines has been created in the Australian State of Victoria, where it operates so as to exempt the wife from a *general* rule (the converse of that in section 80 of the Police and Criminal Evidence Act) whereby the wife is compellable in all cases, whether or not she is the victim of the alleged offence. The discretion may be exercised where the judge considers that the interest in obtaining the wife's evidence is outweighed either by the likely damage to the marital relationship, or by the harshness of compelling her to testify (Crimes Act 1958, s. 400).

³⁶ See para. 4.13 above.

rape alone, to attempt a final assessment of them. However, we hope that our description of them will help to identify the issues for the purposes of the future more wide-ranging investigation that we think desirable.

D. ANONYMITY

4.32 In the working paper³⁷ we invited views on whether a husband should have the protection of anonymity until conviction. We questioned whether it was right that a husband who is in fact innocent, whether or not the allegations against him are deliberately false, should have the details of his married life revealed in public. We suggested that to create an exception to the general rule that the defendant should be named might not be anomalous in view of the specially deleterious effects of public investigation of the history of the marriage.

1. The present law

4.33 The present position is that only the wife's anonymity is protected. The law is contained in section 4 of the Sexual Offences (Amendment) Act 1976,³⁸ which provides that (a) from the time that an allegation is made that a woman has been the victim of a rape offence,³⁹ she is protected from the publication or broadcast of her name, address or a still or moving picture of her⁴⁰ "if that is likely to lead members of the public to identify her as an alleged victim of such an offence"⁴¹ and (b) after a person is accused of a rape offence "no matter likely to lead members of the public to identify a woman as the complainant" shall be published in writing or broadcast.⁴² The prohibition lasts throughout her lifetime. Breach of the prohibition is a summary offence punishable by a fine not exceeding £2,000.⁴³

4.34 It is a defence to a charge under section 4 to prove that the woman had given written consent to the publication or broadcast of the matter in question.⁴⁴ The judge also has the power, on the application of the accused or a co-accused, to direct that the prohibition shall not apply if this is necessary to induce potential witnesses to come forward and if the direction is not given.⁴⁵ He also has power to lift the prohibition if he is satisfied that the effect of the prohibition is to impose "a substantial and unreasonable restriction on the reporting of proceedings at the trial" and that it is in the public interest to remove or relax the restriction.⁴⁶

4.35 Contrary to the recommendations of the Advisory Group on the Law of Rape (the Heilbron Group), which had recommended giving anonymity to the complainant but not to the defendant in a rape case, section 6 of the 1976 Act gave very similar protection to the accused, except that this protection ceased on conviction. A similar discretion was also given to the judge in respect of the lifting of the prohibition, although if the accused asked for the prohibition to be lifted the judge was bound to give the direction asked for.

³⁷ Para. 4.60.

³⁸ As amended by the Criminal Justice Act 1988, s. 158.

³⁹ A rape offence is defined by section 7(2), as amended by section 158(6) of the 1988 Act, as rape; attempted rape; aiding, abetting, counselling and procuring rape or attempted rape; incitement to rape; conspiracy to rape and burglary with intent to rape. The Report of the Committee on Privacy and Related Matters (The Calcutt Committee) (1990), Cm 1102, para. 10.13, has recommended that section 4 should be extended to cover sexual offences other than rape offences and also that the court in *any* criminal proceedings should have the power to make an order prohibiting publication of the name or address of an alleged victim of the offence or of any other matters likely to lead to his or her identification, where this is necessary to protect the mental or physical health, personal security or security of the home of the victim (para. 10.15).

⁴⁰ Sect. 4(1A) provides that "picture" includes a likeness however produced.

⁴¹ Sect. 4(1)(a). Thus, the victim's identity is now protected from the moment an allegation of rape is made and not just from the time that charges are laid, as originally provided for in the 1976 Act.

⁴² Sect. 4(1)(b).

⁴³ To be increased to £5,000 when the Criminal Justice Act 1991, s. 17 (which relates, among other matters, to the standard scale of fines), is brought into force.

⁴⁴ Sect. 4(5A), unless it is proved that her written consent was obtained by interfering unreasonably with her peace and comfort (s. 4(5B)). These provisions were inserted by s. 158(3) of the 1988 Act.

⁴⁵ Sect. 4(2).

⁴⁶ Sect. 4(3). The judge may not, however, give such a direction by reason only of the outcome of the trial.

Section 6, however, was subsequently repealed by the 1988 Act since it was felt to be anomalous in relation to defendants in other criminal proceedings.⁴⁷

4.36 The present position therefore is that a defendant in a rape case can be named like any other defendant in criminal proceedings, unless to do so could lead to identification of the victim. The practical effect of this is often that the husband accused of raping his wife is incidentally protected because to name him, where his relationship to the victim is also disclosed, could make it easy to identify her. Thus a newspaper, for example, has to choose between naming the husband but not revealing that the victim was his wife, and keeping the husband's identity secret but revealing that the case is one of marital rape. The latter option means that the accused's identity is protected, even though he no longer has a right to anonymity. On the other hand, the disadvantage of the former option is that the public has an inaccurate perception of the types of situation in which rape is committed. In any event, it may still be possible for readers in practice to identify the victim if one newspaper names the husband without specifying that the case is one of marital rape, but another newspaper gives the latter information about what is obviously the crime without naming the accused. This problem of "jigsaw" identification is particularly likely to occur where other details are also given, or where the two reports appear simultaneously in local newspapers.

2. Arguments in favour of the husband's anonymity

4.37 Among those respondents to the working paper who commented on this issue there was almost universal support for according the husband anonymity. Although in the working paper⁴⁸ we were concerned that the innocent husband should be spared the ordeal of having the details of his married life revealed in public, the majority of these respondents in fact gave as their reason the need to reinforce the protection already given to the wife. Certainly, if the husband could not be named once an allegation of rape had been made, this would remove the problem of jigsaw identification of the wife. In many cases it would also give further protection to the wife between the time that the allegation is made and the time that the husband is accused of rape,⁴⁹ since under section 4(1)(a) only publication or broadcast of the woman's name, address or a picture of her is prohibited during this period. In theory, therefore, there is no restriction on publication or broadcast of the husband's name, address or picture, nor of his relationship to the victim, in contrast to the position once the husband has been "accused", when there is a restriction on the publication or broadcast of *any* matter likely to lead members of the public to identify a woman as the complainant. In practice, where the wife is still using her husband's name it could be argued that publication of his name is tantamount to publication of her name. Nevertheless, other details about the husband could still be revealed without an offence being committed. Protection of the husband's identity would therefore give the wife additional protection at this stage.

4.38 The principal argument for giving the husband anonymity is therefore to ensure that the wife is adequately protected from unwanted publicity. Concern for the children of the family was also expressed by some of our respondents. The public revelation of intimate details of the marital relationship, particularly where allegations of associated violence are also made, is likely to cause considerable distress and embarrassment not only to the defendant but also to the children of the family and, if the allegations subsequently prove to be unfounded or are withdrawn, they will have suffered unnecessarily. For the husband, the resentment that this is likely to cause may well be the death knell of a marriage that might otherwise have been saved.

4.39 Some of our respondents also suggested that giving the husband anonymity would help to deter wives from making false allegations. Such an allegation, or the threat of it, might be made out of spite or as a means of blackmail, for example, to exact a more

⁴⁷ Sect. 158(1), (5), 170(2), Sch. 16. This followed the endorsement of the views of the Heilbron Group by the Criminal Law Revision Committee in its Fifteenth Report, Sexual Offences (1984), Cmnd 9213, para. 2.92.

⁴⁸ Para. 4.60.

⁴⁹ By section 4(6) of the 1976 Act, a person is accused of a rape offence if (a) an information is laid alleging that he has committed a rape offence; or (b) he appears before a court charged with a rape offence; or (c) a court before which he is appearing commits him for trial on a new charge alleging a rape offence; or (d) a bill of indictment charging him with a rape offence is preferred before a court in which he may lawfully be indicted for the offence.

advantageous financial or property settlement or to secure custody of the children. As we said in the working paper,⁵⁰ the likelihood of such a threat or allegation being successfully pursued is not very great. In any event, it is likely to be the prospect of arrest and prosecution, rather than the attendant publicity, that concerns the husband most. Nevertheless, without the threat of publicity, the impact of such an allegation would be lessened, perhaps considerably in some cases.

3. Arguments against the husband's anonymity

4.40 The main argument against giving the husband the protection of anonymity in marital rape cases is that to do so would create an anomaly, not only in relation to other defendants in rape cases but also in relation to defendants in other criminal proceedings. It is certainly true that the arguments listed above in favour of giving the husband anonymity do not apply exclusively to cases of marital rape. Jigsaw identification in a rape case may also occur where the accused and victim are related to each other in some other way, for example, if they are father and daughter, or where the accused and victim are living together as man and wife and using the same name. The need to protect the children from the damaging effects of adverse publicity could also apply to cases involving cohabitants. There are also other situations where a false allegation of rape, or for that matter some other serious criminal offence, and the threat of publicity associated with it, might be used as a way of exerting pressure. For example, a woman might falsely accuse the man with whom she is cohabiting of raping her in an attempt to thwart an application by him for custody of their child.

4.41 As for the argument that the husband in a marital rape case should be given anonymity to protect him from unnecessary embarrassment, this could also be applied to any defendant in a rape case or, for that matter, to defendants charged with other serious criminal offences. Indeed, the Heilbron Group's argument against giving anonymity to defendants in rape cases was that whereas victims should be anonymous to encourage them to report crimes of rape and so ensure that rapists do not escape prosecution, the same reasoning cannot apply to the accused.⁵¹ Yet the Calcutt Committee noted⁵² that during the passage of the amendments to the 1976 Act made by the Criminal Justice Act 1988 there appeared to be a shift of emphasis within Parliament, with greater concern to protect the victim from embarrassing publicity and less prominence being given to the criminal justice considerations.⁵³ If the main purpose of giving anonymity to rape victims is now to protect them from harmful publicity, it could be argued that the defendant should be accorded the same protection until he is proved guilty.

4. Conclusion

4.42 Like the Heilbron Group,⁵⁴ we are not in a position to make recommendations with regard to the anonymity of defendants generally as this project is limited to marital rape. However, it is only in rape cases that adult complainants are accorded anonymity, and we recommend that the husband be given anonymity in such cases principally in order to give extra protection to the wife. The wife who is a victim of rape by her husband is in a more vulnerable position in this respect than other rape victims because she is likely to have the same surname and may well be living at the same address as the defendant. Anonymity for the defendant will thus make the wife's own existing right to anonymity more effective in practice and easier to protect. The further incidental benefits that would be derived from such a provision are the protection of the children's interests and the preservation of any possibility of reconciliation. We appreciate that rape cases involving cohabitants may sometimes raise some of the same issues. However, it is not as common for cohabitants to use the same surname as it is for husbands and wives, so the particular

⁵⁰ Paras. 4.62–4.64.

⁵¹ Report of the Advisory Group on the Law of Rape (1975), Cmnd. 6352, para. 177.

⁵² Report of the Committee on Privacy and Related Matters (1990), Cm 1102, para. 10.12.

⁵³ The fact that rape victims now have the right to waive the restrictions against publicity (see para. 4.34 above) is evidence of this change in attitude. Thus, a victim who sees the publicity given to another rape case may well be unaware that the woman concerned has given her written consent to it and as a consequence be reluctant to report the incident to the police.

⁵⁴ Who said, at para. 178, "While appreciating that there may be a case for giving all accused persons anonymity before conviction we feel that such a radical proposal would more appropriately come, if at all, from a committee concerned with criminal law generally rather than one concerned specifically with the crime of rape".

difficulty about identification that exists in the case of married partners will be much less likely to arise. Cases of marital rape will be likely to involve, or to cause apprehension of, the revelation of intimate details of the marital relationship during the course of the proceedings. The latter publicity, if it identifies those involved by name, can be particularly distressing for all family members and, in general terms, seems likely to be more damaging to a husband and to his relationship with other members of the family than it would be to a cohabitant. And, in any event, the fact that a remedy that we are persuaded to be a rational and proper step in the field of marital rape might have some merits in some other cases, on which we are not at present reporting, cannot be a reason for withholding the remedy in marital rape itself.

4.43 We therefore *recommend* that in relation to (i) rape, (ii) attempted rape, (iii) burglary with intent to rape and (iv) assault with intent to rape,⁵⁵ the provisions of sections 4 and 5 of the Sexual Offences (Amendment) Act 1976 should be extended to the husband so that publication of the husband's name, address or a "still or moving picture" of him would be prohibited under section 4(1)(a), and publication of any matter likely to lead to identification of the husband as the accused would be prohibited under section 4(1)(b). In the working paper,⁵⁶ we suggested that the husband should only have the protection of anonymity until conviction, on the basis that he cannot complain about the history of the marriage relationship being brought into public view if he has in fact abused the confidence of that relationship by forcing intercourse upon his wife. However, the need to give additional protection to the wife, and incidentally to protect the children of the family, will continue even if the husband is convicted and we are therefore now of the view that protection of his anonymity should not cease on conviction. The importance in this matter of giving additional protection to the wife suggests that the only reliable general rule for when the man's protection should cease is on the death of the wife; any less extensive rule might cause difficulty in particular cases. Section 4A(2) that is inserted in the 1976 Act by clause 2(3) of our draft Bill so provides.

4.44 The court's dispensing powers in sections 4(2) and 4(3)⁵⁷ would also be exercisable in relation to both the husband and the wife, or in respect of the husband alone. In practice, cases where the purpose of the dispensing power could be achieved by naming the husband but not the wife are unlikely to arise; but there is no reason to deprive the judge of this flexibility should the circumstances of the particular case be such as to justify it. It would not be right to introduce a power to lift the prohibition in relation to the wife alone, because this would be to make wives the only complainants in rape cases who run the risk that their identity will become public while that of the accused will not. However, given that one reason for preserving the husband's anonymity is to protect the children and the family as a whole, it should not be possible for the wife alone to waive the protection of anonymity,⁵⁸ unless the husband is convicted. The defence provided for in section 4(5A) and (5B) of the 1976 Act should therefore only be available where both parties have given their written consent. Following conviction, however, only the wife's consent should be required.⁵⁹

⁵⁵ We further *recommend* that, consequentially, this offence should be added to the list of rape offences in s. 7(2) of the 1976 Act: we have concluded that it would be anomalous for the complainant only to be entitled to anonymity in relation to a rape offence if it was committed by her husband. We explained in the working paper, para. 2.31, that some cases (decided after the enactment of the 1976 Act) suggest that the offence is extant, and that last year Professor John Smith expressed the view that "the better opinion" may be that the offence survives.

⁵⁶ Para. 4.60.

⁵⁷ See above, para. 4.34.

⁵⁸ *Ibid.*

⁵⁹ For a note of sections 4, 4A and 7(2) of the 1976 Act as they would appear after enactment of the draft Bill in Appendix A, see Appendix C.

PART V

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

5.1 In this Part of the report we summarise our conclusions and our recommendations for reform. Where appropriate, we identify the relevant provision in the draft Bill in Appendix A that is aimed at putting into effect a particular recommendation.

5.2 We recommend that:

- (1) There should be no amendment of the law as decided in *R v R* (1991), that there is no marital immunity in the crime of rape. (Paragraph 3.64; draft Bill, clause 1(1))
- (2) The offences under sections 2 and 3 of the Sexual Offences Act 1956 should be extended to marital intercourse. (Paragraph 3.66; draft Bill, clause 1(2))
- (3) The law should be clarified to put it beyond doubt that the wife is similarly compellable in the case of marital rape as she is in the case of marital violence generally; and the wife should be compellable where the offence charged is *any* sexual offence. (Paragraph 4.13; draft Bill, clause 3)
- (4) In cases within marriage of rape, attempted rape, burglary with intent to rape and assault with intent to rape, the husband (as well as the wife) should not be identified; and assault with intent to rape should be added to the rape offences listed in section 7(2) of the Sexual Offences (Amendment) Act 1976. (Paragraph 4.43; draft Bill, clause 2)

5.3 We have concluded that:

- (1) The substance of section 1(2) of the Sexual Offences Act 1956 should be re-enacted. (Paragraph 2.8; draft Bill, clause 1(1))
- (2) The consent of the Director of Public Prosecutions should not be required for a prosecution for marital rape; and there should be no other special restriction on prosecution. (Paragraph 4.11)

(Signed) PETER GIBSON, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
19 November 1991

APPENDIX A

Draft

Sexual Offences Bill

ARRANGEMENT OF CLAUSES

Clause

1. Rape etc.
2. Anonymity in marital rape etc. cases and meaning of rape offence.
3. Exceptional compellability of accused's spouse in certain sexual cases.
4. Short title and commencement.

DRAFT

OF A

B I L L

TO

Amend the law relating to rape and certain other sexual offences.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Rape etc.
1956 c.69

1.—(1) For section 1 of the Sexual Offences Act 1956 (rape) there shall be substituted the following section—

“Rape.

1.—(1) It is an offence for a man to rape a woman.

(2) A man commits rape if—

(a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

(b) at that time he knows she does not consent to the intercourse or is reckless as to whether she consents to it.

(3) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.

(4) Subsection (2) above applies for the purpose of any enactment.”

(2) In sections 2(1) and 3(1) of the Sexual Offences Act 1956 (procurement of women to have unlawful sexual intercourse) the word “unlawful” shall be omitted.

1976 c.82

(3) Section 1(1) of the Sexual Offences (Amendment) Act 1976 (which is superseded by this section) shall cease to have effect.

Anonymity in
marital rape etc.
cases and
meaning of rape
offence.

2.—(1) The Sexual Offences (Amendment) Act 1976 shall be amended as follows.

(2) In section 4(1) (anonymity of complainants in rape etc. cases), at the beginning, there shall be inserted the words “Subject, in the case

EXPLANATORY NOTES

Clause 1

This clause implements recommendations (1) and (2).

Subsection (1) replaces section 1 of the Sexual Offences Act 1956 with a new section taking in, except for the omission of the word "unlawfully", the substance of section 1(1) of the Sexual Offences Act 1976, which is repealed by *subsection (3)*.

Subsection (2) repeals the word "unlawful" in sections 2(1) and 3(1) of the 1956 Act.

Clause 2

This clause implements recommendation (4) by modifying for marital rape cases the application of section 4 of the Sexual Offences (Amendment) Act 1976.

Subsection (1) is introductory.

Subsection (2) subjects section 4 of the 1976 Act, in relation to cases of marital rape, to the modifications contained in a new section 4A, which is inserted by *subsection (3)*. *Subsection (2)* of the inserted section applies in relation to the husband, subject to the court's direction, and for the duration of the wife's life, the prohibition on publication which applies in relation to the complainant in the case of a rape offence. *Subsection (3)* provides that in marital rape cases, any such direction may disapply the prohibition in relation to both the wife and the husband, or only in relation to the husband. As to breach of the prohibition, *subsection (4)* makes available the defence conferred by section 4(5A) (written consent of the complainant) on proof of written consent of both the wife and the husband. Accordingly, the subsection also extends the disapplication of the defence (under section 4(5B)) on proof of unreasonable interference to include such interference with the peace and comfort of the husband. *Subsection (5)* provides that *subsection (4)* should not apply after conviction.

Sexual Offences

of a marital rape offence, to the modifications of this section made by section 4A of this Act.”.

(3) After section 4, there shall be inserted the following section—

“Anonymity of complainant and defendant in marital rape etc. cases. 4A.—(1) Section 4 of this Act shall have effect in the case of a marital rape offence with the following modifications.

(2) The prohibition in subsection (1) of the publication or other disclosure (except as authorised by a direction) of—

(a) the woman’s name or address or a picture of her; and

(b) matter likely to lead members of the public to identify the woman;

shall apply in relation to the person against whom the allegation or accusation of the rape offence is made (“the man”) as it applies to the woman, but shall continue in force for the duration of the woman’s life only.

(3) Any direction in pursuance of that section may disapply the prohibition either in relation to the man and the woman or in relation to the man only (but not in relation to the woman only) and, where given in pursuance of an application, whether or not the application sought that form of direction.

(4) Subject to subsection (5) below, the defence conferred by subsection (5A) on proof of the written consent of the woman to the appearance of matter of the description in question shall only be available on proof of the written consent of the woman and the man; and the exception in subsection (5B) on proof of unreasonable interference with the woman’s peace or comfort applies also on proof of unreasonable interference with the man’s peace or comfort.

(5) Where the man is convicted of the rape offence subsection (4) above does not apply as respects any time after the conviction.”

(4) In section 7(2) (definition of rape offence, etc, for purposes of the Act), in that definition—

(a) after the words “attempted rape”, where they first occur, there shall be inserted the words “assault with intent to rape,”; and

(b) for the words “or attempted rape” there shall be substituted the words “, attempted rape or assault with intent to rape”.

(5) In section 7(2), after the definition of “a rape offence” there shall be inserted the following—

““a marital rape offence” means any of the following, namely rape, attempted rape, assault with intent to rape and burglary with intent to rape where, at the time of the alleged offence, the victim and the person accused of the offence are married to each other;”.

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Clause 2 (continued)

Subsection (4) adds assault with intent to rape and attempt to commit that offence to the definition of "rape offence" in the 1976 Act.

Subsection (5) defines "marital rape offence" for the purposes of the modifications of the 1976 Act effected by this clause.

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- (6) In consequence of the foregoing amendments—
- 1976 c.82 (a) in section 5 of the Sexual Offences (Amendment) Act 1976—
- (i) for the words “the preceding section” (wherever they occur) there shall be substituted the words “section 4 of this Act”; and
 - (ii) in subsection (5), for the words “of such matter as is mentioned in” there shall be substituted the words “such as to contravene”;
- 1980 c.43 (b) in section 6(5) of the Magistrates’ Courts Act 1980 for the words from “section” to the end there shall be substituted the words “sections 4 and 4A of the Sexual Offences (Amendment) Act 1976 (anonymity in rape cases of complainant and, in marital rape cases, of complainant and defendant)”; and
- (c) paragraph 66 of Schedule 15 to the Criminal Justice Act 1988 shall cease to have effect.
- Exceptional compellability of accused’s spouse in certain sexual cases.
- 1984 c.60 3.—(1) In section 80(3) of the Police and Criminal Evidence Act 1984 (exceptional compellability of accused’s spouse) after paragraph (a), there shall be inserted the following paragraph—
- “(aa) the offence charged is a sexual offence against the wife of the accused; or”
- (2) In consequence of the amendment made by subsection (1) above in subsection (3) of that section—
- (a) in subsection (3)(c), at the end, there shall be inserted the words “or of attempting to commit any offence falling within paragraph (aa) above.”.
 - (b) in subsection (7), for the words “subsection (3)(b)” there shall be substituted the words “subsections (3)(aa) and (b)”.
- Short title and commencement.
- 4.—(1) This Act may be cited as the Sexual Offences Act 1991.
- (2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.
- (3) Subject to subsection (4) below section 2 above shall not apply in relation to an allegation or accusation of an offence which is made before the commencement of this Act and section 3 above shall not apply in relation to any trial, or any proceedings before a magistrates’ court as examining justices, which began before the commencement of this Act.
- (4) Section 2(4) above shall not, in its application to sections 1(2), 2 and 3 of the Act of 1976, apply in relation to any trial, or any proceedings before a magistrates’ court, which began before the commencement of this Act and shall not, in its application to sections 4 and 5 of the Act of 1976, apply in relation to an allegation or accusation of an offence which is made before the commencement of this Act.

EXPLANATORY NOTES

Clause 2 (continued)

Subsection (6) contains technical provisions consequential on the insertion of section 4A.

Clause 3

This clause implements recommendation (3).

Subsection (1) inserts in section 80(3) of the Police and Criminal Evidence Act 1984 a further express exception to the general rule that a wife is not compellable to give evidence against her husband, where the offence charged is a sexual offence against the wife of the accused. *Subsection (2)(a)* extends the new exception to attempts, and *subsection 2(b)* applies the definition of "sexual offence" which already applies to the existing exception in section 80(3)(b). (That exception relates to sexual offences against persons under the age of sixteen.)

Clause 4

This clause provides for the short title and commencement of the Act.

APPENDIX B

THE LEGAL EFFECTS OF MARRIAGE

1. The legal effects of marriage in Hale's time¹ were indeed sufficient to justify Millament's prediction that she would "dwindle" into a wife.² Simply stated, marriage involved a life-long commitment to live together which could be enforced by both parties by ecclesiastical decree and by the husband by self-help. The only relief, unless the marriage could be annulled, was an ecclesiastical decree of divorce *a mensa et thoro*, equivalent to the modern decree of judicial separation, or a full divorce by private Act of Parliament. During "coverture", as the wife's condition was called, she was deprived of almost all individual legal personality, including title to or control over her property and income.³ The best-known account is that of Blackstone, who wrote that:

"By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband: under whose wing, protection, and *cover*, she performs every thing; . . ."⁴

2. That such a state of affairs is now regarded with abhorrence was demonstrated by respondents to our working paper, who wrote that "society no longer tolerates the medieval idea of marriage as the wife signing away her rights over her own body" and "the idea that a wife is the husband's chattel is deeply revolting to modern thinking".⁵ Moreover, the legal rules on which Blackstone's account was based have now been changed in almost every respect; until the decisions of the Court of Appeal and House of Lords in *R v R*⁶ the marital immunity was almost their sole survivor.

3. Thus, although marriage remains a life-long commitment, this may be brought to an end on the ground that the marriage has irretrievably broken down.⁷ When judicial divorce was first introduced in 1857, the grounds discriminated between husband and wife, but in 1923 the wife was given the same right as a husband to petition on the ground of adultery alone.⁸ Now, each has the same right to petition for divorce or judicial separation. The old remedy of restitution of conjugal rights did not discriminate between them but was originally enforced by ecclesiastical penalties alone. These were replaced by penal sanctions during the nineteenth century which were in turn abolished in 1884.⁹ Thereafter the decree was largely a "peg" upon which to hang a claim for ancillary relief during the marriage and was finally abolished in 1970.¹⁰ Although the husband alone had a common law duty to maintain his wife, the only means of enforcing this was the wife's agency of necessity, which was also abolished in 1970.¹¹ The spouses' statutory claims for financial relief, property adjustment, and occupation of the family home are now entirely reciprocal.¹²

4. Consortium, which is broadly living together as husband and wife, was once thought to be a right which only the husband was able to enforce, either by action in tort against third parties who interfered or by physical confinement of the wife.¹³ The action for

¹ Most of Hale's work, including *Pleas of the Crown*, was left in manuscript and published long after his death in 1676.

² W. Congreve, *The Way of the World* (1700); Millament, of course, sought to put conditions on her acceptance of the married state which women in a different walk of life were unable to do.

³ Save to the extent that this had been settled to her separate use, but even then the settlement might restrain her from anticipating or alienating property or future income.

⁴ *Commentaries* (1765), i, 442.

⁵ A contemporary view of newly wed aspirations is given by a study of the Marriage Research Centre, P. Mansfield and J. Collard, *The Beginning of the Rest of Your Life?* (1988).

⁶ [1991] 2 WLR 1065 (CA) and [1991] 3 WLR 767 (HL).

⁷ Matrimonial Causes Act 1973, s. 1(1).

⁸ Matrimonial Causes Act 1923, ss. 1 and 2, amending Matrimonial Causes Act 1857, s. 27.

⁹ Matrimonial Causes Act 1884, s. 2.

¹⁰ Matrimonial Proceedings and Property Act 1970, s. 20.

¹¹ *Ibid.*, s. 41(1).

¹² Matrimonial Causes Act 1973, ss. 21–24; Matrimonial Homes Act 1983, s. 1; Domestic Proceedings and Magistrates' Courts Act 1978, ss. 1, 6 and 7; Inheritance (Provision for Family and Dependents) Act 1975, s. 1.

¹³ *Re Cochrane* (1840) 8 Dowl 630; the extent to which he had power to do this was in doubt during the eighteenth century.

enticement was eventually extended to the wife,¹⁴ although the action for loss of consortium was not.¹⁵ These actions were abolished in 1970¹⁶ and 1982¹⁷ respectively. The husband's right to confine his wife was never extended to the wife but was removed in 1891 by the historic ruling of the Court of Appeal in *R v Jackson*.¹⁸ This marked the end of the law's recognition of the husband's right to use physical coercion upon his wife in all save sexual matters. A husband who takes the law into his own hands in an attempt to enforce his right to consortium may now be found guilty of kidnapping and false imprisonment.¹⁹

5. In almost all respects, the legal manifestations of the "doctrine of unity" have also disappeared. A husband and wife cannot be guilty of the crime of conspiring with one another,²⁰ but the Court of Appeal has declined to extend the rule into the law of tort.²¹ As Lord Denning MR said of the doctrine: "It has been eroded by the judges who have created exception after exception to it. It has been cut down by statute after statute until little of it remains. It has been so much eroded and cut down in law, it has long since ceased to be true . . ."²² Husband and wife can now sue one another in tort²³ and have separate contractual and proprietary capacities.²⁴ The last vestige of the old common law rules of property disappeared with the introduction of separate taxation last year.²⁵ There remain a few special rules in the law of evidence, which originated in the proposition that spouses could not testify either for or against one another, but arguably served a different purpose.²⁶

6. Thus the idea that marriage is a relationship in which the wife subjects herself to her husband's will simply cannot hold good today. In law, the spouses now have equal status in relation not only to one another but also to their children.²⁷ However, there remain social, economic and physical inequalities in many marriages which in practice limit the wife's freedom of action and may make it difficult for her to resist her husband's expectations or to leave if these become intolerable.

7. Of course, in most marriages, there will be an expectation of a sexual relationship. Some respondents expressed this expectation in strong, even graphic terms. However, it is clear that, apart from the marital rape immunity, the law does not grant any remedy to enforce that expectation as a right. No injunction will be granted to enforce the personal obligations of matrimony, even if they are recognised as such.²⁸ Any remedy of a spouse whose partner refuses to have sexual intercourse lies, not in seeking to enforce it, but in seeking release from the marriage itself. Thus, if a husband or wife reaches a settled decision not to have sexual intercourse at all the other may ask that the marriage be annulled on the ground of wilful refusal to consummate it.²⁹ It has been said that a husband cannot complain of wilful refusal unless he has sought to overcome his wife's objections by "such tact, persuasion and encouragement as an ordinary husband would use in the circumstances . . ."³⁰ This led one respondent to suggest that there may be "an obligation, albeit of a limited kind, imposed upon a wife, to submit to one act of sexual intercourse arising out of the fact that wilful refusal to consummate the marriage would give her husband grounds for a petition for nullity". But giving the husband grounds for a nullity

¹⁴ *Gray v Gee* (1923) 39 TLR 429; see *Place v Searle* [1932] 2 KB 497.

¹⁵ *Best v Samuel Fox* [1952] AC 716.

¹⁶ Law Reform (Miscellaneous Provisions) Act 1970; s. 4 abolished the husband's claim for damages for adultery, and s. 5 abolished the actions for enticement and harbouring.

¹⁷ Administration of Justice Act 1982, s. 2.

¹⁸ [1891] 1 QB 671.

¹⁹ *R v Reid* [1973] QB 299.

²⁰ Criminal Law Act 1977, s. 2(2)(a), believed to represent the common law.

²¹ *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529; the history and development of the doctrine are fully explored in the judgment of Oliver J at first instance, [1979] Ch 496.

²² [1982] Ch 529, 538.

²³ Law Reform (Husband and Wife) Act 1962.

²⁴ Married Women's Property Act 1882; Law Reform (Married Women and Tortfeasors) Act 1935; Married Women (Restraint upon Anticipation) Act 1949.

²⁵ Finance Act 1988, s. 32, abolishing aggregation of income for income tax purposes as from the year 1990-1991; s. 104 does the same for capital gains tax.

²⁶ See G. L. Williams, "Legal Unity of Husband and Wife", (1947) 10 MLR 16, 19-20.

²⁷ The common law rule that the husband is sole natural guardian of their children is abolished in the Children Act 1989, s. 2(4); the wife was first granted "equal rights and authority" by the Guardianship Act 1973, s. 1(1).

²⁸ *Paton v BPAS Trustees* [1979] QB 276.

²⁹ Matrimonial Causes Act 1973, s. 12(b).

³⁰ *Baxter v Baxter* [1947] 1 All ER 387, per Lord Greene MR at p. 388; the point did not arise in the House of Lords [1948] AC 274.

petition is quite different from giving him the right to proceed without his wife's consent and to enforce her obligation by self-help. Moreover, the obligation recognised by matrimonial law is not of such an unconditional nature as to make self-help an appropriate remedy. The refusal must be "wilful" in the sense of a "settled and definite decision come to without just excuse".³¹ There is nothing to stop the spouses agreeing to refrain from intercourse during marriage or until some event, such as a religious ceremony, takes place.³² Furthermore, if one of them leads the other to believe that he or she will not seek to have it annulled on this ground, a nullity decree may be refused.³³

8. Similarly a husband or wife who refuses intercourse may in certain circumstances be found to have behaved in such a way that the other cannot reasonably be expected to live with him or her, and a divorce may therefore be granted if the marriage has irretrievably broken down.³⁴ By parity of reasoning it could be argued that this gives rise to an obligation, "albeit of a limited kind", to behave reasonably in the matter of sexual relations. But this means that there are obviously circumstances in which either spouse may reasonably refuse intercourse and sometimes both may do so.³⁵ Thus, in one case, a divorce was denied to a husband whose wife refused to have intercourse more than once a week³⁶ and in another to a wife who complained that intercourse was unsatisfactory and infrequent because of her husband's low sexual drive.³⁷ On the the hand, excessive or perverted sexual demands have long been held capable of grounding a divorce.³⁸ Once again, therefore, matrimonial law is far from recognising the husband's absolute right to insist on intercourse whenever and in whatever circumstances he chooses or to use self-help in enforcing it.

9. Nor did the respondents to our working paper put forward the existence of the matrimonial remedies as an argument for retaining the husband's immunity. Where a wife does not agree to sexual intercourse, the notion that a husband should be able to insist on intercourse without her consent was firmly rejected by the great majority. Matrimonial law gives neither party an absolute legal right to intercourse. Still less does it recognise that one of them is able to use self-help to enforce such a right. As far as the general law of marriage is concerned, the rights of the spouses are equal, and this must include an equal right to choose whether or not sexual intercourse should take place.

³¹ *Horton v Horton* [1947] 2 All ER 871, 874.

³² *Kaur v Singh* [1972] 1 WLR 105.

³³ Matrimonial Causes Act 1973, s. 13(1).

³⁴ Under the old law, refusal of intercourse was held to be cruelty by a wife in, e.g. *Synge v Synge* [1900] P 180, *Evans v Evans* [1965] 2 All ER 789, and *P(D) v P(J)* [1965] 1 WLR 963, and by a husband in *Sheldon v Sheldon* [1966] P 62.

³⁵ *Archard v Archard*, *The Times*, 20 April 1972.

³⁶ *Mason v Mason* (1981) 11 Fam Law 143.

³⁷ *Dowden v Dowden* (1978) 8 Fam Law 106; see also *B(L) v B(R)* [1965] 1 WLR 1413; *P v P* [1964] 3 All ER 919.

³⁸ *Holborn v Holborn* [1947] 1 All ER 32.

APPENDIX C

SECTIONS 4, 4A AND 7(2) OF THE SEXUAL OFFENCES (AMENDMENT) ACT 1976, AND SECTION 80 OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984, AS THEY WOULD APPEAR AFTER IMPLEMENTATION OF THE DRAFT BILL IN APPENDIX A

(The proposed amendments are indicated by bold print)

Sexual Offences (Amendment) Act 1976

Section 4

(1) Subject, in the case of a marital rape offence, to the modifications of this section made by section 4A of this Act, except as authorised by a direction given in pursuance of this section—

- (a) after an allegation that a woman has been the victim of a rape offence has been made by the woman or by any other person, neither the woman's name nor her address nor a still or moving picture of her shall during her lifetime—
 - (i) be published in England and Wales in a written publication available to the public; or
 - (ii) be broadcast or included in a cable programme in England and Wales, if that is likely to lead members of the public to identify her as an alleged victim of such an offence; and
- (b) after a person is accused of a rape offence, no matter likely to lead members of the public to identify a woman as the complainant in relation to that accusation shall during her lifetime—
 - (i) be published in England and Wales in a written publication available to the public; or
 - (ii) be broadcast or included in a cable programme in England and Wales;

but nothing in this subsection prohibits the publication or broadcasting or inclusion in a cable programme of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence.

(1A) In subsection (1) above "picture" includes a likeness however produced.

(2) If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the Crown Court for a direction in pursuance of this subsection and satisfies the judge—

- (a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and
- (b) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that the preceding subsection shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant.

(3) If at a trial the judge is satisfied that the effect of subsection (1) of this section is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that subsection shall not apply to such matter as is specified in the direction; but a direction shall not be given in pursuance of this subsection by reason only of the outcome of the trial.

(4) If a person who has been convicted of an offence and given notice of appeal to the Court of Appeal against the conviction, or notice of an application for leave so to appeal, applies to the Court of Appeal for a direction in pursuance of this subsection and satisfies the Court—

- (a) that the direction is required for the purpose of obtaining evidence in support of the appeal; and
- (b) that the applicant is likely to suffer substantial injustice if the direction is not given,

the Court shall direct that subsection (1) of this section shall not, by virtue of an accusation which alleges a rape offence and is specified in the direction, apply in relation to a complainant so specified.

(5) If any matter is published broadcast or included in a cable programme in contravention of subsection (1) of this section, the following persons, namely—

- (a) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;
- (b) in the case of any other publication, the person who publishes it;
- (c) in the case of a broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper, and
- (d) in the case of an inclusion in a cable programme, any body corporate which sends or provides the programme and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5A) Where a person is charged with an offence under subsection (5) of this section in respect of the publication or broadcast of any matter or the inclusion of any matter in a cable programme, it shall be a defence, subject to subsection (5B) below, to prove that the publication, broadcast or cable programme in which the matter appeared was one in respect of which the woman had given written consent to the appearance of matter of that description.

(5B) Written consent is not a defence if it is proved that any person interfered unreasonably with the woman's peace or comfort with intent to obtain the consent.

(6) For the purposes of this section a person is accused of a rape offence if—

- (a) an information is laid alleging that he has committed a rape offence; or
- (b) he appears before a court charged with a rape offence; or
- (c) a court before which he is appearing commits him for trial on a new charge alleging a rape offence; or
- (d) a bill of indictment charging him with a rape offence is preferred before a court in which he may lawfully be indicted for the offence,

and references in this section and section 7(5) of this Act to an accusation alleging a rape offence shall be construed accordingly; and in this section—

“a broadcast” means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;

“cable programme” means a programme included in a cable programme service;

“complainant”, in relation to a person accused of a rape offence or an accusation alleging a rape offence, means the woman against whom the offence is alleged to have been committed; and

“written publication” includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

(7) Nothing in this section affects any prohibition or restriction imposed by virtue of any other enactment upon a publication broadcast or inclusion in a cable programme; and a direction in pursuance of this section does not affect the operation of subsection (1) of this section at any time before the direction is given.

Section 4A

(1) Section 4 of this Act shall have effect in the case of a marital rape offence with the following modifications.

(2) The prohibition in subsection (1) of the publication or other disclosure (except as authorised by a direction) of—

- (a) the woman's name or address or a picture of her; and
- (b) matter likely to lead members of the public to identify the woman;

shall apply in relation to the person against whom the allegation or accusation of the rape offence is made ("the man") as it applies to the woman, but shall continue in force for the duration of the woman's life only.

(3) Any direction in pursuance of that section may disapply the prohibition either in relation to the man and the woman or in relation to the man only (but not in relation to the woman only) and, where given in pursuance of an application, whether or not the application sought that form of direction.

(4) Subject to subsection (5) below, the defence conferred by subsection (5A) on proof of the written consent of the woman to the appearance of matter of the description in question shall only be available on proof of the written consent of the woman and the man; and the exception in subsection (5B) on proof of unreasonable interference with the woman's peace or comfort also on proof of unreasonable interference with the man's peace or comfort.

(5) Where the man is convicted of the rape offence subsection (4) above does not apply as respects any time after the conviction.

Section 7(2)

In this Act—

"a rape offence" means any of the following, namely rape, attempted rape, assault with intent to rape, aiding, abetting, counselling and procuring rape, attempted rape or assault with intent to rape, incitement to rape, conspiracy to rape and burglary with intent to rape;

"a marital rape offence" means any of the following, namely rape, attempted rape, assault with intent to rape and burglary with intent to rape where, at the time of the alleged offence, the victim and the person accused of the offence are married to each other; and

references to sexual intercourse shall be construed in accordance with section 44 of the Sexual Offences Act 1956 so far as it relates to natural intercourse (under which such intercourse is deemed complete on proof of penetration only);

and section 46 of that Act (which relates to the meaning of "man" and "woman" in that Act) shall have effect as if the reference to that Act included a reference to this Act.

Police and Criminal Evidence Act 1984, section 80

(1) In any proceedings the wife or husband of the accused shall be competent to give evidence—

- (a) subject to subsection (4) below, for the prosecution; and
- (b) on behalf of the accused or any person jointly charged with the accused.

(2) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence on behalf of the accused.

(3) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused if and only if—

- (a) the offence charged involves an assault on, or injury or a threat of injury to, the wife or husband of the accused or a person who was at the material time under the age of sixteen; or
- (aa) the offence charged is a sexual offence against the wife of the accused; or
- (b) the offence charged is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or
- (c) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above or of attempting to commit any offence falling within paragraph (aa) above.

(4) Where a husband and wife are jointly charged with an offence neither spouse shall at the trial be competent or compellable by virtue of subsection (1)(a), (2) or (3) above to give evidence in respect of that offence unless that spouse is not, or is no longer, liable to be convicted of that offence at the trial as a result of pleading guilty or for any other reason.

(5) In any proceedings a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married.

(6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.

(7) In subsections (3)(aa) and (b) above "sexual offence" means an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978.

(8) The failure of the wife or husband of the accused to give evidence shall not be made the subject of any comment by the prosecution.

(9) Section 1(d) of the Criminal Evidence Act 1898 (communications between husband and wife) and section 43(1) of the Matrimonial Causes Act 1965 (evidence as to marital intercourse) shall cease to have effect.

APPENDIX D

List of individuals and organisations who commented on the Law Commission's Working Paper No. 116, "Rape within Marriage" (1990)

Mr Peter Alldrige, Cardiff Law School, University of Wales
Professor J A Andrews
The Ashiana Project
Association of Chief Police Officers
Mr Chris Barton, Department of Law, Staffordshire Polytechnic
Canon G B Bentley
Mr G W Blackall
Professor Christopher Boorse
Borough of Milton Keynes (Working Party on Violence against Women and Children)
Professor Margaret Brazier, Ms Caroline Bridge, Mr Martin Davey, Faculty of Law,
University of Manchester (jointly)
Ms Grainne di Burca, Fellow, Somerville College, Oxford
Chiswick Family Rescue Limited
Council of Her Majesty's Circuit Judges
Professor S M Cretney MA DCL FBA
Criminal Bar Association
Criminal Law Review
Crown Prosecution Service
Derby Rape Crisis Centre
Edinburgh Rape Crisis Centre
Family & Youth Concern
The Family Law Bar Association
Mr M J Fisher
Professor M D A Freeman, University College, London
The Hon Mr Justice Garland, Presiding Judge of the South Eastern Circuit
The General Council of the Bar
Haldane Society of Socialist Lawyers
Her Honour Jean Graham Hall and Mr Douglas F Martin (jointly)
Ms Joan Harpin
Holborn Law Society
The Hon Mr Justice Hollings
The Hon Mr Justice Hollis
Homeless Action
Islington Women's Advice Group
The Institute of Legal Executives
Mr Andrew Jefferies
The Hon Mr Justice Johnson
Justice
Justices' Clerks' Society
Justice of the Peace
Kingston Women's Centre
The Law Society
Mr D A Leonard, Deputy Chief Constable, Sussex Police
Mr R De Lima
The London Criminal Courts Solicitors' Association
Ms Nicola Mackintosh
Married Women's Association
Mr John B Milmo QC
Mr Jonathan Montgomery, Lecturer in Law, University of Southampton
The Mothers' Union
The Rt Hon Lord Justice Mustill
National Association of Local Government Women's Committees
The National Council of Women of Great Britain
National Family Trust
National Federation of Women's Institutes
Ms Katherine O'Donovan, Rutherford College, University of Kent
The Hon Mr Justice Ognall
The Hon Mr Justice Owen
Plymouth Claimants Union

Police Federation of England and Wales
The Police Superintendents' Association of England and Wales
Ms Josephine Reeves
Relate
Mr Alec Samuels
The Hon Mr Justice Schiemann
Scottish Trades Union Congress (General Council)
The Society of Public Teachers of Law
Mr J R Spencer, Selwyn College, Cambridge
The Hon Mr Justice Steyn, Presiding Judge of the Northern Circuit
Stirling District Council
Ms Celia Wells, Cardiff Law School, University of Wales
Welsh Women's Aid
Mr Richard White
Mr Stephen White, Senior Lecturer, Cardiff Law School, University of Wales
Professor Glanville Williams
Women Against Rape
Women's Aid Federation (England) Limited
Women and Housing Forum
Women's Committee, London Borough of Greenwich
Women's Equality Unit, Islington Council
Women's National Commission

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