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of Canada

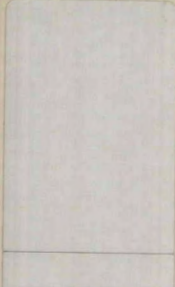
Commission de réforme du droit  
du Canada

**CRIMINAL LAW**

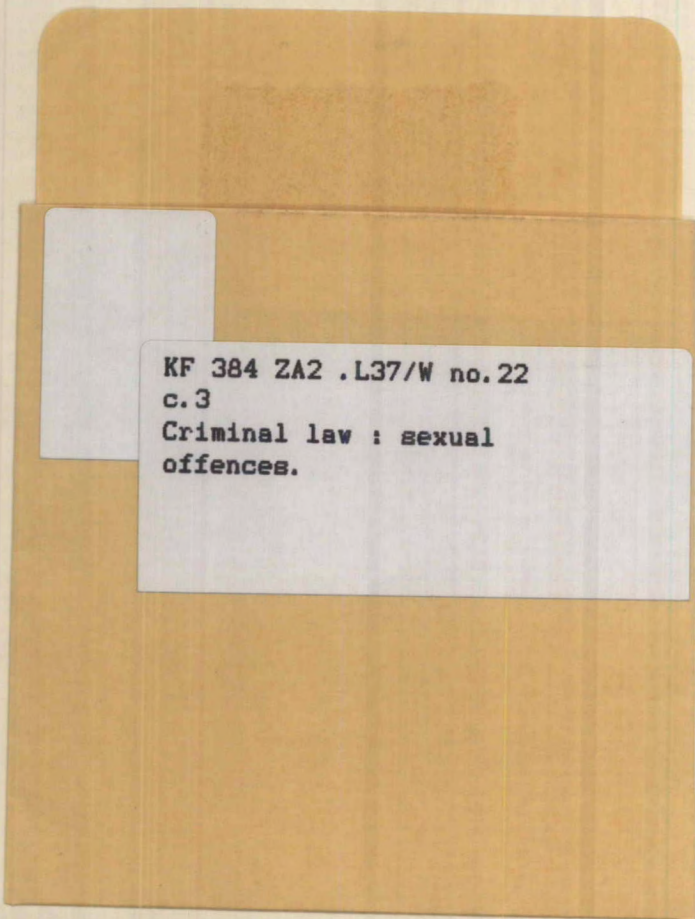
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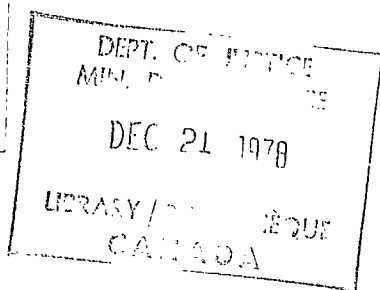
Working Paper 22



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# Law Reform Commission of Canada

## Working Paper 22

### CRIMINAL LAW

# sexual offences

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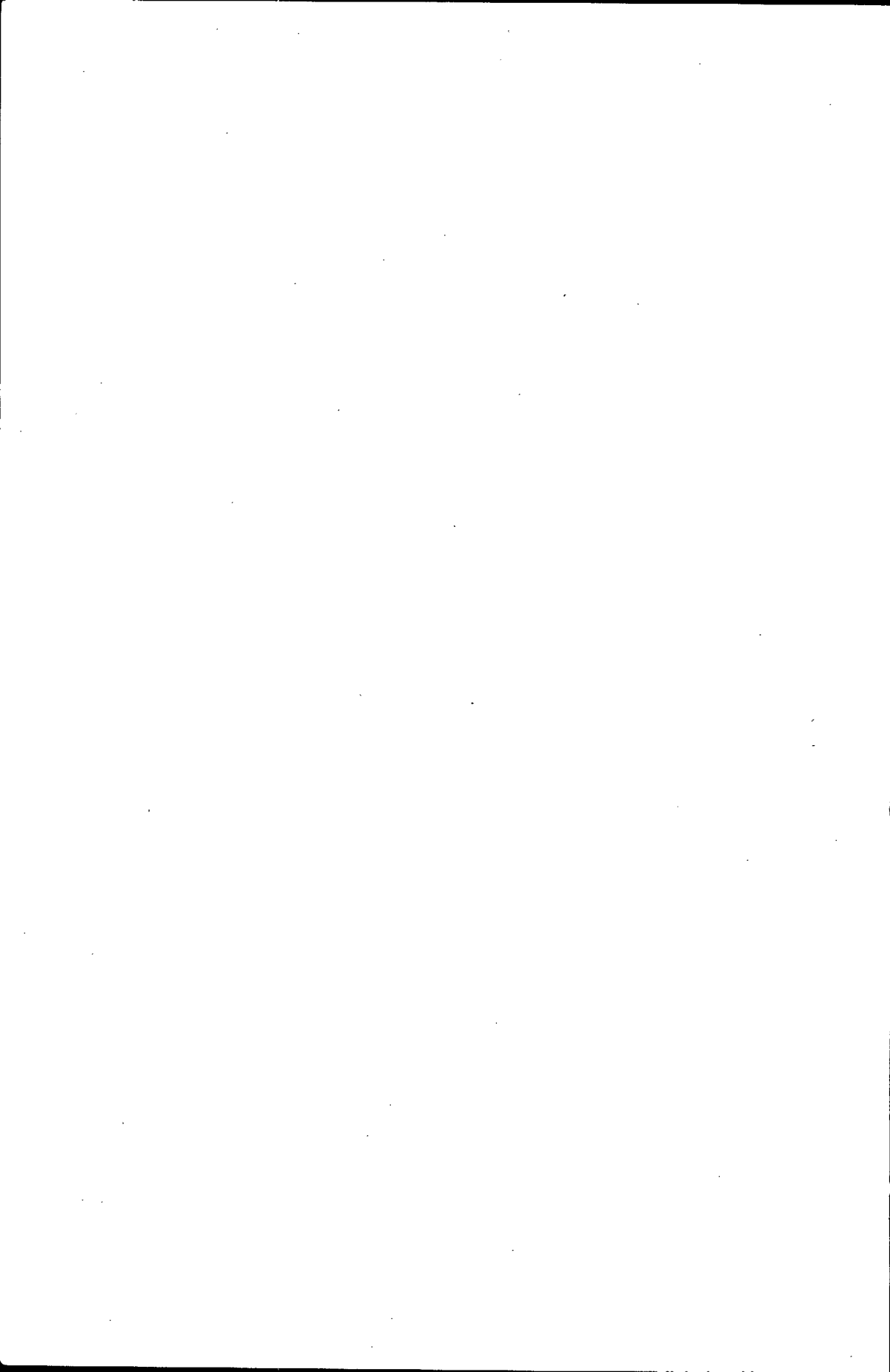


# Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary  
Law Reform Commission of Canada  
130 Albert Street  
Ottawa, Ontario  
K1A 0L6



## **Commission**

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**Francis C. Muldoon, Q.C., Vice-Chairman**  
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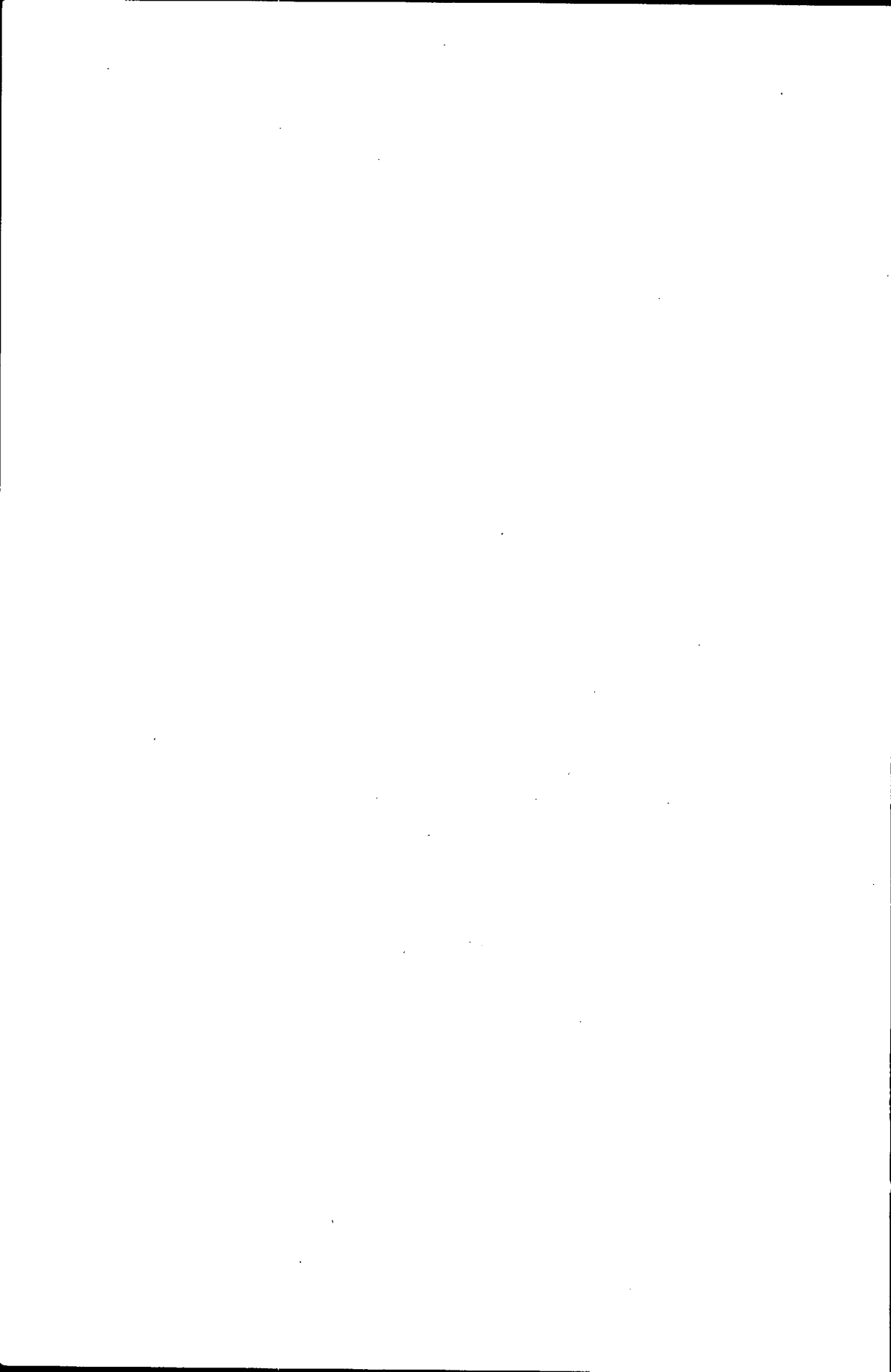
## **Consultants**

**Dr. J. W. Mohr**  
**Joanna L. McFadyen**

## **Researchers**

**Tanner Elton**  
**Judge Sandra E. Oxner**  
**Marcia H. Rioux**  
**Dr. R. E. Turner**

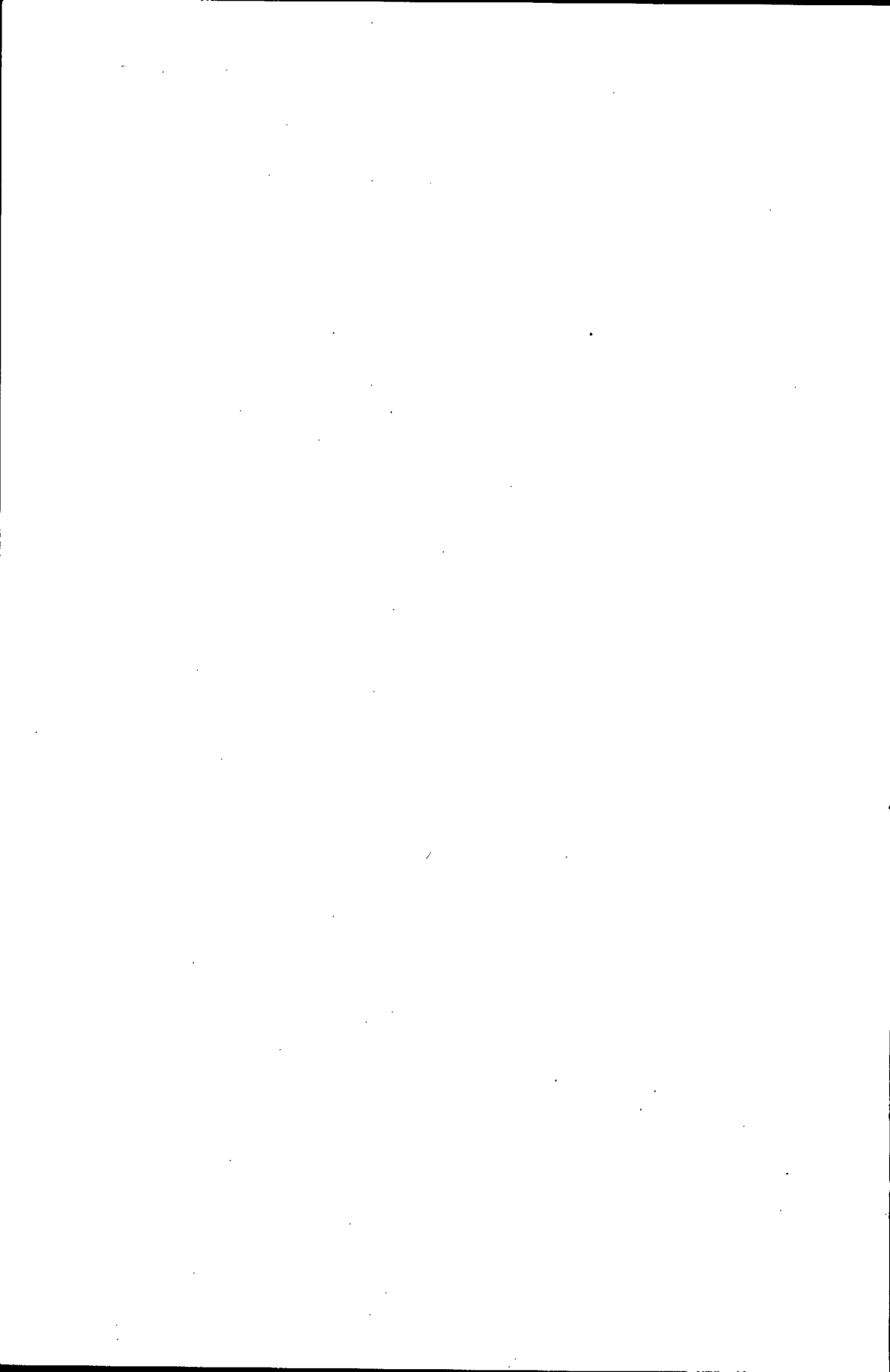
Working Papers are published by the Commission for the purpose of soliciting public comment on its tentative proposals in order to assist the Commission in the formulation of its final recommendations on the subject matter. The fact that the Commission lists the researchers and consultants is not, and should not, be construed as an indication that all of the views expressed in the Paper, or form in which they are conveyed, meet with their approval — it is however, a recognition of the important contribution they have made to its inception.





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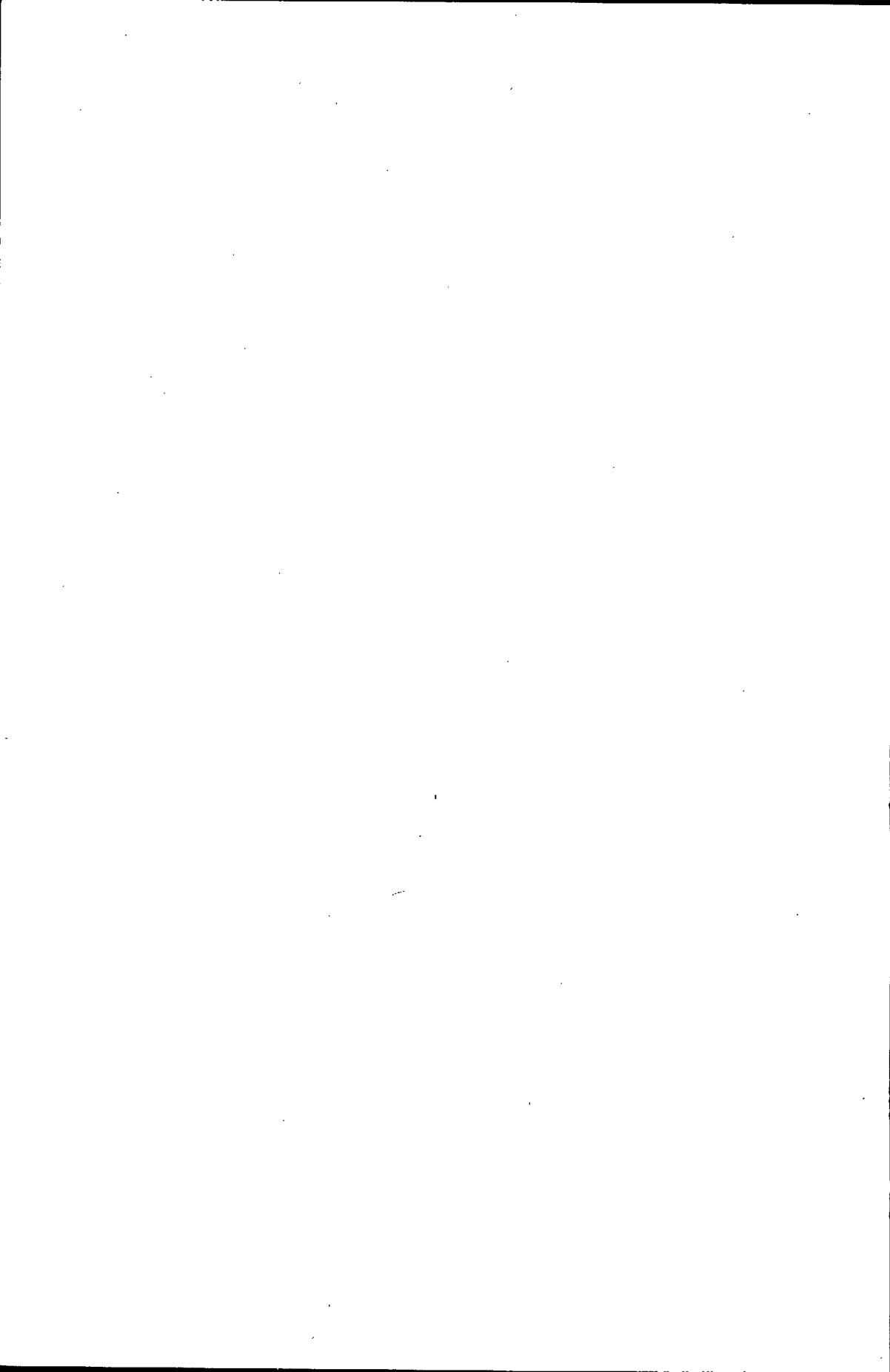


# Acknowledgments

Interested professionals, associations and groups have played an important role in the research and writing of this Working Paper. Mental health professionals, judges, lawyers and women's groups were among the main contributors of comments and criticisms at a series of meetings and consultations held over a number of years.

The Commission expresses its gratitude to those persons who gave us the benefit of their information, advice and criticism. Although it is difficult to single out a particular group, we feel the work and papers of the study groups of the Clarke Institute of Psychiatry deserve special mention. We hope that the process of consultation will continue and expand to include public response and feedback to the ideas expressed in this Working Paper.

The Commission acknowledges the valuable input of a Commissioner, Dr. Gérard V. La Forest, in the initial discussions leading to this Working Paper. Dr. La Forest is now on leave from the Commission and is working with the Canadian Bar Association.



# Foreword

Although sexual offences make up only three to six per cent of criminal offences, they are of major public concern. Most people have at one time or another felt apprehensive about the possibility of being sexually assaulted. Many worry that their children may be the subject of sexual exploitation.

In this Working Paper, the Commission is trying to do three things. First, to devise new, more concise formulations of sexual offences for the *Criminal Code* of Canada. Second, to adapt the law to modern Canadian society. Third, to examine the role of the Canadian criminal law in relation to sexual conduct.

# CHAPTER 1

## Introduction

In this Working Paper a new formulation of sexual offences is proposed as an alternative to the present provisions in the *Criminal Code*. The reformulation has two objectives: first, to simplify and organize sexual offences; second, to bring the law more in line with present values and attitudes towards sexual offences and towards the use of the criminal law.

### I. Simplification

Simplification and clarification of the provisions of the *Criminal Code* dealing with sexual offences and better organization of those provisions are goals of this Working Paper. Canada's *Criminal Code* is a compilation of various statutes rather than a code of law as the term is properly understood. Frequent revision and amendment have resulted in disorganized laws relating to sexual offences. This in turn has made the law inaccessible to the layman and even to lawyers not specializing in criminal law. Of course, the frequent revision and amendment have been undertaken in response to Parliament's perceptions of the social values of Canadians and the need for protective laws over the years.

Organization, however, is needed within the *Criminal Code* to group the various sexual offences together. As it stands now, the Code embodies a variety of historical developments and has few clearly discernible organizing principles. Although sexual offences constitute only a small part of the Code, they cover such a multitude of "sins" that it is often difficult to identify the issues in many of the sections. Some offences are directed against the use of force or fraud, others to prohibitions of sexual acts with specific groups or persons, and still others criminalize specific types of sexual behaviour.

Re-expression of the language used in sexual offences is also vital. There are many obsolete legal provisions in the sections of the Code dealing with sexual offences. Anachronistic, euphemistic and emotionally charged expressions such as "carnal knowledge", "previously chaste character" and "rape" need to be re-examined in the light of current language and social practice. Although the judicial interpretations of these expressions may have somewhat clarified their meanings in the understanding of the legal profession, the population at large does not have ready access to that knowledge.

Re-expression and simplification mean more than just changing the appearance of the law; they mean changing the substance as well. Today, the practice of classifying sex offenders as dangerous for the purposes of the vagrancy provisions of the Code is neither efficacious nor fair. Predicting how dangerous an offender might be is an extremely uncertain process which offends against the basic principles of criminal law. Rather than resorting to this process, substantive offences should be formulated so that behaviour dangerous to the life and security of persons in a community is clearly identified. This behaviour could then be subject to sentences of separation, which carry severe maximum penalties.

While simplification and clarification of the law are necessary for a reformulation of sexual offences, they are not alone adequate. A re-evaluation of the substance of the provisions of the Code is also needed to bring sexual offences more in line with society's changing values and attitudes.



## II. Sex offences and evolving values

Recent public discussion has raised many questions about sexual offences. Why was it that, until a 1975 amendment to the *Criminal Code*, evidence of a rape victim's previous sexual conduct was so important in a trial? Why do the provisions "protecting" sixteen to eighteen year old women exclude those not "of previously chaste character"? Why is soliciting for the purposes of prostitution an offence directed at women only? Why should men always be characterized as aggressors and women as victims in the criminal law of sexual offences when it is not necessarily always so?

That such questions are now frequently posed reflects some change in social values. The increasing acceptance of alternate living arrangements, the widespread use of birth control and a realignment of male-female roles are a few of the social trends resulting in pressure for change.

One example of how the law has fallen behind is with the *Criminal Code* provisions for protecting young women from sexual interaction. Many sexual offences deal with restrictions on sexual intercourse with women, ostensibly to protect them. However, some have argued that such legislation reflects anachronistic perceptions of the role of women in contemporary society and actually protects something more akin to property rights.

Using criminal sanctions to control sexual conduct has also been questioned. When re-evaluating the role of the criminal law in controlling sexual conduct, the aims and purposes of the criminal law must be considered. In its reports to Parliament on criminal law, the Commission stressed the importance of linking the criminal law to social values. While protection of society from crime is one goal, the criminal law should also maximize personal liberty and minimize state intervention. Because criminal sanctions diminish freedom, they should be invoked only with great restraint because of the impact of both misuse and overuse on the individual and the state. As a means of social control, the criminal law, then, should only be used as a last resort.

In this Commission's Report to Parliament, *Our Criminal Law*, the following tests of criminality are suggested:

1. Does the act seriously harm other people?
2. Does it in some other way so seriously contravene our fundamental values as to be harmful to society?
3. Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
4. Given that we can answer "yes" to the above three questions, are we satisfied that criminal law can make a significant contribution in dealing with the problem?

Consideration is given in this Working Paper to how present provisions prohibiting sexual conduct accommodate these tests. In light of contemporary values, consideration is given to which forms of sexually related conduct are socially intolerable and which forms of that conduct should properly be subject to criminal prosecution. In determining this, the Commission must try to identify the principles which should govern the reformulation of sex offences.

### III. Organizing principles

The Commission's consultations and the debate generated within the Commission demonstrate the divergence of opinion in this contentious area. But although there are many grounds for disagreement, there is also a substantial consensus on basic issues. No one seriously questions the right to personal bodily integrity and the right to engage in sexual activity only with consent. Few would disagree that there should be some limitations placed on sexual activities between adults and children. Most would agree that there should be some regulation of the performance of sexual acts in public places. Given that

society wishes to impose some controls on sexual conduct, three main concerns emerge:

1. *Consent* The first condition to sexual behaviour is that those involved freely consent to it without fraud;
2. *Age* There is a strong feeling in our society that children and other traditionally protected persons should be guarded from possible exploitation and corruption because they may be too immature to foresee the consequences of their decisions;
3. *Privacy* Sexual behaviour, even where socially or legally condoned, is considered a private matter to which others should not be unwillingly exposed.

These three concerns can be formulated into three policy issues, which are the business of the criminal law. These are:

- protecting the integrity of the person
- protecting children and special groups
- safeguarding public decency

An examination of sexual offences reveals that the above concerns are, in fact, the basis of many of the present provisions; but others are in part or entirely contrary to them. In Chapter 2 an analysis and reformulation of present sexual offences on the basis of the above policy issues is undertaken. First, however, related and equally important issues which are not directly related to the substantive law will be examined.

#### IV. Sexual offences — The wider context

A legal reformulation of the provisions of the *Criminal Code* is a limited exercise in solving the problem of sexual offences in Canadian society. As the Commission has stated before, crime

can be understood and effectively dealt with only in relation to the social milieu in which it occurs. Although the focus of this paper is on reform of the substantive law of sexual offences, it must be emphasized that legal change is only worthwhile when accompanied by changes in attitudes and practice. As a method of social control, the criminal law has inherent limitations and should not be looked upon as the only means by which society can respond to social problems. Whether harsh or lenient, criminal law has never succeeded in eradicating crime. The law of itself cannot solve all the troubles of human behaviour. What is important is not what the law says but what it does to and for people.

The responses of the police, the courts and the correctional agencies to the *Criminal Code* determine what is actually done about sexual offences and sexual offenders. Each institution should ensure that the coercive power of the criminal law and the procedures surrounding it are sensitively and sensibly employed so that the social fabric is not unnecessarily injured. It is therefore important that the persons involved in this process have a clear understanding of the policies underlying the substantive law so that they may exercise their discretion in a manner consistent with those policies.

The responses of the community, the police and the courts to sexual offences deserve special attention and are part of the question of a comprehensive philosophy for our criminal justice system. Here, we can attempt to set out only some of the relevant considerations.

Some believe that forbidding certain behaviour will make it disappear and that the law alone can accomplish this end. But the treatment of crime in general and sexual offences in particular extends beyond the boundaries of the criminal process. The criminal law is linked to negative sanctions, and the severity of a crime is expressed by the severity of the sanction which can be imposed. Rape, which carries a maximum sentence of life imprisonment, is seen as more detrimental behaviour than indecent exposure, which has a maximum penalty of six months imprisonment.

Punishment of the offender has few, if any, positive consequences for the victim. Punishment does not completely resolve the problem, for the sentence applies only to the offender and does little about the circumstances which led to the criminal behaviour. Unless there is a change in the behaviour of the offender or the circumstances which gave rise to the crime, the individual and the community remain in fear of further offences, either upon the offender's emergence from prison or on the part of other offenders.

It is necessary to consider various ways of resolving problems to ensure that the interests of the victim and offender and those of the community are served. Such alternative methods of problem resolution need not interfere with the use of the criminal justice system but may be made available before or at the same time that the process goes into play. It is possible that more potential offenders would seek help with what they recognize as a problem if they were not afraid of the consequences of the criminal process. Victims also would be more likely to come forward if they did not feel they were going to be subjected to further indignity.

*The Community* The experience of physicians, clinicians, and others dealing with the welfare of families and children indicates that a great deal of discretion is normally exercised when working with persons whose behaviour suggests that they may commit sexual offences. This is especially true when such behaviour is manifested within families and other long-term relationships. Whether a sexually-related incident is referred to the police for formal processing or is dealt with in an informal manner will often depend on such things as availability of resources, such as family counselling centres, and how effective these resources are seen to be in dealing with the incident.

Even when formal legal action is clearly necessary, such community organizations as crisis centres and family and child welfare agencies can provide victims and their families with aid, support and advocacy which are not available, within the formal process.

*Police* The police are closely linked to the community and much of their work is not confined to law enforcement. The way

police treat both the victim and the offender depends on what the police feel is expected of them. Where police identified their work as helping to solve problems, as well as being protectors and evidence gatherers, their attitudes and actions have been more helpful to the community, the offender and the victim.

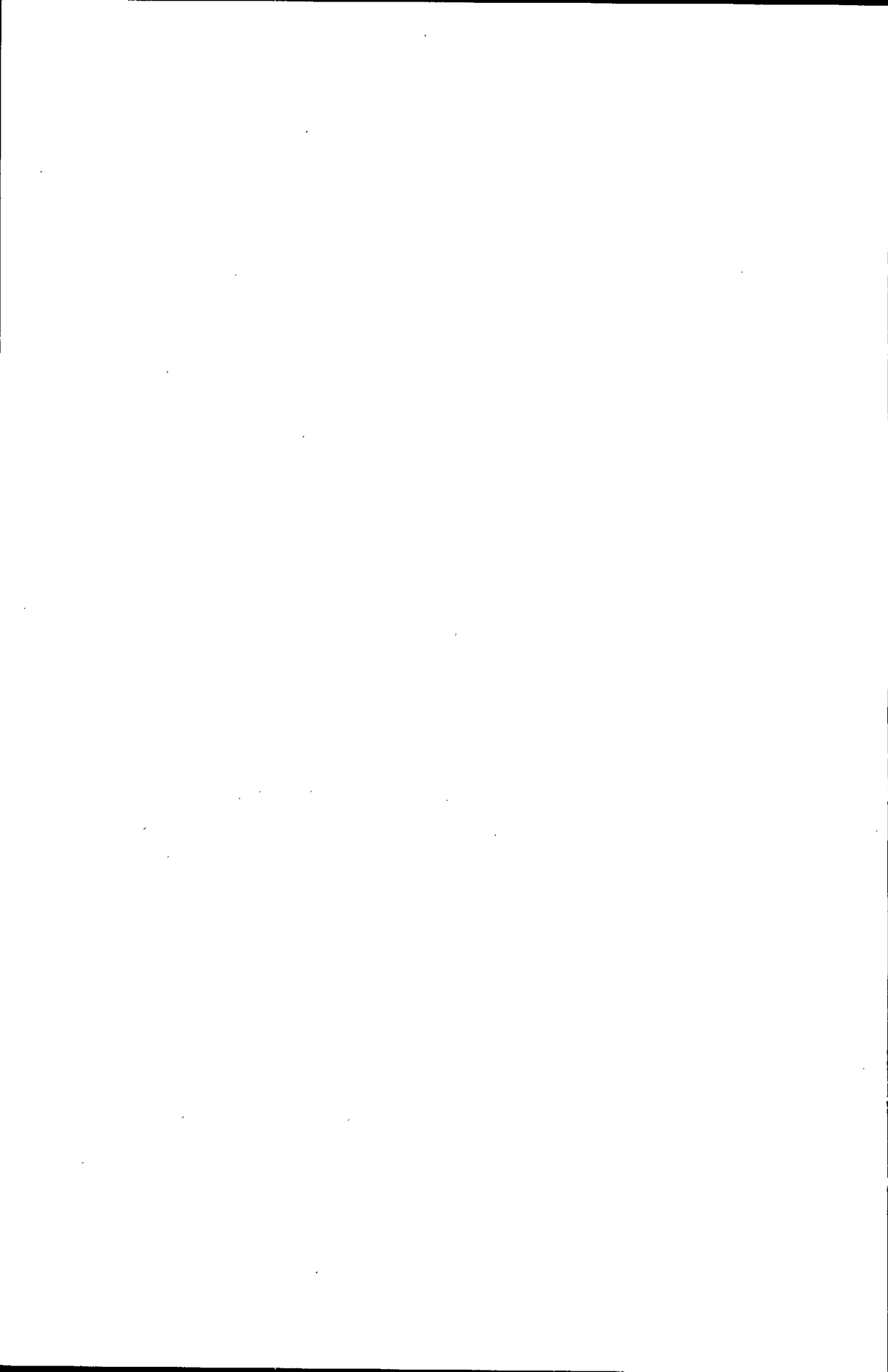
In the Commission's Report, *Guidelines on Dispositions and Sentences in the Criminal Process*, criteria were recommended for identifying situations and conditions that would permit the use of other forms of response to crime, including resolution by the interested parties or referral to community services and agencies. Police work in this area is difficult, but experienced policemen tend to have better "street knowledge" than most other members of society. As such, they could, as recommended in the Report, *Mental Disorder in the Criminal Process*, accomplish a great deal more than they are now able to do by acting as mediators and without recourse to the formal legal process. Such discretion should, of course, be exercised openly following known criteria and be subject to some form of review.

*Courts* Generally, criminal cases are heard in criminal courts. Our Report, *Family Law*, raised important questions about the jurisdiction of family courts over criminal offences such as assaults and incest which are committed between members of a family. This issue is especially important in the context of sexual offences, many of which involve family members.

Incest is clearly a case in point, as are many cases of indecent assaults on children and on spouses. The unified family court may be a more appropriate forum for a constructive resolution of such cases than the criminal courts where trial procedures do not always lend themselves to sorting out the various interests and concerns involved in family disputes. Unified family courts on the other hand, should integrate the services of the police, the courts and community agencies. Family counsellors attached to such courts could be extremely helpful in sorting out family problems related to sexual offences.

The emphasis in the chapter which follows is on the substantive law relating to sexual offences. Following the three organizing principles enunciated earlier, the law relating to these principles is discussed and a reformulation is suggested. The Commission makes its recommendations based on the discussion and reformulation.





## CHAPTER 2

# Analysis and Reformulation of Sexual Offences

### I. Prohibitions governing sexual behaviour in the present *Criminal Code*

Before proceeding on the matter of sex offences, we should briefly review the offences actually described in the Code. The *Criminal Code* denounces a wide variety of conduct related directly or indirectly to sex. The following list of offences indicates the broad scope of sexual prohibitions in the present *Criminal Code* (See Appendix for the text of the offences).

Part IV of the *Criminal Code* of Canada is entitled, "Sexual Offences, Public Morals and Disorderly Conduct," and comprises sections 138 to 178. Sections 138 to 142 cover definitions and procedures. The following sections contain the substantive provisions related to sexual conduct:

#### *Sexual Offences*

143 Rape

145 Attempt to commit rape

146 Sexual intercourse with female under fourteen;  
between fourteen and sixteen

- 148 Sexual intercourse with feeble-minded
- 149 Indecent assault on female
- 150 Incest
- 151 Seduction of female between sixteen and eighteen
- 152 Seduction under promise of marriage
- 153 Sexual intercourse with step-daughter, or female employee
- 154 Seduction of female passengers on vessels
- 155 Buggery or bestiality
- 156 Indecent assault on male
- 157 Acts of gross indecency
- 158 Exception re acts in private between husband and wife or consenting adults

*Offences Tending to Corrupt Morals*

- 159 Corrupting morals (obscenity)
- 163 Immoral theatrical performance
- 166 Parent or guardian procuring defilement
- 167 Householder permitting defilement
- 168 Corrupting children

*Disorderly Conduct*

This group of offences relates primarily to conduct which is not sexual in nature. The sections relating to sexual conduct are as follows:

- 169 Indecent acts
- 170 Nudity
- 171(1)(b) Indecent exhibition
- 173 Trespassing at night
- 175(1)(e) Previous sex offenders prohibited from loitering

In addition, several other sections throughout the Code either refer or are applied to sexual behaviour, for example, sections 248 and 249 on abduction of females and subsection 330(2) on indecent telephone calls. However, they are not discussed here because they can be more appropriately dealt with in a reformulation of other parts of the Code. For example, sections 248 and 249 would be more appropriately dealt with under provisions in the *Criminal Code* relating to kidnapping. Likewise, subsection 330(2) would find better expression under *Criminal Code* provisions dealing with harassment.

The laws on obscenity and soliciting are not discussed in this paper. They should be the subject of further research and analysis in the quest for either appropriate objective norms or the appropriate definition of community standards or both. The Commission has also made recommendations in regard to obscenity in Working Paper 10, *The Limits of Criminal Law*.

The analysis of sexual offences based on three policy guidelines — protecting the integrity of the person, protecting children and special groups and safeguarding public decency — will inevitably overlap as some of the offences fall into more than one category. Issues of procedure, evidence and punishment — some of which have been dealt with in other Commission publications — have not been fully discussed.

In presenting each policy issue, we have followed offences as they appear in the *Criminal Code*. This provides an easy cross-reference for those not familiar with Part IV of the Code. The Appendix sets out the offences referred to and the proposed reformulations so as to facilitate comparison.

## II. Protecting the integrity of the person

Freedom from violence or injury, often referred to as the inviolability of the person, is the most basic right we possess. Part VI of the *Criminal Code*, specifically devoted to "Offences Against the Person and Reputation", includes prohibitions against interference with the life, safety and bodily integrity of the person.

Rape and indecent assault are two major categories of sexual offences dealing with the right to be free from unwanted infringement of one's bodily integrity, or the right to be free from physical attack.

### A. Rape

Sections 143 and 145 of the *Criminal Code* state that it is an offence for a man to have, without her consent, sexual intercourse with a woman who is not his wife. In addition, it is an offence for a man to have sexual intercourse with a woman who is not his wife, with consent gained by force, fear or fraud. It is the absence of the woman's valid consent which transforms an act of sexual intercourse into the offence of rape. Before a conviction is possible, the prosecution must establish either that the accused knew that the woman did not consent to the intercourse or that the accused was reckless as to whether she consented.

Subsection 3(6) of the Code provides that sexual intercourse is complete upon penetration to even the slightest degree, whether or not semen is emitted. An accused, moreover, according to the case law, cannot successfully plead drunkenness as a defence in a charge of rape, except where the drunkenness was so severe as to interfere with his capacity to form any intent whatsoever.

But the issue of rape involves much more than legal definition. In recent years concerns have been raised about the nature and frequency of rape and the criminal proceedings related to it. The number of offences reported in crime statistics has greatly increased over the past decade. Whether this increase is due to a general rise in aggressive acts, to a greater willingness on the part of rape victims to report the offence, or to both, is not at all clear. It must be remembered that the number of criminal offences reported to the police is considerably less than actually committed.

A second area of growing concern is the process of investigation and trial. The plight of the victim in the criminal process is still not commonly appreciated. It is not often recognized that the victim in a rape case, perhaps more so than in other offences, is a passive pawn in the contest between the state and the accused. While many resources are expended in determining whether the accused is guilty or not, little if anything is done to assist the victim in dealing with the event.

In addition to the trauma she has suffered, the victim has the problem of discussing with others matters which would normally be regarded as intensely private. Regardless of the circumstances, rape evokes strong emotional reactions which are further intensified by the investigatory procedures. The recent establishment of rape crisis centres in a number of cities has helped to alleviate the mental anguish suffered by those rape victims who engage such centres' services. These centres give aid, information and moral support to victims and assist them through the investigation and trial.

A third area of concern is the nature of the offence itself. Essential to it is the violation of the integrity of the person through unwanted sexual contact. On this basis, rape is actually a form of assault and should therefore perhaps be treated as such under the law.

An assault is essentially an intentional application of force on another, or an attempt or threat to apply force without that person's consent. Rape is the intentional application of force in order to accomplish sexual intercourse without the victim's

consent. On this basis, it can be seen that all of the legally defined elements of rape are contained in the concept of assault, with sexual intercourse being a specific ingredient in addition to the force applied or threatened by the accused. The concept of sexual assault, therefore, more appropriately characterizes the actual nature of the offence of rape because the primary focus is on the assault or the violation of the integrity of the person rather than the sexual intercourse. In addition, it has been suggested that change in the focus of the offence from sexual intercourse to assault could in some measure help to lessen the unnecessary and embarrassing stigma which still adheres to rape victims by virtue of folklore about rape.

Several criticisms of the formulation and specific content of section 143 may be made. These are discussed in the order in which each point appears in the section.

*A male person . . .* Any differentiation in the *Criminal Code* between male and female persons should be avoided unless absolutely necessary. Both sexes should be equally protected and, when appropriate, equally culpable. In the present offence only men can be offenders while women, unless charged as a party to an offence committed by a man, can be only victims. Given the present statutory definition of the crime, this situation could hardly be otherwise.

*. . . commits rape . . .* The term "rape" is said to stigmatize. This stigma attaches to both victims and offenders. The offender becomes labelled a "rapist" and the victim sometimes becomes somehow morally suspect even if her complaint is amply proved and vindicated in law. These hard to describe but nonetheless real attitudes constitute that which is said to be the folklore relating to rape. What is prohibited is, of course, not sexual intercourse *per se* but its attainment through an assault.

*. . . when he has sexual intercourse with a female person . . .* The offence of rape has been limited to the penetration of the vagina by the penis. However, it is equally abhorrent for a person to be forced to submit to oral or anal penetration.



. . . *who is not his wife*. The exception in the Code which stipulates that forced sexual intercourse between spouses does not fall within the purview of section 143 provoked much discussion among the Law Reform Commissioners. One view is that the exception should be removed on the basis that the law, and especially the criminal law, should not endorse the concept that husbands have the right to their wives' sexuality without consent. From this perspective, the exception seems anomalous in that it suggests a husband has proprietary rights in his wife as a sexual object.

Another view is that the exception should be abolished only for spouses who are living apart. While it certainly seems appropriate to extend the offence to spouses no longer living under the same roof, the availability of a charge of rape between cohabiting spouses could, it is suggested, create serious evidentiary problems. It may be extremely difficult, if not impossible, to determine whether or not the victim consented in a specific instance to intercourse with the accused when they had had a long and continuous sexual relationship. Indeed, nothing prevents either spouse, and nothing has ever prevented the female spouse, from resorting to the general and aggravated assault provisions presently expressed in the *Criminal Code*. Convictions of assault have long supported separation proceedings under the family law of many provinces.

The Law Reform Commission has not achieved definitive consensus on the question of the inter-spousal exception to rape and welcomes comments from readers. However, *the Commission recommends that the exception in the Criminal Code which stipulates that forced sexual intercourse between spouses does not fall within the purview of section 143 should be abolished in regard to spouses who are not cohabiting*. The question remains whether inter-spousal exception to rape should be removed from the Code or should be retained for spouses who are living together. These questions, of course, are subsumed in the even larger issue.

Where concern is focused only on reducing the incidence of acts now classified as "rape", it must be recognized that the criminal law has extreme limitations in the matter of eradicating

criminal behaviour of any sort, regardless of the terms by which it is described. To expunge from the Code all mention of that crime called rape, and relegate it to a form of assault for all purposes would certainly effect a change in the characterization of the offence. Such a change of characterization, however, should not be seen as affecting and, in the view of the Commission, does not affect the reprehensible nature of the act. Whether the change would be more effective in terms of increased protection for the dignity and inviolability of the person, or whether its greatest value would lie in alleviating the distress, humiliation and stigmatization that is associated with the present law, is not so clear. Hopefully both results would follow. The Commission invites Canadians to express to us their reasons for thinking that such a change, seen in the context of all the proposals made in this paper, would — or would not — be for the better.

## B. *Indecent assaults*

Section 149 covers indecent assault on a female person by any person. Section 156 covers indecent assault on a male person but only when committed by another male. Central to these offences is the concept of assault and the violation of the integrity of the person. The term *indecent* has never been specifically defined and the indecency is determined by the surrounding circumstances. Following this line of reasoning, an assault, such as an unwanted touching of the arm, may be held to be an indecent assault if it is accompanied by an indecent suggestion or proposal.

Consent is also central to the offence of indecent assault. Consent to the touching is a defence, except where the person being touched is under fourteen years of age. In such a case, the accused may not raise in his/her defence the fact that he/she believed the person to be above the age of fourteen or that the person consented. The offence of indecent assault on a female

person makes special reference to consent obtained by false and fraudulent representations as to the nature and quality of the act while, in stark distinction, the offence of indecent assault on a male person does not make any such reference.

Again, the questions arise: Is it necessary to separate indecent assault from assault as a general category? Is it reasonable to maintain a separate charge for male and female victims? Does not the present situation in which a person is held strictly liable though he/she honestly, but mistakenly, believed that a consenting party was above the age of fourteen seem to impose an unusually high burden or responsibility?

There should be a clear understanding of the acts involved in a given charge. Although assault is commonly understood to mean aggressive physical acts, empirical studies show that many charges under sections 149 and 156 are, in fact, not assaults, as the word is commonly understood, but sexual contact with children in the absence of force. Such acts are a major cause of concern and should remain the subject of criminal charges. However, it would be more appropriate to re-conceptualize them so as to reflect their non-violent character.

### *C. Reformulation*

Whether the charges of rape and indecent assault should ultimately be a part of offences against the person or whether they should stand separately as sexual offences depends upon the underlying philosophy which is adopted in the reformulated *Criminal Code* as well as on the organizational framework eventually recommended. In dealing with the offence of rape, there are basically three options:

1. retaining the rape section in its entirety;
2. replacing the rape section with an offence of sexual assault which would continue to distinguish between sexual contact and sexual penetration;

3. replacing the rape section with an offence of sexual assault which would make no distinction between sexual contact and sexual penetration for the purposes of the substantive law, but would provide for consideration of the circumstances of the offence when the sentence is determined, in particular, violence, threat of violence and penetration.

①

In the first option, rape as now defined by the criminal law of Canada is indeed a species of assault. However, it is an assault with differences — two, at least, to be specific.

*Potential  
birth*

Rape is the only known kind of assault which can cause a new, individual member of our human species to be “summoned” into existence. The victim might become pregnant in this kind of assault. Egalitarian ideals of avoiding differentiation between the sexes apart, no woman of and by herself could ever impregnate a man or another woman, no matter how she carried out an assault. Our ancestors surely recognized this singular feature of rape as well as we do. It is this difference which always did, and still does, distinguish rape from any and all other forms of assault, whatever label it is made to bear.

*consent*

The second distinguishing factor of this kind of assault is the essential ingredient of non-consent (or lack of informed consent) on the part of the victim. No other extremely serious crime is so similar to an act which, in other circumstances, is so mutually esteemed and valued — as is the case, of course, with consensual sexual intercourse. In the matter of assault, other than sexual assault, the question of consent, or its absence, does not come into issue, apart from sporting events and mutually arranged personal combat. The ingredient of non-consent is always an issue in an accusation of rape, whereas it rarely if ever is an issue in accusations of any other type of assault.

Rape, then, is an assault which is well known to be clearly different by reason of these two distinguishing features.

The Commission considered these two distinctive features of the criminal assault called rape very thoroughly in reaching the recommendation which we propose for reform in this

particular matter. Are these distinguishing features of rape so significant as to require that rape must always be expressed as a distinctive offence in criminal law? The Commission concludes that rape does not always need to be expressed in such distinctive isolation, but can be properly and usefully subsumed in a more general offence called sexual assault. The judgment of interested individual members of the public is, however, still invited in response to this question.

② The second option argues that if one objective is to direct attention away from rape as a sexual offence and towards the right of every person to be free from physical assault, it may be more appropriate to adopt a sexual assault provision that maintains the distinction in substantive law between contact and penetration as an aggravating element. Some people might consider forced penetration as such an intimate violation of an individual's bodily integrity as to require that it be singled out as a condition of the offence. In this particular instance, the emphasis is on the extent to which a person's privacy has been infringed. The emphasis is not, therefore, on the penetration as a sexual act.

③ However, a third option is needed because it can be argued that the second option would be a mere relabelling of the present offence and would make no significant difference to perceptions about the nature of the offence. Accordingly, this third option would create a new offence of sexual assault which does not distinguish between unwanted sexual contact and unwanted sexual penetration for the purposes of the substantive law, but rather provides for consideration of aggravating circumstances of the assault when the sentence is determined.

In general, we favour the third option, a new offence of sexual assault applying to and not distinguishing between contact and penetration, as being the best embodiment of the stated objectives of reform of sexual offence laws, but also see merit in the two other choices. Through this Paper we wish to encourage the public to participate in law reform, and we seek the opinions of interested readers as to whether this choice is the most appropriate.

The following, then, is a reformulation of the offence of sexual assault that focuses on a new approach to forced sexual intercourse. *The Commission recommends that a similar reformulation be adopted in the Criminal Code to replace the present offence of rape.*

### *Sexual Assault*

(1) *Every one who has sexual contact with a person without that person's consent is guilty of an offence of sexual assault.*

(2) *For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental and that is offensive to the sexual dignity of that person.*

(3) *In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.*

This reformulation, incorporating rape and indecent assault, underlines the continued emphasis on protecting the integrity of the person, regardless of gender. Sexual contact and penetration without consent are considered assaultive acts with sexual connotations rather than "illegal" sexual acts.

Contact has not been separated from penetration for purposes of the substantive offence so as to turn the focus of the offence to assaultive rather than to sexual acts. The reformulation covers a broader scope of activities than does the present section as it includes anal and oral penetration.

Subsection (3) directs the court to consider all the circumstances of the offence when passing sentence on a person convicted of sexual assault. This direction to the court represents a recognition that the gravity of the crime may depend on such evidentiary matters as the presence or absence of violence, penetration, or a weapon.

However, changing and reformulating provisions of the Code will not be enough to eliminate all dissatisfaction with the present law. Some of the concerns can be dealt with only through changes in practice and procedure. These are concerns about the cross examination of the victim as to past sexual conduct and concerns about the undue publicity given to trials involving sexual offences.

First, on the matter of the victim's character in sexual offences. This Commission's Report to Parliament, *Evidence*, recommended limitations concerning evidence of the victim's character in sexual cases. Thus, in subsection 17(2) we propose that:

*evidence of a trait of the character of the victim of a sexual offence that is relevant solely to the disposition of the victim to act or fail to act in a particular manner is inadmissible, unless the judge at a hearing in camera is satisfied that the admission of such evidence is necessary for fair determination of the issue of guilt or innocence.*

Further, the *Criminal Law Amendment Act* of 1975 provided that such questions may be asked only with the permission of the court. This is now embodied in section 142 of the Code. These provisions reflect the concern that the victim's previous sexual conduct is usually of questionable relevance to the matter of consent in a rape charge. This reasoning would apply equally to a charge of sexual assault.

Second is the concern with undue publicity. The question of the victim's privacy is perhaps not as simple as it seems at first glance. The criminal process is intrinsically public, while sexual behaviour is intrinsically private. A conflict of values can therefore develop in the process of investigation, charging and trial. Victims and their families can be seriously embarrassed by finding themselves subjected to public exposure. Publicity is also a matter of serious concern, as it affects the rights and interests of the accused. It has often been stated that the principle of innocence until guilt has been proven can be seriously violated by publication of allegations before and during the trial.

The present *Criminal Code* contains a series of provisions that extend power to the court to hold closed hearings. Under subsection 442(1) the court may be closed where the judge "is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice" to do so. Section 162 limits the publication of reports of judicial proceedings. Section 467 permits an accused to request that publication of evidence at a preliminary hearing be restricted until discharge or the end of trial. In addition, section 441 provides for an unpublicized trial when the accused is under the age of sixteen years. And a judge is given power to exclude the public from preliminary hearings, under paragraph 465(1)(j), "where it appears to him that the ends of justice will be best served by so doing".

These provisions may not, however, be sufficient in the case of alleged sexual offences. The personal reputation of the accused, the victim or witnesses may be jeopardized. Because of the private nature of sexual behaviour and the intense interest in it by some sectors of the media, the state has a responsibility for providing protection when the consequences of publishing information gained through the investigation or trial process go far beyond any official punishment.

To this end, *the Commission recommends that section 142 be retained but that the Criminal Code be amended to restrict publication or broadcast of material likely to lead members of the public to identify a rape victim, except with authorization of the court; and to maintain the anonymity of the accused unless he/she is convicted or the court otherwise authorizes.* This was done in England in 1976 by the *Sexual Offences Amendment Act*, after publication of the *Report of the Advisory Group on the Law of Rape*.

### III. Protecting children and special groups

The remaining offences under the subheading of the *Criminal Code* entitled "Sexual Offences" concern special classes of persons, specific sexual acts or a combination of both. In this section we focus on the viability of these restrictions.



## A. *Sexual intercourse with females*

Section 146 prohibits any male person from having sexual intercourse with a female person who is not his wife and is under the age of fourteen years (subsection (1)), or with a woman of previous chaste character, who is not his wife and is between the ages of fourteen and sixteen (subsection (2)).

That the woman consented to the sexual intercourse, or the accused believed her to be above the prohibited age are no defence to a charge under these subsections. In effect, the accused is held strictly liable for ascertaining that the female person is above the prohibited age. The requirement in subsection (2) that the victim be of previous chaste character is generally interpreted to mean that she has never had sexual intercourse (*virgo intacta*) or she has had extremely limited sexual experience. Evidence that the victim has previously had sexual intercourse with the accused is deemed, by virtue of subsection 139(4), not to mean that she was of previously unchaste character.

Most people agree on restricting sexual interaction between adults and children. But it is interesting to note that until 1890 the absolute prohibition of sexual intercourse with young females extended only to age ten. Stephen's draft code of 1892 set the age at twelve. And it was only later that the age was extended to fourteen to conform with the provision that a child under fourteen could not give consent to sexual intercourse or an act of indecency.

The focus of the prohibitions on sexual intercourse with young women reflects a concern with pregnancy out of wedlock as well as with physical, psychological and social maturity. The protection of children is also the subject of sections 166 ("Parent or Guardian Procuring Defilement"), 167 ("Householder Permitting Defilement") and 168 ("Corrupting Children"). Provisions in child welfare legislation and under the *Juvenile Delinquents Act* also restrict some forms of interaction between adults and children. The offence of contributing to juvenile delinquency is, in fact, usually applied to sexual matters,

although it does not always or necessarily involve sexual intercourse with the young person. It may equally involve placing a juvenile in company or circumstances tending to contribute to delinquency. It should be noted, however, that the recent proposal for legislation to replace the *Juvenile Delinquents Act* does not include a similar provision. *If this proposed legislation were passed, the Commission would recommend introducing into the Criminal Code an offence relating to contributing, on the part of adults, through sexual interaction, to the delinquency of young persons under the age of sixteen.* The Commission thinks it is important to maintain a provision of this nature in the law.

Subsection 146(1) represents a total prohibition of sexual intercourse with female persons under the age of fourteen. Even though biological sexual maturation takes place earlier now than it did 100 years ago, there would be little support on social grounds for reducing the age limit of total prohibition. Social maturation does not necessarily coincide with biological maturation. Since the definition of oneself is so closely tied with one's sexual identity, and children under the age of 14 may not have the experience or the maturity to make decisions in their own best interests about their own sexuality, a case can reasonably be made to prevent their exposure to sexual activity regardless of their purported consent.

The prohibition on young women fourteen-to-sixteen-years of age, (subsection 146(2)) applies only to a "female person of previous chaste character". In addition, before it can convict, the court must be of the opinion that the accused was more to blame than the female person. It must be kept in mind that section 146 applies in the absence of force, threat or fraud. Regardless of age, a rape charge may be laid, under section 143, when there has been force, threat or fraud.

Most people will concede that the state and the public have an interest in controlling sexual behaviour in this age group but the present section does not accomplish this. The exclusion of those who are not of previous chaste character and those who are more to blame severely limits the applicability of this subsection. Although such a restriction may be necessary in the

context of the criminal law, the present configuration of the offence largely defeats the social and regulatory intent of the section. The fact that the section is rarely invoked tends to substantiate this.

If sexual intercourse in this age group is a matter for concern because of the possibility of early pregnancy and standards of morality, then those who are “not of chaste character” and those who are “more to blame” are likely to present problems. Even in the absence of force, fraud or exploitation sexual intercourse with fourteen-to-sixteen-year-old women is already included in the offence of contributing to juvenile delinquency, and such intercourse between adults and young persons should continue to be prohibited by criminal law. The form and substance of the offence of contributing to juvenile delinquency are superior to the similar but more limited provisions of subsection 146(2) of the *Criminal Code* in this one aspect at least: in the offence of contributing to juvenile delinquency, the gender of the accused and that of the child are immaterial as ingredients of the offence.

The Commission would be inclined to recommend the maintenance of subsection 146(2) of the *Criminal Code*, or some similar but more comprehensive provision, if there were no other legal sanctions against such conduct. However, in view of the generally earlier maturation of girls than of boys, such conduct between non-adult teenagers, while not to be encouraged in law, is conscientiously too difficult to maintain as a crime. Such conduct, if it were to be regulated in law, would be better regulated by provincial child welfare laws according to the wisdom of the legislators of each province. *We recommend, therefore, that subsection 146(2) of the Criminal Code be repealed.*

Section 151 prohibits men eighteen years or older from seduction of sixteen-to-eighteen-year-old previously chaste women. The term *seduction* has been taken in law to mean sexual intercourse outside of marriage with a woman who is a virgin and who consents to intercourse as a result of the accused’s persuasion, solicitation, promises or other enticements. This section may also apply to a woman who is no longer

*virgo intacta* but who has, in the eyes of the court, "rehabilitated herself in chastity". In addition, evidence that the victim has previously had sexual intercourse with the accused does not mean she is of unchaste character.

Section 151 embodies a conception of women which no longer has a place in the criminal law. This is also true of section 152 which makes it illegal for a man twenty-one years of age or older to seduce, by promise of marriage, an unmarried, previously chaste woman under the age of twenty-one; and of section 154 which prohibits a male owner, master or employee of a vessel from seducing female passengers.

These sections are rarely invoked and are often quoted as ridiculous examples of the criminal law. They assume a general sexual immaturity among women and also attribute to men the sole responsibility for making sexual decisions. Such assumptions, not only incorrect but unjust to men and women, should not be reflected in the criminal law. *We therefore recommend the repeal of sections 151, 152 and 154 from the Criminal Code.*

Section 148 restricts sexual intercourse between a male person and a female person "who is not his wife, and who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile". The intention is obviously to protect mentally handicapped women from sexual intercourse outside of wedlock on the basis that they are incapable of giving free and informed consent and thus reach a decision about sexual behaviour in their own best interests. However, the delineated categories are not scientifically definable and holding a court of law responsible for determining whether a person was capable of consenting, places it in a difficult position. Further, although there may in some cases be a concern about pregnancy out of wedlock, it is difficult to argue that persons with a mental handicap should not have the same rights to sexual expression as other members of society.

Section 148 is superfluous and need not be retained. Whether an alleged victim had the capacity to consent can be considered by the jury under a charge of sexual assault. Thus it would remain an offence to have intercourse with a person who,

because of her/his mental infirmity, was incapable of giving a valid consent. However, the category of persons to which the prohibition would apply would be narrowed to protect only those who are in fact incapable of valid consent. This is in contrast to the broad working of the present section, which may apply in situations where intercourse occurs with a person who, although mentally infirm in terms of one of the categories set out in section 148, is in fact capable of giving valid consent. *We therefore recommend that section 148 be repealed from the Criminal Code.*

Paragraph 153(1)(a) prohibits sexual intercourse between a male person and his stepdaughter, foster-daughter or female ward. This paragraph may be seen as an extension of the incest provision to include adopted or ward children. Much of the conduct prohibited by this paragraph is also prohibited by sections 146 and 151 (dealing with prohibitions against intercourse with females under eighteen). Although it may be appropriate to protect young persons in dependency situations, it is questionable whether this specific provision is needed. *Therefore we recommend the repeal of paragraph 153(1)(a) from the Criminal Code.*

Paragraph 153(1)(b) restricts sexual intercourse between a male employer and a previously chaste female employee under the age of twenty-one. A conviction can result from a charge under this paragraph only if the court is of the opinion that the accused was more to blame than the female person for the sexual intercourse. Paragraph 153(1)(b) is directed against the misuse of dependency in employment situations. It does discriminate, however, in favour of females of previously chaste character. The qualification that the accused must be more to blame simply extends the prohibition of sexual intercourse in this circumstance to the age of twenty-one years (see subsection 146(2)). If the purpose of this prohibition is to prevent the use of a dependency relationship for obtaining sexual favours, then the question of previous chaste character is not appropriate. Restricting the offence to sexual intercourse seems to run contrary to the interests that it is intended to protect. Other forms of sexual activity will have to be included if the intent of the law is to be met.

In the absence of force or threat, which are covered by other charges, and in the presence of exploitation, regulation of such behaviour might be better left to labour legislation. A person who for instance is dismissed because of a refusal to engage in sexual relations should be able to object to the dismissal on those grounds. Anyone not reinstated under such circumstances should be entitled to sue in civil courts and to complain to the appropriate Human Rights Commission on the basis of discrimination in employment. *We therefore recommend the repeal of paragraph 153(1)(b) from the Criminal Code.*

## B. *Incest*

One of the strongest and most universal restrictions on sexual intercourse is that between persons of a close blood relationship. Biological, psychological, sociological and anthropological reasons for this prohibition are set out in an extensive literature. Thus, it may be surprising that incest was only recently treated as a crime at common law. Although incest was included as an offence in Canada's first *Criminal Code* in 1892, it did not become a crime in England until 1908. Until that time incest was left, as Blackstone expressed it, to the "feeble coercion of the spiritual courts". Studies of incest show, however, that the application of criminal procedure and sanctions in this area creates problems and raises many questions which are difficult to resolve.

The offence of incest is defined in section 150 as sexual intercourse between two people who by blood relationship are either parent and child, brother and sister, half-brother and half-sister, or grandparent and grandchild. It is not an offence where the parties do not know that they are blood relatives.

There are a number of sections of the *Criminal Code* dealing with family and household matters. Already mentioned are

sections 166 and 167 on parents, householders or guardians permitting or procuring defilement and section 168 on corrupting children. Others include section 249 on the abduction from the possession of parent or guardian of female persons under sixteen, section 251 on polygamy and section 254 on bigamy. In addition, there are provisions regulating the marriage ceremony, such as section 258 which makes it an offence to pretend to solemnize a marriage, and section 259 which deals with marriage contrary to law.

The criminal law and the criminal process are notoriously weak in dealing with family problems. This is true even in situations involving general prohibitions, such as cases of family assault of which assault in marriage and child abuse are two examples. In fact, it has been found that the intervention of criminal law has, in some cases, further aggravated the situation by making it less accessible to other, more supportive forms of intervention.

Incestuous behaviour in the family rarely occurs in isolation from other problems. Recognition of this fact is vital to any discussion of the manner in which incest should be treated. It is also important to recognize that there are other forms of socially unacceptable sexual behaviour besides sexual intercourse between family members. Any of these may be the cause or the effect of other family difficulties. A re-evaluation of incest as an offence cannot, therefore, take place in the context of criminal law alone. It must first and foremost take place in the context of family law.

In the latter area of law, we agree that many family disturbances should firstly be a matter of social and psychological treatment, secondly a matter of regulation by family and child welfare law, and only thirdly a matter of criminal law.

The Commission, in its Report, *Family Law*, recommended the creation of unified family courts. There is a clear indication from those who have dealt with cases of incest that this type of court would often be more effective in dealing with this problem than criminal courts. These courts would provide resources that take into account the special nature of family relations in a crisis. If criminal prohibitions against incest were maintained, the

crown or the judge would have the option to transfer such cases to family court. This procedure could also be followed when other sexual offences involving family members are alleged.

Is retaining a specific incest section necessary? As has already been discussed, sexual intercourse involving force, fear or fraud is prohibited by the *Criminal Code* under the rape and indecent assault provisions, which apply to all persons. It includes blood relations specifically covered by section 150, which prohibits incest. In addition, sexual intercourse with minors is restricted under the criminal law and will remain so under the proposed reformulations. The reformulations will protect young persons under the age of eighteen from sexual intercourse in coercive situations. It is proposed that this would include a child living at home with her/his parent. The vast majority of incest charges occur between a father and a daughter who is at the onset of puberty. This type of situation would fall within the scope of the recommended reformulations dealing with sexual assault and sexual relations with young persons.

Had there never been a criminal offence of incest, the Commission would certainly not at this time recommend its creation as it is redundant to the extent that any form of sexual assault is already prohibited. In the reformulation to come, intercourse between parents and children under the age of eighteen years will be prohibited by making it an offence for a person to engage in sexual relations with a young person within her/his authority. However, the reformulation would no longer prohibit sexual intercourse between consenting siblings and between consenting parents and their children eighteen years and older. The effect, therefore, of removing the incest offence from the *Criminal Code* would be to decriminalize consensual sexual intercourse between blood-related adults. Such a change should not be interpreted as approval of such activity, but as recognition that it is conduct not properly the business of the criminal law. *The Commission therefore recommends the repeal of section 150 from the Criminal Code.*

Due to the strong social and religious views held by many about incest even between adults, the Commission solicits the readers' views on how this offence should be dealt with.



The very nature of incest and offences involving sexual intercourse with young persons compounds the problem of child victims as witnesses. One of the grounds for objecting to sexual contact between adults and children is that, at least in our culture, it is seen as a potential interference with the process of sexual maturation. At the same time, it has been suggested that court proceedings concerning sexual offences in which a child has been involved can be more traumatic for the child than was her/his involvement in the actual offence.

A number of procedures could be implemented to avoid placing child witnesses in situations that may be psychologically damaging. Yet, it must be remembered that the accused's rights must be protected by any new procedure. This necessitates, as a minimum, that the accused and her/his counsel have a right to be present at all times during testimony given by a child witness for the record.

The examination of child witnesses outside of the courtroom milieu could be accomplished in different ways. Both counsel could be present while the presiding judge questions the child in chambers, where a more informal, less threatening atmosphere prevails. Or, such an examination could take place in a room furnished in the style of a family room. Or, it may still, in the appropriate circumstances, be possible to conduct the examination in the courtroom. The presiding judge must take responsibility for the conduct of counsel and the welfare of the child. It is possible that a general change of attitude towards child witnesses may be sufficient to eliminate traumatic stresses in all but the most extreme situations.

In extreme circumstances where there is no possibility of sparing a child witness unnecessary hardship, the prosecution's best choice may be to forego calling the child to testify. Responsibility could be placed upon the judge to suspend trials in which a child's testimony appears problematic and to refer the matter to the Attorney General for consideration. A variation of this procedure would be to automatically call upon a representative for child witnesses, who would have to report to the Attorney General on the likelihood of the child being adversely affected by a court appearance. The Attorney General could then decide whether or not the prosecution should continue.

These are only some possible solutions to the delicate question of calling children to testify in sexual offence trials. Such procedures may not be necessary in all cases, but only, for example, where children are called to testify against their parents. It is in these situations that children undergo the most trauma. What is necessary, however, is to allow for the effects of court appearances on children, and to modify present procedure to spare child witnesses unnecessary hardship and mental anguish.

### C. *Other sexual acts*

The two remaining sections under the subheading Sexual Offences in Part IV of the *Criminal Code* which deal with substantive sexual offences are section 155 which prohibits buggery and bestiality and section 157 which prohibits gross indecency.

Buggery in this context is anal intercourse. The term gross indecency is not defined in the Code or, for that matter, in the case law but the charges under this section have been mainly against adult males committing homosexual acts in public places. Before the 1953-54 revision of the *Criminal Code*, this offence was specifically limited to males. A charge of indecent assault is more commonly used where homosexual acts with children and adolescents occur.

The offences of buggery and gross indecency, usually applied to homosexual acts, have been limited in their application by the 1968 amendment contained in section 158. This amendment states that these are not criminal when they occur in private between consenting persons over the age of 21 or who are husband and wife. Therefore, the prohibition of acts of buggery and gross indecency applies to unmarried persons under the age of 21 and to acts performed in public places.

The age restriction on both buggery and gross indecency raises some problems. It is difficult to justify a prohibition of homosexual acts carried out in private by consenting adults. However, prohibitions in circumstances where these acts are carried out in coercive situations, when they involve children or when they are done in public are properly the subject of the criminal law. Both forced buggery and gross indecency would fall under the proposed sexual assault provision. *We therefore recommend the repeal of sections 155 and 157 from the Criminal Code.*

The restriction against the performance of these and other sexual acts in public places is justifiable and should be continued. Such a prohibition, however, falls more appropriately within the context of safeguarding public decency.

Bestiality refers to sexual intercourse between a human and an animal. It is difficult to provide a rationale for maintaining the bestiality provision where it applies to acts in private. In cases of forced bestiality, where one person coerces another by threats or the use of force to participate in an act of bestiality, a charge of assault could be used.

Section 147 provides that no male person under the age of fourteen can be charged with rape. This exemption from criminal responsibility is unnecessary in light of the present laws, which provide that a person under fourteen cannot be tried in criminal court. Further, in light of present day knowledge concerning the ability of young males to perform an act of sexual penetration, the exemption should not be available to persons under the age of fourteen years who are charged before a juvenile court with an offence involving penetration. Moreover, if penetration becomes a matter solely for sentencing considerations, as we recommend in this Working Paper, the provisions of section 147 will be obsolete.

Section 158 provides a partial exemption from sections 155 and 157 which deal with buggery, bestiality and gross indecency. As consensual acts of buggery, gross indecency and bestiality are no longer illegal except in exploitive situations with young

persons under eighteen years, these exemptions are superfluous. *We therefore recommend the repeal of sections 147 and 158 from the Criminal Code.*

#### D. Reformulation

The analysis of the prohibitions in this chapter has led the Commission to recommend reformulations in the following areas: Sexual relations with a person under fourteen years; Sexual relations with a person between fourteen and eighteen years.

##### *Sexual Relations with a Person Under Fourteen Years*

*Subsection 146(1) dealing with sexual intercourse with female persons under fourteen should be retained in substance. However, the limitation to male aggressors and female victims should be removed for reasons previously discussed and the section should be broadened to include both sexual penetration and sexual contact. The new section could contain the following elements:*

1. *Every one who has sexual contact with a person under the age of fourteen years is guilty of an offence.*

2. *For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.*

3. *In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.*

4. *An accused is not guilty of an offence under this section because he or she has sexual contact with a young person under the age of fourteen years if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of fourteen years or older.*

### ***Sexual Relations with a Person Between Fourteen and Eighteen Years***

*Following our recommendations as to the repeal of subsection 146(2) and sections 151, 152, 153 and 154, there is a need to extend the protection of the criminal law to minors. Since cases involving force and fraud would be covered by the sexual assault reformulation, protection may be extended to special dependency situations that may give rise to coercion or exploitation. Incorporating the same definition for sexual contact, the new section could contain the following elements:*

1. *Every one who has sexual contact with a young person fourteen years or older but under eighteen years of age who is dependent upon him or her or under his or her authority, but is not his or her spouse, is guilty of an offence where the sexual contact is caused by the exercise of such authority or dependency.*

2. *For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.*

3. *In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.*

4. *An accused is not guilty of an offence under this section if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of eighteen years or older.*

This provision would protect children, stepchildren, foster-children and employees under the age of eighteen from exploitation arising from situations in which they are dependent upon another or subject to another person's authority.

#### IV. Safeguarding public decency

It is incontestable that criminal law has a role in protecting the integrity of the person. Nor would many contest its role in the protection of the sexual development of children. In addition, there are several offences under the subheading "Disorderly Conduct" which can be justified on the grounds of the need to safeguard public decency.

In the *Criminal Code*, the subheadings "Offences Tending to Corrupt Morals", "Disorderly Conduct", and "Bawdy-houses", "Procuring" and "Soliciting" contain offences directed mainly at sexual matters, although other forms of behaviour and conduct are included.

##### A. *Offences tending to corrupt morals*

As questions regarding obscenity are deserving of some special attention, this paper will not address that aspect of safeguarding public decency. *To the extent that the remaining sections under the subheading "Offences Tending to Corrupt Morals" dealing with the defilement, corruption and procuring of children would not be dealt with by the reformulated offences proposed thus far, they should be regarded as matters more appropriately handled through child welfare legislation.*

## B. *Disorderly conduct*

This group of offences, as the title implies, extends beyond the prohibition of sexual behaviour. Only two sections, however, wholly relate to other matters. These are section 172 dealing with obstructing an officiating clergy and disturbing religious worship, and section 174 concerning offensive, volatile substances.

Section 169, which prohibits indecent acts, is important because it is applied primarily to the phenomenon of exhibitionism and is one of the most common sexual offences. Exhibitionism is a well known, although not well understood, clinical phenomenon. It generally involves compulsive behaviour where sexual gratification is derived from exposing the genitals to female persons. The phenomenon is mainly evidenced in younger males and is often repetitive because of its compulsive nature, but it tends to diminish and disappear with increasing age. Exhibitionism has been known for a long time and has remained relatively unaltered by changing sexual morals. Whether or not a criminal complaint is made often depends upon the community's understanding of such behaviour.

Although some people feel that exhibitionism should not be treated in the context of criminal law, section 169 is, from social and clinical perspectives, the appropriate criminal law section to deal with the activity. Under this section an act of exhibitionism must be carried out wilfully in a public place or with an intent to insult or offend. Dealing reasonably with such offences is mainly a question of procedure and sanction. It should be noted this section operates also to prohibit other sexual conduct in public, such as, for example, sexual intercourse or buggery, and *we therefore recommend the retention of section 169 in the Criminal Code.*

Nudity in a public place is prohibited by section 170. The section was enacted in response to the use of public nudity as a form of civil disobedience by Doukhobors. Some types of passive public nudity are forms of exhibitionism, it should be noted, although not regarded as so offensive as those acts

prohibited by section 169. Nudity is defined as being "...so clad as to offend against public decency or order". The Attorney General's consent must be obtained before proceedings under this section may be commenced. The nudity complained of must offend against public decency and order. Although recognizing the problems of selective and local enforcement, *we recommend that this section be retained in the Criminal Code.*

Only paragraph (1)(b) of section 171 relates to public decency. Under this paragraph, it is illegal to openly expose or exhibit an indecent exhibition in a public place. Although this section may be seen as an extension of the obscenity provisions in the *Criminal Code*, *we recommend its retention in the Criminal Code pending any changes to the criminal law of obscenity.*

The offence of trespassing at night, contained in section 173, applies to diverse situations, but is most commonly used in cases of voyeurism. Substantively, no objection is raised against applying this section to voyeurism, although the presence of such a form of sexual compulsion in a charge under this section should be reflected in procedures and sentencing. *We recommend the retention of section 173 in the Criminal Code subject to changes in procedures and sentencing.*

Section 175 relating to vagrancy, was amended in 1972 when the first three paragraphs of subsection (1) were removed. Of the remaining paragraphs in subsection (1), (d) and (e), only the latter is relevant to public decency. It prohibits loitering and wandering in or near a schoolground, playground, public park or bathing area by those who have been convicted of rape, sexual intercourse with a female under fourteen or between fourteen and sixteen, indecent assault on a male or female, buggery, bestiality or gross indecency.

Paragraph (e) is problematic from the point of view of criminal law. Even if the reason for the prohibition — an attempt to prevent criminal behaviour — is supported, the subsection is extremely restrictive as the prohibition need not be related to the sexual offence for which the person was convicted. For example, a conviction for bestiality does not lead to the



assumption that the person is a potential menace wandering on a public beach. However, under paragraph (e) such a person would be committing the offence of vagrancy if found wandering in one of the prohibited public places. This position at law of a convicted sex offender is an example of the misunderstanding with which sex offenders are often regarded. This offence also raises questions about the fair treatment of sex offenders whose freedom of movement is restricted on the basis of their status as offenders.

It would be far more equitable to attach restrictions on access to public places on the basis of the specific offence committed. And the restriction should be limited to a specific period, after which the person's freedom to be at large would be automatically restored.

Restrictions on access to public places could be included in probation orders, or special restriction orders could be created to provide for situations where the court is of the opinion that the term of the order should extend beyond the three-year limitation on probation orders. Such an order would also be useful where it is unnecessary to impose upon the convicted offender the prohibitions and requirements that are part of a probation order. Under a restriction order, it would be a breach similar to a breach of probation for the convicted offender to loiter in specified places. The maximum duration should not exceed five years and the offender should have the opportunity to apply for removal of the restriction after a certain period of good behaviour. *We recommend repeal of paragraph 175(1)(e) from the Criminal Code subject to provisions allowing for a court to make an order so that a person convicted of a specific sexual offence can be restricted from access to certain specified public places. We recommend further that this order of restriction be limited in duration.*

### *C. Common bawdy-houses, procuring and soliciting*

Part V of the *Criminal Code*, which is entitled "Disorderly Houses, Gaming and Betting", includes several offences of a

sexual nature. However, there are very little empirical data on the incidence of these offences, all of which relate in some way to prostitution, which is no longer in itself an offence under the *Criminal Code*. This lack of data respecting the application of Part V of the Code makes it difficult to formulate policy implications on which reform would be based.

No recommendations on bawdy-houses, procuring and soliciting are being proposed at this time. A study relating to this area of the law should precede such recommendations.

Although the law of soliciting is not discussed in this paper, it seems appropriate to point out the need for a minor reform which would have a major effect in making the law of soliciting more rational. The offence of soliciting if it is to remain an offence applies only to women. The same activity engaged in by a man is not against the law. This anomalous situation should be rectified. *The Commission therefore recommends amending section 195.1 of the Criminal Code to apply equally to men and women.*

#### D. *Reformulation*

While the Commission suggests changes in the criminal law relating to safeguarding public decency, a total reformulation is not recommended at this time, although substantial reorganization is needed.

*First, under the Criminal Code subheading "Offences Tending to Corrupt Morals", those provisions dealing with defilement, corruption and procuring would be better dealt with under the proposed Criminal Code reformulation designed to protect children and special groups. Other provisions not falling under that category, but which are considered offences of a sexual nature, might best be enacted as child welfare legislation.*

Second, although all but three sections under the heading "Disorderly Conduct" are properly understood as sexual offences, all are in need of minor reformulations, the better to reflect the organizing principle of safeguarding public decency. Paragraphs 171(1)(a), (c) and (d), (causing a disturbance), section 172 (obstructing clergy and disturbing a religious ceremony), and section 174 (dangerous and volatile substances) should be removed from the ambit of sexual offences. Section 169 deals with indecent acts in public and should remain within this part of the new formulation. The Commission affirms retention of section 170, dealing with nudity, as a *Criminal Code* offence. Paragraph 171(1)(b) which prohibits displaying indecent exhibits should be retained at least until there are changes in the law of obscenity. Although section 173 which deals with voyeurism should be substantively unchanged, there is need of some reform in the procedural aspects of the offence. Paragraph 175(1)(e) which prohibits convicted sexual offenders from loitering in public places requires a change in emphasis. Instead of restricting access to public places on the basis of whether a person has been convicted of specified sex offences, the restriction should be applied according to the nature of the offence committed. Further, the restriction should be limited to a specific period of time after which, barring extenuating circumstances, the restriction is lifted.

Third, because of the problem of the lack of data in relation to the offences contemplated under the *Criminal Code* subheading, "Common bawdy-houses, Procuring and Soliciting", the Commission recommends that a more central, in-depth study be undertaken before any major reforms are proposed. In a preliminary way, the Commission recommends that section 195.1 which deals with soliciting for the purposes of prostitution apply equally to men and women.

## V. Sentencing

A discussion about law reform relating to sexual offences would be incomplete without considering the sentencing of persons convicted of sexual offences. Here too, as in the

substantive law relating to sexual offences, changes in sentencing policy will have only minimal impact if they are not accompanied by changes in attitudes.

The Commission has stated in other papers that the criminal process should impose sanctions to show disapproval and exert control and only when this is done should rehabilitation be taken into account. The concepts of punishment and treatment should be separated in the sentencing process. The aims of criminal sanctions, we have suggested, are the expression of disapproval, undoing the harm done, restoring peace, order and trust, and applying the amount of control necessary.

The sentencing of sex offenders is perhaps more problematic than the sentencing of most other offenders. Sex offences differ in severity and may therefore be subject to the whole range of sentencing options. One reason may be that the criminal law operates on presumptions of normalcy and freedom of choice. These presumptions form the basis for concepts of responsibility and culpability which justify the imposition of such sanctions as fines and imprisonment. For some sexual offences, however, traditional sanctions will not be appropriate. The reason is that some sexual offences may be regarded as the result of abnormal and irrational behaviour.

It is generally easier to understand non-sexual offences even when we disapprove of them. For example, because hitting out in anger is within the ordinary realm of experience, most people can understand an assault without condoning it. Therefore the help of experts in explaining the meaning of most offences is generally not needed, although it may be useful in deciding what should be done about them.

This is not the case with sexual offences, which are generally regarded as a form of irrational behaviour. Most people are not inclined to participate in the types of sexual behaviour prohibited in the *Criminal Code*. For instance, most people would not display their genitals in a public place even if it were not prohibited. And most people would not wish sexual contact with children. Therefore the average person does not understand such behaviour and feels puzzled or threatened, even when the behaviour is not in itself threatening.

Although the application of psychiatric terms in itself does not warrant a general presumption of abnormality, clinical definitions of such sexual behaviour as exhibitionism and paedophilia do help an understanding of the activity. Thus, expert testimony may be extremely useful in the sentencing of sex offenders. Experts can assist the offender and her/his counsel to devise treatment plans by providing information about the nature and limitation of existing treatment resources. It should be stressed that treatment of a physical or psychological nature should be a voluntary matter.

Treatment can range from out-patient therapy, which is the case for most sex offenders where facilities are available, to hospital orders in conjunction with sentences of imprisonment. The absence of the option of such orders is nowhere as deplorable as in the case of sex offenders. The court is often left with no choice but to impose a prison sentence even though it may be patently inappropriate.

Where sentences involve a combination of treatment and control the conditions under which the sentence is served must be flexible. We have previously recommended that the court retain jurisdiction over altering the conditions of community-based sentences. Where treatment is in progress, supervision should be provided by such officers of the court as probation officers. This would remove the clinical service from the double-bind of trying to gain the offender's confidence for effective treatment on the one hand while having to report to the court on the offender's continued detention on the other. Regardless of the offence committed, this separation of function in sentence supervision is important for all persons whose treatment is seen as beneficial both to the individual and to society.

When the sentence has wholly or partly been for the purpose of separating the offender from society, the Commission has recommended that a sentencing supervision board periodically review the conditions of the sentence. Such a board is especially important in cases of hospital orders. Conditions of treatment may need alteration, the offender or the institution may request the termination of treatment, and partial release

into the community may be possible after a period of time. All of these functions make it possible for both the offender and the treatment service to determine the sequence of treatment. The board could also assume a review function when the offender and the institution disagree or have other problems.

It should be kept in mind that offenders do return to the community. Therefore, it is in the community's interest that the offender be capable at that time of coping with problems that arise. For this reason alone it is necessary to institute a system within which conditions of sentence can be varied from time to time so that the offender can be gradually reintegrated into the community. The conditions of sentence are therefore as important as the sentence itself and should not be left to administrative decisions, particularly when treatment is indicated and has been agreed to by all concerned.

Finally, it is generally accepted that sexual offenders face higher risks of unjustified personal abuse in prison than do others. It may be necessary to take this into account when determining the conditions of sentence. It should also be kept in mind that prisons represent a sexually atypical community within which it is extremely difficult, if not impossible, to determine whether an offender's attitudes or behaviour patterns have changed so that he/she may be released.

## Conclusion

Sexual offences in the *Criminal Code* are in need of reform. Some of the offences are rarely charged while others reflect outdated attitudes toward men and women. Many sexual offences no longer accurately reflect the reality of present day sexual behaviour.

It is difficult for both the legal practitioner and the lay person to discern the organizing principles underlying sexual offences as they are set out in the *Criminal Code*. For the Code to be an effective instrument of social control, we must identify those areas where we have a substantial degree of agreement about the fundamental values that should be affirmed and protected in our society. In doing so, however, we must recognize that the criminal law can serve only a limited function and should not be regarded as a replacement for other social controls.

When the criminal law is applied to sexual offences it has three purposes: to protect the integrity of the person, to protect children and special groups and to safeguard public decency. Protecting the integrity of the person is a fundamental value in our society. Special rules about sexual interaction between adults and children reflect a general understanding that children, lacking as they do both physical and social development, may not be capable of protecting themselves. Finally, safeguarding public decency is consistent with a general societal principle that individuals have a right not to be subjected to what might be regarded as disorderly conduct of a sexual nature.

These three organizing principles have been the basis for analyzing sexual offences in the present Code. The analysis has led us to conclude that some offences should be removed, while others should be redrafted so as to more accurately reflect contemporary attitudes about sexual behaviour in Canadian

society. The result is a simplified group of offences with the underlying principles clearly stated and identified.

The recommendations in this paper deal with reform of the substantive offences in the *Criminal Code*. This does not mean that the procedure related to such offences is unimportant and may be ignored. But such reforms require separate and extensive consideration which goes beyond the scope of this paper.



## Recommendations

1. That the *Criminal Code* provisions relating to the offence of rape be reformulated to embody the notion of sexual assault as in the following:

### *Sexual Assault*

- (1) Every one who has sexual contact with a person without that person's consent is guilty of an offence of sexual assault.
  - (2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental and that is offensive to the sexual dignity of that person.
  - (3) In determining the sentence of a person convicted under this section, the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence. (P. 22)
2. That if the provisions against rape as presently defined in the *Criminal Code* were to be maintained, the exception which stipulates that forced sexual intercourse between spouses is not rape should be abolished in regard to spouses who are not cohabiting. (P. 17)
  3. That sections 155 and 157 of the *Criminal Code* be repealed. Instead, forceable buggery and bestiality, as well as gross indecency would fall under the proposed sexual assault provisions, with the gravity of those acts determined on all the circumstances and more specifically on whether there has been penetration or violence. (P. 35)

4. That section 158 be repealed from the *Criminal Code*. Since the exemptions outlined in section 158 relate to sections 155 and 157 which are to be abolished in part and incorporated into the sexual assault provision in part, the section becomes superfluous. (P. 36)

5. That the following reformulation or a similar reformulation be adopted regarding sexual relations with a young person under fourteen years of age:

(1) Every one who has sexual contact with a person under the age of fourteen years is guilty of an offence.

(2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.

(3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.

(4) An accused is not guilty of an offence under this section because he or she has sexual contact with a young person under the age of fourteen years if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of fourteen years or older. (Pp. 36, 37)

6. That the following reformulation or a similar reformulation be adopted regarding sexual relations with a person between the ages of fourteen and eighteen:

(1) Every one who has sexual contact with a young person fourteen years or older but under eighteen years of age who is dependent upon him or her or under his or her authority but is not his or her spouse, is guilty of an offence where the sexual contact is caused by the exercise of such authority or dependency.

(2) For the purposes of this section “sexual contact” includes any touching of the sexual organs of another or the touching of another with one’s sexual organs that is not accidental.

(3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.

(4) An accused is not guilty of an offence under this section if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of eighteen years or older. (P. 37)

7. That subsection 146(2) of the *Criminal Code* be repealed. Instead, in the absence of force, fraud or exploitation, sexual intercourse on the part of adults with fourteen to sixteen year old persons should continue to be prohibited as contributing to juvenile delinquency or be prohibited elsewhere in the criminal law. (P. 27)
8. That section 148 of the *Criminal Code* be repealed. Instead, sexual intercourse with a mentally handicapped person would be illegal only when that person was in fact incapable of giving valid consent. In such a case, a charge would be laid under the sexual assault provision on the basis of non consent. (P. 29)
9. That sections 151 and 152, paragraphs 153(1)(a) and (b) and section 154 of the *Criminal Code* be repealed. Instead, the Commission’s reformulation would provide for protection of young persons under the age of eighteen in dependency situations. For those whose employment opportunities are threatened by sexual exploitation, regulation should be left to labour legislation, with actions and referral to the appropriate Human Rights Commission. (Pp. 28, 29, 30)

10. That those offences under the *Criminal Code* subheading "Offences Tending to Corrupt Morals" dealing with defilement, corruption and procuring of children would better be dealt with under the proposed federal legislation to replace the *Juvenile Delinquents Act* as well as under provincial child welfare legislation and the laws relating to prostitution. (P. 38)
11. That section 142 be retained but that the *Criminal Code* be amended so as to restrict publication or broadcast of material likely to lead members of the public to identify a rape victim, except with authorization of the court; and maintain the anonymity of the accused unless he or she is convicted or the court otherwise authorizes. (P. 24)
12. That section 147 of the *Criminal Code* be repealed. This exemption from criminal responsibility is unnecessary in the light of present laws, which provide that a person under fourteen cannot be tried in criminal court. (P. 36)
13. That section 150 of the *Criminal Code* be repealed. Instead, incestuous behaviour would be prohibited under the reformulations suggested in this paper dealing with sexual assault and sexual relations with young persons. (P. 32)
14. That section 169 of the *Criminal Code* dealing with indecent acts calculated to offend others be retained. (P. 39)
15. That section 170 of the *Criminal Code* dealing with nudity be retained. (P. 40)
16. That paragraphs 171(1)(a), (c) and (d) (Causing a disturbance, obstructing persons in a public place and disturbing the peace), section 172 (Obstructing clergy and disturbing a

religious ceremony), and section 174 (Dangerous and volatile substances) be removed from the ambit of sexual offences and that the remaining sections in the *Criminal Code* under the subheading "Disorderly Conduct" be reformulated the better to reflect the organizing principle of safeguarding public decency. (P. 43)

17. That paragraph 171(1)(b) of the *Criminal Code* which prohibits displaying indecent exhibits should be retained to be modified in consonance only with changes, if any, in the law of obscenity. (P. 40)
18. That section 173 of the *Criminal Code* dealing with voyeurism remain substantively unchanged but undergo sentencing and procedural reform to recognize the sexually compulsive nature of the offence. (P. 40)
19. That paragraph 175(1)(e) of the *Criminal Code* be repealed subject to provisions allowing for a court to make an order so that a person convicted of a specific sexual offence can be restricted from access to certain specified public places. This order of restriction should be of limited duration. (P. 41)
20. That section 195.1 of the *Criminal Code* dealing with soliciting for the purposes of prostitution apply equally to men and women. (P. 42)
21. That should the *Juvenile Delinquents Act* be replaced by new legislation which does not prohibit contributing to juvenile delinquency, such a provision should be enacted in the *Criminal Code*. (P. 26)



# Appendix

## Comparison between sexual offences in the *Criminal Code* and the recommended reformulations

*Criminal Code*

*Proposed Reformulations*

### PART IV

#### SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT

##### RAPE

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

- (a) without her consent, or
- (b) with her consent if the consent
  - (i) is extorted by threats or fear of bodily harm
  - (ii) is obtained by personating her husband, or
  - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

##### SEXUAL ASSAULT

(1) Every one who has sexual contact with a person without that person's consent is guilty of an offence of sexual assault.

(2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental and that is offensive to the sexual dignity of that person.

(3) In determining the sentence of a person convicted under this

## PUNISHMENT FOR RAPE

144. Every one who commits rape is guilty of an indictable offence and is liable to imprisonment for life.

## ATTEMPT TO COMMIT RAPE

145. Every one who attempts to commit rape is guilty of an indictable offence and is liable to imprisonment for ten years.

## SEXUAL INTERCOURSE WITH FEMALE UNDER FOURTEEN

— Sexual intercourse with female between fourteen and sixteen —  
Where accused not more to blame.

146. (1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and

(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.

## SEXUAL RELATIONS WITH A PERSON UNDER FOURTEEN YEARS

(1) Every one who has sexual contact with a person under the age of fourteen years is guilty of an offence.

(2) For the purpose of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.

(3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.

(4) An accused is not guilty of an offence under this section because he or she has sexual contact with a young person under the age of fourteen years if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of fourteen years or older.



## SEXUAL RELATIONS WITH A PERSON BETWEEN FOURTEEN AND EIGHTEEN YEARS

(2) Every male person who has sexual intercourse with a female person who

(a) is not his wife,

(b) is of previously chaste character, and

(c) is fourteen years of age or more and is under the age of sixteen years,

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.

(1) Every one who has sexual contact with a young person fourteen years or older but under eighteen years of age who is dependent upon him or her or under his or her authority, but is not his or her spouse, is guilty of an offence where the sexual contact is caused by the exercise of such authority or dependency.

(2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.

(3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.

(4) An accused is not guilty of an offence under this section if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of eighteen years or older.

the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person.

This provision has not been retained.

## AGE

147. No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while he is under the age of fourteen years.

This provision has not been retained and under the proposed reformulations would be obsolete.

## SEXUAL INTERCOURSE WITH FEEBLE-MINDED, ETC.

148. Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

- (a) who is not his wife, and
- (b) who is and who he knows or has good reason to believe feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years.

This provision has not been retained. However, protection is provided under the Sexual Assault reformulations in circumstances where a mentally infirm person is incapable of giving a valid consent.

## INDECENT ASSAULT OF FEMALE — Consent by false representations

149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

This provision is contained in the Sexual Assault reformulation. It is also contained in part in the reformulations dealing with Sexual Relations with a Person Under Fourteen and Between Fourteen and Eighteen.

**INCEST — Punishment — Compulsion of female — “Brother” — “Sister”**

**150.** (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

(2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment upon her.

(4) In this section, “brother” and “sister”, respectively, include half-brother and half-sister.

This section has not been retained but some provision is made for control of incestuous relationships in the proposed reformulations.

**SEDUCTION OF FEMALE BETWEEN SIXTEEN AND EIGHTEEN**

**151.** Every male person who, being eighteen years of age or more, seduces a female person of previously chaste character who is sixteen years or more but less than eighteen years of age is guilty of an indictable offence and is liable to imprisonment for two years.

The concept of seduction has not been retained. However, young persons within this age group are protected from the abuse of dependency relationships under the reformulation dealing with Sexual Relations with a Person Between Fourteen and Eighteen.

## SEDUCTION UNDER PROMISE OF MARRIAGE

152. Every male person, being twenty-one years of age or more, who, under promise of marriage, seduces an unmarried female person of previously chaste character who is less than twenty-one years of age is guilty of an indictable offence and is liable to imprisonment for two years.

This provision has not been retained.

## SEXUAL INTERCOURSE WITH STEP-DAUGHTER, ETC., OR FEMALE EMPLOYEE — Where accused not more to blame

153. (1) Every male person who  
(a) has illicit sexual intercourse with his step-daughter, foster daughter or female ward, or  
(b) has illicit sexual intercourse with a female person of previously chaste character and under the age of twenty-one years who

(i) is in his employment,

(ii) is in a common, but not necessarily similar, employment with him and is, in respect of her employment or work, under or in any way subject to his control or direction, or

(iii) receives her wages or salary directly or indirectly from him,

is guilty of an indictable offence and is liable to imprisonment for two years.

This provision has not been retained. Protection is provided until the age of eighteen for persons in dependency relationships under the reformulation Sexual Relations with a Person Between Fourteen and Eighteen.

These provisions are better dealt with in civil actions or in complaints to Human Rights Commissions.

(2) Where an accused is charged with an offence under paragraph (1)(b), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person.

This provision has not been retained.

### SEDUCTION OF FEMALE PASSENGERS ON VESSELS

154. Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority, has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years.

This provision has not been retained.

### BUGGERY OR BESTIALITY

155. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This provision is better dealt with under the proposed Sexual Assault reformulations.

### INDECENT ASSAULT ON MALE

156. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years.

This offence is contained in the Sexual Assault reformulation as well as the reformulation dealing with Sexual Relations with a Person Under Fourteen and Between Fourteen and Eighteen.

## ACTS OF GROSS INDECENCY

157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.

This provision has not been retained.

## EXCEPTION RE ACTS IN PRIVATE BETWEEN HUSBAND AND WIFE OR CONSENTING ADULTS

158. (1) Sections 155 and 157 do not apply to any act committed in private between

- (a) a husband and his wife, or
- (b) any two persons, each of whom is twenty-one years of age,

both of whom consent to the commission of the act.

(2) For the purposes of subsection (1),

- (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if two or more persons take part or are present; and
- (b) any person shall be deemed not to consent to the commission of an act

- (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or

- (ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or an imbecile.

This provision has not been retained.

**IMMORAL THEATRICAL PERFORMANCE — Person taking part**

**163.** (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

This provision has been retained pending changes in the law of obscenity.

**PARENT OR GUARDIAN PROCURING DEFILEMENT**

**166.** Every one who, being the parent or guardian of a female person,

(a) procures her to have illicit sexual intercourse with a person other than the procurer, or

(b) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of the female person, is guilty of an indictable offence and is liable to

(c) imprisonment for fourteen years, if the female person is under the age of fourteen years, or

(d) imprisonment for five years, if the female person is fourteen years of age or more.

This section is more properly the subject matter of legislation governing prostitution and child welfare legislation.

## HOUSEHOLDER PERMITTING DEFILEMENT

167. Every one who

(a) being the owner, occupier or manager of premises, or

(b) having control of premises or assisting in the management or control of premises,

knowingly permits a female person under the age of eighteen years to resort to or to be in or upon the premises for the purpose of having illicit sexual intercourse with a particular male person or with male persons generally is guilty of an indictable offence and is liable to imprisonment for five years.

This section is more properly the subject matter of legislation governing prostitution and child welfare legislation.

## CORRUPTING CHILDREN — Limitations — “Child” — Who may institute prosecutions

168. (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years.

(2) No proceedings for an offence under this section shall be commenced more than one year after the time the offence is committed.

(3) For the purposes of this section, “child” means a person who is or appears to be under the age of eighteen years.

This section is more properly the subject matter of child welfare legislation.



(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court.

#### INDECENT ACTS

169. Every one who wilfully does an indecent act

(a) in a public place in the presence of one or more persons, or

(b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

This provision has been retained.

#### NUDITY — Nude — Consent of Attorney General

170. (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

This provision has been retained.

(2) For the purposes of this section a person is nude under this section without the consent of the Attorney General.

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.

CAUSING DISTURBANCE, INDECENT EXHIBITION, LOITERING, ETC. — Evidence of peace officer

171. (1) Every one who  
(b) openly exposes or exhibits an indecent exhibition in a public place,  
is guilty of an offence punishable on summary conviction.

This provision has been retained.

TRESPASSING AT NIGHT

173. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

This provision has been retained.

VAGRANCY

175. (1) Every one commits vagrancy who  
(e) having at any time been convicted of an offence under a provision mentioned in paragraph 689(1)(a) or (b), is found loitering or wandering in or near a school ground, playground, public park or bathing area.

This provision has been changed to be more reflective of the nature of the sexual act rather than the offender's status.