LAWS WHICH DISCRIMINATE AGAINST WOMEN - CRIMINAL LAW

RECOMMENDATIONS

1. That the Criminal Code be amended with respect to self defence as envisaged by the Model Criminal Code of the Standing Committee of Attorneys General.

2. That a new defence of self-defence be created to take account of the reality of the lives of women who kill their abusers .

3. That in Western Australia provocation be retained as a defence.

4. That provocation be reformulated so that it no longer requires suddenness and proportionality and the need for a specific trigger be deleted and the test becomes a subjective test.

5. That there be judicial recognition of the need for expert evidence to inform juries of the realities of domestic violence

6. That the penalty for murder no longer be a mandatory life sentence

7. That stalking legislation be introduced.

8. That the Evidence Act be amended to take account of multiple intrafamilial sexual abuse so that in an appropriate case it will be a matter for a jury to determine whether the evidence of a sibling assists in the determination of the credit of a complainant.

9. That female genital mutilation be made a crime

10. That the State Government request the Commonwealth Government to pass legislation in relation to female genital mutilation

LAWS WHICH DISCRIMINATE AGAINST WOMEN - CRIMINAL LAW

CRIMINAL RESPONSIBILITY

11. While many citizens complain of the necessity to lock themselves into their homes because of the perceived dangers in the streets, thousands of women and children may well believe, on reasonable grounds, that they would be safer to lock themselves out of their homes.

12. The high incidence of domestic violence in Australia is now well documented and as to homicides, 40 per cent of those in Western Australia in 1992-1993 were domestic: there were 23 domestic homicides in Western Australia in this period and 18 of the victims were women and children. Surveys in other States show that the risk of being killed by a partner in a heterosexual relationship is three or more times greater for women.

13. The assistance which may be provided to women has been dealt with in other chapters of this report. The first section of this chapter deals with the criminal responsibility of women who eventually resort to lethal self help.

14. The relevant sections of the *Criminal Code* are:

> **245.** The term "provocation" used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another, to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
>
> A lawful act is not provocation to any person for an assault.
>
> An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
>
> An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.
>
> **246.** A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used

is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous bodily harm.

Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

248. When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

249. When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.

This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

250. In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself against an assault, it is lawful for any other person acting in good faith in his aid to use a like degree of force for the purpose of defending such first-mentioned person.

280. A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter.

> **281.** When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which cause death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

15. Self defence and provocation have developed where men of approximately equal strength are in dispute with each other, often in one-off confrontational encounters; they simply do not provide for situations where women kill or injure their spouses after prolonged periods of abuse and do not acknowledge the reality of these women's lives.(1)

16. **Self-defence** requires imminence of threat and proportionality to that immediate threat. Many women lose their right to claim self-defence because they protect themselves in advance by surprise attacks, arm themselves before being attacked, or kill during a lull in violence in the course of a battering incident. A battered woman's intimate knowledge of the deceased may enable her to predict the inevitable occurrence of an attack long before it becomes obvious to anyone else. Further, advanced notice of an attack does not necessarily mean that she is able to deal with the attack by peaceful means such as getting out or calling the police. Recent studies in New South Wales and similar complaints in Western Australia, reveal that victims of domestic violence still face significant practical and procedural problems in getting effective protection from the police and through the criminal justice system, and fear of retaliation is considered by many women to be a major factor preventing them from leaving violent relationships.(2) Leaving does not necessarily guarantee protection - 46% of spousal killings by men in New South Wales were found to be in situations where the women had either left or were in the process of leaving.(3) In addition disparities in strength could make it unwise for a woman to wait until an attack is in progress when it would become necessary to engage her assailant in hand-to-hand combat.

17. In an endeavour to assist women the psychological theory known as the battered woman syndrome has been developed. It is primarily associated with the work of Lenore Walker, an American psychologist, and is defined as follows:

> "A woman who is repeatedly subjected to any forceful, physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationship with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman."(4)

18. The characteristic features of the syndrome were summarised by King CJ: (p.366)(5)

> "Studies by trained psychologists of situations of domestic violence have revealed typical patterns of behaviour on the part of the male batterer and the female victim, and typical responses on the part of the female victim. ...
>
> Repeated acts of violence, alternating very often with phases of kindness and loving behaviour, commonly leave the battered woman in a psychological

condition described as 'learned helplessness'. She cannot predict or control the occurrence of acute outbreaks of violence and often clings to the hope that the kind and loving phases will become the norm. This is often reinforced by financial dependence, children and feelings of guilt. The battered woman rarely seeks outside help because of fear of further violence. It is not uncommon for such women to experience feelings for their mate which they described as love. There is often an old pervasive feeling that it is impossible to escape the dominance and violence of the mate. There is a sense of constant fear with a perceived inability to escape the situation."

19. Evidence of battered woman syndrome has been held to be admissible as expert evidence to support a woman's reliance on self-defence in various US State jurisdictions(6), by the Canadian Supreme Court(7), by the Court of Appeal in South Australia(8) and the New South Wales Supreme Court(9).

20. While evidence of the battered woman syndrome should be used and is of assistance the law should not develop only in this direction. It may be seen to characterise women who resort to violent self-help as being helpless and lacking sense. Attention may focus on whether the woman conforms to the syndrome rather than on whether the action she took was necessary and justified in the circumstances. Women who have actively sought assistance, made attempts to escape the violence and/or tried to fight back may be excluded from relying on the evidence and excluded from raising self defence.

21. The battered woman syndrome is carefully analysed by Leader-Elliott, in "Battered But Not Beaten: Women Who Kill In Self-Defence".(10) He concludes that it too may not in many cases acknowledge the reality of the lives of women who kill and imperils women who cannot present a convincing appearance of weakness or incapacity.

22. There are two defining elements of the battered woman syndrome. The first is the subjection of the victim to violence in a repeating three phase pattern: (1) a period of mounting tension (2) an acute battering incident followed by (3) a period of loving contrition. The second element in the syndrome is learned helplessness.

23. While violence in families may be often repetitious, patterned and ritualised there is probably more variety than is allowed for in the syndrome. Further "the theory suffers from the defect of supposing violent men and battered women to be more stupid and their relationships less complex than is generally the case".(11)

24. Walker invokes learned helplessness to explain why the victim of domestic violence does not flee the house, seek help or end the relationship: she does not do these things, or others which uninstructed common sense might suggest, because she cannot. She has been reduced to a condition where action is impossible. Expert evidence that the accused was a battered woman whose reactions were consistent with the condition of learned helplessness, is meant to provide a counter to the natural tendency to insist that reasonable or ordinary individuals exhaust alternative courses of action before resorting to the use of deadly force.

25. Leader-Elliott(12) suggests that in reality Walker's studies of abused women provide scant support for the theory of learned helplessness and concludes:

"Of course there are women who have not yet reached the point of terminating the relationship and there are some who will never do so. That does not justify the conclusion that those who do remain are irrational or affected by psychological deficits which make them incapable of escape. Walker concedes that there were good and sufficient reasons why many of her battered women remained in violent relationships. Some had been pursued, beaten and recaptured. The risks of death or injury when a woman leaves a violent man are well documented. Others remain in order to protect their children. Many lack resources or access to help. If a woman does leave, economic and family pressures may compel her to return. There is no need to searched for indications of psychological disorder for an explanation of the decision to remain. They do so because they have good grounds for supposing that the benefits of the relationship, however meagre, outweigh the available alternatives. When they leave they do so because the costs can be endured no longer. Though Walker refers at various points to the possibility that data drawn from her survey of battered women might be analysed in this way, recognising the real impediments to freedom, the suggestion is relegated to the list of interesting topics for future research. The issue is more immediate however. The hypothesis of learned helplessness is essentially dismissive. The testimony of women who chose to stay in violent relationships deserves a more responsive hearing.

There is another dimension to the issue of escape, which goes beyond any conception of battered women as victims, whether of mental disorder or of social forces beyond their control. Assumptions that the choice to continue the relationship is pathological, a consequence of mental disorder, masks the mundane reality of domestic violence. Violence takes its place with economic hardship, infidelity, alcoholism and excessive drug use, the competing demands of home and work and the other destructive forces which constitute so large a part of intimate relationships. Many women contend with violence and abuse in order to maintain a home, a marital identity, a commitment, a relationship or a family life for their children. The simplest and most nearly accurate explanation of a woman's choice to remain may be found in her belief that her life in that relationship, and the relationship itself, was still worth defending. There is no reason to assume, even in the rare cases where the violence and abuse culminate in the death of one or other partner that she stayed because she was psychologically incapable of leaving or that her choice to remain was irrational or pathological. More credit and more humility is due to the courage in adversity, to the ingenuity and to the not infrequent humour which sustains these grossly imperfect, though far from uncommon, relationships. When domestic violence is in issue it is the spectators, rather than the victims, who are likely to engage in unreal speculations and flights from reality."

26. Despite the criticisms of the battered woman syndrome which appear to be well founded it should not be closed off as an option because the *Criminal Code* and the common law have not proved to be as malleable as some commentators believe they could be to social developments. Furthermore, while no surveys have been conducted it is the daily

experience of those who practice the law before juries that juries almost always demand higher standards of women than they do of men.

27. At the same time it has to be conceded that what few advances there have been for women have taken place in those States governed by the common law. It does seem that the common law will provide the model which will be followed in the Code States for amendment of the various codes.

28. At present there is a proposal to amend the law of self-defence found in the "Model Criminal Code, Chapter 2, General Principles of Criminal Responsibility", Criminal Law Officers Committee of the Standing Committee of Attorneys General. At the time of preparation of this paper the Model Criminal Codes Homicide Section was not available but generally the recommendation was:

> "313.
>
> A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.
>
> 313.1 Conduct is carried out by a person in self-defence if
>
> - the person believed that the conduct was necessary
>   - to defend himself or herself or another person; or
>   - to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
>   - to protect property from unlawful appropriation, destruction, damage or interference; or
>   - to prevent criminal trespass to any land or premises; or
>   - to remove from any land or premises a person who is committing criminal trespass; and
> - his or her conduct was a reasonable response in the circumstances as perceived by him or her.
>
> 313.2 This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the removal of such a trespasser.
>
> 313.3 This section does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful.
>
> 313.3.1 Conduct is not lawful for the purposes of section 313.3 merely because the person carrying it out is not criminally responsible for it.

29. While this would be a substantial improvement if it were to apply to homicide, there is concern that it does not embed in it justification for homicide by women victims of long-

term intimate violence and particularly a battered woman whose intimate knowledge of the deceased enables her to predict the inevitable occurrence of an attack long before it becomes obvious to anyone else. A further concern is that the conduct to which the woman is responding will be viewed as being conduct which must take place immediately before her response, that is, she will be required to involve herself in hand to hand combat.

30. The concerns remain that the Model Criminal Code still hinges on an assessment of reasonableness albeit by reference to a subjective perception and it may require an explanation by way of expert evidence of the psychological processes and the question will be: what is reasonable to a battered woman? The concern is that this may not be a great deal different from "belief, on reasonable grounds, that she could not otherwise save herself". Furthermore, because of the context in which the Model Criminal Code embeds self-defence, there is no disincentive to interpret "circumstances" narrowly, that is to say the other scenarios listed in the provisions envisage one-off situations: protecting property, removal from land and preventing imprisonment.

31. In all the circumstances it is recommended that the Criminal Code be amended as envisaged by the Model Criminal Code but that in addition a new defence be created to take account of the reality of the lives of women who kill their abusers and it is suggested that it be as follows:

> "Conduct is carried out by a person in self-defence if the person is responding to a history of personal violence against herself or himself or another person and the person believes that the conduct was necessary to defend himself or herself or that other person against the violence."

32. **Provocation**. While the community places a very high value on human life, the law in this area concedes that otherwise decent people may be provoked beyond human endurance and that this should partially excuse even the use of lethal force. Despite that, provocation under the Criminal Code does not take account of the reality of women's lives, that is women who kill or injure their abusers.

33. It requires suddenness and proportionality and the self control of the objective ordinary person. It further requires a specific triggering incident. The requirements of the defence were developed to meet standard cases such as killings, immediately following a sudden quarrel or upon the accused unexpectedly discovering his wife in bed with another man. This does not account for women experiencing what one commentator called "constipated rage" resulting in delayed retaliation. The need for a specific trigger ignores the social reality of many battered women's experiences, ignores the fact that an "ordinary" battered woman (even if she could be considered by a jury) could eventually reach a stage of being provoked beyond endurance without a specific trigger. In requiring the trigger to be done to the accused or in her presence it does not allow for the situation of a battered woman discovering that her partner has had sexual intercourse with one or more of her children.

34. In the early 1980s a number of highly publicised cases of domestic killings highlighted the inadequacies of the prevailing law of homicide, in particular the defence of provocation and the mandatory penalty for murder. In 1981 the Government of New South Wales established a Task Force on Domestic Violence which recommended the abolition of the

mandatory life sentence for murder and the reformulation of the defence of provocation. The result, so far as it is relevant for these purposes, is found in the Crimes Act 1990 (N.S.W.) and is:

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

    (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

    (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

    whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

    (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;

    (b) the act or omission causing death was not an act done or omitted suddenly; or

    (c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond a reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a change of murder.

35. It can be seen that in New South Wales provocation no longer requires a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission and the accused's response need not be sudden.

36. In New South Wales it was accepted that the rules with respect to suddenness reflected male responses to trauma. Indeed, the whole law of provocation was based on a

paradigm of men as natural aggressors and operated to reinforce this paradigm. The amendments brought necessary and commendable changes to the law of provocation, although some areas remain of concern in attempting to make the defence available to women who kill their abusers.

37. It is recommended that in Western Australia provocation be reformulated so that it no longer requires suddenness and proportionality and the need for a specific trigger be dropped. That latter should be just a factor within the requirement that the accused actually lost self-control because of the provocation offered(13). Further, the objective test should be abolished.

38. The objective test is two-pronged in that characteristics of an accused can be taken into account to understand how the provocative conduct would affect someone like the accused - that is, whether the conduct had a certain sting in the circumstances. But these factors are not (with the exception of age and sex) relevant to the degree of self control to which the accused could be expected to be held. This is a grave disadvantage to a woman who has been battered for many years.

39. In ***Stingel v. The Queen***(14) this two-pronged test was confirmed. In relation to the gravity of the provocation the High Court said:

> "The content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused ... in that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult."

40. However, in relation to the power of self control of the "ordinary person" the Court said:

> "Subject to a qualification in relation to age ... the extent of the power of self control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused."

41. This objective test has been criticised as complex, highly artificial and behaviourally inept. Furthermore, it contravenes a basic principle of the criminal law that culpability is to be assessed by reference to the subjective mental state of an accused. As to its complexity, that has been criticised by Mr Justice Murphy who said that it was so complex that the jury would:

> "If not consciously, at least subconsciously dismiss such refinements and decide as they thought to be fair and just in the circumstances." (15)

42. This is not a risk that a battered woman should be required to take, that is to say, that a jury would dismiss such refinements and decide as they thought to be fair and just in the circumstances.

43. In making the recommendation that provocation be reformulated we are mindful that the criticism of provocation is not simply the problems attendant on raising provocation in cases of battered women who kill, but also the way in which the defence is seen to operate as a licence to kill women (16). We accept that our suggested reformulation addresses only the first of these problems

44. It is said that the situation with provocation is different from self defence in that men do rely on provocation in the context of gendered assaults whereas they do not rely on self defence in these circumstances. (Gendered assaults would include the kind of assault in ***Stingel*** (supra) where, although it was a man who was killed, the attack was due to sexual jealously/possessiveness of a woman.) If a subjective test is introduced without gender somehow being taken into account in the case of gendered assaults by man, the man would simply have to show that he was subjectively provoked and there would be no mechanism for insisting on what is acceptable in terms of gender relations. It is said that this is similar to the common law of rape: if a man actually believed a woman consented it was not rape - regardless of whether the belief was reasonable (and regardless of whether the woman actually consented). This both discounts the woman's perception of reality and accepts and encourages wilful blindness on men's part about women's experiences.

45. It seems to us that this is a legitimate criticism which should be considered in the reformulation of provocation but it should not be used to abolish provocation as a defence or delay reformulating it to make it available to battered women.

46. There have been recommendations that provocation be abolished as irrelevant to determining guilt and should only be taken into account in respect of sentencing. It is our view that if a person is provoked beyond human endurance that should continue to be a partial excuse. Accused persons are not only concerned with sentence, they are concerned with the community's recognition of their moral culpability or lack thereof and should be entitled to have that considered by a jury of their peers. While it may be the case that the more appropriate defence for a woman who kills her partner after a period of domestic violence is self-defence and a new defence specifically applicable to victims of domestic violence who kill, nevertheless provocation should not be abolished because it may remove a necessary and appropriate defence for such women.

EVIDENCE

47. Australian Courts are bound by common law evidentiary rules which prohibit the calling of evidence on matters of common knowledge and on questions going to the ultimate issue which the jury is required to find. Expert evidence is admissible whenever scientific study provides an acceptable basis for testimony which goes beyond common experience and common conceptions or misconceptions.

48. It is for this reason that evidence of the battered woman syndrome has been given in various cases in the United States and Australia. However, recent studies suggest that domestic violence is extremely widespread in this country, is insufficiently recognised and surrounded by myths and false assumptions. Furthermore, it can be seen that to allow expert evidence in relation to the battered woman syndrome to be given it has been

"medicalised" and requires the reconstruction of the accused's experience in a way which is consistent with scientific or medical discourse.

49. It is our recommendation that there is a need to encourage judicial recognition of the need for expert evidence to inform juries of the appalling realities of domestic violence in our society and that women such as women who have previous experience of continuous domestic violence or have worked in women's refuges be recognised as experts. It has been suggested that judicial recognition of the battered woman syndrome offers a potential beginning for the reception of more soundly based expert evidence on the nature and effect of domestic violence and that is one of the reasons it is suggested in this paper that it not be closed off as an option for women and as one of the means by which the defences be developed.

PENALTY FOR MURDER

50. At present the penalty for murder is a mandatory life sentence. If a woman is convicted of murdering a spouse who has abused her for many years it may not be considered appropriate that she receive a mandatory life sentence. At the present time that is the only option available and it is recommended that the mandatory life sentence for murder be abolished.

STALKING LEGISLATION

51. There is an urgent need to put in place legislation to assist women who are endeavouring to end relationships with men who refuse to accept the end of the relationship. Also to assist women who are being stalked by strangers.

52. A number of tragic cases in other states have resulted in the death of women who complained of being stalked by rejected partners, but the law was powerless to assist them before a physical assault took place.

53. Stalking legislation has been introduced in other states, notably in Queensland, whose criminal code is most similar to ours.

54. It is our recommendation that as a matter of urgency stalking legislation be introduced in Western Australia.

HOCH v R

55. In ***Hoch v R*** 81 ALR 225 it was held inter alia:

> "The criteria of admissibility of similar fact evidence was that its probative force clearly transcended its merely prejudicial effect and if there was a real chance that the evidence was a concoction born of conspiracy, a trial judge could hardly be satisfied that it possessed the probative force which alone warranted its admission."

In further explanation of this it was said per Mason CJ, Wilson and Gaudron JJ at 228:

"Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voire dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible."

56. Regrettably, in recent times large numbers of adults have complained that as children they were sexually abused, often within families. Furthermore, it is well known for numbers of children in the one family to make complaint. The result of ***Hoch's*** case is that those children cannot support each other's credibility in court. Because they are related to each other they have had an opportunity to concoct evidence and they certainly have a motive for concoction because of the abuse that they have suffered. The rationale of ***Hoch's*** case is that the evidence ought not be admitted at all if the trial judge is of the opinion that there is a rational view of it which is inconsistent with the guilt of the accused because if he or she is of that opinion the evidence will not possess the requisite high degree of probative force. The result is that where the evidence has the three characteristics which it will always have where children of the same family make the same complaint, it is never admissible.

57. This should be a question for the jury to determine. Evidence of similar complaint of similar behaviour by a sibling could be highly probative of the credibility of a complainant.

58. It is recommended that the *Evidence Act* be amended to take account of multiple intrafamilial sexual abuse so that in an appropriate case it will be a matter for a jury to determine whether the evidence of a sibling assists in the determination of the credit of a complainant.

FEMALE GENITAL MUTILATION

59. We have relied entirely on the discussion paper issued on 31 January 1994 by the Family Law Council and we acknowledge that.

60. Circumcision of young girls is a traditional cultural practise which is mainly performed in but not confined to a number of African countries. Female genital mutilation is used to embrace all types of circumcision other than mere ritual where an incision is made in the girl's genital area. It can involve any one of four procedures, although Sue Armstrong in *"Female Circumcision: Fighting a Cruel Tradition", New Scientist, 22 1991*, suggests that : "In reality the distinction between the types of circumcision is irrelevant since it

depends on the sharpness of the instrument used, the struggling of the child and the skill and eyesight of the operator."

61. Female genital mutilation is generally accepted as having predated Islam, Christianity and other major religions. It is sometimes incorrectly thought that female genital mutilation has its origins in Islam, however, there is no Islamic religious basis for the practise and the Koran does not contain a specific call for it. In Australia some Muslim religious leaders have come out strongly against this practise and it appears to have developed as a tradition in some countries.

62. It is important that the fact that a person comes from a particular country or holds a particular religious belief does not mean that the person practises or supports the practise of female genital mutilation.

63. The evidence relating to the incidence of female genital mutilation in Australia is mainly anecdotal. However, it would not be unreasonable to infer from recent developments in migration from African countries which practise female genital mutilation, that it is likely that the practise is now occurring in Australia. The extent of the practise, however, is not known.

64. Female genital mutilation can have devastating physical, psychological and sexual effects on females which are set out in detail in the discussion paper, and it has no known benefits, nor is it, as has already been stated, part of any religious requirement.

65. The Family Law Council adopted the preliminary conclusion that female genital mutilation primarily is a practise which aims at dominance of women and girls on whom it is practised. The Council has formed the preliminary conclusion that female genital mutilation is a practise which should not be accepted in Australia and that the law should be clarified to make it clear that female genital mutilation is a crime and that it constitutes child abuse in Australia. Furthermore, legislation should make it clear that all forms of female genital mutilation, including ritualised circumcision, are not acceptable in Australia. The Council has emphasised that these are preliminary conclusions and is interested in hearing views and comments on these conclusions.

66. The Council has further reached the preliminary conclusion that the simplest and most effective and quickest way to legislate against this practise is for one Act to be passed by the Commonwealth which builds on existing state legislation and services. The Council's view is that this could be done by the Commonwealth parliament using its external affairs powers. The legislation would employ the existing reporting, investigation and protection facilities of the States/Territories in much the same way as is presently does for the purposes of investigating child abuse allegations under the Family Law Act 1975.

67. It is the recommendation of this Task Force that female genital mutilation be made a criminal offence and that it be made clear that it is child abuse. It is further our recommendation that the State government request the Commonwealth government to pass legislation in relation to this matter and should it fail to do so that the State should pass such legislation.

References

(1) Discussion Paper 54, July 1993, Equality Before the Law.

(2) "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 CLJ 369.

(3) Wallace, "Homicide: The Social Reality" - N.S.W. Bureau of Crime Statistics and Research.

(4) L. Walker "The Battered Woman Syndrome" (1984).

(5) Runjanjic and Kontinnen v. R. (1991) 53 A.Crim R362

(6) Ibn-Tamas v US (1979) 407 A2d 626
State v. Keely (1984) 478A 2d 364.

(7) R v. Lavallee (1990) 1 SCR 852

(8) Runjanjic and Kontinnen v. R. above

(9) R v. Hickey unreported NSW Sup. Ct. April 1992.

(10) (1993) 15 S.L.R. 403

(11) Above 413

(12) Above 417

(13) N.S.W. Law Reform Commission, Discussion Paper 31.

(14) (1990) 171 CLR 312

(15) (1990) VRI at 12.

(16) Australian Women, Contemporary Feminist Thought, Edited by Grieve & Burn - Chapter 19.

General References

- Discussion Paper 54, July 1993, Equality Before the Law.
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