of control over custody of and access to children of de facto relationships so that all children of failed relationships could be dealt with on the same basis. Queensland and Tasmania were adamant in their refusal to hand over any power to the Commonwealth. However, New South Wales, Victoria and South Australia reached agreement with the Commonwealth to rationalise this area of the law.

residual links with uk. The Federal Government, all of the State Governments, the British Government and the Queen have finally reached agreement on severing the residual constitutional links between Australia and Britain. Although the Queen will remain as Head of State and the governments will retain the right to recommend the granting of imperial honours to the Queen if they are so inclined, the package of measures will bring to an end the formal legal status of the Australian states as colonies of the United Kingdom. The measures include:

- an end to powers of the British Parliament and Government in relation to the States, including the power to pass legislation affecting the States;
- an end to the Queen's power to withhold assent from or disallow State laws on the advice of British Ministers;
- the Premiers will be able to advise the Queen directly on the appointment and dismissal of Governors rather than being required to put recommendations to the British Government for presentation to the Queen.

Similar reforms were implemented in respect of the Commonwealth Government by the Statute of Westminster which was passed in 1931 and adopted by the Curtin Government in 1942, the adoption being retrospective to 1939.

The reforms will also abolish appeals from the State Supreme Courts to the Privy Council. The High Court will now be the final court of appeal in the Australian Legal system. It is anticipated that all of the States will pass the necessary legislation to implement these proposals during the current budget sessions of Parliament and that federal legislation will be passed by the end of November. It is expected that the required British legislation will be submitted to the British Parliament early next year.

success in south australia. Another area of successful constitutional reform was the approval by the South Australian Parliament of amendments to the South Australian Constitution providing for fixed term parliaments. The new provision, which provides for Parliaments to run for a minimum of three years with the option of extending the term to four years, was passed with support of both the Government and the Opposition. This success highlights the desirability of consensus for achieving constitutional reform.

rape law reform

Marriage is nothing but a civil contract.
John Selden c.1600

marital immunity. Rape has been in the news in recent weeks. A Victorian Judge ruled in mid-September that a husband in that State could not be held guilty of raping his wife with whom he was living even for acts of forced oral and anal intercourse. The view that husbands cannot be guilty of raping their wives goes back to a 17th Century court decision. It is based on reasoning that marriage involves a grant of irrevocable consent to sexual intercourse. In 1980 the law on rape was reformed in Victoria. Despite pressure to remove the marital immunity entirely the then Victorian Government limited its application slightly, so that it would no longer apply where the parties were living 'separately and apart'. Even at common law the immunity rule did not apply where there was a judicial separation or a decree nisi had been granted towards divorce. The same legislation in Victoria which narrowed the marital immunity also decriminalized consensual anal intercourse, which used to be called 'the abominable crime of buggery'. So if the Vic-

torian Judge's decision is right, that 1980 legislation had the effect of marginally narrowing the marital immunity (where the couple were living separately and apart, but without a formal judicial separation) but considerably widened the range of acts which a husband could lawfully inflict on his wife.

Anonymity is a hallmark of the Victorian case. The parties were not identified. The Judge who made the ruling suppressed his name from publication. The Age also quoted 'a leading Melbourne barrister' to the effect that the 17th Century rule about marriage involving irrevocable consent 'did not extend to the other sex acts not regarded as a necessary part of a marriage relationship. It could not extend to anal intercourse, which was illegal ... The common law presumption that the wife was consenting would still appear to be limited to normal sexual penetration,' the barrister is quoted as saying. (*Age* 14 September).

in the street. As well as engaging in non-consensual sexual acts, the defendant was alleged to have done considerable violence to his wife. It appears from the report in the *Age* (14 September) that the man pleaded guilty to assault charges and not guilty to the rape charges. His wife was subsequently interviewed by the *Age* (*Age* 18 September 1985). She spoke of history of physical and sexual assaults on her during the course of the marriage. She said that her experience with police and 'domestics' had led her to conclude that police thought the problem in all cases was not their problem as they were worried that women would turn on them and deny everything in court: 'but the police should not give women a choice whether to press charges or not. It should be automatic, just as it is automatic if the assault happens in the street.'

The Australian Law Reform Commission has a Reference on Domestic Violence in the ACT. However its Reference is not specifically focusing on sexual violence. The final Report on Domestic Violence is expected later this year.

marital immunity reviewed. The Victorian Government responded to the Victorian decision and the out-cry over it by announcing plans to review the law on marital immunity.

The law on marital immunity varies a great deal around the country. In Western Australia the position is very similar to Victoria. In New South Wales marital immunity was done away with entirely, in 1981. There has apparently only been one case brought over alleged rape involving a married couple then living together – the celebrated case of *Wentworth v Rodgers* in which the prosecution failed. In South Australia marital immunity is lost if intercourse consists of or is associated with:

- assault occasioning actual bodily harm to the spouse; or
- an act of gross indecency to the spouse; or
- an act calculated to seriously and substantially to humiliate the spouse;

or the threat of any of these, or of the threat of the commission of a criminal act against any person. In the Northern Territory the criminal code does not mention the immunity and its status there is obscure. Probably, not having been expressly abolished, it survives. Full immunity still exists in the ACT but legislation to remove it is presently before the ACT House of Assembly. In Queensland the immunity still exists.

common sense. Meanwhile in New South Wales a furore arose over the acquittal of a man who has now twice been acquitted of separate sexual assaults in the past two years. He also has a previous conviction for rape, committed in 1972. There was considerable similarity between the allegations made in the two acquitted cases, each involving abduction at knife-point from West Ryde, a Sydney suburb, and forced oral sex and vaginal intercourse. In each case the defend-

ant relying on his unsworn statement claimed that he acted with consent. In the first case in which the defendant was acquitted criminal compensation was refused to the alleged victim, the trial judge saying that he was 'unable to find ... on a balance of probability ... that the participation of the applicant in the sexual activity in the car was because of fear rather than her own inclination'. On the other hand, the judge also warned the defendant that it was his 'last chance', and that he ought to get rid of his 'habit of picking up girls off the street'. In the second case the Trial Judge said he would favourably view an application for compensation, adding: 'As some compensation it may convey to you my own views about the matter.' The prosecutrix in the first case complained that whereas she was subject to cross-examination, the defendant was permitted to make a statement from the dock without cross-examination 'and he was believed'. She added:

> The only time the jury will believe that a woman has been raped is if she has an arm and leg broken and a scar six inches deep across her face. Yet you are told by police and by the Rape Crisis Centre that the new rape legislation means you don't have to be injured to prove the case nor should you put your life in danger.

The prosecutrix in the second case said she felt that the jury in acquitting the defendant had believed his story that she, the prosecutrix, would flag down a passing car and have sex with a total stranger: 'To have to face that in public is humiliating'. (*Sydney Morning Herald* 12 September). In an editorial on the case the same day the *Sydney Morning Herald* rejected suggestions that the law on sexual assaults is too lenient. It commended the 'common sense' of the law which allowed the defendant to be acquitted and yet criminal compensation paid to the prosecutrix, pointing to the different standard of proof applying in the criminal trial from that governing the compensation claim: 'It would be unwise to see these cases as indicating the need for fundamental changes in an area of law that is only recently been radically reformed' the *Herald* said. 'In this difficult area, confidence in the fundamental soundness of the present law should not be shaken by these acquittals'.

The editorial aroused a good deal of letter writing amongst the *Herald's* readers. Included amongst these was Professor Michael Chesterman a Commissioner of the Australian Law Reform Commission. He said that the *Herald* editorial had failed to mention three matters which must be highlighted in any discussion of sexual assault trials:

- The stereotyped view that the only true 'sexual assault victim' is one who screams and fights back to the limit of her capabilities, needs to be more firmly debunked.
- The possibility of separate legal representation for the woman should be canvassed. Professor Chesterman pointed out that the prosecution does not have any distinct responsibility towards her; its role is to present the Crown case as a whole.
- The possibility of making the evidence of the accused subject to cross-examination must be raised. Professor Chesterman said that this would be a special exception to the normal rule presently applying in New South Wales, allowing statements to be made from the dock not on oath and not liable to cross-examination. (*Sydney Morning Herald* 16 September).

unsworn statements. A number of Law Reform Commissions, operating as far as possible in conjunction, are examining the right to make unsworn statements. The New South Wales Law Reform Commission is doing so as part of its Reference on Criminal Procedure and it is expected to report shortly. The Victorian Law Reform Commission is also looking at the question and is due to report about the time this journal goes to press. The Australian Law Reform Commission recently published an Interim Report on Evidence which recommended retention of the dock or unsworn statement. The Commission's proposals will be considered at public hearings

later this year and the Commission expects to move to a final report on all aspects of its Evidence Reference in 1986.

western australian case. At about the same time as rape was in the news in Victoria and New South Wales, a Western Australian jury found a male intruder not guilty of the rape of a girlfriend of a policeman in a flat which he was convicted of breaking into. He also admitted stealing $100 from the woman's purse, and having intercourse with her, but claimed she had undressed him and forced him to have intercouse with her. (*Sydney Morning Herald,* 19 September) According to a newspaper report the policeman raced from the public gallery of the court after the decision was announced towards the man in the dock shouting: ' I will kill you, you bastard'.

Western Australian civil rights campaigner Mr Brian Tennant urged that contempt charges be laid against the policeman over the incident. Mr Tennant was bashed unconscious at his home shortly afterwards. Mr Tennant is a former President of the Western Australian Council for Civil Liberties. Mr Tennant was attacked by a masked man wielding a club and suffered a fractured leg, fractured cheekbone, cuts and concussion. He is quoted by the *Sydney Morning Herald* as saying he believed the attack was connected with his public criticism over the courtroom behaviour of the policeman but he was not accusing the policeman of being involved with the bashing. (*Sydney Morning Herald,* 24 September)

contempt and juries

The jury says 'he's guilty'
And says the judge, says he,
For life Jim Jones I'm sending you
Across the cruel sea.

trad song, *Jim Jones at Botany Bay*

revelations of jurors. The law of contempt has once again become a matter of controversy in recent months with the possibility of contempt proceedings being brought against media organisations that publish the revelations of jurors. Considerable doubt as to the parameters of the law of contempt was expressed by journalists after the trials of High Court Justice Lionel Murphy and the Secretary of the Builders Labourers' Federation Norm Gallagher. In relation to the *Murphy* case, four jurors, together with a number of politicians, academics and public figures, gave their views on the course of the trial, the merits of the Crown case, the adequacy of the law and the abilities of the legal representatives.

As well, members of the Federal Opposition called for Justice Murphy's resignation from the High Court, while other forces came to the support of the High Court Judge to declare that the jury had made an error, that the trial Judge had misdirected the tribunal of fact or simply that 'something dreadfully wrong had happened'. Newspapers ran stories on 'the history of the man' and the rights and wrongs of the Murphy jury's decision became a matter of national controversy. All of this took place before the accused had been sentenced and the appellate processes had had a chance to begin.

Part of the controversy was itself generated by the preparedness of four of the jurors in the *Murphy* case to come forward and air their distress at the press reaction to the jury decision and to explain the difficulty that they had experienced in coming to their verdict. With the 'sensational revelations from the juryroom', press interest in the case took a new tack, asking what harm had been done to the public's confidence in the administration of justice by the events of the trial. Professor Chesterman of the ALRC expressed his surprise at the level of comment and pointed out that the legal processes were far from being exhausted. (*Sydney Morning Herald,* 22 July 1985) In August at a seminar on *Directions in Media Law* conducted by Longmans Professional Books, Professor Chesterman went on to point out that the legal system can be in a 'position of some embarrassment' if the media disclose details of jury deliberations before legal proceedings in the case have concluded. Mr Freckelton, also of the ALRC, ap-