

Sexual violence on trial: An update on reform options

ELISABETH MCDONALD

Abstract

For many years, across many jurisdictions, empirical research has replicated the concerns of women complainants in rape cases. In New Zealand the reforms of the mid-80s have still not significantly addressed the distress felt by those who are just witnesses for the prosecution with very little protection from often harsh and unnecessary cross-examination. The 2006 acquittal of three police officers charged with historical sexual offending put trial process reform in rape cases back on the political agenda. In this short piece, some of the possible reforms that may yet assist those women who take the stand are outlined.

Keywords

Trial process reform; sexual offending; rules of evidence; experiences of rape complainants

There is little incentive for rape victims to come forward when the system which is supposed to protect the public from crime serves them up in court like laboratory specimens on a microscope slide (McEwan, 1989).

In 1996, at the conclusion of the Doctors for Sexual Abuse Care (DSAC) Conference *Rape: Ten Years' Progress?*, Warren Young, now Deputy President of the Law Commission, spoke as part of the "Future Directions Panel". The panel was asked to address the question: 'If the conference reconvenes in 10 years time what will have changed?' He said this:

The message from the conference is that the criminal justice system is not geared to meet the needs of victims.... We need to be looking for alternative ways of dealing with complainants which can best address the needs of victims. Such alternative methods may include restorative justice or marae justice but we need to be open to *other innovative possibilities* and be prepared to experiment and evaluate them. That is where I hope we will have moved to in 10 years time (Young, 1996).

Although academics, lawyers, judges and community workers in New Zealand, as in other jurisdictions, continued to express concern over the next ten years about the low conviction rates in sexual cases, and the re-traumatisation of complainants who chose to enter the criminal justice system, it was not until a high profile case in 2006 that the public became engaged and two successive governments were compelled to act. Reform of the pre-trial and trial process in cases of sexual offending was back on the political agenda as a result of historical sexual conduct between police officers and young women in the Bay of Plenty in the mid-1980s.

A number of young women claimed they were gang-raped by three police officers. Although complaints were made at the time, no action was taken until a journalist highlighted the issue in 2004. In March 2006, the three men were acquitted of raping one of the women (Nicholas, 2007). Public concern about the case initially centered on the fact that the jury was not told that two of the accused had been convicted of raping another of the young women (New Zealand Law Commission, 2008).

As a result of this public disquiet, the Government responded in a number of ways, including asking the Law Commission to consider the issue of disclosure of a defendant's previous convictions at trial. In the foreword to their May 2008 report, the Commission concluded: "[T]here could be value in investigating whether the adversarial system should be modified

or replaced with some alternative model, either for sex offences or for some wider class of offences” (New Zealand Law Commission, 2008). The Commission has now been asked by the Government to undertake this investigation and is doing so in conjunction with the author and two academic colleagues (New Zealand Law Foundation, 2009).

In this note, I wish to outline some of the possible reforms being considered as a result of the current research. In part this piece is a follow-up to the article previously published in the *Women’s Studies Journal* (McDonald, 2005). I will begin by commenting on two reform options that have been the basis of recent consultation by the Ministry of Justice, (2009, 2011) but will conclude by mentioning two other “innovative possibilities” which may yet receive serious political attention.

Current reform proposals: The role of the prosecutor and the use of alternative ways of giving evidence

Aspects of the trial process which a complainant will want to know about is the possibility of any alternative ways of giving evidence, as well as the physical layout of the courtroom, including (safe) access and waiting rooms. In *Victims of Crime – Guidance for Prosecutors* (“Guidance for Prosecutors”) this information is seen as being appropriately delivered by Victim Advisors (Crown Law Office, 2010):

In cases involving sexual offending the prosecutor should ensure that arrangements have been made for the victim to meet with a Victim Advisor or specialist support worker where available, before the hearing or trial, to explain the Court process and show the victim the Courtroom. Any alternative means of giving evidence (e.g. behind a screen) should be shown to the victim and explained.

This guidance suggests that a third person conveys information from the complainant to the prosecutor – particularly in this context with regard to the use of alternative ways. The difficulty here is that the Victim Advisor, while certainly able to demonstrate how the alternative ways might work, is not in a position to say whether such means will be available to the particular complainant. Although their preference might be conveyed back to the prosecutor, as the prosecutor will be making any application for the use of alternative ways (or the attendance of a particular support person), they will be best placed to make the relevant inquiries of the complainant and to advise as to likely outcome. In the words of a Victim Advisor (Mossman, 2009):

Often victims tell us that they have information and knowledge of the crime that the Crown is unaware of, and establishing a relationship between prosecutor and victim allows for a better prosecution, and mostly likely, a better chance of conviction. As it is, prosecutors may not know the best questions to ask, as they have the minimum information... Victims have expressed frustration and lack of trust in the prosecution process, and feel disempowered by this distance between victim and prosecutor.

Aside from wanting to be more involved in the decision to apply for the use of alternative ways, complainants currently may not be aware of these protections, or know how to enforce them. The Ministry of Women’s Affairs funded study interviewed victims who had been involved in court processes. Only two of the 11 interviewed said they had been given a choice about the mode of giving evidence (Kingi, 2009). While not all complainants will wish to give evidence behind screens, it is important that they are advised of the possibility, not only to facilitate the way they give evidence, but also as a method of ensuring their involvement in their case.

In the Ministry of Justice’s 2009 Consultation Document, *A Focus on Victims of Crime: A Review of Victims’ Rights*, Preliminary Proposal 5 was that “prosecutors offer to meet with (or otherwise contact) victims of serious crimes if possible at a time prior to the first court hearing.” Research suggests that meeting with prosecutors prior to trial is likely to ensure victims

feel better prepared and more involved in the criminal justice system (Stern, 2010). In the Ministry of Women's Affairs funded study, when victims of sexual offending asked what could be done to improve the court process, one of the suggestions was to meet with the Crown Prosecutor at an earlier time (Kingi, 2009).

After reviewing submissions on the Consultation Document, the Minister of Justice announced that one of the reforms in the "victim's package" would improve victim-prosecutor communications (Power, 2011). However, the only relevant recommendation made was that the Police Prosecution Service's *Statement of Policy and Practice* be amended to provide that police prosecutors (or their delegate, who will usually be the officer in charge of the case) must take reasonable steps to contact victims of sexual offending before the trial (Cabinet Paper, 2011). This was seen as important as it would align the practice with that set out in the Guidance for Prosecutors. However, the timing and content of such a meeting is also of importance. In Appendix 1 to the Cabinet Paper, which sets out the costs and benefits of the proposals, it is stated that the proposed "[m]eetings with victims are likely to be short and to occur on the day of the hearing." Such meetings can therefore not meet the stated needs of complainants in cases of sexual offending, nor will they be timely in terms of ascertaining the views of the complainant as to the use of any alternative ways. The concerns expressed by complainants therefore remain unanswered. For those outside the criminal justice system it must appear inexplicable that such a relatively easy and straightforward change in process is not possible.

The next reform proposal comes from the recommendations the work of Kirsten Hanna et al published in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Policy* (Hanna, 2010). The recommendation is: that there should be "a presumption in favour of video recorded forensic interviews and CCTV or live audiovisual links for all child witnesses".

The proposal to introduce a presumption in favour of the use of alternative ways of giving evidence (for all child witnesses) seems to have been based in part on the following view expressed in the AUT research (Hanna, 2010):

As evidenced over time, law and policy-making do not guarantee effective and consistent implementation on the ground. This is borne out in the current study. The criminal justice is still finding it difficult to accommodate child witnesses to the extent possible under the current legislative and procedural frameworks...For example...[f]ourteen percent of the child witnesses in the 2008-2009 sample testified without using any alternative modes of evidence.

Stated like this, it does seem of concern that, in particular, child complainants are not giving evidence in an alternative way. However, two points need to be made about this statement. First, the study concerned child witnesses, not just *complainants* – and it is only child complainants for whom the prosecution must seek directions. It may be that the witnesses in these cases were not giving evidence of a particular type or in a level of detail that made seeking a direction appropriate. Secondly, and more significantly, fourteen percent is the equivalent of 10 out of the 71 in the research sample. However, 8 of these 10 had expressed a preference to give evidence in the ordinary way and were all over the age of 13. Given that research has consistently demonstrated the value of children's views being taken into account regarding such decisions (New Zealand Law Commission, 1999), and the fact that the judge must "have regard" to their views (s 103(4)(b) and s 107(4)(b) of the Evidence Act 2006) it should be seen as a positive outcome that the children were listened to. This leaves two out of 71 (less than three percent) who gave evidence in the ordinary way, but for reasons that are not explained or were not apparent to the researchers.

Therefore, based on the research undertaken by the AUT it is not clear that a strong case has been made for introducing a presumption or any other legislative change that would result in the increased use of alternative ways for child witnesses.

Further, there are practical difficulties of creating a presumption in favour of alternative ways when one of the matters to be taken into account is the views of the witness – who may well, as the previous discussion demonstrates, wish to give evidence in the ordinary way. That is, it would be the prosecution who would be required to rebut the presumption on the basis that their child witness (or complainant) did not wish to give evidence in an alternative way.

Finally, it is unclear what the positive effect of a presumption will be, as opposed to, for example, to the requirement that the prosecution seek directions in every case involving a child witness. In both scenarios the defence will contest the application if they are so instructed, or they will consent to the order being made. The argument has been made that a presumption will reduce time spent on the application process (Hanna, 2010) – but in the case of a presumption, the court and the defence would still need to be advised as to which form of alternative way was being requested.

These arguments aside, I certainly support the use of alternative ways in appropriate cases and an increased use of alternative ways in cases involving child witnesses and complainants in sexual cases. However, there is currently no New Zealand research to indicate that child witnesses, more particularly child complainants, are being inappropriately denied the ability to give evidence in an alternative way.

However, given there is research that suggests adult vulnerable witnesses (especially complainants in cases of sexual offending or family violence) (Kingi, 2009), are not always made aware of the potential for them to give evidence in an alternative way, I favour thought being given to amending the Evidence Act 2006 to require the prosecution to seek directions as to how any complainant in a sexual case should give their evidence. This is not the same as a presumption, which has the potential to take away a women's choice, but it would require the prosecutor to actively consider the possibility of the use of alternative ways of giving evidence in every case of sexual offending.

Other innovative possibilities: alternative ways of offering and testing evidence

Concern expressed by complainants that they can only respond to questions when giving evidence, rather than being allowed to use their own words, is not of course limited to sexual cases or even to complainants. The feeling of not being in control of what they want to say may well be exacerbated in sexual cases by limited contact with the prosecution and by the nature and content of complainants' evidence. "Very few women understand the trial process in any depth, and find the process – especially the fact that they never get to 'their story' – confusing and alienating" (Commission on Women, 2004).

The authors of the Australian study, *Heroines of Fortitude: the Experience of Women in Court as Victims of Sexual Assault* (Gender Bias and the Law, 2006), recommended use of section 29(2) of the Evidence Act 1995 by complainants in sexual cases. This provision allows for the giving of evidence in narrative form; no similar provision is included in the New Zealand Evidence Act 2006. Nicola Lacey (1998) has similarly called for changes to "allow victims more fully to express their own narrative in the court room setting".

"Narrative form" is used "in contradistinction to the familiar process by which a witness giving oral evidence is asked questions and the witness's evidence takes the form of the answers given to those questions. 'Narrative form' refers to the situation where a witness stands in the witness box and speaks without being questioned" (Odgers, 2010). Another benefit of allowing evidence to be given in a narrative form is that it will allow witnesses to tell "their story" in a form accessible to the fact-finder. Story-telling has been shown to assist juror comprehension (Pennington, 1991). Allowing a person to arrange their story, or say what happened, in the or-

der which makes most sense to them is more likely to be “listener-friendly” (Hunter, 2009).

Section 29(2) has recently been amended following the Australian Law Reform Commission’s review of the federal legislation (which has also been enacted in NSW and Victoria). It now provides that the court, either as a result of the party’s application or on its own motion: “direct that the witness give evidence wholly or partly in narrative form.” The Commission stated that they remain “of the view that narrative evidence is an important tool in ensuring that the best evidence is before the court” (ALRC, 2006). The Commission identified four particular categories of witness for whom s 29(2) would have particular application: experts, Aboriginal and Torres Straight Islanders, children and persons with an intellectual disability – but the section is not limited in this way and could equally be used for complainants in sexual cases, regardless of age.

The main concern with in-court use of this form of giving evidence is that the narrative might breach admissibility rules (McDonald, 2005). This will arguably not be at issue with regard to expert witnesses who will usually know what is permissible, but unless a witness is prepared (but not coached) beforehand to stay within the rules, it may well be problematic, especially in a jury trial. The best option for this possibility would therefore be that the witness’s evidence in chief is pre-recorded, even close in time to reporting. Provision could be made for the presentation of the complainant’s evidence to be primarily in narrative form, with any appropriate editing if required.

Being cross-examined remains one of the significant concerns of complainants in sexual cases; however there are obvious limits to what may be done to address such concerns within the current model of adversarial trial process (Kebbell, 2007). Such a party-driven model brings with it stated duties of a defence lawyer including protecting their client “so far as possible from being convicted” (Lawyers and Conveyancers Act 2008) and providing the client “with fearless, vigorous and effective defence” (Code of Conduct).

Unpleasant cross-examination is not, of course, reserved for complainants in sexual cases – it is seen as a necessary part of putting the prosecution to the proof to challenge the accuracy, reliability and credibility of any witnesses. What is different about cross-examination in sexual cases is that it involves questioning concerning intimate and personal details, it is usually conducted over a longer period of time and there is unique trauma connected to the alleged offending. Nevertheless what happens in trials concerning sexual cases “is a function of broader systemic factors” including the constraints imposed by the adversarial process, the ethics of advocacy and the laws of evidence (Brereton, 1997; Ellison, 2002; Roberts, 2010). This observation does not, however, explain the view held by many working in the criminal justice sector that cross-examination in sexual cases contributes in large part to the low conviction rate (Mossman, 2009).

It is not universally agreed that the use of examination-in-chief and cross-examination results in obtaining the best evidence from a witness (Zajac, 2009; Ellison, 1999 and 2010) in fact “it is now widely regarded as an obstacle, rather than the royal road, to effective forensic fact-finding” (Roberts, 2010). Cross-examination rules affirm and reinforce “the false and simplistic perception that witness credibility can and should be tested by hearing and seeing witnesses respond to a lawyer’s probing questions” (Hunter, 2009). European models do not in fact rely on the oral questioning of every witness in order to find out the truth – however, the lack of witness “confrontation” will be taken into account when determining the weight to be given to the written statements from those persons (Lempert, 2008).

It is also true that fact-finders in New Zealand trials may rely on evidence that is not tested by way of cross-examination at trial. Leaving aside the possibility of pre-trial cross-examination, the ability to admit hearsay evidence when the maker is unavailable assumes that cross-

examination is not a requirement for admissibility in all cases (McEwan, 2004). Further, in order to ensure sufficient reliability some kind of pre-trial testing of the evidence could occur – for example, either by traditional cross-examination which is recorded or by a different kind of questioning undertaken by a judge or trained interviewer (Hunter, 2009). In such a way, inconsistencies could still be explored, the case “put” to the witness, such that the lack of cross-examination either pre-trial or at trial need not be required for admissibility or assessments as to weight.

Conclusion

Given that reform of trial process in cases of sexual offending is back on the political agenda, it is timely to consider what “innovative possibilities” might be introduced in New Zealand. This note touches on a few concerns expressed by complainants that could well be addressed by either legislative reform or changes to practice within the current criminal justice system. There are, however, calls for consideration of alternatives outside of the traditional processes that could be utilised by adult victims/survivors of sexual abuse in order for them to gain resolution and healing. Consideration of these options will be included in further work, which will be published this year (VUP, 2011). Current research into such alternatives will therefore be the subject of further public debate, and lobbying of Government, 15 years on from the DSAC interdisciplinary conference. It is to be hoped this debate will result in increasing options for those who experience sexual violence.

ELISABETH MCDONALD is an Associate-Professor of Law at Victoria University of Wellington. The law relating to sexual offences connects all of Elisabeth’s teaching and research interests, which include criminal law, the law of evidence, feminist legal theory, and law and sexuality. Elisabeth has been involved in research projects assessing the experience of women complainants over a number of years. She was employed by the New Zealand Law Commission to assist in the evidence law reform project and is a co-author of the leading New Zealand text on that reform: The Evidence Act 2006: Act and Analysis, now in its second edition.

References

- Australian Law Reform Commission. (2006). *Uniform Evidence Law* (ALRC 102). Sydney: Australian Law Reform Commission.
- Brereton, D. (1997). How different are rape trials? A comparison of the cross-examination of complainants in rape and assault trials. *British Journal of Criminology* 37(2), pp. 242-261.
- Cabinet Domestic Policy Committee. (2011). *Enhancing Victims’ Rights Review* (Cabinet Paper). Wellington: Ministry of Justice.
- Code of Conduct for PDS Lawyers and Other PDS Employees*, cl 2(b).
- Commission on Women in the Criminal Justice System. (2004). *Women and the criminal justice system*. London: Fawcett Society.
- Crown Law Office. (2010). *Victims of Crime – Guidance for Prosecutors*. Wellington: Crown Law Office.
- Ellison, L. (1999). The protection of vulnerable witnesses in court: An Anglo-Dutch comparison. *International Journal of Evidence and Proof* 3(1), pp. 29-43.
- Ellison, L. (2002). *The Adversarial Process and the Vulnerable Witness*. Oxford: Oxford University Press.
- Ellison, L. & Wheatcroft, J. (2010). *Exploring the Influence of Courtroom Questioning and Pre-Trial Preparation on Adult Witness Accuracy*. Leeds: University of Leeds & University of Liverpool.
- Gender Bias and the Law Project. (1996). *Heroines of Fortitude: The experience of women in court as victims of sexual assault*. Sydney: New South Wales Department for Women.
- Hanna, K., Davies, E., Henderson, E., Crothers, C. & Rotherham, C. (2010). *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy*. Auckland: Institute of Public Policy.
- Hunter, J. (2009). Battling a Good Story: Cross-examining the Failure of the Law of Evidence. In Roberts, P. & Redmayne, M. (Eds.), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (pp.

- 261-290). Portland, Oregon: Hart.
- Kebbell, M.R., O'Kelly, C.M.E., Gilchrist, E.L. (2007). Rape victims' experiences of giving evidence in English courts: a survey. *Psychiatry, Psychology and Law* 14(1), pp.111-119.
- Kingi, V. & Jordan, J. (2009). *Responding to sexual violence: Pathways to recovery*. Wellington: Ministry of Women's Affairs.
- Lacey, N. (1998). Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law. *Canadian Journal of Law and Jurisprudence* 11, pp. 47-68.
- Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 13.13.
- Lempert, R. O. (2008). Anglo-American and Continental Systems: Marsupials and Mammals of the Law. In Jackson, J., Langer, M. & Tillers, P. (Eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (pp. 395-414). Portland, Oregon: Hart.
- McDonald, E. (2005). Sexual violence on trial: Assisting women complainants in the courtroom. *Women's Studies Journal*, 19(2), pp. 107-130.
- McEwan, J. (1989). Documentary hearsay – refuge for the vulnerable witness?. *Criminal Law Review*, pp. 629-642.
- McEwan, J. (2004). Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial. In Duff, A., Farmer, L., Marshall, S. & Tadros, V. (Eds.), *The Trial on Trial Volume One: Truth and Due Process* (pp. 51-70). Portland, Oregon: Hart.
- Mossman, E., MacGibbon, L., Kingi, V. & Jordan, J. (2009). *Responding to sexual violence: Environmental scan of New Zealand agencies*. Wellington: Ministry of Women's Affairs.
- Ministry of Justice. (2009) *A Focus on Victims of Crime: A Review of Victims' Rights* (Public Consultation Document). Wellington: Ministry of Justice.
- Ministry of Justice. (2011). *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system* (issues paper). Wellington: Ministry of Justice.
- Nicholas, L. & Kitchin, P. (2007). *Louise Nicholas: My Story*. Auckland: Random House.
- New Zealand Law Commission. (1999). *Evidence Law Reform* (NZLC R 55 – Volume 2). Wellington: Law Commission.
- New Zealand Law Commission. (2008). *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R 103). Wellington: Law Commission.
- New Zealand Law Foundation. (2009). *Is the criminal justice system failing victims?* Retrieved from <www.law-foundation.org.nz>
- Oggers, S. (2010). *Uniform Evidence Law* (9th ed). Rozelle: Thomson Reuters.
- Pennington, N. & Hastie, R. (1991). A cognitive theory of juror decision making: The Story Model. *Cardozo Law Review* 13(2-3), pp. 519-557.
- Power, S. (2011). *Speech to Working with Sexual Violence Symposium*. Retrieved from <www.beehive.govt.nz>
- Roberts, P. & Zuckerman, A. (2010). *Criminal Evidence* (2nd ed). Oxford: Oxford University Press.
- Stern, V. (2010). *The Stern Review: Independent review into how rape complaints are handled by public authorities in England and Wales*. London: Government Equalities Office and Home Office
- Young, W. (1996). Future Directions Panel. *Proceedings of DSAC Conference Rape: 10 Years' Progress?*, Wellington.
- Zajac, R. & Cannan, P. (2009). Cross-Examination of Sexual Assault Complainants: A Developmental Comparison. *Psychiatry, Psychology and Law* 16(1), S36-S54.