Sexual violence on trial: Assisting women complainants in the courtroom

ELISABETH MCDONALD

> 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.[1]

For more than twenty years, those working in the New Zealand criminal justice system have been concerned about the experience of women victims of sexual violence who testify in court as complainants. Ten years ago, Justice Thomas (who subsequently sat on the Court of Appeal), had this to say:

> The extreme distress of a complainant giving evidence in a rape case and reliving the trauma of the ordeal in the witness box, can be seen in the courtroom at any time. It is not an uncommon occurrence, and it is done in the name of justice. But there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilized persons. It is inexplicable that the practice can be tolerated with such equanimity.[2]

Justice Thomas was writing ten years after the publication of a report that resulted in a number of significant changes to the trial process, changes which I outline in Part II of this article. Many of these changes impacted significantly, and positively, on the experience of complainants in sexual cases. Others have been less successful in their implementation. More recent research indicates that further changes, either not contemplated or not supported twenty years ago, need to be considered.

In considering further changes, I am primarily concerned with those reforms that will potentially improve the experience of women complainants, while not discounting the importance of fair trial requirements. The article will therefore focus on reforms which are responsive to concerns actually expressed by women complainants. Some of these reforms are contained in the Evidence Bill, which I discuss in Part III. Other possibilities have yet to be fully debated in New Zealand, and Part IV sets out some systemic reforms worthy of attention.

I conclude by reaffirming the need for the criminal justice system to be open to 'innovative possibilities' that can 'best address the needs of victims',[3] and to be willing to experiment with such possibilities in the near future.

The current evidential and procedural rules

There are many evidential rules that apply both in cases of sexual offending as well as in a wide range of other criminal cases. In this section, I focus on the rules which are relevant only in 'cases of a sexual nature' (adopting the definition from s23C(a) and s23A(1) of the Evidence Act 1908) as well as any other rules of broader application which I consider have a particular significance in the context of sexual cases, because of how they are applied, or because of how they could be applied.

In this section I also expressly consider the role of the prosecuting counsel and the judge, as significant participants in the trial process from the point of view of complainants in sexual cases. The 'voices' of complainants will also form part of the critique of the current law and practice, which I also begin in this part.

Alternative ways of giving evidence and the provision of support persons

The statutory-based assistance for complainants in sexual cases, regarding the use of different 'modes' of giving evidence (allowing them to testify out of court, for example), only applies to complainants under the age of seventeen at the time of the commencement of the proceeding (s23C(b) of the Evidence Act 1908).

The provision of assistance for adult complainants in sexual cases has been more limited, although the Court of Appeal has recognised that orders covering the manner in which complainants (or indeed any witnesses) may give evidence, are possible as part of the exercise of the court's inherent jurisdiction.[4] In this way, women complainants in sexual cases (and adult witnesses in other cases) have been permitted to testify from behind screens, via CCTV, pre-recorded videotape and even via video link from overseas, although such orders are relatively uncommon in sexual cases and tend to be made when the complainant can establish some other form of vulnerability aside from merely their status as complainant in a sexual case. In other words, as in the case of the intellectually impaired woman in *R v Thompson*,[5] the more the

complainant is 'child-like', the more likely the court will accept the argument that special provision should be made, by analogy with the statutory regime.

Although I am not aware of any recent research on this point, anecdotal evidence indicates most women complainants in sexual cases are not provided with any assistance while they are giving evidence, except the use of a support person. If any other modes of evidence are agreed to, it tends to be the use of a screen (which allows the complainant to testify without seeing the accused) rather than CCTV (which allows the complainant to testify from outside of the court room). I am not aware of any adult complainant offering their evidence in chief on pre-recorded videotape (with the exception of the complainant in *Thompson*), although there is no particular reason why a complainant, or indeed any witness, should not have their evidence pre-recorded in this manner.

Privacy issues

Also a result of the 1986 reforms, section 375A of the Crimes Act 1961 provides for closure of the court while the complainant is testifying. The object of the provision is to 'reduce the embarrassment a complainant is likely to experience when having to deal in detail with the alleged offence, and there is an associated hope that such protection will encourage more victims to complain.'[6] Complainants would, of course, prefer that the provision should apply throughout the trial, not just when they testify, given the on-going disclosure of their personal details.[7]

(General) witness questioning rules

There are no specific statutory provisions which guide the nature of the questions put to adult complainants in sexual cases. Section 14 of the Evidence Act 1908 (which controls the asking of 'indecent' and 'scandalous' questions) is intended to apply, yet the current language is not wide enough to include all of the types of questions which complainants find unnecessary, unpleasant or offensive. It is up to the trial judge to make decisions about appropriateness on a case-by-case basis.

Appropriate judicial control of proceedings is also important in sexual cases where the defendant is unrepresented and wishes to personally cross-examine the complainant. Such a process is

prohibited pursuant to s23F(1) of the Evidence Act 1908 in cases of child complainants but it has always been left to the trial judge to deal with the situation when it arises with women complainants in sexual cases. Again, anecdotal evidence and the information collected from trial judges and practitioners by the Law Commission, suggests that such questioning by an accused is widely thought to be impermissible, yet a case in Christchurch in 2002 highlighted the difficulties of upholding the rights of an accused while protecting the complainant, where this occurs in the absence of clear legislative guidance. Responses from practitioners, women lawyer groups and the Government at that time indicated wide-ranging support for some kind of legislative intervention to prevent such questioning,[8] which has yet to occur.

Sexual history evidence

Section 23A of the Evidence Act 1908, which is aimed at limiting the admission of sexual history evidence about the complainant (with any person *other* than the accused), is the New Zealand equivalent of what is referred to in some other jurisdictions as a 'rape shield' provision. Along with the other evidential rules, which apply specifically to sexual cases, rape shield provisions have attracted much (feminist) academic analysis.[9] Complainants have also been asked to report the extent to which they have been questioned about their sexual history at trial.[10]

A number of replicated findings and commonly held perspectives may be distilled from the significant literature on this topic:

(i) Complainants consider it distressing, irrelevant, embarrassing, unfair and distracting to be asked about their previous sexual experience. Complainant distress impacts on the quality of evidence they are able to give. The fact that victims of sexual offences know they may be asked about their sexual experience may well be a factor in low reporting rates.

(ii) Admission of evidence concerning a complainant's sexual history makes it more likely the fact-finder will attribute blame to the complainant and less likely they will consider the accused's conduct criminal. (This is more likely to occur when the evidence concerns the complainant's sexual history with the accused – evidence not currently subject to section 23A.) The prejudice arising from such

evidence cannot be meaningfully countered by a direction from the judge, nor does it appear that 'limited use' directions are an effective way of ensuring that the evidence is used by the jury only for specific purposes (for example, to assist the decision about belief in consent and not for the impermissible purpose of informing jury opinion about the credibility of the complainant).

(iii) Although theoretically desirable as a matter of principle, the admission of sexual history evidence has traditionally not been appropriately controlled in the absence of a specific rule (that is, subjecting the evidence merely to a relevance requirement and perhaps to an inquiry into its prejudical effect, has not been sufficient to prevent the admission of irrelevant and highly prejudicial sexual history evidence).

(iv) Rape shield laws that allow for the exercise of judicial discretion (as in New Zealand) seem to be the least effective way of preventing the introduction of irrelevant and prejudical sexual history evidence. Category-based exclusion provisions are more effective yet are more open to challenge on the basis of potential or actual unfairness to an accused.

The challenge should now also be, subject to the final form of clause 46 of the Evidence Bill (see the discussion in the next part), subjecting evidence of the sexual experience of the complainant *with the defendant* to appropriate scrutiny – in a way that reduces the prejudice to the complainant but does not prevent fairness to an accused.

Recent complaint evidence

The rationale for the admission of recent complaint evidence arises from the historical expectation that a victim of sexual abuse would immediately raise a 'hue and cry'. In the absence of such a response, it was presumed a later, delayed allegation was unlikely to be true and more likely to have been motivated by malice, blackmail or simply a change of heart. Given the significance placed on the existence of a 'recent complaint' in the context of a sexual case, it seems just that such a complaint should be offered as evidence of consistency (and therefore creditability) of the complainant as an exception to the rule against narrative.

Despite receiving much attention from critics, who favour a range

of alternatives including abolition, liberalisation, and extension (to other offences), this common law (or 'judge-made') rule of admission has changed very little over time. The requirements for admission are still that the complaint must be made at 'the first reasonable opportunity', to the person the victim would be expected to complain to. More latitude is given (especially in the case of complaints by children) with regard to 'evolving' or 'incremental' complaints, so that complaints to more than one person may be admitted if forming part of the same disclosure, linked by some degree of timeliness and similarity of content.

Although the recent complaint exception is a common law rather than statutory rule, part of the 1986 reform package resulted in the enactment of section 23AC of the Evidence Act 1908.[11] The section is an important addition to the operation of the rule and is consistent with its rationale, in the sense that it allows a (judicial) response when there is a delay. If the defence suggests that the lack of recent complaint indicates lack of veracity (that is, lack of recent complainant 'diminishes the credibility of the complainant'),[12] the judge may direct the jury that there may be 'good reason' for the delay.

Corroboration

Traditional suspicion of the truthfulness of sexual offence allegations ('easy to make') and the supposed difficulty of avoiding conviction ('hard to disprove') was also behind the common law's development of the corroboration warning in sexual cases.[13]

Corroboration was never a requirement for a rape conviction, but that did not prevent the development of a large and complicated amount of case law concerning what might amount to corroboration, if only for the purpose of adjusting the directions to the jury, who were otherwise told that it was 'dangerous to convict on the uncorroborated [unsupported] evidence of the complainant'.

Twenty years on, Warren Young's criticism of the routine use of the corroboration warning seems uncontentious.[14] The resulting section 23AB of the Evidence Act 1908, made it clear that judges may still, in appropriate cases, direct a jury to exercise caution in the absence of independent evidence. There is, however, no reason to subject the evidence of a complainant in a sexual case to any more scrutiny (or any more suspicion) than any other complainant, but I am not aware of any New Zealand study that has examined current practice on this

point. At the 1996 Wellington Conference, however, *Rape: Ten Years Progress?* Ellis J stated that, despite the reform: 'I still give them not the old six inch gun, which said it is dangerous to convict unless there is corroboration … I think in the view of quite a few judges there has not been particularly significant change in substance.' More recently, Bill Wilson QC, during in a trial in Palmerston North, told the jury that 'sexual allegations are so easy to make, so difficult to disprove.'[15]

Tellingly, however, Ellis J also said as part of his 1996 presentation that:

> As a practicing lawyer, I was always of the view, and so was my family, that it would only be in the most extreme circumstances that you would ever advise a woman to participate in the criminal process if she was alleging that she had been raped.

The role of the judge

During a sexual offence trial, as in any indictable proceedings, the judge has significant control over the trial process – from the manner in which the complainant gives evidence, to questions of admissibility and the content of jury directions. However, even though the judge is best placed to influence the 'tone' of the proceedings, research indicates that judges are cautious about interfering in the questioning of witnesses, especially with regard to defence counsel in criminal proceedings.[16] This may be a result of the best intentions in the context of rape trials: to avoid an appeal leading to a re-trial as a result of the judge 'descending into the arena' or prejudicing the defence case or trial strategy.

Complainants, unaware of the significance of the role of the judge, tend to report favourably about judges who allow them to take a break during testifying or appear sympathetic or understanding in other ways. They tend to place responsibility for the distress of cross-examination solely on counsel (defence counsel for asking the questions and prosecuting counsel for not objecting), even though the judge has ultimate control over the manner and content of questions.

The role of prosecuting counsel

A complainant in a sexual case is 'just a witness' (even though they are usually the 'primary witness'), so they do not have their own representation. Many complainants are unaware of their true

status, however, and view prosecuting counsel as 'their lawyer'. For obvious reasons, this creates unrealistic expectations and a high level of dissatisfaction. Even those who do understand their position as a witness rather than a party, regularly report that lack of contact with the prosecution, which means lack of information and a sense of lack of support (or having someone 'on their side'), adds to the difficulty they experience as a complainant – in particular, a sense of disempowerment and irrelevancy.[17]

Regardless of how well informed they are as to the role of prosecuting counsel, complainants do hold them responsible for not protecting them more from the distressing aspects of cross-examination. Research does indicate that prosecutors could be more pro-active with regard to preventing inappropriate or irrelevant questioning of complainants.

The extent of complainant disappointment with prosecutors who are seen as failing to protect their interests is not jurisdiction-specific. All the research, which examines the experience of women complainants in sexual cases, concludes that the majority of prosecuting counsel are viewed as adding to the difficulties of the trial process, rather than alleviating it.

A number of jurisdictions have recommended initiatives to address some of these concerns. One of the recommendations of the Crime and Misconduct Commission in Queensland was that,

> the Office of the Director of Public Prosecutions develop formal policies for communicating with complainants in sexual matters. As part of these formal policies, a senior legal officer of the ODPP should be required to prepare a written summary of the reasons for decisions that are made about the case.[18]

More recently, the Fawcett Society's Commission on Women in the Criminal Justice System recommended that,

> [t]he Crown Prosecution Service should have the responsibility for victim liaison in sexual or domestic violence cases following charge so that accurate information and explanations of review and other significant decisions are routinely passed onto the victim. This will require special training for CPS caseworkers and prosecutors to ensure that they have the appropriate skills to carry out this function.[19]

Recommendation 2 from *Heroines of Fortitude: The Experience*

of Women in Court as Victims of Sexual Assault,[20] also focuses on the need for better information and communication. Most recently, the Victorian Law Reform Commission's *Final Report on Sexual Offences*,[21] recommended on-going, specific training for prosecutors and members of the judiciary.

Further reform options for New Zealand: Within the current adversarial process

Given that complainants in sexual cases still report dissatisfaction with the trial process, despite the effects of the 1986 reforms, there is a need for the introduction of further measures to improve their experience in the courtroom, as well as pre-trial.

Some reforms proposed in the Evidence Bill 2005,[22] although of general application, will have particular significance in sexual cases (if enacted); others relate specifically to sexual cases. In the next sections I discuss the relevant Bill provisions and assess the desirability of the proposals. I conclude by identifying matters that are not addressed by the Bill, which may be worthy of further consideration, especially in the context of sexual cases.

The Evidence Bill proposals: An evaluation

(i) Alternative ways of giving evidence and the provision of support persons

The Bill extends (and amends) the existing legislation, which provides for the giving of evidence in alternative ways (currently applicable only to child complainants in sexual cases), to all witnesses. The types of alternative ways that may be used are broadly defined in clause 101 of the Evidence Bill and include the use of CCTV, pre-recorded videotapes, screens and video links.

With regard to women complainants in sexual cases, and any other witnesses, directions may be made for their evidence to be given in an alternative way (clause 99). The directions may be made after application by a party or as a result of the judge's own initiative. The grounds for the making of an order are set out in clause 99(3) and include matters of particular relevance in the context of sexual cases: the trauma suffered by the witness; the nature of the proceeding; and, the nature of the evidence that the witness is expected to give. Other grounds may also be relevant in particular cases: the witness's

fear of intimidation; and, the relationship of the witness to any party in the proceeding. (Similar provisions are included in the recent Vulnerable Witnesses (Scotland) Act 2004, amending ss271–271M of the Criminal Procedure (Scotland) Act 1995.)

The Evidence Bill 2005 also proposes legislative confirmation of the practice of allowing a support person to be near a complainant in a sexual case, while they give evidence: clause 75(1) makes the presence of a support person an entitlement for a complainant in any proceeding.

(ii) Witness questioning rules

Section 14 of the Evidence Act 1908 is extended and amended by clause 81(1) of the Bill. It provides that the judge 'may disallow, or direct that a witness is not obliged to answer, any question that the judge considers intimidating, improper, unfair, misleading, needlessly repetitive, or expressed in a language that is too complicated for the witness to understand.'

Although the discretion to disallow such questions remains with the judge, clause 81(2) provides a list of matters that the judge may take into account. This list includes reference to 'the nature of the proceeding' and so encourages judges to consider 'improperness' and 'intimidation' in the specific context, for example, a sexual case.

The Bill's extension of section 23F of the Evidence Act 1908 to other cases may be more contentious. Limitations on an accused's ability to conduct their own defence, it has been argued, is a breach of their right to confront witnesses against them. The Law Commission, however, did consider the rights of a defendant in a criminal case and concluded that the proposed limitation was not a breach of the right to confrontation, as understood in New Zealand.[23]

Clause 91(1) of the Bill therefore provides that a defendant in a criminal proceeding is not entitled to personally cross-examine a complainant in a sexual case; a complainant in a case involving domestic violence; and, a child witness in any case, unless the judge gives permission. In any other case, the judge may order that an unrepresented party must not cross-examine a particular witness (clause 91(2)). The grounds for such an order are set out in clause 91(3) and are virtually identical to the grounds for making an order about the manner of giving evidence (the nature of the proceeding, for example), as are the fairness matters the judge must consider (clause 91(4)).

The scope of the section will probably be broadly supported, given the reaction to the recent Christchurch case, however, the manner in which cross-examination may proceed under the Bill has already been the subject of criticism. The New Zealand Law Society was of the view that an *amicus* should be appointed. Clause 91(5)(6) provides that the questions from an unrepresented party may be 'put to the witness ... by the judge or a person appointed by the judge for that purpose' (if the defendant fails or refuses to engage a lawyer for the purpose within a reasonable time). Commentators considering the comparable Australian legislation consider that the questions should not be asked twice (once by the defendant and once by the judge) and that it may be preferable for counsel to be appointed for the specific purpose.

(iii) Sexual history evidence

The Law Commission's Evidence Code proposed some changes to section 23A of the Evidence Act 1908. Section 46(2) of the Code extends the 'heightened relevance' test to evidence concerning the sexual experience of the complainant with the particular defendant, but the evidence is not subject to a leave requirement and its effectiveness will be dependant on defence counsel considering the evidence in light of the rule and the willingness of the prosecution to object.

In my view, the leave requirement (that is, where the evidence is subject to a decision by the judge, in the absence of the jury, as to its admissibility) should be extended to cover evidence of the complainant's sexual experience *with the particular defendant*. Empirical research into the connection drawn between an existing sexual relationship and the attribution of responsibility, indicates the significance of limiting evidence of the sexual history of the complainant and the defendant:

> It was apparent from the vignettes that the degree of responsibility attributed to the male decreased with the change in the sexual history of the relationship and in the implied consent of the female, whereas the amount of responsibility attributed to the female increased … In fact, many males believe that the longer the partners are together and the more formal their commitment to each other, the greater the right to sexual access of their partners and the greater the likelihood that females will feel obligated to accommodate their partner's sexual demands.[24]

Drawing on research on this point, Hart Schwartz argues that, although it appears that the courts have 'finally rejected the myth

that some women are "the type" who "always say yes"', current legal changes suggest a belief 'that a woman who has engaged in consensual sexual intercourse with a *particular man* is more likely to do so at another time with *that same man*.'[25]

The Code does strengthen the current proviso in section 23A by the wording of s46(3):

> In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters (a) for the purpose of supporting or challenging the truthfulness of the complainant; or (b) for the purpose of establishing the complainant's consent.

This makes it clear that evidence of a complainant's 'reputation' in sexual matters is irrelevant to the issue of whether or not consent has been given on the occasion in question. I would go further, as the Law Commission was not inclined to do, and recommend a further limitation – that reputation evidence can also not be offered for the 'purpose of establishing the defendant's belief in consent'. The point here is that this part of the provision is concerned with 'reputation' evidence, not evidence of 'sexual experience'. How can the complainant's reputation in sexual matters provide, of itself, grounds for the defendant believing she consented to sexual relations with him? Consent is, after all, given to a person, not a set of circumstances.

Unfortunately, clause 40 of the Evidence Bill 2005 does not follow the Law Commission's recommendations and merely retains section 23A of the Evidence Act 1908. The fact that the Bill makes no changes to the current law is also problematic as the wording of clause 36(4) means that sexual history evidence about a complainant that is offered as being solely or mainly relevant to truthfulness will be admissable under the 'substantial helpfulness' test, rather than the heightened 'direct relevance' test. Depending on how the substantial helpfulness test works in practice, this change has the potential to re-introduce the drawing of inappropriate connections between sexual conduct and credibility, which section 23A was introduced to prevent.

(iv) Recent complaint evidence

The Evidence Bill 2005 replaces the common law rule concerning recent complaint evidence with a general provision applicable in all cases. The relecant part of clause 31 provides that '[a] previous

statement of a witness that is consistent with the witness's evidence is not admissible unless ... the statement is necessary to respond to a challenge to the witness's truthfulness or accuracy ...'. (Truthfulness is defined in clause 4(2) of the Bill.)

This exception is wider than the current exception concerning 'recent fabrication'. It also contains no requirements relating to recency or recipient, so that any 'complaint' may be offered in evidence to 'meet a challenge to that witness's truthfulness'. Aside from the requirement that the complaint must be consistent with the witness's evidence and must 'meet the challenge', the Bill's general exclusion provision in clause 8(1)(b) (which focuses on 'needless' prolonging of the proceeding) will operate to control the amount of complaint evidence being offered under clause 31.

This proposal seemingly addresses the concerns that the recent complaint exception is discriminatory. (This argument is made from two different positions: feminists argue that the exception operates to perpetuate the belief that complainants in sexual cases, usually women, cannot be believed on their evidence alone; masculinists argue that it is an example of inappropriate paternalism which benefits women and prejudices the accused, who is usually male.) It may not, however, limit the amount of case law concerning the admission of what we know refer to as complaint evidence in sexual cases: it will just be centred around different issues. Rather than the evidence being scrutinised as to timeliness, for example, appeals concerning the admissibility of complaint evidence will be based on whether there really had been a challenge to the complainant's truthfulness; whether the content of the previous complaint was sufficiently consistent with the complainant's evidence; and whether the complaint was responsive to the truthfulness challenge. These inquiries will, of course, not be limited to sexual cases any more, but that may arguably be the only advantage to the abandonment of the common law recent complaint exception. My preference would be for the 'recency' requirement to be relaxed with regard to women complainants in sexual cases, as it has been for children.

(v) Evidence of character and credibility (truthfulness and propensity)

Currently it is not permissible to bolster the credibility of a witness except in some limited circumstances, and not by offering evidence

of the witness's reputation for truthfulness. The accused in a criminal case is in a different position with regard to evidence as to their truthfulness and good character. Even though it may be of limited probative value, and offering it comes with attendant risks for some accused persons, their ability to offer such evidence about themselves is a long-standing concession.

Unsurprisingly, complainants in sexual cases, especially where they have been subject to cross-examination about their sexual experience, manner of dressing, social, and drinking habits,[26] consider it unfair that they are not permitted to offer good character evidence about themselves. This disparity is not, of course, limited to sexual cases, but it is more pronounced in such cases, as it is far less common for the victims of other offences to be subject to wide-ranging questions about their personal lives and reputations.[27]

The Evidence Bill proposes to allow evidence about the character ('propensity') and credibility ('truthfulness') of any witness to be called under certain conditions. The Bill's rules are intended to be wide enough to allow witnesses, including complainants in sexual cases, to offer evidence about their own (or any person's) truthfulness or propensity. The Bill defines 'propensity evidence' as evidence of 'the reputation or disposition of a person; or acts, omissions, events or circumstances with which a person is alleged to have been involved', which tends to show that person's propensity to act in a particular way or to have a particular state of mind' (clause 4).

There was very little concern expressed about the extension of these rules when the Law Commission consulted with the profession about the draft Evidence Code in March 1998.[28] In fact, some defence counsel had already been discussing the issue, particularly in the context of sexual offences.[29]

Matters not provided for in the Evidence Bill 2005

Research that has examined the experience of complainants identifies many difficulties complainants face when testifying at trial. Although rules and procedures are in place, or are proposed in the Evidence Bill 2005, which may well be responsive to those concerns, further reform may also assist complainants to give their best evidence and not be unnecessarily distressed by the trial process.

In this section, I outline two other possible reform options, which are responsive to complainant concerns.

(i) Use of narrative 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 limited to sexual cases or even to complainants. The feeling of not being in control of what they want to say may 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.'[30]

The authors of the Australian study, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*,[31] recommended use of section 29(2) of the Evidence Act 1995 (NSW) by complainants in sexual cases. This provision allows for the giving of evidence in narrative form; no similar provision is included in the Evidence Bill, which does draw on the Australian legislation in other contexts (see for example, s63 and s75). Nicola Lacey has similarly called for changes to 'allow victims more fully to express their own narrative in the court room setting'.[32]

As Stephen Odgers points out, however, with regard to the Australian provision, one of the matters that the judge needs to take into account when allowing a witness to give evidence in a narrative form is the witness's understanding of the rules of evidence.[33] It seems therefore to be a model that was proposed to cater for the evidence of expert witnesses as opposed to complainants in sexual cases. Presumably, however, complainants could be assisted in the preparation of their evidence so as to ensure their 'narrative' does not breach any admissibility rules. Such preparation (only with regard to advice as to admissibility, not 'coaching' or instructing her what to say) might be undertaken with the complainant's separate representation, as discussed below.

Provision for offering narrative evidence in writing 'in the form of a prior statement' is now possible in Scotland pursuant to s271M of the Criminal Procedure (Scotland) Act 1995, as amended in 2004. Such a statement is admissible as the (vulnerable) witness's evidence in chief 'without the witness being required to adopt or otherwise speak to the statement in giving evidence in court' (s271M(2)). A 'vulnerable witness' is defined in terms of the likelihood of the witness

becoming distressed, the nature of the proceedings and the type of evidence the witness will give – a definition that would cover most complainants in sexual cases.

(ii) Legal representation for complainants

A number of civil law jurisdictions allow separate representation for complainants in sexual cases, in some contexts because a civil claim is heard together with the criminal case (France, for example), but in other jurisdictions because State-funded legal representation is available for complainants as part of the criminal proceedings (Germany, for example). Some aspects of the role of these lawyers cannot be easily accommodated within an adversarial trial process (for example, the possibility of the prosecution *and* the complainant's lawyer cross-examining the accused), but other versions of this representation model could operate within the current criminal justice system.

One such possibility is the Danish model, which Jennifer Temkin argues could be adapted for England.[34] In June of 1980, section 741 of the Danish Procedural Code was amended to provide that a lawyer was to be appointed at the victim's request in sexual cases (this provision has since been extended to also apply in a range of violence, including robbery.) Counsel may also be appointed at the request of the police for the duration of the police investigation. At court, the complainant's counsel may apply for leave for the complainant to give evidence in the absence of the defendant, for example, and may object to inappropriate questions put by the defence.

The advantages of separate representation for complainants in sexual cases would be: increased amount of information given to complainants about the trial process, outcome and appeal options; extra support available during the trial process; applications could be made in the best interests of complainants (for example, applications as to alternative ways of giving evidence); and, full argument could be made as to admissibility matters (for example, sexual history evidence).

It is certainly arguable that these roles can and should be fulfilled by victim support workers, prosecuting counsel and trial judges. However, research has consistently demonstrated that these tasks are not routinely undertaken to the satisfaction of complainants, or even in a manner that is consistent with existing legal authority. The absence

of relevant support and strong, effective advocacy about admissibility matters, or manner of questioning, means that complainants tend to be distressed by and dissatisfied with the trial process. Distressed complainants are unlikely to give their best evidence and dissatisfied complainants will not encourage other victims to proceed with their complaints.

More recently, Ireland introduced a limited form of legal representation for complainants in sexual cases within an adversarial model. Under section 4A of the Criminal Law (Rape) Act 1981 (as amended by section 34 of the Sex Offenders Act 2001), when the accused wishes to offer sexual history evidence about the complainant, the complainant has legal representation available to her for that application process. The Irish Act therefore enacts a limited version of legal representation for complainants in rape cases. Similar proposals are being considered in Scotland.

Both these reform options could also be incorporated as part of more significant structural or systemic changes – which I discuss below.

Reform options: Structural and systemic change

Separate specialised courts to deal with sexual offences

'Sexual offences courts' operate in South Africa. The advantage of separate specialised courts is the ability to have the proper facilities (for example, separate waiting rooms, CCTV equipment) appropriately trained staff and counsel and judges with the relevant expertise. Such courts could utilise different procedural and evidential rules, which could therefore accommodate an extended role for any complainant legal representation (for example, objecting to the manner of cross-examination, assisting the judge with formulating jury directions), increased use of written evidence, or the offering of narrative evidence. The court could also incorporate relevant aspects of 'restorative justice' in appropriate cases (see the discussion below) and perhaps even a different model of decision-making (for example, a 'panel' rather than a jury).

In its *Final Report on Sexual Offences*,[35] the Victorian Law Reform Commission notes that a new stand-alone court (for child sexual assault cases) is currently being piloted in New South Wales. The trial is over half-way through its 28-month period and some evaluative information is available. The Commission, however,

only recommended the establishment of a specialised *list* in the Magistrates' Court and assignment of a designated judge to hear sexual assault cases involving child complainants. Similarly, 'without the results of adequate comparative evaluation data', the Queensland Crime and Misconduct Commission did not feel able to make any recommendations about the implementation of alternative processes, while noting that any such recommendations would be outside the terms of reference of their Inquiry *Seeking Justice: An Inquiry into how Sexual Offences are Handled by the Queensland Criminal Justice System*.[36]

Disadvantages of a specialised sexual offences court may include: the reluctance of counsel or members of the judiciary to 'specialise' in this of the law; the 'privileging' sexual offences over other offences which may have similar impact on victims, for example, domestic violence and other serious assaults, or alternatively, treating sexual offences as less serious as those which are the subject of 'usual' indictable proceedings; and, the invariable issues of increased cost. Notwithstanding these kind of concerns, however, special domestic violence courts are currently being trialled in Queensland, New South Wales and Manukau.

Incorporating the advantages of an inquisitorial model?

Under an inquisitorial model, significantly more evidence is offered in written form, as there is less emphasis on the principle of orality, and any questioning of witnesses is mainly undertaken by the judge or judicial panel. Any discussion of reform options that address the concerns of complainants in sexual cases would not be complete without consideration of what might be possible under a different model of prosecution. Although significant changes to procedure and admissibility rules could not occur without full consideration of the advantages and disadvantages of such change, a version of an inquisitorial model could presumably operate in the context of a separate sexual offences court.

'Restorative justice' and sexual offending

I have put quotation marks around the words 'restorative justice' to indicate the concept is a flexible one and the label is invoked to describe a range of practices which respond to crime but vary significantly.[37] It has been used to describe New Zealand's family

group conferences, Marae justice, and victim-offender mediation, as well as the process of victims being involved in a police cautioning process or the decision about sentencing.

The type of 'restorative justice' most utilised in New Zealand is a pre-sentence 'conference' that involves the victim (and their supporters or family), the offender, who has admitted responsibility for the offence (and their supporters or family), as well as those responsible for facilitating the conference and assisting those involved (most particularly the victim) to achieve an agreed outcome.[38]

Because this type of process usually requires the victim and offender to meet and reach an agreement, feminists have expressed concern that such 'restorative justice' is problematic for women who have been the victims of domestic violence or sexual offending – often discussed together and referred to as 'gendered harms'. The primary reason for this concern stems from the view that these are crimes that stem from the power imbalance between men (usually the offenders) and women (usually the victims). Critics are concerned, as they are with the use of mediation for sexual harassment,[39] or domestic violence claims,[40] that women will not receive a just result when the power dynamic that has led to the harm is replicated in the restorative justice or conference process.[41]

These criticisms are responded to in the work of (among others) Allison Morris,[42] Kathleen Daly,[43] and Mary Koss.[44] They argue that some form of restorative justice may be possible in response to sexual offending, in a way that does not re-victimise the complainant. Current initiatives, including the RESTORE programme in the United States,[45] are, however, limited to cases involving first-time offenders who have committed less serious (that is, non-penetrative) sexual crimes. Advocates of restorative justice consider that it may be an effective option in cases of 'acquaintance' or familial sexual offending, including rape, but it is just as important, some would say more so, to attend to concerns about the possibility of coercion and disempowerment in situations in which the victim and offender know each other and may need to have an ongoing relationship. It is also important to bear in mind that the category of 'acquaintance rape' contains a large variety of offending – from rape within a marriage or a long-term relationship, to rape which occurs on a first date, or as part of workplace victimisation. Not all of these rapes may properly be dealt with outside of the traditional criminal justice process.

New Zealand is a world leader in the development and application of restorative justice, due to both Governmental and community initiatives. It would be consistent with the use of restorative justice initiatives here to date to explore the appropriateness of restorative justices processes in the resolution of sexual offending.[46] There are, however, many special considerations to take into account when formulating an appropriate 'restorative justice' response to sexual offending, more, I would suggest, than can be addressed by just following the 'Best Practice' model advocated by the Ministry of Justice. Not the least significant matter is the relative seriousness of the offending. Because *rape* complainants have most often been asked about their experiences of the trial process, any proposed alternatives should improve their experience, not worsen it. It has not been established to date that rape cases can be effectively dealt with, from a victim's perspective, by a restorative justice process. The indications are that it might be possible, but not in every case, not for every victim, and not without thoughtful development of the best process.[47]

Conclusion

In this article I have outlined the current law and practice, the relevant current reform options contained in the Evidence Bill 2005, and other proposals that have relevance to the prosecution of sexual offences, with a view to determining which reforms could improve the experience of (women) complainants.

Under the existing criminal trial process, it would be possible to have limited legal representation for complainants following the Danish model. New Zealand could also pilot a specialised sexual offence court. A separate trial process in such a court could accommodate the following: the ability for complainants to give narrative evidence; the ability for complainants to give written (or narrative) evidence; and, State-funded legal representation for complainants. There will be, and should be, further research and discussion about the possibility of restorative justice in (some) sexual offence cases. These are some options possible within the current system, which could be pursued in tandem with the implementation of the Evidence Bill 2005.

However, in 1996, at the conclusion of the DSAC Conference *Rape: Ten Years' Progress?*, Warren Young, now Law Commissioner,

spoke as part of the 'Future Directions Panel'. The panel was asked to address the question: 'If the conference reconvenes in ten 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. I am not convinced that within the current adversarial system under which we operate, it can really be modified to do so. I would therefore argue that if we were to make real progress we ought not waste too much time or energy on reforming the criminal justice system. …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.[48]

In this article I have outlined some 'innovative possibilities' that are in operation overseas and may not sit easily with our current adversarial model. This does not mean, however, that they cannot be implemented in New Zealand. They are options worthy of further consideration. In my view, a range of options, to match the range of sexual offending, should be available to provide the best outcome in each individual case. The current trial process may suit some types of sexual offending, but not others. Whatever the reform, the potential impact on complainants must be of primary concern.

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 in sexual cases and was employed by the New Zealand Law Commission to review the law of evidence. She is currently also Co-Convenor of the Women's Consultative Group, an advisory committee of the New Zealand Law Society.*

Notes

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[3] Warren Young, 'Future Directions Panel' in *Rape: 10 Years Progress?* (Wellington: DSAC Conference Proceedings, 1996) p. 163.
[4] *R v Moke & Lawrence* [1996] 1 New Zealand Law Reports, p. 263.
[5] Unreported, 19 March 2003, Court of Appeal, CA 361/02.
[6] Gerry Orchard, 'Sexual Violation: The Rape Law Reform Legislation, *New Zealand Universities Law Review*, *12* (1986) pp. 97–113.
[7] Bridget MacKintosh, 'Crown Prosecutor's Perspective' in *Rape: 10 Years Progress?* (Wellington: DSAC Conference Proceedings, 1996) p. 97.
[8] 'Law Change to Protect Sex Attack Victims', *New Zealand Herald*, 16 November 2002.
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[10] *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (NSW: Gender Bias and the Law Project, Department for Women, 1996); *The Legal Process and Victims of Rape* (Dublin Rape Crisis Centre, 1998).
[11] *Rape Study: A Discussion of Law and Practice: Volume I* (Wellington: Department of Justice, 1983) p. 145.
[12] Orchard, p. 110.
[13] Elisabeth McDonald, 'An(other) Explanation: The Exclusion of Women's Stories in Sexual Offence Trials' in *Challenging Law and Legal Processes* (Wellington: New Zealand Law Society, 1993) pp. 47–68.
[14] *Rape Study: A Discussion of Law and Practice: Volume I* (Wellington: Department of Justice, 1983) p. 140.
[15] 'Evidence was 'concocted'', *The Wairarapa Times-Age*, 17 May 2001, p. 3.
[16] Louise Ellison, 'Rape and the Adversarial Culture of the Courtroom' in Mary Childs and Louise Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2001) p. 48.
[17] Elisabeth McDonald, '"Real Rape" in New Zealand: Women's Complainants' Experience of the Court Process', *Yearbook of New Zealand Jurisprudence*, *1* (1997) pp. 59–80.
[18] *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (Brisbane: Crime and Misconduct

Commission, 2003) p. xxiii.

[19] *Commission on Women in the Criminal Justice System* (London: The Fawcett Society, 2004) p. 21.

[20] Gender Bias and the Law Project *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (NSW: Department for Women, 1996) p. 147.

[21] Victorian Law Reform Commission, *Final Report on Sexual Offences* (Melbourne, 2004) Recommendations 35–41.

[22] The Evidence Bill 2005, introduced in May 2005, adopts most of the proposals contained in the work of the Law Commission: New Zealand Law Commission, *Evidence: Evidence Code and Commentary: Report 55 – Volume 2* (Wellington, 1999).

[23] New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses* (PP26, Wellington, 1996) p. 51.

[24] Sophia Xenos and David Smith, 'Perceptions of Rape and Sexual Assault Among Australian Adolescents and Young Australians', *Journal of Interpersonal Violence*, *16* (2003) pp. 1103–19.

[25] 'Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection', *Criminal Reports (4th)*, *31* (1994) p. 233.

[26] Lees, p. 31.

[27] Jennifer Temkin *Rape and the Legal Process* (2 edn, Oxford University Press, 2002) p. 296.

[28] *The New Zealand Law Commission Consultative Workshop on the Proposed Evidence Code* (Wellington: New Zealand Law Society, 1998).

[29] 'Why shouldn't a complainant be able to call character witnesses?' Gary Turkington, quoted in Pamela Stirling, 'Trial and Terror', *New Zealand Listener*, 30 November 1996, p. 21.

[30] *Commission on Women in the Criminal Justice System* (London: The Fawcett Society, 2004), 29.

[31] Gender Bias and the Law Project, p. 5.

[32] 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law', *Canadian Journal of Law and Jurisprudence*, *11* (1998) pp. 47–68.

[33] Stephen Odgers *Uniform Evidence Law* (5th edn, Sydney: Lawbook, 2002) p. 66.

[34] Temkin, *Rape and the Legal Process*, p. 281.

[35] Victorian Law Reform Commission, Chapter 3.

[36] (Brisbane: Crime and Misconduct Commission, 2003) p. 156.

[37] See further Howard Zehr and Harry Mika, 'Fundamental Concepts of Restorative Justice', *Contemporary Justice Review*, *1* (1998) pp. 47–55.

[38] *Restorative Justice in New Zealand: Best Practice* (Wellington: Ministry of Justice, 2004), p. 8.

[39] Claire Baylis 'The Appropriateness of Conciliation/Mediation for Sexual Harassment Complaints in New Zealand', *Victoria University of Wellington Law Review*, *27* (1997) pp. 585–620.

[40] Hilary Astor, 'Swimming Against the Tide: Keeping Violent Men Out of Mediation' in Julie Stubbs (ed.) *Women, Male Violence and the Law* (Sydney: nstitute of Criminology, 1994) p. 147.

[41] Stephen Hooper and Ruth Busch, 'Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea', *Waikato Law Review*, *4* (1996) pp. 101–30.

[42] 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice', *British Journal of Criminology*, *42* (2002) pp. 596–615.

[43] With Sarah Curtis-Fowley, 'Victim Advocacy Groups and the Idea of Restorative Justice', forthcoming in Violence Against Women <http://www.griffeth.edu.au/school/ccj/kdaly.html>.

[44] With C. Quince Hopkins, 'Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offences', forthcoming in Violence Against Women.

[45] See Mary Koss *et al.,* 'Restorative Justice for Sexual Violence' (2003) *Annals of the New York Academy of Sciences*, *989* (2003) pp. 384–95.

[46] Judge FWM McElrea raised this as a possibility at the 1996 Conference: 'What Relevance Might Restorative Justice Have in the Case of Rape?' in *Rape: Ten Years Progress?* (Wellington: DSAC, 1996) p. 109.

[47] Since this article was written, the Safe Programme's Project Restore at the Grey Lynn Community Centre, which provides a restorative justice option for victims of sexual offending, was launched (5 August 2005).

[48] Young, emphasis added, p. 163.