

INVESTIGATION AND THE DECISION TO PROSECUTE IN SEXUAL VIOLENCE CASES: NAVIGATING THE COMPETING DEMANDS OF PROCESS AND OUTCOME

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I. INTRODUCTION

It is well established that many more sexual offences are committed than are reported to police. The New Zealand Crime and Safety Survey 2009 found that, in line with international experience, sexual offences had the lowest level of reporting to police at seven per cent.¹ It is therefore important to investigate what we may be able to achieve in the way the criminal process operates in sexual violence cases by reform at various points in the system (investigation, prosecution, pre-trial, trial, sentencing). Issues and problems related to initial investigation and the decision to prosecute affect (and are affected by) the trial process and the availability of support and alternatives to the formal process.

Whilst acknowledging the inter-connectedness of reforms at different stages of the criminal process, the focus in this paper is on options for reform or enhancement of current initiatives in the early stages of investigation and prosecution. To this end, the paper discusses the current system of investigation, including the guidelines for police in investigating allegations of sexual offending; investigative innovations that are underway or that New Zealand may usefully consider implementing; and possible reforms in relation to the decision to prosecute. The paper concludes that the early stages of investigation and decision to prosecute, which often do not take centre stage in any discussion of law reform, have a significant effect on impact of any reform of trial processes.

II. INVESTIGATION

A common feature of international research in relation to sexual offending is that the police often bear the brunt of criticism and dissatisfaction, because they are the link between the victim and the criminal process. The effect of the “real rape” typology on police responses has gained particular attention.²

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1 Because of the small number of sexual offences involved in the survey, the figures have a high relative standard error: Ministry of Justice *The New Zealand Crime and Safety Survey: 2009. Main Findings Report* (2010) at 45.

2 Sara Payne *Rape: The Victim Experience Review* (Home Office, 2009). See also Office of Women’s Policy *Study of Reported Rapes in Victoria 2000-2003: Summary Research Report* (Office of Women’s Policy, Department for Victorian Communities, 2006); Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (2002) [*Report on the Joint Inspection*].

Certainly, police are members of the wider community, and so promotion of community awareness around sexual offending in tandem with specific training for police may have flow-on effects that encourage more reporting.³

Once someone decides to report a sexual offence against them, greater understanding of the reality of sexual offending could improve the police response and prevent some victims withdrawing from the criminal process. A telling example can be found in a study of reported rapes in Victoria, Australia. The researchers found that victims' decisions about proceeding further were "heavily mediated by the police response" in almost one third of cases.⁴ In tracking through the case files, it was apparent that these were the cases where police had been confident that the complaint was false, had commented on the lack of physical evidence or had discussed with the victim the unlikelihood of the case proceeding further. This led the researchers to conclude that "the greater the perceived level of [police] disbelief in the allegation, the more likely victims were to express a wish to withdraw their complaints".⁵

When coupled with one quarter of withdrawals in the sample being due to a negative perception of the criminal justice process (such as fear about the court process), it becomes apparent that the police response to those who do report sexual offending against them is of paramount importance. This is not only because the police response may affect whether the case continues in the criminal process, but also because it impacts on the victim's view of the process⁶ and whether they feel validated when disclosing what has happened. Hence, the police response has the ability to affect the long term recovery for victims of sexual offending through validation of their experience, as well as the shorter term outcome of the complaint.

Numerous studies have also shown that police decisions to charge or "no crime"/ "no further action" a complaint are linked to conceptions of "real rape" – with greater likelihood of a charge being pursued where there is physical injury, and where there is no (or not any ongoing) relationship between the victim and the offender. These findings often relate to the perceived credibility and responsibility of the victim. For example, police officers have been found to view victims as less credible and attribute

3 For a discussion of help-seeking decisions and agency responses to these, see Denise Lievore *No longer silent: A study of women's help-seeking decisions and service responses to sexual assault* (A report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women, 2005).

4 Office of Women's Policy, above n 2, at 30.

5 Ibid. See also Payne, above n 2, who states that "it has often been said that a raised eyebrow can be the difference between the rape victim deciding to continue with a case or to withdraw from the process", at 11, and "the women I spoke to were clear that if they are not treated with dignity when first reporting rape, it is unlikely they would continue to support a prosecution", at 12.

6 Various studies suggest that victims are interested in procedural as well as substantive justice, so that being treated with respect by police is important, and victims may feel satisfied with the process whatever the ultimate outcome: for examples, see Richard B Felson and Paul-Philippe Pare "Gender and the victim's experience with the criminal justice system" (2008) 37 *Social Science Research* 202; Laura Simpson and Sally Hickman "Fair treatment or preferred outcome: the impact of police behaviour on victim reports of domestic violence incidents" (2003) 37 *Law and Society Review* 649.

responsibility to the victim where she was intoxicated at the time of the offence,⁷ and to view victims as more credible when crying and showing despair,⁸ which corresponds to the general expectation of a match between emotional response and the seriousness of the offence.⁹ It should be noted that it is sometimes difficult to assess from the results of studies in this area how much of the link to a “real rape” conception is due to the beliefs of the officers themselves, due to the officers’ assessment of the downstream likelihood of conviction in light of widely held societal beliefs, or both.

Jordan has observed that the police role following a rape complaint:¹⁰

[M]ust necessarily reflect a detached and evaluative assessment of the incident characterized by professional distance and impartiality. An individual officer cannot afford to empathise too closely with the victim, since over-identification carries with it the risk of loss of perspective and emotionally based decision-making.

However, she also observed that tension arises from a police focus on outcome (getting a result of a successful prosecution) at a time when complainants are focussed on process (how they are treated, whether they are respected and believed).¹¹ It is therefore necessary in any review of investigative processes to attempt to evaluate the extent to which policy and practice are successful in striking a balance between the needs of the investigation and of the victim/survivor.

A. Adult Sexual Assault Investigation Guidelines

The Adult Sexual Assault Investigation (ASAI) guidelines, introduced as a policy in 1998 and last revised as guidelines in 2009,¹² set out best practice for the investigation of sexual offences. The criminal process gives a great deal of responsibility and discretion to the police, from receiving and recording complaints, through to investigative processes and decisions as to the evidential robustness of the case. The ASAI guidelines aim to avoid inappropriate exercise of discretion by allowing for supervision of

7 Robyn McLean and Jane Goodman-Delahunty “The influence of relationship and physical evidence on police decision-making in sexual assault cases” (2008) 40 *Australian Journal of Forensic Sciences* 109.

8 Guri C Bollingmo and others “Credibility of the emotional witness: A study of ratings by police investigators” (2008) 14 *Psychology, Crime & Law* 29. This is despite the fact that it has been proven that judgments of credibility by lay people and professionals are unreliable: Aldert Vrij, Par Anders Granhag and Stephen Porter “Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection” (2010) *Psychological Science in the Public Interest* 1.

9 MR Rose, J Nadler and J Clark “Appropriately upset? Emotion norms and perception of crime victims” (2006) 30 *Law and Human Behavior* 203. Although research indicates that reactions to criminal victimisation follow a predictable pattern, how the emotional states within that pattern are expressed differ – with immediate reactions commonly ranging from highly emotional to calm, controlled and numb: FW Winkel and L Koppelaar “Rape victims’ style of self-presentation and secondary victimisation by the environment” (1991) 6 *Journal of Interpersonal Violence* 29.

10 Jan Jordan “Worlds Apart? Women, Rape and the Police Reporting Process” (2001) 41 *British Journal of Criminology* 679 at 701.

11 *Ibid.*

12 New Zealand Police *Adult Sexual Assault Investigation Guidelines* (, 2009).

investigations, strict record-keeping and national monitoring of investigative practice. They emphasise the need for victims to be kept fully informed and have crisis support persons available to them at all stages of the process.

1. Enhancing the welfare and safety of victims and improving the investigation and resolution of complaints

Amnesty International Australia devised a National Plan of Action to eliminate violence against women, in which they outlined good police practices to support women through reporting and investigation and protect them from further violence.¹³ The first practice listed is that there should be a dual focus on supporting the victim/survivor of violence and bringing the perpetrator to justice. Such a dual focus is difficult to achieve. The ASAI guidelines acknowledge the long term consequences of sexual violence for victims, and the effect on recovery that the police response may have. Communication with complainants is acknowledged to have benefits in empowering them (thereby facilitating recovery) and in encouraging co-operation so that the quality of the investigation is improved. Key principles of the ASAI guidelines are:

- The victim's wellbeing and safety is paramount;
- Victims must be referred for specialist crisis support and be encouraged to have specialist crisis support available to them throughout the investigation until case resolution;
- Sexual assault is a serious criminal act and offenders should be held accountable;
- Good communication and consultation with the victim, specialist crisis response person, and medical forensic practitioners during Adult Sexual Assault (ASA) investigations can ensure the victim's co-operation with the investigation and improve investigation outcomes;
- Police will protect the privacy of victims as far as possible during ASA investigations; and
- Specially trained investigators who are working predominantly on ASA investigations and adult forensic interviewers (regardless of the nature of the interview) should have six monthly, one on one, scheduled visits with a psychological service.

The desired outcomes in the ASAI guidelines reflect the first Amnesty International condition: enhance the welfare and safety of sexual assault victims through the service, information and support provided, and improve the investigation, resolution and accountability of adult sexual assault complaints. Partnerships and key process points, including detail about appropriate action at each process point, are also contained in the guidelines. The result is a very comprehensive document – but by nature of its length it may be questionable how many officers actually access it in the Manual of Best Practice.

13 Amnesty International Australia *Setting the Standard: International good practice to inform and Australian national plan of action to eliminate violence against women* (2008) at 50.

2. Providing a safe environment for reporting of offending

The first step in process point 1 of the ASAI guidelines reflects another one of the Amnesty International good practice conditions, providing a safe and confidential environment for women to report violence. The guidelines direct that appropriate procedure is to move the complainant to a location which has elements of privacy, safety, and comfort, that it not be a suspect interview or holding room. This is a desirable goal, although it may not be easy to achieve in its implementation, particularly in smaller stations. What is a “safe” environment should also take into account diverse populations – for example Māori, Pacifica, other ethnicities, and those with disabilities (mental, intellectual or physical).

The importance of the initial police response to the investigation, and to the victim’s dignity and long term recovery was discussed above. The ASAI guidelines allow for brief details of the offence to be taken at this time, in order to ascertain whether it is a sexual offence and the steps to be taken. The guidelines caution officers to take care not to contaminate the complainant’s memory – but they may not realise that they are doing so, particularly where they have not received specialist investigative interviewing training. Because reports may come in many forms (telephone, police station counter etc.), officers taking the initial report may not be ASA trained, and there may therefore be an increased risk of secondary victimisation at the very earliest stage.

Under the ASAI guidelines, frontline staff should refer the case to a specialist investigator immediately after the initial contact, except where there is urgency or another justifiable reason. The reasons for not appointing an ASA investigator have to be recorded. The ASA investigator will normally carry out a preliminary interview, and the formal interview is carried out after any medical examination, preferably by a level 3 interviewer, (see the discussion of interviewing in section II E below).

3. Provision of ongoing investigator training

Gaining adequate numbers of ASA investigators, particularly in rural areas, is perhaps a long term goal rather than current reality. The Commission of Inquiry into Police Conduct was concerned that many officers were unaware of the ASAI policy and/or did not take up training on it.¹⁴ A third Amnesty International good practice principle is that there should be compulsory, ongoing and accredited training on issues surrounding violence against women for both senior officers and new recruits.¹⁵ The Auditor-General,¹⁶ in monitoring the police response to the Commission of Inquiry Report, found that there have been improvements in take-up of training although there is still need for a more consistent approach. It is acknowledged that training

14 Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (Department of Internal Affairs, 2007) at 82-83 and 86-89.

15 Amnesty International Australia, above n 13, at 50.

16 Office of the Auditor General *Response of the New Zealand Police to the Commission of Inquiry into Police Conduct: Second monitoring report* (2010).

of a workforce takes time and resources. Greater reflection on what level of ongoing training is needed for all staff may yield benefits at the crucial time of initial reporting and the following preliminary interview.

There is little data available regarding the impact the ASAI guidelines may have on victims' perception of police and the process, and any effect on reporting rates. The Auditor-General's second report on the Police response to the Commission of Inquiry recommendations reported that 61% of complaints were investigated by ASA trained CIB officers, with a further 29% investigated by CIB officers who had not had specialist training.¹⁷ The "Environmental Scan" completed by researchers for the Ministry of Women's Affairs reported police estimates that formal interviewing was carried out by an ASA qualified member of the police in 79 per cent of cases and by a Level 3 interviewer in 30 per cent of cases,¹⁸ but that the preliminary/scoping interview was mainly conducted by the CIB detective on duty, who had not necessarily had specialist ASA training.

Policies, protocols and guidelines which attempt to navigate the sometimes competing interests of the needs of the investigation and the needs of the victim are important in signalling appropriate action and the ethos of the police force. However, policies and protocols alone will not be able to be implemented successfully and effect real change without also addressing the prevailing views about sexual violence. As Kelly argues:¹⁹

Changes in police and prosecutorial protocols, and even statute reform, will have limited impact whilst the understanding of 'real rape', 'real rapists' and 'real victims' continues to exclude the majority of forced sex....If the last twenty years of research tells us anything it is that new statute law, policies and protocols must be accompanied by implementation processes which seek to expand and deepen understandings of the realities of rape.

The problem then may not lie in policy or guidelines, but in the perspectives and experiences of police officers.²⁰ Much broader criminal justice research supports this view, suggesting that whether rules are followed depends on the degree of fit between the culture and the rules, the ease of evasion and the cost of detection.²¹ Because of the high level of discretionary decision-making in the early stages of an investigation, for policy and guidelines to work requires work to ensure that the underlying beliefs fit with the policy set out.

17 Ibid, at 33 (2.80).

18 Elaine Mossman and others *Responding to Sexual Violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, 2009) at 76. The ASA qualified staff have completed the 5 day course; Level 3 interviewers have completed specialist investigative interviewing training. ASA qualified staff may not be trained as level 3 interviewers. Investigative interviewing is discussed below.

19 Liz Kelly *Routes to (in)justice: a research review on the reporting, investigation and prosecution of rape cases* (Child and Woman Abuse Studies Unit, University of North London, 2001) at 43.

20 Jennifer Temkin "Reporting Rape in London: A Qualitative Study" (1999) 38 *The Howard Journal of Criminal Justice* 17.

21 See, for example, the discussion of working rules and the legal reform model in Michael McConville, Andrew Sanders and Roger Leng *The Case for the Prosecution: Police suspects and the construction of criminality* (Routledge, London, 1991) at chapters 2, 9 and 10.

New Zealand Police have responded by the appointment of a national Sexual Assault Co-ordinator who oversees policy and monitoring, and by making considerable effort to increase the number of officers who participate in ASA training courses.²² These courses address a number of issues, including myths, dealing with victims, and trauma as well as medical and forensic evidence, interviewing, prosecution and the courts.

Such training is important for every officer, because the initial report and preliminary interview have the potential to greatly impact the way the case progresses. The response of the first officer involved may therefore influence how seriously the case is dealt with from then on. Payne cites an example of a control room officer in the UK failing to pass on information about a reported rape until the following day, contrary to procedure, because the victim had a history of reporting rape and so the officer did not take her seriously.²³

4. Consistency of training, approach and application of policies

Aligned to the need for more widespread training on the realities of sexual offending, is the need for consistent application of policies, guidelines and levels of training, and monitoring that the required levels have been reached. The Auditor-General's report, in commenting in general on police progress on the Commission of Inquiry's recommendations, outlines this well in stating that:²⁴

The Commission's recommendations will not be implemented just because new systems and processes are in place. They will be implemented when those new systems and processes are in place, supported, used properly, monitored (and adjusted, if necessary), and are producing the required effect.

Furthermore, good policies are only useful if they are implemented consistently across the country. Victims have a right to know what kind of response they can expect from police wherever they live. As NZ Police have a great deal of discretion in deciding what investigative measures to take and whether to pursue charges, it is of paramount importance that ASAI training is consistent and that appropriate monitoring of all decisions is maintained, especially where this concerns the police utilising a "no offence outcome". The Auditor-General found that the training for those taking initial complaints was delivered inconsistently, with variations in length of training and quality and competency of trainers.²⁵ Such variations obviously carry with them the possibility of a corresponding variation of response in different parts of the country. The Auditor-General also found significant variation between Districts in training coverage in relation to the 5 day

22 There is both a 5 day ASA investigation course and training for staff who take the initial complaint (watchhouse, reception, communication and frontline staff). The latter is part of recruit and annual training.

23 Payne, above n 2, at 13.

24 Office of the Auditor-General, above n 16, at 6.

25 *Ibid.*, at 50.

course for those who investigate sexual offences.²⁶ This was also reflected in feedback from specialist support services, who reported a wide variation in complainants' experiences of the police.²⁷

The ASAI guidelines provide that a Detective Senior Sergeant or above must be consulted before an officer suggests that there has been fabrication of a complaint. Some other jurisdictions have examples of an extension of this approach. For example, the Metropolitan Police Service (MPS) were concerned that decisions around no further action or no crime, as well as charging decisions, were not consistent across cases. From December 2006, the MPS have placed the authority to classify a complaint as "no crime" or "not crime" centrally in Project Sapphire, a team managing policy, practice and advice on rape investigations.²⁸

Consistency of investigative procedures comprises a fourth area of good practice identified by Amnesty International Australia,²⁹ one that in several areas the New Zealand Police are currently unable to meet. The Auditor-General's second monitoring report states that "[i]n our view, such large variations in complainants' experiences would be reduced if the ASA Investigation Guidelines were followed, investigators were trained, and training was effective".³⁰

Although the requirements of different cases vary, whatever consistency can be achieved will assist victims in knowing what to expect from police. Individual districts may supplement the ASAI guidelines or produce new initiatives to respond to local issues. Although these may be innovative and helpful, there does need to be adequate dissemination around this to allow victims to have a consistent approach whichever part of New Zealand they live in.

Even where policy or guidelines are impeccable and officers are supportive and dedicated, each individual will only have a finite resource of emotional energy and may become "burnt out". This in itself may lead to inconsistent treatment or a failure to treat victims with dignity. One possible solution suggested by police respondents overseas and by Amnesty International Australia is the formation of a specialist unit.

5. Specialist Units

The ASAI guidelines allow for the appointment of district Adult Sexual Assault coordinators, and the setting up of specialised Adult Sexual Assault Teams. A small number of these teams have been set up.³¹ Such teams are worthy of greater consideration, including whether they should be the norm (this would aid consistency, but may have significant resourcing implications).

26 Ibid, at 47.

27 Ibid, at 48.

28 Metropolitan Police Service *The Attrition of Rape Allegations in London: A Review* (2007) at 2.4.

29 Amnesty International Australia, above n 13, at 50.

30 Office of the Auditor-General, above n 16, at 48. Note that the report was in June 2010 and Police continue to put effort into improving the training of staff and consistency of investigations.

31 In Auckland and Counties Manukau there are dedicated adult sexual assault investigation teams. Most Districts utilise generalist CIB staff for sexual offending investigations.

In the recent research for the Ministry of Women's Affairs, a number of police respondents suggested that more specialist teams should be set up to aid consistency of approach for victims.³² Evaluation of the effectiveness of specialist units has taken place in the UK, and this may assist in assessing whether expansion of such units should be recommended in New Zealand. The MPS Project Sapphire Sexual Offences Investigation Teams (SOIT) have reported positive outcomes for crimes solved and support for victims as a result of SOIT and dedicated investigators.³³

Evaluation of a 2008 pilot project in the south of England has assessed how a specialist unit worked in practice, the impact of the changes, and lessons for the future.³⁴ Substantial process benefits were observed, but few outcome benefits. All the interviewees who had worked in the pilot of the Unit felt that it was a positive development, citing improved quality of investigations, enhanced victim care and a faster, more focussed service. However, few of the Unit staff thought that the Unit had improved case outcomes in terms of conviction rates. The quality of investigations was perceived to have improved by:

- consistency of the lead investigator as cases progressed;
- knowledge of individual cases being shared more readily among team members;
- compressed time scales in the execution of time sensitive investigative actions;
- reduced the risk of not collecting evidence;
- the development of specialist investigative skills within the Unit membership; and
- clear separation of investigative role from victim liaison.

These results mirror findings from research conducted on dedicated units more generally, such as improvement in the co-ordination of investigations, increased liaison between the police and external agencies, and sharing of complementary skills.³⁵ The consistency of one investigator following a case through could have significant benefits for victim support and rapport, depending on the arrangement of staff within the unit. The pilot study unit had SOIT officers offering interviewing and support services, with dedicated investigators conducting the investigation. These investigators felt that they could achieve the distance they need from the victim to view the evidence impartially, whilst knowing that the SOIT officer was ensuring safety and

32 Mossman and others, above n 18, at 122.

33 Metropolitan Police Service Deputy Commissioner's Command *A review of rape investigations in the MPS: final report* (Directorate of Strategic Development and Territorial Policing, Project Sapphire, Metropolitan Police Service, 2005).

34 Lauren van Staden and Jane Lawrence *A qualitative study of a dedicated sexual assault unit* (Home Office, 2010).

35 *Ibid.*, at 2; James Morgan, Lucy McCulloch and John Burrows *Central Specialist Squads: A framework for monitoring and evaluation* (Police Research Series Paper 17, Home Office, London, 1996).

support of the victim. This addressed the traditional tension in the dual role that police are asked to play, but also poses the risk that investigators will disengage from victims.

The expansion of specialist units is worth further examination. The UK government have recently observed that:³⁶

[E]merging evidence... suggests that forces which develop a specialist unit tend to observe an increase in reporting and confidence among victims and a more joined up approach between agencies, the voluntary sector and the police. This results in a more joined up service for victims.

Particular challenges will arise in more widespread location of such units in New Zealand given geographical spread. Officers within a specialist unit do not have to exclusively investigate sexual offences, but would need to have specialist training. The Warwickshire constabulary, on finding that it had deployment problems in rural areas, introduced a 24 hour call out rota for specialist rape investigators. This could enhance quality of service, but also could create problems for officers' working conditions if they had long periods on call.

6. Police and community agency co-operation

The final principle of good practice identified by Amnesty International Australia is police coordination with other agencies in a co-operative multi-agency response.³⁷ The ASAI guidelines aim to involve support agencies in partnership with the police, particularly at the formal interview and medical examination stages, including where victims initially state that they do not need support.³⁸ Co-operative relationships with support agencies have led New Zealand Police to identify three types of support called the "tripartite response":³⁹ crisis support; the Sexual Abuse Assessment and Treatment Service (discussed below); and victim safety and offender accountability support.

The Taskforce on Sexual Violence found that, although relationships between police and specialist groups had improved in some cases, there was still much effort needed to build trust further.⁴⁰

In order for specialist support agencies to be successful in their role at the investigative stage of the criminal process, police officers need to be aware of the services available and be willing to involve them at an early stage. Research for the Taskforce on Sexual Violence suggests that the majority of police officers feel that they have a good relationship with specialist

36 HM Government *The Government Response to the Stern Review: An independent review into how rape complaints are handled by public authorities in England and Wales* (Cabinet Office, 2011) at 19-20.

37 Amnesty International Australia, above n 13, at 50.

38 New Zealand Police, above n 12, at key process point 3.

39 Office of the Auditor-General, above n 16, at 51.

40 Taskforce for Action on Sexual Violence *Report to the Ministry of Social Development: Tauīwi Responses to Sexual Violence* (2009) at 35-36.

community agencies in the sector,⁴¹ although some specialist sexual violence groups outlined that they were not always the primary point of contact for police in sexual offence cases.⁴²

Mossman et al also found that the costs and geographical coverage of services limited the ability of agencies to deliver the level of service they would like.⁴³ Victim support has a national focus but some areas have little or no access to specialist sexual violence help for victims.⁴⁴ Although the majority of specialist community agencies are able to provide support at police interviews and medical examinations, less than half are able to do so on a 24 hour basis.⁴⁵ All of this highlights the importance of adequate resourcing for community support agencies. In assessing geographical coverage, support for diverse population groups should not be forgotten. Further research needs to be undertaken to assess the level of support for these groups and ways forward in adequately funding and staffing specialist support agencies.

B. Independent sexual assault advisors

In the UK, an attempt at better consistency of support has been made by the establishment of Independent Sexual Violence Advisors (ISVAs). These began to be introduced in 2006. Their main roles are:⁴⁶

- advice and support;
- providing non-therapeutic support and practical help to victims at the point of crisis and beyond;
- where required, supporting victims through the criminal justice system; and
- multi-agency partnership working on behalf of the victim.

ISVAs therefore give practical support and information, liaise with other agencies, and give the victim information about criminal justice processes and any police investigation. The need for information about the case and police decisions can be fulfilled by support agencies where the relationships with police are good. The UK research suggests that ISVAs are a particularly useful method of achieving clear lines of communication between police and the victim. Once the victim reports to police, it can feel that they have no control over the process, with the wheels of the criminal process set in motion. As one victim has expressed “I felt I was being swept away: I was going through with it whether I liked it or not”.⁴⁷

ISVAs provide continuity for complainants throughout the process by an independent (non-police) service. Unlike sexual offences investigation team (SOIT) trained officers, their contact with the victim will continue past the point at which a decision on whether or not to proceed to charge is reached.

41 Mossman and others, above n 18, at 78.

42 Taskforce for Action on Sexual Violence, above n 40, at 37.

43 Mossman and others, above n 18, at 60-61.

44 Taskforce for Action on Sexual Violence, above n 40, at 39-43 and 49. See also Mossman and others, above n 18, at 19 and 39; Office of the Auditor-General, above n 16, at 51.

45 Taskforce for Action on Sexual Violence, above n 40, at 25.

46 Amanda Robinson *Independent Sexual Violence Advisors: A process evaluation* (Home Office, 2009).

47 Payne, above n 2, at 15.

Referring to the increase in uptake of counselling, and lauding the role of ISVAs in reassurance and support of complainants, the Stern Review recently noted that “as an example of a reform to a system that is effective, cost-effective and affordable, the establishment of ISVAs is hard to beat”.⁴⁸

Although most ISVAs are based in Sexual Assault Referral Centres (discussed below), some have been based in specialist units within police stations, which was viewed as enhancing police knowledge about ISVAs, the need for victim support and the issues around secondary victimisation.⁴⁹

ISVAs have been successful because they are able to offer support and assistance at an early stage, which can then continue throughout the criminal process and beyond. No one group need have a monopoly, but the importance of availability, continuity and quality of adequately funded support should be a priority (whether that is provided through a position such as ISVAs and/or through community agencies such as Rape Crisis and HELP).

C. Forensic Medical Examination

The forensic medical examination has been described as “one of the most arduous processes any crime victim has to face.”⁵⁰ In order to be as effective as possible in gathering forensic evidence, medical examinations are performed as soon after the time of the offence as possible, ideally before the victim has time to clean themselves, eat or drink.⁵¹ The necessity for empathetic medical staff is therefore clear.

Doctors for Sexual Abuse Care (DSAC)⁵² has organised a framework to try to ensure that victims are seen by doctors with specialist training. Analysis of material from the examination is carried out by the government’s forensic science institute, Environmental Science and Research. In several European jurisdictions, the United States and Canada, forensic nurses are employed to address the problems in getting sufficient numbers of female doctors willing to perform forensic medical examinations. The evaluations of programmes that use forensic nurses are generally positive.⁵³

Call-outs for DSAC doctors often take place during the night, with average call-outs taking 3 hours for meeting the victim, undertaking the examination and collecting the evidence. Where the sexual offending took place more than two weeks prior to the referral for a forensic medical examination, a DSAC doctor will not collect evidence but may still undertake a “health and safety” check.

48 Baroness Vivian Stern *The Stern Review: Independent Review Into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office, 2010) at 105.

49 Van Staden and Lawrence, above n 34.

50 Jan Jordan *The Word of a Woman? Police, Rape and Belief* (Palgrave MacMillan, Basingstoke, 2004) at 168.

51 *Ibid.*

52 Doctors for Sexual Abuse Care <www.dsac.org.nz/index.html>.

53 Liz Kelly “Promising Practices Addressing Sexual Violence” (expert paper prepared for “Violence against women: Good practices in combating and eliminating violence against women” Expert Group Meeting organised by UN Division for the Advancement of Women, Vienna, Austria, 17-20 May 2005); Jo Lovett, Linda Regan and Liz Kelly *Sexual Assault Referral Centres: developing good practices and maximising potentials* (Home Office Research, Development and Statistics Directorate, 2004).

Some positive changes have resulted from the work by DSAC and the ASAI guidelines, with research suggesting a more positive experience with the doctor and that far fewer forensic medical examinations are now conducted in police stations.⁵⁴ This is hopefully a trend that will continue, given that “a private, dedicated space, which combines clinical needs for cleanliness in the examination room with a separate calming and relaxing location to undertake interviews and support, are minimum requirements.”⁵⁵ However, a forensic medical examination may still be a traumatic, re-victimising experience for many complainants. For example, the victim will be asked to pluck out hair from the root, undergo an examination of her whole body for bruises and abrasions, have her pubic hair combed and plucked, and have a speculum examination. DSAC doctors and nurses must wear gowns and hats to prevent contamination of evidence, which (while necessary) could seem a rather cold approach even where the rationale has been carefully explained. DSAC doctors are required to ask a series of specific questions about what happened. These questions are potentially distressing although medically relevant. These questions come before the formal interview by police, and so there is a danger that the later cognitive interview could be compromised.

Under a fairly recent arrangement, the Sexual Abuse Assessment and Treatment Service (SAATS), funded by the Accident Compensation Corporation (ACC), New Zealand Police and the Ministry of Health, allows District Health Boards (DHBs) to provide services using DSAC approved doctors.⁵⁶ The service accepts referrals from the police, or from specialist crisis agencies and health providers who see a victim who has not yet made a complaint to police. In this way, forensic evidence can be secured without victims having to make a quick decision about whether they wish to make a formal complaint to the police. SAATS is designed to provide:⁵⁷

- a 24 hour, 7 days a week service;
- timely medical triage by a medical specialist or nurse with training in sexual abuse care;
- expert medical assessment, sexual health advice and treatment that meets health, injury and forensic needs;
- referral to, and coordination with, other services in a timely manner such as NZ Police, CYFs, and Crisis Support Agencies;
- provision for follow-up treatment; and

54 Venezia Kingi and others *Responding to Sexual Violence: Pathways to recovery* (Ministry of Women’s Affairs, 2009) at 85-86.

55 Liz Kelly and Linda Regan *Good Practice in Medical Responses to Recently Reported Rape, Especially Forensic Examinations* (A Briefing paper for the Daphne Strengthening the Linkages Project, Child & Woman Abuse Studies Unit, London Metropolitan University, 2003) at 12.

56 Accident Compensation Commission “Sexual Abuse Assessment and Treatment Services (SAATS)” (2010) ACC <www.acc.co.nz/for-providers/contracts-and-performance/all-contracts/PRD_CTRB131885>.

57 *Ibid.*

- treatment that is provided in an environment suitable for the client and their supporters, and one that meets forensic requirements.

Local police districts are expected to develop local working agreements with the SAATS provider to ensure that victims can receive medical care for non-forensic purposes, including in those cases where the complaint is historical and/or it does not proceed to prosecution.⁵⁸

SAATS services incorporate some of the features of Sexual Assault Referral Centres (SARCS) found in a number of jurisdictions, including the UK, US, Canada and Australia.⁵⁹ Typically, SARCs include the forensic medical capacity with counselling and often provision for the formal video interview to be conducted on site. Variations in a number of jurisdictions include “one stop shops” which deal with historical sexual abuse as well as acute care, and centres which are more broadly based than SARCs, incorporating services for domestic violence and for both children and adults.

The impetus behind all of these variations is similar: to provide consistent support to victims whilst also advancing the requirements of the criminal process. Whether SAATS is extended, or some other SARC type model is put into operation in New Zealand is an issue that warrants further discussion.

D. Co-ordinated/ Multi-agency responses to sexual violence: Sexual Assault Referral Centres

At their most comprehensive, referral centres bring together all legal and medical agencies and departments in one place. They offer medical care, psychological counselling, legal advice and other support, from professionally trained staff. Most centres are located in hospitals or police owned facilities, as this allows access to medical staff and equipment. Others are community based or allied to sexual health clinics. SARCs provide a link with police, as the SARC is often the location where police meet with the victim, where forensic examinations, and sometimes formal interviews, are carried out.⁶⁰ SARCs are usually state funded: in the UK from the police, local authority and health budgets, in Australia from health.⁶¹ The British government has stated that:⁶²

58 New Zealand Police, above n 12, process point 6.

59 Kelly and Regan, above n 55, at 14-16.

60 Home Office “Sexual Assault Referral Centres” (2010) <www.homeoffice.gov.uk/crime-victims/reducing-crime/sexual-offences/sexual-assault-referral-centres/>. In New Zealand a similar service for children is provided by the Kimiora sexual assault centre, run by the New Plymouth Police Child Sexual Assault Team. It houses police on their year-long sexual crimes rotation, but also provides a medical/forensic examination room, showering facilities, an interview room with recording facilities, offices, and a lounge, kitchen and reception area. The house is separate from the police station and delivers specialist services by working with DSAC doctors and community specialist support services: see Linda Louise Beckett “Care in Collaboration: Preventing Secondary Victimization Through a Holistic Approach to Pre-Court Sexual Violence Interventions” (PhD thesis in Criminology, Victoria University of Wellington, 2007).

61 Kelly and Regan, above n 55.

62 Home Office, Department of Health and Association of Chief Police Officers *Revised National Service Guide: A resource for developing Sexual Assault Referral Centres* (2009) at 2.

Sexual Assault Referral Centres (SARCs) exemplify how organisations can work in partnership to provide services to victims whilst also providing high quality forensic care to improve evidence, and ultimately improve criminal justice outcomes. SARCs are a highly skilled, one-stop destination in the aftermath of a rape or sexual assault. They provide services that are tailored to the needs of victims and underpinned by principles of dignity, respect and belief.

SARCs offer integrated and coordinated services in one place. They are seen to combine service to victims and to the criminal process. In most UK SARCs, samples may be taken and stored for a number of years. For example, REACH in Northumbria will store samples for up to 5 years. In New Zealand, the limit is 6 months,⁶³ which may not be enough time for a victim to reach a decision on whether she wishes to pursue a prosecution.

Although SARCs have been criticised because they do not work with victims/survivors of historical sexual abuse, this does depend on the jurisdiction and the area within jurisdictions, with some SARCs offering service for less recent assaults. Increasingly, victims are self referring as the profile of local SARCs increases. Different models and emphasis on provision of crisis care, forensic examinations, immediate medical care, counselling and advocacy can be seen across the different manifestations of SARC.⁶⁴ A significant issue is that, because of the high level of funding required to set up and run a SARC, they tend to be based in urban areas with high population density and good public transport links. This has implications for the wide use of a similar model in New Zealand. The British have addressed this by a variation on the model, allowing for “regional” SARCs which combine services across a wider geographical area, rather than the “one stop shop”.

The UK government has utilised previous evaluations⁶⁵ and ongoing experience to devise minimum standards for SARCs:⁶⁶

- Twenty-four hour access, including arrangements for self-referrals, to crisis support, first aid, safeguarding, specialist clinical and forensic care in a secure unit;
- Appropriately trained crisis workers to provide immediate support to the victim and significant others where relevant, throughout the examination process;
- Choice of gender of physician wherever possible;
- Access to forensic physicians and other practitioners who are appropriately qualified, trained and supported and who are experienced in sexual offences examinations for adults and children;
- Dedicated, forensically approved premises and a facility with decontamination protocols following each examination to ensure high-quality forensic integrity and a robust chain of evidence;

63 New Zealand Police, above n 12, process point 6.

64 Lievore, above n 3.

65 For example, Lovett, Regan and Kelly, above n 53.

66 Home Office, Department of Health and Association of Chief Police Officers, above n 62, at 18.

- The medical consultation includes a risk assessment of harm/self harm, together with an assessment of vulnerability and sexual health; Immediate access to emergency contraception, post exposure prophylaxis (PEP) or other acute, mental health or sexual health services and follow-up as needed;
- Access to support, advocacy and follow-up provided through an independent sexual violence adviser (ISVA) service, including support throughout the criminal justice process, should the victim choose that route;
- Well co-ordinated interagency arrangements are in place, involving local third sector service organisations supporting victims and survivors, and are reviewed regularly to support the SARC in delivering to agreed care pathways and standards of care; and
- A minimum dataset and appropriate data collection procedures in each SARC.

The increased funding for SARCs has decreased the funding for agencies such as Rape Crisis in the UK (SARCs not only gain funding from various government departments, but also from community charitable donations). This is an issue to be wary of. Most commentators and SARC staff agree that ongoing funding of community support agencies is vital, not only to cover areas where there is no SARC, but also to provide ongoing follow up (some SARCs offer counselling for up to a year, others for much less) and choice for victims. Ideally, partnerships between SARCs and specialist agencies within the community should be fostered.⁶⁷ This would fit with the espoused aim for UK SARCs to “co-ordinate and simplify the pathway for victims to access wider healthcare, social care and criminal justice processes to improve individual health and well-being, as well as criminal justice outcomes”.⁶⁸

E. Investigative interviewing

The New Zealand Police have begun an ambitious cognitive interview training⁶⁹ programme, whereby officers are becoming accredited in investigative interviewing and will receive ongoing workplace assessment and training. Change has been implemented to accord with international best practice in interviewing, which takes account of psychological research to allow for the best evidence possible being elicited from witnesses. The

67 “Conference Report – Improving Outcomes for Victims of Sexual Violence: A Strategic Partnership Approach” *National Conference on Sexual Violence* (jointly organised by the Home Office, Department of Health, the Crown Prosecution Service and the Association of Chief Police Officers, Coventry, 2005) at 1-138.

68 Home Office, Department of Health and Association of Chief Police Officers, above n 62, at 4.

69 The New Zealand Police have utilised investigative interviewing that uses an enhanced cognitive interview technique. The original cognitive interview technique was developed by Fisher and Geiselman: see RP Fisher and RE Geiselman *Memory enhancing techniques for investigative interviewing: the cognitive interview* (Thomas, Springfield, IL, 1992).

techniques draw from research on investigative interviewing.⁷⁰ The research draws on knowledge about memory processes and contamination through questioning. The starting point is that open questions are generally the best type of questions, allowing for a detailed answer that is less influenced by the questioner and is therefore more accurate.⁷¹

There is in place a gradual move to the video recording of interviews with “significant witnesses”, who are deemed to require special attention due to vulnerability, intimidation or investigative importance.⁷² Many complainants in sexual violence cases will therefore be “significant witnesses”. The recording of interviews aims to reduce the contamination of the witness’ account in comparison with traditional techniques of statement taking, which requires a more active process of structuring the account on the part of the interviewing officer. Recording should therefore “improve the establishment of facts”,⁷³ although resource and implementation issues mean that the majority of interviews with complainants are still not video-recorded.⁷⁴

The enhanced cognitive interview technique for investigative interviewing is a major improvement which not only gains the most reliable evidence possible, but also allows witnesses to tell their story without being hindered in their recall by the officer’s framework of events. It is to be hoped that adequate resources for training and implementation continue in this area. Some challenges arise in using the video-recorded interviews as evidence in chief, which are discussed in the “Evidence Issues” article in this issue.

Currently, there are four levels of competency in investigative interviewing within NZ Police:⁷⁵

- Level 1 (Foundation), at which stage officers may interview victims, witnesses and suspects for volume and priority offences.
- Level 2 (Advanced), where the officer may interview in relation to serious and complex crime.
- Level 3 (Specialist Adult Witness) specialist interviewing for major crime.
- Level 4 (Advisor). At this level officers co-ordinate and advise on interviewing for major crime.

70 The “PEACE” model can apply to both suspect and witness interviewing. PEACE stands for planning and preparation, engage and explain, account, closure and evaluation. The NZ Police have adopted a tiered accreditation structure similar to that operated in a number of English police constabularies, for example see <http://www.gloucestershire.police.uk/sei/s/931/f87.pdf> for the Gloucestershire Constabulary’s policy.

71 Brian R Clifford and Richard George “A field evaluation of training in three methods of witness/ victim investigative interviewing” (1996) 2 *Psychology, Crime and Law* 231.

72 Mary Schollum *Investigative Interviewing: The Recommendations* (New Zealand Police, 2006) at 40. The recommendation in the report was for electronic recording of the evidence of all significant witnesses.

73 *Ibid*, at 41.

74 Mossman and others, above n 18, at 75.

75 This implements recommendation 11 from Schollum, above n 72. There is also a supervisor level.

All recruits and current constables should receive foundational training while all members of the Criminal Investigations Branch should receive level two training. As of June 2009, almost 4000 staff had received Foundation training and around 90 staff had been trained as level three specialists.⁷⁶ The recommendations in the review envisaged that training of all officers would take place in the long-term but might be completed by 2012.⁷⁷ As at the end of 2010, 81% of staff have received level 1 training, although only 9% are accredited.⁷⁸ This highlights problems in the ongoing review of interviews and supervision required for staff to gain accreditation.⁷⁹ Implementation reports for other levels of training are due to be completed in the next two years.⁸⁰ As the interviewing framework develops, specialist interviewers should become more readily available, although as with the ASAI investigation policy, the challenge lies in implementation out in the districts.

It is hoped that the scheme of investigative interview training will improve the experience of sexual offence complainants, and also elicit more complete evidence. Secondary victimisation of complainants is a risk in all investigations, and is heightened where the interviewer holds erroneous beliefs about sexual violence (such as “rape myths”), or utilises inappropriate investigative interviewing techniques. It is likely that officers who attend sexual violence victim interviewing courses commit fewer errors than those who do not,⁸¹ through greater awareness of appropriate techniques and education about the varied “normal” reactions of victims of sexual violence. The realisation that recall may be affected by intoxication and trauma in the initial period after the offence⁸² has soothed concerns that victims are not interviewed as soon as possible after the offence, something which is a departure from traditional police practice.⁸³

However, the advances begun in New Zealand are currently undermined by a number of issues. Firstly, an initial complaint to police may be made at a time when no specialist interviewer is available. The preliminary interview is then conducted in order to assess the facts, identify witnesses, and arrange for a forensic medical examination (where the sexual assault occurred recently). Recent research conducted for the Ministry of Women’s Affairs found that who conducted this rather crucial preliminary interview varied according to time and place. When asked who was likely to conduct the scoping interview, 90% of police officers indicated it would be a Criminal Investigation Branch (CIB) detective on duty and 10% that it would be a

76 New Zealand Police *Annual Report 2008/09* (Wellington, 2009) at 2.

77 Schollum, above n 72, at 33.

78 Sonia Cunningham *Evaluation of the Implementation of Investigative Interviewing Training and Assessment (Level 1) Final Report* (New Zealand Police, 2010) at 36.

79 *Ibid.*, at 10.

80 Personal communication from New Zealand Police, March 2011.

81 Jo Eunkjung and Mi Jung Jang “Effects of sex-role stereotypes and rape myths on interviewing sexual violence victims” (Second International Conference on Investigative Interviewing, University of Portsmouth, 3-7 July 2006).

82 Louise Ellison “Promoting effective case-building in rape cases: a comparative perspective” [2007] *Criminal Law Review* 691.

83 Jordan, above n 50; Elaine Mossman and others *Responding to Sexual Violence: A review of literature on good practice* (Ministry of Women’s Affairs, 2009).

general duties officer.⁸⁴ Clearly, even in a limited interview, complainants may be negatively affected by insensitive or inappropriate questioning. A later formal cognitive investigative interview will suffer if there is contamination of memory at this early stage.

Second, if a forensic medical examination is undertaken, the medical officer may be required to ask specific questions, which runs counter to the idea of the cognitive interview technique, and again may undermine some of the benefits of the techniques used in a subsequent formal interview.

Third, the majority of officers conducting formal interviews have undertaken the ASAI course, but research for the Ministry of Women's Affairs found that only a third had reached the required level of accreditation as a specialist adult interviewer.⁸⁵ This has improved as more officers have been trained under the investigative interviewing programmes, although it is likely that rural areas will have lower availability of specialist officers.

Fourth, there is as yet a lack of suitable facilities for interviewing complainants and witnesses,⁸⁶ and financial limitations mean that this is unlikely to be resolved in the short term. The SARC model described above allows for specialist interviewing facilities for use in each area, away from a police station.

III. PROSECUTION

New Zealand is one of the few jurisdictions where specially trained police (from the Police Prosecution Service)⁸⁷ conduct summary prosecutions. Trials on indictment are conducted by Crown Solicitors, who are private practitioners appointed to prosecute under a warrant issued by the Governor-General. All prosecutions on indictment are commenced with the laying of an information by Police.⁸⁸ In serious sexual offences, the police therefore decide whether to prosecute and initial charges; following committal the Crown Solicitor will make all decisions relating to charging and conduct of the prosecution. Charges may therefore be amended by the Crown Solicitor, especially where there has been little communication between Police and the Crown Solicitor. This could cause unnecessary distress to complainants.

Should there be a decision not to prosecute, there is a right in New Zealand for any person to lay an information, and therefore to undertake a "private prosecution".⁸⁹

84 Mossman and others, above n 18, at 7.2.

85 Ibid, at 7.4.

86 Office of the Auditor-General, above n 16, at 49.

87 See Police Prosecution Service *Statement of Policy and Practice* (New Zealand Police, 2009) for an outline of functions and relationships with police and Crown Solicitors. Police prosecutors do not need to be legally qualified.

88 Crown Law Office *Prosecution Guidelines* (2010) at [5.3]. Crown Solicitors may act before committal on the instructions of an informant. Where this occurs in sexual cases, the informant will almost always be the Police.

89 Private prosecutions have been acknowledged in the Criminal Disclosure Act 2008, s 6. On private prosecutions see also the discussion at III B 2 below.

A. Decision to proceed with a prosecution

New Zealand has an opportunity system of prosecution, giving those who make prosecution decisions discretion as to whether to prosecute. There is not any central body of binding principles or decision makers that governs the decision to prosecute, although there are guidelines issued by the Crown Law Office,⁹⁰ which assist with decisions as to commencement of criminal proceedings, which charges to lay, and whether to continue or discontinue a prosecution. No central body controls prosecutions, unlike in many other civil and common law jurisdictions, where there is a public prosecution service.

There are no specific guidelines for prosecution of sexual offences.⁹¹ Specific policies and guidelines can clearly signal the approach of the authorities to sexual offence prosecutions. For example, the policy in England and Wales outlines the role of specialist investigators and counsel and clearly states that the Crown Prosecution Service is aware of rape myths and is careful not to allow these to affect prosecutorial decision-making.⁹²

The decision to prosecute, referred to in the guidelines as “the Test for Prosecution”, comprises two limbs: the Evidential Test and the Public Interest Test.⁹³ The Evidential Test must be satisfied before there is consideration of the Public Interest Test and requires that there is a reasonable prospect of conviction (objectively assessed), which exists if:⁹⁴

[I]n relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

Triggs et al found that in the first stage of the investigative process in their New Zealand study:

- approximately one third of complaints were classified as “no offence”;
- around eight per cent of cases were viewed by police as a false complaint for which the complainant should be cautioned or prosecuted;
- in 55 per cent of the total cases, there was an identified suspect;
- in two per cent of cases the suspect was warned and the case closed;
- in 17 per cent of total cases, even where the suspect was identified, no charges or other action was taken and the case was closed; and
- of total cases, 31 per cent of the files proceeded with the charging of the suspect.

90 Crown Law Office, above n 88.

91 See, for example, Crown Prosecution Service *CPS Policy for Prosecuting Cases of Rape* (2009).

92 *Ibid.*

93 Crown Law Office, above n 88, at [6.1].

94 *Ibid.*, at [6.3].

The study concluded that there was a significant degree of miscategorisation and possible dismissal of genuine complaints in the files,⁹⁵ although there has been an increase in prosecution of sexual offending at a greater rate than for other types of offence. Australian research suggested that where a decision to prosecute was made, the strongest influences were evidence or offender based, but that where the investigation did not proceed, 40 per cent of decisions appeared to be victim based.⁹⁶

Specialist prosecutors and officers may offer a method of improving the quality of categorisation decisions, so that there can be greater confidence in robust decision making. Specialist police units more generally were discussed above, specialist prosecutors are discussed below.

In making a decision to charge a suspect, police rely upon guidance provided by the Solicitor-General's Prosecution Guidelines. In the early stages, there has been concern about a lack of adequate supervision, meaning that some cases may be filtered out too early.⁹⁷ With the exception of indecent assault, sexual offences will usually be tried on indictment. Police prosecutors will usually retain responsibility for the case between the filing of the charge/information and the outcome of the committal process. The case passes into the hands of the Crown Solicitor once it is set down for trial.

Mossman et al found that in many sexual offence cases, police investigators had early contact with either police legal services or the local Crown Solicitor to discuss legal issues and to help to decide whether to lay charges.⁹⁸ Such collaboration is useful for victim well-being, as there is more likely to be consistency in information they are given. There were some police officers who believed that Crown involvement should consistently occur at an earlier stage.⁹⁹ The Law Commission has previously recommended that Crown Solicitors become involved in the case at the point where a defendant enters a plea or elects trial by jury.¹⁰⁰

1. "Victimless" or "evidence based" prosecutions

Both victims and police have a role to play in whether the prosecution is pursued, or whether the case is closed or dealt with in another way. The same issues that affect reporting of offences to police also may apply to victims not wanting to pursue the case further (for example, the nature of the criminal process, fear of giving evidence, especially cross-examination, the availability of other routes for resolution of the offence, and family or victim-offender relationships).¹⁰¹ It has been shown above that both verbal and non-verbal cues from police can affect the victim's decision on whether to withdraw. It

95 Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women's Affairs, 2009) at 42-43.

96 Office of Women's Policy, above n 2.

97 New Zealand Law Commission *Criminal Prosecution* (NZLC R66, 2000).

98 Mossman and others, above n 18, at 79.

99 Ibid, at 80.

100 New Zealand Law Commission, above n 97, at 35-36.

101 Ministry of Women's Affairs *Restoring Soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at 36-37.

is important that victims are believed, are treated with respect and dignity, maintain some degree of control and have access to continued information and liaison.¹⁰²

There is a relative paucity of research on the dynamics of victim withdrawal and how much of a role pressure to withdraw plays in victims' decisions. Although it is ultimately the decision of police as to whether there will be a prosecution, in many cases the co-operation of the complainant will be needed for the prosecution to be viable. However, the Evidence Act 2006 has arguably opened the way to more "victimless prosecutions" (sometimes termed "evidence based" prosecutions to signal that there is still a victim of the offending).

In the domestic violence case of *Singh v R*¹⁰³ the appellant's partner (D) had attempted to have the prosecution abandoned on several occasions. The Crown's position was that these attempts were a result of pressure from the appellant (D was dependent on the appellant's sponsorship to remain in New Zealand). D had given evidence at a preliminary hearing, adopting entries in her diary documenting violence and thereby supporting the Crown case. Before trial, D's lawyer informed the police that D intended to leave New Zealand, and a warrant was issued for her arrest. At trial she denied the truth of the diary entries and was declared hostile. Her claim of privilege against self-incrimination (that she may commit perjury if she gave evidence) was rejected. The jury convicted the appellant on counts where there was independent evidence, acquitting where the only evidence was the depositions evidence of D. On appeal to the Supreme Court, the Court held that:¹⁰⁴

Much has changed with the Evidence Act 2006. Spousal immunity has been abolished. Prior out-of-court statements by a witness now have independent evidential value. This means that the approach taken in *O'Brien* [prosecutors could not call witnesses who they knew would repudiate the truth of what they had said to the police] no longer applies, except perhaps in much attenuated form. The consequence is that a prosecutor in a domestic violence case is now far less dependent on the co-operation of the complainant. We are satisfied that this represents a conscious legislative policy decision based on the recommendations of the Law Commission.

The Court went on to state that allowing the privilege would mean that witnesses could avoid giving evidence by making a statement or volunteering an affidavit which is inconsistent with other statements made or evidence previously given; or by signalling an intention to repudiate prior statements inculcating the defendant. This, the Court said, would undermine the policy behind the Evidence Act 2006.¹⁰⁵

102 Kelly, above n 19, at 21.

103 *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322. The Court of Appeal decision is *Singh v R* [2010] NZCA144.

104 *Ibid*, at [23]. It should be noted that prior out of court statements are subject to an assessment of their reliability: *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.

105 *Ibid*, at [24]. Complainants who retract a complaint could potentially be prosecuted for making a false complaint or for attempting to defeat the course of justice.

In England and Wales, the Crown Prosecution Service Policy for prosecuting rape sets out when a prosecution will be continued against a victim's wishes.¹⁰⁶ The CPS policy stipulates that the reasons why the complainant withdraws support for the prosecution will be investigated, by taking a written police statement from the victim about why he or she is withdrawing support, asking whether the original complaint was true and whether there has been pressure on the complainant to withdraw support. The police views on the evidence and likely reaction of the complainant to being compelled to give evidence should also be sought.¹⁰⁷

The policy also outlines that the evidential sufficiency of the prosecution without the complainant's evidence should be assessed, as should the public interest issues in continuing the case without the support of the complainant. Generally, the more serious the offence, the more likely it is that the prosecution will continue in the public interest, even without the complainant's support. Where the complainant's evidence is needed to prove the case, then use of the police statement as evidence or the use of special measures such as a screen is considered. Ultimately, the CPS may compel the complainant to attend court.¹⁰⁸

There has long been frustration with the cases withdrawn due to a "complainant reliant"¹⁰⁹ system in many common law jurisdictions (particularly in interpersonal violence cases). Being "complainant reliant" means that without a co-operative complainant the prosecution is discontinued. However, victimless prosecutions can be controversial, encapsulating both prosecutions conducted without the need for the victim to give evidence and also cases where the victim is compelled to give evidence (as envisaged in England and Wales by the CPS Prosecuting Rape policy). These two forms of response to a victim's decision not to support a prosecution potentially have very different effects on that victim's sense of empowerment.

True victimless prosecution takes any power or control away from the offender; whereas mandated or compelled participation still allows for intimidation of the complainant by the defendant in determining the content of his or her evidence. There is also the sense that the ability for victims to feel a sense of control or empowerment is taken away when forced to testify by the State.¹¹⁰ Although proceeding without the victim giving evidence also takes away choice on the victim's part, it is arguably less threatening to personal autonomy, and takes away the need to go through giving evidence. An "evidence based" victimless prosecution will simply not be possible in many cases – where there is little physical evidence and the offence took place in private, the very cases where victims may encounter particularly challenging cross-examination should they give evidence.

106 Crown Prosecution Service, above n 91, at section 5.

107 *Ibid.*

108 *Ibid.*

109 Louise Ellison "Prosecuting Domestic Violence Without Victim Participation" (2002) 65 *Modern Law Review* 834; Andrew Sanders and Carolyn Hoyle "Police response to domestic violence: from victim choice to victim empowerment" (2000) 40 *British Journal of Criminology* 14.

110 Ellison, above n 109, at 848.

B. Duties to the victim when making charging decisions

1 Pre-trial interviews

In the UK, Lord Goldsmith advocated for prosecutors to be able to hold witness interviews at any stage of the proceedings, for example with regard to matters of evidence or assessment of a witness's reliability.¹¹¹ This is reflected in the CPS Policy for Prosecuting Rape, which provides that "the purpose of pre-trial witness interviews is to enable the prosecutor to reach a better informed decision about any aspect of the case."¹¹² At the pre-trial stage this inevitably means that prosecutors may interview for the purpose of pre-trial screening out of "weak" cases, as is the case in Canada.¹¹³ However, for the cases that continue, contact with the prosecutor at an early stage may be a good thing, allowing a rapport to be built up between the victim and the prosecutor. Similar provisions apply in other jurisdictions: for example in New South Wales meetings may take place between complainants, prosecutors and DPP solicitors before the committal hearing.¹¹⁴

In New Zealand, police will make the initial decision to charge and there is no public prosecution service: as such the position is slightly different, meaning that a pre-trial interview before charge (as envisioned by the CPS in its consultation document) is unlikely to have the same impact, unless there is an early team approach to sexual violence prosecutions between police and the Crown Solicitor. The fact that in England and Wales "police officers are investigators, not lawyers, and may not always be in the best position to assess the importance of certain aspects of the evidence that the witness has provided"¹¹⁵ led to a recommendation that an early interview would allow for prosecutorial assessment of the reliability of the witness' evidence. In New Zealand, the Law Commission have expressed the view that the initial charging decision should be seen as part of the investigative process rather than a prosecutorial function.¹¹⁶ For Crown Solicitors to undertake a meeting with complainants at such an early stage would require greater collaboration at an earlier stage between the Crown Solicitor and the police than takes place in most cases.

2. Duties when deciding not to pursue a prosecution

Where a prosecutor (police or Crown Solicitor) decides not to pursue a prosecution, there is limited ability for victims to challenge the decision. Where there is a decision not to lay charges, the ASAI policy stipulates that the victim should be kept informed.¹¹⁷ The general duty of the prosecutor to

111 Lord Goldsmith QC *Pre-trial witness interviews by prosecutors Report* (Crown Prosecution Service, 2006).

112 Crown Prosecution Service, above n 91, at 27.

113 Laura McGowan "Prosecution interviews with witnesses: what more will be sacrificed to 'narrow the justice gap'" (2006) 70 *Journal of Criminal Law* 351.

114 Kelly, above n 19, at 29.

115 Crown Prosecution Service *Pre-trial witness interviews by prosecutors: A consultation paper* (Crown Prosecution Service, 2003). See also Lord Goldsmith QC, above n 111; Paul Roberts and Candida Saunders *Pre-trial Witness Interviews: Interviewing prosecution witnesses* (Crown Prosecution Service, 2007).

116 New Zealand Law Commission, above n 97.

117 New Zealand Police, above n 12, process point 5.

inform and explain matters to the victim¹¹⁸ throughout the process may lead Crown Solicitors to inform victims of their reasons, but there is no specific duty to do so within either the Prosecution Guidelines or the Guidance on Victims of Crime. In England and Wales, decisions to drop, reduce the case or advise police to take no further action must be discussed with a second specialist lawyer.¹¹⁹

In civil law jurisdictions, there is traditionally greater ability for the victim to challenge prosecutorial decisions. In Austria, for example, if the prosecutor decides not to lay charges, the victim can appeal to the court (a single judge) against this decision.¹²⁰ The court can direct the prosecutor to undertake further investigations or review the case, but it cannot direct the prosecutor to lay charges. Similarly, in Germany if the prosecutor decides not to prefer charges, the victim is entitled to lodge a complaint with the head of the public prosecution office within two weeks of being notified of the decision. If the head of the office dismisses the complaint, the victim may apply to the court for a review of the prosecution decision. The court must dismiss the application if there are no sufficient grounds for preferring charges. Otherwise it must order the prosecution to lay charges. There is no appeal against the court's decision. In the Netherlands, the victim can appeal to the Court of Appeal against a decision not to prosecute. The Court may dismiss the appeal, direct that the prosecution goes ahead, or remit the case for further investigation.

Unlike most civil law jurisdictions, in the New Zealand process victims are able to pursue a private prosecution. Any person can lay an information. However, this is not an option that is realistically open for many, it being potentially expensive and emotionally difficult without the practical support of the police. The Solicitor-General has the power to stay such prosecutions, or to take over a trial on indictment.¹²¹ Other than this, there is no official input into private prosecutions. Such prosecutions are bound by the requirements of the Criminal Disclosure Act 2008, which in s 6 provides that:

prosecutor means the person who is for the time being in charge of the file or files relating to a criminal proceeding; and includes—

... (c) in the case of a private prosecution, the person who laid the information and any counsel representing that person.

118 Crown Law Office *Victims of Crime – Guidance for Prosecutors* (2010) at [5].

119 Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary *Without Consent: A Report on the joint review of the investigation and prosecution of rape offences* (2007) [*Without Consent*]; Crown Prosecution Service, above n 91, at [3.8].

120 In Austria, unlike in New Zealand, there is no general right for victims to undertake a private prosecution, although they may act as a "subsidiary prosecutor". In Germany s 374 of the Code provides that there are a small number of offences entitling the victim to bring a private prosecution without the involvement of the public prosecutor. Apart from that, however, there is no general right of private prosecution. However, there is the "nebenklager" procedure which allows for the victim to act as a second prosecutor and avail him or herself of legal representation. There is similar provision in Switzerland, Croatia, Poland and Turkey: Marianne Wade, Christopher Lewis and Bruno Aubusson de Cavarlay "Well informed? Well represented? Well nigh powerless? Victims and Prosecutorial Decision-making" (2008) 14 *European Journal on Criminal Policy and Research* 249.

121 Crown Law Office, above n 88, at [3.5].

3 Plea and charge negotiation

“Plea bargaining” or “charge negotiation” is a quasi-formalised form of pre-trial discussions, in which the parties attempt to come to an agreement about charges to which the defendant will plead guilty. The prosecutor may reduce or amend charges in return for the guilty plea. The prosecutor has no ability to negotiate with the defendant about type or quantum of sentence.

Guidance to prosecutors on approaching plea negotiation has been included in the Prosecution Guidelines and the police also provide indications to their staff on appropriate conduct.¹²²

Despite a traditional reluctance to formally recognise plea bargaining, there is now acceptance that plea discussions may serve a useful purpose in preventing a contested trial. This is better for victims and witnesses as it protects them from cross-examination, as well as serving to save court time. It also allows for a guilty plea, which will be reflected in the sentence imposed. The Prosecution Guidelines provide that plea discussions and arrangements have the following advantages for the administration of the criminal justice process:¹²³

16.1.1 Relieving victims or complainants from the burden of the trial process;

16.1.2 Releasing the saved costs in Court and judicial time, prosecution costs, and legal aid resources to be better deployed in other areas of need;

16.1.3 Providing a structured environment in which the defendant may accept any appropriate responsibility for his or her offending that may be reflected in any sentence imposed.

The prosecutor must not initiate plea discussions. This is to avoid the impression that prosecutors have overcharged in order to encourage negotiation.¹²⁴ Furthermore, such discussions may only take place where the defendant is represented.¹²⁵ Prosecutors, whilst not initiating discussions, can make it known that they are willing to discuss regarding plea and charges.¹²⁶ If an arrangement as to plea is reached, it should be recorded.¹²⁷ No arrangement should be reached where the public interest favours proceeding on the charges as originally laid.¹²⁸

There appears to be some practice of plea bargaining or charge substitution that takes place in sexual violence cases. A small number of New Zealand cases seem to end in the withdrawal of sexual violation charges and guilty pleas to lesser offences.¹²⁹

According to the Prosecution Guidelines, victims should be told about plea discussions and can make their views known to the prosecutor. It is questionable what degree of responsibility this requirement places on prosecutors or how much ability victims have to question charge negotiation

122 Police Prosecution Service, above n 87.

123 Crown Law Office, above n 88, at section 16.

124 New Zealand Law Commission, above n 97, at [236].

125 Crown Law Office, above n 88, at [16.2].

126 Ibid, at [16.3].

127 Ibid, at [16.5].

128 Ibid, at [16.9].

129 Triggs and others, above n 95, at 62.

agreements. The victim's interests are not the paramount consideration in the prosecutor's decision, "while victims' rights are an integral part of the criminal justice system, ultimately the prosecutor must make decisions based on the public interest and interests of justice."¹³⁰

C. Specialist prosecutors and vertical prosecution

Several jurisdictions have attempted some form of specialist prosecution team for sexual offences. Many of the initiatives are not directly applicable to New Zealand and would require significant modification, because we do not have a public independent prosecution service. Furthermore, New Zealand is also a small jurisdiction and therefore some forms of specialisation would be unsustainable. However, prosecutorial specialisation for sexual offences has been utilised in a number of forms, and there is evidence that the use of specialist teams decreases attrition.¹³¹ The Crown Prosecution Service in England and Wales has introduced area rape co-ordinators as well as specialist rape prosecutors.¹³² The co-ordinator position itself may offer some benefits of co-ordination and monitoring of standards, regardless of the level of specialisation of prosecutors themselves.

The motivation for specialism is to minimise additional trauma to victims. There is also an educative aim – prosecutors receive special training, the profile of sexual offence matters is raised (thereby educating the public re: "rape myths"), and confidence in the system is improved. This is particularly the case when the conviction rate or the experience for victims is actually affected.

Some units incorporate both investigation and prosecution. Despite the challenges, further discussion of possible adoption of some aspects of these specialist units is warranted. There are several potential advantages of specialist prosecution units:

- The focus on sexual offences is typically characterised by the victim being allowed more contact with prosecutors and prosecuting counsel than is the norm, because they are aware of the benefits of such responsiveness;
- Prosecutors and prosecuting counsel take on a more active role in case building; and
- As expertise in sexual offences cases will grow amongst specialist prosecutors, there will be better awareness of tackling some of the problems inherent in rape cases, and the involvement of counsel from the start allows for better continuity of personnel ("vertical prosecution").

In jurisdictions that have adopted some form of specialisation, there is an emphasis on the importance of counsel and prosecutors who have experience and can specialise in sexual offending cases. The Victorian Specialist Sex Offences Unit reported in 2008, one year into its operation, that their

¹³⁰ Crown Law Office, above n 88 at [16.6].

¹³¹ Kelly above n 19, at 29; Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary *Report on the Joint Inspection*, above n 2.

¹³² For trial counsel, only advocates who have attended a CPS accredited course and have demonstrated the right skills when monitored are able to undertake rape prosecutions in court: Crown Prosecution Service, above n 91, at [3.9].

experience (along with the Canadian and South African experience) has been that a strong, consistent and proactive approach to the prosecution of sex offences has the capacity to influence the functioning of the whole criminal justice system.¹³³ In addition, they claim that it is less distressing for complainants, increases community confidence and reporting, and decreases attrition.¹³⁴

After one year, the Unit provided figures suggesting that the percentage of guilty pleas had doubled from the previous year (28 – 58%) and that of the cases contested at trial (92), approximately one third resulted in a conviction (32) – 14 convicted on all charges and 18 on some of the charges – which represented a significant improvement.

A South African qualitative study suggests that specialist prosecutors should have the skills of a lawyer, social worker and psychologist; be dedicated and passionate; flexible; objective; a realist; resourceful; persistent; and able to work well with others.¹³⁵ This is a rather idealistic “wish list”, but underneath it lies the idea that a specialist prosecutor should be able to approach the cases with a will to ensure that victims are treated as well as possible by the criminal process. Despite this, the specialist prosecutor is no more a representative of the victim than the non-specialist, which has led to calls in a number of jurisdictions for some form of legal representation for the victim.¹³⁶

Specialist units are resource and time intensive, and even in a relatively large jurisdiction such as England and Wales, there have been some problems in securing enough counsel who have the requisite experience and are willing to be “rape specialists”. Relevant to this is the South African experience that the role is draining,¹³⁷ highlighting the need for debriefing or some other form of emotional support for those who work in the area of prosecution of sexual offending. Concerns about the emotional impact and development of too narrow a focus shaped the English decisions around specialisation, with an attempt (not entirely successful) at a structured system of specialisation, rotation and training.¹³⁸

The English Crown Prosecution Service Inspectorate have concluded that it is important to have a form of “vertical prosecution” – beginning to end handling of a case by a single specialist lawyer with expertise in rape cases – to maintain continuity of approach within the prosecution team. They further recommended that there is continuity of counsel.¹³⁹ Other studies

133 Michele M Williams “Specialist Sex Offences Unit” (paper presented to Just Partners: Family Violence, Specialist Courts and the Idea of Integration National Conference, Canberra, 22–23 May 2008).

134 Ibid.

135 KD Müller and IA van der Merwe “The Sexual Offences Prosecutor: a new specialisation” (2004) 29 *Journal for Juridical Science* 135 at 141–143.

136 This issue is discussed by Elisabeth McDonald “The views of complainants and the provision of information, support and legal advice: how much should a prosecutor do?” in this issue.

137 Müller and van der Merwe, above n 135, at 148.

138 Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Report on the Joint Inspection*, above n 2, at 8.73.

139 Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Without Consent*, above n 119.

have found that early contact between counsel and victims helped to build rapport and trust, and that vertical prosecution was necessary to maintain that rapport.¹⁴⁰

D. Innovations to address attrition rates, encourage cross sector teamwork and reduce trauma to victims

1. Public Prosecution Service

As discussed above, there is no central body that controls prosecutions in New Zealand. It is arguable that some of the reform initiatives below, and the ability to mandate greater consultation with complainants, are easier in systems which have a public prosecution service. The Crown Prosecution Service in England and Wales and the Office of the Procurator Fiscal in Scotland are examples of common law systems with a public prosecution service. Civil law jurisdictions commonly have prosecution offices that are ultimately responsible to the Minister of Justice.¹⁴¹ In most European civil law systems, prosecution services are centrally responsible for the decision to prosecute.¹⁴² They are in charge of the investigation of offences (officially, although this is often not exercised in practice in minor cases). They may guide the police in the collection of evidence.¹⁴³

The Law Commission ultimately rejected the idea of a stand-alone Crown Prosecution Service for New Zealand, although it recognised the benefits of a clear separation between investigation and prosecution functions.¹⁴⁴ This has arguably improved since the Law Commission report with the clearer separation of the Police Prosecution Service from the operational functions of New Zealand Police, which has made a particular difference for summary prosecutions.¹⁴⁵

2. Processes to ensure that “hard” cases are not too easily dismissed

South Africa and England and Wales have both introduced systems whereby a decision not to prosecute a rape allegation must be referred to a senior prosecutor for review – in New Zealand the PPS process does not reach the same level. Similar reform would mean that, where the police make the decision whether to charge, seeking advice from a Crown Solicitor may

140 Amanda Konradi “Too Little, Too Late: Prosecutors’ Pre-court Preparation of Rape Survivors” (1997) 22 Law and Social Inquiry 1.

141 Jörg-Martin Jehle, Paul Smit and Josef Zila “The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions” (2008) 14 European Journal on Criminal Policy and Research 161.

142 Ibid.

143 Beatrix Elsner, Chris Lewis and Josef Zila “Police Prosecution Service Relationship within Criminal Investigation” (2008) 14 European Journal on Criminal Policy and Research 203.

144 New Zealand Law Commission, above n 97, at [19]. There is currently a review of Public Prosecution Services underway, due to report to Cabinet in February 2012: see Cabinet Domestic Policy Committee “Review of public prosecution services” (March 2011) DOM (11) 10. The review will include consideration of the reforms undertaken as a result of the Law Commission’s recommendations in 2000.

145 See Police Prosecution Service, above n 87. The Public Prosecution Review will assess whether the establishment of the Police Prosecution Service “has been effective in addressing the issues identified by the Law Commission”: Cabinet Domestic Policy Committee, above n 144, at 21.

be mandatory. The propounded benefit of such an approach is to ensure that a rounded judgment of evidential sufficiency takes place. The decision to prosecute could remain with the police, whilst mandating that advice has to be sought from a specialist Crown Solicitor.

3. Teamwork

Clear communication between all agencies involved in the prosecution of sexual offences is vital. This will increase the chances that greater skill will be brought to bear in an area where it is difficult to secure successful prosecution. There is potential that greater inter-agency working could tend to blur the lines drawn between the stages of police prosecution and decision to charge and the later involvement of Crown Solicitors – however, it could be seen to be an extension of the ability for advice to be sought from Crown Solicitors by police in the more complex cases. In Scotland, the Crown Office and Procurator Fiscal Service concluded that early dialogue between the police and prosecutor/counsel would help to: identify evidential weaknesses early on; achieve a common understanding about sufficiency of evidence; and provide timely advice to victims about the likelihood of further investigation and prosecution by the Crown.

In England and Wales, the trial advocate is supposed to attend a conference with the rape specialist prosecutor, the investigating officer, the medical staff, and any other experts involved as soon as practicable after he or she receives instructions.¹⁴⁶ The unit in Victoria also emphasises the need for a team approach between prosecutors and barristers.

4. Advisory Group on Sexual Crime – Scotland

The Advisory Group set up in Scotland would achieve some of the aims of specialisation, without much reform of core system processes – this operates as a permanent expert group bringing together groups such as prosecutors, Rape Crisis, and the Association of Chief Police Officers to consider best practice in all aspects of the investigation and prosecution of sexual crime.

Part of the role of the Advisory Group is to provide specialist training for prosecution staff who work on rape cases. This training is delivered by medical experts, police officers, and members of Rape Crisis. In this way, the conceptions and beliefs around the “real rape” typology can be more effectively challenged. Procurators Fiscal have been tasked with seeking opportunities within local communities to raise awareness of the nature of rape and dispel myths, thereby attempting to address the issues within a wider group than training of lawyers would allow.¹⁴⁷

5. Training and Evaluation of lessons learned

In England and Wales a number of processes have been recommended to ensure that lessons are learnt and that therefore the system can improve the conviction rate. Some of these innovations are in place; others have not yet been achieved:

146 Crown Prosecution Service *Rape Manual* (Crown Prosecution Service, 2010).

147 Crown Office Procurator Fiscal Service *Review of the Investigation and Prosecution of Sexual offences in Scotland: Report and Recommendations* (2006).

- Regular meetings between police and the crown prosecution service in each constabulary area now take place to discuss “no criming” rates, withdrawal rates, the number of prosecutions, the rate of discontinuance and the conviction rate;
- Training courses for barristers who prosecute serious sexual offence cases, including a manual and e-learning package. Training of trial counsel is also mandated in Victoria, Winnipeg (Canada) and Scotland;
- Monitoring of courtroom prosecution advocacy;
- Dissemination of lessons learned after each prosecution – this has not yet been achieved, but the idea is a good one that may be worth considering in New Zealand – trial counsel should write a report on lessons to be learnt, along with debriefs for all concerned (police, prosecutor, caseworkers, medical examiners) to learn from the experience (both acquittals and convictions).¹⁴⁸ A similar process has been recommended in Scotland;¹⁴⁹ and
- Rape trial files to be sampled systematically to check for the quality of decision making, identification of learning points, and dissemination of results.

IV. CONCLUSION

Whilst acknowledging the significant improvements made by police in their processes for investigation of allegations of sexual offending, this paper has highlighted several possible areas of reform. Areas of particular promise which are ripe for further research include specialisation and a multi-disciplinary team approach to the investigation and prosecution of sexual offences.

Although law reform, changes to policy and protocol can make a difference to the reporting, investigation and prosecution of sexual offending, there must also be real engagement with enhancing knowledge of criminal justice professionals and the general public about the realities of sexual violation. Law reform later in the process cannot have significant impact on attrition and conviction statistics, or achieve a better experience of the criminal process for victims, without investigative and prosecutorial decisions being based on real experiences of sexual assault. In turn, if the fact-finders at trial utilise ideas of “real rape”, it will inevitably filter back to affect future assessments of evidential sufficiency when deciding whether to pursue a prosecution. In finding the balance between process and outcome, criminal justice professionals should remember that “the best evidence can only be gleaned from the best treated victim”.¹⁵⁰

148 Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Report on the Joint Inspection*, above n 2. Little progress has been made on this innovation: Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Without Consent*, above n 119.

149 Crown Office Procurator Fiscal Service, above n 147.

150 Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Report on the Joint Inspection*, above n 2, at 98.