

MAKING THE PROCEDURE FIT THE CRIMES: OPTIONS FOR PROCEDURAL CHANGE IN SEXUAL OFFENCE CASES

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I. THE GENERAL APPROACH TO PROCEDURAL ISSUES

A useful starting point for considering issues of criminal procedure is to consider what the purpose of the criminal trial is. A compelling analysis is that of Antony Duff and his colleagues¹ who identify three strands to the normative conceptions of the proper purpose of the criminal trial:

- “participation”- involving the defendant being called to account, put to the test, or brought face to face with his accusers.
- “due process” – where the focus is on the conduct of the trial and the effectiveness of procedures in protecting citizens against the state and its potentially oppressive power.
- “efficient management” – the most recent – which seeks to find cost-effective ways of managing trials to increase the frequency of “correct” outcomes while limiting the quantum of resources of the state, and of the parties to the proceedings including witnesses and victims, which are expended.

New Zealand law currently focuses primarily on the second and third of these normative conceptions, although the Criminal Procedure (Reform and Modernisation) Bill 2010 seeks to place greater emphasis on the third.

The traditional emphasis on the ‘due process’ norm leads us to analyse any proposal for changes to the procedure for trying sexual offences by testing the proposal to see if it is consistent with the absolute requirement that criminal trials be fair,² a right affirmed in the New Zealand Bill of Rights Act 1990 s 25(a) which gives to criminal defendants “the right to a fair and public hearing by an independent and impartial court”. That right has three aspects – that the trial be “public”, that the hearing be “fair” and that the tribunal be independent and unbiased.³ The right to be present and to present a defence has also been recognised as necessary for a fair trial.⁴

However a focus on the first of Duff et al’s norms leads us to look to the question of the extent to which the trial achieves the goal of achieving accurate outcomes and holding the guilty to account. In that sense trial “fairness” should take into account the interests of the Crown and society

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1 A Duff and others *The Trial on Trial: Volume Three* (Hart Publishing, Oxford and Portland, 2007) at 61.

2 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.

3 See generally Jeremy Finn “Inquisitorial trials for sexual offences and ‘fair trial’ rights” (2010) 15 Canterbury LR 317.

4 *R v Hines* [1997] 3 NZLR 529, (1997) 15 CRNZ 158 (CA) at 549; and at 177 per Richardson P.

generally in ensuring that the prosecution has a proper opportunity to obtain a conviction where the evidence so warrants.⁵ It has been suggested that fairness to the victim of the offence is also to be sought.⁶ That analysis is similar to that of Thom Brooks who has argued that fairness of a trial involves two different elements.⁷ Firstly a fair trial is one that renders fair verdicts so that "...a fair trial will be one that will release the innocent and punish the guilty all things considered."⁸ The second element is that of appearance. A fair trial is a trial that is understood to be fair, so that, whatever the processes used to reach a verdict, the verdict should be one which the parties to the trial and the general public regard as having been achieved by a fair process.

There is some evidence that victims of sexual offending do not perceive the current process for trying such offences as fair but rather regard it as unduly weighted in favour of the defendant.⁹ On Brooks's argument, this may indicate a risk that popular acceptance of that view would lead to the trials being regarded as unfair. On the other hand, any popular perception that the trial process is unfair to the defendant may give rise to a reluctance on the part of tribunals to find defendants guilty. That might mean a process which is seen as unduly weighted toward the prosecution may, counter-intuitively, increase the rate of acquittals. That would significantly increase the hardship and stress of complainants and victims who find that the accused is acquitted not on the basis of the evidence but on a jury's appraisal of the fairness of the process.¹⁰

Analysis of proposed changes to the procedural rules for criminal cases must also now consider the efficient management norm, in that – all other things being equal – preference should be given to changes which provide equally accurate outcomes at the lowest cost in resources. While efficiency should not trump justice, it is a useful yardstick for comparing different methods of achieving justice.

Bearing those concerns in mind, it is highly desirable to consider whether the current law which is generally, if not necessarily invariably, protective of the fair trial rights of both defence and prosecution may contain particular rules which are open to scrutiny and challenged as operating unfairly or unreasonably in relation to victims. However proposals for change to the pre-trial and trial process which may assist victims must still be carefully analysed to ensure they do not cause a trial to become unfair to prosecution or defence.

5 *R v Robinson* [2007] NZCA 336 at [21]; compare *R v Harrer* [1995] 3 SCR 562 at [45]. –. Christopher Corns "Videotaped evidence in Victoria: some evidentiary issues and appellate court perspectives" (2004) 28 Crim LJ 43 at p 47.

7 Thom Brooks (ed) *The Right to a Fair Trial* (Ashgate, Farnham, 2009) at p xii.

8 *Ibid.*

9 Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga: Report of the Task Force for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (Ministry of Justice, 2009) at 51.

10 Kelly Richards "Child complainants and the court process in Australia" (Australian Institute of Criminology, Canberra, July 2009).

II. WHAT ARE THE ISSUES OF CONCERN?

Research into the experiences of complainants in sexual offence cases has identified a range of issues which should be addressed. Other issues are apparent on analysis of the relevant legislation and case law. It is convenient to divide discussion into four areas. Firstly, and relatively briefly, there are the concerns as to procedural decisions which are made without sufficient consideration for the interests of victims of sexual offending where changes of limited scope could significantly improve the position. In this category we may place issues as to bail, change of venue and jury selection. Secondly there are concerns which may be of more general concern in all criminal trials but which are particularly acute in sexual offence cases. These include the physical security and safety of the victim at the court room and while waiting to give evidence and the possibility of scheduling the appearance of the victim to give evidence. Thirdly there is the generic question of delay in the criminal process which means that trials may take place many months after the offending. Lastly the paper considers the linked issues of the right to silence and defence disclosure of disputed issues. Research has identified a perception by many victims that the trial process is unfair because the defendant is not required to put forward at an early stage any version of accounts or to notify in advance the basis of a defence to be relied on. Clearly changes in this regard would be likely to have a major impact on the criminal law.

A. Bail and the pre-trial release from detention of a person charged with sexual offending

The question of pre-trial release from custody of persons accused of offending is governed by the Bail Act 2000. A recent study suggests that there are some concerns with the way in which the bail system operates in sexual offence cases. The *Report of Taskforce for Action on Sexual Violence*¹¹ recommended changes be made to improve procedures and responsiveness for victims in relation to bail applications.¹² The principal concerns expressed were that insufficient emphasis was given to the safety needs of the victim when the issue of bail was considered,¹³ that consideration should be given to both the physical and psychological safety of victims, and that victims of offending should have an opportunity to be heard “on their safety needs and concerns when decisions about bail are being made”. It was also recommended that victims be given timely information about bail outcomes and access to specialist support 24 hours a day where necessary. Further, state funding should be available to victims where alternative accommodation was necessary.¹⁴

Unfortunately the Task Force report does not make it clear whether the concerns related to the granting of police bail or to the granting of bail by the courts. The suggestion that the victims have an opportunity to be heard

11 Taskforce for Action on Sexual Violence, above n 9.

12 Ibid, at [52].

13 Similar issues have been raised in other jurisdictions, see for example Sara Payne *Rape: The Victim Experience Review* (Home Office, 2009) at 23.

14 Taskforce for Action on Sexual Violence, above n 9, at recommendation 59.

rather suggests the latter. However it is sensible to consider in regard to both police bail and bail at the court's discretion the extent to which some changes may be necessary or desirable.

1. Police Bail

The issue as to the possible grant of police bail will arise prior to the defendant first appearing in court. Under the Bail Act 2000, the police may grant bail to a person arrested without a warrant if the offence charged is triable summarily and the defendant "cannot practicably be brought immediately before a court".¹⁵ Only the most serious sexual offences are not triable summarily,¹⁶ so most defendants who are charged with sexual offences and cannot be brought immediately before a court¹⁷ will be able to seek police bail.

The test in s 21 is that police bail may be granted if the police officer considers that "prudent" to do so. Police bail may be granted on conditions that could have been imposed by the District Court to ensure the defendant attended trial, did not commit any further offending while on bail and did not interfere with witnesses.¹⁸

However the general power to impose conditions and the general test of "prudence" for the granting of bail are displaced where the defendant is charged with a domestic violence offence. Under s 21(2) police have as the paramount consideration the protection of the victim of the alleged offending. The use of the word "paramount" in s 21(2) means that the criterion of protection of the victim must override all other considerations even though those considerations would otherwise support the granting of bail.¹⁹ Further, under s 21(4A) the police have an additional power to impose conditions reasonably necessary to protect the victim of the offence and any person residing with them. There is also a requirement in cases where the defendant is charged with breach of a protection order that he or she not be released on police bail for at least 24 hours after the arrest.²⁰

It is unlikely that the police can, by their own internal procedures, validly fetter to any substantial degree the discretion given to the police by the Bail Act.²¹ Statutory amendment may be necessary. Three possible solutions may be identified. The first is that the Bail Act be amended to provide expressly for the police to have regard to the interests, including psychological well-being, of the complainant when deciding whether it is prudent to grant police bail. Instead of, or in addition to, that change the Act might be changed to

15 Bail Act 2000, s 21(1)(c).

16 Crimes Act 1961, s 128 (sexual violation); s 129A(1) (sexual connection with consent induced by threats); s 132 (sexual conduct with a child under 12) and s 142A (compelling indecent act with animal).

17 For example a person arrested on a Saturday night will not be able to be brought before a court till the Monday following. Longer delays may occur where a public holiday means the Courts are not sitting.

18 Bail Act 2000, s 21(4) conferring on police the powers to impose conditions given to the Courts by s 31 of that Act.

19 Compare *Reed v Police* HC Rotorua CRI-2009-463-31, 28 May 2009 at [29].

20 Bail Act 2000, s 23.

21 Compare the discussion of the invalidity of fettering the discretion to arrest in *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC) at 121.

provide that the police have greater powers to impose conditions which will prevent *contact* between a defendant released on police bail and the victim rather than the more specific preventing of interference with the witness.

A more far-reaching solution would simply be to remove the power of the police to grant bail to persons charged with sexual offences. This would require defendants be kept in custody until they could be brought before the court. There is perhaps a slight risk that police officers may be more reluctant to arrest for a sexual offence if they know that such an arrest will mean the defendant's automatic detention in police custody until a court of appearance can be arranged. However, proper police procedures and training should alleviate any such risk.

2. Court Bail

The material cited above by the Task Force implies that the courts are not currently being adequately informed of the concerns of victims of offending, are not giving sufficient weight to those concerns, or both. It is not clear that the problem is necessarily with the provision of information to the court. Under s 8(3) Bail Act 2000, where a defendant is charged with "sexual violation or other serious assault or injury", the Court must "take into account" the views of the victim as ascertained by the police and conveyed by the prosecutor.²² However it is possible that not all prosecutors convey to the court the concerns of victims as strongly as those victims would wish. This may not necessarily involve any element of fault on the part of the prosecutor but rather a reasonable and proper carrying out of their functions.

If there is a significant problem with the quality of the information supplied by prosecutors to the court in sexual offence cases when bail is being considered, one solution might be for the victim, personally or through a lawyer or other representative, to convey to the court directly any concerns the victim may have about his or her physical safety and as to any impact the release of the defendant on bail may have on the victim.

If however the principal concern is that bail is being granted too readily or on insufficiently stringent conditions, the solution would appear to lie in making suitable amendments to the relevant statutory provisions. Under s 31 conditions may be imposed if they are reasonably necessary to prevent the defendant failing to appear at court when required, or reoffending while on bail or interfering with witnesses or evidence against the defendant. There is no specific provision in relation to offences other than domestic violence to require the courts to have particular regard to the safety and well-being of the victims of the alleged offending. Assault on, or intimidation of, the victim of offending would clearly fall within both the second and third of the risks which may be managed by suitable conditions.

The Task Force data suggests that bail may be being granted, albeit on conditions, where it should not be granted at all or that conditions being imposed on the grant of bail are insufficiently stringent. If that is so, the answer would appear to be to amend the Bail Act to require judges to give a

22 See Victim's Rights Act 2000, s 30. A victim must request to be notified of developments by the police and given the relevant details before this will occur, see s 31.

higher priority to the safety and security, both physical and psychological, of victims of sexual offending. There is a possible model in s 8(4) Bail Act which could be adapted. That subsection – paralleling the provisions we have seen in regard to police bail – requires that where a defendant is charged with breach of a protection order the Court must treat as the “paramount consideration” the need to protect the victim of the alleged offence. Such an amendment would mean that in almost all cases of sexual offending the defendant would be denied bail. This might be seen as unduly impinging on the right under s 24(b) New Zealand Bill of Rights Act 1990 of a defendant, as a person charged with an offence, to be released on reasonable terms and conditions unless there is just cause for continued detention. The importance of recognising the defendant’s rights under that section of the Bill of Rights Act has been emphasised by the courts on many occasions.²³ However the right of the defendant may be limited to the extent that this is necessary in a free and democratic society.²⁴ Indeed the Bail Act itself recognises that in some cases bail may be restricted on societal grounds, so that, for example, persons with a significant record of serious offending may have to establish on the balance of probabilities that bail should be granted.²⁵

If there is concern that making the safety of the victim the paramount issue would unduly limit the availability of bail, it would be possible to use other terminology which would require the court to place a greater emphasis on issues of safety of the victim without allowing that concern to trump all other relevant matters. It could be, for example, that requiring the court to make the protection of the security and safety of the victim of the offending a “primary” concern would provide an adequate reconciliation of the interests of the defendant and of the victim of the alleged offending.

3. Bail for repeat offenders

A separate issue concerning the release of persons alleged to have committed sexual offences is the circumstances in which there might be a reverse onus of proof, so that the defendant has to establish on the balance of probabilities that bail should be granted. Under s 10 Bail Act 2000, a person who has previously been convicted of one or more of a list of specified offences and is currently charged with one or more of the same list of specified offences (though not necessarily the same offence) is required to establish on the balance of probabilities that he or she should be released on bail. The Ministry of Justice has raised the possibility of amending the list of offences specified in s10 to include further sexual offences.²⁶ Currently the only sexual offence included in the list of specified offences is sexual violation.²⁷ There seems no good reason not to include in the list other serious sexual offences. The determination of which offences which should be included may require

23 See *R v Blaikie* [2000] 1 NZLR 31 (CA).

24 See New Zealand Bill of Rights Act 1990, s 5.

25 See Bail Act 2000, ss 10 and 12.

26 Ministry of Justice *Bail in New Zealand: Reviewing aspects of the bail system* (2011) at [123].

27 Crimes Act 1961, s 128B.

some analysis of reoffending rates etc but obvious possibilities for inclusion are attempted sexual violation²⁸ and assault with intent to commit sexual violation.²⁹

4. Selection of venue and change of venue

In most cases trials will be held in the court nearest to the offending. This reflects an axiom that, all other things being equal, justice should be done in the community in which the alleged offending occurred – an axiom which has been adopted in both statute and case law.³⁰ However in appropriate cases, the courts may transfer the trial to another centre – or in the case of jury trials to another sitting of the court – if that is necessary to obtain a fair trial. In cases on indictment an order for a change of venue or sitting may be made by a High Court Judge or District Court Judge, as appropriate, if doing so is “expedient for the ends of justice”.³¹ In summary cases a District Court Judge may order a change of venue.³² An application for a change of venue (or sitting in indictable cases) may be made by either prosecutor or defendant, and an interlocutory appeal is possible in both summary cases and trials on indictment.³³

There are grounds to question the premise which is relied on in the selection of the trial venue. The difficulty arises most acutely in smaller and provincial centres, where it is highly likely that despite rules relating to suppression of reporting of the identity of the complainant in a sexual offence case the identity of the victim will become widely known within a short time.³⁴ In such cases it seems inappropriate to schedule the trial for that centre – at least unless the victim has indicated she or he is content for the trial to take place there. It would be highly desirable to enact a statutory rule that in sexual offence cases the venue for the trial will be selected by a judge of the court after hearing from both prosecution and defence and after taking into account the views of the victim as ascertained and conveyed by the prosecutor.³⁵ It should be noted that these concerns as to effective breach of the suppression orders will not be significantly affected by the victim giving evidence by some mode other than appearance in person.

Similar issues as to the absence of consideration of the views of the victim arise where there is an application by either the prosecution or the defence for a change of venue. As noted earlier, the statutory test is that whether

28 Crimes Act 1961, s 129(1).

29 Crimes Act 1961, s 129(2).

30 See Summary Proceedings Act 1957, s 18; *R v Houghton* CA371/99, 23 November 1999. The jury for a jury trial should normally be drawn from the community where the alleged offending occurred: Juries Act 1981, s 5(5)(b); *R v Middleton* CA218/00, 26 September 2000.

31 Crimes Act 1961, s 322.

32 Summary Proceedings Act 1957, s 34.

33 In summary cases jurisdiction to consider appeals apparently lies under District Courts Act 1947, ss 4A and 72; in indictable cases appeals are provided for in Crimes Act 1961, s 379A(1) (a) and (2)(a).

34 See the victim’s account recorded by Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to recovery* (Ministry of Women’s Affairs, 2009) at 103.

35 A model for the ascertainment and presentation of the views of the victim can be found in the combined provisions of the Bail Act 2000, s 8 and Victim’s Rights Act 2000, s 30, discussed above.

the change of venue or sitting is “expedient to the ends of justice”. The Court of Appeal has discouraged the placing of any gloss on the statutory wording³⁶ and has held that the decision in any particular case must be “strongly context specific”.³⁷

The interests of the complainant or victim do not receive specific mention in the statute and they have been largely invisible in the case law. While for the most part the court has been concerned with the risk that without an order for a change of venue or sitting the trial of the accused might not be fair, the interests of victims has been seen as relevant to a change of venue for a summary trial.³⁸ The Court of Appeal has indicated, in the context of a murder trial, that the interests of the victim’s relatives should be considered.³⁹ However it seems evident that consideration of the interests of victims and witnesses is neither mandatory nor decisive. This is perhaps the more surprising given that in another context – the withdrawal of guilty pleas – the courts have specifically held that the “interests of justice” include the interests of victims and witnesses.⁴⁰ The position would be clarified if there was a statutory rule in sexual offence cases that when considering a change of venue application the court must take into account the views of the victim as ascertained and conveyed by the prosecutor. It is likely that there will be little impact of a change of venue on a victim where the victim’s evidence is to be by way of video recording or by video link.

Slightly different issues arise with the more rare case of an application for a change of sittings, but again it is possible a change of sittings may disadvantage victims who have relied on a scheduled trial date in planning their affairs.⁴¹

It is highly likely that any such system will also improve the general information flow to victims as to procedural developments, a matter as to which concerns have been raised.⁴²

Under the Criminal Procedure (Reform and Modernisation) Bill 2010, as currently drafted, there is provision for the place of trial or the court sitting at which the trial is to take place to be transferred to a different time or place “if the court considers that the proceedings could be more conveniently or fairly heard at that other place or sitting”.⁴³ While it is possible the general wording “more ... conveniently” may be interpreted as requiring the court to consider potential hardship to the complainant or other witnesses,⁴⁴

36 *R v Mayer-Hare* [1990] 2 NZLR 561 (CA) at 563 .

37 *R v Foreman (No 2)* [2008] NZCA 55 at [13].

38 *Warren v Police* [1995] 3 NZLR 411 (HC) at 414.

39 *R v Te Kahu* [2006] 1 NZLR 459, (2005) 22 CRNZ 133 (CA) at [104]-[105].

40 *R v C* CA59/02, 28 May 2002.

41 Note the account of the negative impact on a victim of a change in trial date arising from other causes in Kingi and Jordan, above n 34, at 92.

42 *Ibid*, at 102

43 Criminal Procedure (Reform and Modernisation) Bill 2010, cl 157.

44 Or, possibly, as primarily authorising consideration of the convenience of the Judge and counsel, a matter which under current law is not relevant except in very unusual and exceptional circumstances: *R v Foreman (No 2)*, above n 37, at [16].

the position would be much more straightforward if the court was to be required specifically to take into account the interests of the complainant as ascertained and conveyed to the judge by the prosecutor.

B. Jury selection

One of the last procedural steps prior to the commencement of a trial by jury will be the selection of the jury. Both prosecution and defence may challenge an unlimited number of jurors for cause and also make a number of peremptory challenges (without any requirement of specified grounds for the challenge). It is common for the prosecution to consult the police to determine whether any potential juror has a criminal conviction, which should motivate the Crown to challenge the prospective juror if selected. The Supreme Court has approved such prior jury “vetting”.⁴⁵ There is, however, no requirement that the prosecutor consult the victim as to matters related to jury selection and the exercise of the prosecution’s rights to challenge.

There may be a case for some requirement of consultation, particularly in cases which are tried in smaller centres. There is anecdotal evidence that in smaller centres the making of name suppression orders does not always protect the identity of a complainant in a sexual offence case. It is possible that were a complainant to be allowed to see the list of prospective jurors, the complainant might identify potential jurors whose presence on the jury might cause the complainant undue stress or embarrassment even though the potential juror could not be challenged for cause as being likely to be biased against the Crown.

C. Improving the experience of victims when appearing at court – security and scheduling

There is evidence that the stress that victims in sexual offences feel about giving evidence may be significantly exacerbated by the physical conditions of the courthouse and the circumstances in which they must wait for an unpredictable amount of time to give evidence. Recent research has indicated that a proportion of victims in sexual offence cases found it stressful to encounter the accused or the accused supporters in the public areas of a courthouse.⁴⁶ Anecdotal evidence from lawyers is that victims may be the subject of abuse and vilification by the accused supporters both outside the courthouse and within the public spaces of a courthouse. The New Zealand data mirrors overseas research which has produced similar findings as to the extent to which victims find a lack of suitable physical facilities and a degree of distress from encounters with the accused. Several overseas studies have indicated that the facilities provided in courthouses to complainants who are called as witnesses are substandard and increase the stress experienced by those complainants when called to give evidence.⁴⁷

45 *Gordon-Smith v R* [2009] NZSC 20, [2009] 2 NZLR 725 at [14].

46 Kingi and Jordan, above n 34, at 101; Taskforce for Action on Sexual Violence, above n 9, at [52].

47 Christine Eastwood and Wendy Patton *The Experiences Of Child Complainants Of Sexual Abuse In The Criminal Justice System* (Queensland University of Technology, 2006) at 51-52 and 70-73; I Bacic and others *The Legal Process and Victims of Rape* (The Dublin Rape Crisis

The difficulty is compounded because complainants frequently spend long but unpredictable amounts of time in the inadequate facilities which are provided.

One solution to this problem is to improve the physical facilities of the courthouses used for sexual offence trials. A blueprint for such improvement was set out by the Taskforce for Action on Sexual Violence in 2009:⁴⁸

... facilities should be designed so as to provide safe and appropriate environments for victims. In Police stations this could include victim-specific facilities that ensure privacy, capacity for support people and separation from offender and public environments. In court buildings this could include safe parking, a separate entrance and waiting rooms, facilities and resources to accommodate victims' support people, including funding for support people.

Australian research has suggested that separate and purpose-designed facilities are particularly necessary for child victims.⁴⁹

It is obvious that the capital costs of such changes would be significant, but it is at least possible that scheduling of sexual offence trials should, as far as possible, take into account the quality of the facilities available to victims. Most importantly, scheduling should also take into account the extent to which their physical and psychological safety can be assured.

A more cost effective and speedy solution may be to reduce the frequency with which complainants are required to give evidence orally at the trial. Clearly where evidence can be video-recorded before the trial and the complainant need not be present at the trial, there can be no problems with facilities or delay.

Secondly there may be increased use of video links to allow complainants to give evidence from premises which may be distant from the place of trial. This certainly avoids any risk of contact with the defendant or his or her supporters. It does not, however, remove the problem of unpredictable delays in giving evidence and may, or may not, remove any difficulty with the quality of the areas provided within which complainants must wait to give evidence.

A third, and more far-reaching, innovation would be to provide procedural rules which would require the court to fix the time or times at which a complainant's evidence will be heard. It appears that where expert evidence is to be called in a criminal trial, it is customary for the court to fix the time at which that evidence will be heard so as not to unduly inconvenience the expert witness. Naturally the intended timing cannot always be adhered to, but in general the process is successful. There seems to be no reason whatsoever why the trial process should treat expert witnesses more favourably than it does complainants in sexual offence cases. Lessons

Centre, Dublin, 1998) at 43.

48 Taskforce for Action on Sexual Violence, above n 9, at [59].

49 See also Jennifer Temkin "Prosecuting and Defending Rape: Perspectives from the Bar" (2000) 27 *Journal of Law and Society* 219 at 236.

may also be drawn from an English initiative which sought to minimise waiting times for vulnerable and intimidated witnesses. The process has enjoyed a significant measure of success.⁵⁰

D. Delay as an issue in sexual offence trials

In many criminal justice systems including that of New Zealand, there are serious problems with bringing cases to court in a timely way. While there is no data as to the timeframes for sexual offence cases, defended jury trials will take, on average, a year from the initiation of proceedings in the District Court and more than 16 months in the High Court.⁵¹ There are two significant aspects to this issue of delay, firstly the impact of delay on the rights of an accused to a prompt trial,⁵² which need not be considered fully here, and secondly the impact on complainants and witnesses of an extensive delay between initial disclosure to the police and later stages in the legal process.

1. Attrition because of delay

Another paper in this workshop considers the question of attrition in sexual offence cases in detail.⁵³ It is sufficient here to note that there is some empirical data which indicates that delay is a factor in victims not persisting with the case.⁵⁴

In a recent New South Wales study it was found that 29% of complainants who withdrew the complaint prior to the matter going to trial cited as their principal reason for withdrawing the complaint the delay between complaint and trial.⁵⁵ Participants in the NSW study indicated that there was a significant need for improvements to the criminal justice process to reduce delays. Suggestions made included having a dedicated sexual offences court, a separate sexual assault case list and mandatory trial management conferences to ensure that all matters were ready for the trial to proceed.⁵⁶ A number of participants suggested that defendants and defence counsel deliberately

50 Becky Hamlyn and others *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* (Home Office Research, Development and Statistics Directorate, 2004) at 42.

51 New Zealand Law Commission and Ministry of Justice *Criminal Procedure (Simplification) Project: Reforming Criminal Procedure* (Wellington, 2009) at 1.

52 New Zealand Bill of Rights Act 1990, s 25(b) guarantees a right to trial without undue delay. The remedies for undue prosecutorial or systemic delay include a stay of proceedings: *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) but the Supreme Court has indicated other remedies may be more appropriate, and the normal response to excessive pre-trial delay will be a reduction in the sentence imposed if a guilty verdict is returned: *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750. at [9]-[18].

53 Yvette Tinsley "Investigating the decisions to prosecute in sexual violence cases – Navigating the competing demands of process and outcome" published in this issue, at p 43.

54 Kingi and Jordan, above n 34, at 79.

55 NSW Violence Against Women Specialist Unit *Improving Service and Criminal Justice Responses to Victims of Sexual Assault: A Report of a State-based Consultation with Adult Victims of Sexual Assault, Services and Agencies* (2006) at 13.

56 *Ibid*, at 45.

sought to delay proceedings in the hope that the complainant would not continue with the matter.⁵⁷ Similar concerns as to the impact of delay in finalising proceedings have been identified in other overseas studies.⁵⁸

2. Indirect effect – lessening witness credibility

Apart from the direct impact on complainants and witnesses – and those defendants whose trial is delayed when they would have wished it to occur more speedily – there is a very important secondary effect of delay. That is the impact on memory of lapse of time, a lapse which is more marked in relation to peripheral details. Most witnesses will remember events less accurately as time goes by. Further, whether or not there has in fact been a diminution of accuracy, defence counsel may more readily and plausibly suggest that witnesses no longer have a fully accurate recall of significant events because peripheral details are not recalled accurately or at all.⁵⁹ Fading of memories and consequently quality of evidence over time is also mentioned elsewhere as a significant factor militating against delay.⁶⁰

3. Indirect effects – delaying recovery of victims

A key element of delay in court proceedings is that it prevents witnesses from making as speedy a recovery from the effects of the offending as might otherwise have been the case. Lengthy proceedings are likely to require the victim to re-live the experience over a long period and thus to keep the memory relatively fresh. That in turn may delay recovery.⁶¹

Delay issues and their consequences may be particularly significant for child complainants, because any significant delay will have occupied a proportionally greater fraction of their life to date.⁶²

For example, a child who makes a disclosure at eight years old, and waits two years for the process from disclosure to initial investigation to videotaped evidence to charges being laid to the trial, has spent a fifth of their life engaged with this issue, and a quarter of the life for which they have memory. For some, the time of involvement with allegations and being a witness results in their life being experienced as “on hold” for a significant time of their life.

It is therefore particularly important to eliminate unnecessary delays in cases involving child victims of sexual offending.⁶³

57 Ibid, at 56.

58 Victims of Crime Coordinator *A Rollercoaster Ride, Victims of Sexual Assault: Their Experiences with and Views about the Criminal Justice Process in the ACT* (ACT Government, Canberra, 2009) at 27; Bacik and others, above n 47, at 11.

59 Temkin, above n 49, at 235-236; JD Jackson “Law’s Truth, Lay Truth and Lawyers’ Truth: The Representation of Evidence in Adversary Trials” (1992) 3 *Law and Crit* 29 at 42-43.

60 Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women’s Affairs, 2009) at 118.

61 Institute of Criminology at Victoria University of Wellington *Rape Study (Volume 2)* (Department of Justice, 1983) at 153.

62 Fred Seymour and others *NZ Psychological Society Response to Ministry of Justice Alternative pre-Trial and Trial Processes For Child Witnesses In New Zealand’s Criminal Justice System Issues Paper* <www.psychology.org.nz/cms_show_download.php?id=1220>, at [11].

63 Judy Cashmore and Patrick Parkinson “What Responsibility Do Courts Have to Hear Children’s Voices?” (2007) 15 *International Journal of Children’s Rights* 43 at 48.

III. POSSIBLE SOLUTIONS

Recent changes to the committal process and to the disclosure process have had some significant impact in reducing the time taken in most proceedings.⁶⁴ Some significant further shortening of the period between charge and trial may be effected if the Criminal Procedure (Reform and Modernisation) Bill 2010 is enacted, particularly if – as is discussed below – a regime of defence identification of disputed issues is introduced. Such a regime is intended overall to allow a quicker focus on the real issues. It may also avoid unnecessary interlocutory applications. Whether the projected savings of time will be achieved is debateable, given the strong interest many defendants have in trying to delay the functioning of the criminal justice system.

One solution advocated in New Zealand is the enforcement of stable court dates to avoid the considerable psychological and practical disruption which is caused by court dates being moved at short notice, something which is of particular concern in larger urban areas.⁶⁵ Such changes may have significant negative impacts on victims.⁶⁶

A. Balancing the scales between victim and defendant – creating a regime of defence disclosure or limiting the right to silence.

1. The concerns

Several surveys of victims of sexual offending which has resulted in a court trial have indicated that victims frequently believe that the process has been unfair because there was undue focus on the conduct of the victim and the defendant was able to escape similar scrutiny if he or she did not give evidence. Suggestions by victims and bodies considering reform of the law relating to trial on sexual offences have often recommended either a limitation on the defendant's right to silence⁶⁷ or a requirement that the defendant disclosed at an early stage of the proceedings the intended defence to the charges, or both. Indeed some surveys seem to have made little differentiation between the two.

For example the Task Force for Action on Sexual Violence considered that a fairer trial would result if there was a better balance of focus at the trial on the actions and behaviours of the accused as well as those of the victim.⁶⁸ Later the Task Force Report makes it clear that concern was that where “a defendant does not give evidence, the complainant's testimony and credibility end up being the key focus of a trial”, something which complainants considered to be unfair.⁶⁹

64 See Summary Proceedings Amendment (No 2) Act 2008; Criminal Disclosure Act 2008.

65 Taskforce for Action on Sexual Violence, above n 9, at [59].

66 Kingi and Jordan, above n 34, at 79. Similar concerns have been expressed in England: Hamlyn, above n 50, at 37.

67 Public Issues Committee of the Auckland District Law Society *Sexual Crimes: Trial Process Needs Review* (Auckland District Law Society, 2002).

68 Taskforce for Action on Sexual Violence, above n 9, at 51.

69 Ibid.

The Task Force recommended that there should be a specific provision requiring a judge in a sexual offence case to direct the jury that an adverse inference against the accused may be drawn where the accused has not given evidence at the trial,⁷⁰ as well as recommending a more general provision for defence disclosure which would require the defence in sexual violence cases disclose the grounds of the defence and the names of any witnesses ahead of the trial.⁷¹

2. The current law

The right to silence is specifically guaranteed to persons arrested by section 23(4) New Zealand Bill of Rights Act 1990. For current purposes and in the context of the New Zealand legal system the core elements of the right to silence are that a person cannot be compelled to answer questions, in or out of court, where the answer might incriminate the person questioned; cannot be compelled at trial to give evidence; and is immune from adverse comments being made at trial on the failure to give evidence or to answer questions at an earlier stage of the proceedings. The last of these elements – the right not to have adverse comment made – does not necessarily extend to a right not to have adverse inferences drawn from silence at the trial or at an earlier stage of the case. It is at least arguable that judges sitting without a jury may draw adverse inferences from silence.⁷²

The Evidence Act 2006 provides that no comment can be made at the trial on the fact that a defendant did not before the trial answer questions put to, nor respond to statements made to, the defendant nor can comment be made on a failure to disclose a defence before trial.⁷³ Further, neither counsel nor the judge may invite the fact-finder to draw an inference of guilt from such failure and where the case is being tried by judge and jury the judge must direct the jury that the jury is not permitted to draw an inference of guilt from a failure either to answer questions or to advance the defence before trial.⁷⁴ The position is different where a defendant does not give evidence at trial. Comment on the fact that the defendant did not then give evidence may be made only by the defendant, the defendant's counsel or the judge.

The right not to have to make pre-trial disclosures is sometimes said to be part of the right to silence,⁷⁵ but it is not always treated as such. For example in *Smith v Director of Serious Fraud Office*⁷⁶ Lord Mustill listed six components of the right to silence, none of which relate directly to defence disclosure. The starting point is that a court has no inherent or common law power to require a defendant to disclose any part of his or her intended defence before the trial.⁷⁷ All defence disclosure requirements must thus be imposed by statute. The Criminal Disclosure Act 2008 requires disclosure of

70 Ibid, at 60.

71 Ibid, at 60, 62 and 66.

72 J B Robertson (ed) *Adams on Criminal Law – Evidence* (looseleaf ed, Brookers) at [EA32.02].

73 Evidence Act 2006, s 32(1)(a).

74 Ibid, s 32 (2).

75 Robertson, above n 72, at [EA 22.01].

76 *Smith v Director of Serious Fraud Office* [1993] AC 1, [1992] 3 All ER 456.

77 *R v Livingston* [2001] 1 NZLR 167, (2000) 18 CRNZ 162 (CA), at 175; and at 169-170.

intended alibi evidence⁷⁸ and of a brief of evidence from any expert witness that the defendant intends to call at trial.⁷⁹ The Evidence Act 2006 requires the defence, where it intends to rely on hearsay evidence, to give notice of the intended evidence and details as to its provenance. A further obligation is to disclose an intention to call evidence which attacks the veracity of a co-defendant⁸⁰ or to call propensity evidence in relation to a co-defendant.⁸¹

3. Theory and analysis

It is essential that the difference between a regime of defence disclosure and a limitation of the right to silence is borne in mind at all times in the debate. The two may overlap to some extent but they are conceptually different and are aimed at different perceptions of the purpose of procedural rules regulating trial and pre-trial processes. In the analysis advanced by Duff et al, reproduced at the beginning of this paper, proposals for limitations on the defendant's right to silence are concerned with the "participation" element of a trial under which the emphasis is on calling the defendant to account and determining guilt or innocence. By contrast defence disclosure regimes are concerned primarily with efficient management of the legal process so as to minimise the consumption of resources while maximising the number of accurate trial outcomes. It is notable that most opposition to limitations on the right to silence or to the introduction of defence disclosure draw primarily on Duff et al's second conception of the trial – the issue of due process and protecting the individual against the wrongful exercise of state power.

Not only are issues to do with the right to silence and those to do with defence disclosure conceptually distinct but they are also clearly different in their operation. A defence disclosure regime requires the defendant to identify one or more (not mutually inconsistent) matters in dispute. This will mean, in most cases, a need early in the proceedings to settle on a single matter, or a restricted range of matters, which are to be relied on as exculpating the defendant. The right to silence means, quite simply, that the defendant need never put forward any exculpatory account at all and may simply put the prosecution to proof.

Two different bases exist for defence disclosure regimes. These, as indicated earlier, reflect the first and third of Duff et al's norms of the trial – calling to account and efficient case management. The key element in relation to call into account is that a defence disclosure regime requires the defendant to put forward at an early stage of the proceedings his or her basis for resisting the charge with the consequence that a subsequent change of ground will lower the likelihood that the exculpatory account will be credible. Where this basis for a defence disclosure regime is relied on it is essential that the defence make its position clear before there has been complete prosecution disclosure of its case. If the defence do not need to identify the disputed issue until

78 Criminal Disclosure Act 2008, s 22.

79 Ibid, s 23.

80 Evidence Act 2006, s 39.

81 Ibid, s 42.

disclosure has been made, there remains the possibility – which exists under the current law – that the defendant may construct an account fitted around and explaining the material disclosed by the prosecution.⁸²

Although many lawyers do as a matter of practicality identify informally issues that are in dispute as part of the negotiations or other pre-trial and changes,⁸³ the law cannot rely on defence counsel adopting particular tactics, not least because the defendant may refuse to permit their use. If there is to be a system of defence disclosure it will need to be mandatory and impose some form of penalty or disadvantage for non-compliance. The sanctions proposed in the Criminal Procedure (Reform and Modernisation) Bill 2010 are that: in judge alone trials an adverse inference may be drawn by the judge from the defendant's failure to indicate that the required time the issues in dispute; and in jury trials the judge may give leave to the prosecutor to comment on a failure to identify disputed issues and, more importantly, the judge may direct the jury that they are permitted to draw an adverse inference from that failure. However the jury must also be told that they may not convict solely on the basis of such an inference should they draw it.

4. What kind of change to the “right to silence” rules?

At the core of complainant dissatisfaction with the trial process is the fact that the complainant is required to give his or her evidence in detail and be cross-examined on and without any requirement that the defendant do the same.⁸⁴

In that sense the key issue is one of drawing adverse inferences, in appropriate cases, from the failure of the defendant to give an account of the process which can be questioned and challenged by the prosecution. As noted earlier, proposals have been made for an exception to the ‘right to silence’ principle in all sexual offence cases. Such a proposal is problematic in at least two aspects.

Firstly there will be a small number of sexual offence cases in which it might be unreasonable and unfair to the defendant to draw any influence from a failure to give evidence at trial. An extreme example is of a defendant who advances a defence of insanity. It would be manifestly unreasonable to draw adverse inferences from the failure of such a defendant to give evidence.

Secondly there will be problems in cases where a defendant is charged with both sexual offences and other offending. An exception to the right to silence which applied only to the sexual offences would require the jury to perform the difficult task of allowing themselves to draw adverse inferences in relation to the sexual offences but not in relation to the other offences charged.

82 Mossman and others, above n 60, at 104-105; Igor Judge, President of the Queen's Bench Division “The criminal justice system in England and Wales – Greater efficiency in the criminal justice system: Time for change?” (speech delivered in Sydney, August 2007).

83 New Zealand Law Commission *Criminal Pre-trial Processes: Justice through Efficiency* (NZLC R89, 2005) at 50-51.

84 Mossman and others, above n 60, at 103-104.

These difficulties can be resolved if, rather than having a blanket rule, some form of judicial discretion is conferred. The nature of that discretion would need to be carefully considered. It might for instance be provided that while the finder of fact may draw adverse inferences from a failure to give evidence the judge has a discretion to either not draw such inferences or to direct the jury not to do so. Alternatively the onus could be on the prosecution to establish to the judge's satisfaction that there is a proper case for the judge to draw, or permit to be drawn, adverse inferences from silence.

Conferral of such a discretion might allow the alignment of the law as to judicial comment adverse inferences in sexual cases with that applying to allegations of criminal conduct or other misconduct by prosecution witnesses which are made by a defendant who does not then give evidence. It might be thought proper to allow adverse inferences to be drawn where a defendant challenges the veracity of the complainant, or alleges misconduct on the complainant's part, but does not then give evidence and be subject to cross-examination.

5. Issues as to the form of defence disclosure.

It is common ground that in the majority of sexual offence trials the only two persons who could give direct evidence of the alleged offending are the complainant and the defendant. This does, to some extent, mark the sexual offence area off from other types of criminal conduct. Further defence disclosure regimes may work well in sexual offences cases because the potential defences open to a defendant are largely incompatible (identity, denial of activity, accidental touching, consent, reasonable belief in consent) and thus (in theory) defendants can readily indicate the basis of a challenge to the prosecution case.

The Criminal Procedure (Reform And Modernisation) Bill 2010 will create a defence disclosure regime under which the defence must notify the prosecutor of any particular elements of the offence that the defendant contends cannot be proved; and any particular defence, justification, exception, exemption, proviso, or excuse on which the defendant intends to rely.⁸⁵ While that clause would require identification of the issues in dispute, they do not go as far as requiring the defendant to indicate what evidence will be called by the defence in relation to those issues. In particular there is no requirement that the defence give notice as to the intention of the defendant to testify or not to testify. One significant limitation on the defence is that it may not identify as disputed issues matters which "if the defendant's contention in relation to each were to be accepted, would be mutually contradictory".⁸⁶

The regime proposed in the Bill does not go as far as has been recommended by the Task Force for Action on Sexual Violence in that it will not require, in the majority of cases, disclosure of the names of intended witnesses or the evidence to be given by those witnesses. It will however almost inevitably require notice of the nature of the defence to be relied on (identification, consent etc).

85 Criminal Procedure (Reform And Modernisation) Bill 2010, cl 64(1).

86 Ibid, cl 67(c).

The New Zealand proposal is similar to defence disclosure legislation enacted in several of the Australian states. Those statutes are largely premised on efficiency grounds so as to avoid the need for formal proof of matters not in contention between the parties.⁸⁷ While the regimes are not identical they have as common elements the requirements that the defence disclose intended alibi evidence and intended expert evidence (including the identity in each case of the witnesses to be called), and – in most cases – the matters which are in dispute between prosecution and defence.

A more far-reaching regime has been created in England by the Criminal Procedure and Investigations Act 1996 which requires the defence to file a written “defence statement” which sets out:⁸⁸

[T]he nature of the accused’s defence, including any particular defences on which he intends to rely...the matters of fact on which he takes issue with the prosecution...why he takes issue with the prosecution, and...any point of law...which he wishes to take, and any authority on which he intends to rely for that purpose.

The defence must also provide the name and address of witnesses to be called in support of an alibi, or details helping to find or identify any such witnesses.⁸⁹

The statutory scheme is amplified by the Criminal Procedure Rules 2010 which have an overriding objective to ensure that criminal cases are dealt with “justly”.⁹⁰ Dealing with a criminal case justly includes “acquitting the innocent and convicting the guilty;” “dealing with the prosecution and the defence fairly;” “recognising the rights of a defendant;” “respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;” and “dealing with the case efficiently and expeditiously”.⁹¹ Each participant in a criminal case is under a duty to comply with these new Rules and to “prepare and conduct the case in accordance with the overriding objective.”⁹²

This regime has been highly controversial. The key point under the Rules is that if the defence do not make disclosure of an issue and in dispute as to an element of the offence, the judge may prevent the defence from relying on that matter at trial if the prosecution failed to establish it as a necessary element of the offence.⁹³

6. Inconsistent defences?

The requirement in the Criminal Procedure (Reform and Modernisation) Bill that a defendant may not identify as being in dispute issues which are mutually inconsistent may be most important in the sexual offence context. It would, for example, prevent the identification in an indecent assault case of accidental touching and consent as issues in dispute. The major question in the context of sexual offences is whether this would prevent a defendant from

87 See for example Crimes (Criminal Trials) Act 1999 (Vic), s 1.

88 Criminal Procedure and Investigations Act 1996(UK), s 6A(1).

89 Ibid, s 6A(2).

90 The Criminal Procedure Rules 2010 (UK), rule 1.1(1).

91 Ibid, rule 1.1(2).

92 Ibid, rule 1.2(1)(a).

93 *R v Penner* [2010] EWCA Crim 1155.

raising as issues in dispute both consent and a reasonable belief in consent although consent was absent. Under the current law it appears common for defendants to argue in the alternative that the defendant actually did consent to sexual contact or that although there was no consent the defendant believed on reasonable grounds that consent had been given.

On a logical analysis these two defences are inconsistent in that they take contradictory stances as to the fact of consent. It will be vital in any form of defence disclosure regime for sexual offending that this point is specifically addressed. The point is important because it must shape significantly the way in which the defence conducts any challenge to the complainant's evidence. If the defence is simply that there was consent, the focus must be solely on that matter. If the defence is that the defendant had formed a reasonable belief in consent there will be no room for cross-examination as to actual consent. The complainant, and the prosecution, will know ahead of time what is alleged and the judge will be in a far better position to control cross-examination which touches on matters which are irrelevant to the issue actually relied upon.⁹⁴

IV. CONCLUSION

While there is a very substantial body of research into the shortcomings of the current process for the handling of sexual offence cases in the criminal justice system, comparatively little of this research has focused on procedural matters. In particular there has been no systematic study of the interaction of different procedural rules nor is the extent to which the cumulative effect of several decisions on different procedural points may affect the case as a whole. Nor have the particular concerns of participants in sexual offences cases featured prominently in general studies of procedural reform. The issues discussed in this paper are only some of those which need to be considered in any review of the process for trial of sexual offence cases. However it is evident that there is very considerable scope for changes to be made to particular rules so that interests of victims of sexual offending can be better accommodated and protected without imperilling the basic requirement that criminal trials be fair. A systematic study of the procedural issues – beginning with the principal issues raised here – which identifies coherent bases for change can then proceed without great difficulty to modify the existing rules appropriately. The aim must be to achieve a body of procedural law designed to allow cases to proceed through a streamlined, efficient and harmonious process. Any such reform process have the twin aims of producing more accurate outcomes in terms of convicting the guilty and acquitting the innocent and reducing the significant and unfair negative impact on victims of sexual offending.

94 During the discussion at this paper at the workshop the validity of the argument given here was strongly controverted on the basis that consent and a reasonable belief in consent are not mutually exclusive. It is suggested that the correct position is that "actual consent" and "reasonable belief in consent although consent was absent" are mutually exclusive. A different composite defence of "reasonable belief in consent because the victim actually consented or behaved in such a way as to lead the defendant to believe there was consent" does not raise the same issues of inconsistency.