THE VIEWS OF COMPLAINANTS AND THE PROVISION OF INFORMATION, SUPPORT AND LEGAL ADVICE: HOW MUCH SHOULD A PROSECUTOR DO?

Elisabeth McDonald*

> The complainant is often left feeling like a peripheral player in their own case…Having seen myself how marginalised complainants are in the legal process I could not myself go through it unless it was a stranger or significant public safety issue.[1]
>
> Not every report of rape will result in a successful conviction, but it is this government's ambition that every report be treated seriously from the point of disclosure; that every victim be treated with dignity; and that every investigation and prosecution be conducted thoroughly and professionally, without recourse to myths and stereotypes.[2]

I. Introduction: The Role of the Victim – The Current Debate

The Ministry of Justice has recently outlined the benefits of a criminal justice system that is "responsive" to victims.[3] It is argued that these benefits are twofold: a greater focus on victims will assist in reducing the cost and impact of crime, and improved responsiveness to victims "will enhance the effectiveness of, and public confidence in, the criminal justice system" seen as essential to ensuring that victims report crimes.[4]

But what does it mean to "focus on victims" and be "responsive to victims"? Does this involve giving victims certain enforceable rights at various stages of the criminal justice process? Does it allow a victim to actively participate in decisions made with regard to the case? Or is it limited to ensuring that victims are provided with information about the process they will be a part of?

The proposals in the Ministry of Justice's Public Discussion Document are stated to have the effect of improving the "victim's role within the criminal justice process by providing for more communication between victims and prosecutors to ensure that victims have the opportunity *to be more involved in the case*."[5] The appropriate level of victim involvement in a case is, however, a much debated issue. The relevant context must be taken into account. In New Zealand, the debate must consider the current adversarial trial process as well as other aspects of the historical, cultural and social context.

Those in favour of an increased role for victims, or who support victim-centered reforms, often argue that the imbalance between defendant rights and victim rights needs to be addressed. Victims in fact often express

* Elisabeth McDonald, Associate Professor of Law at Victoria University of Wellington

1 Elaine Mossman and others *Responding to Sexual Violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, 2009) at 121.

2 Home Office *Government Response to the Stern Review* (2011) at 17.

3 Ministry of Justice *A Focus on Victims of Crime: A Review of Victims' Rights – Public Consultation Document* (2009) at 4.

4 Ibid.

5 Ibid, at 5 (emphasis added).

concern that they do not have a say in what happens at various stages of the process, unlike the accused. Further they have to be subject to processes, such as undesirable cross-examination, which the defendant may avoid.[6] The Ministry of Justice also uses the rhetoric of balance:[7]

> We believe that it is possible to find a balance between improving the involvement of victims in the criminal court process and upholding the principled, professional operation of the system including the rights of the defendant.

However, the arguments of increased involvement on the basis of fair balancing is problematic when it is unclear what is being balanced and what weight is being given to the potentially competing interests. In the words of Ian Edwards:[8]

> We cannot justify granting participation rights to victims simply because they are rights enjoyed by defendants; the justification for granting certain rights to defendants might be inapplicable to victims. For example, legal representation for the defendant is crucial to ensure that he receives a fair trial, and is not subject to the unrestrained power and resources of the state. However, legal representation for a *victim* cannot be justified on these grounds, as the victim is not in a position of inequality vis-à-vis the state.

Further, although some victims may want more involvement, it is the State's responsibility to manage the decision-making in the criminal justice system (as it is currently conceived) and there should not be burdens or expectations of decision-making placed on all victims, regardless of their individual preferences.[9] State oversight of decision-making is also more likely to result in consistency and predictability of treatment – which is very important when considering the impact of variable outcomes on a defendant.

It is therefore important to consider what kind of participation is appropriate or desirable for victims. Edwards draws a distinction between dispositive and non-dispositive participation – where dispositive participation gives a victim control over certain aspects of the process.[10] Under this form of participation the prosecutor would, for example, be under an obligation to find out the victim's preference and to act on it but the victim would also have an obligation to supply such a preference. Non-dispositive participation includes consultation; the provision of information; and, expression. In these forms the victim is not the decision-maker but they are in a position to potentially influence the particular decision. These need to be contrasted to the form of non-participation that Edwards refers to as "receiving information" – where the victim is told of the outcome of a decision but is merely a passive recipient and has no input into the decision-making process.[11]

6 See Amanda Konradi *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger, London, 2007).

7 Ministry of Justice, above n 3, at 25.

8 Ian Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 Brit J Criminol 967 at 972.

9 Andrew Ashworth "Victims' Rights, Defendants' Rights and Criminal Procedure" in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, Dartmouth, 2000) at 198.

10 Edwards, above n 8, at 974.

11 Ibid, at 976-977.

All of these types of participation and non-participation could form part of a victim's interaction with the various players within the criminal justice system at various times. In thinking particularly about victim control over outcomes however, it needs to be asked whether this is possible to do "whilst upholding principles of rationality, consistency and objectivity".[12] This has particular importance when considering the role of the prosecutor who is required to make independent decisions.[13]

Victims have regularly asked to have more information made available to them about the process and the role of the various individuals within it. As discussed below, there has been recognition of the importance of doing this – although at present there seems to be a lack of consistency across the country with regard to who imparts this information and at what time. It is also not clear that the information is given at a time or in a way that meets the diversity of needs of victims.[14]

There are already points at which the victim's views are required to be ascertained and considered when a decision is made – for example, with regard to decisions about bail,[15] plea discussions,[16] and alternative ways of giving evidence.[17] Unlike a dispositive form of participation, this kind of consultation will not necessarily yield an outcome consistent with the victim's wishes. Their desires will be weighed against other factors (for example, fair trial matters).[18] With this type of participation the matters for consideration are again consistency of treatment across the country and, most importantly, that consultation is undertaken in a timely way by the most appropriate person. There are also issues as to whether the victim should be consulted about other matters, for example, admissibility of sexual history evidence.

Victim *control* over decision-making is most contentious, given the existing roles of the prosecutor, the judge and defence counsel in particular. In this paper, I do not advocate for victim control (that is, the victim as party or decision-maker) but rather an increase in the number of stages in the process at which the victim can participate through *meaningful* consultation. One way of achieving increased representation of victims' views, or to use the words of the Ministry of Justice, victim *involvement*, is to require more points of contact between the victim and the prosecutor.

12 Ibid, at 980.
13 Crown Law Office *Prosecution Guidelines* (2010) at [4.1] [*Prosecution Guidelines*].
14 Mossman and others, above n 1, at 128.
15 Crown Law Office *Prosecution Guidelines*, above n 13, at [14.6].
16 Ibid, at [16.6]
17 Crown Law Office *Victims of Crime – Guidance for Prosecutors* (2010) at [24] [*Guidance for Prosecutors*]; Evidence Act 2003, s 103(4)(b).
18 Evidence Act 2006, s103(4).

II. The Role of Prosecuting Counsel

A complainant in a sexual case is "just a witness" (even though they are usually the primary witness), so they do not have their own representation. Many complainants are unaware of their true status, however, and view prosecuting counsel as "their lawyer". For obvious reasons, this creates unrealistic expectations and a high level of dissatisfaction. Even those who do understand their position as a witness, rather than a party, have historically reported that lack of contact with the prosecution, which means lack of information and a sense of lack of support (or of having someone "on their side") adds to the difficulty they experience as a complainant. In particular, victims may experience a sense of disempowerment and irrelevancy.[19]

Regardless of how well informed they are as to the role of prosecuting counsel, complainants have historically held them responsible for not protecting them more from the distressing aspects of cross-examination. Research indicates that prosecutors could be more pro-active with regard to preventing inappropriate or irrelevant questioning of complainants, but may choose not to do so for tactical reasons.[20] The prosecutor "may consider that floods of tears strengthen the witness's credibility, and consequently sit back and let the defence do its worst."[21]

The extent of complainant disappointment with prosecutors who are seen as failing to protect their interests is not jurisdiction-specific. Most of the research that examines the experience of women complainants in sexual cases concludes that the majority of prosecuting counsel are viewed as adding to the difficulties of the trial process, rather than alleviating it.[22]

19 See Elisabeth McDonald "Real Rape in New Zealand: Women Complainants' Experience of the Court Process" (1997) 1 Yearbook of New Zealand Jurisprudence 59; Venezia Kingi and others *Responding to Sexual Violence: Pathways to recovery* (Ministry of Women's Affairs, 2009) at 93; Konradi, above n 6, at Chapter 4; Sara Payne *Rape: The Victim Experience Review* (Home Office, 2009); Ivana Bacik, Catherine Maunsell and Susan Gogan *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, Dublin, 1998); Gender Bias and the Law Project *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (NSW Department for Women, 1996).

20 See Jonathon Doak "Victims' Rights in Criminal Trials: Prospects for participation" (2005) 32 Journal of Law and Society 294 at 307.

21 Jenny McEwan "The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union" (2009) 10 ERA Forum 369 at 383.

22 See Konradi, above n 6; Joseph R Gillis and others "Systemic Obstacles to Battered Women's Participation in the Judicial System: When Will the Status Quo Change?" (2006) 12 Violence Against Women 1150; Lisa Frohmann "Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management" (1998) 45 Social Problems 393; Payne, above n 19, at 22. But see Mark R Kebbell, Caitriona M E O'Kelly and Elizabeth L Gilchrist "Rape victims' experiences of giving evidence in English courts: a survey" (2007) 14 Psychiatry, Psychology and Law 111; ACT Government *A Rollercoaster Ride: Victims of Sexual Assault: Their experiences and views about the Criminal Justice process in the ACT* (ACT Government, 2009) at 20.

A. Meeting with the Complainant Pre-trial: How often and for what purpose?

A number of jurisdictions have recommended initiatives to address some of these concerns – focussing initially on greater communication with complainants. One of the recommendations of the Crime and Misconduct Commission in Queensland was that:[23]

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

The Fawcett Society's Commission on Women in the Criminal Justice System also recommended that:[24]

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

In the Ministry of Justice's 2009 Consultation Document, *A Focus on Victims of Crime: A Review of Victims' Rights*, Preliminary Proposal 5 was that "prosecutors offer to meet with (or otherwise contact) victims of serious crimes if possible at a time prior to the first court hearing."[25] Research suggests that meeting with prosecutors prior to trial is likely to ensure victims feel better prepared and more involved in the criminal justice system.[26] A study by Kingi and Jordan found that when victims of sexual offending were asked what could be done to improve the court process, one of the suggestions was to meet with the Crown Prosecutor at an earlier time.[27]

Sometimes it is argued that prosecutors should not have contact with victims before trial. The usual rationale for such an argument is that prosecutors should act dispassionately and represent the public interest, rather than that of an individual victim.[28] It is also argued that restricting pre-trial discussions with victims eliminates the possibility for witness coaching. However, these concerns ignore certain aspects of the current New Zealand

23 Crime and Misconduct Commission *Seeking Justice: An Inquiry into how sexual offences are handled by the Queensland criminal justice system* (Crime and Misconduct Commission, 2003) at xxiii.

24 Commission on Women and the Criminal Justice System *Women and the criminal justice system* (Fawcett Society, 2004) at 21.

25 Ministry of Justice, above n 3, at 27.

26 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 81-83.

27 Most victims only meet the prosecutor on the day of the trial. See Kingi and others, above n 19, at 83, 102.

28 Ministry of Women's Affairs *Alternative models within the criminal justice system: How adversarial and inquisitorial justice systems treat sexual violence, and possible measures which the criminal justice system in New Zealand could draw on for victims of sexual violence: Background Paper* (Prepared for Taskforce for Action on Sexual Violence working group by Ministry of Women's Affairs, 2009) at 10. See also Crown Law Office *Prosecution Guidelines*, above n 13, at [17.2.3]: "the prosecutor must not display what could appear to be a personal interest in the outcome, and must act with regard to the overarching values of fair trial."

criminal justice system. First, contact already occurs between prosecutors and witnesses with no significant concerns being expressed that prosecutors have lost their objectivity.[29] Secondly, prosecutors are professionals. As officers of the court they have a duty to behave professionally and dispassionately. This is reinforced by their obligations under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, particularly rule 13.12 which requires a prosecutor to act fairly and impartially and to present the prosecution case with professional detachment. Meeting with a victim prior to trial is unlikely to override these obligations and inhibit the prosecutor's independence. Prosecutors, as with all lawyers, are presumed to have the ability to appropriately balance their professional ethics and responsibilities with their personal views.[30]

Thirdly, although victims are not parties to criminal proceedings in a legal sense, it is important to acknowledge the role they play in such proceedings as witnesses and the negative effect that such proceedings can have on them.[31] There is evidence that one of the reasons that victims do not report such offences is their fear and distrust of the criminal justice system.[32] Enhancing the experience of victims may have a flow on effect for reporting and conviction rates.[33] Even if this is not the case, improving the experiences of individual victims in the criminal justice system is a valuable outcome in and of itself. The Evidence Act 2006 also expressly recognises, in s 6(c),that promoting fairness to witnesses is an important purpose of the Act. In the words of Dan Jones and Josie Brown:[34]

29 For example, "prosecutors must make all reasonable efforts to ensure any views of the victim are put before the Court where an application for bail is made…": Crown Law Office *Prosecution Guidelines*, above n 13, at [14.5]. Presumably the usual way to find out about the victim's views is to meet with them.

30 This is supported by an evaluation of a pilot programme in England and Wales where prosecutors undertook witness interviews (including interviews with victim witnesses) prior to trial. The authors of the evaluation found that the prosecutors were generally aware of the need not to coach a witness in their substantive evidence; Paul Roberts and Candida Saunders *Pre-trial Witness Interviews: Interviewing prosecution witnesses* (Crown Prosecution Service, 2007).

31 One such example is the comments made by a witness (who had been a complainant in an earlier, related, sexual assault case) in *R v Mangnus* HC Auckland CRI-2006-004-7577, 16 August 2007: "[The complainant] has sworn a supporting affidavit in which she says she found giving evidence at the 2005 [sexual assault] trial was a very stressful ordeal. She had to relive the whole event of being raped by a number of different men. At one stage during her evidence the trial judge granted a brief adjournment because she felt she was going to faint. In a similar manner, the victim described the trial process as "horrible and humiliating" in *R v Keen* DC Timaru CRI-2008-076-002472, 2 December 2009 at [10] (as reported in the *Timaru Herald,* 3 December 2009).

32 Denise Lievore *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Commonwealth Office of the Status of Women, Commonwealth of Australia, 2003) at 28-34; 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 9; Pia van de Zandt "Heroines of fortitude" in Patricia Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, Sydney, 1998) at 107; Kingi and others, above n 19, at 58.

33 McEwan, above n 21, at 369.

34 Dan Jones and Josie Brown "The Relationship between Victims and Prosecutors: Defending Victims' Rights? A CPS Response" [2010] Crim LR 212 at 225.

> It does not necessarily compromise the independence of the prosecutor to be fully aware of the needs and concerns of an individual victim or witness, and to take the necessary steps to temper the often traumatic experience of being an unwilling part of the criminal justice system…Taking proper account of the needs of victims and witnesses is critical to persuading them they have a meaningful role in the criminal justice system and helping them understand what that role is.

There is no doubt that complainants prefer to meet the prosecutor before trial – and preferably more than once, and not just immediately before the trial. However, whether or not this is desirable or practicable depends in part on the purposes of the meeting. A guideline document *Victims of Crime – Guidance for Prosecutors* ("*Guidance for Prosecutors*") was issued by the Crown Law Office in January 2010 and provides that the "prosecutor should meet with the victim before the trial to discuss the giving of evidence and any issues that are likely to arise."[35] It is not clear what the content of such a meeting is expected to be. However, the timeliness of such a meeting may impact on what is discussed and the effect it has on the complainant in terms of his or her preparedness for trial. A meeting just before the trial to effect introductions and to go over the time and place of giving evidence will be helpful, but it will not necessarily prepare the witness effectively. If the content of the discussion is about what the complainant might expect by way of cross-examination, then clearly the day before or the day of the trial is not the appropriate time for this to occur.

The New Zealand Law Society did not agree, as stated in the Ministry of Justice's Preliminary Proposal 5, that the meeting with the prosecutor should occur before the first court hearing: "It would be more appropriate for prosecutors to meet with the victims prior to the trial. There is little point requiring an earlier meeting, as the defendant may plead guilty."[36] Leaving this issue to one-side for now, the Law Society's further concern with the proposal was the proposed purpose of the meeting:[37]

> Paragraph 86 states that the purpose of the meeting between the prosecutors and the victim is to familiarise the victim with the general court processes and procedures, and to outline the role of the prosecutor and what they (the victim) can expect from the case.
>
> We do not object to victims being provided with this information, but we query whether the prosecutor is the most appropriate person for this role. We would prefer to see the Police Officer in Charge (O/C) or Victims Advisors to perform this function, *as many do*, as a matter of routine under our current regime [emphasis added].

Therefore, an explanation of the role of the prosecutor and information about the general court processes is not something that the Law Society believes should be imparted to the victim prior to trial by the prosecutor. The meeting referred to in *Guidance for Prosecutors* must therefore involve matters other than these. Presumably this will involve outlining how the victim will give evidence and what questions "are likely to arise". Such a meeting must therefore take place a reasonable time in advance of the trial, so that the victim has time to reflect on this advice, and may in fact have

35 Crown Law Office *Guidance for Prosecutors*, above n 17, at [14].
36 New Zealand Law Society *A Focus on Victims of Crime – A review of victims' rights* (2010) at 2.
37 Ibid.

some further information in response to give to the prosecutor as a result of this discussion. This meeting may therefore be more akin to the pre-trial interviews possible in England and Wales, which are discussed further below.

I now return to consider the issue of the timing of any meeting. The Law Society has expressed the view that there is no point in a meeting until prior to the trial itself. However, there may well be an important role for the prosecutor to play well in advance of a trial – in particular with regard to decisions about which charges to lay and whether there is to be any change to such charges. The Ministry of Justice's Preliminary Proposal 6 in fact suggests that prosecutors should tell victims why it is necessary to change the charges laid.[38] The Law Society's response to this proposal was that their preference is for the Police Officer in Charge to convey such information to the complainant. The Society also referred to paragraph 16.6 of the *Prosecution Guidelines* which require that "[t]he victim or complainant must be informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor."[39] Again, it seems to be the Law Society's preference that information as to the complainant's views or position should come via the Officer in Charge, not from the prosecutor.

In cases when there is a death, paragraph 16 of the *Guidance for Prosecutors* provides that the prosecutor will "on request meet the family of someone killed as a result of a crime and explain a decision on prosecution." No similar provision is made in this regard concerning victims or complainants in cases of sexual offending, although specific mention is made of them elsewhere in the *Guidance for Prosecutors*.[40] This seems to draw a distinction between informing the "primary witness" of the prosecution decisions as compared to informing the family of the victim. In both cases those potentially receiving the information are likely to be victims of offending under the Victims Rights Act 2002 and may well be also witnesses. It is not immediately apparent why such a distinction is made in the *Guidance for Prosecutors*.

By contrast, in England the CPS Policy provides that after receiving the evidential report from the Police the prosecutor must tell the victim if there is insufficient evidence to lay charges. There is a similar obligation to inform the victim if the prosecutor decides to drop a case or alter the charges. Such information will normally be conveyed in a letter explaining the reasons.[41] In a rape case, the prosecutor who made a decision to drop or alter the charge will notify the victim within one working day and will offer to meet the victim to explain reasons.[42]

38 Ministry of Justice, above n 3.
39 Crown Law Office *Prosecution Guidelines*, above n 13.
40 See Ibid, at [13]-[16].
41 Crown Prosecution Service *CPS Policy for Prosecuting Cases of Rape* (2009) at [10.3].
42 Ibid, at [10.4]. The police may also personally deliver an explanatory letter to the victim, at [10.5].

1 Consultation about evidential rules and procedures

Other aspects of the trial process which a complainant will want to know about is the possibility of any alternative ways of giving evidence and the physical layout of the courtroom, including (safe) access and waiting rooms. In *Guidance for Prosecutors* this information is seen as being appropriately delivered by Victim Advisors:[43]

> Prosecutors should ensure that victims have been referred to Court Services for Victims. Victim Advisers can assist by explaining the Court process, showing the victim the courtroom and ascertaining and communicating the views of victims. They can also ensure that victims with special needs have an appropriate support person organised in the courtroom if required and ensure that other special arrangements of the trial are made …
>
> In cases involving sexual offending the prosecutor should ensure that arrangements have been made for the victim to meet with a Victim Adviser or specialist support worker where available, before the hearing or trial, to explain the Court process and show the victim the Courtroom. Any alternative means of giving evidence (e.g. behind a screen) should be shown to the victim and explained.

This guidance again suggests that a third person is to convey the views of the complainant to the prosecutor – particularly, in this context, with regard to the use of alternative ways. The difficulty here is that a Victim Advisor, while certainly able to demonstrate how the alternative ways might work, is not in a position to say whether such means will be available to the particular complainant. Although the victim's preference might be conveyed back to the prosecutor, as it is the prosecutor who will be making any application for the use of alternative ways (or the attendance of a particular support person) and will be best placed to make the relevant inquires of the complainant and to advise as to likely outcome. In the words of a Victim Advisor:[44]

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

In England the CPS Policy provides that when it is decided that the prosecutor will make application for special measures (alternative ways of giving evidence) the prosecutor will ask police if the witness wants to meet with the prosecutor. It is the Police Officer or Witness Care Officer who will usually have received the relevant information regarding the application.[45] The stated purpose of such a meeting is "to build trust and confidence and enable us to reassure the witness that their needs will be taken into account. We will also offer such a meeting if we have decided not to apply for special measures so that we can explain that decision … Wherever possible, the CPS prosecutor will ensure that the advocate that will be conducting the

43 Crown Law Office *Guidance for Prosecutors*, above n 17, at [11], [13].
44 Mossman and others, above n 1, at 121.
45 Crown Prosecution Service, above n 41, at [7.9].

trial attends the meeting…"[46] This process addresses the concerns outlined above which might arise in the absence of any discussion directly between the prosecutor and the complainant.

Consulting complainants about their views before the decision to apply for the use of alternative ways is made will address the recently identified issue that complainants may not be aware of these protections, or know how to enforce them. In the Kingi study the researchers interviewed victims who had been involved in court processes. Only two of the 11 interviewed said they had been given a choice about the mode of giving evidence, although the authors acknowledge that as there were only a small number of interviews and the sample was not representative, these findings must be interpreted with caution.[47] Nevertheless, it is of concern that such a small proportion of interviewees felt they had been given a choice about the way in which they gave evidence. While not all complainants will wish to give evidence behind screens or via video link, it is important that they are advised of the possibility, not only to facilitate the way they give evidence, but also as a method of ensuring their involvement in their case.

Further, in the same study complainants were asked what they thought could be done to improve court processes for sexual assault complainants. Suggestions included using screens when complainants give evidence and having support available throughout for complainants.[48] A complainant is entitled under s 79 of the Evidence Act 2006 to have a support person near her when giving evidence and a screen may be used upon application (s 103 of that Act), as may other "alternative ways" such as CCTV or pre-recorded videotape. These suggestions by complainants who had been through the criminal justice system lend support to the conclusion that existing support mechanisms may not be adequately explained or outlined to complainants. Even if they are not utilised, there is still merit in ensuring victims are aware of the potential measures that may assist their experiences in the criminal justice system.

A useful amendment to s 12 of the Victims' Rights Act 2002 therefore might be to require victims of sexual offending to be given information about the possibility of giving evidence in alternative ways under s 103 of the Evidence Act 2006 and the entitlement to have a support person present while giving evidence under s 79 of the Evidence Act 2006. Although the availability of such assistance can be provided by a Victim Advisor, or even by way of a pamphlet,[49] as noted above there may be in most, if not all

46 Ibid, at [7.10]. The CPS has also issued a leaflet for victims providing information about meetings with the prosecutor, see http://www.cps.gov.uk/publications/prosecution/witnesseng.html.

47 Kingi and others, above n 19, at 20, 95. 84% of prosecutors interviewed thought that use of screens and closed-circuit television was a good idea if it helped the victim to relax and give clear coherent evidence: Mossman and others, above n 1, at 112.

48 Kingi and others, above n 19, at 102.

49 See Ministry of Justice "For Victims of Sexual Violence: Moving Through the Criminal Justice System" (2010) at http://www.justice.govt.nz/publications/global-publications/v/victim-information-sexual-violence/publication/at_download/file. Note however that this does not give information about the role of the prosecutor and, contrary to the NZLS views and the Prosecution Guidelines, indicates that the prosecutor "will help you if you have been called as a witness" and make sure victims know what support options are available and how

cases, a need for fuller discussion about the likelihood of such measure being available to the particular complainant. Unless the Victim Advisor has specialised training in this area,[50] such discussion should be undertaken with the prosecutor, or some other person with the appropriate knowledge and expertise.

The document *Guidance for Prosecutors* was issued after the Kingi study was published. It does state that when considering whether to seek directions for witnesses to give evidence in an alternative way "prosecutors should confirm the views of the victim; inform the victim of the directions made (if any); or explain why it is not considered appropriate to apply for a direction".[51] If it is in fact the prosecutor who undertakes these discussions with the complainant, these will need to be done at an early stage and therefore will increase the number of times the prosecutor is in contact with the complainant.

Although it is suggested that the complainant should be able to discuss issues of trial process with the prosecutor, including the availability of alternative ways of giving evidence, it is more contentious to suggest that the prosecutor should talk with the complainant about what kinds of questions that might be asked, or to gather more information from the complainant directly to assist with resisting an application under s 44 or supporting an application under s 37. The possibility of this role is discussed further below in the context of considering pre-trial interviews.

III. Other Sources of Information

Concern expressed in the research is not limited to the complainant's expectations of the role of the prosecutor. The lack of relevant and timely information provided to complainants by those working within the criminal justice system has long been criticised in many jurisdictions. For example, Recommendation 2 from *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault,*[52] focused on the need for better information and communication. The Victorian Law Reform Commission's *Final Report on Sexual Offences* also recommended on-going, specific training for prosecutors and members of the judiciary.[53] Recommendation 3 from the NSW Criminal Justice Sexual Offences Taskforce was that there

they work (at 14-15). A much more comprehensive and accessible publication written by women in 1993 could helpfully be updated and reprinted: see Wellington Community Law Centre *Rape Survivors' Legal Guide* (Wellington, 2003).

50 Currently Victim Advisors are not specially trained regarding sexual offending (see Mossman and others, above n 1, at 29 ff) – but they do provide advice and act as a liaison between victims and OIC and prosecutor. See also Kingi and others, above n 19, at 102.

51 Crown Law Office *Victims of Crime*, above n 17, at [24].

52 Gender Bias and the Law Project, above n 19, at 147.

53 Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (2004), Recommendations 35–41.

should be "immediate action taken to ensure there is consistent and accurate information in a variety of formats given to victims at the outset by service providers about their rights and the criminal justice system process."[54]

In New Zealand it seems to be accepted that "victims of crime find it frustrating having to deal with multiple government agencies to get information about the criminal justice system, their rights and how to access services".[55] That is, agencies accept that there is information that victims need to receive, but it is not delivered in a uniform way across the whole country, and sometimes it may be either not delivered at all or only in a limited way. Possible ways to address this concern is by the provision of some form of "one stop shop" for victims and to provide specialist advisors for victims of sexual offending.

A. Specialist Victim Advisors

Witness Care Units were first introduced in England and Wales in 2002 and are now available in all 42 CPS Areas:[56]

> The aim of Witness Care Units is to provide a single point of contact for victims and witnesses, minimising the stress of attending court and keeping victims and witnesses up to date with information about their case in a way that is convenient to them. They also carry out an assessment of the needs of victims with the aim of providing them with the right level of support necessary to help them through the criminal justice process. This is essentially an administrative exercise to impart and receive information – the unit staff are not Crown Prosecutors (many are police staff) – and neither do they have any involvement with casework decisions.

It is apparent from this explanation that although such Units who employ Witness Care Officers are a good source of information, the amount of either specialised or particularised information or support will be limited. Similarly the Ministry of Justice's[57] proposal to set up a centrally based Victims' Services Centre within the Ministry will assist with the delivery of consistent information but it cannot, and it is not proposed that it will, deliver individualised assistance relating to a particular case.

In England and Wales, Independent Sexual Violence Advisors (ISVAs) are currently based either in SARCS (Sexual Assault Referral Centres) or attached to other agencies or community groups. ISVAs are "expected to provide support, advice and information to victims, and to liaise with other relevant agencies on their behalf, in the expectation that this will reduce their fear and uncertainty over the criminal justice process and encourage their participation."[58] A recent review of the role of ISVAs indicate they have

54 Criminal Justice Sexual Offences Taskforce *Responding to sexual assault: the way forward* (Criminal Law Review Division, Attorney General's Department NSW, 2005). See also Kingi and others, above n 19, at 102.

55 Ministry of Justice, above n 3, at 4.

56 Jones and Brown, above n 34, at 219. See also Crown Prosecution Service, above n 41, at [7.33].

57 See Ministry of Justice, above n 3, at 15 ff.

58 Amanda Robinson *Independent Sexual Violence Advisors: A process evaluation* (Home Office Research Report 20, 2009) at 11.

added value to the existing victim services and provide "a much needed proactive and tailored service which [meets] the practical, non-therapeutic support and information needs of victims of rape and sexual violence."[59]

Victims were also positive about the ability of ISVAs "to do everything" which helped to prevent them feeling "shuttled between agencies".[60] There was also a view expressed from referral or partner agencies (like the Police) that the fact that the ISVAs could explain the criminal justice process to them "could enhance victims' engagement thereby potentially reducing attrition".[61] A report undertaken by Victims' Champion Sara Payne[62] agreed with the conclusion as to the added value of ISVAs while suggesting their efficacy is impacted on by a (usual) high case-load so that some are limited to providing only information.[63] Recommendation 19 of *The Government Response to the Stern Review* may well address this concern in that it states that ISVA are so crucial to the way "the State fulfils its obligations to victims of violence [that] funding should be available in all areas where the demand makes a post viable."[64]

In New Zealand six sexual violence court advisors were appointed in July 2010, something said to be done after consultation with TOAH-NNEST.[65] These are stated to be "trained and experienced advisors who understand the dynamics of sexual violence and the needs of victims of sex offences".[66] It is proposed there will be 18 sexual violence court advisors across the country by July 2012. The Ministry of Justice has, however, no specific job description for such specialist advisors – saying that there are no "specialist Victim Advisors, but Victim Advisors who manage sexual violence victims only."[67] That is, they are *dedicated* rather than *specialist* advisors. It is unclear whether the appointments will all have the appropriate experience and training, given there is no particular requirement in the Position Description. What is clear is that the role is not as a victim advocate but one of providing information and liaising with other participants in the criminal justice system, with one the of the relevant deliverables being to "[e]nsure victim's views and any issues/concerns are conveyed to the Police, Judiciary, Community Probation Service and the Crown Prosecutor; as appropriate and with the consent of the victim".[68]

59 Ibid, at iii.
60 Ibid, at 27.
61 Ibid, at xi.
62 For information regarding the role of the Victims Champion, see Ministry of Justice "Sara Payne appointed independent Victims' Champion"(2009) <http://www.justice.gov.uk/news/newsrelease260109b.htm>.
63 Payne, above n 19, at Annex B (this Report also suggests that the CPS is still not giving enough information and there is uneven support across geographical areas).
64 Home Office, above n 2, at 12.
65 Ministry of Justice *Government Response to Te Toiora Mata Tauherenga Report of the Taskforce For Action on Sexual Violence* (2010) at 11.
66 Ibid, at [26].
67 Email from Kathryn Patterson to Ellen Thomson regarding "Specialist Court Victim Advisors" (15 March 2011).
68 Ministry of Justice *Position Description: Victims Advisors* (2006). This position description dates May 2006 and is seemingly unchanged in relation to recruiting those who will only work with victims of sexual violence.

IV. Pre-trial Complainant Interviews

Overseas courts and writers have held that the prosecutor may properly familiarise witnesses with the process of the trial provided there is no discussion of the evidence so that the discussion can be categorised as witness preparation as opposed to amounting to coaching the witness.[69]

However, the role of the prosecutor has arguably been expanded to allow discussion of the evidence – a move viewed by some as objectionable on the grounds that it compromises desirable prosecution objectivity.[70] Pre-trial witness interviews – introduced nationally in England and Wales in 2008 after a pilot that began in 2006 – allow prosecutors to assess reliability and understand complex evidence and can take place both before and after the charge, must be recorded in audio or video, and can include "taking the witness through their statement, asking questions to clarify and expand evidence, asking questions related to character, exploring new evidence or probing the witness's account."[71] Although this is a tool for prosecutors it is seen as providing benefits to victims as it allows the prosecutor to explain processes and establish some rapport. Complainants may therefore have more confidence that the case is being dealt with in a professional manner.[72] This kind of option does, however, require the prosecutor to have had sufficient training or experience to be able to interact with victims in an appropriate way and to know what kinds of questions to ask so that the process has a positive outcome for both the prosecution and the complainant.

Such interviews would also satisfy the request from complainants to meet with the prosecutor in a timely way; to feel that they have been kept informed about the process and what they may expect and also given a chance to talk with the prosecutor about their story outside of the trial itself. Such an interview would be in keeping with the statement in *Guidance for Prosecutors* that the "prosecutor should meet with the victim [of sexual offending] before trial to discuss the giving of evidence and any issues which are likely to arise."[73]

As well as this kind of trial preparation meeting the stated wishes of complainants in sexual cases, there is also some empirical research that suggests that there are benefits in terms of "promoting the rational ascertainment of facts".[74] "Prepared" mock witnesses who received guidance

69 See *R v Momodou* [2005] 2 All ER 571 at [62], cited in Louise Ellison "Promoting effective case-building in rape cases: a comparative perspective" [2007] Crim LR 691 at 706.

70 See Laura McGowan "Prosecution Interviews of Witnesses: What More Will Be Sacrificed to 'Narrow the Justice Gap'" (2006) 70 JCL 351.

71 Jones and Brown, above n 34, at 222; see also Crown Prosecution Service, above n 41, at [7.12]; Association of Chief Police Officers, Crown Prosecution Service and National Police Improvement Agency *Guidance on Investigating and Prosecuting Rape (Abridged Edition)* (2010) at [6.2.2].

72 Jones and Brown, above n 34, at 224.

73 Crown Law Office *Guidance for Prosecutors*, above n 17, at [14].

74 See R Mahoney and others *Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV6.02], discussing the purpose provision in s 6 of the Evidence Act 2006.

on how to manage cross-examination (by seeking clarification of a complex question, for example) were "significantly more likely than their unprepared counterparts to provide factually correct responses during questioning."[75]

However, there is no doubt an inherent tension in the idea of the prosecutor as an objective "minister of justice" presenting evidence to the court dispassionately as part of the overall public interest in pursuing a conviction, while at the same time supporting or protecting the victim, through either regular objections to the questioning by defence counsel or by being obviously sympathetic to the plight of the complainant.[76] Of course this tension is understandable in an adversarial trial process where it is the parties who are responsible for calling the evidence and the judge sits as the neutral umpire. In an inquisitorial process the roles are reversed: "It is the judge who calls and examines the evidence and it is the lawyers who are there largely to ensure that the proceedings are fair".[77]

For this reason, a number of academics, policy makers and victims' advocacy groups have suggested the introduction of separate legal representation for complainants in cases of sexual offending.[78] These lawyers could be available at various times in the proceedings and could perform a range of different functions which the prosecutor or Victim Advisors are unable or ill suited to perform:[79]

> It might therefore be asked whether the victims or their legal representatives ought to be able to exercise a right of allocution within the criminal justice trial. This would save the prosecutor from having to juggle two roles which are ultimately incompatible.

Of course the need or desirability of separate legal representation does depend on how well victim concerns are being met at each stage of the process. More regular contact with prosecutors, or the use of an ISVA – who may sit in on regular meetings with police and prosecutors and report

75 See Louise Ellison and Jacqueline Wheatcroft "'Can you ask me that in a different way please?' Exploring the impact of courtroom questioning and witness familiarisation on adult witness accuracy" [2010] Crim LR 823 at 837. A literature review in 2002 also concluded that there are positive effects of witness preparation (reduction of stress, more likely to give best evidence etc) as compared to no preparation or insufficient preparation – see Reid Howie Associates *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions* (Scottish Executive Central Research Unit, 2002) at 88 ff.

76 See Doak, above n 20, at 306.

77 R Volger "Learning from the Inquisitors" (1994) L Ex 28 at 28, cited in Louise Ellison "A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems" (unpublished PhD thesis, University of Leeds, 1997) at 15.

78 See for example Ilene Seidman and Susan Vickers "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform" (2005) 38 Suffolk UL Rev 467at 481 ff; Doak, above n 20; Anne Cossins "Is There a Case for the Legal Representation of Children in Sexual Assault Trials?" (2004) 16 CICJ 160; Jennifer Temkin *Rape and the Legal Process* (2nd ed, Oxford University Press, New York, 2002) at 281 ff; also recommended by NSW Rape Crisis Centre and Anne Cossins "A Best Practice Model for the Prosecution of Complaints of Sexual Assault by the NSW Criminal Justice System" (2007) 1-10 at 8; Kingi and others, above n 19, at 102; South African Law Commission *Sexual Offences Report* (Project 107, 2002) at 233 ff; 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 at 260.

79 Doak, above n 20, at 307.

back to the victim – may well address the main concerns – as long as these consultation options are consistently available throughout the country. If not, the case for a complainant's own advocate is stronger.

V. Legal Representation for Complainants

Many civil law jurisdictions allow separate representation for complainants in sexual cases, in some contexts because a civil claim is heard together with the criminal case (the *partie civile* process in France, for example), but in other jurisdictions because State–funded legal representation is available for complainants as part of the criminal proceedings as secondary prosecutors (as for example in Germany where the Nebenkläger role is handled by a lawyer). In fact, in European jurisdictions where the criminal justice process is primarily "inquisitorial",[80] "virtually every country permits some form of independent legal representation for victims of sexual offending."[81] Some aspects of the role of these lawyers may not be easily accommodated within a traditional adversarial trial process (for example, the possibility of the prosecution *and* the complainant's lawyer cross-examining the defendant), but other aspects or forms of these representation models could operate within the current New Zealand criminal justice system.

One such possibility is the Danish model, which Jennifer Temkin argues could be adapted for England.[82] In June 1980, s 741 of the Danish Procedural Code was amended to provide that a lawyer was to be appointed at the victim's request in sexual cases. This provision has since been extended to also apply in a range of violent crime, including robbery. Counsel may also be appointed at the request of the police for the duration of the police investigation. At court, the complainant's counsel may apply for leave for the complainant to give evidence in the absence of the defendant, for example, and may object to inappropriate questions put by the defence.

Possible roles for such a lawyer in the New Zealand context could include:

- having access to the prosecution files;
- appealing the prosecution's decision, on behalf of the victim, not to lay charges or to alter the charges;
- representing the complainant's view at a bail hearing;
- resisting an application by the defendant that the complainant should give oral evidence at the committal stage;
- resisting a application to discharge the accused pursuant to s 347 Crimes Act 1961;

80 It should be noted that use of the labels "adversarial" and "inquisitorial" are somewhat controversial, as no system particularly embodies either model. Nor does homogeneity exist between systems purporting to adopt either model. See discussion in Ellison, above n 77, at 10. We prefer "common law" and "civil law" to describe the differing trial processes.

81 Fiona E Raitt *Independent Legal Representation for Complainers in Sexual Offence Trials* (Research Report for Rape Crisis Scotland, 2010) at [2.08].

82 Temkin, above n 78, at 293 ff.

- presenting the complainant's view during an application by the defendant to withdraw a guilty plea;
- undertaking pre-trial argument for admission or exclusion of evidence (for example pursuant to s 18, s 37, s 43 or s 44 Evidence Act 2006);
- making applications for the use of alternative ways of giving evidence (s 103 Evidence Act 2006);
- explaining the trial process;
- conducting pre-trial preparation; and,
- being present at the trial (and objecting to inappropriate questions under s 85 Evidence Act 2006);
- helping with the preparation of a Victim Impact Statement.[83]

The advantages of separate representation from a complainant's point of view in sexual cases include: increased amount of information about the trial process, outcome and appeal options; extra support available during the trial process; evidence admissibility applications could be made in the best interests of complainants (for example, applications as to alternative ways of giving evidence), and; fuller argument, taking into account information provided by the complainant, could be made as to admissibility matters (for example, sexual history evidence).

It is certainly arguable that these roles can and should be fulfilled by victim support workers, prosecutors and trial judges. However, research has consistently demonstrated that these tasks are not routinely undertaken to the satisfaction of complainants, or even in a manner that is consistent with existing legal authority or best practice. The absence of relevant support and strong, effective advocacy about admissibility matters, or the manner of questioning, means that complainants tend to be distressed by and dissatisfied with the trial process. Distressed complainants are unlikely to give their best evidence and dissatisfied complainants will not encourage other victims to proceed with their complaints.

In 2001 Ireland introduced a limited form of legal representation for complainants in sexual cases within an adversarial model. Under s 4A of the Criminal Law (Rape) Act 1981 (as amended by s 34 of the Sex Offenders Act 2001), when the defendant wishes to offer sexual history evidence about the complainant, the complainant has legal representation available to her for that application process. This only occurs when the decision is made in the absence of the jury (usually during a voir-dire, not pre-trial) and not in situations where the prosecution is seeking to admit the evidence. The prosecutor is required to tell the complainant about the right to separate legal representation.[84] The Irish Act therefore enacts a limited version of legal representation for complainants in rape cases. Similar proposals are currently being considered in Scotland.[85]

83 See also Raitt, above n 81, at Chapter 6.
84 Criminal Law (Rape) Act 1981 (Ireland), s 4A(3).
85 See Raitt, above n 81.

Research undertaken in Dublin prior to the reform found that there was a highly significant relationship between having a legal representative and a victim's overall satisfaction with the trial process. The researchers found that the victim of sexual offending with some form of legal representation experienced fewer difficulties obtaining information about case developments; had a clearer understanding of their role at trial; higher levels of confidence and were more articulate when testifying; experienced less hostility from the defendant's lawyer and were much more satisfied with their overall treatment within the criminal justice process.[86]

However, stated concerns about the introduction of separate legal representation include:

- "[J]udges have a duty to protect all witnesses from unfair cross-examination by counsel…They do not need counsel appearing for witnesses to remind them of it."[87]
- Victims of sexual offending are not special cases in need of such support.[88]
- Lack of suitably qualified lawyers to perform such a role – they may have to be drawn from the defence bar, which may be problematic.[89]
- The provision of separate legal representation would be likely to "interrupt the smooth flow of the prosecution case and reduce the chances of conviction."[90]
- It would impact on the defendant's right to a fair trial as enshrined in the Bill of Rights.[91]
- Prohibitive cost implications, especially if such a role was to be available through Legal Aid.[92]

Some responses to these concerns are now discussed.

A. The Judge (and Prosecutor) should Perform the Functions of the Proposed Victim's Lawyer

It is true that the perceived need for victim separate legal representation would be addressed if judges intervened in what is thought to be inappropriate cross-examination and the prosecutor provided the desired pre-trial support. However, as discussed in this paper and elsewhere such roles are not being routinely or consistently performed by judges and prosecutors and there is a limit to how much this can effectively or appropriately occur within an adversarial process.[93]

86 Bacik and others, above n 19, at 17-18.
87 Criminal Law Revision Committee England and Wales *Sexual Offences* (HMSO, 1984), cited in Temkin, above n 78, at 302.
88 Ibid.
89 Raitt, above n 81, at [8.10]
90 Warren Young *Rape Study Vol 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983) at 70.
91 Raitt, above n 81, at [7.03] discusses fair trial rights in the context of Scotland and the European Court of Human Rights.
92 South African Law Commission, above n 78, at 243.
93 See also Raitt, above n 81, at [7.09] ff, [7.30] ff.

B. Victims of Sexual Offending are not Special Cases in need of such Support

There are two responses to this concern. First, much literature does exist indicating that complainants in sexual cases have particular needs and are much more at risk within the criminal justice process of being retraumatised. There are therefore avoidable long-terms ill effects of being a witness for the prosecution in such cases.[94] Secondly, other models of separate legal representation, or third party intervention, already exist for other "special" cases – for example, counsel for the child, McKenzie friends, *amicus curiae*, or counsel appointed under s 95 of the Evidence Act 2006.[95]

C. There is a Lack of Suitably Qualified Lawyers to perform such a Role

All jurisdictions that have introduced the availability of legal representation for victims have faced this difficulty. It has been the case that lawyers who act for victims are usually drawn, at least initially, from the defence bar. Over time in some jurisdictions, for example Germany, the amount of work available has allowed lawyers to develop a practice based almost entirely on performing this role. There should not be a particular problem with the legal representative for a complainant being also defence counsel in other cases. It is, after all, not unusual for defence counsel to also prosecute. Suitable training would need to be provided, and required, for lawyers to take on the role and this should help allay any concerns victims may have about the usual practice of their lawyer.

D. There would be Interruption of the Smooth Flow of the Prosecution Case and Reduction in the Chances of Conviction

Many attrition studies, both here and overseas,[96] demonstrate that conviction rates in cases of sexual offending are comparatively low, and extremely low in cases of "acquaintance rape" involving adult victims. It is hard to see how participation in the process by a victim's lawyer, especially

94 Sue Lees "Judicial Rape" (1993) 16 Women's Studies International Forum 11; L Madigan and N Gamble *The Second Rape* (Lexington Books, Toronto, 1991); Payne, above n 19; Zsuzsanna Adler *Rape on Trial* (Routledge and Kegan Paul Ltd, New York, 1987); Konradi, above n 6; Gillis and others, above n 22; Payne, above n 19; Rebecca Campbell and others "Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers" (2001) 16 Journal of Interpersonal Violence 1239.

95 See also Raitt, above n 81, at [7.06]; Temkin, above n 78, at 302. Of course in the case of counsel for the child and *amicus curiae* the availability of this role does not amount to a party status for the third person who views they are presenting: "The court retains total discretion whether and how to consider the amicus brief…this device allows third parties to share their perspective with the court without requiring the court or the parties to change their behaviour or decisions." Erin C Blondel "Victims' Rights in an Adversary System" (2008) 58 Duke LJ 237 at 254.

96 See for example Ministry of Women's Affairs *Restoring Soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at 32; Jo Lovett and Liz Kelly *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe: Final Research Report* (Child & Woman Abuse Studies Unit, London Metropolitan University, 2009); Vanessa E Munro and Liz Kelly "A vicious cycle? Attrition and conviction patterns in contemporary rape cases in England and Wales" in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing, London, 2009) 281; Kathleen Daly and Brigitte Bouhours *Rape and Attrition in the Legal Process: A Comparative Analysis of Five*

if that role is primarily at a pre-trial stage or in the absence of the jury, could adversely affect convictions rates. Even if the victim's representative could be more actively involved during the trial, it seems unlikely "that the jury would respond to objections from the complainant's lawyer by acquitting the defendant. It is more likely to acquit the defendant if defence counsel is permitted gratuitously to undermine her character and discredit her."[97]

The extent that "smooth flow" will be a real concern depends on the eventual role of the complainant's lawyer during the trial itself. If they have no right to object to evidence or to particular forms of questioning, this would not prove any interruption. In fact, research has indicated that even the presence in court of a complainant's legal representative has a helpful flow on effect in terms of the kinds of questioning pursued by the parties.[98] It might also be possible for the victim's lawyer to be solely in charge of any objections during the cross-examination of the complainant, or attention is given to the division of tasks in a way that there is no duplication or "inequality of arms" – a matter than impacts on the next concern.

E. Negative Impact on the Defendant's Right to a Fair Trial

Common law jurisdictions with an adversarial trial process that have considered the possibility of separate legal representation for victims have primarily focussed on these last two concerns as reasons for not recommending formal introduction of such a scheme. In Ireland, extension of the scheme beyond out-of-court applications for the introduction of sexual history evidence was resisted on the grounds that it would be unconstitutional.[99] In the Auld Review of the English Criminal Courts,[100] in response to a suggestion from Victim Support that a victim's legal representative should be entitled to ask questions and to sit near the prosecution to assist in contradicting defence evidence, Sir Robin Auld stated:[101]

> It is difficult to see how such a scheme would fit our adversarial system, in which there are only two parties and the hearing is the substitute for private vengeance not an expression of it. To put an alleged victim whose account the defendant challenges – as will often be the case – in the ostensibly privileged role of an auxiliary prosecutor would be unfair.

However, even if there would be unfairness in such a model, there are other ways of providing legal advice and support to a victim without introducing something more like the Nebenkläger role in Germany (which is seen as difficult and unwieldy at times in that jurisdiction, especially in cases of multiple victims). The appointment of an independent lawyer could arguably impinge on a defendant's right to a fair trial if s/he elects to give evidence

Countries (Griffith University, 2009); Paul O'Mahony "The Attrition Rate in Rape" ("Rape Law: Victims on Trial?" Conference of the Dublin Rape Crisis Centre and the Law School, Trinity College Dublin Castle, Dublin, 16 January 2010).

97 Temkin, above n 78, at 304.

98 Raitt, above n 81; Bacik and others, above n 19, at 17-18.

99 (6 April 2000) 517(5) Dáil Eireann Debate 1086.

100 Right Honourable Lord Justice Auld *A Review of the Criminal Courts of England and Wales* (Ministry of Justice, 2001).

101 Ibid, at 545; see also Jenny McEwan, Mike Redmayne and Yvette Tinsley "Evidence, jury trials and witness protection – the Auld review of the English criminal courts " (2002) 6 Int'l J Evidence and Proof 163 at 176.

and a right of cross-examination is given to the complainant's lawyer *in addition* to the prosecutor.[102] However, a representative could "achieve quite a lot even if confined to interventions during any cross-examination stage of the complainant, and/or to objections to…the introduction of sexual history evidence." [103] When considering fairness then the key seems to be the role of the lawyer and the victim – in particular whether this has the effect of making the victim a party in the case with rights to litigate the merits. This point was made in submissions to the South African Law Reform Commission:[104]

> In relation to sexual offences cases victims' lawyers have the potential to fill a substantial gap created by the reality that existing players fulfil pre-allocated roles within the process and that our criminal justice system suffers from chronic under-resourcing and often serious attitudinal problems. If narrowly and clearly circumscribed we believe that legal representation for the victim of sexual offences would withstand constitutional scrutiny. This is not least because providing support to the victim and assisting her in a way that ensures that she testifies cogently and coherently can only serve to benefit the process.

The Commission's stated reasons for not recommending legal representation for victims of sexual offending however was not unfairness to the defendant but the lack of State funds with the consequence that only "rich victims" would have access to such support.[105]

F. Prohibitive Cost Implications

Most significant changes, or changes with the potential to make significant difference, come at a cost. It is true that State-funded legal assistance for victims of sexual offending will be expensive. However, it may be that savings may occur elsewhere if the role of a victim's lawyer was to reduce the time required by Victim Advisors, prosecutors or members of the police. Further, it is undoubtedly the time to do something different by way of assisting victims of sexual offending to proceed in a healthy way through the criminal justice process.

102 Raitt, above n 81, at [6.08].
103 Raitt, above n 81, at [6.09].
104 D Smythe "Legal Representation for victims of sexual offences: Submission to the South African Law Commission " (2002), cited in Riatt, above n 81, at [4.20].
105 South African Law Commission, above n 78, at 243.

VII . Conclusion

There is no doubt at present that particularly adult victims in cases of sexual offending are not receiving uniform, consistently available advice from those tasked to give it to them.[106] There are not only regional variations, but there is also arguably inappropriate delegation to victim support agencies – who are not in a position to provide the advice or information due to lack of specialised training. Some advice needs to come from those who will be in court with the complainant – that is what they wish – but due to time constraints and concerns about the proper roles of the prosecutor that is not occurring. It is also not clear that helpful publications targeted at victims of sexual offending are available or being given to victims in a timely fashion. There is, however, a clear and pressing need for victims, especially adult victims of sexual violence, to be able to easily access the necessary help, information and support, without the trauma associated with the offending being exacerbated by the difficulty of navigating the criminal justice system. How this need can be best addressed is one of the important questions confronting the researchers and the workshop participants.[107]

106 See the discussion of the difference in the amount co-ordinated support as between children and adult victims in Linda Louise Beckett "Care in Collaboration: Preventing Secondary Victimisation Through a Holistic Approach to Pre-Court Sexual Violence Interventions" (PhD Thesis, Victoria University of Wellington, 2007) at 181, 219 ff.

107 Ibid, see proposal for a co-ordinated response at 247 ff.