

THE NEEDS OF VICTIMS IN SEXUAL OFFENCE TRIALS

PAULETTE BENTON-GREIG*

In considering potential reform to the criminal justice system so as to improve its responsiveness to victims, “The Views of Complainants and the Provision of Information, Support and Legal Advice: How much should a prosecutor do?”¹ considers the actual and potential roles of a number of criminal justice agents who are, or could be, empowered to facilitate increased system responsiveness to victims, and greater victim involvement in sexual offending trials. This commentary draws on a victim advocacy point of view and argues for a victim need driven model of response that includes an independent legal representative for the victim.²

I. WHAT DOES IT MEAN TO BE RESPONSIVE TO VICTIMS?

The needs of victims after sexual assault are many and varied but themes described by those who have a community-based social service role in responding to victims – crisis workers, counsellors, advocates – can support the following principles:

- *Safety* – this means re-establishing psychological and emotional safety, a first step toward being able to trust others again, as well as physical safety;
- *Healing* – responses to sexual offending should assist victims to heal; they should not cut across the victim’s healing process or re-traumatise them;
- *Restoration of autonomy* – because sexual violence is an extreme abuse of control over one’s person, victims need to re-establish control over their selves and assert their autonomy;
- To be treated with *respect, dignity* and *compassion* – these are basic victims’ rights but they have particular resonance for victims of sexual offending due to the nature of that offending, and the impact on victims of society-wide victim-blaming and rape justification beliefs.

* Paulette Benton-Greig was the Agency Development Manager at Auckland Sexual Abuse HELP Foundation from 2005 to 2011. She was the Taiwi representative on the Taskforce for Action on Sexual Violence criminal justice working party, and has an MA(Hons) in Women’s Studies and a Bachelor of Laws. Her views are based on many consultations and discussions with clinical staff and management at Auckland Sexual Abuse HELP and multiple consultations with members of TOAH-NNEST (a national network of community sexual violence service providers). She would like to thank Kathryn McPhillips, Clinical Manager, Auckland Sexual Abuse HELP.

1 Elisabeth McDonald “The Views of Complainants and the Provision of Information, Support and Legal Advice: How much should a prosecutor do?” published in this Issue at 66.

2 The needs of adult and child victims of sexual offending are similar but different. This commentary discusses adult victims. The term “victim” is used to refer to the person who has had the experience of being victimised by sexual offending, rather than role specific terms such as complainant and witness.

These service driven principles for responding to victims are closely related to how the needs or rights of victims in the criminal justice system have been described. Edwards identifies the rights of “being in control, having a say, being listened to, or being treated with dignity and respect”.³ Martin argues that:⁴

A more victim-centred justice response ... would ... respond to victim’s concerns about having choice, being treated as autonomous individuals, having face-to-face contact, and voicing the impact of their experience.

In other words, within the criminal justice system, victims need choice, voice, visibility and autonomy.⁵

It is fundamental to a victim advocate point of view that people who report sexual offending should not be at risk of psychological harm in their pursuit of safety and justice. At a minimum our criminal justice system should do no further harm to victims. Unhappily, this is far from the situation in cases of sexual violence. Our criminal justice processes, and particularly the adversarial trial process, are often experienced by victims as humiliating, re-traumatising, degrading and abusive. Instead, after sexual assault, victims need to feel (and be) safe, to have the opportunity to heal, to restore their sense of personal autonomy, and to be treated with compassion for what they have been through. A system that is informed by victims’ needs can arrange its processes so that harm to victims is prevented and a system that is responsive to victims’ needs can go some way toward restoring their dignity and autonomy. These needs can also be translated into the principles of *protection* from harm through involvement in justice processes, *participation* in decision-making about aspects of the case that affect them and an experience that can support a victim’s *restorative* process.

The principle of safety stems from a victim’s need to re-establish sufficient psychological safety to be able to function in the world. It starts with the re-creation of physical safety and includes the sense of safety that flows from that. For a victim, the fact of offender access to their lives has been established by the assault itself and she or he may never go back to feeling safe from that person again. It is not common for accused offenders to be arrested immediately after a complaint being made to the Police and it is even rarer for those who are arrested to be held in custody. In some cases Protection Orders or Child Youth and Family notifications can be expedited, but in many cases – for instance the taxi driver who knows where you live – no such protective mechanism exists. So victims need clear, prompt and meaningful information about what is happening with the investigation and particularly about the accused’s whereabouts. Bail conditions are very important to a victims’ sense of safety. Whilst there is a requirement that

3 Ian Edwards “An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making” (2004) 44 *Brit J Criminol* 967 at 973, cited in Jonathon Doak “Victims’ Rights in Criminal Trials: Prospects for participation” (2005) 32 *Journal of Law and Society* 294 at 295.

4 Patricia Yancy Martin *Rape Work: Victims, gender, and emotions in organization and community context* (Routledge, New York, 2005) at 215.

5 See generally Jan Jordan *Serial Survivors: Women’s Narratives of Surviving Rape* (Federation Press, Sydney, 2008) at Ch 6.

victims' views are ascertained and considered in relation to decisions about bail, this is infrequently and inconsistently implemented, something which is a source of extreme distress to some victims.⁶ Consistent implementation of safety mechanisms that exist would assist victims. So too would prioritising additional safety initiatives such as victim-aware facilities at Police and Court venues that ensure privacy, capacity for support people and separation from offender and public environments.⁷ Victim safety mechanisms and their consistent implementation in the best interests of the particular victim should be the highest priority for the criminal justice system and are the most significant factor in protecting victims from further – physical and psychological – harm.

Rape or sexual assault is one of the most deeply personal violations that an individual can experience. It inherently involves what many consider the ultimate abuse of personal control. In *Serial Survivors: Women's Narratives of Surviving Rape*, Jordan describes this impact thus:⁸

In the act of rape the rapist seizes control of the victim's body, violating the victim's sense of autonomy. The sense of disempowerment experienced is immense. Another person has taken charge of one's body, manipulating it like a puppet, reducing the victim to an object, a prop in that man's world.

This is one of the reasons that rape is the event most likely to give rise to post-traumatic stress symptoms.⁹ Healing from rape requires the restoration of personal efficacy and control. Victims' ability to exercise control over matters which personally affect them decreases the likelihood of suffering harm through the replication of the dynamics of abuse and can aid a victim's healing process. In particular, the process of giving evidence is an important opportunity for restoration of control for victims, but also poses considerable potential for harm. Nothing has the potential to replicate the dynamics of abuse more than being positioned as "just a witness" – an exhibit or object for scrutiny – in the accountability process for her or his own rape. Rape is the ultimate experience of being turned into an object for someone else's purpose, and rape trials do nothing if not turn the victim into the central object of the trial – her or his testimony and credibility being the core of cases which rest on the (non)existence of consent; as most do.

The way in which complainants give evidence in court and how they receive support in court is therefore vital to victim wellbeing. Whilst the Evidence Act 2006 has opened the way for much greater use of alternative modes of evidence this relies on an application from one of the parties or by direction from the Judge. Whilst some prosecutors are proactive in seeking the views of complainants as to how they want to give evidence,

6 Crown Law Office *Prosecution Guidelines* (2010) at [14.6]

7 See Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (Ministry of Justice, 2009) at 61.

8 Jordan, above n 5, at 180.

9 P Resick "The Psychological Impact of Rape" (1993) 8 *Journal of Interpersonal Violence* 223 at 234; A DeMaris and C Kaukinen "Violent Victimization and Women's Mental and Physical Health: Evidence from a national sample" (2005) 42 *Journal of Research in Crime and Delinquency* 384, cited in Jordan, above n 5, at 160.

there is still considerable variability of practice and effort on this matter and some complainants still report not being informed of the possibility of an alternative way of giving evidence.¹⁰ This is of significant concern because giving evidence, especially undergoing cross-examination, has been repeatedly identified as having the potential to cause serious distress and harm to victims.¹¹ The suggested amendment to s 12 of the Victims Rights Act 2002 requiring that information about alternative ways of giving evidence and the entitlement to court support must be provided to victims could go some way toward improving consistency of practice in this respect.

In addition, it is a common assumption amongst Police and prosecutors that giving evidence from behind a screen is the most effective and efficient alternative way of giving evidence. In some cases when victims are informed about alternative ways, only the possibility of a screen is discussed. However, screens can replicate the dynamics of abuse because the defendant can see the victim but she or he is unable to see the defendant. If a particular victim has been stalked, abducted or subjected to mind-games as part of an abuse dynamic this courtroom experience of unpredictability and loss of control can trigger high levels of hyper-vigilance and re-traumatise the victim. The potential for harm in this instance, as in many others, is reduced where the victim receives high quality specific information, has the opportunity to reflect on that information, and to ask specific questions of those who can influence the outcome of any application as this increases the predictability of events. It can also provide an opportunity for the victim to experience restoration of autonomy even in the face of having to recount the details of earlier victimisation.

For a victim to be treated with respect, dignity and compassion for what she or he has been through, the victim needs to be listened to and have the opportunity to understand why certain courses of action are recommended or taken, including understanding decisions as to the laying or altering of charges. The laying of charges that do not represent the victim's experience of the offending is not uncommon and can cause victims significant distress by adding to a victim's sense of being invisible and not validated by the system that represents society. Victims with little familiarity with the criminal justice system may not find it easy to understand the reasoning behind judgments about the weight of evidence or how the rules of evidence operate, but the opportunity to understand and be heard provides a humane, respectful and compassionate experience. Not being given that opportunity can seriously derail a victim's healing process, leaving victims years later still angry that, for no reason apparent to them, their abuser was not held to account for his actions. The same reasoning also applies to the need to understand the outcome of trials, particularly where a not-guilty verdict is returned. For some victims, a verdict is something of an anti-climax after the experience of giving evidence, but understanding it can be very important to re-establishing a post-trial identity for victims and also for family members and supporters of victims. In relation to decisions such as charging and verdicts,

10 McDonald "Views of Complainants" above n 1, at 75.

11 Doak, above n 3, at 306.

the provision of written reasons and the opportunity to ask questions about them, and to understand or to give voice to a different reality, could reduce the potentially damaging impacts of events like the laying of reduced charges and not-guilty verdicts.

A victim-responsive justice system is one that ensures safety and protection from harm, supports restoration of autonomy through informed choice and influence over self, and operates to provide victims with experiences of being treated with respect, dignity and compassion.

II. WHO SHOULD RESPOND TO VICTIMS AND HOW SHOULD THEIR NEEDS BE MET?

The needs and rights of victims are not consistent with the adversarial, party-driven, contest of proofs that is our criminal justice system. Many victims of sexual offending feel marginalised, irrelevant and disempowered as a result of participating in the criminal justice system.¹² Contributing causes include the alienation that being merely a witness to the process of accountability for one's own violation breeds, a lack of opportunity for meaningful participation in the trial process and repeated departures from proscribed procedure by some criminal justice system agents. Research has indicated a need for better access to information for victims engaged in the criminal justice system,¹³ and that the use of dedicated victim-focused advocates assists victims to navigate and negotiate this foreign system.¹⁴ The needs of victims for safety and healing, and of restoration of autonomy, means they also need to be able to enforce mandated procedure, to exercise informed choice, and to have effective influence over matters that personally affect them. If victims need choice, voice, visibility and autonomy, they also need a legitimate mandated route through which to meet those needs.

The most reliable way to achieve these aims is for victims to have access to a dedicated independent legal representative who would put the victim's views in the appropriate forums, monitor and enforce mandated procedure and inform and consult with victims about the trial and the criminal justice process. A legal representative could represent the victim's views and needs at bail hearings, convey the victim's views about the laying or altering of charges and ensure that where those views are not reflected in the outcome the victim has a full opportunity to understand why. The lawyer could also represent the victim's interests in various pre-trial applications including applications as to admissibility of evidence and the use of alternative ways of giving evidence, as well as explaining and preparing the victim for the trial process. Representation should extend to the trial and include objecting to inappropriate questions, explaining the progress of the trial including outcome and appeal matters, and representing the victim's views and needs at sentencing and parole hearings.

12 See Elisabeth McDonald "Real Rape' in New Zealand: Women complainant's experience of the court process" (1997) 1 Yearbook of New Zealand Jurisprudence 59.

13 McDonald "Views of Complainants", above n 1, at 76.

14 Ibid, at 77.

It is the status of an independent legal representative for the victim that is more compelling and more valuable than the alternative Independent Sexual Violence Advisor (ISVA) model. Whilst both models have been evaluated as positive by victims, limitations in the role and status of the ISVAs are unlikely to support effective promotion of victim voice in an environment of competing institutional imperatives. A review of (limited) independent legal representation for victims of sexual offending in Ireland found that there was:¹⁵

... a highly significant relationship ... between having a lawyer, and overall satisfaction with the trial process. The presence of the victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.

Victims found great advantages in having access to a legal representative with specialist knowledge and legal authority,¹⁶ as there were fewer difficulties obtaining information about case developments, a clearer understanding of her or his role at trial, and greater articulateness when testifying.¹⁷ On the other hand “[t]here is nothing more disempowering for a complainant than being at one end of the chain without a representative able to influence the decision at the other end.”¹⁸

Victims need individual representation so that their particular needs can be attended to. Meaningful consultation and the exercise of informed choice rest on processes that take account of the realities of victims' lives and which can bridge the gap between the justice system and victims' everyday lives. As most victims of sexual offending are women, the findings of the *Women's Access to Legal Services* study paper on the communication needs of women encountering the justice system provides useful guidance on this point. Women need information in everyday language, in everyday places, from people who understand their everyday lives and who understand how engagement with the criminal justice system might impact on them.¹⁹ The legal representative for the victim of sexual offending must have the capacity to work appropriately with vulnerable or traumatised people, a thorough understanding of the dynamics of sexual offending and of the potential psychological impacts of justice system processes. It would not however, be a psychotherapeutic role so victims would also need access to an independent court support counsellor whose primary focus is the psychological needs of the victim and her or his supporters. If the lawyer and counsellor were to operate in partnership with other relevant agents, there could be a case management model, clear lines of communication and a problem solving forum.

15 I Bacik and others *The Legal Process and Victims of Rape* (Dublin Rape Crisis Centre, Dublin, 1998) at 17–18, cited in Fiona Raitt *Independent Legal Representation for Complainers in Sexual Offence Trials* (Research Report for Rape Crisis Scotland, 2010) at [8.04].

16 Ibid.

17 McDonald “Views of Complainants”, above n 1 at 82.

18 Raitt, above n 15, at [8.05].

19 New Zealand Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999) at [129].

Independence is vital because the legal representative must be free to give voice to the victim's views without having the tactical and strategic imperatives that come with responsibility for prosecuting a trial and without being, first and foremost, an agent of the state. Whilst some prosecutors feel (and act on) a responsibility to ensure the justice system is responsive to victims, separate representation for victims will free prosecutors from the "irreconcilable conflict that arises for prosecutors in tending to the conflicting interests of the complainant, the public and the accused."²⁰ Prosecutors can then focus on their prosecuting role and supporting their key witness in her or his evidence giving role. The division of roles between victim representation and prosecution may also support a greater emphasis on pre-trial case preparation processes.

Many victims express a desire to meet prosecutors in advance of trial, and for more than a single meeting. An initial meeting, which should be more than a week prior to trial, provides an opportunity for a victim to develop rapport with the person with whom she or he will have the most interaction at trial and develop some familiarity with the protocols and language of giving evidence. Such an arrangement would also ensure that prosecutors are sufficiently prepared and are familiar with the victim as a particular person. Many victims would also benefit from pre-trial interviews that include eliciting a complete account from the victim so as to review complex (and often time distant) evidence. Research has established that the dissociative effects associated with trauma can alter time sense and both heighten and dull perception of various events.²¹ This is most acute in the immediate post assault state but the time between event and trial may mean more detail is available to the victim. An opportunity to relay the fact of this to the prosecutor can reduce anxiety and may assist the evidence-giving process.

Such an interview would also provide an opportunity to explore what may be considered counter-intuitive behaviours to those without a familiarity of common responses to sexual assault. Many victims know that their reactions may seem odd to others, even to themselves, and they fear that such disparities may be used to discredit them in court. In fact those apparent contradictions are often the fodder of defence challenges to credibility based on societal misconceptions about rape and the impact of victimisation. Such challenges can do much harm to victims of sexual offending and can be one of the most confusing and damaging aspects of cross-examination. Typically judges and prosecutors are slow to intervene in defence questioning along these lines in order to preserve the perception of their objectivity and for fear of appeal.²² However there is a strong case to be made that the use of pejorative and factually unsupported misconceptions about sexual assault has no place in a modern criminal justice system. The challenging of their use by a victim's legal representative could provide victims with some protection from this harm and may also engender positive change in trial procedure.

20 Raitt, above n 15, at [8.07].

21 Judith Herman *Trauma and Recovery: The aftermath of violence – from domestic abuse to political terror* (2nd ed, Perseus Books, New York, 1997) at 43.

22 Raitt, above n 15, at [7.30].

Whilst victims often understand that they should receive fair and respectful treatment from all agents of the criminal justice system, they do not currently have recourse to enforce such standards. Mostly those agents do not intend harm but the imperatives of the institution to which they are accountable, time constraints, competing responsibilities, trial strategy and lack of specialist knowledge about the dynamics of sexual abuse can lead to that outcome. Such experiences of harm or disregard can pile on top of feeling both central and powerless in the role of key witness, and then be exacerbated by the humiliating and re-traumatising experience of giving evidence. Changing that all too common experience into one in which a victim has full, timely and appropriately delivered information, a fully informed opportunity to exercise choice, a conduit for expressing their needs, influence over outcomes, and a forum in which to be heard and to understand will require that the victim has a dedicated independent legal representative. That representative should be empowered to protect victims from the potentially harmful impacts of sexual offence trials, to ensure that victims are able to participate in processes and decisions that matter to them and to promote experiences within the criminal justice system that are consistent with a victim's restorative needs.