

# INTRODUCTION TO THIS SPECIAL ISSUE

JEREMY FINN, ELISABETH McDONALD AND YVETTE TINSLEY\*

## I. THE CONTEXT OF OUR RESEARCH

It has long been accepted that there are many problems with the current law and practice in relation to the prosecution of sexual offence cases. A major issue is that a large majority of all sexual offences committed are not reported to the authorities, precluding the possibility of prosecution. The New Zealand Crime and Safety Survey 2009 found that that only seven per cent of sexual offences were ever reported to police.<sup>1</sup> That research mirrors international experience, with studies suggesting that less than 10 per cent of sexual assaults in the USA and Canada are reported to police, as well as low reporting rates in Ireland, Australia and the UK.<sup>2</sup> In part this may be because of apprehension about the investigative stage<sup>3</sup> – particularly where police are not seen as supportive or sympathetic. At the trial stage, complainants report feeling as though they are the ones on trial, given the distressing nature of cross-examination and disclosure of their previous sexual experience.<sup>4</sup>

Other causes for non-reporting include shame, fear of the offender, the effect on family, the nature of their relationship with the offender, and distrust of the police and the legal process.<sup>5</sup> Attrition studies across all jurisdictions indicate that the prosecution rate for sexual offending is lower than for other serious crimes, as is the conviction rate, especially for “acquaintance rape” – that is, where the alleged victim and offender are known to each other, there is usually little independent evidence of the incident and the issue at trial is consent. It is these kinds of cases in particular that give rise to the greatest challenges for law and policy makers and it is this type of offending that is hard to prove and tends to involve the most unpleasant experiences for complainants whose evidence will be robustly tested. As such, the rights of

\* Jeremy Finn, Professor of Law at the University of Canterbury.

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

Dr Yvette Tinsley, Reader in Law at Victoria University of Wellington

1 See Ministry of Justice *The New Zealand Crime and Safety Survey 2009: Main Findings Report* (2010) at 45. This figure may not be reliable given the high percentage standard variance. The comparable figure in the previous survey was nine per cent.

2 See, for example Morrison Torrey “When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions” (1991) 24 *University of California Davis Law Review* 1013; Office for Criminal Justice Reform *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: A Consultation Paper* (2006).

3 Warren Young *Rape Study: A Discussion of Law and Practice Vol 1* (Department of Justice, Wellington, 1983) at 1-2.

4 See Ministry of Women’s Affairs *Restoring Soul: Effective Interventions for Adult Victim/Survivors of Sexual Violence* (2009) at 30; Elaine Mossman and others *Responding to Sexual Violence: A review of literature on good practice* (Ministry of Women’s Affairs, 2009) at 63.

5 Venezia Kingi and others *Responding to Sexual Violence: Pathways to recovery* (Ministry of Women’s Affairs, 2009), at 58. These reasons for non-reporting are replicated in much of the international research: see, for example, Her Majesty’s Crown Prosecution Service Inspectorate and Her Majesty’s Inspectorate of Constabulary *Without Consent: A Report on the joint review of the investigation and prosecution of rape offences* (2007) at 34.

the defendant and fairness to prosecution witnesses are in stark conflict. It is this type of case which gave rise to our project – which was to undertake thorough and wide-ranging research needed to evaluate what reforms in this area were possible and how they might be implemented. The need to do this work was apparent following the trials of several current or former police officers for sexual offending alleged to have occurred in the mid-1980s.

Although several teenagers complained of gang-rape by these officers at the time, no action was taken until a journalist highlighted the issue in 2004. In March 2006, the three men were acquitted of raping one of the women.<sup>6</sup> Public concern about the case initially centered on the fact that the jury were not told that two of the accused had been convicted of raping another of the young women.<sup>7</sup>

As a result of this public disquiet, the Government responded in a number of ways. Significantly, the Prime Minister<sup>8</sup> stated: “[I]n my opinion, no reasonable person would think that a troubled teenage girl engaging in group sex with police officers in a regional town would believe that there [was genuine] consent.”<sup>9</sup> In July 2007, following a third trial in which the police officers were acquitted, the Government set up a Taskforce for Action on Sexual Violence “to lead and co-ordinate efforts to address sexual violence and advise Government on future actions to prevent and respond to this crime.”<sup>10</sup> In the same month, the Ministry of Women’s Affairs, in partnership with the Ministry of Justice and the New Zealand Police, commenced a two-year research project into sexual violence against adults in New Zealand.<sup>11</sup>

Subsequently, the Law Commission was asked by the Government to consider the issue of the disclosure of a defendant’s previous convictions at trial. In the foreword to their May 2008 report, the Commission concluded

6 Louise Nicholas, the woman in question, chose to be named. [http://en.wikipedia.org/wiki/Louise\\_Nicholas](http://en.wikipedia.org/wiki/Louise_Nicholas); see also Louise Nicholas & Philip Kitchin *Louise Nicholas: My Story* (Random House, Auckland, 2007)

7 This woman was subsequently required to testify in a case against two ex-police officers who were charged with perverting the course of justice. She sought to have the same protections she was entitled to as a complainant in a sexual assault trial (such as protection of her name and identity and restrictions on questions relating to her sexual experience) applied in a similar way when she gave evidence a second time (*R v Mangnus* HC Auckland CRI-2006-004-7577, 16 August 2007 at [38]):

Ms Z has specifically sought such protection. She has sworn a supporting affidavit in which she says she found giving evidence at the 2005 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. She also states:

*I am willing to give evidence in the current proceeding. However, I am only prepared to do so if I am afforded the same protections that I was given when I gave evidence at the first trial.*

8 The Prime Minister at the time was Helen Clark.

9 Paula Oliver, “Rickards: It’s a matter of pride” *New Zealand Herald*, 6 March 2007, <<http://www.nzherald.co.nz>>.

10 Ministry of Justice “Taskforce for Action on Sexual Violence” (2009) <<http://www.justice.govt.nz/policy-and-consultation/taskforce-for-action-on-sexual-violence>>.

11 Ministry of Women’s Affairs “Sexual Violence Research Project” (2010) <<http://www.mwa.govt.nz/our-work/svrproject/index.html>>.

that “there could be value in investigating whether the adversarial system should be modified or replaced with some alternative model, either for sex offences or for some wider class of offences.”<sup>12</sup>

That statement prompted the three principal researchers to plan a project to investigate possible options for modification or reform of the current procedure for trial and pre-trial processes for the investigation and prosecution of sexual offending, including possible alternatives to adversarial criminal trials. The New Zealand Law Foundation provided funding for research assistance and travel over a two year period.

Following the Law Foundation grant, the Law Commission was asked by the Government to undertake a similar investigation and it is doing so in conjunction with our research.

## II. ABOUT THE PROJECT

The original goals of our project were:

- (a) collect, collate and distil the concerns which have been expressed about the operation of current law and practices;
- (b) identify any other features of current law, practice and procedure which diminish the effectiveness and accuracy of criminal trials for sexual offences, or which impact unreasonably on victims and other witnesses;
- (c) identify and evaluate the proposals that have been made within New Zealand and overseas for amendment to the law;
- (d) investigate any other possible alterations of law and practice within the current criminal justice framework which could increase the effectiveness and accuracy of criminal trials for sexual offences, and alleviate the detrimental effect on victims and other witnesses; and
- (e) investigate the merits and the feasibility of adopting an inquisitorial model (or aspects of such a process) for trials of sexual offending.

As is often the way with major research projects, the scope of the research has grown considerably from its original conception. In order to acknowledge the limited effect of law reform on some of the more pressing concerns and issues identified both in the literature and through consultation, we have incorporated a focus on issues outside of the formal criminal process as well as possible reform of pre-trial and trial processes. Further, although we have undertaken considerable research which looks at the possibility of introducing some elements of inquisitorial processes, this has formed only part of the work we have done. We have looked at a range of other issues including the possible use of specialist courts or structures, changes to the laws of evidence and criminal procedure, the use of resolution processes outside of the traditional criminal justice system, and at the possibilities for change in the role of the victim in the criminal justice process for these offences.

12 New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, (NZLC R103, 2007) at v.

We undertook to investigate the issues as even-handedly as possible. We have not researched, and have not written, to any prior agenda.

### III. METHODOLOGY

Most of our research has been done by careful analysis of the voluminous published material relevant to our enquiry, but we have also considered material volunteered by people with expertise in particular aspects of the investigation and prosecution of sexual offences and the provision of support to victims of such offending. Members of the research team have also held productive discussions with representatives of a number of organisations operating in relevant areas. These include the New Zealand Police, the Ministry of Justice, Project Restore, the Public Defender Service, TOAH NNEST, Auckland Sexual Abuse HELP, Nga Kaitiaki Mauri and Doctors for Sexual Abuse Care. We also attended the national hui of Rape Crisis.

We were able to gain significant insights into the way in which sexual offence cases were investigated and prosecuted, and various models of supporting victims of such offences, by field research carried out in a number of European jurisdictions in 2010. One or more of the principal researchers met with a range of judges, lawyers, researchers, victim advocates and academics in Austria, Germany, the Netherlands, Denmark, Sweden, England and Ireland. We were also able to observe trials in Germany and Denmark.

We have been greatly assisted by four research assistants – Rachel Souness, Stephanie Grant, Ellen Thompson and Amy Whittaker, as well as receiving benefit from working in this area with the Law Commission.

An integral part of our research has been a process of reporting our findings and preliminary recommendations to interested parties and inviting their feedback. A key element of that was the workshop at which the papers published in this issue were given.

### IV. WHAT WERE WE *NOT* TRYING TO DO?

Our project did not seek to cover all the issues relating to the law and practice of sexual offences and the way in which the victims of sexual offending are treated by government agencies. We have been principally concerned with sexual offending against adults, but much of what we have reviewed, and many of our eventual recommendations, will also be highly relevant to proceedings involving child victims and other vulnerable witnesses. We were not concerned with the legal definitions of the sexual offences themselves. Nor were we concerned with sentencing practices and policies for sexual offending.

We have not considered the extent to which the State provides support to the victims of sexual offending after there has been a trial related to that sexual offending, whether by way of financial payments – through ACC or otherwise – or the provision of counselling or of other resources.

The limitation of our work in this way is not in any way intended to suggest that those matters are not important, nor that the current system is satisfactory. It is simply that these areas are not what the project set out to do.

## V. OVERVIEW OF THE PAPERS IN THIS ISSUE

The papers given at the workshop on 18 and 19 April 2011 appear here in the order they were then presented.

Sir Bruce Robertson's opening speech, "Sexual Offending – Pre-Trial and Trial Reform" raised some provocative points about the need to consider with fresh eyes some of our current practices and rules of procedure and evidence which may operate unfairly in sexual offence trials all of which may contribute to negative outcomes for prosecutors and victims alike.

Yvette Tinsley's paper on the investigation and decision to prosecute in sexual violence cases describes and analyses some of the key factors which may cause attrition in sexual offending cases, and makes a case for the expansion of specialist units to investigate such cases. The paper also evaluates the experience of the United Kingdom with Independent Sexual Violence Advisors and Sexual Assault Referral Centres which provide possible models for adoption in New Zealand. The article then considers how the decision to prosecute a sexual offence is made, prosecutions in cases where the complainant has sought to withdraw the complaint and the use of specialist prosecutors and prosecution teams.

That paper is followed by a brief commentary from Mary-Jane Thomas, who drew on her experience as a Crown Solicitor and prosecutor to discuss the extent to which the current system could be improved so as to achieve both higher conviction rates and a better experience for victims.

Jeremy Finn presented a paper on issues related to criminal procedure which may have particular impact in sexual offence trials where there could be greater input from victims, and greater regard for the interests of victims. The paper also considers how the security and safety of victims when at court can be improved and delays minimised. The paper concludes with possible limitations on the defendant's right to silence and the proposed introduction of a regime of defence identification of disputed issues.

In her paper "The views of complainants and the provision of information, support and legal advice: how much should a prosecutor do?" Elisabeth McDonald explores the role of the victim in prosecutions for sexual offending and the concerns of victims that they are not adequately involved in, or informed of, decisions at critical points. The paper then considers the role of prosecutors in such cases and whether overseas experience might suggest changes to New Zealand practice. It concludes with examining the possible participation in sexual offence trials of a legal representative of the victim.

This paper was followed by a commentary presented by Paulette Benton-Greig. A revised version of that commentary is published here as "The Needs of Victims in Sexual offence Trials". The author makes her case for a more-victim centred approach to such trials including the provision of independent legal representation for victims.

A second paper by Jeremy Finn considers issues as to decision-making and decision-makers in sexual offence trials. That paper considers the overseas experience with specialist courts for sexual offences and New Zealand and overseas experience with other specialist courts to consider whether such courts are effective and should be implemented in New Zealand. Some of

the key requirements of any effective specialist court are discussed, including the need for specialist judges, prosecutors and other staff, and for suitable physical facilities. The paper considers the broad issue of whether sexual offences should be heard by a judge alone or by a jury or by some other model which would involve a degree of lay participation in the decision-making. The discussion explores both the use of different models in the European courts and the degree to which public participation is seen as necessary if verdicts are to have credibility with the public. The paper concludes with a discussion of the extent to which decision-makers – particularly jurors – may make use of heuristic processes which may cause their decision making to be less accurate.

The second day of the workshop commenced with a speech by the Hon Simon Power, Minister of Justice, which is reproduced here.

This was followed by a joint paper on “Evidence Issues” presented by Elisabeth McDonald and Yvette Tinsley which appears under that title in this issue. The paper considers the law and processes by which a victim or other vulnerable witness may give evidence other than orally in the court room. The authors then consider most of the admissibility rules which have significance in trials involving allegations of sexual offending including: sexual history evidence; evidence of recent complaint; evidence of a defendant’s previous convictions; and, the control of the questioning of prosecution witnesses. Tinsley and McDonald conclude with a discussion of the use of expert evidence, particularly expert opinion evidence which might go to explain to the jury the reasons why a complainant in a sexual offence case might delay making a complaint or may behave in a way which jurors might not otherwise understand.

That paper is followed by a commentary by Scott Optican in which he offers his views of the best ways to deal with the giving of evidence. He also suggests other approaches to the admissibility of evidence of the complainant’s prior sexual history and to inform the jurors of matters which might go to the credibility of a victim of sexual offending.

We have included in this issue an article “What’s in an Issue? The Admissibility of Propensity Evidence in Acquaintance Rape Cases” by Stephanie Bishop and Elisabeth McDonald which investigates in detail some issues raised by the terms of s 43 of the Evidence Act 2006, and the treatment of it by the courts. The paper was not presented at our April workshop but discusses in more detail the issues concerning the admissibility of propensity evidence in acquaintance rape cases and therefore makes an important contribution to our work.

Yvette Tinsley and Elisabeth McDonald jointly wrote and presented a second paper, which appears here as “Is there any other way? Possible alternatives to the current criminal justice process”. This paper engages with the jurisprudence on restorative justice, and describes existing models of restorative justice in New Zealand and overseas. It also discusses the special issues that arise for Māori and evaluates arguments about the risks and possible benefits of use of restorative justice processes in sexual offence cases.

The authors conclude with a proposed model for a restorative justice process which might run parallel to the current trial process model but within the criminal justice system.

Shirley Jülich and her colleagues provided a commentary to the Tinsley and McDonald paper drawing on their experience with Project Restore, which emphasises both the potential benefits and the potential risks of using restorative justice in sexual offence cases but concludes that achieving the benefits without negative outcomes as well will require carefully designed programmes implemented by experts. This paper develops the commentary given at the workshop by Dr Kim McGregor and Jennifer Annan.

## VI. FUTURE WORK

Since the workshop in April 2011 the researchers have devoted much of their time to further research, consideration of issues raised at the workshop and consultation with interested groups. The results of that work will appear in our final report, which will be published by Victoria University Press at the end of 2011.

In the long term, the solution to many of the problems with the procedure for sexual offences and the treatment of victims of that offending is to alter the popular perception of the real nature of sexual offending, so that all victims of sexual offending receive consistent – and appropriate – treatment at all stages of the criminal justice process. That must be a long-term process which cannot be brought about by legal change alone but will require both better education of the public and a shift in popular culture as regards sexual behaviour and sexual offending.

We cannot wait for that long-term shift to resolve the problems which many victims have identified. It is therefore necessary to see what can be done in the short term by legal change and by alterations in administrative and government procedures. We hope this project, and these papers, may help with that process.