

# DECISION-MAKING AND DECISION MAKERS IN SEXUAL OFFENCE TRIALS: OPTIONS FOR SPECIALIST SEXUAL OFFENCE COURTS, TRIBUNALS OF FACT AND THE GIVING OF REASONS

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## I. INTRODUCTION

This paper looks at aspects of the process of decision-making in trials of sexual offending. It considers first the experience of other jurisdictions with courts dedicated to hearing sexual offence cases and with specialist courts for similar offending, then considers the arguments of principle and pragmatism both for and against the creation of such courts before sketching a design for a specialist court for sexual offending in New Zealand, should one be set up.

The second part of the paper looks at the body that adjudicates in sexual offence cases, and considers the existing practice in New Zealand, as well as a range of tribunals that operate in different overseas jurisdictions. It examines in some detail the arguments for and against lay participation in tribunals for sexual offending, including considering some of the social science research as to decision-making processes to see whether this can inform the debate as to the appropriate form of the tribunal for sexual offence cases.

## II. SHOULD THERE BE SPECIALIST SEXUAL OFFENCES COURTS IN NEW ZEALAND?

There have been many calls in different jurisdictions for the creation of specialist courts to deal with sexual offending or for the development of different administrative provisions to assist with the efficient and speedy processing of sexual offence cases. To evaluate the merits of such proposals it is desirable first to consider what has been tried overseas, then to look at arguments for and against such courts and then to consider what features any such court should have.

### *A. Experience with Specialist Sexual Offence Courts*

The best known specialist sexual offences court is that used in South Africa where there were in 2005 more than 60 specialist courts hearing sexual offence cases.<sup>1</sup> Around one quarter of these were “blueprint” courts, in that they met the requirements of a national blueprint developed in 2002

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1 A rather different kind of specialist sex offences court exists in some counties of the State of New York. Their primary function is in dealing with sentencing of sexual offenders who may be required to be registered post conviction, and to coordinate the work of prosecutors, probation and correctional agencies and providers of treatment for convicted offenders. The courts function in conjunction with specialised police units, specialist prosecutors and have provision for victim advocates to have input into the proceedings. As the principal thrust is on sentencing and treatment of offenders, they do not appear to furnish a model which

and updated in 2005.<sup>2</sup> The blueprint sets out the essential requirements for the Sexual Offences Courts and covers both personnel requirements and equipment and location requirements. Of these, credentials for prosecutors are the most comprehensive, and include a requirement of a minimum of three years' experience in criminal litigation, being passionate and empathetic about sexual offences, having been trained as a specialist sexual offences prosecutor and receiving continued training and debriefing. The blueprint requires two prosecutors per court. Requirements for judges/magistrates, intermediaries, victim assistant services and support services are also included, although the blueprint focuses more on the overall nature of these positions, rather than detailed requirements of the role, function or responsibilities.<sup>3</sup> The blueprint also specifies certain physical requirements for the court building. The court room and all associated services must be situated so as to prevent contact between the accused and victims. There must be separate waiting rooms for children and adults, private consultation areas, CCTV and/or one-way mirror systems and an intermediary room. The remaining, and larger, number of courts for sexual offences are "dedicated" courts which only hear sexual offences, but do not meet all the requirements of the national blueprint. It appears the numbers of "dedicated" courts has declined in recent years as sexual offence cases have been allocated to other courts as part of case management strategies to make more efficient use of resources.<sup>4</sup>

The South African courts for sexual offences were designed to tackle a very low rate of conviction for sexual offences, particularly against children, and to mitigate the hardships encountered by complainants in the ordinary courts. They have been successful in both respects. Surveys of their functioning have found that conviction rates have risen from 10-20% before they were created to 60 -75% in cases heard in the specialist courts,<sup>5</sup> although the rate of convictions vary significantly over time. One significant variable is the quality of the specialist prosecutors, with lower conviction rates at the Wynberg court being considered to be due to the induction of a less experienced group of specialist prosecutors.<sup>6</sup>

Several evaluations of these courts have been carried out, and they recognise that the courts have achieved a high degree of success in improving the experience of victims in the handling of cases, even though not all sexual

could readily be adapted in New Zealand to defended sexual offence trials. See Anne Cossins *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee, 2010) at [5.105]–[5.119].

2 The blueprint can be found as an annexure to the article by HB Kruger and J Reyneke "Sexual Offences Courts in South Africa: *Quo vadis?*" (2008) 33(2) *Journal for Juridical Science* 32.

3 Ibid.

4 National Prosecuting Authority South Africa *Annual Report 2008/09* (Pretoria, 2009).

5 M Sadan, L Dikweni and S Cassiem *The Sexual Offences Court in Wynberg and Cape Town and Related Services: A pilot assessment* (Institute for Democracy in South Africa, Cape Town, 2001) at 37.

6 Ibid.

offences cases go through the specialist courts and the procedures required in that court are not always followed.<sup>7</sup> One review noted this victim centred approach thus:<sup>8</sup>

Courts for sexual offences appeared to have aligned themselves as institutions aimed primarily at the restoration and maintenance of the victim's dignity. Their current approach would seem to suggest that these courts are to some degree focused on the victim's empowerment through the litigation process. This is in keeping with the principles of ... therapeutic jurisprudence.

However it has been noted that offenders have expressed a lack of confidence in the fairness and objectivity of the court and the court staff including the prosecutors.<sup>9</sup> As is discussed below, there is a risk that a perception that a court's processes are not fair will lead to a perception that the offending punished by that court was not serious or that the verdicts were not valid.

The specialist courts have not always been successful in reducing stress on victims or other negative outcomes. Walker and Louw identified problems such as a failure to properly communicate to victims the outcome of the cases in which they were involved and instances of a failure by the magistrates to protect victims from intimidation by offenders or by defence counsel.<sup>10</sup>

### *B. Other Specialist Courts for Similar Offending*

Various jurisdictions have experimented with specialist courts for domestic violence. A specialist court of this kind was established in Manitoba in 1990 and another in Western Australia in 1999. Special domestic violence courts are currently being trialled in New Zealand<sup>11</sup> and in Queensland and New South Wales. There has also been an experiment with a specialist drug court in Christchurch.

New South Wales has trialled the use of a specialist court for child sexual assault cases. This was done through pilot projects in three suburban Sydney courts and one regional centre. In each case the pilot court was able to hear all sexual offences, whether summary or indictable. Interim evaluations of the project do not indicate a great level of success, primarily because the prosecutors and the judicial officers in the specialist court were not themselves

7 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 37.

8 SP Walker and DA Louw "The Bloemfontein Court for Sexual Offences: perceptions of its functioning from the perspectives of victims, their families and the professionals involved" (2004) 17 SACJ 289 at 291 ["The Bloemfontein Court"].

9 SP Walker and DA Louw "The Court for Sexual Offences: Perceptions of the professionals involved" (2007) 30 Int'l J L & Psychiatry 136.

10 Walker and Louw "The Bloemfontein Court", above n 8, at 292 and 305.

11 For an evaluation of the Waitakere DC trial project see Mandy Morgan and others *An Evaluation of the Waitakere Family Violence Court Protocols* (Massey University, Palmerston North, 2007).

specialists but rather drawn from the general pool of prosecutors or judges. While there was an option for judges to receive some specialist information and training it appears the opportunity was not generally taken up.<sup>12</sup>

### *C. Special Lists for Sexual Offence Cases*

A different approach to the problems posed by sexual offences trials is not to operate a specialist institution but rather to provide a specialized administrative process which will allow more timely and effective case management of sexual offence cases. In 2001 the Victorian Law Reform Commission raised for public consultation the ideas of establishing a new stand-alone court with jurisdiction to hear both summary and indictable offences of a sexual nature and the establishment of specialist lists in both the Magistrates' Court and the County Court.<sup>13</sup> However after some mixed feedback the Commission in 2004 finally recommended a special list for the County Court and a special list, in the Magistrate's Court only, for sexual cases where the complainant was a child or had cognitive impairment.<sup>14</sup> It later noted that a pilot project of a specialist committal list in the Magistrates' Court had resulted in more cases settling by way of a guilty plea after committal and had also reduced delays in cases going to trial.<sup>15</sup>

A specialist listing process was set up in New Zealand in the 1990s for cases involving child complainants (and defendants), to operate in both the District and High Courts, but it has to a large extent been superseded by other reforms. There has been no evaluation of its effects.<sup>16</sup>

### *D. Specially "ticketed" Judges – the English Situation*

Various studies have demonstrated the need for specialist training of judges in understanding how sexual offences affect victims and the consequences this may have for the manner in which they present their evidence.<sup>17</sup> In England some attempt has been made to address this issue. In England, Crown court judges require a "sex ticket" before they are able to preside at sexual offence trials. This requires firstly that the judge be considered suitable to conduct such trials and also that he or she have attended a three day specialist training course. That course is designed to make judges aware not only of relevant law and sentencing guidelines but also of wider issues such as the effects of serious sexual crime upon victims and the perception of complainants as to how their complaints are handled by the criminal justice system as a whole. Participant judges are expected to become better equipped to understand psychiatric and emotional factors which affect reporting by

12 See generally Judy Cashmore and Lili Trimboli *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (NSW Bureau of Crime Statistics and Research, Sydney, 2005).

13 Victorian Law Reform Commission *Sexual offences: Discussion paper* (Melbourne, 2001).

14 Victorian Law Reform Commission *Sexual offences Law and Procedure: Final Report Implementation* (Melbourne, 2004) at p liii, recommendations 51 and 53.

15 *Ibid.*, at 176, [3.108].

16 See Practice Note *Sexual Offences Involving Child Complainants and Child Defendants* (Chief District Court Judge's Chambers, 1998).

17 I Bacik and others *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, Dublin, 1998) at 45.

complainants of serious sexual offences (both as to the timing and the contents of complaints), the manner in which complainants give their evidence and the pressures upon them and the short-term and long-term effects on victims of sexual offending and the impact of the trial process.<sup>18</sup> The expectation is that judges will continue to attend such seminars every three years, and it is for the presiding judges to monitor that.<sup>19</sup>

However the numbers are such that the “sex ticket” is not a specialist qualification. In 2010 496 of the 686 circuit judges of England and Wales had the qualification, and another 200 or so part-time judges were also being authorised to hear sexual offending cases.<sup>20</sup>

### *E. Do Specialist Courts meet the Expectations of them?*

A key issue is, of course, whether specialist courts achieve the goals intended. Almost invariably it is difficult, sometimes impossible, to obtain statistical data which can demonstrate the impact of particular specialist courts or trial pilots of specialist courts. Thus an evaluation of the New South Wales domestic violence intervention court model found little statistical evidence of the success or otherwise of the pilot project, but did find a majority of stakeholders believed that the pilot project had brought benefits.<sup>21</sup>

The one jurisdiction where it is clearly evident that a specialist court had had a significant impact on both the process by which sexual offence cases were investigated and prosecuted and the trials conducted and the rate of conviction for sexual offences is in South Africa. The specialist sexual offence courts which have been in operation since 1993 have shown significantly higher rates of conviction than in the past, and have mitigated the worst impact of the criminal justice process on complainants. However this level of success must not be overstated, Firstly the prior rates of prosecution and conviction were extremely low – between 10 to 20%<sup>22</sup> – so that almost any co-ordinated government action would have been likely to have had some impact, and secondly, in South African society at large, sexual offending continues to occur at a rate which appears to be very significantly higher than in European or Australasian jurisdictions.

The New South Wales pilot of specialist courts to hear cases of sexual offending against children was not considered to be particularly successful. A full evaluation by Cashmore and Trimboli in 2005<sup>23</sup> found that the conviction rates for cases heard in those courts was broadly comparable with those for other courts where no such standard features were used. They also

18 Peter Rook QC *Improving Outcomes for Victims of Sexual Violence: A Strategic Partnership Approach: Conference Report* (National Conference on Sexual Violence, 2006) at 123-124. See also 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 93.

19 Baroness Vivian Stern *ibid.*

20 *Ibid.*, at 92-93.

21 Laura Rodwell and Nadine Smith *The New South Wales Domestic Violence Intervention Court Model* (NSW Bureau of Crime Statistics and Research, Sydney, 2008).

22 Kelly, above n 7, at 37.

23 Cashmore and Trimboli, above n 12.

found that there were inconsistencies in the use of the special provisions for children to give evidence. In part this may have been due to the lack of specialist prosecutors and judges. Interim evaluations of the project have noted that voluntary provision of specialised information had not been effective in ensuring all judges were aware of the particular issues arising when dealing with child witnesses and complainants.<sup>24</sup>

#### *F. Arguments For and Against Specialist Sexual Offences Courts*

There are a number of arguments which have been advanced in favour of a specialist sexual offence court. Most proponents of specialist courts have suggested that there would be very significant benefits from having specialist judges – usually self-selected from the existing judiciary – who would acquire a high degree of expertise with the special rules of procedure and methods of presenting evidence which may be used in sexual offence cases. Such judges would also be highly likely to be much more aware of the concerns of complainants and be ready to ensure that complainants' interests were safeguarded. Expertise in the relevant law and practice may also lead to greater efficiency and a higher quality of service. In particular judges and lawyers may develop a more full understanding of the impact of sexual offences on victims and be able to tailor their practice to reduce the stresses on victims.

While these benefits could be very substantial, there may be some doubt as to whether they would all be realised. It has been pointed out that such specialisation might create a real risk of judicial “burnout” given the demanding nature of many sexual offence trials.<sup>25</sup> While that could be avoided by a suitable scheme of rotation of judges, there would then need to be a larger pool of expert judges on whom the burden would fall in turn. It is also been suggested that there is a risk that judges (and counsel) may be reluctant to opt for a specialist role.<sup>26</sup> An Australian study also found reluctance by some judges to create such a specialist body of judges, on the basis that the law relating to sexual offending was not particularly complex and any judge should be competent, and should be considered competent, to try sexual offence cases.<sup>27</sup>

Many of the concerns as to recruitment, retention and specialization have been expressed in relation to other staff that would be needed in a specialist sexual offences court – particularly in regard to recruiting and retaining suitable prosecutors.

A specialist court may also produce more consistent outcomes and a more consistent level of service. It could also act as a focus for the provision of social and support services. As against that, there are significant issues as to resources.

24 Victorian Law Reform Commission *Sexual Offences Law and Procedure: Final Report* (Melbourne, 2006) at 179-180, [3.121] [*Final Report*].

25 *Ibid.*, at 174-175, [3.102].

26 Elisabeth McDonald “Sexual Violence on Trial: Assisting Women Complainants” (2005) 19(2) *Women’s Studies Journal* 107.

27 Victorian Law Reform Commission *Final Report*, above n 24, at 174-175, [3.102].

It is evident that a properly resourced sexual offences court would very considerably benefit complainants of sexual offences but the measures necessary to do so may demand a higher proportion of what is usually a limited budget for the criminal justice system. It is also relevant to consider whether proper facilities – and specialist judges – can be provided in all necessary centres. It would appear both unfair and unsatisfactory to have a system which operated only in certain major centres and was not available in provincial areas.

A more abstract issue – but perhaps a more important one – is the signal sent to the community by the creation of a specialist court. It might emphasise that sexual offending is so serious an offence that a specialist court is needed to ensure offenders are punished. This may send a message to victims of sexual offending which may encourage reporting of offences.<sup>28</sup> However there may be a risk that the reverse will occur. Creation of a separate court may generate a perception that sexual offending is less significant because it is not tried in the mainstream court system. A linked possibility is that the specialist court might be perceived by the public as in some ways less impartial than the mainstream courts, with the possibility that this would decrease the negative social consequences of a conviction for a sexual offence and possibly lessen the perceived public seriousness of sexual offending. There is also some risk that a specialist court may appear to be treating the victims of sexual offences in a way which privileges them compared to victims of other kinds of offences. This might in turn appear to be ‘privileging’ sexual offences over other offences, something which may have negative impacts on victims of other offending such as domestic violence and other serious assaults.

Lastly the existence of a separate sexual offences court might further complicate the already complex meshing of jurisdictions of the courts in criminal matters.<sup>29</sup> However if all sexual offence cases were funneled to a specialist court, procedural simplification for that class of offences might be more readily achieved.

The questions of practicality and cost can only be fully dealt with after there is a decision as to what features the specialist court should have. It is sufficient for the present to draw attention to the issues that should be analysed.

### *G. What Features might a Specialist Court Possess?*

As will be evident from the discussion above, creation of a specialist sexual offences court for New Zealand will require considerably more than a simple adaptation of some existing overseas model, since none can fit easily into the New Zealand system. Some assistance can be gained from reforms

28 See Ministry of Justice *Discussion paper: Improvements to Sexual Violence Legislation in NZ* (2008) at [143]-[144]; McDonald, above n 26.

29 Currently some offences are triable only in the District Court, some only in the High Court, and other “middle band” offences may be tried in either. Youth offending is largely, but not always, dealt with in the Youth Court. When the Criminal Procedure (Reform and Modernisation) Bill 2010 which is before Parliament is enacted, the position will be slightly simplified but there would still be some complexities with having a separate sexual offences court.

proposed – and critiqued – in other jurisdictions, as with the specialist sexual offence courts suggested in various Australian jurisdictions, particularly for cases of sexual assaults on children.<sup>30</sup>

Nevertheless certain essential features of such a court can be determined and these can be complemented by other features which are, at the least, highly desirable.

A starting point for discussion is provided by the New South Wales task force<sup>31</sup> which summarised the common elements described in specialist courts in other jurisdictions as follows:

- a dedicated and separate case management list;
- specially trained prosecution teams;
- a dedicated coordinator to facilitate specialist listings;
- specialist witness support;
- specialised court staff;
- specialist police training.

Some of those issues, such as witness support and police training are discussed in other papers in this issue.

First any specialist court system must operate from premises which provide a safe and secure environment for all parties, including complainants and other witnesses. This will require such matters as separate access routes for complainants and prosecution witnesses so that they are not brought into contact with the defendant or the defendant's family or supporters, as well as a separate waiting room, refreshment and toilet facilities. There should be at least some waiting rooms suitable for children and young complainants and witnesses. Lastly the physical facilities must include all the necessary technical equipment for the giving of evidence by CCTV, remote video link or recorded video. Ideally these facilities should be present in all courthouses, but they are particularly required in courthouses where sexual offence cases are tried.

Secondly any specialist court system requires specialist staff. There should be specialist prosecutors who have acquired, by experience or training, knowledge of the special needs and requirements of victims of sexual offences, particularly those who are called upon to give evidence at a trial.<sup>32</sup> It is possible that with the recent transfer of much criminal defence work to

30 The focus of this literature has, however largely been on evidential reforms already adopted in New Zealand and the mechanics of the specialist courts have generally not been discussed in detail. See for example the heavy emphasis on evidential matters and judicial warnings in the most recent proposal for substantive reform in Australia: Cossins, above n 1. See also Kelly Richards *Child complainants and the court process in Australia* (Australian Institute of Criminology, Canberra, 2009).

31 Criminal Justice Sexual Offences Taskforce *Responding to sexual assault: the way forward* (Criminal Law Review Division, Attorney-General's Department NSW, , 2005) at 162.

32 The importance of specialist prosecutors has been identified as critical to the success of the South African sexual offences courts, see Sadan, Dikweni and Cassiem, above n 5, at 37. See also Kelly, above n 7, at 37.

the Public Defender Service there could be specialist defence counsel as well so that in many cases judges, prosecutors and defence lawyers would all have relevant experience and expertise.

Other “human resources” are necessary. There should be specialist trained victim support staff. Suitably trained staff to operate the CCTV and video facilities will be essential.<sup>33</sup> It would be desirable that other court staff are also provided with education and training as to both the special features of the court and the needs of victims of sexual offending.

It seems unlikely any specialist court could operate satisfactorily without suitably experienced and qualified judicial officers. The principal problem identified in the interim studies of the New South Wales pilot project for a specialised court was that many judges lacked the knowledge necessary to deal appropriately with the special character of the cases which were to be tried and the needs of the victims of sexual offences, and those judges were reluctant to take up opportunities for education and training to acquire the relevant knowledge.<sup>34</sup> The idea that judges trying particular kinds of cases should be required to have particular expertise and experience is nothing new. In New Zealand, judges in the District Court who are to sit in the Youth Court – or to conduct jury trials – must be given warrants to act in that capacity. It would be comparatively simple to operate a similar kind of warrant system before a specialist court. However no similar system of specific warrants operates in the High Court, and it is possible (perhaps probable) that there would be judicial resistance to the idea that High Court judges be required to be separately qualified to preside over sexual offence cases.

In addition, a specialist court would require its own case management processes, including a separate process for listing cases for hearing. That would require either a specialist and dedicated court administrator or a judicial officer with appropriate powers to ensure cases were heard speedily and the resources of the court were used efficiently. It will be necessary to consider whether the listing officer’s case management decisions should be binding on the trial judge. In the New South Wales pilot project it was found that, as judges were not bound by listing decisions, much time was spent considering whether to alter those decisions.<sup>35</sup> Case management would still be necessary to ensure that only an appropriate number of cases were listed so as to avoid unnecessary delays and court attendances.<sup>36</sup>

It would be essential that any specialist sexual offences court had jurisdiction to hear cases involving multiple offences of which only some were sexual offences (for example a single transaction involving burglary and sexual offending, or sexual offending and an attempt to pervert the course of justice in relation to the sexual offence). It would be most unsatisfactory for the related but non-sexual offences to be tried separately where, as would usually be the case, a primary witness for the prosecution for the non-sexual

33 Insufficient technical support of this kind was identified as a cause of poor outcomes in the NSW specialist court pilot: See Cashmore and Trimboli, above n 12, at 10-11.

34 *Ibid.*, at 12.

35 *Ibid.*, at 13

36 *Ibid.*, at 22-27.

offence is the victim of the sexual offence. In the current system the two different charges would usually be heard together because there would almost inevitably be an interconnected narrative which could not easily be presented separately and, equally importantly, evidence on one matter would be admissible on the other.<sup>37</sup> The introduction of a specialist court should not make the victim's position worse by having to give evidence in separate proceedings.

All the features discussed above would need to be tailored around the key decision as to the mode of making decisions as to guilt or innocence. Most specialist courts which have been tried involve judge-alone trials (New South Wales being the exception). Most of the specialist features are best suited to trials where judges are the sole deciders of fact, or are involved in the making of factual decisions. There is some force in the comment of some Victorian judges who questioned "the utility of a specialist court that seeks a verdict from a non-specialist jury".<sup>38</sup>

### III. WHAT KIND OF TRIBUNAL SHOULD HEAR SEXUAL OFFENCE CASES?

#### *A. The Current New Zealand Law as to Modes of Trial for Sexual Offences*

A small number of serious sexual offences can only be tried by judge and jury because the maximum sentence of imprisonment which can be imposed on conviction is 14 years or more.<sup>39</sup> Other sexual offences can be tried summarily. In such cases the defendant has the right of election under s 66 Summary Proceedings Act 1957 to elect jury trial. In most cases the trial will then be held before judge and jury.<sup>40</sup>

A defendant who elects jury trial after being charged summarily with an offence where the maximum sentence of less than 14 years can seek judge-alone trial on indictment under s 361B Crimes Act 1961.<sup>41</sup> The judge must order trial by judge-alone unless the judge considers that it is in the interests of justice that the accused to be tried before a judge and jury.<sup>42</sup> The more general interests of justice prevail over the accused's wishes where the making of an order for judge-alone trial would require multiple trials with consequent hardships to witnesses who would need to testify twice,<sup>43</sup> or would effectively

37 See *R v Daleszak* CA246/05, 25 October 2005; *R v Betti* CA39/06, 11 April 2006.

38 See submission of Judges Neesham, Nixon, Kelly and Hart, cited in Victorian Law Reform Commission, above n 24, at 174-175, para 3.102.

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

40 The exception is where the prosecution successfully applies for a judge-alone trial under ss 361d or 361E, discussed below.

41 The sexual offences where judge-alone trial is possible under this section are Crimes Act 1961, ss 129 (attempted sexual violation or assault with intent to commit sexual violation); 130 (incest); 131 (sexual conduct with dependent family member); 131B (sexual grooming); 134 (sexual conduct with a young person under 16); 135 (indecent assault); 138 (sexual exploitation of impaired person); 143 (bestiality) and 144 (indecency with animal).

42 Crimes Act 1961, s 361B(4).

43 *R v S (CA426/2008)* [2008] NZCA 404 at [22]-[24].

sever the trials of offences which would otherwise be held together even if severance was sought.<sup>44</sup> Mere additional costs or inconvenience do not justify granting the application.<sup>45</sup> Absent some compelling considerations, the courts have apparently largely assumed that the issue of the interests of justice can be determined by considering what is in the interests of the defendant, and, further, that an informed defendant may decide what mode of trial is in his or her best interests.<sup>46</sup> There has been no judicial consideration of whether public confidence in the decision-making process or other wider social concerns might require adherence to a norm of jury trial and thus dictate that an application for a judge-alone trial be refused.<sup>47</sup>

In addition a judge may order trial by judge-alone against the defendant's wishes if the trial would be unduly long and complex<sup>48</sup> or where there is a risk of jury tampering.<sup>49</sup> The power to order a judge-alone trial against the defendant's wishes has, so far, almost exclusively been used in fraud cases. The Supreme Court has held that where the question of whether to order a judge-alone trial was "finely balanced" it would be appropriate to recognise the protection of the right to trial by jury in s 24(e) New Zealand Bill of Rights Act 1990 and refuse an application.<sup>50</sup>

#### IV. SHOULD THERE BE LAY PARTICIPATION IN THE TRIBUNALS FOR SEXUAL OFFENCE CASES?

The question of principle is whether the giving of a verdict in a sexual offence case should involve lay participation or should be solely a matter for one or more professional judges. It is essential to bear in mind that the arguments for and against lay participation are not necessarily the same as those about whether the decision-making should be by judge-alone or by a jury. Most of the debate and dialogue has been premised on these two options being the sole ones available. There has therefore been little if any discussion about the merits of lay participation in other forms – lay judges or assessors – or of more radical alternatives such as allowing the judge to sit with the jury during decision-making.

##### *A. Public Validation and Lay Judges or Jurors?*

The most powerful arguments for retaining jury trial is that public acceptance of verdicts in controversial cases is more likely where there is seen to have been a degree of public input in the form of a jury verdict which provides some element of validation of the result. Given that 98% of cases are decided by judges without jury, the argument must be refined to one that jury validation is necessary in cases of serious offending where the

44 *R v Narain* [1988] 1 NZLR 580 (HC).

45 *R v Mahomed* HC Auckland CRI-2008-092-748, 16 July 2009 at [34]-[38].

46 *R v Narain*, above n 44.

47 The point was raised in argument by the Crown in *R v Narain*, above n 44, on the basis that decisions as to credibility of witnesses are best made by a jury, but the argument was not addressed in the judgment.

48 Crimes Act 1961, s 361D (for offences punishable by less than 14 years imprisonment).

49 Crimes Act 1961, s 361E (no limitation on nature of offences).

50 *Porter v R* [2009] NZSC 107 at [9].

results may be controversial. Researchers in England have found that some professionals involved in sexual offence cases believe that jury verdicts are preferable to judge-alone verdicts because there will be less controversy over verdicts which are contrary to popular perceptions of the merits, and thus involve less stress on judges than would be the case if judges were also finders of fact.<sup>51</sup>

It has been suggested that the legitimacy accorded legal institutions is mainly a function of the perceived quality of decision-making (procedural justice) and the extent to which people trust the decision maker's motives. On that analysis, social factors such as the opportunity for an actor to present the actor's point of view, procedural fairness and trust are much more important in determining short-term and long-term satisfaction with the justice system and acceptance of outcomes than are instrumental factors such as receiving a favourable outcome.<sup>52</sup> This suggests there may be a real risk that if there is a change to the decision-making mechanism for sexual offence trials to a body which does not have an existing precedent there may be a loss of public confidence in the verdicts, which could have the undesirable effect that the public perceive persons convicted of sexual offending as not truly guilty because the process of conviction had been suspect.

### *B. Forms of Lay Participation*

Two conceptually distinct models of lay participation require discussion – the use of lay jurors and lay judges.<sup>53</sup> The roles of lay jurors and of lay judges can be distinguished by reference to both the nature of the decisions the individuals are called upon to make and the manner in which decisions involving them are reached.<sup>54</sup>

A lay judge has a voice and a vote in any decisions of the court, whether on matters of law or fact. Because he or she has that role, a lay judge will make, or contribute to, any decisions about what material the tribunal will consider, about the elements of the offending charged and any defences open to the defendant on those charges, and as to any procedural issues. The lay judge will also have an input into sentencing decisions. A key point is that a lay judge makes his or her decision individually, though that decision may feed into a collective decision of the court. The collective decision is reached by counting the views of the members of the tribunal to determine whether a sufficient majority exists or – where unanimity is required, whether the tribunal is unanimous. In New Zealand two different models of lay judiciary exist – Community Magistrates and Justices of the Peace. Both have very limited powers to finally determine cases,<sup>55</sup> and will not hear any sexual offence cases.

51 Jennifer Temkin and Barbara Krahe *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 179.

52 T R Tyler "Procedural justice, legitimacy, and the effective rule of law" (2003) 30 *Crime & Justice* 431.

53 A third, the use of lay assessors, is so uncommon as to not need discussion here.

54 It must be noted that the description of particular tribunals in different countries does not always accord with this framework. For example, the functioning of a "jury" in Denmark, as discussed later, is very unlike the New Zealand conception of a jury.

55 See Summary Proceedings Act 1957, ss 9A and 9B.

A lay juror, by contrast, decides only matters of fact and has no input into legal matters which arise for decision such as what evidence the tribunal will hear, any procedural matters, or in formulating the legal issues which the tribunal of facts is to determine. As importantly, a lay juror is involved, from the outset, in a collaborative decision-making process. The decision of the jury, whether it is to be unanimous or by a majority, is the decision of a collective body which reaches its verdict after a process of deliberation and debate as a body.

### *C. Why Use Juries?*

The New Zealand Law Commission has identified the functions of a jury as being:

- to determine the relevant facts of the case and to apply the law to reach a verdict of guilty or not guilty;
- to act as the community conscience in deciding criminal cases;
- to safeguard against arbitrary or oppressive government, and to legitimise and maintain public confidence in the criminal justice system;
- to educate the public about the workings of the criminal justice system.

The third of those points conflates two linked but separate issues the idea that a jury may decide contrary to the facts or law where it believes a prosecution had been brought by an oppressive or unreasonable government and the idea that because the findings of the court in criminal cases is made by a jury verdict, that verdict – whether an acquittal or a conviction – is more valid and deserving of public confidence. Of these the first has some historical basis, since in the common law tradition juries were seen as protecting individuals from the unfair exercise of the power of the state. Indeed in the 19<sup>th</sup> century many European countries introduced jury trials on that ground, although very few retained them through the first half of the 20<sup>th</sup> century.<sup>56</sup> The second argument, of public validation, is considered further below.

Many of these grounds are much less convincing or compelling. To see the jury system as a way of educating the public about the criminal justice process is surely misguided. Firstly education is much more effective when it is delivered to persons in their formative years. These are of course people who will not sit on the jury. Secondly a significant bloc of the population are disqualified from jury service by either the fact of previous criminal convictions or because they do not reside in a settled location long enough to be called to jury service. Thirdly, as very few criminal trials are in fact tried before juries, jurors may receive a quite false picture of the overall criminal justice system.

The argument that jury trial is desirable because juries can act as the community conscience when deciding on their verdicts can be even more readily dismissed. It is surely illogical to set up a criminal justice process

56 Yue Ma “Lay Participation in Criminal Trials: A Comparative Perspective” (1998) 8 ICJR 74 at 74-75.

incorporating a tribunal of fact which is designed to operate according to law but to justify its use on the basis that it will fail to act in accordance with its legal obligations.

More importantly there is a fundamental point in regard to both the community conscience and bulwark against despotism arguments – one rarely made clearly in the literature and never by partisans of jury trial – is that where a jury is seen as invoking some kind of community equity or public opinion and acting in disregard of the strict rules of law and of the evidence it may well not be acting to limit state power or to protect individuals. In the words of Temkin and Krahe:<sup>57</sup>

If community views about the offence in question are at odds with characteristics of the case they are called on to decide, principles of fairness and equity may be compromised.

It is as likely – and possibly more likely – that the jury may return an unjust and incorrect guilty verdict in respect of a defendant who should have been found not guilty. While it is possible that such an adverse verdict, reached through improper means, might be quashed on appeal, there can be no certainty this would occur. Nor does it appear a risk a defendant should be required to run.

It is also true that goals of public education and input can be achieved to some degree by other forms of lay participation, but it is clearly much more difficult to envisage a system of lay judges who are required to give reasons for their decisions being able to act in the same way that a jury can when the jury verdict is inscrutable.

It is suggested that of the five arguments advanced by the Law Commission, only two deserve serious consideration – the (implied) assertion that juries are accurate decision-makers and the issue of public validation of the criminal justice system through jury verdicts.

#### *D. Accuracy Arguments*

Any decision as to the optimum mode(s) of trial for sexual offending must consider whether there is any reliable data as to the levels of accuracy achieved by different kinds of fact-finding bodies which might make us wish to opt for one kind rather than the other. While there have been some studies of the degree to which judges and juries might come to different conclusions, it is very difficult to determine which conclusion was in fact correct.

There is a substantial body of literature which suggests that a single judge will have difficulty in assessing the credibility of a witness where all the judge has to go on is the witness's demeanour in court.<sup>58</sup> Obviously, as is said in that literature, credibility is far more easily determined where there are contemporary documents or other evidence against which oral testimony can be checked. In many instances there will be no such other evidence and the question before the court will fall to be determined on the basis of the perceived credibility and reliability of the complainant.

<sup>57</sup> Temkin and Krahe, above n 51, at 69.

<sup>58</sup> See David Ipp "Problems with fact-finding" (2006) 80 ALJ 667 and G T Pagone "Centipedes, Liars and Unconscious Bias" (2009) 83 ALJ 255.

It has been traditionally said that juries are more likely to be able to assess credibility than are judges. There is, however, very little empirical evidence which can be used to determine whether this is so.

Researchers have used as a proxy for accuracy of jury deliberations the extent to which jurors and judges agree on verdicts. Various studies have shown differing degrees of congruence as to outcomes. An American study of the 1960s found that in 78% of cases the jury and judge agreed on the verdict.<sup>59</sup> More recent New Zealand research into 48 jury trials has suggested that juries and judges agreed precisely on the appropriate verdicts in half the cases; but the differences of view between juries and judges (and other legal experts) in the other cases was frequently explicable by jury behaviour such as hung juries or agreement, contrary to law, on a compromise verdict. That study noted also that where there was a difference between the judge's view and that of the jury, it was likely that the jury would have acquitted where the judge would have convicted.<sup>60</sup> A recent survey of jury trials in England has also concluded that juries will be slower to convict than would a judge hearing the same evidence.<sup>61</sup> It should be noted that while for many years conviction rates in jury trials for sexual offences were markedly lower than in jury trials for other offences, recent research suggests that in England the conviction rates are now more closely aligned.<sup>62</sup>

Even if juries may be more prone to acquit than would a judge, there is still some chance that an erroneous verdict would be reached. The proportion of suspect convictions would appear to be low. A New Zealand study found only a single case (of 48 studied) where a conviction was considered to be dubious by the researchers.<sup>63</sup> A somewhat less methodologically rigorous English study has suggested that more than 5% of guilty verdicts returned by juries were considered by legal professionals to be questionable.<sup>64</sup>

In the case of tribunals made up of a professional judge and lay judges there may well be a high degree of congruence between the professional judge's decision and that of the lay judges. However studies of Croatian and of Chinese courts have suggested that a high degree of unanimity in the tribunal – up to 95% in the Croatian study – may not be as a result of genuinely congruent decision-making but rather of an unwillingness by the lay judges to contradict a professional judge or even to engage thoroughly with the evidence which might have led them to a different view.<sup>65</sup> During the course of our project, researchers discussed aspects of trial procedure with judges and other legal professionals from a range of European countries. The anecdotal data gathered in our research suggests that it is relatively rare

59 Harry Kalven Jr and Hans Zeisel *The American Jury* (University of Chicago Press, Chicago, 1966) at 63.

60 Yvette Tinsley "Juror Decision-Making: A Look Inside the Jury Room" in Roger Tarling (ed) *The British Criminology Conference: Selected Proceedings*. (vol 4) Papers from the British Society of Criminology Conference, Leicester, 2000).

61 Temkin and Krahe, above n 51, at 179.

62 Cheryl Thomas *Are Juries Fair?* (Ministry of Justice, London, 2010) at 31.

63 Tinsley, above n 60.

64 J Baldwin and M McConville *Jury Trials* (Clarendon Press, Oxford, 1979) at ch 5.

65 See Sanja Kutnjak Ivkovi "Lay Participation in Decision-making: a Croatian Perspective on Mixed Tribunals" (1997) 36 *Howard JCrIm Just* 406 at 407; Ma, above n 56, at 87-88.

for professional judges sitting with lay judges to be overruled by the lay majority, but that it was not uncommon for the lay judges to be divided in their opinions.

While the data is not conclusive, it can certainly be said that it cannot be shown empirically that juries are necessarily better decision-makers than judges – nor that they are worse.

## V. SOME EXISTING ALTERNATIVE MODELS FOR THE TRIAL OF SEXUAL OFFENCES

Most debate in New Zealand about the appropriate way of trying sexual offences has been conducted as though there is a simple choice to be made between judge-alone trial and jury trial. However it is worth considering alternative models to see if they would appear to have any significant advantages over current procedures and to identify possible difficulties which would incline us to rule them out.

### *A. Single Professional Judge*

In the current context, we need not say a great deal about judge-alone trial. The vast majority of criminal cases in New Zealand are decided by a single professional, legally qualified, judge. Most judge-alone trials take place in the district court summary jurisdiction, but noted earlier, there may be judge-alone trials of cases on indictment in both the District Court and High Court.

A model for trial which focuses on a single professional judge is therefore able to draw on a very considerable body of law – and lore – as to how such trials may properly be conducted. The resource costs are significantly lower than are involved in judge and jury trials, both because court rooms need not be as elaborate and because judge-alone trials may be conducted more efficiently because matters arising during the trial as to admissibility of evidence or the propriety of particular questions can be more speedily resolved. It is also possible that professional judges may be more readily educated to understand the effects of sexual offending on victims, including how victims may present their evidence before and during trial, than would be the case for jurors. It is also possible that adequately experienced professional judges may be at least as good, and quite possibly better, than the jurors in evaluating complex or conflicting evidence. It is also possible they may be at least as good as juries in determining credibility of witnesses.

### *B. Multi-Judge Panels*

One alternative which has received virtually no consideration in the common law world is the possibility of a multi-judge trial panel. It may be that this is largely down to an unthinking acceptance of an argument made by Lord Diplock that having multiple judges on the bench during jury trials would unduly prolong examination and cross-examination of witnesses because of the need for the judges to confer on issues of admissibility of

evidence or other issues.<sup>66</sup> That view ignores the reality that jury trials with a single judge are frequently disrupted by the jury having to be excluded while issues of evidence or other procedural matters are debated. It is unlikely that the disruption would be significantly worse with a multiple judge panel. More seriously there has been little discussion of multi-judge trial panels without any lay participation. The issue is deserving of considerably greater attention than it has so far received. Parallels may also be drawn with the exercise of the contempt jurisdiction of the High Court, where it is very common for a bench of two or more judges to sit, without apparent procedural difficulties. In a different sphere of law again, the Employment Court regularly sits with multiple judges who are judges of both law and fact.

Thus there seems no good reason why the tribunal of fact could not operate with several judges. That panel could operate with a fact-finding jury or without one. However the resource demands of having several judges and a jury would be severe. Nor is it obvious that such a body possesses significant advantages over a multi-judge panel without a jury, except in so far as there may be matters of either public confidence in the system or the possibility that a jury panel may be a more effective method of determining the credibility of witness evidence.

It is notable that a number of the proponents of continued use of jury trials have argued that collective debate and scrutiny of evidence may be a more effective method of evaluating it than is the decision of a single judge acting alone. There is considerable force in that argument, but the benefits of collective decision-making may well be as easily realised in a multi-judge panel as by a jury. This is particularly so where the panel of judges are required to articulate their reasons for their decision, as doing so will focus attention sharply on areas of difficulty.

### *C. Other Models Used in Europe*

There are a range of other options for trying sexual offence cases which are in use in other jurisdictions. These represent a range of levels of public participation and a variety of different lay actors.

At one end of the spectrum there is the use in the Netherlands of a panel of three professional judges, with a majority being sufficient for conviction. In the adjacent jurisdictions of Belgium and France sexual offence cases will be tried either in the *Tribunal Correctionnel* (before a panel of three professional judges) or in the higher *Cour d'assises*. In both jurisdictions that court consists of three professional judges and a jury. In Belgium the jury is of 12, selected from a panel drawn at random from the electoral roll. In France the jury numbers only nine. It appears that in Belgium, but not in other "inquisitorial" jurisdictions there has been some attempt to have a body of judges specialising in dealing with child sexual abuse cases.<sup>67</sup>

66 Lord Diplock and others *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Command 5185, 1972) at 18, cited in New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [114].

67 Bacik and others, above n 17, at 14.

Other jurisdictions employ a different mode of lay participation in that they involve laymen who are not selected at random from the electoral roll or other proxy for a representative sample of the population. Instead jurisdictions such as Austria, Germany, Denmark and Sweden use lay judges and lay “assessors”. Thus in Austria and Sweden sexual offence cases would be tried before a tribunal comprising one professional judge and two lay assessors. In Germany less serious offences would be tried by a single professional judge but more serious ones either before a single professional judge and two lay assessors or – if the minimum penalty is four years imprisonment or more – before the Landgericht (or High Court) where the Tribunal is two professional judges and two lay assessors. In every case where there is a professional judge and lay assessors decisions are made by the panel acting collaboratively and by a majority (in the case of three member panels a two thirds majority).

In Denmark sexual offending will be tried in the District Court with three judges and a “jury” of six, but the term “jury” is misleading as the members of that panel are drawn from the same call of persons as sit as lay judges in less serious cases. In Germany, Sweden and Denmark the lay assessors or lay judges are drawn from a list of people who either self-nominate (in Germany) or are nominated by social organisations, usually political parties of which they are members (in Denmark and Sweden). The lay judges or lay assessors are therefore not genuinely representative of the community, and can – at the risk of some inaccuracy – be considered broadly comparable in their social backgrounds to Justices of the Peace in New Zealand.

The European “jury” systems do not operate with the clear-cut distinction between judges deciding the law and jury deciding the facts as is to be found in the common law world. In France, Belgium and Denmark where there are bodies called juries the judges sit together with the jury when considering the verdict. In France the decision of the Cour d’Assise requires a two thirds majority (eight of the 12 individuals) while in Denmark two of the three judges and four of the six jurors must agree on guilt or innocence.

#### *D. Options to Choose Mode of Trial*

It has been suggested in England that judge-alone trials would be more likely to lead to convictions than would jury trials but that where defendants had an option as to the mode of trial, no defendant would choose judge-alone trial.<sup>68</sup> This may be a result of a perception that, as argued by Thom Brooks,<sup>69</sup> judges are unable completely to put aside knowledge of incriminating material which they have seen at other stages of the proceedings but which is inadmissible as evidence. However there have been some New Zealand cases where the defendant in a sexual offence case has sought judge-alone trial, possibly because of a fear that on the particular facts a jury would simply not engage with the defence case.<sup>70</sup>

68 Temkin and Krahe, above n 51, at 179.

69 Thom Brooks “The Right to Trial by Jury” (2004) J Applied Phil 197 at 211.

70 This would appear to be the rationale for seeking judge-alone trial in *R v Narain*, above n 44.

## VI. DEFENDANT'S RIGHTS AND MODE OF TRIAL ISSUES

The options as to the mode of trial for sexual offences are constrained to some extent by existing law which provides rights to defendants to protect them against unfair or defective trials. Two such rights are important to our current enquiry. The first is the right of a defendant charged summarily with an offence carrying more than three months imprisonment to elect trial by jury. Under current law this means that every defendant charged summarily with a sexual offence may insist on a jury trial. That right, which is provided for in both the New Zealand Bill of Rights Act 1990 and in the Summary Proceedings Act 1957,<sup>71</sup> can be removed by legislation if so desired. There is a proposal before Parliament at present to raise the threshold for a defendant's right to insist on jury trial to three years,<sup>72</sup> and there is no fundamental objection to removing it completely. Indeed, as noted earlier, a right to jury trial for offences carrying less than 14 years imprisonment may be overridden in long and complex cases or where there is a risk of intimidation or jury tampering. Parliament could, if it chose, provide that sexual offences were to be tried by one or more judges without any lay participation, or that they were to be tried by some different and appropriate tribunal.

More fundamentally perhaps, the Supreme Court has made it clear that there is an absolute right to a fair trial<sup>73</sup> and that s 25(a) of the New Zealand Bill of Rights Act 1990, which confers on a defendant a right to a fair and public hearing by an independent and impartial court, is to be read as "affirming" that fair trial right.<sup>74</sup>

This absolute right to a fair trial does not translate to an absolute right to a jury trial. A trial by a newly created tribunal which had not been used in New Zealand will still be a fair trial if the procedure is fair and the tribunal meets the requirements of impartiality and independence.

### *A. Decision-making, Evaluation of Data and Heuristics*

Key matters which must be considered in deciding what kind of tribunal should undertake fact-finding in sexual offence cases are the ways in which the members of particular kinds of fact-finding tribunal may approach their task and the extent to which fact-finders may substitute mental shortcuts or heuristics for thorough scrutiny and evaluation of the evidence.

A convenient recent survey of these issues is that of Jennifer Temkin and Barbara Krahe.<sup>75</sup> Temkin and Krahe argue that because thorough evaluation of evidence may be difficult and time consuming,<sup>76</sup> many people – subconsciously rather than deliberately – simplify their processing by the use of heuristics (mental shortcuts and rules of thumb) to allow for quicker processing of information with a lower expenditure of effort. Thus where deciding which of two parties is to blame for a situation, fact-finders may

71 Summary Proceedings Act 1957, s 66; New Zealand Bill of Rights Act 1990, s 24(e).

72 Criminal Procedure (Reform and Modernisation) Bill 2010, cl 48.

73 For an analysis of the right to a fair trial see Jeremy Finn "Inquisitorial trials for sexual offences and 'fair trial' rights" (2010) 15 Canterbury LR 317.

74 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [77].

75 Temkin and Krahe, above n 51, at 49ff.

76 *Ibid*, at 66-67.

attribute more blame to the party about whom they had more information even if that material was not directly relevant to the issue of responsibility.<sup>77</sup> One study found that in mock trials where the complainant's biographical details were provided, but not those of the defendant, just over half the participants found the defendant guilty. By contrast when biographical information was provided about the defendant and not the complainant, 90% found the defendant guilty.

A second heuristic process involves the use of "counterfactuals" where the decision maker tries to imagine whether a different outcome of events would have occurred had one of the actors behaved differently. In one study where participants were asked to work out alternative courses of action for the victim they blamed the victim while where they were asked to consider possible alternative actions by the perpetrator, they blamed the perpetrator.<sup>78</sup>

It is evident on analysis that the use in a sexual offence trial of either of these heuristic devices is likely to lead a decision maker to acquit rather than to convict. Firstly in most sexual offence trials the complainant's personal history will have been explored to a greater extent than that of the defendant, and there is a strong possibility that defence counsel will try to indicate that the complainant's conduct was a cause of the events which occurred and that had the complainant acted differently any criminal conduct would have been avoided.

A third heuristic which may be significant in sexual offence cases is hindsight bias by which the decision maker makes use of information as to the outcome of an episode when evaluating actions during that episode. As Temkin and Krahe note, this heuristic has significant consequences for the way in which sexual offending is perceived.<sup>79</sup>

There are other ways in which fact-finders may process the information they receive in a way which may distort the conclusion eventually reached. In particular jurors may use a "story" model by which they try to make sense of information by creating a narrative structure of their own which presents "a plausible, coherent and complete" account of the events. In deliberations the jurors then look at the story as they have constructed it and find the best fit between the "story" and the options that they have by way of verdicts.<sup>80</sup> While the use of a story model may not interfere with accurate decision-making if the evidence is reasonably coherent, complete and largely uncontested, it may be seriously problematic in cases where there is a degree of conflict or the information is only partial.

77 DM Rempala and F Bernieri "The consideration of rape: the effect of target information disparity on judgements of guilt" (2005) 35 *Journal of Applied Social Psychology* 536, cited in Temkin and Krahe, above n 51, at 49.

78 NR Branscombe and others "Rape and Accident Counterfactuals: who might have done otherwise and would it have changed the outcome?" (1996) 26 *Journal of Applied Social Psychology* 1042, cited in Temkin and Krahe, above n 51, at 49.

79 Temkin and Krahe, above n 51, at 50.

80 N Pennington and R Hastie "Explaining the evidence: Tests of the story model for juror decision-making" (1992) 62 *Journal of Personality and Social Psychology* 189, cited in Temkin and Krahe, above n 51, at 65.

If the evidence is inconsistent or incomplete, jurors may draw on their accumulated world knowledge, including their general beliefs about the offence in question, their lay comprehension of the legal process and their understanding of how to construct a proper story, to infer the elements needed to make the story complete and coherent. Then the jurors may have alternative stories.<sup>81</sup>

Where this process is used by jurors, there are several possible sources of error in the decision-making. Firstly where jurors form competing hypotheses during the trial as they receive evidence, they may choose one of the hypotheses as more probable than the other, and then view evidence received after that point with an element of hindsight bias which leads them to give more weight to evidence congruent with the hypothesis selected and less weight to evidence not congruent with the hypothesis, regardless of the actual creditability of the evidence.<sup>82</sup>

Secondly where jurors, or other decision-makers, rely on general beliefs about an offence in question it is likely the views they have will be erroneous. It has long been argued that jurors in sexual offence cases will, consciously or unconsciously, measure the evidence in the case against a mental template of “real rape” which bears little resemblance to reality. That view has been challenged recently by other research which suggests that in cases involving alleged sexual offending by a defendant who was previously known to the complainant, jurors may be measuring the case against a model of how people communicate expressions of sexual interest and the degree to which there may be miscommunication about such sexual interest.<sup>83</sup> In the case of alleged offending by a person known to the victim, jurors may well expect evidence of physical resistance. Use of either inaccurate stereotype may lead jurors into error, usually to the benefit of a defendant who may be acquitted despite there being an adequate case for conviction.

It should be noted that judges, whether in jury trials or judge-alone trials, are not immune from placing weight on their own preconceptions as to what constitutes sexual offending.<sup>84</sup> However it is to be hoped that with appropriate professional experience and/or appropriate judicial training resort to such preconceptions will be minimised to an acceptable level.

There is also evidence that people who are in a positive emotional state will process information more shallowly and superficially and more in line with previous conceptions of reality whereas negative emotional states are conducive to careful and accurate information processing.<sup>85</sup> It is possible, though apparently not yet tested empirically, that jurors will be much more ready to convict in cases where there has been injury to the complainant

81 Ibid.

82 Temkin and Krahe, above n 51, at 55.

83 Louise Ellison and Vanessa Munro “A Stranger in the Bushes or an Elephant in the Room? Critical Reflections on the Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 12 New Crim LR 781 at 789-790.

84 For a clear example of such judicial ‘reasoning’ see the verdict overturned in *R v Perkins* (2007) 223 CCC(3d) 289 (Ont CA); on the question of some judges’ views see Temkin and Krahe, above n 51, at 138-139.

85 Temkin and Krahe, above n 51, at 57.

precisely because they will have heard evidence of the injuries which may have induced a more negative emotional state and therefore greater accuracy in assessment of the evidence.

Lastly, and concerningly, there is some research evidence that male jurors are more likely to disbelieve female complainants and to acquit defendants in sexual cases than are female jurors who see and hear the same witnesses.<sup>86</sup> There is a very real risk that a jury decision will not be reached solely because of the evidence adduced at trial but at least in part because of the particular gender balance of the jury. However other studies have questioned the extent of any differentiation of verdicts on the basis of juror gender.<sup>87</sup>

## VII. CONSEQUENCES FOR THE LEGAL PROCESS OF MODES OF INFORMATION PROCESSING

Clearly it is desirable that decision-making in sexual offence trials should be, as far as possible, based on a careful scrutiny of the evidence rather than by reliance on gender differences or by the decision-makers' use of heuristics or other techniques which give rise to possible inaccuracy in processing of the data. This does not of itself indicate that one particular kind of tribunal will be better at accurate decision-making than would another. It is however highly likely that persons who have significant experience of careful analysis of data and evidence and who are used to avoiding the risks of error from employing heuristics in assessing that data will make better decision-makers in criminal trials than would those without such experience. This would favour the use of professional judges or lay judges with relevant life experience and/or training. It would indicate that juries may be less effective in accurately scrutinising the evidence. To some extent problems with juror decision-making from the use of heuristics may be countered by a process of collective decision-making and the need for debate within the jury. This is particularly likely where the jury initiates its deliberation by a discussion of the evidence rather than by an initial poll of juror views.<sup>88</sup> Such initial deliberation is also likely to reduce stress on jurors and increase their belief that their view as to the proper verdict is better reasoned.<sup>89</sup> However there remains a concern that if most jurors share a particular stereotype of what constitutes a particular kind of sexual offending it is likely the final decision will reflect that shared (and frequently erroneous) view.

86 Natalie Taylor *Juror attitudes and biases in sexual assault cases* (Trends and Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, Canberra, 2007). A different view has been put forward in the US by John S Batchelder, Douglas D Koski and Ferris R Byxbe "Women's Hostility Toward Women In Rape Trials: Testing The Intra-Female Gender hostility thesis" (2004) 28(2) American Journal of Criminal Justice 181, but their study drew heavily on mock jurors from the law enforcement community who cannot be assumed to represent community reactions.

87 Temkin and Krahe, above n 51, at 136-137.

88 Philip E Tetlock "Accountability and Complexity of Thought" (1983) 45 Journal of Personality and Social Psychology 74, cited in Louise Ellison and Vanessa Munro "Getting to (not) guilty: examining juror's deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 Legal Stud 74 at 85.

89 Ellison and Munro, *Ibid*, at 85-86.

A fruitful area for exploration would be to determine whether jurors who have been given guidance by the judge as to the process of decision-making are more or less likely to use heuristic processes and therefore more likely or less likely to reach a verdict which accords with the evidence. It is now common in New Zealand for judges to provide juries with a considerable body of material including transcripts of evidence, copies of relevant statutory provisions and of the judge's summing up and decision-making aids such as "decision-trees" or "flow-charts" which incorporate references to witnesses whose evidence was relevant to a particular issue and the core elements of their testimony. The Court of Appeal has indicated that it is judicial best practice to provide such assistance.<sup>90</sup> Prior to the introduction of this practice, and in jurisdictions other than New Zealand where such practices are not common, jurors have indicated that they would derive considerable assistance from the provision of such materials.<sup>91</sup> It would certainly seem possible that guidance of this kind in the decision-making process may decrease the extent to which jurors employ heuristic techniques for evaluating evidence. It is also possible that at least some of the issues relating to reliance on stereotypical views of what constitutes sexual offending may be addressed by other means, such as expert evidence.<sup>92</sup> That option is addressed in the "Evidence Issues" article in this issue.

### VIII. COLLECTIVE DECISION-MAKING

Many partisans of jury trial argue that one of the advantages it brings is that juries are required to reach a verdict through a process of collective decision-making in which each member of the jury is informed by the arguments and insights of others. In this sense the process is more robust than a single judge making up his or her mind. The New Zealand jury study provides some support for this view with a number of cases where jurors did change their stance during deliberations.

There is therefore some sound argument for collective decision-making rather than single judge trials. However it is certainly true in New Zealand that in the vast majority of criminal cases, and virtually all civil cases, judgement of fact is made by a single judge. There is no full study of the

90 *R v Vaibu* [2009] NZCA 111 at [28].

91 Warren Young, Neil Cameron and Yvonne Tinsley *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (NZLC PP37,1999) at 62. See also Temkin and Krahe, above n 51, at 182.

92 Louise Ellison and Vanessa E Munro "Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) *Brit J Criminol* 49 at 363–383; Louise Ellison "Closing the credibility gap: the prosecutorial use of expert witness testimony in sexual assault cases" (2005) 9 *Int'l J Evidence & Proof* 239; Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Research and Public Policy Series Paper No. 68, Australian Institute of Criminology, 2005); Crissa Sumner-Armstrong and Peter Newcombe "The education of Jury Members: Influences on the Determinations of Child Witnesses" (2007) 13(3) *Psychology, Crime & Law* 229. See also Elisabeth McDonald and Yvette Tinsley "Evidence issues" in this issue at 123.

accuracy of judge-alone trials but it is evident from the success of some appeals that judges can fall into error. However, on that same criterion the error rate does not seem to be great.

A final point to be considered is that if collective decision-making is seen to possess advantages not found in single judge trials, the benefits may be able to be achieved without the use of a jury of 12. Collective decision-making by a smaller jury or by a multi-judge panel may achieve exactly the same result.

## IX. CONCLUSION

Research in New Zealand and overseas indicates the centrality of issues as to the mode of trying sexual offences where any reform of the law is undertaken. While New Zealand has little or no experience with specialist courts for sexual offences there is a body of knowledge from the use of specialist courts for other offences on which it may draw. In addition there is a very substantial body of overseas material which can provide guidance in selecting possible alternative models for the trial of sexual offences. As is evident from the discussion throughout this paper there is ample scope to make significant changes to the way in which decision-making takes place in sexual offence trials both by the use of specialist courts or specialist judges and by improvements to the administrative processes of the system such as the institution of a special sexual offences list which could allow for sexual offences cases to be processed more quickly.

Any substantial reform of the way in which sexual offence cases are handled by the criminal justice system must take into account the extent to which changes in other areas must be consistent with existing procedures which it is desired to retain or complemented by changes to the jurisdiction or procedure of the courts. To attempt to modify one without the other may well frustrate any scheme for reform.

Whether or not specialist courts are created, or a special list is instituted, any reform proposal must determine the extent to which lay participation in the trial of sexual offences is seen as necessary to public acceptance of the verdict of the courts. Unfortunately debate in this country and overseas is too often conducted in terms which posit a choice between judge-alone trials and trial by judge and jury. Alternative models for lay participation are available but evaluation of them should take place only after a decision is made as to the need for any form of lay participation at all.

Overseas experience also demonstrates that effective reform of the mode of trial for sexual offences may require a significant increase in the resources available for handling such cases. Provision of specialist prosecutors, judges, and facilities will not be cheap but if the result is that the criminal justice process for sexual offence cases runs more smoothly, efficiently and accurately the investment will be more than worthwhile.