



THE JUSTICE RESPONSE TO VICTIMS OF SEXUAL VIOLENCE

CRIMINAL TRIALS AND
ALTERNATIVE PROCESSES





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ALTERNATIVE PROCESSES

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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7 December 2015

The Hon Amy Adams
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R136 – THE JUSTICE RESPONSE TO VICTIMS OF SEXUAL VIOLENCE: CRIMINAL TRIALS AND ALTERNATIVE PROCESSES

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive style.

Sir Grant Hammond
President

Foreword

Sexual violence is a blight on New Zealand society. It has serious effects on victims and for society at large.

It is also marked by a distinct concern for the rule of law. As a potential offence, it is badly under reported. In the view of some, as much as 80 per cent of offences go unreported.

This latter characteristic is a matter of the greatest concern for the formal criminal justice system. Whatever the figure is – and no-one doubts it is a high percentage – a significant number of complainants are “opting out” of the very system that is supposed to recognise their rights and support their needs. They are doing so largely because they perceive the formal criminal justice system to be alienating, traumatising, and unresponsive to their legitimate concerns.

The fundamental task for the Law Commission in this Report has been to assess and make recommendations on how the position of complainants might be improved, but without compromising the trial rights of defendants. It has to be said that this is no easy task. Indeed, it is one of the more challenging law reform exercises that can be posed today.

The Commission is of the view that useful improvements can and should be made to the existing formal system, and we have addressed these in our Report. The Commission has however also reached the view that incremental change, which has been struggling forward over the last three decades, will not bring about the desired result of bringing these complainants within the formal justice system or satisfying their legitimate needs.

First, we consider that a specialist sexual violence court, however formally constituted, is required, and potentially as a division of the District Court.

Second, the hard fact of the matter, as so many of our consultees put to us, is that an alternative system outside the present criminal justice system is also required. Sir Owen Woodhouse once said of the then workers’ compensation regime that we could fix some things, but the workers’ compensation system would still leave many disenfranchised. So it is with this subject area. We have therefore in this Report gone further and explored what such an alternative system might look like. The aim is certainly not to displace the criminal justice system. Indeed, it is to be hoped that the system will be improved with the reforms we have recommended. But real innovation is required.

Third, better support systems are required for victims, and we have made suggestions under this heading.

Finally, this exercise merits repeating the wise words of Sir Owen 50 years ago: "... [i]f there may seem to be a weight of tradition against change, at least it is worth remembering that the apparent heresies of one generation become the orthodoxies of the next. The ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility."*

A handwritten signature in green ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Sir Grant Hammond
President

* New Zealand Royal Commission to Inquire into and Report upon Workers' Compensation *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, Government Printer, 1967) at [33].

Acknowledgements

We are grateful to everyone that provided input during this review, both at Issues Paper and Report stage. We would particularly like to thank the many individuals and organisations, both in the legal sector and in the sexual violence sector, who devoted their time and expertise to assist us, and the contribution of past colleagues on the Issues Paper.

The lead Commissioner for this Report was Sir Grant Hammond. The assistant Commissioner was Judge Peter Boshier. The legal and policy advisers were Mihiata Pirini, Kate McKenzie-Bridle and Lisa Yarwood. The law clerk who worked on this Report was Rebekah Gerry.

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Executive summary

- 1 Sexual violence occurs in a number of contexts and in a number of forms. It has certain defining characteristics that distinguish it from many other forms of criminal offending. Among these is that it usually occurs in private and many acts of sexual violence are perpetrated by someone known to or in a family or domestic relationship with the victim. For this and many other reasons, it tends to be neither talked about nor reported. Through fear of what will happen to their family, through shame or guilt, or through apprehension that they will not be believed, the victims of sexual violence may choose not to tell anyone about it. Another reason for not reporting sexual violence to the authorities, as established in a New Zealand-based victim study, is fear and distrust of the legal system.¹
- 2 The significant under-reporting of sexual violence inhibits the proper operation of the criminal justice system. The acts in question cannot be scrutinised for their evidential strength and, if necessary, charges filed so they can be tested in a criminal trial. The mechanisms of the criminal justice system, which are designed to investigate, test, and prosecute alleged criminal offending, cannot operate. Perpetrators of sexual violence are not held accountable for it. Victims and their families and whānau do not see any form of justice done.
- 3 It is in this context that the Law Commission has completed this Report. We have considered whether the criminal trial process as it applies to cases of sexual violence should be modified or fundamentally changed, in order to improve the system's fairness, effectiveness, and efficiency and, in particular, the court experience of complainants. As such, we begin by looking at the processes that occur at trial and considering whether those could be improved. A substantial part of our Report is concerned with those matters, and the option of a separate court to process sexual violence cases is one of many reforms we consider in that section.
- 4 However, it has also become apparent that many victims do not report because the way the criminal justice system currently responds to sexual violence does not suit their circumstances. There is no question of the psychological and physical harm that sexual violence can do to its victims. But a criminal trial, with the potential for conviction and imprisonment of the perpetrator if the act is established beyond reasonable doubt, is not always the response that will most effectively target the harm caused and that will bring the outcomes that victims want, that meet their needs, and that consequently benefit their families, whānau, and communities. The weight of our consultation with the justice and sexual violence sectors has supported the suggestion that there are ways to do justice for victims of sexual violence, in a way that meets the broader public interest, that do not involve a criminal trial.
- 5 Determining what that should look like, and how it should be made available to victims in a way that is appropriate and suitable given the circumstances in which the sexual violence occurred and that balances private interests and public concerns, is the subject of a large part of our Report. In Part C of our Report, we examine the case for an alternative to trial which would be available for acts of sexual violence, if the victim wants it, if the perpetrator is willing to be involved,² and if the case is assessed as appropriate.

1 Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to Recovery* (Ministry of Women's Affairs, 2009) at 58. Just over half of the 75 victims surveyed had not reported the incident of sexual violence to Police. Twenty-six per cent of those who did not report cited fear and distrust of the legal system.

2 Perpetrator involvement would not, in the reform proposal we put forward, always be necessary: see Part C.

- 6 The third necessary aspect of this review concerns the support provided to victims of sexual violence. Good support is, for many victims, a necessary precondition to being willing and able to access the justice system. That includes practical, therapeutic, and medical support, received both directly after the act of sexual violence and on an ongoing basis.
- 7 A huge amount of time and effort is put in by those who work in the sexual violence support sector, much of it on a voluntary basis (and therefore not necessarily reflected in the amount of funding the sector receives). We acknowledge the efforts of all those involved to respond to and support victims of sexual violence. We suggest that government could take on more of a leadership and support role so that those in the sector are in a good position to continue to provide high-quality support to victims of sexual violence.
- 8 We have divided our review into three parts, reflected in the substantive parts of this Report:
- courts;
 - alternatives to trial; and
 - support for victims.

COURTS

- 9 If a victim of sexual violence reports a complaint to Police and criminal charges result, the victim will often be required to appear as a witness on behalf of the prosecution. Because they are usually the only witness to the acts in question, their evidence forms an important part of the prosecution's case. As such, the experience of a victim of sexual violence at trial is shaped not only by the fact that they are the victim of the acts alleged and the complainant at trial; it is also shaped by the fact that they are the sole witness to the incident and will need to give evidence in court.
- 10 In Part B we describe those features of the trial process that shape and affect the experience of complainants and that we understand to present particular hurdles and difficulties.
- 11 *The time between filing of charge and trial:* once charges have been filed, the period of waiting for the case to be set down for trial and waiting for the trial itself may impact a complainant's personal circumstances, given that a high incidence of sexual violence occurs in a family or relationship context. Lengthy waiting periods may also affect a complainant's psychological recovery. Complainants of sexual violence are required to remember the facts of the offending for recall at trial – and the extent to which they are able to do so may bear on their credibility as a witness.
- 12 *The cross-examination of complainants:* complainants may be cross-examined on their evidence at length by defence counsel. Cross-examination requires “putting the witness to proof” on matters such as consent or belief in consent, which often involves challenging a complainant's credibility and reliability as a witness. The experience of giving evidence at trial is sometimes described by complainants as being akin to a second assault.
- 13 *Availability of information and support for complainants:* throughout the trial process, complainants will be required to interact with a number of different people fulfilling various roles, which may be confusing to someone unfamiliar with the court process. The diffusion between various different people of responsibility for keeping the complainant informed makes it difficult to ensure complainants are receiving adequate information and support.
- 14 *Court facilities and physical environment:* in a criminal case the courtroom is designed to permit a defendant to be put “on trial” in a place that is open to the public in the interests of transparent

justice. But the physical design of the courtroom is an extremely poor fit for complainants who must give intimate evidence of an alleged incident of sexual violence. The design of the court building may require complainants, defendants and jurors to occupy shared waiting areas and use the same facilities.

- 15 In Chapter 4 we make a number of targeted recommendations to address these issues. To target the issue of delay, our primary recommendation is that legislation should impose a limit on the time taken for a case involving sexual violence, from when charges are filed to when the trial itself takes place. We recommend that complainants should have greater access to the ability to pre-record all of their evidence before trial and at a point in time that is closer to the alleged incident of sexual violence, including evidence given in cross-examination where appropriate. This may minimise some of the burden of waiting for the trial itself.
- 16 Among other things, we also recommend that the role of the specialist sexual violence advisers be extended so that they can offer support both before and after the court process itself; that the sexual violence sector be funded to create a comprehensive and up-to-date guide for laypeople explaining how sex offences are investigated and prosecuted; and that, wherever possible, complainants in sexual violence cases and their supporters have access to separate entrances at court, separate waiting rooms, and separate refreshment facilities.
- 17 In Part B we also discuss the advantages of court specialisation for sexual violence cases. Court specialisation involves applying a specialist approach to a particular area of law, to be able to better address the complexities or sensitivities that area of law raises. Participants in the court process can refine their skills by accruing specialist expertise. Court cases can be handled more consistently, more efficiently, or more appropriately, depending on the inherent features of those difficult cases and the barriers that they might otherwise encounter in the courts.
- 18 We conclude that court specialisation is appropriate in the area of sexual violence, and in Chapter 5 we discuss what form that could take. Our primary recommendation is for a specialist sexual violence court to be established. In the first instance, we recommend that this be done as a pilot in one or more District Courts throughout New Zealand, with subsequent consideration given to whether it should be legislated as a permanent division of the District Court after two years' operation. Without suggesting in specific detail how the pilot court should operate, we recommend that its core aims should be to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant; and to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants. We also recommend that every District Court and High Court judge who sits on a sexual violence case should be required to have a designation to do so, which would involve the completion of a special training course.
- 19 In Chapter 6 we consider the question of the fact-finder in sexual violence cases. As for most serious criminal offending, the role of fact-finder in sexual violence cases is currently filled by a jury of 12 laypeople (other than in the small number of sexual violence cases that are tried by judge-alone). The function of the jury is to determine the relevant facts of the case and to apply the law to reach a verdict of guilty or not guilty. In sexual violence cases the function of the jury is sometimes questioned, however, on two main footings. The first is that some doubt the ability of a group of 12 laypersons to make decisions about sexual violence, an area which is often the subject of misunderstandings and misconceptions. The second is that the presence of jurors at a sexual violence trial may cause harm to complainant witnesses who must, among other things, tell their story to 12 strangers and in a forum which is foreign and alienating. However, jurors also fulfil a core and important function in our criminal justice system, and any proposal to limit the right to trial by jury in a specific class of criminal cases needs careful consideration.

20 We suggest in Chapter 6 that sexual violence, as a form of criminal offending, may be one that is not well-suited to fact-finding by a jury comprised of 12 laypeople. However, the design of an alternative needs to be carefully considered, and it would need to be justified as a reasonable limit on the right to jury trial in the New Zealand Bill of Rights Act 1990. At this stage we make no recommendation to change the fact-finder in sexual violence cases, but we suggest that the issue could be returned to when considering the future operation of a specialist sexual violence court. We also make some recommendations intended to put juries in a good position to fulfil their decision-making function in sexual violence trials.

ALTERNATIVES TO TRIAL

- 21 In Part C we examine alternatives to trial. We first consider what it is that victims need in order to experience justice and whether these “justice needs” or “justice interests” are currently being met through the criminal justice system. We conclude that there is a need for an alternative justice mechanism and then consider what mechanism may be appropriate.
- 22 In Chapter 8 we explore two key issues that need to be carefully considered in a proposal of this kind. The first is whether, and how, certain cases that are *not* appropriate for an alternative process of this kind should be identified and excluded. The second is how the alternative process should be designed so that perpetrators will have some incentive to, and will consent fully and freely to, participate in it.
- 23 Chapter 9 sets out our proposal for an alternative justice process. The proposal is for victims of sexual violence to have the ability to access an accredited programme provider to discuss the range of options available to meet a victim’s justice needs. Victims may wish to meet with a perpetrator to tell their story and seek redress (for example reparation, an apology, or an undertaking to complete a treatment programme) or they may wish to reconcile with or be validated by family, whānau, or their community. The process would be flexible. The goals would be for victims to achieve a sense of justice; for perpetrators (where involved) to take responsibility for their actions; and for the making of redress in the form considered most appropriate.
- 24 The alternative process would be initiated only by a victim electing to participate in it. The victim and/or perpetrator could withdraw at any time, up until completion. All participants would need to meet certain statutory eligibility criteria, including perpetrator acknowledgement that the incident occurred.
- 25 Providers would be responsible for monitoring the outcomes of these programmes and, if the alternative process was satisfactorily completed, there would be a statutory bar against the perpetrator being prosecuted for the same incident of sexual violence. Participation and statements made in the process would be inadmissible in a criminal trial; statements made would be confidential; and no criminal record would result. A register of those who had completed the alternative process would be maintained by an oversight body, but disclosed only in statutorily-permitted circumstances.
- 26 Cases that involved perpetrators, use of a weapon or extreme physical violence would be excluded by legislation from proceeding through this alternative process. Cases that had been assessed by providers as posing an unacceptable risk to community safety or a risk of secondary victimisation or physical harm to an individual would not be permitted to proceed. There would be rights of review of some provider decisions and a number of necessary oversight functions including, amongst other things, accrediting and monitoring providers and programmes and maintaining a central registry of participants who had completed the process.

SUPPORT FOR VICTIMS

- 27 Part D is concerned with the assistance provided by the sexual violence support sector, including government departments with responsibilities in the field of sexual violence. We consider what gaps exist in the support provided; whether these gaps have a negative impact on victim engagement with the criminal justice system; and whether closing those gaps could have a positive impact on the extent to which victims engage with the justice system, whether in a criminal trial or in an alternative process.
- 28 We conclude that improvements are required in how support services are coordinated, in order to ensure that the support of community and government based agencies “wraps around” and addresses the unique needs of each victim. In particular, government has a greater role to play in leading and supporting the sexual violence support sector to coordinate services, to lead research on sexual violence, and to professionalise the workforce through training, education, accreditation, and quality monitoring.
- 29 As such, in Part D the Law Commission recommends that the Government establish an independent commission for sexual violence. We suggest that a commission is the ideal mechanism through which government and the sexual violence response sector can robustly engage with one another. In Chapter 12 we set out our proposal that such a commission could be established by statute in the form of an independent Crown entity. We suggest that it should perform three core functions in the area of research, training/education, and monitoring of the quality of services provided. We also emphasise the need for a commission of this kind to fulfil its functions independently of government, to consult with the sector, and to represent a cross-section of society.

A NOTE ON THE HISTORY OF THIS REVIEW

- 30 The terms of reference for this review were received in 2010. As formulated, they were broad and wide-ranging. They directed the Commission to undertake a high-level review of criminal trial processes, and whether the essentially adversarial framework within which those processes operate should be modified or fundamentally changed. The Commission was directed to consider the suitability of inquisitorial models of criminal justice for New Zealand. It was asked to put a particular emphasis on the need for change in the way sexual violence cases are handled in an adversarial criminal justice system.
- 31 Before the Commission had finally reported its recommendations, the review was put on hold. Four years later it was revived and we are now, in 2015, at the stage of making final recommendations. In the interim period, there has been some change in the scope of the review. We have been asked to make our recommendations in an abbreviated timeframe and have received subsequent additional direction as to the terms of reference. This, plus the Commission’s subsequent assessment of the areas where the need for law and policy reform is most pressing, have led us to focus solely on the area of sexual violence and the appropriateness of the existing justice response to sexual violence. We wish to note the assistance received from the Commission’s earlier research and express our hope that the matters covered in the Issues Paper published by the Commission in 2012 can be further progressed if considered appropriate.³

³ Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012).

Recommendations

PART B: COURTS

THE COURT EXPERIENCE OF COMPLAINANTS

- R1 Legislation should require that, save in exceptional circumstances, all cases involving sexual violence should be set down for hearing within a specified time of the filing of the charge.
- R2 The Victims' Rights Act 2002 should include a right for complainants in a case involving sexual violence to have the case disposed of in as speedy a manner as possible, with responsibility for giving effect to the right to lie with the Ministry of Justice.
- R3 The Evidence Act 2006 should provide that an adult complainant in a sexual violence case is entitled to give their evidence in chief in one or more of the alternative ways set out in section 105 or in the ordinary way set out in section 83.
- R4 The legislation should include a requirement that prosecutors consult with complainants on the mode in which they prefer to give evidence.
- R5 The Evidence Act 2006 should include a provision to the effect that complainant witnesses in sexual violence cases may pre-record their cross-examination evidence in a hearing prior to trial, unless a judge makes an order to the contrary.
- R6 Relevant reasons for making a judicial order should include those that pertain to the fair trial rights of defendants and circumstances where it would be impractical or excessively costly to undertake cross-examination in a pre-recorded hearing before trial.
- R7 The Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where cross-examination is to be done in a pre-recorded hearing before trial.
- R8 The definition of "communication assistance" in section 4 of the Evidence Act 2006 should be amended to include assistance for witnesses who do not have a communication disability but who may struggle to comprehend questions (for example, because of age).
- R9 The Ministry of Justice should, in collaboration with the Ministry of Social Development, consult on extending the role of the specialist sexual violence victims' advisers as outlined in paragraphs 4.119 to 4.128 of this Report.
- R10 The Ministry of Justice should fund the sexual violence sector and the legal community, on an ongoing basis, to create a comprehensive and up-to-date guide for laypeople explaining how sex offences are investigated and prosecuted and providing information regarding any alternatives to a criminal trial that may be available.

- R11 The Ministry of Justice should consider funding the development of separate entrances, separate waiting rooms, and separate refreshment facilities in those District Courts where they would be particularly beneficial. Complainants in sexual violence cases, and their supporters, should be entitled to the use of those facilities.
- R12 The Victims' Rights Act 2002 should include the right of a complainant in a sexual violence case to a separate entrance at court, a separate waiting room, and separate toilet and refreshment facilities wherever reasonably possible.
- R13 Legislation should provide that a judge in a sexual violence case may, either on the application of a party or on his or her own initiative, reconfigure the courtroom in which the case is to be heard to avoid causing unnecessary harm to a complainant witness.
- R14 The Criminal Procedure Act 2011 should require the court to take account of the views of the victim, as ascertained and conveyed by the prosecutor, when considering a change of venue in cases of sexual violence.
- R15 The Victims' Rights Act 2002 should include the right of victims in a sexual violence case to be informed by the prosecutor of an application to change the court venue and to have their views conveyed to the court.
- R16 The Criminal Procedure Act 2011 should authorise a judge to clear the court at any point in a proceeding involving sexual violence, where he or she is of the view that the order is necessary to avoid causing undue emotional distress to a complainant witness. An order under that provision should be able to be made subject to an exception for members of the media.

COURT SPECIALISATION

- R17 A specialist court for sexual violence should be implemented in New Zealand.
- R18 The specialist court should be implemented first as a pilot in one or more District Courts throughout New Zealand.
- R19 The objectives of the specialist court should be:
- to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant; and
 - to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants in sexual violence cases.
- R20 Administrative staff in the court should receive training and education on what constitutes good practice when dealing directly with complainants.

- R21 The pilot court should be evaluated after two years and consideration should be given to whether a sexual violence court should be legislated as a division of the District Court to hear all sexual violence cases across the country and, if so, what rules of evidence should apply in that court and who the fact-finder should be.
- R22 Every District Court and High Court judge who sits on a sexual violence case should be required to have a designation to do so.
- R23 The Institute of Judicial Studies should be funded to develop, in consultation with the judiciary and the sexual violence support sector, specialist training courses for judges on sexual violence cases.
- R24 The Solicitor-General should be resourced to publish specific guidelines for the prosecution of cases involving sexual violence.
- R25 Every prosecutor who appears in a sexual violence case, whether in the High Court or the District Courts, should be required to be accredited (i.e., to have completed appropriate training and education on the prosecution of sexual violence cases and to know how to deal with complainants in that process).
- R26 The Legal Services (Quality Assurance) Regulations 2011 should include experience and competence requirements applicable to defence counsel who appear in sexual violence trials on a legal-aid basis.
- R27 The Government should consider the desirability of funding a long-term research project to examine the feasibility and design of a specialist sexual violence court to operate post-guilty plea, in the form proposed in the Law Commission paper *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012).

THE FACT-FINDER IN SEXUAL VIOLENCE CASES

- R28 Judges who sit on sexual violence cases should have access to detailed and up-to-date guidance on the instances in which guiding judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed.
- R29 In court proceedings involving charges of sexual violence, the parties should be encouraged to agree upon expert evidence or a written statement for the jury dealing with myths and misconceptions around sexual violence. Wherever possible a written statement should be admitted by consent as a joint statement under section 9 of the Evidence Act 2006.
- R30 Future consideration could be given to reviewing the substantive rules of evidence in sexual violence cases. Such a review could take place at the same time as the next review required under section 202 of the Evidence Act 2006.

PART C: ALTERNATIVES TO TRIAL

ASSESSMENT OF CASES ENTERING THE ALTERNATIVE PROCESS

- R31 A risk assessment framework should be developed specifically for the alternative process, with, at a minimum, input from the sexual and family violence sectors, forensic mental health/psychological experts, and researchers in the field.
- R32 Providers should apply the risk assessment framework to determine whether cases pose an unacceptable risk to community safety and should not proceed through the alternative process.
- R33 Cases where the public has a compelling interest in seeing conduct publicly denounced should be excluded from entry into the alternative process by way of a description set out in statute (the “public interest legislative descriptor test”). Such cases should include those where there are factors such as use of extreme physical violence, multiple perpetrators, and use of a weapon.
- R34 Providers should conduct the assessment of whether cases meet the public interest legislative descriptor test as part of conducting the risk assessment (see R 32).
- R35 Where sexual violence occurs within the context of intimate partner violence, and where the alternative process would put the victim at a risk of harm, those cases should be assessed as ineligible under the suitability assessment (see R 36).
- R36 Providers should conduct suitability assessments of individual cases to proceed through the alternative process. Such suitability assessments should consider the dynamics of the individual case, taking into account the matters outlined in Chapters 8 and 9 of this Report, and including an assessment of whether the perpetrator has the capacity to move to a point of acknowledging the harm caused to the victim by the act of sexual violence; to offer a genuine apology; and to make redress.

ALTERNATIVE PROCESS

- R37 A new statute should be passed which sets out the guiding principles for the alternative process and the other matters covered in Chapters 8 and 9 of this Report.
- R38 A rigorous accreditation framework should be developed against which programmes can be assessed and which incorporates the key values and components described in paragraphs 9.32 to 9.45 of this Report, yet which is sufficiently flexible to allow the development of creative, safe, effective, and robust programmes.
- R39 The new statute (see R 37) should include a definition of “completion of a programme”, which should include the perpetrator fulfilling all “conditions” agreed to in an outcome agreement but should exclude any “undertakings” made by the perpetrator.
- R40 The programmes should be audited on a regular basis (perhaps twice a year).

- R41 Providers and facilitators should be specialists who are trained and experienced in working with sexual violence.
- R42 The accreditation framework against which programmes are assessed (see R 38) should also incorporate standards and competencies against which providers and facilitators can be assessed, accredited, and regularly monitored.
- R43 Providers and facilitators should be required to renew their accreditation every few years or (for providers) earlier if there are significant changes to the structural operation of the provider.
- R44 It should be a breach of the statute to deliver a programme unless the person or body is accredited and the programme and facilitators are accredited.
- R45 The statute should provide that the alternative process may be initiated only at the election of a victim of sexual violence.
- R46 The definition of “consent” to participate in an alternative process should be provided for in the statute as set out in paragraph 9.90.
- R47 The statute should set out the eligibility criteria for both victims and perpetrators to participate in the alternative process as set out in paragraphs 9.88 to 9.102.
- R48 Consideration should be given to whether one of the possible outcomes of an “intention to charge” family group conference would be for the young offender and victim to engage in an alternative process on the basis that this is desired by the victim; that both participants are otherwise assessed as suitable and safe to participate; and that specialists skilled in youth offending and sexual violence are involved in both processes.
- R49 The matters to be considered by providers when conducting a suitability assessment (see R 36) and how a provider should apply the risk assessment framework (see R 32) should be set out in guidelines/good practice standards.
- R50 Training should be given to providers to conduct suitability assessments (R 36) and to apply the risk assessment framework (R 32).

REVIEW AND PROTECTIONS

- R51 The function of reviewing the decisions of providers in applying the risk assessment framework (including decisions to suspend or cease provision of programmes) should be conducted by an independent review panel.
- R52 The statute should set out the grounds for review of risk assessment decisions of providers.
- R53 Policies and procedures should be developed to guide the panel in carrying out reviews.

- R54 The panel should have a statutory power to confirm a decision or refer it back to the provider with a direction to reconsider.
- R55 The statute should make it clear that:
- the alternative process is voluntary for both the victim and perpetrator; and
 - the victim and perpetrator may withdraw from the alternative process at any time prior to the completion of the process; and
 - withdrawal from the process prior to completion will not affect the right of the victim to make a complaint to Police about the incident of sexual violence.
- R56 Legal aid should be extended to victims and perpetrators who participate in the alternative process where they would otherwise be eligible for legal aid in accordance with the income and asset tests set out in relevant legislation.
- R57 The statute should provide that statements and communications made during the alternative process are confidential, with a breach made a punishable offence, with the exception that the record of a completed alternative process may be disclosed to Police and the Department of Corrections as described in Chapter 9 of this Report.
- R58 Further thought should be given to an exception to confidentiality to enable the provider to advise Police or Child, Youth and Family of any disclosures made by the perpetrator in the course of the alternative process regarding acts of sexual violence committed against others.
- R59 Confidentiality obligations should allow a victim to have support and work through issues arising from participation in the alternative process but should prohibit publication of any facts that would lead to disclosure of the perpetrator's participation in the alternative process.
- R60 The Evidence Act 2006 should be amended as outlined in paragraphs 9.147 to 9.153 of this Report to provide a privilege for the benefit of any perpetrator for participation in the alternative process and for statements made, information given, or communications between the perpetrator and any other person during that process, including any person involved in the delivery of the process. There should be an exception for propensity evidence as outlined in paragraphs 9.154 to 9.156.
- R61 The Evidence Act 2006 should be amended to provide a privilege to victims in respect of participation in the alternative process and for statements made, information given, or communications between the victim and any other person during that process, including any person involved in the delivery of the process.
- R62 The statute should provide that where a perpetrator participates in and completes the alternative process, there is a bar against subsequent prosecution of the perpetrator for the same incident of sexual violence against the same victim, except in the instances noted in paragraph 9.162 of this Report.

- R63 A central register should be maintained of those who have completed the alternative process.
- R64 Guidelines or practice standards for the alternative process should be created in consultation with the sector, covering the topics outlined in Chapter 9 and Appendix D of this Report.
- R65 Providers and facilitators should be periodically monitored and programmes should be periodically audited.
- R66 Outcome agreements should be periodically monitored.
- R67 Capacity should be built in the sector; training and support should be provided for providers and facilitators seeking accreditation; and the need for alternative process programmes should be identified and those programmes developed in underserved geographic or demographic areas.
- R68 Records of the assessment decisions of a provider should be maintained in a central register (see R 63).
- R69 The statute should provide that information may only be released from the central register in the form of a “record of completion” in the situations noted at paragraphs 9.140 to 9.145 of this Report.

OVERSIGHT FUNCTIONS AND BODY

- R70 The commission recommended in Part D of this Report should perform the oversight functions described in paragraphs 9.173 to 9.192 of this Report.
- R71 The commission should be structured in such a way that its function of overseeing alternative processes is conducted independently of its other functions.
- R72 If R 70 is not accepted, the oversight functions in Chapter 9 of this Report should be performed by the Ministry of Justice, except for the function of maintaining records and a central registry, which should be performed by the newly-established independent review panel (see R 51).

PILOT PROGRAMME

- R73 The alternative process should first be implemented as a pilot programme which is monitored and evaluated and necessary changes made before it is rolled out further.

PART D: SUPPORT FOR VICTIMS

- R74 Government should invest the necessary resources and facilitate the following improvements to the sexual violence support sector:
- Development and implementation of training and education programmes across the sexual violence sector and made available to all those interacting with sexual violence victims in a professional capacity.
 - Consideration of whether a recognised accreditation programme based on good practice guidelines to promote the growth of a skilled workforce in the sexual violence sector should be rolled out nationally.
 - Creation of an effective monitoring system attached to the accreditation programme.
 - Creation of a dedicated research unit (this may be located within an established body) funded to facilitate the application of research into practice standards, with a clear agenda and charged with fostering international collaboration for this purpose. This includes the adoption of data collection programmes.
- R75 A sexual violence commission (see R 76) should be given responsibility for:
- coordinating of the scope and nature of services provided; and
 - promoting communication and consultation across the sector.
- R76 A sexual violence commission should be established with a number of commissioners and a core staff with expertise in the field of sexual violence. One commissioner should focus on issues and concerns relating to Māori victims.
- R77 The commission should be established by statute in the form of an independent Crown entity.
- R78 In addition to coordinating the sector (see R 75), the commission should fulfil the following functions:
- establishing a dedicated sexual violence research unit;
 - developing and implementing training and education programmes for those who work with sexual violence victims; and
 - establishing and monitoring an accreditation system for those who work with sexual violence victims, which might extend to the providers of the alternative justice processes and the programmes recommended in Part C of this Report.
- R79 The commission, in consultation with sector providers, should give consideration to the most effective model for allocating and distributing funding to ensure wraparound care.

- R80 The commission's performance should be measured against a detailed set of output measures, agreed with the commission's monitoring agency, and reflecting the core functions set out in this Report.
- R81 The commission, in consultation with sector providers, should provide a statement of intent every three years and report annually to government on its financial accounts.
- R82 The commission should have a board of governance and membership with an emphasis on diversity and expertise in the field including multiple representatives from the sexual violence service provider sector, different ethnic and cultural groups (including tangata whenua and representatives from migrant and non-English speaking communities), the LGBTI community, the disability community and the medical/counselling profession.

Part A

INTRODUCTION



Chapter 1

Scope, approach, and context of this review

INTRODUCTION

- 1.1 The Law Commission has been asked to consider whether the criminal trial process as it applies to cases of sexual violence should be modified or fundamentally changed, in order to improve the system's fairness, effectiveness and efficiency and, in particular, "the court experience of complainants".⁴
- 1.2 It is generally accepted that the number of acts of sexual violence reported to Police does not reflect the actual prevalence of sexual violence in the community.⁵ Previous reviews have also established that many victims of sexual violence have a negative experience in or perception of the criminal justice system.⁶ Both these things have been confirmed by the research and consultation process undertaken in this review.
- 1.3 The recommendations in this Report seek to reduce the risk of re-traumatisation of those who go through the criminal justice system by proposing a number of reforms to criminal trial processes as they apply in cases of sexual violence. (For reasons explained below, we do not look at the Police investigation or prosecutorial decision-making stage). The Report also recommends the establishment of an alternative, non-criminal process, so that victims⁷ of sexual violence have greater choice in the form of redress they seek. Finally, it suggests ways to better meet the support and service needs of victims, on the basis that meeting those needs puts victims in a better position to report acts of sexual violence.
- 1.4 The focus of this Report is on the processes that apply to sexual violence within the criminal justice system. It does not examine the substance of the offences of sexual violence that are currently on the statute book or substantive legal rules such as the definition of consent.
- 1.5 It seems generally accepted among consultees that the custodial presumption in section 128B(2) of the Crimes Act 1961⁸ and the high sentencing tariffs that attach to sexual violence offences are a contributing factor to under-reporting (the offence of sexual violation/rape carries a maximum sentence of 20 years' imprisonment, with six to eight years the recommended starting

4 Letter from Amy Adams (Minister of Justice) to Grant Hammond (President of Law Commission) regarding revised Law Commission work programme 2014/15 (24 November 2014). The terms of reference for this review were first received in 2010 and an Issues Paper published in 2012. The review was then put on hold. Subsequently, it was revived, and the terms of reference have not changed, although the matters covered in this Report differ from the scope and nature of the proposals put forth in the Issues Paper. For the full terms of reference and discussion of the prior history of this review, see below.

5 See Chapter 2.

6 See Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to recovery* (Ministry of Women's Affairs, 2009) at ch 7; Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, 2009) at ch 8; advice to the Law Commission from Dr Linda Beckett (June 2015), on file with the Law Commission; and Law Commission *Alternative Pre-trial and Trial Processes: Summary of Submissions to Consultation* (NZLC, 2012).

7 We discuss our use of the term "victim" in this Report below.

8 Section 128B(2), which is sometimes referred to as a "custodial presumption", states that a person convicted of the offence of sexual violation must be sentenced to imprisonment unless the court thinks the person should not be, having regard to the particular circumstances of the person convicted and the particular circumstances of the offence, including the nature of the conduct constituting it.

point for offending at the lower end of the spectrum).⁹ These factors also mean perpetrators have a strong incentive to aggressively defend a charge rather than to admit it. This Report does not consider a change to the custodial presumption or propose amending the maximum penalties that attach to sexual violence offences or guidelines for their imposition. However, a review of these factors could be warranted in the future in order to address these issues.

- 1.6 We also note that our recommendation for an alternative process for dealing with sexual violence would sit outside of the criminal trial process and would not lead to a conviction or criminalisation. It may, therefore, address some of the concerns about the drawbacks of the current high penalties for sexual violence offences.

THE FUNDAMENTAL PROBLEM

- 1.7 In this Report, we use the term “sexual violence” as a broad descriptor of all unwanted acts of a sexual nature perpetrated by one or more person(s) against another.¹⁰ (We use the term “sexual offence” or “sexual offending” only with reference to an act or acts of sexual violence for which there has been a trial and/or conviction).
- 1.8 Sexual violence occurs in a number of contexts. It is often committed by someone who is known to the victim, whether a family member, an intimate partner, a friend or a recent acquaintance (see Chapter 2). In all its forms, however, it has certain defining characteristics that distinguish it from many other forms of criminal offending.¹¹ The fundamental problem, in our view, is that the criminal justice system by and large fails to take account of those distinguishing characteristics. Change is required if victims are to feel in a position to report acts of sexual violence. What that change should be, and what is possible now and what needs to be looked at further in the future, is the subject of this Report.

What distinguishes sexual violence?

It usually occurs in private

- 1.9 Sexual violence usually occurs in private and without witnesses besides the victim. It can also occur without evidence of physical force or harm. The evidence that is required to prove criminality to the required standard of beyond reasonable doubt is more difficult to establish, unless the acts in question conform to the “real rape” stereotype, which is an act of rape involving a stranger, use of a weapon and evidence of violence (see further below). Most acts of sexual violence do not conform to that stereotype.

It breaches intimate physical and psychological boundaries

- 1.10 Sexual violence is a form of offending that breaches a victim’s most intimate physical (and psychological) boundaries. This has a number of consequences, including less willingness of victims to report it to someone they do not know, such as Police, especially since to obtain the requisite evidence to establish criminal offending beyond reasonable doubt, the victim must go through a medical examination and questioning on the intimate details of the acts alleged.
- 1.11 In the process of investigating allegations of family violence, sexual violence may be overlooked because the victim does not raise it, because it is difficult for Police to ask about it without

⁹ *R v AM* [2010] NZCA 114 at [93].

¹⁰ See also the definition of sexual violence in *Elaine Mossman and others*, above n 6, at 5.

¹¹ See also *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (Ministry of Justice, 2009) at 55–57.

having first established a measure of trust and because it is more difficult to establish in court than forms of violence that leave physical evidence.

The relationship between perpetrators and victims

- 1.12 Most perpetrators of sexual violence are known to their victim and many are in a personal or family relationship with their victim. The victim may be reliant on the perpetrator for social or economic support. The victim may not want the perpetrator to go to jail for a lengthy period. However, at the end of the criminal trial process, the outcome for the defendant is either conviction or acquittal. If the outcome is a conviction, the likely result is a term of lengthy imprisonment. If the outcome is an acquittal, there are very few other options for a victim to seek justice in a form that can sit alongside the need or desire, if any, to have ongoing contact with the defendant.

The psychological impact of sexual violence and the absence of a “typical” victim response

- 1.13 The psychological impacts of sexual violence on its victims can include depression, denial, phobic reactions and intrusive thoughts about the event.¹² A victim of this form of violence is less likely to be willing to engage with a system in which their credibility and, potentially, sexual history with the defendant and others will be scrutinised and challenged in a public setting in front of 12 jurors. Some victims of sexual violence experience shame and guilt responses, which will also make them less willing to go through a trial experience of this kind.¹³
- 1.14 In addition, as noted in research summarised by Koss:¹⁴
- Because most rape victims know their perpetrator and the act is an intimate bodily invasion, sexual violence is a more severe violation of personal trust than other crimes such as burglary even though both transgress the boundaries of private, personal spaces.
- 1.15 A related point is that, although sexual violence can have a number of distinctive impacts on its victims, there is no “typical” victim response. Victims may behave in one of many different ways to cope with the psychological impact of offending both at the time of the incident and afterwards. Some of these may appear counter-intuitive, yet they are established by research to be common responses. When tested at trial, however, the diverse and sometimes counter-intuitive nature of victims’ responses may appear to be, or may be presented as, evidence that an incident of sexual violence did not occur.

The distinct justice needs of sexual violence victims

- 1.16 The particular psychological impacts of sexual violence can give rise to needs that are identifiably distinct in terms of what victims of sexual violence seek from the justice system when they make a complaint.
- 1.17 We draw upon the concept of “justice needs” in this Report. This refers to the idea that victims of sexual violence have justice needs/interests and that these needs/interests are unique to them as victims of sexual violence.¹⁵ This concept of “justice needs” is one measure for assessing ways in which the criminal justice system response can be improved to the benefit of victims, both in respect of trial and in respect of the alternative process covered in Part C.

12 Advice to the Law Commission from Dr Linda Beckett (June 2015), on file with the Law Commission.

13 Project Restore *Restorative Justice for Sexual Violence: Principles of good practice* (Project Restore NZ, 2010) at 4.

14 Mary Koss “Chapter 10: Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” in James Ptacek (ed) *Restorative Justice and Violence Against Women* (Oxford University Press, Oxford, 2009) 218 at 221.

15 Kathleen Daly “Reconceptualizing sexual victimization and justice” in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds) *Justice for Victims* (Routledge, Abingdon, 2014).

- 1.18 We explore these “justice needs” further in Part C, but by way of example, victims of sexual violence in particular may be more likely to need a sense of participation in the process of seeking justice. That and many of the other “justice needs” of victims of sexual violence often run counter to the role played by victims at trial, in which they are largely relegated to the role of primary witness to the offending upon whose evidence much of the success of the case rests.

Cultural conceptions about sexual violence

- 1.19 Sexual violence is frequently associated with beliefs and ideas that are based either in moral judgements about how people (especially women) should and should not behave or that are based in ideas about the perpetration of sexual violence that do not reflect reality. Globally, these are sometimes referred to as “rape myths”. Kelly, Lovett and Regan in their 2005 study of attrition in rape cases describe these as “powerful stereotypes that function to limit the definition of what counts as ‘real rape’, in terms of the contexts and relationships within which sex without consent takes place”.¹⁶
- 1.20 A set of powerful cultural conceptions are associated, for instance, with the expected response of a victim to sexual violence. This is for a victim to physically resist or struggle, yell to draw the attention of others, immediately cut all contact with the perpetrator and report the sexual violence directly. Many people who experience sexual violence, however, may not call attention to it at the time. They may freeze out of shock or as a form of self-protection. Some victims report not wishing to cause a scene. They may not report the incident of sexual violence until some time after the fact or may not recognise it or identify it as an act of sexual violence.
- 1.21 The term “real rape” is sometimes used to describe the “typical” rape scenario that most people associate with rape. It is likely to involve an attack by a stranger on an unsuspecting victim, with the use of threat or force by the assailant and active physical resistance by the victim.¹⁷ However, research shows that the majority of sexual violence is committed by men who are known to the victim either as a date or recent acquaintance, a friend or a partner.¹⁸ Also, much sexual violence involves a series of assaults over many years by one perpetrator against the same or victim or victims.¹⁹ A 2009 report by the Ministry of Women’s Affairs sets out the common characteristics and dynamics of sexual violence and how this often diverges from the commonly held or stereotypical view of “real rape”.²⁰
- 1.22 These cultural conceptions are unique to sexual violence as a form of criminal offending. To the extent that they have an impact on the fact-finder in a criminal trial, they are likely to affect whether the fact-finder finds the complainant, and the circumstances in which the sexual violence is alleged to have occurred, credible.

16 Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study, United Kingdom, 2005) at 2.

17 Kelly, Lovett and Regan, above n 16, at 2 and Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 31–33. See Susan Estrich “Rape” (1986) 95 Yale LJ 1087 at 1088 and 1092 for an early definition of “real rape”.

18 Heenan and Murray *Study of Reported Rapes in Victoria 2000–2003: summary research report* (Office of Women’s Policy and Department for Victoria Communities, Melbourne, 2006); D Lievore *Non-Reporting and Hidden Recording of Sexual Assault: an international literature review* (Office of the Status of Women, Canberra, 2003); and R Jewkes, P Sen and C Garcia-Moreno “Sexual violence” in EG Krug and others (eds) *World Report on Violence and Health* (World Health Organization, Geneva, 2002) all as cited in Elaine Mossman and others, above n 6, at 6.

19 Heenan and Murray *Study of Reported Rapes in Victoria 2000–2003: summary research report* (Office of Women’s Policy and Department for Victoria Communities, Melbourne, 2006) and D Lievore *Non-Reporting and Hidden Recording of Sexual Assault: an international literature review* (Office of the Status of Women, Canberra, 2003) both as cited in Elaine Mossman and others, above n 6, at 6.

20 Ministry of Women’s Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at 13–14.

THE VIEWS OF VICTIMS AND OTHERS

- 1.23 The feeling that the trial process and its outcomes are not well-suited to dealing with sexual violence is shared by both victims and those who work in the system, including lawyers and Police.
- 1.24 The following is a selection of comments made in submissions to our Issues Paper:²¹
- I am a survivor of sexual violence and would never report it due to the way the current legal system victimises survivors.
 - The legal and sentencing systems deepens the trauma and adds in the most cruel way to what is in effect a second “sentence imposed on the victim”.
 - ...it was a horrendous, long, arduous, disempowering, re-traumatising and re-victimising process. ... I wouldn’t recommend going through the current justice system [as] you have to be superwoman in order to cope.
- 1.25 These comments align with those made in a previous research study commissioned by the Ministry of Women’s Affairs in 2009. In that study, 58 interviews and 17 surveys were undertaken of victims who had disclosed a rape or sexual assault to Police, a support agency or a professional at any time from 2000 onwards.²²
- 1.26 Thirty-six of the 75 research participants said they had reported an incident of sexual violence to Police since 2000, and an equal number did not report to Police.²³ When questioned on their reasons for not reporting, respondents gave multiple responses, but the main reasons were that they did not think they would be believed, it would have an adverse effect on family/whānau, they felt shame or whakamā,²⁴ and they were afraid of the perpetrator.²⁵ These responses align with the high incidence of sexual violence in family or intimate partner relationships. A significant number of respondents cited a feeling of fear and distrust of the legal system (26 per cent) and previous experience with Police (23 per cent).²⁶
- 1.27 Seventeen of the research participants were involved in court processes.²⁷ The 14 participants who had given evidence in court all gave negative responses when asked how it had affected them. One said:²⁸
- It was embarrassing and kind of degrading and disgusting and I felt kind of like I was the one on trial because you know the things they ask you and the things they imply and you’re in a room full of people, 90 percent of whom I don’t know talking about intimate sexual stuff. Ninety percent of them are men, you know – most of them were men.
- 1.28 In response to questions about the experience of cross-examination, one respondent said:²⁹
- It undid a lot of the work I did in counselling on understanding the truth of what happened. It reinforced a lot of the offenders’ messages and rationales when I was a child. I almost became a child again.

21 Law Commission, above n 6, at 36.

22 Kingi and Jordan, above n 6.

23 Kingi and Jordan, above n 6, at 57.

24 An adjective used to describe a range of feelings from shyness through embarrassment to shame and consciousness of fault, and behaviour involving varying degrees of withdrawal and unresponsiveness: definition from Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999) at xvi.

25 Kingi and Jordan, above n 6, at 58.

26 At 58.

27 At 91.

28 At 95.

29 At 95.

1.29 When questioned, those who work in or are familiar with the criminal justice system often say they would not advise victims to go through it. In another 2009 study conducted on behalf of the Ministry of Women's Affairs, over 1300 surveys were sent to community service providers (specialist support agencies, general victim support groups, doctors and other victim advocates) and criminal justice groups (Police, judges, Crown prosecutors, and court staff).³⁰ Of the groups surveyed, between 76 per cent and 90 per cent would recommend that a victim of sexual violence report it to Police, but only 20 to 30 per cent would recommend going through the criminal justice system.³¹ The reasons given by all were similar – because the criminal justice process is harmful and can re-traumatise complainants. A Crown prosecutor and a Police officer respectively made the following comments in their survey responses:³²

- In my view the process for complainants in sexual violence cases is brutal, every aspect of the complainant's character and conduct is questioned and exposed, and the likely outcome is not guilty.
- I wouldn't put myself through this and certainly would let a friend or family know how degrading it is and that they will be revictimised and the chances of a guilty verdict are very, very low.

1.30 In *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand*, the following comment made by a judge is noted:³³

As a practicing lawyer, I was always of the view, and so was my family, that it would only be in the most extreme circumstances that you would ever advise a woman to participate in the criminal justice process if she was alleging she had been raped. ...

... that is the 90 percent we are talking about – the women who do not report.

1.31 In summary, the research establishes that there are many reasons why people choose not to deal with acts of sexual violence in the criminal justice system, and many of them are directly attributable to the functioning of the trial process and the limited outcomes it delivers. It seems that victims do not report because they perceive (often accurately) that the criminal trial process will not serve them and their interests well. They may feel that they will not be believed and that the ordeal of giving evidence is not worth the perceived low likelihood of a guilty verdict. Alternatively or in addition to that, the outcomes of a guilty verdict (a criminal conviction and imprisonment for the defendant) may not be outcomes that the victim wants.

1.32 The result of the above is that many incidents are never reported or dealt with officially through the criminal justice system or in any other kind of way (see Chapter 2 for a discussion of the available statistics on reporting of sexual violence). The non-reporting of an act of sexual violence prevents action being taken regarding that act. If alleged offences are not reported, the evidence cannot be tested in a criminal trial, and those who may be found criminally responsible for it cannot be held accountable. The offences cannot be denounced or punished, and the objectives of the criminal justice system such as denunciation, punishment, deterrence, and public safety cannot be met.

1.33 The Victims' Rights Act 2002 contains rights and principles that are premised on the legitimate desire of victims of criminal conduct to feel some sense of participation in the justice system.³⁴

30 Mossman and others, above n 6.

31 At 87–88.

32 At 88.

33 Comments of Justice Antony Ellis "The Rape Trial: Are the Scales of Justice Evenly Balanced?" in Juliet Broadmore, Carol Shand and Tania Warburton (eds) *The Proceedings of Rape: Ten years' progress?* (Doctors for Sexual Abuse Care (NZ), Wellington, 1996) at 83 as cited in Elisabeth McDonald and Rachel Souness "From 'real rape' to real justice in New Zealand Aotearoa: The reform project" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 41.

34 Victims' Rights Act 2002, ss 7–9; 11–14; 29–48.

Victims of sexual violence who do not report it are denied access to the benefit of the policy position set out in that Act and the rights that the Act contains. Those who do not report the incident to Police may also be less likely to get access to non-justice support services such as those provided by non-governmental organisations and the counselling support offered through ACC.

- 1.34 Apart from the effect of the sexual violence itself on the victim (for instance, sexual violence has been correlated with most indicators of deprivation and poor health),³⁵ the non-reporting of the violence may have undesirable downstream impacts on victims who may be left with a feeling that “justice has not been done”.

OUR APPROACH

- 1.35 In this part we set out the issues that are examined in this Report and our approach to addressing those issues.
- 1.36 We begin by looking at the processes that occur at trial and pre-trial and considering whether those could be improved. We do not look at Police investigation and charging decisions, although as noted in Chapter 3, this area may require further analysis.
- 1.37 We have not limited our approach to an examination of the trial process alone. The justice needs of sexual violence victims, as we go on to discuss in Part C, have been describe as “diametrically opposed” to what is required of those victims when they enter the trial process.³⁶ Victims also want more choice about the options available for how they seek justice. Where possible and appropriate, these alternatives should be available to them. Thus, we have looked at the potential for alternatives to the trial process that might better align with victims’ justice needs.
- 1.38 Finally in this Report we also consider whether more can be done to support victims so that they are in the best position possible to be able to engage with the criminal justice system.

Other considerations and issues relating to scope

- 1.39 In writing this Report, we have also given thought to a number of other considerations and “scope” issues.

Sexual violence and family violence

- 1.40 Because sexual violence often occurs in a family or domestic context, some forms of sexual violence have a necessary overlap with family violence. Family violence may be defined to include a broad range of controlling behaviours, commonly of a physical, sexual and

35 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together*, above n 11, at 1.

36 Judith Herman “Justice from the Victim’s Perspective” (2005) 11 *Violence against Women* 571 at 574.

psychological nature, which occurs within a variety of close interpersonal relationships.³⁷ In certain contexts we also refer to intimate partner violence, which is a subset of family violence.

- 1.41 Family violence and how New Zealand should respond to it is the subject of an ongoing government review.³⁸ The Law Commission has two references underway that address forms of family violence.³⁹ The problem of family violence and how the legal system should respond to it is not the subject of this Report. We also note that family violence exhibits specific features of power and coercive control that do not appear in all contexts of sexual violence. Although there is crossover between the two, because of the substantial differences between them, they need to continue to be seen as distinct issues, and so we would caution against a wholesale transplanting of the reforms here into the family violence area.⁴⁰

Children and other vulnerable victims

- 1.42 This Report focuses on victims of sexual violence, as a distinct group of complainants of a particular kind of criminal offending. There are many other distinct groups of victims who can be singled out. These include children, victims with disabilities or special needs, and other victims who, because of their circumstances or features unique to them, may be classed as “vulnerable”.
- 1.43 We note the focus put on improving the criminal justice system for child complainants in the past five years or so and the various policy and law reforms that have resulted.⁴¹ Our report is not focused on child complainants, however we would note that *most* of the child complainants in the criminal justice system are complainants in cases of alleged sexual violence. Therefore, to the extent that the system is improved for victims of sexual violence, those improvements may be expected to bring benefits for child complainants in the criminal justice system. We think that this strengthens the case for focusing on sexual violence. While we do not focus on child complainants specifically, we are fully supportive of a continued focus being put on improving the criminal justice response to children.

Sexual violence can affect anyone

- 1.44 In this Report, we have chosen not to take a “gendered” approach towards sexual violence. A gendered approach would focus on sexual violence as a form of criminal offending that is predominantly perpetrated by men against women.⁴² We do not contest the elements of power

37 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Family Violence Death Review Committee 2014) at 13. Defined in full as:

a broad range of controlling behaviours, commonly of a physical, sexual and/or psychological nature, which typically involve fear, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between partners, parents and children, siblings and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family. Common forms include:

- violence among adult partners
- abuse/neglect of children by an adult
- abuse/neglect of older people aged approximately 65 years and over by a person with whom they have a relationship of trust
- violence perpetrated by a child against their parent
- violence among siblings.

38 Ministry of Justice *Strengthening New Zealand's Legislative Response to Family Violence: A public discussion document* (2015).

39 See “Victims of family violence who commit homicide” and “Creation of a separate crime of non-fatal strangulation” Law Commission < www.lawcom.govt.nz >

40 Ministry of Social Development *Report on submissions to the Inquiry into the funding of specialist sexual violence social services* (2014) at 18.

41 See, among others, Ministry of Justice *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system* (2011); Cabinet Domestic Policy Committee Minute of Decision “Child Witnesses in the Criminal Courts: Proposed Reforms” (29 June 2011) DOM Min (11) 10/1 and Paper to the Cabinet Social Policy Committee “Amendments to the Evidence Act 2006” (12 November 2013).

42 Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, London, 2005); L Kelly *Promising Practices Addressing Sexual Violence* (United Nations Division for the Advancement of Women, Vienna, 2005); and D Lievore *Prosecutorial Decisions in Adult Sexual Assault Cases: an Australian study* (Office of the Status of Women, Canberra, 2004) all as cited in Mossman and others, above n 6, at 6.

and control involved in sexual violence, and we recognise the need to look carefully at the intersections between sexual violence, family violence and other forms of criminal offending. However, we do not wish to overlook the incidence or effect of sexual violence in same-sex relationships, of sexual violence against those who identify as transgender, and of all other victims who do not fit the gendered model of sexual violence. For the same reason, we do not use gendered pronouns throughout this Report.

Use of the terms “victim” and “perpetrator” in this Report

- 1.45 We have elected to use the term “victim” in this Report to refer to people who have been through an experience of sexual violence. (Where relevant, when referring to a victim who is appearing at trial, we use the term “complainant” or “complainant witness”).
- 1.46 We received submissions and heard from people in consultation objecting to the use of the word “victim”. There are some in the sexual violence sector who find the term “victim” potentially disempowering and who prefer to use the word “survivor” or “victim/survivor”. By our use of the term “victim”, we do not wish to disempower those who experience sexual violence, each of whom will respond to and perceive an act of sexual violence differently. Some people would also choose not to use the term sexual “violence” because, while they might view the conduct in question as an incursion of their most intimate physical boundaries, they might not label it an act of violence. The terminology is important, and we acknowledge these views.
- 1.47 Contrastingly, some have objected to the use of the word “victim” being applied to a person who makes a complaint about criminal offending unless, and until, that criminal offending has been established in a criminal trial resulting in a guilty plea or verdict. We use the term “victim” in the interests of simplicity. We note the widespread use of the term “victim” in policy and legislation (among other things, the Victims’ Rights Act 2002) often in reference to points in time that occur before a criminal trial. Our use of the term is not to be taken as a suggestion that an allegation of sexual violence may be treated as proved before it has been properly tested at trial and a guilty plea or verdict entered.
- 1.48 We use the term “perpetrator” to refer to a person who has, or is claimed to have, perpetrated an act of sexual violence upon another. We use that term for the purpose of simplicity. The term “defendant” will not always fit the context, because sometimes we refer to a person claimed to have committed an act of sexual violence who is not being prosecuted in court. Our use of the term “perpetrator” is not to imply that the person in question is or has been found guilty of an offence of sexual violence.

STRUCTURE AND OVERVIEW OF REPORT

- 1.49 This Report is divided into four parts.

Part A Introduction

- 1.50 Chapter 1 sets out the scope and history of the review and our approach to reform. Chapter 2 gives an overview of the available statistics relating to the prevalence and harm of sexual violence and rates of reporting.

Part B Courts

- 1.51 Part B examines the trial process. Chapter 3 sets out the pre-trial and trial process from beginning to end, covering the filing of charges, preparation for trial, prosecution either in the District Courts or the High Court and appeal. Chapter 4 examines the issues with the current trial process from the perspective of complainants and sets out targeted law reform

recommendations, including the speed of disposal of cases involving sexual violence, how sexual violence complainants give evidence at trial, and court-based supports available to complainants. Chapter 5 makes recommendations for court specialisation, including through the establishment of a specialist sexual violence court to be implemented as a pilot at District Court level in the first instance. Chapter 6 considers whether the jury should be replaced as the “fact-finder” in cases involving sexual violence and ultimately recommends no change at present but that further exploration of alternative fact-finders should take place as part of an evaluation of the specialist sexual violence court.

Part C Alternatives to trial

- 1.52 Part C proposes an alternative justice process that sits outside the existing criminal justice system and court-mandated restorative justice processes. Chapter 7 makes the case for this formalised alternative, referring to the distinct justice needs of sexual violence victims, and that these may be able to be met in ways other than through the criminal justice system.⁴³ Chapter 8 addresses some particularly complex issues associated with a proposal of this kind, and Chapter 9 sets out the reform proposal.
- 1.53 Part C recommends that victims of sexual violence have the option of an alternative process as well as, or as an alternative to, making a complaint that would go through the criminal justice system and to trial. Victims would be able to contact an accredited programme provider who could offer a programme to the victim and/or the perpetrator with the goal of achieving a sense of justice for the victim through the programme and allowing a perpetrator to take responsibility for his or her actions and, where relevant, make redress. We recommend that, where a perpetrator satisfactorily participates in and completes the process, there would be a statutory bar to subsequent criminal prosecution for the same incident of sexual violence.

Part D Support for victims

- 1.54 In Part D, we consider the scope and nature of non-justice support services for victims of sexual violence in New Zealand and ask whether reforms can be made to better encourage and prepare victims to engage with a criminal trial or an alternative process.
- 1.55 Chapters 10 and 11 examine whether reform is required and conclude that there are areas where support for victims can be improved. Chapter 12 sets out our recommendation that government assume a leadership role in the sexual violence support sector by undertaking responsibility for coordinating the services provided and by promoting communication and consultation across the sector. This may be done through the establishment of a new government entity, which we recommend take the form of an independent commission. In addition to coordinating the sector, we identify three key functions for such a commission of:
- (a) establishing a dedicated sexual violence research unit;
 - (b) developing and implementing training and education programmes for those who work with sexual violence victims; and
 - (c) establishing and monitoring an accreditation system for those who work with sexual violence victims (which could also extend to the providers of the alternative justice processes and the programmes recommended in Part C).

43 Daly “Reconceptualizing sexual victimization and justice”, above n 15.

OUR CONSULTATION PROCESS – 2014/15

- 1.56 Because of time constraints it has not been possible, in the drafting of this Report, to undertake an extensive consultation process with individual victims. We have, however, been able to draw on submissions that were made by individual victims, we have consulted with support groups who work with victims, and we have had access to research and literature that draws on views and experiences gathered directly from victims.⁴⁴
- 1.57 We have also had access to the submissions made on the Issues Paper for this review, which was published in 2012. This Report does not progress all of the proposals made in the Issues Paper, but we refer to submissions made on the Issues Paper wherever they are relevant to the proposals put forth in this Report.
- 1.58 In the writing of this Report we consulted with a number of individuals, organisations, and government agencies, including (but not limited to):
- victim support organisations including the National Collective of Rape Crisis and the collective sector group known as TOAH-NNEST (Te Ohaakii a Hine – National Network Ending Sexual Violence Together);
 - the Ministry of Social Development, Ministry of Justice, Ministry for Women, Police and ACC;
 - lawyers from the Public Defence Service, representatives of the Criminal Bar Association, individual prosecutors and Crown Law;
 - a number of judges of the District Courts who have experience conducting sexual violence trials and judges of specialist courts including the Alcohol and Other Drugs Treatment Court, the Family Violence Court, the Rangatahi Court and the Youth Court; and
 - academics and experts in the legal and sexual violence sectors.
- 1.59 We note in particular the assistance received from Elisabeth McDonald and Yvette Tinsley, and from the book published as a result of research completed by them and Jeremy Finn in 2011, titled *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*.⁴⁵
- 1.60 Finally, in this review, we have also been assisted by a small reference group of experts in criminal law and sexual violence who provided us with their views on some of the courts recommendations, drawing from their own experience in the area.⁴⁶

Consultation with Māori and minority groups

- 1.61 Current data and research indicate that Māori experience sexual violence to a substantially greater degree than other groups within New Zealand. However, in a report commissioned by Te Puni Kōkiri in 2009, it was noted that most policy material is focused on family violence or whānau violence.⁴⁷ Little material looks specifically to issues of sexual violence for Māori and the report stated that in the growing body of literature on sexual violence generally, very few authors have engaged directly with Māori.⁴⁸ The commissioned report, *Te Puāwaitanga o*

44 See, for example, Kingi and Jordan, above n 6, and Ministry of Women’s Affairs, above n 20.

45 McDonald and Tinsley (eds), above n 33.

46 The members of this group were Jonathan Temm, Fletcher Pilditch, Professor Chris Gallavin, Dr Suzanne Blackwell, and Dr Leehe Vardi.

47 Leonie Pihama and Huriana McRoberts *Te Puāwaitanga o te Kākano: A Background Paper Report* (Te Puni Kōkiri, 2009).

48 At 14.

te Kākano, applied a research methodology sourced in kaupapa Māori and sought to actively engage with government and with Māori representatives in the sector.⁴⁹

- 1.62 Time prevented us from undertaking a research project based on kaupapa Māori or to consult directly with affected Māori whānau and communities. We have instead relied on the findings in *Te Puāwaitanga o te Kākano* and on our consultation with a small number of sector representatives (such as Ngā Kaitiaki Mauri at TOAH-NNEST) to consider how law reform could be framed in a way that enables Māori communities to respond to sexual violence in a way that is consistent with tikanga practices and with te ao Māori. We also discussed the review with the Māori Liaison Committee established to advise the Commission on projects that concern Māori.⁵⁰
- 1.63 Minority ethnic communities may also conceptualise and respond to sexual violence in differing ways, and victims from those communities may be uniquely affected. We have spoken to some representatives from the sector, which are focused specifically on minority groups, such as the Inner City Women’s Group and Sahaayta Counselling and Social Support. Where possible, we have also drawn on written literature.⁵¹

A NOTE ON THE HISTORY OF THIS PROJECT AND THE CURRENT SCOPE OF THE REVIEW

- 1.64 In 2010, the Law Commission was directed to undertake this review under the following terms of reference:

The Law Commission is asked to undertake a high-level review of pre-trial and trial processes in criminal cases. In particular, it should consider whether the adversary framework within which those processes operate should be modified or fundamentally changed in order to improve the system’s fairness, effectiveness and efficiency.

The Commission should include within its review, an examination of inquisitorial models and consider whether all or any part of such models would be suitable for incorporation into the New Zealand system.

The Commission is asked to put particular emphasis upon the extent to which a new framework and/or new processes should be developed to deal with sex offence cases. However, it should also consider the desirability of alternative approaches in other categories of cases such as those involving child victims and witnesses and family violence, and it should consider the extent to which the system needs to be modified more generally.

- 1.65 Prior to this, there had been a number of government-led initiatives in the area of sexual violence. From 2009, the Ministry of Women’s Affairs received funding for research on the “well-being of adult victims of sexual violence” with an emphasis on seeking “a strong evidence base for policy and operational responses”.⁵² In 2007, the Taskforce for Action on Sexual Violence was constituted as a partnership between key government agencies and the sector “to lead and co-ordinate efforts to address sexual violence”.⁵³ The Taskforce, which was supported

49 At 17. The research methodology was grounded within Māori worldviews and perspectives. The report articulated those Māori values, attitudes, concepts and practices that are most relevant to sexual violence issues and how sexual violence affects Māori, including whakapapa, whānau, whanaungatanga, mana, tapū, noa and whare tangata.

50 Māori Liaison Committee terms of reference < www.lawcom.govt.nz > .

51 See, for example, Jemaima Tiatia *Sexual Violence and Pacific Communities Scoping Report* (Ministry of Pacific Island Affairs, 2008); and Marlene Levine and Nicole Benkert *Case Studies of Community Initiatives Addressing Family Violence in Refugee and Migrant Communities* (Ministry of Social Development, 2011).

52 Ministry of Women’s Affairs “Factsheet 2009 – Sexual Violence Research Unit” (2011) < www.mwa.govt.nz > and see also Ministry of Women’s Affairs, above n 20.

53 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together*, above n 11.

by TOAH-NNEST, existed from July 2007 to July 2009 and made several recommendations to government to prevent and respond to sexual violence.⁵⁴ Included was a recommendation that consideration be given to an alternative mechanism for dealing with sexual violence cases.⁵⁵

- 1.66 In 2008, in the context of a Report on the admission of evidence of criminal history to criminal trials, the Law Commission had suggested that the Government undertake an inquiry into whether the present adversarial trial model should be modified or replaced with an alternative model, either for sexual violence offences or for a wider class of offences.⁵⁶ Subsequently, the Law Commission was directed to undertake a review on the terms of reference set out above.

Law Commission's Issues Paper

- 1.67 The Law Commission published an Issues Paper in 2012 that included a review of inquisitorial systems and concluded that “the traditional criminal justice process is limited in its ability to deliver justice”.⁵⁷
- 1.68 In the writing of the Issues Paper the Law Commission worked in collaboration with Elisabeth McDonald and Yvette Tinsley from Victoria University of Wellington and Jeremy Finn from the University of Canterbury, who received a grant from the Law Foundation for research on alternatives to pre-trial and trial processes in cases of sexual violence. The Commission was also assisted by a steering group consisting of Elisabeth McDonald and Yvette Tinsley, representatives from the judiciary, Police, prosecution and defence bars, community service providers working with victims of sexual offending, and offender treatment services.
- 1.69 The Issues Paper raised a number of possible reforms that could be applied to all criminal trials, including putting the judge more in the role of fact-finder with increased direction over determining the issues at trial and the ability to ask questions directly of the parties. The Commission received submissions on its Issues Paper from a wide variety of groups and individuals, including legal professional organisations, the judiciary, community law centres and non-governmental organisations as well as individual counsellors, psychologists, lawyers, social workers and others.⁵⁸
- 1.70 The Law Commission was in the course of considering these submissions when the then Minister of Justice and then Minister responsible for the Law Commission, the Hon Judith Collins, indicated that the work was not to proceed further. The Commission collated a summary of submissions received on its Issues Paper but did not proceed to a final Report at that time.⁵⁹

Revival of the review

- 1.71 In late 2014, the Law Commission received a direction to restart the project working to the same terms of reference. The current Minister of Justice, Hon Amy Adams, made an additional request to put a “particular focus on sexual offence cases, to identify best practice for improving

54 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together*, above n 11.

55 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together*, above n 11, at 67. Recommendations of the Taskforce would later inform the 2014 Social Service Select Committee Inquiry into the Funding of Specialist Sexual Violence Social Services, with government agencies being required to present progress updates against taskforce recommendations.

56 Law Commission *Disclosure to Court of Defendant's Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at v–vi.

57 Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 7.

58 Twenty-six submitters identified themselves as victims of sexual violence or other offending or family/whānau members of victims or indicated they had been defendants in criminal trials. Twenty-two organisations made unique submissions and 28 organisations made substantially similar submissions based on the submission of Auckland Sexual Abuse Help Foundation (HELP Auckland).

59 Law Commission, above n 6.

the court experience of complainants”,⁶⁰ and to develop proposals to improve the criminal justice response to sexual violence.

- 1.72 The matters covered in this Report differ from the scope and nature of the proposals put forth in the Issues Paper published by the Commission in 2012. Many of those proposals were very positively received.⁶¹ However, the focus of this Report is limited to sexual violence, given the timeframe for completion of the project, subsequent additional direction as to the terms of reference and the Commission’s subsequent assessment of the areas where the need for law and policy reform is most pressing.

AREAS FOR FURTHER REVIEW

- 1.73 This review is limited to examining how the law responds to sexual violence that has already occurred. However, several submitters to the Issues Paper noted the need to prevent sexual violence and work with sex offenders to prevent reoffending, including the need for social change and a coordinated, rather than an isolated, response.⁶²
- 1.74 One of the members of the Māori Liaison Committee⁶³ noted that, especially for Māori communities, reform proposals will be less successful if they target victims in isolation of the wider context. It was suggested that our review could also serve to empower communities to address offending and enable the criminal justice system to take better account of the history and treatment needs of perpetrators of sexual violence, who are often themselves victims of sexual violence.
- 1.75 We agree that more is needed to address the causes and reduce the incidence of sexual violence. We have not been able to do that as part of this review, but we think that education campaigns, better treatment options for offenders within the corrections system and a coordinated government response should all be a priority.⁶⁴

60 Letter from Amy Adams (Minister of Justice) to Grant Hammond (President of Law Commission) regarding revised Law Commission work programme 2014/15 (24 November 2014).

61 See Law Commission, above n 6.

62 At [128].

63 Established to advise the Law Commission on projects that concern Māori: “Māori engagement” Law Commission < www.lawcom.govt.nz > .

64 We also note the ongoing work being done by the Government in this space, under the auspices of the Ministry of Social Development and the Ministry of Justice.

Chapter 2

Prevalence and harm of sexual violence

INTRODUCTION

- 2.1 This chapter presents some of the statistics relating to sexual violence in New Zealand, taking care to highlight the limitations of the data available.
- 2.2 There are difficulties in painting an accurate statistical picture, which are discussed below. However, the sexual violence sector estimates that one in four women and one in eight men are the victim of sexual violence in their lifetime.⁶⁵
- 2.3 The 2014 New Zealand Crime and Safety Survey (NZCASS)⁶⁶ concluded that two per cent of adults were the victims of one or more sexual offences in 2013,⁶⁷ and according to earlier NZCASS studies, the number of sexual offences per 100,000 adults in 2005 was six, while the number of sexual offences per 100,000 adults in 2008 was four.⁶⁸
- 2.4 A further figure provided in the NZCASS in the last three surveys is the number of sexual offences (not expressed as a percentage). In 2005 there were 317,000, in 2008 there were 285,000 and in 2013 there were 186,000 sexual offences.⁶⁹

65 Allison Morris and James Reilly *New Zealand National Survey of Crime Victims 2001* (Ministry of Justice 2003) at 166. Other figures from the sector include Rape Crisis Dunedin, which states on its website that “1 in 3 girls and 1 in 6 boys will experience sexual abuse, possibly more” (“Frequently asked questions” Rape Crisis Dunedin < www.rapecrisisdunedin.org.nz >); Women’s Refuge notes that “one in three women experience psychological or physical abuse from their partners in their lifetime” (“New Zealand domestic violence statistics” Women’s Refuge < womensrefuge.org.nz > citing Janet Fanslow and Elizabeth Robinson “Violence against women in New Zealand: prevalence and health consequences” (2004) 117 *The New Zealand Medical Journal* 34); HELP Auckland give the figure of 1 in 5 women on their website (“Sexual Abuse Statistics” HELP < helpauckland.org.nz >); ACC notes in the context of their “Mates and Dates” programme that “20% of female and 9% of male secondary school students report unwanted sexual contact or being made to do unwanted sexual things” (“Injury prevention strategy” ACC (17 October 2014) < acc.co.nz >) while TOAH-NNEST notes that “there is no one definitive number that provides the true rate of sexual violence in New Zealand; rather the following statistics provide an indication of the prevalence of sexual violence in New Zealand: a cohort study of New Zealand children spanning from birth till the age of 25 found that sexual abuse was reported by 16% or around 1 in 6 people before the age of 18 [citing Fergusson, Boden and Horwood “Exposure to childhood sexual and physical abuse and adjustment into early adulthood” (2008) 32 *Child Abuse & Neglect* 607]. A World Health Organisation multi-country study found rates of child sexual abuse in New Zealand for adult women to be 28% (in rural setting) and 23% (in urban settings), or around 1 in 4 women [citing Janet Fanslow, Elizabeth Robinson, Sue Crengle and Lana Perese “Prevalence of child sexual abuse reported by a cross-sectional sample of New Zealand” 31 *Child Abuse and Neglect* 935]. Recent international research indicates that 1 in 6 boys will experience some form of sexual abuse before the age of 16 [citing Gary Foster, Cameron Boyd and Patrick O’Leary *Improving policy and practice responses for men sexually abused in childhood* (Australian Institute of Family Studies 2012)] ... 26% of female students, and 14% of male students, reported unwanted sexual contact which was defined as being touched sexually or being made to do sexual things that they did not want to [citing Fleming and others *Youth’12 Overview: The health and wellbeing of New Zealand secondary school students in 2012* (University of Auckland, Auckland, 2013)]... approximately 29 percent of women and 9 percent of men experience unwanted and distressing sexual contact over their lifetime” [citing Pat Mayhew and James Reilly *The New Zealand Crime & Safety Survey: 2006* (Ministry of Justice 2007)]” (“Prevalence” TOAH-NNEST < toah-nnest.org.nz >). On the “It’s Not OK” website the figures taken from the 2015 New Zealand Crime and Safety Survey provide that 24 per cent of women and 6 per cent of men have experienced sexual violence at some point during their life; and Ministry of Women’s Affairs state that a quarter to a third of New Zealand women will experience intimate partner violence or sexual violence in their lifetime (“What is violence against women?” Ministry for Women < women.govt.nz >).

66 Based on 6,943 interviews conducted in the period February to June 2014 relating to 2013.

67 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014* (Ministry of Justice, 2014) at 4.

68 These figures have a high relative error (> 20 percent) and are described as not being statistically reliable: Pat Mayhew and James Reilly *The New Zealand Crime & Safety Survey: 2006* (Ministry of Justice 2007) at 55; Bronwyn Morrison, Melissa Smith and Lisa Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report* (Ministry of Justice 2010) at 31.

69 Note the number of offences is different to incidents because an incident may have up to two offences. Ministry of Justice *2014 New Zealand Crime and Safety Survey: Main Findings* (2015) at 21.

LIMITATIONS OF THE DATA

- 2.5 It is difficult to paint an accurate picture of sexual violence in New Zealand (including prevalence, reporting and attrition) using statistics. In addition to a lack of data, there are issues including:
- (a) methodology (for example relating to the standard errors or point estimate used making it troublesome to reach a strong estimate figure);
 - (b) limitations, including privacy restraints that can have implications for the figures presented (for example small self-selecting survey samples may lead to cohort bias);
 - (c) the use of prevalence rates that fail to take into account that individuals might be victimised more than once; and
 - (d) in victimisation studies, the sensitive nature of the questions may mean people do not accurately self-identify with a category or select an inconclusive statement such as “don’t know/can’t remember/don’t wish to answer”.⁷⁰
- 2.6 Police statistics, for example, do not reflect minor offences where the victim did not wish to pursue the matter or multiple instances of the same type of offence that are reported concurrently and may be recorded as a single offence.⁷¹ Changes in 2014 have meant that Police are seeking to record data that will permit a more victim-focused record of crime.
- 2.7 Victimisation surveys, such as the NZCASS, are surveys of segments of the general public asking about their experience of crime victimisation. Such surveys may provide a more accurate picture of prevalence, as people are directly asked about their experiences and may reveal offending that has not been reported to Police. However, these studies also have limitations, such as the fact that they do not include victims who have been murdered, children and victims who do not reside in private households (such as the homeless, prisoners and those in hospitals, psychiatric institutions, retirement homes or boarding houses).⁷² This can result in under-estimation of the extent of victimisation, yet the NZCASS are also at risk of *over-estimating* victimisation because they accept what participants report at face value.
- 2.8 Much of New Zealand’s data on sexual violence is dated, infrequent or inconsistent in its focus. For example, lifetime prevalence of sexual violence was not included in the 2006 or 2009 NZCASS. Those surveys state that the figures on sexual violence are statistically unreliable due to the small survey sample.⁷³ Similarly, the 2014 NZCASS involved just over 6,000 respondents.
- 2.9 We also note the difficulty of gathering data in this field due to potential ethical difficulties (which informed the NZCASS methodology) and that this might lead to bias arising in sample cohorts that do respond to surveys, in turn making it difficult to accurately measure sexual violence that occurs in society.

70 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014*, above n 67, at 50. In the 2014 NZCASS, people who failed to fill in the self-completion section of the survey were excluded, which totaled 1.9 per cent of all respondents. Of that 1.9 per cent, 22.9 per cent said it was “too personal”, and 7.6 per cent said it was “too upsetting” to complete the questionnaire.

71 Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, September 2009) and Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 55; Morrison, Smith and Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report*, above n 68, at 28.

72 Allison Morris and James Reilly *New Zealand National Survey of Crime Victims 2001* (Ministry of Justice, May 2003) at 34.

73 Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 53; Morrison, Smith and Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report*, above n 68, at 30.

WHERE DOES SEXUAL VIOLENCE OCCUR?

- 2.10 The victims and perpetrators of sexual violence do not, as a group, conform to any stereotype. An act of sexual violence may be perpetrated in a one-off incident between acquaintances or friends. It may occur in a family home between family members over several years, and the perpetrator may be a child or much older than the victim.
- 2.11 Sexual violence can occur in an ongoing, long-term relationship, often in concert with other kinds of violence and abuse (physical, emotional and psychological). In such cases, sexual violence is a form of intimate partner violence perpetrated in the context of a pre-existing domestic relationship, which is also likely to be characterised by economic dependence and emotional manipulation. Sexual violence in the context of an intimate partner relationship does not conform to the stereotype stranger rapist on which many “social fears and vulnerabilities” are projected.⁷⁴
- 2.12 Sexual violence may be perpetrated against a young person or a child by a family/whānau member or a friend, often on repeated occasions and spanning several years. Sexual violence against a child raises complex legal issues because of the age of the victim and their particular vulnerability and because the incident may not be revealed until some years later. Child victims will have special additional needs, including at trial, or if the violence only comes to light several years later, there may be issues with evidence.

PREVALENCE OF SEXUAL VIOLENCE

- 2.13 Notwithstanding these limitations, an indication as to the prevalence of sexual violence can be measured through various sources. As these figures are from different sources, the extent to which those sources overlap is unknown, as different groups and methods are utilised. Thus, comparison between the sources would be inappropriate and potentially misleading.

NZCASS

- 2.14 The NZCASS series began as the New Zealand National Survey of Crime Victims (NZNSCV) in 1996. A second NZNSCV occurred in 2001, before changes in the survey design and a re-naming in 2006. The NZCASS was repeated in 2009 and in 2014.
- 2.15 The NZNSCV and the NZCASS series provide data from a comprehensive survey exploring the experience of crime victimisation of 5,000 to 7,000 randomly selected New Zealanders aged 15 and above.
- 2.16 In the 2001 NZNSCV, around one in five women and one in 20 men reported being the victim of sexual violence in their lifetimes.⁷⁵ Lifetime prevalence was not surveyed in the 2006 or 2009 NZCASS, but in the 2014 survey, it was found that 24 per cent of women and six per cent of men experienced sexual violence during their lives.⁷⁶

74 Kathleen Daly “Reconceptualizing sexual victimization and justice” in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds) *Justice for Victims* (Routledge, Abingdon, 2014) at 380.

75 19.3 per cent of women and 4.2 per cent of men report having been victims of sexual violence: Morris and Reilly *New Zealand National Survey of Crime Victims 2001*, above n 72, at 166. We note that the survey size was limited at 57 respondents. The 12 month prevalence in the 2001 survey was 0.8 per cent for men and 4.5 per cent for women.

76 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014*, above n 67, at 51.

- 2.17 In 2005, six per cent of adults experienced sexual violence in that year (reported in the 2006 NZCASS).⁷⁷ In 2008, that figure was four per cent of adults (reported in the 2009 NZCASS).⁷⁸ As mentioned above, these numbers are statistically unreliable. The relative standard error was more than 20 per cent, due to the small number of respondents relating to sexual violence, and we note that the 2006 NZCASS stated that a 90 per cent confidence interval for sexual offences would indicate a rate between 2.9 and 9.9 per cent.⁷⁹ In addition, in the 2006 sample, those who said “don’t wish to answer” were counted as having been victimised once.
- 2.18 The NZCASS series also provide a “prevalence rate”, being the percentage of adults who experienced one or more offences in the relevant year in order to determine how widespread victimisation is. We note that the prevalence rate does not take into account that a person might have been victimised more than once. In 2005, the prevalence rate was four per cent, in 2008, this rate was three per cent, and in 2013, this rate was two per cent.⁸⁰

ACC

- 2.19 Another way to get an idea of the prevalence of sexual violence in New Zealand is data from ACC records. ACC funds counselling services for victims of sexual violence, regardless of whether the incident is reported to Police. In the 2013/14 financial year, approximately 5,500 new sensitive claims (a sensitive claim is a claim for support arising from sexual abuse or sexual assault that leaves a person with a mental injury) were lodged with ACC. 17,600 new and existing sensitive claims received a payment. The number of new sensitive claims made to ACC is increasing.⁸¹ ACC estimates that only 19 per cent of sexual violence incidents are reported to them, based on the estimation of underreporting recorded in the NZCASS.⁸²
- 2.20 Although a claim must be lodged to access ACC-funded support, sensitive claims clients do not need to have an accepted claim to access that support. Immediate support is offered to all sensitive claims clients immediately on lodging a claim. For many, this support is sufficient, and they do not require long-term or specialised support or treatment. Clients can withdraw from and return to support at any time during their recovery. A sensitive claim would therefore only need to be accepted to receive long-term or specialised support and treatment.
- 2.21 Since ACC has redesigned its sensitive claims services (the Integrated Services for Sensitive Claims (ISSC)), going live in 2014, ACC expects more people to access its sensitive claims services and accordingly has forecast increased spend to meet anticipated increased demand. As a matter of course, ACC gathers claims-based client data. In support of the ISSC, ACC has initiated a data-based monitoring and reporting project, which will allow ACC to better understand clients’ service experiences and outcomes. ACC will apply this data to continuously improve its sensitive claims services, ensuring they remain responsive to clients’ needs.⁸³

77 Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 53.

78 Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 53; Morrison, Smith and Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report*, above n 68, at 30. We assume these figures relate to calendar year as there is no indication that the reference is to fiscal year (or other definitional reference).

79 Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 105.

80 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014*, above n 67.

81 Meeting between the Law Commission and ACC (7 January 2015). See also Accident Compensation Corporation “How do I make a claim? – Sensitive claims” < www.acc.co.nz > .

82 Meeting between the Law Commission and ACC (7 January 2015).

83 Meeting between the Law Commission and ACC (27 May 2015) and email from Hayden Calderwood, ACC to the Law Commission (2 October 2014).

Specialist sexual violence support sector

- 2.22 Many victims may seek assistance from the non-government support sector rather than departments such as ACC. One community-based service provider working in the sexual violence sector receives an average of 15,000 calls to its crisis support lines every year. A recently established 0800 national crisis support line specifically for people affected by sexual violence is receiving an average of 220 calls per month just to that 0800 number, and another key community-based service provider that specialises in working with children affected by sexual violence provided support to over 650 people in 2014. These figures are representative of only three agencies from the sector, and as a whole, the sector lacks funding to be able to collate national statistics.⁸⁴
- 2.23 Women’s Refuge states it receives 82,000 calls annually on its crisis/support line and that in the year 2010/11 nearly 25,000 women and children used its services.⁸⁵ These figures include both family violence and sexual violence, and a victim may use the crisis/support line more than once.

REPORTING OF SEXUAL VIOLENCE

- 2.24 It is generally considered that there is under-reporting of sexual violence in comparison to other types of offences.
- 2.25 Approximately nine per cent of sexual violence in New Zealand was reported to Police on the basis of the 2006 NZCASS.⁸⁶ In the 2009 NZCASS “sexual offences had the lowest reporting rate with only seven per cent of offences reported to Police”.⁸⁷ In the 2014 NZCASS, an estimate of reporting of sexual violence was not provided due to a high sampling error.⁸⁸
- 2.26 A 2009 study found that just 31 per cent of sexual violence incidents that are reported to Police are prosecuted, and only 13 per cent of sexual violence incidents reported to Police ultimately resulted in a conviction.⁸⁹ This same study suggested that, of those sexual violence incidents that are reported to Police and that result in charges being filed, a large proportion fail to advance through to a completed trial (attrition). Data from Statistics New Zealand suggests that resolution rates in the criminal justice system are lower in relation to sexual violence as opposed to other forms of criminal offending in New Zealand. This may be due to the nature of sexual violence, which usually occurs in a private setting with no witnesses, leading to a lower likelihood of success in the criminal justice system. The low resolution rate in itself may deter victims, alongside procedural concerns about the nature of the adversarial trial system.
- 2.27 The grim statistics above are not unique to New Zealand. One comparative study across Canada, Australia, England and Wales, Scotland and the United States (in the period 1995 to 2010) found that on average, 14 per cent of sexual violence victims report to the Police.⁹⁰ Among those countries, 30 per cent of reported cases proceeded to prosecution, 20 per cent were adjudicated

84 Meeting between TOAH-NNEST and the Law Commission (14 September 2015).

85 “New Zealand domestic violence statistics” Women’s Refuge < womensrefuge.org.nz > .

86 Mayhew and Reilly *The New Zealand Crime & Safety Survey: 2006*, above n 68, at 135; Ministry of Women’s Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at [1.3]. The New Zealand Crime and Safety Survey estimated the reporting rate to be nine per cent in 2006.

87 Morrison, Smith and Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report*, above n 68.

88 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014*, above n 67, at 106.

89 Triggs and others, above n 71, at 57.

90 Kathleen Daly and Brigitte Bouhours “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries” in M Tonry (ed) *Crime and Justice: A Review of Research Vol 39* (University of Chicago Press, Chicago, 2010) at 572.

- in court and 12.5 per cent of reported cases resulted in a conviction for a sexual violence offence.⁹¹
- 2.28 In 2014, Police crime statistics recorded 83 sexual offences per 100,000 members of the population,⁹² which amounts to only about 1.16 per cent of total offences recorded that year.⁹³ A recorded offence is an “incident that has been reported to, or detected by police where police believe an offence is likely to have been committed”.⁹⁴ Therefore, the level of recorded offences includes offences additional to those that have been reported by a victim. However, given the highly private nature of sexual violence, most recorded sexual offences will be as a result of reporting by the victim, rather than detection by the Police.
- 2.29 The numbers of sexual offences recorded by Police is rising, despite the fact that the total number of offences recorded has declined slightly. As mentioned above, the recorded rate of sexual violence is not indicative of the true prevalence of sexual violence, so an increase in recorded offences could either show increased offending, increased reporting by victims or both.
- 2.30 This increase in recorded offences has corresponded with a growing number of sexual offence charges, largely driven by an increase in charges for aggravated sexual assault rather than non-aggravated sexual assault.
- 2.31 As mentioned above, the largest indicator of the recorded rate of sexual offences is likely to be the rate of victims who report the sexual violence to the Police. Studies have found various reasons why victims might be reluctant to do so. Victims may suffer shame, embarrassment, self-blame or guilt. They may fear the perpetrator or have a lack of support to encourage reporting. Some have negative perceptions and doubt about the reliability of the system. Victims frequently express negative perceptions and experiences of traditional court processes and choose not to report sexual violence to the Police.⁹⁵ Some may not understand that what happened to them constitutes a sexual offence.⁹⁶
- 2.32 In the 2014 NZCASS, respondents were asked the reasons why they did not report “violent interpersonal offences”. This category includes but is not limited to sexual violence. Amongst the responses were that the matter was private (37 per cent, being 14 per cent higher than the New Zealand average), “shame/embarrassment/humiliation” (14 per cent, being six per cent higher than the New Zealand average) and not wanting to get the perpetrator into trouble (10 per cent, being four per cent higher than the New Zealand average).⁹⁷ Obviously, these responses relate to all interpersonal offences, and it is unknown whether the full range of possible responses included, for example, fear of the court process.

ATTRITION IN THE COURTS

- 2.33 The resolution rate for sexual violence offences is higher than the resolution rate for all offences, but it is lower than that of other serious offences such as homicide, assault, abduction and harassment. Attrition – where a case does not reach a resolution but is withdrawn or stopped before that point – may occur for many reasons and can occur both during the trial

91 At 608.

92 Police National Headquarters *New Zealand Crime Statistics 2014* (New Zealand Police 2015) at 16. Defined (at 25) as: “Sexual assault and related offences: Acts, or intent of acts, of a sexual nature against another person, which are non-consensual or where consent is proscribed”.

93 Statistics New Zealand *Annual Recorded Offences for the Latest Calendar Years* (data extracted 17 July 2015).

94 *New Zealand Police Definitions* (New Zealand Family Violence Clearinghouse, 2015) at 5.

95 Shirley Jülich and others *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (AUT University, May 2010).

96 See the discussion in Australian Law Reform Commission and NSW Law Reform Commission *Family Violence – A National Legal Response* (ALRC Report 114, NSWLRC Report 128, October 2010) at [26.26].

97 Ministry of Justice *The New Zealand Crime & Safety Survey: 2014*, above n 67, at 113.

process and before the trial begins. For these reasons, any statistics on attrition are not useful in providing an accurate picture of how many victims drop out of the criminal justice system and why.

- 2.34 Reasons for attrition before the trial has begun may be due to ongoing investigations that have not yet been resolved. An offence is recorded as “resolved” when Police apprehend an alleged offender and decide how to deal with them, even if no charges are laid.⁹⁸ Therefore, a high resolution rate (in comparison to other forms of criminal offending) does not necessarily equate to high rates of justice needs of victims having been met.
- 2.35 A 2009 Ministry of Women’s Affairs report into attrition in sexual violence cases found that of reported incidents, 55 per cent of cases had an identifiable suspect.⁹⁹ Despite this, only 31 per cent of cases were prosecuted, and only 13 per cent of reported incidents resulted in a conviction.¹⁰⁰ This figure represents a 42 per cent conviction rate where prosecution occurred, consistent with District Courts’ figures from 2013 that showed 45 per cent of prosecutions for sexual violence against adults resulted in conviction.¹⁰¹ Prosecutions for sexual violence against *women*, however, had a lower conviction rate, at 41 per cent.
- 2.36 In 2014/15 (up to 23 October 2015), 429 sex offence trials were heard in the District Courts (out of a total of 8,372 criminal trials) and 22 at the High Court (out of a total of 87 criminal trials). In 2014/15, an additional 1,175 cases including a sex offence charge were filed in District Courts.¹⁰²
- 2.37 Of the total number of sex offence trials heard by District Courts in 2014/15, 231 resulted in a conviction for the sex offence charge and 134 resulted in an acquittal for the sex offence charge. Fifty-five cases resulted in some other outcome and nine are still awaiting a final outcome, such as a retrial following a mistrial or hung jury, or sentencing.¹⁰³ Other outcomes include dismissals under section 147 of the Criminal Procedure Act 2011, diversion, stay of proceedings (both under the New Zealand Bill of Rights Act 1990 and the Mental Health (Compulsory Treatment and Assessment) Act 1992), withdrawals and “not proceeded with” outcomes (the latter of which is mostly used when Crown Law re-evaluates the case and changes the charges to be pursued at trial).¹⁰⁴ We note the “not proved” (no finding of guilt) outcomes for sexual offences are higher than the average “not proved” outcomes for all offences.

CASE DISPOSAL TIMES

- 2.38 Case disposal occurs when the proceeding of a case is completed. This can occur through an acquittal, conviction, discharge or withdrawal of a case.¹⁰⁵ The average time, from the date of filing of charges until case disposal for a sexual offence headed to jury trial was 480 days.¹⁰⁶ For a sexual offence heard by a judge alone, the average time for case disposal is 167 days.¹⁰⁷

98 Statistics New Zealand *Review of Police crime data: 2014* (2015) at 28.

99 Triggs and others, above n 71, at 34.

100 At 57.

101 *Data Summary: Adult Sexual Violence* (Family Violence Clearinghouse 2014) at 10.

102 Figures provided by the Ministry of Justice (4 November 2015).

103 Figures provided by the Ministry of Justice (4 November 2015).

104 Of the total number of sex offence trials heard by the High Court in 2014/15, 17 resulted in a conviction for the sex offence charge and five resulted in an acquittal for the sex offence charge. Figures provided by the Ministry of Justice (4 November 2015).

105 Figures provided by the Ministry of Justice (28 April 2015).

106 Figures provided by the Ministry of Justice (28 April 2015).

107 Figures provided by the Ministry of Justice (28 April 2015).

- 2.39 Of the sex offence trials that took place in District Courts in 2014/15 (even if they were commenced in the years prior), the mean age of a case at the end of the trial hearing was 443 days, and the median age of a case at the end of the hearing was 419 days from the date of filing of charges. Statistics are to the end of the trial and exclude any time the case was on hold due to outstanding warrants to arrest the defendant for failing to show up at court. Of the sex offence trials that took place in the High Court in 2014/15 (even if they were commenced the year prior), the mean age of a case at the end of the trial was 418 days and the median age of a case at the end of the trial was 424 days.¹⁰⁸

COST OF SEXUAL VIOLENCE

Harm to victims

- 2.40 It is well-recognised by the literature that victims bear direct physical and psychological consequences of sexual violence. For example, the 2009 NZCASS reported physical injury occurring in 43 per cent of incidents of sexual violence, although most injuries were described as not serious in nature.¹⁰⁹ This reflects the experience of Doctors for Sexual Abuse Care, who state that most sexual violence incidents do not result in physical injury, except perhaps minor scratches and bruises.¹¹⁰ Approximately 20 females and two males are hospitalised annually for sexual violence, with an average stay of 23 days,¹¹¹ with the length of the stay implying that serious physical injury has occurred as a result of the sexual violence.
- 2.41 Acute physical effects that must be managed can include injuries, sexually transmitted infections, and pregnancy. In the longer term, the impact on the immune system of the severe stress incurred as a result of sexual violence can lead to somatically-induced effects including back pain, tension headaches, skin disorders and other health effects.
- 2.42 The psychological and emotional effect on victims is also severe. Dr Linda Beckett (whose research was an evaluation of services/interventions and whether these had the capacity to meet the support and service needs created by sexualised violence without causing secondary victimisation) mentioned well-documented immediate effects such as feelings of shock, hysteria, disbelief, disgust, fear, guilt, confusion and feelings of powerlessness.¹¹² Common experiences in the slightly longer term were also outlined by Beckett in her later work with victims, including sadness, suicidal thoughts, not going out, difficulty sleeping, non-enjoyment of relationships and intrusive thoughts. Victims may self-harm or abuse alcohol or drugs in order to displace intrusive thinking.
- 2.43 A number of submitters on our Issues Paper commented on the long-term nature of the harm to victims resulting from sexual violence. These include depression, decreased functioning, sleep disturbances, mood swings, denial, sexual dysfunction, difficulty forming relationships, phobias, pre-occupation with the event and fear of solitude or withdrawal/social isolation.
- 2.44 Victims of sexual violence are also at a high risk of future sexual victimisation. A 2012 report by the Ministry of Women's Affairs found that victims of child sexual abuse are at least twice as likely to be sexually assaulted later in life.¹¹³ The same study also concluded that at least 50 per cent of girls and women who are sexually assaulted are likely to be victimised again.

108 Figures provided by the Ministry of Justice (4 November 2015).

109 Morrison, Smith and Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report*, above n 68, at 83.

110 Email from Cathy Stephenson, Doctors for Sexual Abuse Care Wellington, to the Law Commission (2 and 3 October 2015).

111 Email from Chris Lewis, Ministry of Health to the Law Commission (5 January 2015).

112 Linda Beckett "Care in Collaboration: Preventing Secondary Victimisation through a Holistic Approach to Pre-Court Sexual Violence Interventions" (PhD in Criminology Thesis, Victoria University of Wellington, 2007).

113 Ministry of Women's Affairs *Lightning Does Strike Twice: preventing sexual revictimisation* (September 2012) at 11.

- 2.45 As recognised by Kelly and Lovett, victims have different degrees of resilience and cope with sexual violence in different ways.¹¹⁴ As such, and as Beckett has noted, it would be inaccurate to suggest “that sexual violence has deterministic outcomes” – rather, it is accurate to say that “all victims cope and react differently and this depends on the circumstances of the rape and others’ reactions”.¹¹⁵ It is the phrase “others’ reactions” that is at the heart of this Report, referring as it does to secondary victimisation and the risk that the response to victims (in this case, the criminal justice response) further harms rather than helps victims.

Harm to families/whānau

- 2.46 Sexual violence also causes harm and trauma to families and whānau. Figures from the Ministry of Women’s Affairs state that, in 59 per cent of cases, sexual violence is perpetrated by a family/whānau member or current or ex-partner, which causes deep mistrust and pain within family and whānau groups.¹¹⁶
- 2.47 Families/whānau can be placed under severe strain as a result of sexual violence, for example, when supporters side with either the victim or the perpetrator.¹¹⁷ A recent case in the Gisborne District Court highlighted this, when two relatives of a victim of family/whānau sexual violence were jailed for attempting to pervert the course of justice by forcing the victim to retract the claims made against her uncle.¹¹⁸
- 2.48 Even if it is not intra-familial, sexual violence can leave the family/whānau and friends of the victim feeling powerless. In one alleged assault case, a mother said that she felt she had failed her 13-year-old daughter, “like I wasn’t there to protect her”.¹¹⁹
- 2.49 One submitter who was a nurse also noted the potential impact of sexual violence on social relationships, parenting and on the victims’ children. Children who grow up with family/whānau dysfunction, such as that stemming from sexual violence occurring in their household, are at an increased risk of sexual victimisation or sexual violence perpetration in future.¹²⁰

Wider social and economic consequences

- 2.50 Sexual violence is not generally considered an economic crime, but an understanding of the significant financial costs of sexual violence has begun to emerge over the last few decades.¹²¹ These costs are incurred not only by the victim but also the perpetrator, their family and society. Direct individual costs include legal fees and loss of income and costs incurred in accessing medical and welfare services to help with the physical and psychological effects of the abuse.
- 2.51 There are costs on society, as it is charged with policing, providing a criminal justice system, court services, detainment, and providing welfare and compensation provisions for victims. In 2012/13, ACC costs for sensitive claims clients were \$33.6 million.¹²²
- 2.52 A New Zealand Treasury working paper entitled *Estimating the Costs of Crime in New Zealand* included the cost of prevention and dealing with the consequences of sexual violence in its

114 Jo Lovett and Liz Kelly *What a Waste: The Case for an Integrated Violence against Women Strategy* (Women’s National Commission, Department of Trade and Industry, 2005).

115 Beckett, above n 112.

116 Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to recovery* (Ministry of Women’s Affairs, October 2009) at 48.

117 Shirley Jülich and others *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (AUT University, May 2010) at 5.

118 Marty Sharpe “Judge blasts family who intimidated young victim of sexual assault” (30 July 2015) Stuff < www.stuff.co.nz > .

119 Anna Leask “Roast Busters: Alleged victim’s mum fights on” *The New Zealand Herald* (online ed, Auckland, 30 October 2014).

120 Neville Robertson and Heather Oulton *Sexual violence: Raising the conversations – A literature review* (University of Waikato, 2008) at 16.

121 Jülich and others, above n 117, at 5.

122 Ministry of Social Development *Specialist Sexual Violence Sector Review Report to Hon Paula Bennett, Minister for Social Development* (2013) at [7].

- calculation, and concluded sexual violence is the most costly sub-category of crime, costing \$72,130 per incident (compared with, for example, robbery which is costed at \$23,100 per criminal act, and violent offences which are costed at \$8,910 per criminal act).¹²³ This is around 13 per cent of the total cost of crime, despite sexual offences constituting only one per cent of reported crime. Only 18 per cent of this cost was met directly by government (including Police, courts, corrections and health services), leaving the rest of the cost to be borne by private individuals, households and businesses. Treasury estimates that the private sector (including households and individuals) bears a significant proportion of the cost of sexual violence through the intangible costs of psychological effects, pain and suffering.¹²⁴
- 2.53 The tangible costs identified in the Treasury paper related to policy, prevention,¹²⁵ health and “private sector” victim impacts, detection, resolution and redress.¹²⁶ In terms of identifying the intangible loss borne by the private sector (including individuals), the study identifies a lack of New Zealand data and instead relies on data from the United Kingdom converted into New Zealand dollars using the OECD’s purchasing power parity for GDP for 2004.¹²⁷ On that basis, the total cost of sexual violence was estimated by Treasury to cost \$1.8 billion per annum across both the public and private sector.¹²⁸ The community-based sexual violence sector was not included in this Treasury paper, although we know that in 2012/13 government agencies funded \$29.07 million to the sector.¹²⁹
- 2.54 These figures fail to take into account spending that can be indirectly attributed to the consequences of sexual violence. For example, sexual violence may lead to increased alcohol and drug dependence issues, but because the sexual violence is undeclared, the link is not made and resulting costs of sexual violence are not fully identified.
- 2.55 These figures also fail to adequately recognise the extent of economic harm that is a consequence of sexual violence. Examples include the assumption of debt by a victim if their partner was the perpetrator and was imprisoned, the loss of a job if a victim needed to relocate, for example, into a shelter or refuge, or the need for a victim to assume full responsibility for the household and children if their partner was the perpetrator and imprisoned (including increased childcare costs or decreased work time to avoid childcare costs).
- 2.56 Neither do these figures capture the scenario, for example, where a victim cannot meet the household bills because they could not work due to the trauma, power is cut off by the electricity provider and the victim is too ashamed to ask for help from that provider. The lack of electricity contributes to health problems which in turn leads to increased use of health system resources.
- 2.57 These figures do not foresee the economic cost to New Zealand of victims who face such financial hardship as they are unable to plan for superannuation.¹³⁰

123 Tim Roper and Andrew Thompson *Estimating the costs of crime in New Zealand in 2003/04* (New Zealand Treasury, Working Paper 06/04, July 2006).

124 See Ministry of Social Development, above n 122 at [44] and Roper and Thompson, above n 123, at 24.

125 STOP, Wellstop and Safe are the three government-funded NGOs who work with those proactively seeking treatment and who received \$6.58 million in 2012/2013 to deliver interventions to 712 clients.

126 Roper and Thompson, above n 123, at 17.

127 Roper and Thompson, above n 123, at 14.

128 Roper and Thompson, above n 123, at 3. The cost of sexual violence was estimated to be \$1.2 billion dollars in 2006 and estimated to be \$1.8 billion in 2012 terms by the Ministry of Social Development: see Ministry of Social Development, above n 122. This was viewed as the most costly of all crimes: at [6].

129 Roper and Thompson, above n 123, at 25.

130 For more discussion on the economic consequences of family violence and sexual violence on women and the intersection with economic abuse in the intimate partner context, see Emma Smallwood *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (Women’s Legal Service Victoria, 2015).

- 2.58 It is clear that the economic costs that arise as a consequence of sexual violence can be significant, are currently unquantifiable and result in an economic burden for both the victim and the wider community. The extent to which that burden can be linked to sexual violence is further complicated because sexual violence may occur at the same time as family violence, and differentiating the downstream economic consequences of the sexual violence distinct from the family violence is extremely difficult.
- 2.59 Even preventing sexual violence through education has costs. High-profile media campaigns are estimated to cost \$4 million per annum, and even smaller-scale community-based action without television and radio coverage can cost around \$1 million per annum.
- 2.60 Of course, should the recommendations presented in this Report be adopted, there will inevitably be significant costs involved. If the numbers of victims who report sexual violence and enter the criminal justice system or use the alternative justice process increase – indeed even if the numbers of victims accessing improved support services increase – the cost will be large. We consider, however, that the cost of the interventions and improvements proposed in this Report will mitigate and avoid many of the long-term and unquantifiable costs cited above.

CONCLUSION

- 2.61 It is difficult to present a clear statistical picture of sexual violence in New Zealand and likewise its disposal in the criminal justice system. This chapter has sought to present some of the data that is available, noting its limitations and highlighting that many alleged incidents of sexual violence are not tested in court and that the cost of sexual violence is significant. Currently, the high costs of sexual violence occur not only where the case does not enter the criminal justice system, but also where it does enter the criminal justice system, but the process is traumatic for the victim (regardless of the outcome).

Part B

COURTS



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Chapter 3

The existing court process for sexual violence cases

INTRODUCTION

- 3.1 This chapter sets out how criminal court cases involving sexual violence are dealt with in the New Zealand criminal justice system. The first step is the reporting of a complaint of sexual violence to Police. If Police decide to file charges, the offence will be prosecuted, the defendant will enter a plea, there will be a trial if the defendant pleads not guilty and the defendant will be sentenced if the offence is proven. There may also be appeals at the pre-trial stage, after trial or at sentence.
- 3.2 We set the process out in some detail in this chapter, because the conduct of criminal proceedings is now governed by the Criminal Procedure Act 2011 (CPA 2011), the relevant parts of which were not in force when these matters were last examined by the Law Commission in its Issues Paper.¹³¹

A note on the study of inquisitorial criminal justice models

- 3.3 The Issues Paper for this review included a discussion of the differences and similarities between the adversarial and the inquisitorial models of criminal justice.¹³² Researchers travelled to Europe to observe trial processes in Germany, Austria, the Netherlands, Denmark, and Sweden and these were summarised in an appendix to the Issues Paper.
- 3.4 New Zealand's criminal justice system is based on an adversarial model. In general, this can be described as a model under which the parties to a dispute bring the matter to court, define the issues to be determined, and identify and present the relevant evidence to the court. The judge is a neutral arbiter who oversees the fairness of the process and decides the verdict (or directs the jury to decide the verdict) on the basis of the evidence presented by each party and tested under cross-examination by the opposing party. In contrast, in an inquisitorial model of criminal justice (which is the dominant model in European jurisdictions including France, Germany, and the Netherlands) the judge plays a much more active role. The judge may interview witnesses before trial; direct further lines of investigation; decide which witnesses should be called at trial; and does most of the questioning.
- 3.5 In reality, no country's system can be described as demonstrating the "pure" version of either model. Most countries' trial systems have both adversarial and inquisitorial characteristics. However, a common criticism of adversarial systems is that the very nature of the model encourages aggressive and adversarial behaviour that may damage the interests of justice rather than promote them, and it is suggested that the limitations of the adversarial system are particularly profound in cases of sexual violence.¹³³

131 Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2011).

132 At 7–9 and Appendix 1.

133 At 8–9.

- 3.6 We wish to note that in the writing of this Report we were assisted by the research undertaken on inquisitorial models and included in the Issues Paper.

CATEGORISATION OF OFFENCES INVOLVING SEXUAL VIOLENCE

- 3.7 Under the CPA 2011, criminal offences are categorised by seriousness from 1 to 4. The category into which an offence falls determines how it is to be case-managed and tried and whether the defendant is entitled to be tried by jury. Offences in category 1 are lower-level offences generally not punishable by imprisonment. Offences in category 2 are generally punishable by less than two years' imprisonment. Category 3 offences are those generally punishable by two years' imprisonment or more but that are not category 4 offences, and category 4 offences are those listed in schedule 1 to the Act.¹³⁴
- 3.8 Most sexual violence offences fall into category 3. There are no sexual violence offences that fall into category 4.

INITIAL RECORD OF COMPLAINT AND FILING OF CHARGES

- 3.9 Police are responsible for receiving and investigating allegations of criminality and for gathering evidence relating to those allegations. If Police receive an allegation of sexual violence, they will, as in other cases of alleged criminal offending, investigate before deciding what action should be taken.
- 3.10 Police investigations into allegations of sexual violence may be undertaken by specialist investigators or general duty staff and are conducted in accordance with the Adult Sexual Assault Investigation Policy and Procedures (the "ASAI Guidelines").¹³⁵ Police will speak with the person who has made the complaint (the complainant) and with any witnesses. Given that sexual violence often occurs in private, there are seldom witnesses to the alleged offending other than the complainant.
- 3.11 A Police officer trained in cognitive behavioural interviewing will conduct an interview with the complainant, at the time the complaint is made. The interview is video-recorded, and in order for it to be played at trial, the recording must be in accordance with regulations that govern the video-recording of evidence.¹³⁶ These videos are sometimes played at trial as the complainant's evidence in chief, as discussed below.
- 3.12 If the investigation discloses evidence to support a prosecution, Police exercise the initial discretion to file criminal charges. The exercise of discretion is governed by the ASAI Guidelines and by the *Solicitor-General's Prosecution Guidelines* (that apply to all criminal prosecutions).¹³⁷ The *Solicitor-General's Prosecution Guidelines* require there to be sufficient evidence to provide a reasonable prospect of conviction and, in addition, that prosecution would be required in the public interest.¹³⁸

134 Criminal Procedure Act 2011, sch 1. It includes such offences as murder, manslaughter, infanticide, dealing in slaves, treason, espionage, sabotage, piracy and judicial corruption.

135 New Zealand Police *Adult sexual assault investigation (ASAI) policy and procedures* (2013).

136 Evidence Regulations 2007, pt 1.

137 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).

138 At 6.

Filing of charge

- 3.13 Criminal proceedings commence once a charging document is filed.¹³⁹ In the vast majority of cases, the charging document is filed by Police with the assistance of the Police Prosecution Service (PPS). The PPS sits within Police but is administratively separate from the investigation and uniform branches.
- 3.14 At this initial stage, the PPS has responsibility for prosecuting criminal proceedings. However, responsibility for the majority of sexual violence cases will subsequently be transferred to a Crown prosecutor, because of the seriousness of the offences in question (see “Transfer of the case to Crown prosecutor” below).¹⁴⁰

THE DISTRICT COURTS OR THE HIGH COURT

- 3.15 Charges for all criminal proceedings are filed in the relevant District Court, with the subsequent ability to transfer the case to the High Court if necessary.
- 3.16 Category 3 offences are generally tried at District Court level, unless a judge orders that they be transferred to the High Court. As such, most charges of sexual violence are filed and heard in the District Courts. However, charges of sexual violence can be transferred to the High Court if:
- an application for transfer is made by either of the parties and the application is granted by a High Court judge;¹⁴¹
 - the charges are to be heard together with charges that must be heard in the High Court, in which case all the charges will be heard in the High Court;¹⁴² and
 - the case includes charges for an offence listed on the “court of trial” protocol.¹⁴³ The protocol identifies offences and classes of cases that must always be considered for transfer to the High Court in accordance with section 66 of the CPA 2011. Offences of sexual violence involving two or more complainants, for example, are on the court of trial protocol.¹⁴⁴ A High Court judge must determine whether or not to transfer the offence and make an order accordingly.¹⁴⁵
- 3.17 In 2014/15, the District Courts heard 429 trials involving sexual violence, while the High Court heard 22 trials involving sexual violence.¹⁴⁶

ENTRY OF PLEA

- 3.18 Under section 37 of the CPA 2011, a defendant may enter a plea of guilty or not guilty before trial, and may be required by the court under section 39 to enter a plea once the court is satisfied that the initial disclosure requirements under the Criminal Disclosure Act 2008 (under which the prosecution must disclose elements of its case against the defendant) have been satisfied.¹⁴⁷

139 Criminal Procedure Act 2011, s 14.

140 Crown prosecutors must assume responsibility for prosecuting all Crown prosecutions, the definition of which is set out in the Crown Prosecution Regulations 2013, reg 4. All but the most minor sexual offences are included in this definition.

141 Criminal Procedure Act 2011, s 70.

142 Criminal Procedure Act 2011, s 139(1)(b).

143 “Court of Trial Protocol Established by the Chief High Court Judge and the Chief District Court Judge for Category 2 and 3 Offences” (30 January 2015) 9 *New Zealand Gazette*.

144 At 3.

145 Criminal Procedure Act 2011, s 68.

146 Figures provided by the Ministry of Justice (4 November 2015).

147 Disclosure requirements in criminal trials are set out in the Criminal Disclosure Act 2008. Under that Act, the prosecution is required to disclose the core elements of its case to the defence. Section 12 of the Act deals with initial disclosure.

- 3.19 Before a defendant decides whether to plead guilty or not guilty they may, under section 61 of the CPA 2011, seek a “sentence indication”.¹⁴⁸ A sentence indication is a statement by the court that, if the defendant pleads guilty, the court would or would not impose a sentence of a particular type. The purpose of sentence indications is to give a defendant clarity and certainty about the jeopardy they face if they plead guilty.¹⁴⁹
- 3.20 If a defendant pleads guilty and a conviction is entered, there will be no trial and the case may proceed to sentence (see “Sentencing and restorative justice” below). A guilty plea may only be withdrawn with the leave of the court, but the court must grant leave if the defendant has received a sentence indication and the judicial officer that gave it proposes to impose a different type or higher sentence than indicated.¹⁵⁰
- 3.21 If a defendant enters a plea of not guilty, the case will proceed to trial. A number of matters must be dealt with before the trial can take place. These “pre-trial” matters may include an election by a defendant to be tried by jury and pre-trial hearings on matters such as name suppression, bail and admissibility of evidence.

PRE-TRIAL MATTERS

Election by a defendant for trial by jury

- 3.22 The category of an offence determines whether it must be, or is entitled to be, tried by jury. The applicable procedure for trial of category 1 and 2 offences is trial by judge-alone.¹⁵¹ The provision in the New Zealand Bill of Rights Act 1990 (NZBORA 1990) that guarantees a right to be tried by a jury applies only where a person is accused of an offence with a penalty of two years or more imprisonment.¹⁵² By contrast, the procedure for a defendant charged with a category 4 offence is always trial by jury,¹⁵³ unless a judge is satisfied that there is a risk of juror intimidation, in which case, the judge can make an order for trial by judge-alone.¹⁵⁴
- 3.23 Category 3 offences are tried by judge-alone unless the defendant elects to be tried by jury.¹⁵⁵ Thus, section 50 of the CPA 2011 provides that every defendant charged with a category 3 offence may elect to be tried by jury.
- 3.24 Most sexual violence offences fall under category 3, and according to figures from the Ministry of Justice, most defendants charged with offences of sexual violence elect to be tried by jury. In 293 of the sexual violence trials heard in the District Courts in 2014/15, the defendant had the right to elect trial by jury, and in 222 of those trials, the defendant did so (expressed as a percentage, in 76 per cent of cases).¹⁵⁶ This aligns with figures from 2009 to 2014 that show that

148 Criminal Procedure Act 2011, subpt 4 “Sentence indications”.

149 *R v Taylor* [2013] NZCA 55 at [17].

150 Criminal Procedure Act 2011, ss 115 and 116. If an appeal court imposes a more severe sentence than was initially indicated by a sentence indication on appeal, however, a defendant requires leave of the appeal court to withdraw a guilty plea: Criminal Procedure Act 2011, s 252.

151 Criminal Procedure Act 2011, ss 71(2) and 72(2).

152 New Zealand Bill of Rights Act 1990, s 24(e).

153 Criminal Procedure Act 2011, s 74(2).

154 Section 103. The court must be satisfied that there are reasonable grounds to believe that there has been, is, or will be intimidation of one or more jurors or potential jurors, and that the effects of such intimidation can only be avoided by making an order for a trial without a jury.

155 Criminal Procedure Act 2011, s 73(2). If the charge is to be heard together with a charge that must be tried before a jury, all the charges will be tried by jury: Criminal Procedure Act 2011, s 139(1)(a).

156 Figures provided by the Ministry of Justice (4 November 2015).

between 75 and 80 per cent of defendants in the District Courts elected trial by jury (and for the same time period, for cases in the High Court, all but one defendant elected trial by jury).¹⁵⁷

Transfer of the case to Crown prosecutor

- 3.25 Under the CPA 2011, a specified class of criminal proceedings are identified as “Crown prosecutions” and must be conducted by a Crown prosecutor (a Crown solicitor or lawyer or any other lawyer employed or instructed by the Solicitor-General to conduct a Crown prosecution).¹⁵⁸ Crown prosecutions include proceedings for all category 4 offences, all category 3 schedule offences and all other category 3 offences if the defendant elects trial by jury.¹⁵⁹
- 3.26 The time at which a Crown prosecutor will take over the prosecution of one of these cases depends on the offence, but for most offences involving sexual violence, it will be after the defendant has entered a plea.¹⁶⁰ At the time of transfer, the Crown prosecutor is expected to review the charges laid to ensure that they are founded on the available evidence and reasonably reflect the criminality disclosed.¹⁶¹
- 3.27 Once the case has been transferred, the Crown prosecutor becomes responsible for completing all necessary remaining pre-trial procedures and taking the case through to trial.

Decisions about admissibility of evidence sought to be adduced at trial

- 3.28 Under New Zealand’s adversarial system of criminal justice, parties present evidence to a fact-finder, which is either a judge (if the judge is sitting alone) or jury (if the judge is sitting with a jury). The fact-finder must make a decision on the case after applying the relevant law to the facts. The fact-finder must first decide what the facts are, which is done by assessing the evidence offered by the parties.
- 3.29 The Evidence Act 2006 governs what evidence may and may not be offered by the parties when seeking to establish the facts at trial. The rules in the Act may operate to prevent evidence being presented to the fact-finder, or may restrict how the fact-finder may use a particular item of evidence. As such, the Act reflects certain policy positions about what information should and should not be relevant and available to a fact-finder when they are determining the facts in a particular case. It also reflects the rights recognised in NZBORA 1990. Evidence that is deemed unfairly prejudicial and that may undermine the protections traditionally provided by the criminal justice system is not admissible.
- 3.30 A court is sometimes required to make determinations about what evidence can and cannot be offered at trial. If either party wishes to adduce particular evidence and believes the admissibility of that evidence may be challenged, they may apply to the court for an order that the evidence is admissible.¹⁶²

157 The table shows the figures of where defendants elected trial by jury in each court. The figures may include some category 2 offences, in which the defendant is not entitled to elect trial by jury, and need to be interpreted to account for that.

	2009	2010	2011	2012	2013	2014
District Courts	80%	80%	78%	75%	78%	80%
High Court	100%	100%	100%	100%	100%	94%

158 Criminal Procedure Act 2011, s 5.

159 Criminal Procedure Act 2011, ss 5 and 187; Crown Prosecution Regulations 2013, reg 4.

160 Crown Prosecution Regulations 2013, reg 5.

161 Crown Law, above n 137, at [9.3].

162 Criminal Procedure Act 2011, ss 78(2) and 101(2).

- 3.31 The procedure for these pre-trial admissibility determinations differs as between a trial by jury and a trial by judge-alone. If the trial is to be by judge-alone, the court is not required to hear a pre-trial admissibility application, but may do so.¹⁶³ But if the trial is by jury the court must hear the pre-trial admissibility application and must give each party an opportunity to be heard.¹⁶⁴ In a jury trial the prosecutor or defendant may also seek to adduce evidence during trial, regardless of whether pre-trial admissibility hearings were conducted.¹⁶⁵ In such cases, the court may need to adjourn the trial while it determines the admissibility of evidence sought to be adduced.¹⁶⁶
- 3.32 In both judge-alone and jury trials the defendant and prosecutor may, with the court's leave, appeal pre-trial admissibility decisions (see "Appeal of pre-trial decisions", below).

Setting a date for trial

- 3.33 A trial date is set down once a case is ready to proceed. In a jury trial, the trial date is provisionally set at the time of the trial callover hearing, which is when prosecution and defence counsel appear before the court to identify and deal with any matters that must be dealt with for the trial to proceed.¹⁶⁷ In a judge-alone trial the trial date is set at what is called the "case review" hearing.¹⁶⁸
- 3.34 Priority is afforded to certain kinds of cases when a court is setting its roster for hearings. Under the District Courts' rostering protocol, the trial of a case involving sexual violence must be given priority ahead of other kinds of hearings.¹⁶⁹ Priority for sexual violence cases will be balanced against the need to afford priority in other areas. Hearings for cases that are on a special list or hearings for sentencing of an offender are given highest priority.
- 3.35 The High Court currently identifies cases involving complainants under the age of 16 at the time the offending was committed and cases involving young defendants as having priority.¹⁷⁰

THE TRIAL

- 3.36 A criminal trial involves the giving of evidence by the prosecution and defence, a summing up by the judge for the jury (if it is a jury trial), time for juror deliberation, and the delivery of a verdict. It may also include rulings about matters of evidence that were not raised or resolved before trial.
- 3.37 The trial will usually take place in the court where the charges were filed or, if the case is to be heard in the High Court, the High Court that is closest to the District Court where the charges

163 Criminal Procedure Act 2011, s 78(4). Among the grounds on which the court may grant a hearing are that: it is convenient to deal with evidential matters pre-trial; the complainant or witness is particularly vulnerable and resolving admissibility is in the interests of justice; or the trial is to be in a District Court and the evidence has been obtained by way of a High Court order or warrant.

164 Criminal Procedure Act 2011, s 101.

165 Criminal Procedure Act 2011, s 101.

166 A trial court may, however, allow a trial to commence or continue, if that is in the interests of justice, even if an application for leave to appeal a pre-trial decision has been made but is outstanding or leave has been granted but the substantive appeal is outstanding: Criminal Procedure Act 2011, s 222.

167 Section 97.

168 Section 57.

169 Chief District Court Judge Doogue *Rostering Protocol for District Courts of New Zealand* (Ministry of Justice, 2014) at 4.

170 Letter from Geoffrey Venning (Chief High Court Judge) to Grant Hammond (President of the Law Commission) regarding Alternative Trial Practices (20 October 2015).

were filed.¹⁷¹ However, the court can, on its own motion or on application of counsel, transfer the proceedings to a different court if required in the interests of justice.¹⁷²

- 3.38 The length of the trial itself will vary depending on the number and complexity of charges brought and whether it is tried by jury (trials tend to be longer) or by judge-alone. However, according to figures from the Ministry of Justice, in 2014/2015 the average duration of a trial including charges of rape or sexual violation was between three and four days.¹⁷³
- 3.39 Section 107 of the CPA 2011 prescribes the “conduct of a jury trial”. The prosecutor makes an opening statement indicating to the jury the nature of the offences alleged and the evidence that will be called. The defendant may then make an opening statement which identifies the issue or issues to be tried. Each side then adduces their evidence. When all the evidence has been given, both sides may make a closing address. The judge must then “sum up” the case for the jury. The jury deliberates and delivers its verdict (see “Verdict”, below).
- 3.40 Contemporary practice is for judges to sum up more precisely than previously, and summings up are now tailored to the circumstances of the particular case. Jurors are almost always offered a “question trail” which outlines the key factual issues that must be determined to reach a verdict. The Court of Appeal has said that the provision of written material to assist juries’ deliberations is “contemporary best practice”.¹⁷⁴
- 3.41 Section 105 of the CPA 2011 sets out the conduct of a judge-alone trial. The prosecutor usually provides a short outline of the charges faced and the defence provides a short outline of the issue or issues to be tried. The prosecution may then adduce evidence in support of the prosecution case, followed by any evidence the defendant wishes to adduce. After having heard what each party has to say and the evidence adduced by each party, the court must consider the matter and may find the defendant guilty or not guilty.¹⁷⁵
- 3.42 Court proceedings are generally open to the public, although a court may make an order under section 197 of the CPA 2011 to exclude the public from proceedings if satisfied that is necessary to avoid one of the risks in section 197(2)(a) of the CPA 2011, and that a suppression order would not be sufficient to avoid that risk.¹⁷⁶ An exception may be made for members of the media.¹⁷⁷ Under section 199 of the CPA 2011, the court must always be cleared when a complainant is giving evidence in a case of a sexual nature.

The defendant’s rights

- 3.43 The criminal justice process is administered in recognition of the inequality of power between the State and the defendant and the potential gravity of a criminal sanction. The criminal trial is accusatorial: the prosecution must make out its case and the defendant may remain silent. Trial by jury exists for the most serious offences. The fact-finder must be satisfied of guilt beyond

171 Criminal Procedure Act 2011, ss 35, 71–73.

172 Criminal Procedure Act 2011, s 157. The principles governing the decision to transfer proceedings are set out in *McNaughton v R* [2012] NZCA 16 at [6]. These include that: an accused should usually be tried in the court nearest to the place where the crime was committed; jurors should be drawn from the place in which the crime was committed; and that a change of venue may be required to give effect to the accused’s right to a fair and public hearing under section 25(a) New Zealand Bill of Rights Act 1990.

173 Figures from the Ministry of Justice (11 November 2015). This figure includes the days on which the trial hearing proceeded or where guilty pleas or outcomes result on a trial hearing date, and exclude any weekend or week days between trial hearing start date and interim disposal when the trial is not proceeding.

174 *R v Vailu* [2009] NZCA 111 at [28].

175 Criminal Procedure Act 2011, s 106.

176 The risks set out in s 197(2)(a) are: undue disruption to the conduct of the proceedings; or prejudicing the security or defence of New Zealand; or a real risk of prejudice to a fair trial; or endangering the safety of any person; or prejudicing the maintenance of the law, including the prevention, investigation and detection of offences.

177 Criminal Procedure Act 2011, s 198.

reasonable doubt, and the defendant is presumed innocent until guilt is established. These are fundamental legal tenets that are protected under the NZBORA 1990.¹⁷⁸

- 3.44 At trial the defendant is usually represented by a lawyer who is tasked with representing the defendant as strenuously as possible.¹⁷⁹ A defendant may choose to represent him or herself at trial, but a defendant who does so in a sexual violence case is not entitled to personally cross-examine the complainant.¹⁸⁰

THE GIVING OF EVIDENCE AT TRIAL

- 3.45 The giving of evidence forms a substantial part of the trial itself and is governed primarily by the Evidence Act 2006. Evidence may be presented in written form at trial or by witnesses giving evidence in person.
- 3.46 Any person is eligible to give evidence at trial (apart from the trial judge, jurors, and counsel),¹⁸¹ and those who are eligible may (apart from a defendant) be compelled to do so.¹⁸² The defendant has a right to generally be present at the trial,¹⁸³ but no defendant in a criminal trial can be compelled to appear as a witness either for the prosecution or for the defence.¹⁸⁴
- 3.47 Where a witness is giving evidence at trial, the usual process is for the witness to give their evidence in chief first and to subsequently be cross-examined on it by all parties who wish to do so, followed by re-examination if necessary.¹⁸⁵
- 3.48 The purpose of cross-examination is to enable each side to test the evidence put forth by witnesses from the opposing side. In *Gutierrez v R*, the Court of Appeal said that if a fact-finder is asked to disbelieve a witness, the fact-finder must have a reasonable opportunity to properly assess the evidence in question.¹⁸⁶ In *Tootell v Police*, the High Court said that cross-examination gives the finder of fact the opportunity to “make a comparative evaluation of the evidence of both complainant and defendant when [each is] taxed with the other’s story”.¹⁸⁷
- 3.49 The Court of Appeal has accepted, however, that “[a]ggressive cross-examination will become improper when it is calculated to humiliate, belittle and break the witness”.¹⁸⁸ The judge is expected to control inappropriate cross-examination and, under section 85 of the Evidence Act 2006, may intervene if a question asked of a witness is deemed to be “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand”. A lawyer for one of the parties may also raise an objection with the judge if they consider an opposing counsel’s cross-examination is improper.

178 See, for example, the right to be presumed innocent until proven guilty (s 25(c)); the right to be present at trial and to present a defence (s 25(e)); and the right to remain silent throughout the trial and not to be compelled to give evidence (s 25(d)).

179 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.13.

180 Evidence Act 2006, s 95(1)(a).

181 Evidence Act 2006, s 72. Jurors and counsel can, however, give evidence with the permission of the judge: s 72(2).

182 Evidence Act 2006, s 71.

183 Criminal Procedure Act, s 117.

184 Evidence Act 2006, s 73(1).

185 Evidence Act 2006, s 84.

186 *Gutierrez v R* [1997] 1 NZLR 192 (CA), at 199.

187 *Tootell v Police* HC Rotorua CRI-2005-470-37, 16 November 2005 at [9].

188 *R v Thompson* [2006] 2 NZLR 577 (CA) at [68].

Ordinary and alternative ways of giving evidence

- 3.50 The ordinary way of giving evidence is to do so in the courtroom in the presence of the judge and jury, the defendant(s) and their lawyer(s), and any member of the public who is not excluded by the judge.¹⁸⁹
- 3.51 A witness may also apply to give evidence in one of a number of alternative ways as listed in section 105 of the Evidence Act 2006, including:
- while in the courtroom but unable to see the defendant or some other specified person; or
 - from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
 - by a video record made before the hearing of the proceeding.
- 3.52 A witness is also entitled to “communication assistance” to enable that witness to give evidence in court.¹⁹⁰ Communication assistance is defined in the Evidence Act 2006 as:¹⁹¹
- oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who
- (a) does not have sufficient proficiency in the English language to—
 - (i) understand court proceedings conducted in English; or
 - (ii) give evidence in English; or
 - (b) has a communication disability.

Evidence of the complainant in sexual violence cases

- 3.53 In sexual violence cases, the complainant is usually always the principal witness for the prosecution and will usually always be required to appear at trial to give evidence. The complainant is entitled to have one or more support persons nearby when giving evidence.¹⁹² When the evidence of a complainant in a sexual violence case is being given (whether in person, via video, or some other means) the court must be closed to the general public.¹⁹³
- 3.54 It is sometimes the case in proceedings for sexual violence that the complainant’s evidence in chief is given by playing the video record of their interview with Police. The consultation process suggested there is significant variation throughout the country, however, which we discuss further in Chapter 4.
- 3.55 Cross-examination of the complainant on their evidence will almost always occur in person at the trial itself (with the use of a screen or video link if orders have been made to that effect under section 105 of the Evidence Act 2006). In Chapter 4, we consider the circumstances in which it might be appropriate for both the evidence in chief and the cross-examination of the complainant to be given to the jury by playing a video that has been recorded prior to trial.

Medical evidence in sexual violence cases

- 3.56 In a sexual violence case the evidence of the medical doctor who treated the complainant may be put forth either in the form of a formal written statement or by the doctor appearing in person

189 Evidence Act 2006, s 83.

190 Evidence Act 2006, s 80(3).

191 Evidence Act 2006, s 4.

192 Evidence Act 2006, s 79.

193 Criminal Procedure Act 2006, s 199.

at trial. The doctor's evidence may include both forensic evidence taken from the complainant and any information obtained by the doctor from the complainant about the incident.

Expert opinion evidence in sexual violence cases

- 3.57 Expert witnesses may be called on to give opinion evidence, which is admissible “if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding”.¹⁹⁴ This is an exception to the rule that, in general, witnesses must speak only to observed facts and are not permitted to express their opinions or beliefs.¹⁹⁵
- 3.58 The courts have long taken into account the opinion of experts.¹⁹⁶ In *R v Hutton* the Court of Appeal said that expert witnesses in both criminal and civil cases “must not be an advocate for the party but must assist the court impartially on matters within his or her area of expertise”.¹⁹⁷
- 3.59 In sexual violence cases the prosecution might put forth expert evidence to explain to and educate the jury about how victims of sexual violence behave – for instance, that some victims are as likely to freeze as to physically resist an attack. This is sometimes referred to as counter-intuitive evidence and seeks to correct erroneous beliefs or assumptions that fact-finders may hold about the offending. The legitimate use of such evidence for that purpose was recently confirmed by the Supreme Court in *DH v R*.¹⁹⁸
- 3.60 In Chapter 6 we give further consideration to the appropriate use of this kind of expert opinion evidence in sexual violence trials.

VERDICT

- 3.61 After all the evidence has been given for each side, the fact-finder in the trial will decide whether the prosecution has discharged its burden of proving that the defendant committed the alleged offence to the required standard of “beyond reasonable doubt”. This decision is called the verdict.
- 3.62 Verdicts in a jury trial may be unanimous or by a majority with one juror dissenting.¹⁹⁹ The jury does not need to give reasons for its verdict, whereas a judge does (see “Key differences between trial by jury and trial by judge-alone”, below).
- 3.63 Sometimes in a jury trial, the jury is unable to agree (sometimes known as a “hung jury”). A court may discharge a jury where it has remained in deliberation for such period as the judge thinks reasonable (which must not be less than four hours) and where the jury still does not agree on the verdict to be given.²⁰⁰ A new trial will normally follow as a matter of course once a jury has been discharged for failure to agree (see “Retrials”, below). If at the second trial the jury is again unable to agree, the *Solicitor-General's Prosecution Guidelines* provide that the case would normally be stayed unless exceptional circumstances apply.²⁰¹

194 Evidence Act 2006, s 25.

195 *Morgan v Nicoll* [1933] NZLR 1087.

196 See *Buckley v Rice Thomas* (1555) 1 Plowd 118; 75 ER 182.

197 *R v Hutton* [2008] NZCA 126 at [169]–[170]. Although not directly applicable to criminal proceedings, guidance as to the proper role of an expert witness can be found in the High Court Rules and the Code of Conduct for Expert Witnesses which the rules incorporate: Judicature Act 1908, sch 2: High Court Rules, rr 9.43–9.46.

198 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.

199 Juries Act 1981, s 29C.

200 Criminal Procedure Act 2011, s 22(3)(b).

201 Crown Law, above n 137, at [25.3.1].

- 3.64 If the defendant is found guilty, he or she is usually remanded by the judge, whether in custody or on bail, for sentencing, although the CPA 2011 provides that a defendant who pleads or is found guilty may also be sentenced or otherwise dealt with immediately.²⁰² If the defendant is found not guilty, he or she is acquitted of the charge.

SENTENCING AND RESTORATIVE JUSTICE

- 3.65 If a defendant is found guilty after trial or if the defendant pleads guilty, and a conviction is entered, sentencing will follow, usually some weeks later.
- 3.66 The Sentencing Act 2002 sets out a procedure for resolution of any dispute over facts that are relevant to sentence.²⁰³ Otherwise, sentencing will proceed on the basis of an agreed summary of facts and any submissions of counsel, along with other relevant material including pre-sentence reports and victim impact statements. Prior to sentencing the court can adjourn the case in order to make inquiries as to suitable punishment²⁰⁴ and may also direct a probation officer to prepare a pre-sentence report, which may contain information about the offender, the offence, and a proposed sentence.²⁰⁵
- 3.67 In certain cases the court must adjourn the case before sentencing to allow inquiries to be made about the suitability of the case for restorative justice.²⁰⁶ There must be agreement from both the complainant and the defendant before a case is permitted to enter a restorative justice process.
- 3.68 There is no restriction on restorative justice being used in sexual violence cases. However, the Ministry of Justice currently requires restorative justice services for sexual violence to be delivered by an accredited facilitator. Where used in sexual violence cases, restorative justice conferences must be tailored to that context and take account of the unique dynamics of sexual violence. This means that the conferences may be lengthier and require more preparation time. At the time of writing, four restorative justice providers in New Zealand had accredited facilitators.
- 3.69 If a restorative justice conference is undertaken and results in an outcome provided for in section 10 of the Sentencing Act 2002 (for example, if the perpetrator and the victim reach an agreement as to how the perpetrator will remedy the wrong), this must be taken into account by the court when the case returns for sentencing.²⁰⁷ Section 10 of the Act also requires the

202 Criminal Procedure Act 2011, s 114.

203 Sentencing Act 2002, s 24.

204 Sentencing Act 2002, s 25.

205 Sentencing Act 2002, s 26.

206 Section 24A of the Sentencing Act 2002 provides in full:

24A Adjournment for restorative justice process in certain cases

(1) This section applies if—

- (a) an offender appears before a District Court at any time before sentencing; and
- (b) the offender has pleaded guilty to the offence; and
- (c) there are 1 or more victims of the offence; and
- (d) no restorative justice process has previously occurred in relation to the offending; and
- (e) the Registrar has informed the court that an appropriate restorative justice process can be accessed.

(2) The court must adjourn the proceedings to—

- (a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
- (b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.

207 Sentencing Act 2002, s 10.

court to take into account matters such as any response of the perpetrator or the perpetrator's family, whānau, or family group to the offending,²⁰⁸ and any measures taken by the perpetrator to apologise to the victim or otherwise make good the harm that has occurred.²⁰⁹

KEY DIFFERENCES BETWEEN TRIAL BY JURY AND TRIAL BY JUDGE-ALONE

- 3.70 There are a number of differences between jury trials and trials by judge-alone. Principal among these is that in a jury trial, the jury is the “fact-finder” – that is, the jury is responsible for determining the relevant facts of the case and applying the law to reach a verdict of guilty or not guilty. The jury may be discharged from giving a verdict if it cannot agree.²¹⁰ The role of the judge is to oversee and control the conduct of the trial in a general way. In a trial by judge-alone, by contrast, the judge takes on the role of fact-finder. All the evidence is presented to the judge and he or she is responsible for determining the facts and delivering the verdict.²¹¹
- 3.71 Another key difference is that a jury is not required to and does not give reasons for its verdict. In a judge-alone trial, by comparison, the court is required to give reasons for its decision.²¹²
- 3.72 Jury trials are usually longer and more procedurally complex than trials heard by judge-alone. There are detailed rules in the Evidence Act 2006 about what a jury is and is not permitted to hear in a criminal proceeding. At times the jury will be required to leave the courtroom so that the judge and counsel can discuss whether evidence should be presented on certain matters. A judge sitting alone, by comparison, is expected to be able to hear all the evidence and distinguish between what is relevant and what is irrelevant in a determination of the facts. This explains why different procedures apply for determining admissibility of evidence pre-trial in a judge-alone trial versus a jury trial (see “Decisions about admissibility of evidence sought to be adduced at trial” above).
- 3.73 Additional procedural steps apply in a jury trial. A trial callover hearing must take place in which counsel discuss key trial management information.²¹³ The jury must be empanelled. The jurors are given a short briefing by the judge about what to expect and their basic obligations as jurors. Jurors can be excused or discharged in certain situations, while the expectation is that every juror will remain on the jury for the full length of the trial.

APPEALS

- 3.74 In trials by both judge-alone and by jury, the defence and the prosecution have rights of appeal against decisions made pre-trial and after conviction.
- 3.75 Decisions made by a District Court judge in category 3 cases after a defendant has elected trial by jury and in category 4 cases are appealable in the first instance to the Court of Appeal.²¹⁴ First appeals may, with leave of the court, be made directly to the Supreme Court, but only if the Supreme Court is satisfied it is necessary in the interests of justice for it to hear and determine the appeal, and that there are exceptional circumstances to justify a direct appeal.²¹⁵

208 Sentencing Act 2002, s 10(1)(c).

209 Sentencing Act 2002, s 10(1)(d).

210 Juries Act 1981, s 22(3)(b).

211 Criminal Procedure Act 2011, s 106.

212 Criminal Procedure Act 2011, s 106(2).

213 Criminal Procedure Act 2011, s 87.

214 Criminal Procedure Act 2011, ss 219 and 230.

215 Supreme Court Act 2003, s 14.

Appeal of pre-trial decisions

3.76 Certain pre-trial decisions may, with leave of the court, be appealed by either the prosecution or the defence²¹⁶ and, with further leave of the first appeal courts, may be appealed to the second appeal court.²¹⁷ The prosecution and defence may appeal, amongst other matters, decisions on the admissibility of evidence and cross-examination of complainants.²¹⁸ Some decisions may be appealed only by the defence²¹⁹ and a greater range of pre-trial matters may be appealed in jury trials.

Appeal against conviction and sentence

- 3.77 A person convicted of an offence may appeal their conviction once as of right and, with leave, a second time, to a higher court.²²⁰ A third appeal against conviction or sentence may be brought, with leave, on questions of law.²²¹
- 3.78 A first appeal court must allow an appeal against conviction if the jury's verdict was unreasonable with regard to the evidence or, in a judge-alone case, the judge erred in their assessment of the evidence to such an extent that a miscarriage of justice had occurred, or there had been a miscarriage of justice for any other reason.²²²
- 3.79 The prosecution may not appeal an acquittal, but may, with leave, appeal a trial court's ruling on a question of law, albeit not one that arises from a jury verdict.²²³
- 3.80 Both the defence and the prosecution may appeal the sentence imposed (once as of right and a second time with leave).²²⁴ A first appeal court must allow the appeal if satisfied that there is an error in the sentence and a different sentence should be imposed, but must otherwise dismiss the appeal.²²⁵ Thus, in disposing of a successful sentence appeal, a court must set aside or vary or remit the sentence with directions for the sentencing court to adjust it.²²⁶

RETRIALS

3.81 In certain limited circumstances a court may order that a previously acquitted person may be retried. The Solicitor-General, for example, has the power to apply to the Court of Appeal for a retrial where new and compelling evidence is obtained by Police, following the acquittal of a defendant for a specified serious offence.²²⁷ The Court must be satisfied that there is new and compelling evidence to implicate the acquitted person and that a further trial of the acquitted person is in the interests of justice.

216 Criminal Procedure Act 2011, ss 215–217.

217 Criminal Procedure Act 2011, s 223. The second appeal court “must not give leave for a second appeal”, however, unless it is satisfied that the appeal “involves a matter of general or public importance” (s 223(3)(a)) or “a miscarriage of justice may have occurred or may occur unless the appeal is heard” (s 223(3)(b)).

218 Criminal Procedure Act 2011, s 215(2).

219 Criminal Procedure Act 2011, s 218. In category 3 cases after the defendant elects a jury trial, or in category 4 cases.

220 Criminal Procedure Act 2011, ss 229 and 244 (rights of first appeal against conviction and sentence); ss 237 and 253(1) (second appeals against conviction and sentence).

221 Criminal Procedure Act 2011, ss 243 and 259.

222 Criminal Procedure Act 2011, s 232. If it allows an appeal against conviction, a court may direct that an acquittal be entered, or order a new trial, or substitute a conviction for a different offence, or make any other order it considers justice requires: s 233.

223 Criminal Procedure Act 2011, s 296. In addition to pre-trial and post-trial appeal rights, the Criminal Procedure Act 2011 provides both defendants and prosecutors the right to appeal, with leave, questions of law that arise during (and before) trial. If leave is sought before the trial has started, the trial must not start before the application is determined unless that is in the interests of justice. Conversely, if an application is made during trial, the trial must be continued unless it is in the interests of justice that it be adjourned: s 301.

224 Criminal Procedure Act 2011, ss 244, 246 and 253(2).

225 Criminal Procedure Act 2011, s 250.

226 Criminal Procedure Act 2011, s 251.

227 Criminal Procedure Act 2011, s 154.

3.82 A retrial may also be necessary where there has been a “hung jury”. We return to the issue of retrials in cases where there is a hung jury, and their effect on complainants in Chapter 6.

Chapter 4

The court experience of complainants

INTRODUCTION

- 4.1 The preceding chapter sets out the mechanics of the trial process in sexual violence cases. This chapter describes those features of the trial process that shape and affect the experience of complainants and that we understand to present particular hurdles and difficulties. This is with the proviso that all victims of sexual violence are different and their experiences within the criminal justice system differ.
- 4.2 Our examination of the trial process is limited to those matters that arise after a charge has been filed. It does not include the investigation by Police and the decision to prosecute. We note that in 2011, *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* highlighted issues with the investigation and prosecution stages.²²⁸ Proposals were made in the 2010 Issues Paper about Police charging decisions.²²⁹ In this Report, we have not been able to further examine or develop those parts of the Issues Paper, and we would single that out as an area needing further examination in the future.

SUMMARY OF THE ISSUES

- 4.3 The most problematic features of the pre-trial and trial process, from the complainant’s perspective, appear to be the following:
1. *The time between filing of charge and trial:* once charges have been filed, the period of waiting for the case to be set down for trial and waiting for the trial itself may impact a complainant’s personal circumstances, given that a high incidence of sexual violence occurs in a family or intimate relationship context. Lengthy waiting periods may also affect a complainant’s psychological recovery. Complainants of sexual violence are required to remember the facts of the incident for recall at trial – and the extent to which they are able to do so may bear on their credibility as a witness.
 2. *The cross-examination of complainants:* complainants may be cross-examined on their evidence at length by defence counsel. Cross-examination requires “putting the witness to proof” on matters such as consent or belief in consent, which often involves challenging a complainant’s credibility and reliability as a witness. The experience of giving evidence at trial is sometimes described by complainants as being akin to a second assault.
 3. *Availability of information and support for complainants:* throughout the trial process, complainants will be required to interact with a number of different people fulfilling various roles, which may be confusing to someone unfamiliar with the court process. The diffusion of responsibility between various people for keeping the complainant informed makes it difficult to ensure complainants are receiving adequate information and support.

²²⁸ See Yvette Tinsley “Investigation and the decision to prosecute in sexual violence cases” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 120.

²²⁹ Law Commission *Alternative Pre-trial and Trial Processes* (NZLC IP30, 2012) proposals 2A and 2B.

4. *Court facilities and physical environment*: in a criminal case the courtroom is designed to permit a defendant to be put “on trial” in a place that is open to the public in the interests of transparent justice. But the physical design of the courtroom is an extremely poor fit for complainants who must give intimate evidence of an alleged incident of sexual violence. The design of the court building may require complainants, defendants and jurors to occupy shared waiting areas and use the same facilities.
- 4.4 Although the High Court hears a much smaller number of sexual violence cases than the District Courts, we understand that the issues faced by a complainant in the High Court are likely to resemble those faced by a complainant in the District Courts. On this point McDonald and Tinsley commented in written correspondence to us that:²³⁰
- ...it is difficult to know exactly which cases are retained in the High Court and why, but from our reading of the case reports it seems that ... it is not the situation that *only* the more serious or multi-complainant cases are heard in the High Court. Therefore ... we emphasise that consideration should be given to how any reform proposals would or should apply to cases heard in the High Court.
- 4.5 All of the reform proposals in this chapter are, unless otherwise stated, intended to apply to sexual violence trials in both the High Court and District Courts.

ISSUE ONE: THE TIME BETWEEN FILING OF CHARGE AND TRIAL

- 4.6 For sexual violence trials that took place in the District Courts in 2014/15 (including any commenced in the years prior), the mean age of a case from the date of filing of charges until the end of the trial hearing was 443 days. The median age was 419 days. In the High Court, those figures were 418 days (mean) and 424 days (median).²³¹
- 4.7 The amount of time that passes between filing of a charge and trial may be expected to have a disproportionately negative effect, specifically in cases of sexual violence. This is due to the effect of delay on the complainant themselves; on their domestic and social circumstances; and on the evidence.

Effect of delay on the complainant

- 4.8 A unique feature of sexual violence as a form of criminality is that there are usually no other witnesses to it. This means that a successful prosecution is likely to depend, at least to some extent, on how comprehensively a complainant can recall the detailed facts of the incident at trial, in order to appear credible and not evasive. Thus, much is riding on a complainant’s ability to retain those facts in their head. The longer they are required to do so, the greater the potential effect on their long-term therapeutic recovery.²³²
- 4.9 Lengthy periods of time between the alleged incident and the trial itself is also problematic for young complainants because of their age and the proportion of their lives they may spend with criminal proceedings pending. For example, a gap of two years between the incident and trial for a child of six years old amounts to one quarter of that child’s lifetime.
- 4.10 The issue of delay and its effect on complainants was noted by submitters to the Issues Paper. Rape Prevention Education said that “[i]t is absolutely critical for the complainant to have a

230 Letter from Elisabeth McDonald and Yvette Tinsley to Law Commission regarding the alternative trial process reference (2 October 2015) at 3.

231 Figures provided by the Ministry of Justice (4 November 2015). Reference to a “sexual violence trial” is to any trial that includes an offence of sexual violence as its most serious charge (being the charge carrying the highest penalty). They include all cases in which the judge/jury delivered a verdict, all cases in which a mistrial was declared, and all cases determined by guilty plea and/or dismissal either during the trial or on the morning a trial was scheduled to begin. This excludes any time the case was on hold due to outstanding warrants to arrest the defendant for failing to appear at court. The sexual violence offences included in the statistics cited are listed in Appendix A.

232 Law Commission *Alternative Pre-Trial and Trial Processes: Summary of Submissions to Consultation* (NZLC, 2012) at [95].

more streamlined process [in which] delays are minimised”.²³³ They referenced cases which had been adjourned three or more times and in which complainants had been required to put their lives “on hold” for sometimes two or three years.

- 4.11 We note that the submissions on the Issues Paper were made before the passing of the Criminal Procedure Act 2011 (CPA 2011), which has sought to implement better pre-trial case management in order to decrease the time taken to resolve criminal cases. Although it is still relatively early to assess its effect on case disposal times, as the Act did not come fully into effect until 1 July 2013, initial assessments show some reduction in disposal times, which may be attributable to the legislation.²³⁴
- 4.12 Reducing the time taken to dispose of all criminal cases is a worthy and ongoing goal. But we do not think that this is a complete answer to the need to deal with cases of sexual violence in a timely manner.

Effect of delay on the complainant’s domestic and social circumstances

- 4.13 The second unique feature of sexual violence is that many or most victims of sexual violence, as has been noted in previous research, are in a family or domestic relationship with the perpetrator. In one New Zealand study of 69 victims of sexual violence, 31 of the victims in question were assaulted by a current or ex-partner, 10 by a family or whānau member, and seven by a friend or family friend.²³⁵
- 4.14 As such, delay between the incident itself and the trial affects not only the complainant but also their relationship and contact with the perpetrator, any children they may have, family/whānau members who know both the victim and the perpetrator and their respective relationships with friends and acquaintances if they move in a common social circle (for instance if the complainant and perpetrator are both at high school or university and share classes or are in the same university accommodation). Reducing delays in sexual violence cases will not only benefit complainants but also defendants and their respective domestic and social circumstances.

Effect of delay on the evidence

- 4.15 The third detriment of delay in sexual violence cases is its effect on the evidence itself. Unsurprisingly, long delays are likely to impact on a complainant’s ability to accurately and comprehensively recall facts. This is the case for all witnesses who are required to recall facts some time after the incident, but for a complainant witness in a sexual violence case, the effect of a failure to do so when questioned at trial may be significant. The complainant is often the sole witness to the alleged offending and their testimony is heavily relied upon. The closer in time to the incident itself that a complainant is able to recount the facts of that incident, the more detailed and more accurate their recall of the facts is likely to be, and therefore the higher the quality of their evidence – which, in sexual violence cases, is likely to be particularly important.

233 Submission from Rape Prevention Education in response to the Law Commission’s Issues Paper.

234 Ministry of Justice *Criminal Procedure Act 2011: Caseload performance for first twelve months* (November 2014). The Report covers the period from 1 July 2013 to 30 June 2014 and is intended to provide an overview of the behaviour of cases from which further qualitative analysis can be based. It states that overall, cases commenced under the Act are progressing faster through the court system and that the new Act may be contributing to this improvement: at 2.

235 Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to recovery* (Ministry of Women’s Affairs, 2009) at 48.

Status quo and options for reducing delay

- 4.16 At present, sexual violence cases are afforded priority over certain other kinds of criminal cases when being scheduled for trial.²³⁶ However, there is no special process to enable those cases to be “fast tracked” through other steps in the pre-trial process that must be gone through before trial. This may be contrasted with the approach applied to certain other kinds of cases which are singled out for fast-tracking or subjected to statutory timelines due to the nature of the proceedings and the need for swift disposal. Two examples are the separate lists for dealing with certain proceedings heard in the High Court and the statutory deadlines for making certain orders in the Family Court, both of which are discussed below.
- 4.17 A key difference is the sheer volume of cases involving sexual violence and the fact that they are criminal matters, in which adjournments and delays may be more common because of criminal-specific pre-trial matters such as disclosure and entry of pleas. Nonetheless, we have considered whether more can be done in this area to reduce the length of time between the filing of charges and the date of trial.
- 4.18 We have contemplated what might happen in the future if barriers to reporting are addressed and greater numbers of incidents of sexual violence are reported. If that occurs, one can expect to see more cases entering the criminal justice system, which will have a consequential impact on case disposal times. Thought must be given to how sexual violence cases are to be dealt with in a timely manner, and what resources are required to do so both now and in the future, to avoid the risk that complainants will be encouraged to enter the criminal justice system only to wait an unreasonable amount of time for the proceedings to finally be disposed of.

A special list for sex offence cases

- 4.19 Implementing a special court list for sex offence cases is one possible way of fast-tracking those cases through the court process. Special court lists are instigated by the judiciary to allow those cases to be separately managed and overseen by a particular judge or judges because of their urgent, important, or specialist subject matter.²³⁷ We discuss listing here because it is one method of reducing delay between filing and hearing a case, but it is also relevant to Chapter 5 where we discuss the general advantages of court specialisation for sex offence cases. A judicially managed list is a form of specialisation.
- 4.20 We have considered the potential of a special list for sexual violence cases that would be overseen by the judiciary and that would allow those cases to be fast-tracked through the court process. We note, however, that the success of a special listing procedure may depend on how effectively it is managed and overseen by the judiciary. Judges would play a large part in the success of such a list and in ensuring that all the relevant parties comply with the administrative requirements of the list. Yet we note that one of the policy aims of the CPA 2011 was to enable administrative matters to be handled, as far as possible, outside of the courtroom, with cases going before a judge only when the exercise of judicial discretion is required.²³⁸ Making a proposal for a specialist list that would be managed and overseen by the judiciary may run counter to this policy objective.
- 4.21 Fast-tracking through the use of a special list may put too much of a burden on the judiciary, and it may not provide a sufficient incentive for participants in the court system to ensure that sexual violence cases are heard in a timely fashion.

236 Chief District Court Judge Doogue *Rostering Protocol for District Courts of New Zealand* (Ministry of Justice, 11 November 2014) at 4.

237 “High Court lists” Courts of New Zealand < www.courtsofnz.govt.nz > .

238 Law Commission *Criminal Pre-Trial Processes: Justice through Efficiency* (NZLC R89, 2005) at 37.

4.22 Previous experience with attempts to fast-track cases involving child witnesses may be illustrative. In 1992 the Chief Justice and the Chief District Court Judge issued a practice note setting out a direction to fast-track cases involving child witnesses but, despite this, a 2010 study led by Kirsten Hanna of the Auckland University of Technology noted that delay times in cases with child complainants doubled throughout the 2000s, from eight months to 15 months.²³⁹

Statutory provisions with time limits

4.23 A second possibility is for statutory provisions to set down firm time limits for hearing a case within a certain time period, and for a right of complaint to be extended to victims under the Victims' Rights Act 2002 (VRA 2002) where a sexual violence case had not been dealt with in as speedy a manner as reasonably possible in the circumstances.

4.24 It is not unusual for certain proceedings to be subject to statutory time limits for hearing. For example, certain applications in the Family Court are subject to time limits, including an application to vary a protection order under the Domestic Violence Act 1995, which must be heard within 42 days of the application.²⁴⁰ An application for a declaration that a child is in need of care and protection must be heard within 60 days of the application.²⁴¹ In both cases exceptions may be made in special circumstances.

4.25 No such time limits exist in New Zealand in regard to sex offences, but they do in Victoria, Australia. The time limit in question applies to the period between filing of the indictment or committal for trial, and the date of the trial itself. Trials must take place within 12 months for an offence *other* than a sex offence,²⁴² but within three months for a sex offence.²⁴³ There is provision for an extension to be granted in the interests of justice, which in sex offence cases may be no greater than three months.²⁴⁴

4.26 The Victorian statutory time limits have their origins in a government-led reform strategy for sex offences, which ran from 2006 to 2008.²⁴⁵ A 2011 evaluation of that strategy found, however, that the timelines are “virtually never complied with in relation to matters involving adult complainants” and that for cases involving adults, a waiting time of 15 to 18 months before trial was more common. It was noted that judges were giving priority to matters involving children and people with cognitive impairments and that these took place much more quickly.²⁴⁶ But one result of this was that other cases, including those involving sexual violence, were bumped further down the list.

4.27 We have considered whether a statutory requirement would be of benefit in New Zealand and would actually lead to a decrease in disposal times for sex offence cases. On the one hand, simply imposing a statutory requirement will not increase the courts' capacity to prioritise sexual violence cases, especially when that must be balanced against the need to give priority to other cases, such as ones involving children. Also, if such a limit were introduced, there would

239 Kirsten Hanna and others *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (AUT Institute of Public Policy, 2010).

240 Domestic Violence Act 1995, s 46(5).

241 Children, Young Persons, and Their Families Act 1989, s 200.

242 Criminal Procedure Act 2009 (Vic), s 211.

243 Criminal Procedure Act 2009 (Vic), s 212.

244 Criminal Procedure Act 2009 (Vic), s 247(2).

245 Known as the “Sexual Assault Reform Strategy”, its overall aim was to improve the effectiveness of the system's response to sexual offending and to victims of sexual violence. The Victorian Government allocated \$34.2 million in the 2006/07 state budget to a range of initiatives, and another \$8 million in the 2008/09 budget to improve access to prosecution services in regional Victoria: Department of Justice *Sexual Assault Reform Strategy – Final Evaluation Report* (Department of Justice, Melbourne, 2011) at 7.

246 At 106.

need to be sufficient “slack” to be able to divert judges to those cases when they came up, in order to ensure statutory time limits were met. Additional judicial resources may be required.

- 4.28 On the other hand, a legislative time limit puts demonstrable importance on the desirability of prioritising disposal of sexual violence cases. In this manner it provides a clear signal to the courts and the public that, once proceedings are commenced, efforts will be made to bring those to trial as speedily as possible.

What would be the effect of a failure to comply with a statutory time limit?

- 4.29 The VRA 2002 includes a number of rights for victims including the right to be given information about available court services²⁴⁷ and about the progress of the proceedings themselves.²⁴⁸ It also sets out the rights of victims of specific offences including the right to give views on matters such as bail²⁴⁹ and to be notified of certain decisions made in other matters relating to the proceedings.²⁵⁰ A victim or person who feels that a right to which they are entitled to be accorded has not been upheld can make a complaint to the Ministry of Justice under section 49 of that Act.
- 4.30 If a statutory time limit were introduced, the VRA 2002 could include a right, in respect of charges filed for one or more sexual violence offences, to have the proceedings for those charges handled in as speedy a manner as reasonably possible. The Ministry of Justice could be the entity that is ultimately responsible for according the right to relevant persons. If a victim or person considers that the right has not been upheld, they can make a complaint to the Ministry of Justice as provided under section 49 of the Act. The number of complaints received and how they were dealt with would be required to be included by the Ministry of Justice in its annual report.²⁵¹
- 4.31 In this way, a legislative time limit would clearly signal the need for timely disposal of sexual violence cases and would also facilitate the gathering of examples of cases where those time limits were not met. We recommend that the legislation require that all sex offence cases be set down for hearing within a specified time of the filing of a charge. This should be properly qualified so that exceptions can be made for appropriate cases where more time is required.
- 4.32 Our recommendation does not extend to setting down a specific time period, because we have not consulted with the sector on any particular time limit. A time limit of 12 months from the time of filing of charges to the time the case is set down for hearing might be appropriate (and achievable, given the mean disposal time of a sexual violence case in the District Courts in 2014/2015 was between 14 and 15 months.)²⁵² However, further analysis and consultation would be required before an exact time limit could be finalised in legislation.

247 Victims’ Rights Act 2002, s 11.

248 Victims’ Rights Act 2002, s 12.

249 Victims’ Rights Act 2002, s 30.

250 Victims’ Rights Act 2002, ss 34–39.

251 Victims’ Rights Act 2002, s 50A.

252 Figures provided by the Ministry of Justice (4 November 2015).

RECOMMENDATIONS

- R1 Legislation should require that, save in exceptional circumstances, all cases involving sexual violence should be set down for hearing within a specified time of the filing of the charge.
- R2 The Victims' Rights Act 2002 should include a right for complainants in a case involving sexual violence to have the case disposed of in as speedy a manner as possible, with responsibility for giving effect to the right to lie with the Ministry of Justice.

Pre-recording the evidence of a complainant in sexual violence cases

- 4.33 We have noted that the testimony of a sexual violence complainant is usually heavily relied upon at trial. The private nature of sexual violence creates an imperative for a complainant to retain the facts of the incident in as much detail as possible, so that they can be recalled at trial. As noted earlier, while this is beneficial for trial, it can be detrimental to the long-term recovery of the complainant.
- 4.34 Minimising the time between the filing of charges and the trial in the ways suggested above will help address this issue. However, we have also considered the possibility of recording the whole of a complainant's evidence, including cross-examination, at a point in time that is close to the alleged incident and then to replay that evidence at the time of the trial, with the ability to recall the complainant for further questioning at trial if necessary. This would eliminate the detrimental effect of delay on complainants and on the evidence. It would also minimise the stress of giving evidence at trial, because complainants whose evidence is pre-recorded will only have to give evidence in person at trial if they are recalled to do so.
- 4.35 Pre-recording evidence is not the only way to minimise the stress of giving evidence in court. It is also possible to give one's evidence while in the courtroom but unable to see the defendant or other specified person (which would normally be done by the use of a physical screen) or from an appropriate place outside the courtroom (which would normally be done by setting the witness up in another room and asking them questions remotely via CCTV or video link). In each case, directions are required to be made by a judge under the Evidence Act 2006.

The options to pre-record the complainant's evidence in chief under the Evidence Act 2006

- 4.36 The giving of a complainant's evidence in chief by pre-recorded video is made possible under the provisions of the Evidence Act 2006 which provide for alternative ways of giving evidence.²⁵³ In any proceeding, the judge may direct that a witness is to give evidence in chief and be cross-examined "in the ordinary way" or in an "alternative way". One of the alternative ways is to give evidence by video record.
- 4.37 If an order is made for evidence in chief to be given by video record, this would be done by playing a video of the Police interview with the complainant (which is sometimes referred to as the "evidential video interview" or the "EVI"). The video is made at the time the complaint is made to Police. The complainant is asked a series of questions by a member of the Police who is trained in behavioural interviewing.
- 4.38 The video must, if is to be played at trial, comply with rules set down in the Evidence Regulations 2007, covering matters such as who may be present at the video recording and

253 Evidence Act 2006, ss 103-106.

what must be on the video record, and requiring the prosecution to give a typed transcript to the defence.²⁵⁴ As a record which contains a witness's statement, the video must be filed by the prosecution as a formal statement under section 85 of the CPA 2011, and may be accompanied by a summary of the parts of the video that the prosecutor intends to rely on as evidence at the trial.²⁵⁵

Pre-recorded evidence in chief: current practice

- 4.39 Our consultation indicates that in sexual violence cases, there are significant regional variations throughout the country in the use of the EVI as the complainant's evidence in chief (except where the complainant is under 16).²⁵⁶
- 4.40 As far as we are aware, however, it is usual practice for the EVI to be recorded by Police for investigative purposes, and one might therefore always expect such a video to be available and able to be played at trial if necessary.
- 4.41 Regional variations may be attributable to a number of things. Prosecutors are not, in sexual violence cases, required to apply for mode of evidence directions. Guidance directs them to consider doing so,²⁵⁷ but it is not mandatory, and the guidance does not deal specifically with potential use of the EVI as evidence in chief.
- 4.42 This may be compared to the position for child witnesses in which case the prosecutor *must* apply to the court for directions on mode of evidence, although not specifically on playing the EVI as evidence in chief. In any case, it is apparently common practice to use the EVI for child witnesses under 16, although there is no actual entitlement to it for under-16s and defence counsel may oppose it.²⁵⁸
- 4.43 One cannot expect complainants to know of their ability to apply to give evidence via alternative means. The VRA 2002 requires that victims be given information about their "role as a witness in the prosecution of the offence"²⁵⁹ but not the ability to apply for orders as to mode of evidence. In a study of sexual violence complainants commissioned by the Ministry for Women, only two out of 14 research participants said they had been informed of the options regarding mode of evidence.²⁶⁰ From "*Real Rape*" to *Real Justice: Prosecuting Rape in New Zealand* included statements by a senior prosecutor that, in their experience, sexual violence complainants are either casually consulted about mode of evidence or are not consulted at all.²⁶¹

254 Evidence Regulations 2007, pt 1.

255 Criminal Procedure Act 2011, s 82.

256 For children, especially those younger than 16, replaying the EVI is routine: see comments of the Court of Appeal in *M v R* [2011] NZCA 303 at [2] and *Emma Davies and others "Prerecording children's entire testimony"* [2011] NZLJ 335 at 335.

257 Crown Law *Victims of Crime – Guidance for Prosecutors* (6 December 2014).

258 Note that the position will change upon enactment of the Evidence Amendment Bill 2015 (27-1). Under clause 32 of that Bill a child witness, when giving evidence in a criminal proceeding, will be "entitled to give evidence in 1 or more alternative ways". At the time of writing the Bill was awaiting report back from select committee.

259 Victims' Rights Act 2002, s 12(1)(c).

260 Kingi and Jordan, above n 235, at 48.

261 Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "The potential impact of other proposed reforms on the processes in sexual violence cases" in McDonald and Tinsley (eds), above n 228, 105 at 116.

4.44 Regional variations may also be due to the exercise of judicial discretion which is inherent in the relevant sections of the Evidence Act 2006. A direction on mode of evidence may be made on one of the grounds listed in section 103(3) of that Act.²⁶² Section 103(4) sets out what the judge must have regard to when giving a direction:

- (4) In giving directions under subsection (1), the Judge must have regard to—
- (a) the need to ensure—
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
 - (b) the views of the witness and—
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.

4.45 It may also be that in some areas of the country, defence counsel more rigorously oppose the use of the EVI as evidence in chief than in other areas.

Options to introduce more consistent use of the EVI as evidence in chief

4.46 There is a strong argument in favour of more consistently using the EVI as the evidence in chief of a complainant in sexual violence cases. This is already the practice for witnesses under 16 years, with good reason, since younger witnesses are more likely to be particularly affected by delays and the potentially intimidating experience of giving their evidence in person at trial. Given that an EVI is made for investigatory Police purposes, and the legislation already provides for its use at trial, it seems logical that it be used wherever possible to minimise the stress on witnesses and to help ensure that good-quality evidence is put before the court.

4.47 One prosecutor noted in correspondence with us that they:

... cannot see any real prejudice to a defendant if a complainant's EVI is replayed in every trial where one has been recorded. Any inadmissible material can be edited in advance. The EVI [is] closer in time and taken with trained interviewers. I back myself as an asker of questions, but I am not a highly trained interviewer, court is months if not years after the fact, and there is no real basis for creating the mystery of a "previous statement" when the jury could have just watched that for themselves.

A requirement on prosecutors to apply for directions in sexual violence cases

4.48 One way of introducing more consistent use of the EVI as evidence in chief in sexual violence cases might be to require prosecutors, in those cases, to apply to the court for mode of evidence directions. As noted, they are already required to do so in cases involving child witnesses.

4.49 This option was considered by the Law Commission in 2013.²⁶³ However, the Commission concluded that a mandatory direction is not appropriate for sexual violence complainants, primarily because not all of those complainants will want or need alternative modes of giving

²⁶² Section 103(3) lists the age or maturity of the witness; the physical, intellectual, psychological, or psychiatric impairment of the witness; the trauma suffered by the witness; the witness's fear of intimidation; the linguistic or cultural background or religious beliefs of the witness; the nature of the proceeding; the nature of the evidence that the witness is expected to give; the relationship of the witness to any party to the proceeding; the absence or likely absence of the witness from New Zealand; and any other ground likely to promote the purpose of the Act.

²⁶³ Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 223-227.

evidence.²⁶⁴ Instead the Commission recommended that prosecutors be encouraged to apply for mode of evidence directions. That change has since been given effect,²⁶⁵ but regional variations continue to affect complainants in sexual violence cases. It may be that the guidance is not having its intended effect. It may also be that the judicial discretion to grant orders is being exercised differently across the country and/or that there are variations in defence counsel practice.

An entitlement to use of the EVI as evidence in chief

- 4.50 Another option is to include an entitlement in legislation so that, wherever a complainant must give evidence in chief in a sexual violence case, that evidence will be given *either* by playing the pre-recorded EVI at trial or, if the complainant prefers, in the ordinary way or in one of the other alternative ways set out in section 103 of the Evidence Act 2006. Any entitlement needs to encompass all of the possible alternative ways of giving evidence, because not all complainants will want to give their evidence in chief via EVI and should not be required to do so. Some will want to give it in person but, for instance, behind a screen. They should be entitled to do so.
- 4.51 Amendments to the Evidence Act 2006 are currently before Parliament which, if passed, will introduce an entitlement for all child witnesses in criminal proceedings to give their evidence in an alternative way.²⁶⁶ It will no longer be necessary for the prosecution to apply to the court for directions. If the child witness wishes to give evidence in the ordinary way, an application will need to be made to the court. Written notice of the intention to call a child witness and the way in which they will give evidence will be required to be provided to every other party and the court. Any other party will be able to apply for a direction that the witness gives their evidence in the ordinary way. When giving a direction the court will need to consider whether the interests of justice require a departure from the usual procedure (being the giving of evidence in an alternative way) and the matters in sections 103(3) and (4) of the Evidence Act 2006.
- 4.52 These clauses reflect a policy decision that child witnesses should be entitled to give their evidence in an alternative way. We are satisfied that there is a solid policy basis for extending this entitlement to complainant witnesses in sexual violence cases, so that they may give their evidence in chief in an alternative means, including by playing the EVI at trial if that is desired. We discuss what we think the position should be for evidence given in cross-examination below.

Conclusion and recommendations on use of the EVI as evidence in chief and other alternative ways of giving evidence

- 4.53 We therefore recommend that the Evidence Act 2006 be amended so that a complainant in a sexual violence case is entitled to give their evidence in chief in one or more of the alternative ways set out in section 105 of the Evidence Act 2006 or, if they prefer, in the ordinary way. There is a template for giving effect to this recommendation within clause 32 of the Evidence Amendment Bill 2015 that is currently in Parliament (see proposed new section 27).²⁶⁷
- 4.54 We note that not all complainant witnesses in sexual violence cases will want or need an alternative mode of giving evidence. A legislative entitlement to give evidence via an alternative means should not preclude the ability to give evidence in the ordinary way if desired. In the Evidence Amendment Bill 2015, this is taken account of by enabling an application to the judge

264 At [11.70].

265 See Crown Law, above n 257, at [24].

266 Evidence Amendment Bill 2015 (27-1), cl 32.

267 Evidence Amendment Bill 2015 (27-1), cl 32.

that a child witness is permitted to give evidence in the ordinary way.²⁶⁸ Such a provision is appropriate for children so that the court may be satisfied that the child fully appreciates the possible effect of giving evidence in the ordinary way, but the policy position is different for adults that have full capacity. It would be paternalistic to require an application to court to give evidence in the ordinary way. We therefore recommend that a complainant witness in a sexual violence case (who is not a child) should be entitled to give their evidence in the ordinary way if desired. Notice should be given to the other party and to the court of the way in which the complainant witness will give evidence in a sexual violence case.

- 4.55 Prosecutors will need to consult with complainants on modes of evidence if these recommendations are to be given proper effect. Though a complainant may be entitled to give evidence in one of many different ways, such an entitlement is worth little if the complainant does not know that it exists. We therefore recommend that the Evidence Act 2006 should be amended to also include a requirement for prosecutors to consult with complainant witnesses in sexual violence cases on the mode of delivery of evidence in chief.

RECOMMENDATIONS

- R3 The Evidence Act 2006 should provide that an adult complainant in a sexual violence case is entitled to give their evidence in chief in one or more of the alternative ways set out in section 105 or in the ordinary way set out in section 83.
- R4 The legislation should include a requirement that prosecutors consult with complainants on the mode in which they prefer to give evidence.

The current options for the mode of giving evidence in cross-examination

- 4.56 The alternative modes of giving evidence provided for in section 105 of the Evidence Act 2006 apply equally to evidence in chief and to evidence given in cross-examination. Thus, a witness may be cross-examined while shielded from view of the defendant or some other person, or may be asked questions while seated in another room via CCTV or video link.
- 4.57 Similarly, the pre-recording of cross-examination evidence is made possible by section 105 of the Evidence Act 2006, as was recently confirmed by the Court of Appeal in *M v R*.²⁶⁹ That can be achieved by conducting a hearing prior to trial in which the witness, the judge, counsel, defendant, and necessary court staff are present, purely for the purpose of conducting witness cross-examination. The hearing can be videoed and replayed at trial for the jury.

Pre-recorded cross-examination evidence: current practice

- 4.58 Pre-recording of cross-examination happens more rarely than pre-recording of evidence in chief, especially for adults. We are aware of only two instances in which adult witnesses have had their cross-examination evidence pre-recorded. In *R v Kereopa*,²⁷⁰ Heath J directed that the prosecution witness's entire evidence be pre-recorded on video because the witness was terminally ill and unlikely to be alive at trial. In *R v Willeman*²⁷¹ Cooper J directed that the

268 Pursuant to clause 32 of the Evidence Amendment Bill 2015 (27-1), the new section 107A will provide that if a child witness indicates his or her wish to give evidence in the ordinary way, the party calling the witness may apply to a judge for a direction that the child be permitted to do so.

269 *M v R* [2011] NZCA 303.

270 *R v Kereopa* [2008] DCR 29 (HC) at 11.

271 *R v Willeman* (Tetraplegic: Interpreter) [2008] NZAR 664 (HC) at [5] and [48].

complainant, a tetraplegic, give all their evidence at home before the trial. Beyond this, our research has not revealed any criminal cases from 2011 onwards in which orders were made for adult complainants to be cross-examined in advance of trial. In most cases the alternative ways of giving evidence in cross-examination were via CCTV or behind a screen.

- 4.59 However, a number of cases in Auckland between 2010 and 2011 successfully used pre-recording for the cross-examination evidence of children.

The experience in Auckland, 2010-2011

- 4.60 Several applications for pre-recording the cross-examination of child complainants and witnesses were granted in the Auckland District Court throughout 2010 and 2011. The first application was approved in December 2010²⁷² and there were subsequently 13 pre-recorded hearings completed between December 2010 and May 2011.

- 4.61 Each hearing was attended by a judge, court staff, lawyers, the defendant, and the witness. The judge, counsel, defendant, and witness watched the pre-recorded video interview (which served as evidence in chief) the day before the hearing. At the hearing, the children were further examined and cross-examined via CCTV from a room in the courthouse in the usual way (although juries were not present at these hearings). The hearings were conducted according to a memorandum developed by the Ministry of Justice, outlining operational processes for use of pre-recorded cross-examination evidence.²⁷³

- 4.62 A sample of nine of these trials was formally evaluated in 2011. Five of the sampled cases involved allegations of sexual violence. The youngest witness was six years old and the eldest was 19. The participants were interviewed on a voluntary basis, with four of the six potential defence counsel and all of the prosecutors and victims advisors participating. The participant's perceptions of the advantages and disadvantages of pre-recorded cross-examination were summarised and the authors concluded overall that the pre-recorded hearings were making a positive contribution to the justice system, with one prosecutor interviewed stating that:²⁷⁴

I don't see that there is any drama in connection with the innovation. It's just another step to ensure that best evidence is put before the court. And there is provision to permit both sides to recall the witness if necessary.

Previous Law Commission work: 1996 and 2013

- 4.63 In 1996 the Law Commission released a preliminary paper in which it proposed the increased use of pre-trial cross-examination for children and other vulnerable witnesses.²⁷⁵ However, the Commission did not make a final recommendation on this in its subsequent Report, citing strong opposition from the defence bar (although the proposal received support from a range of community groups). The Commission suggested that more should be known about the experience of pre-trial cross-examination in other countries before a recommendation to this effect was made.²⁷⁶

272 *R v Sadlier* DC Auckland CRI 2010-044-004165 (7 December 2010).

273 Davies and others, above n 256.

274 Emma Davies and Kirsten Hanna "Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases" (2013) 46 *Australian & New Zealand Journal of Criminology* 239 at 304.

275 Law Commission *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper* (NZLC PP26, 1996).

276 Law Commission *Evidence* (NZLC R55, 1999) at 121.

- 4.64 In 2013, the Law Commission returned again briefly to this issue within the ambit of its review of the Evidence Act 2006. It concluded that the pre-recording of evidence has merit where fast-tracking of the case is not possible and that this area requires further attention.²⁷⁷

The position in 2015

- 4.65 In 2011 the Court of Appeal in the case of *M v R*²⁷⁸ was asked to consider the jurisdiction to make orders for pre-recorded cross-examination and, at the same time, the Court provided some comments on factors relevant to the exercise of that jurisdiction. Among other things, the Court noted the general rule under criminal law that a defendant is not required to “show their hand” before the start of a trial. To the extent that requiring the defence to undertake cross-examination before trial might countermand that rule, this should not be done lightly.²⁷⁹ The jury would not be present for cross-examination, which has flow-on effects such as preventing defence counsel from “tailoring his or her cross-examination depending upon the reaction of the particular jury to it”.²⁸⁰
- 4.66 The Court also noted practical implications, such as the overall greater use of court resources (because a judge and court staff and a courtroom have to be provided for the taking of the evidence).²⁸¹ There may be a risk of complainants having to be recalled to give evidence again, if new matters come to light shortly before trial.²⁸² Also, a judge should be “very slow to order pre-trial cross-examination in the absence of clear evidence” that full disclosure has occurred.²⁸³
- 4.67 The Court was, however, satisfied that pre-trial cross-examination does not necessarily interfere with the fair trial rights guaranteed by the New Zealand Bill of Rights Act 1990 (NZBORA 1990), such as the right of every person charged with an offence to adequate time and facilities to prepare a defence.²⁸⁴ On this point the Court said:²⁸⁵

We do not accept that pre-trial cross-examination would necessarily infringe such rights. On the other hand, we do accept that fair trial rights guaranteed by the Bill of Rights should influence when the jurisdiction to order pre-trial cross-examination is exercised.

- 4.68 When *M v R* was delivered, existing applications for pre-recording in Auckland were frozen and no subsequent pre-recording hearings have since taken place.²⁸⁶ However, the experience with pre-recording that came out of those trials has, as noted above, been positively evaluated.

The potential benefits and drawbacks of pre-recorded cross-examination

- 4.69 Pre-recorded cross-examination has a number of potential benefits. One is that it can lighten the burden of holding on to the facts of the incident for later presentation at trial. If the trial occurs some time after filing of the charge, pre-recording would shield the evidence from deterioration by delay, and may also shield the complainant witness against some of the anxiety of waiting for the trial.
- 4.70 It has also been suggested that pre-recorded cross-examination may reduce the risk of a mistrial by allowing judges to more robustly control questioning in the knowledge that interventions

²⁷⁷ Law Commission, above n 263, at [11.80].

²⁷⁸ *M v R* [2011] NZCA 303.

²⁷⁹ At [34].

²⁸⁰ At [38].

²⁸¹ At [36].

²⁸² At [40].

²⁸³ At [35].

²⁸⁴ At [25].

²⁸⁵ At [25].

²⁸⁶ Davies and others, above n 256.

could be edited out. It may also make it easier to give witnesses breaks during the cross-examination process.

- 4.71 The Court of Appeal in *M v R* noted its concerns that pre-recording should not take place before full disclosure has been made; otherwise, the defence loses the opportunity to question a witness on relevant aspects of the prosecution's case which are only subsequently disclosed to the defence. This, however, is a practical problem which we think can be addressed in the design and operation of the processes for pre-recording.

Stakeholders' views

- 4.72 Many of the people we spoke to in the drafting of this Report were supportive of moves towards pre-recording cross-examination where appropriate. We received the collated views of 20 District Court Judges noting that consideration should be given to greater use of pre-recorded evidence.²⁸⁷
- 4.73 We consulted with a group of highly experienced stakeholders including two senior prosecutors (see paragraph 1.60), who supported the use of pre-recording evidence by way of video. They commented that pre-recording hearings give an opportunity to explore and test the complaint before trial:²⁸⁸

Some factual and reality testing before the courtroom is beneficial. The prosecution may have an opportunity to consider the video-evidence in the light of reality testing and cross-examination. It is sometimes the case that issues raised at trial come as a surprise to the prosecution. These issues can often be answered if time is available. But time is often not. So some trials run aground in a way that could be considered quite unfair; but understandable on the current burden of proof method. Early video interview, and cross-examination after charge, may be very beneficial on different levels.

- 4.74 We also note that in 2011 the Ministry of Justice released an issues paper considering among other things a proposal for pre-recording of cross-examination for child witnesses, and the proposal received a number of supportive submissions.²⁸⁹ The New Zealand Law Society submitted that for children it “should be the usual, but not mandatory, method of proceeding”.
- 4.75 Some submitters to our Issues Paper opposed the pre-recording of cross-examination on the basis that new matters may come to light or additional disclosure may occur after the pre-recorded hearing has taken place. This might then require the witness to be recalled or might disadvantage the defendant's case.

Our conclusion and recommendations for reform

- 4.76 There have been significant developments in the years since the Law Commission first considered the matter of pre-recording cross-examination evidence in 1996. There has been positive experience of the practice in Auckland for child witnesses and complainants. There is empirical research and a considerable volume of international commentary that is strongly in favour of it.²⁹⁰ Western Australia in particular has been using the measure for over twenty years, and reports that it has been successful.²⁹¹

287 Letter from Jan Doogue (Chief District Court Judge) to the Law Commission regarding alternative trial processes practice reference (6 October 2015).

288 Letter from Jonathan Temm to the Law Commission regarding alternative trial processes (sexual offences trials) (28 October 2015).

289 Ministry of Justice *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system: Issues Paper* (2010).

290 See Laura Hoyano “Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants” (2015) 2 Crim LR 107 and John Spencer *Review of Public Prosecution Services* (2011).

291 Emily Henderson “Communicative competence? Judges, advocates and intermediaries discuss communication issues in the cross-examination of vulnerable witnesses” (2015) 9 Crim LR 659; Emma Davies and others, above n 256; and Kevin Sleight “Managing Trials for Sexual Offences - A Western Australian Perspective” (paper presented to AIJA Criminal Justice in Australia and New Zealand - Issues and Challenges for Judicial Administration, Sydney, 7 September 2011).

- 4.77 While it will never suit all cases, pre-recording of cross-examination could be of benefit to many complainant witnesses in cases involving sexual violence, as a means of shielding complainants from delay-related harm and with the concomitant benefit of shielding the evidence itself against deterioration by the passage of time.
- 4.78 Recall of witnesses will sometimes be necessary but, with refined processes, the need to recall should be able to be managed and minimised as much as possible. Any increase in costs may be offset by consequential cost savings in other areas, for instance there might be reduced trial time in some cases because the evidence is captured in advance.
- 4.79 As framed our proposal should, we suggest, enable countervailing considerations relating to the fair trial rights of defendants to be taken into account. We therefore recommend that the Evidence Act 2006 include a provision to the effect that the starting point for all complainant witnesses in sexual violence cases is that they may pre-record their cross-examination evidence. This would be subject to an order made by a judge that there are good countervailing reasons why cross-examination is required to occur on the day of trial itself. Countervailing reasons should include those that pertain to the fair trial rights of defendants; so for instance where the judge is not satisfied that criminal disclosure requirements have been met. They could also include where pre-recording of cross-examination would be impractical or excessively expensive.
- 4.80 To give operational effect to this recommendation, we suggest that the Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where applications to undertake pre-recorded cross-examination are made and granted.

RECOMMENDATIONS

- R5 The Evidence Act 2006 should include a provision to the effect that complainant witnesses in sexual violence cases may pre-record their cross-examination evidence in a hearing prior to trial, unless a judge makes an order to the contrary.
- R6 Relevant reasons for making a judicial order should include those that pertain to the fair trial rights of defendants and circumstances where it would be impractical or excessively costly to undertake cross-examination in a pre-recorded hearing before trial.
- R7 The Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where cross-examination is to be done in a pre-recorded hearing before trial.

Early disclosure of defence

- 4.81 An underpinning principle of criminal trial procedure is that a defendant is not required to show their hand (disclose what or how they propose to argue in defence) before trial. This applies equally to sexual violence cases as to all criminal cases. The prosecution, by comparison, must disclose all relevant information to the defence unless there is good reason to withhold it, and is under a number of requirements to disclose certain information about its case.
- 4.82 The Criminal Disclosure Act 2008 does impose some limited disclosure obligations on the defence relating to evidence relied on where the defence intends to run an alibi defence and when the defendant proposes to call an expert witness. Otherwise, there are no legislative

requirements on the defence to identify those aspects of the prosecution case that it intends to challenge or the evidence it intends to lead.

Context to the issue

- 4.83 In 2005, the Law Commission reviewed the disclosure obligations on defendants in criminal trials²⁹² and made a recommendation that all defendants who are proceeding to trial should be required by statute to disclose the issues in dispute.²⁹³ The Commission noted that court practice at the time indicated growing acceptance of the benefits of clarifying the issues to be tried at trial²⁹⁴ and it looked also at defence disclosure precedents overseas.²⁹⁵ It concluded that even in New Zealand's adversarial criminal justice system, in which it might be considered justified to make the prosecution jump through as many "hoops" as possible before trial, "the greater societal interest in efficiently processing criminal cases demands a degree of mutual cooperation".²⁹⁶
- 4.84 A proposal for inclusion of a global requirement of early defence disclosure in all criminal proceedings was subsequently included in the Criminal Procedure (Reform and Modernisation) Bill.²⁹⁷ However, that provision was ultimately removed because of concerns that such a provision might infringe the defendant's right to silence, or might contribute to an erosion of those rights.²⁹⁸ This was despite the Law Commission having concluded that, based on its review of the authorities the right to silence was not engaged by a requirement to disclose one's defence.²⁹⁹

The issue as it applies in this review

- 4.85 We considered in the course of this present review whether to reconsider the disclosure obligations on defendants in cases involving sexual violence specifically. The suggestion was made that requiring the defendant to disclose certain information about the defence before the trial might reduce the time to get to trial. Time would not then need to be spent on, for example, setting out a range of facts or matters which may not be contested at trial.
- 4.86 It was also suggested that introducing disclosure obligations on defendants might have the additional benefit of helping to reduce potential anxiety felt by complainants. This would be because if the defence case was properly advanced then the complainants may be in a better position to give a measured reply to the questions asked in cross-examination.

Consultation and conclusion

- 4.87 Prosecutors with experience in sexual violence cases were somewhat divided as to whether such a proposal could achieve its aims. Some pointed out that the defence in a sexual violence case usually turns on consent. Requiring the defence to disclose that fact in advance would not, it was suggested, add much of value to pre-trial procedures.
- 4.88 For similar reasons, nor would it necessarily greatly assist a complainant to know that the defence to be argued is the defence of consent. Usually that will already be clear from the facts of the alleged offence. Questions were also raised as to who would inform the complainant of

292 Law Commission, above n 238, at 52-58.

293 At R 26.

294 At [170-171].

295 At [172-177].

296 At [190].

297 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2), cl 64.

298 (27 September 2011) 676 NZPD 21418.

299 Law Commission, above n 238, at 180-182.

this, and how it would be explained to them what this actually means for their experience of trial, and whether that would in fact go any way towards improving their experience of trial itself.

- 4.89 Ultimately, our consultation on this point did not suggest that the proposed disclosure requirements would effectively address the issues of delay or of complainant anxiety about cross-examination. We therefore make no recommendation for specific defence disclosure obligations in cases involving sexual violence. However, we suggest that it would be worthwhile examining how much information is being voluntarily disclosed already in case management discussions under the CPA 2011 specifically in sexual violence cases. There might be a case to formalise some of those disclosures in a way that might expedite pre-trial procedures and help limit the parties to the relevant issues at trial. That might also put the judge in a position to better identify and control irrelevant questions asked in cross-examination, which we discuss below.

ISSUE TWO: CROSS-EXAMINATION OF COMPLAINANTS IN CASES INVOLVING SEXUAL VIOLENCE

- 4.90 Cross-examination of witnesses is a fundamental feature of the adversarial trial system. Yet, the indication from submitters to the Issues Paper and people we spoke to in consultation is that, for complainants, the prospect of cross-examination is one of the most feared and anxiety-inducing parts of trial. It seems relatively clear that this particular aspect of the trial affects the decision to report the alleged offending to Police, given the complainant's knowledge that he or she is likely to be cross-examined by defence counsel.

The purpose of cross-examination

- 4.91 Cross-examination affords the defence an opportunity to “put the complainant to proof” on aspects of the complainant's evidence that the defence disputes. In *R v Soutar* the Court of Appeal said that cross-examination “relates to the challenge and confrontation of opposing witnesses under the adversarial system”.³⁰⁰ Each side has a duty to cross-examine witnesses in the circumstances set out in section 92 of the Evidence Act 2006:

92 Cross-examination duties

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may—
 - (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
 - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
 - (c) exclude the contradictory evidence; or
 - (d) make any other order that the Judge considers just.

300 *R v Soutar* [2009] NZCA 207 at [27]. The Court said that it is not, however, an absolute rule.

4.92 The right of the defence to examine witnesses put forth by the prosecution is guaranteed under NZBORA 1990.³⁰¹ However, cross-examination that is designed to humiliate, belittle or break a witness is not permissible.³⁰² Section 85 of the Evidence Act 2006 allows judges to disallow questions or direct witnesses not to answer on certain grounds, and a judge might intervene in cross-examination if he or she considers that the questions asked are “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand”. In full, section 85 provides:

85 Unacceptable questions

- (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
 - (a) the age or maturity of the witness; and
 - (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
 - (c) the linguistic or cultural background or religious beliefs of the witness; and
 - (d) the nature of the proceeding; and
 - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

The nature of the problem with cross-examination in sexual violence cases

4.93 In a sexual violence case, the defence is often one of consent (i.e. that the complainant consented to sex or acted in such a way that the defendant could have reasonably believed they consented). If so, the defence will usually cross-examine the complainant witness on their evidence of absence of consent. Or, the defence might be that the sexual contact never occurred, in which case the complainant will be cross-examined on their evidence that the sexual contact did take place.

4.94 We consulted with Dr Linda Beckett (see paragraph 2.42) who reported numerous examples in her research of defence counsel “rudeness to, and bullying of, complainants”. One prosecutor gave anecdotal evidence of defence counsel using body language and gestures to undermine complainants giving evidence (such as eye rolling towards the jury). Auckland Sexual Abuse HELP submitted on our Issues Paper that “[s]eldom have any of our staff reported a defence counsel being genuinely respectful towards a complainant.”³⁰³ A District Court judge we spoke to said that many questions are asked in an inappropriate fashion, and suggested that judges must be more prepared to apply some kind of filter to the questions asked and to require defence counsel to desist or reframe where necessary.

4.95 However, representatives we spoke to from the Criminal Bar Association did not believe that, in general, defence lawyers question complainants too aggressively. They said:³⁰⁴

301 New Zealand Bill of Rights Act 1990, s 25(f).

302 *R v Thompson* [2006] 2 NZLR 577 (CA) at [68].

303 Law Commission, above n 232, at 275.

304 Letter from the Criminal Bar Association to the Law Commission regarding the alternative trial process reference (9 September 2015).

... it is inevitable that when a witness gives evidence contrary to the other side's case theory that they will find themselves under some form of attack in cross-examination. The purpose of the rules of evidence is to ensure that that attack is focused on what is relevant and in issue.

In some cases there is no avoiding the fact that that questioning attacks the very integrity of the witness. ...it is to be expected that the process of being challenged about evidence will be very difficult for a witness.

- 4.96 Our consultation revealed that supporters of sex offence complainants and experts in the trauma associated with reliving the experience through cross-examination take one view; lawyers who are responsible for defending the accused and who are trained to cross-examine witnesses in an adversarial system take another view. One trial lawyer summed it up to the effect that, quite simply, defence counsel questions are appropriate for lawyers and inappropriate for complainants.
- 4.97 There is also disagreement on whether section 85 of the Evidence Act 2006, which allows judges to disallow inappropriate questions, is being adequately used in sexual violence cases. Some consultees suggested that judges are reluctant to take too interventionist an approach because of the risk of creating grounds on which the case may be appealed.
- 4.98 We did not conduct an empirical study of how frequently section 85 is used in sex offence cases, but we do note one New Zealand study conducted in 2010 which looked at the willingness of judges to intervene where complex questions were asked of children in cross-examination. The study included 16 trials involving children (many of which were for sexual violence)³⁰⁵ and judges intervened 38 times in 10 trials. The authors found that, compared with a 1994 study judges were intervening more often;³⁰⁶ however, they also noted that a number of complex questions were *not* challenged by judges. The number of prosecutor objections had remained relatively steady between the 1994 and the 2010 study.
- 4.99 In this context, we have considered what could be done to ensure that a complainant's disputed evidence can be robustly put to proof by defence counsel, which is a defendant's right and a feature of the existing system, while ameliorating or minimising some of the more distressing consequences for complainants.
- 4.100 We make recommendations for court specialisation in Chapter 5, including a recommendation that judges and prosecutors be required to complete training before they can be involved in sexual violence cases. This may help contribute to a change of culture in the way that sexual violence cases are heard in court. However, we have also considered the options for a specific legislative amendment of section 85 of the Evidence Act 2006.

Amendment of section 85 of the Evidence Act 2006

- 4.101 McDonald and Tinsley in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* recommended that the Evidence Act 2006 should be amended to include a provision that the judge may disallow a question if asked in a way that is unduly intimidating or overbearing, by taking into account the matters in section 85(2).³⁰⁷ They noted calls for greater judicial management of inappropriate cross-examination, and considered such a change may assist such judicial control. They observed that this amendment ought to be a separate section, since the

305 Hanna and others, above n 239, at 88.

306 At 91.

307 Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in McDonald and Tinsley (eds), above n 228, 279 at 317.

inquiry into the extent to which a question may “intimidate” is focused on the person asking the question:³⁰⁸

However, the inquiry as to the extent to which a question may “intimidate” the witness is arguably focused on a different inquiry to the other aspects of s 85, as it is likely to be about the manner or behaviour of the person asking the question, rather than the substance or content of the question itself. A proper question may be asked in an intimidating way; such a question should still be able to be asked but in a different manner.

- 4.102 The word “intimidating” was in fact included in a draft Evidence Code written by the Law Commission some years earlier,³⁰⁹ but when the Evidence Act 2006 was passed, the word was removed from the legislation at select committee stage on the basis that “there are other definitions of unacceptable questioning which protect the interests of the witness, and we consider that grounds to disallow a question because it is intimidating could lead to the loss of relevant information.”³¹⁰
- 4.103 The Law Commission returned to the question of amending section 85 to include a reference to “intimidating” questioning in its 2013 review of the Evidence Act 2006.³¹¹ The Commission ultimately made no recommendation to amend section 85, partly because the Select Committee had seen fit to remove the reference to intimidating questioning, and partly because the Commission was not convinced it would add much to the section.³¹²
- 4.104 The 2013 review of the Evidence Act 2006 was an operational one, not a “first principles” review.³¹³ It was also a general review of the Act’s operation, and the Commission was not in a position to consider the experience of complainants in sexual violence cases and how their experience is shaped or affected by the approach to questioning of defence counsel in cross-examination.
- 4.105 If section 85 is to be considered again, we consider that this should take place as part of a consideration of how that section operates within the Act as a whole, perhaps as part of a future review of the Evidence Act. For the present instance we make no recommendation in respect of section 85.

Use of intermediaries

- 4.106 It has been noted by Hanna and others that the cross-examination of children raises particular issues and that overseas, intermediary models for children and vulnerable witnesses have proven successful.³¹⁴ Intermediaries, as they operate in England and Wales, are third parties who sit alongside the witness to communicate questions to the witness and answers to the court. They do not decide what questions to put. Their role is to assist communication and understanding, not to take on the function of investigator.³¹⁵
- 4.107 Due to time constraints we have not been able to consider a full proposal for intermediaries in sexual violence cases involving children and vulnerable witnesses. With greater consideration,

308 At 317.

309 *Law Commission Evidence: Volume 2* (NZLC R55, 1999) at 208.

310 Evidence Bill 2005 (256-2) (select committee report) at 10.

311 Law Commission, above n 263.

312 At [11.23].

313 At iv.

314 Hanna and others, above n 239.

315 Ministry of Justice *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (London, 2011) at [2.196].

it may however be possible for that to be further explored within a pilot sex offences court (see Chapter 6).

- 4.108 *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* reached the conclusion that further research was required on implementing an intermediary model.³¹⁶ They recommended, however, that an amendment be made to the Evidence Act 2006 in its definition of “communication assistance”. The definition pertains to section 80(3) of the Evidence Act 2006, which provides for the entitlement of a witness in a civil or criminal proceeding to “communication assistance” to permit that witness to give evidence. “Communication assistance” is defined at section 4 as:

... oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who—

- (a) does not have sufficient proficiency in the English language to—
 - (i) understand court proceedings conducted in English; or
 - (ii) give evidence in English; or
- (b) has a communication disability.

- 4.109 As noted by McDonald and Tinsley, however, although a witness in proceedings may struggle to answer questions (for example, because of age) they may not have a “communication disability” as defined in the statute.³¹⁷ They suggested that an amendment could make it clear that communication assistance should be available not only to people who have a “communication disability”, but also to those who may struggle to comprehend questions. We support that recommendation and reproduce it in our Report.

RECOMMENDATION

R8 The definition of “communication assistance” in section 4 of the Evidence Act 2006 should be amended to include assistance for witnesses who do not have a communication disability but who may struggle to comprehend questions (for example, because of age).

ISSUE THREE: AVAILABILITY OF INFORMATION AND SUPPORT FOR COMPLAINANTS

- 4.110 Section 12 of the VRA 2002 states that victims must be given information as soon as practicable on a range of matters. For victims of sexual violence specifically, we know that the provision of advice, information, and support is linked to reduced attrition³¹⁸ and to a more positive victim experience.³¹⁹ However our consultation revealed some issues in this area.

The number of people a complainant must interact with at trial

- 4.111 Complainants in sexual violence cases report feeling overwhelmed, confused, and distressed by the number of people they interact with and to whom they are required to repeat their story from the time of complaint to the conclusion of proceedings. For instance, Crown prosecutors are expected to explain to the victim, or have Police or a victim adviser explain, the court processes and procedures, and are expected to keep the victim informed of what is happening

³¹⁶ Elisabeth McDonald and Yvette Tinsley “Evidence Issues” in McDonald and Tinsley (eds), above n 228, 279 at 312-313.

³¹⁷ At 312-313.

³¹⁸ Jo Lovett and Liz Kelly *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (Child and Woman Abuse Studies Unit, London Metropolitan University, 2009) at 111.

³¹⁹ Amanda Robinson *Independent Sexual Violence Advisors: a process evaluation* (Home Office, 2009).

during the course of the trial.³²⁰ But this is distinct from the role of having direct, day-to-day contact with victims, which is a role usually filled by Police. The key Police contact for the complainant is usually the “officer in charge” of the investigation. But in Crown prosecutions, it is the Crown prosecutor that should ensure the officer or investigator in charge advises victims of the outcome of sentencing and fully explains the reasons for the judge’s decision.

- 4.112 A related problem is the lack of understanding of the nature of the prosecutor’s role. Prosecutors represent the interests of the State, not the victim, but most complainants lack the requisite knowledge and experience of criminal theory and process to appreciate this. As has been noted by one prosecutor:³²¹

Speaking as a prosecutor, we are the community’s advocate and not the complainant’s. We are perceived by the complainants as their lawyer – and we often don’t disabuse them of that because they haven’t got one.

- 4.113 From the complainant’s perspective, it is confusing having to communicate with so many different people simply to stay informed about the progress of the case. The diffusion of the responsibility to keep the complainant informed (between the officer in charge of the case, the prosecutor and an assigned victim adviser) makes it difficult to ensure complainants get all the information they are entitled to. More can be done, we suggest, to streamline the number of people to whom a complainant must talk at trial and to clarify their roles for the benefit not only of complainants but for all the participants in the court system.

The role of the specialist court-based victims’ advisers

- 4.114 In New Zealand, the court-based victims’ advisers work under the Ministry of Justice and are tasked with providing information to victims of criminal offences. There are currently 73 such advisers attached to different base courts throughout the country.³²² Their role includes keeping victims informed about a case, advising them of their rights, helping victims understand and participate in the court system, and organising a safe environment for a victim to appear in court, including consideration of modes of evidence and entry and exit from court buildings to avoid media.
- 4.115 Since 2010, the Ministry of Justice has also employed “specialist” advisers who are intended to assist victims of sexual violence specifically.³²³ There are currently 20 such specialist advisers attached to different courts throughout the country. We are told by the Ministry of Justice that, although they have no specific figures, demand for these advisers is high and anecdotal reports suggest that sexual violence victims are one group that rely heavily on this service.³²⁴
- 4.116 There are, however, issues with the limited scope of the role of specialist victims’ advisers. They are a highly useful resource for victims engaged with the criminal justice system but because they are attached to courts and operate under the auspices of the Ministry of Justice, they are assigned to a case only once charges are filed. Advisers therefore cannot provide support and information at other relevant stages, such as at the time when a complainant is deciding whether to report an incident of sexual violence to Police. Nor is it strictly within the scope of

320 Crown Law *Solicitor-General’s Prosecution Guidelines* (2013) at [5].

321 Elisabeth McDonald “Complainant desire for information, consultation and support: How to respond and who should provide?” in McDonald and Tinsley (eds), above n 228, 168 at 181.

322 Email from Ministry of Justice to Law Commission regarding alternative trial process reference (7 October 2015). Advisers are also able to provide coverage for nearby courts (for instance, an adviser with a base court at Hamilton may also provide coverage to Taumarunui, Te Awamutu, and Te Kuiti).

323 *Government Response to Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (September 2010) at [26].

324 Email from Ministry of Justice to the Law Commission regarding alternative trial process reference (7 October 2015).

their role to, for example, provide follow up support or assistance to victims who decide not to pursue a complaint with Police, or to complainants who do make a complaint but where Police decide not to file charges.

- 4.117 Numerous studies of the needs of victims of sexual violence show the desirability of support that “wraps around” the victim from beginning to end (see Part D). The conventional timelines of a trial, to which the specialist victims’ advisers are currently bound, does not align with the needs of complainants in sexual violence cases.

Recommended reforms

- 4.118 We make two overarching recommendations for reform. The first is to expand the role of the specialist advisers who currently sit within the Ministry of Justice, so that they can support complainants in a more flexible and responsive way. More thought should subsequently be given to establishing a fully independent sexual violence adviser (an “ISVA”) to eventually take over this role. The second recommendation is to ensure that up to date, comprehensive, coherent written information about the trial process is always made available to complainants through the proper channels.

Expansion of the role of the specialist victims’ advisers

- 4.119 One way to ensure victims are adequately informed is for ongoing, centralised support to be provided to victims by way of a single liaison point between the complainant and the criminal justice system, in the form of an “attached advocate”. That person would provide ongoing support and information to complainants according to a timeframe that makes sense to the complainant, rather than one that runs in tandem with the trial.
- 4.120 The Law Commission put such an option forward in its Issues Paper in the form of Independent Sexual Violence Advisers (ISVAs),³²⁵ drawing on the proposal that was first made in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*.³²⁶ The ISVA would be an adviser appointed to a victim from their first point of contact with Police or another agency. The ISVA would provide support and advice until the victim’s complaint was resolved and help give effect to the various rights to information and support encompassed in the VRA 2002.
- 4.121 The ISVA proposal received support from a number of different stakeholders (from the legal and sexual and family violence sectors, other organisations, and individuals). Submitters noted that it could alleviate the burden on the prosecutor thus facilitating the justice process.³²⁷ An ISVA would allow the victim to have greater awareness of what was occurring and to ask questions.
- 4.122 In England, Wales, and Scotland, ISVAs were introduced in 2006.³²⁸ They give practical support and information to victims, liaise with other agencies, and give the victim specific information about criminal justice processes and police investigation. A 2009 review of ISVAs found that their services were successfully meeting “the practical, non-therapeutic support and information needs of victims of rape and sexual violence”.³²⁹
- 4.123 Some submitters to the Law Commission’s Issues Paper expressed reservations as to the resourcing required to implement an ISVA proposal. We would not recommend implementation

325 Law Commission, above n 229, at 41.

326 McDonald “Complainant desire for information, consultation and support: How to respond and who should provide?” in McDonald and Tinsley (eds), above n 228 at 213.

327 Law Commission, above n 232, at [432].

328 Amanda Robinson *Summary: Independent Sexual Violence Advisors - a process evaluation* (Home Office, 2009) at 18.

329 At iii. See further Appendix E.

- of an ISVA proposal if that were to have a negative effect on funding of the sexual violence support sector. We note the submission of the National Collective of Rape Crisis and Related Groups Aotearoa, which said that “the provision of ISVAs should not be at the expense of providing and encouraging the use of other support services such as specialist sexual violence agencies”.³³⁰
- 4.124 In the first instance, we recommend that the role of specialist sexual violence victims’ advisers who sit under the Ministry of Justice should be expanded into a non-legal support role from the earliest point of contact with the system, throughout trial if any, and onwards. They should provide support and information and act as a liaison with Police, court staff, and lawyers. Advisers should not need to be a lawyer or legally trained but do need to be familiar with the court process. However, as noted, their support role should not be limited to the court process.
- 4.125 In order to give effect to this proposal, the Ministry of Justice and the Ministry of Social Development must collaboratively consult on extending the role of the existing advisers as recommended above. Both agencies’ involvement is required to give effect to the combined justice and social support functions of the specialist advisers, and to ensure that their role is not limited to that of advisers who are attached only to courts. To provide proper support to victims of sexual violence specifically, their role needs to go beyond that, and should be reshaped with that objective.
- 4.126 We realise that these advisers would not be “ISVAs” in the sense that they are not independent of government – rather they are employed and funded by government. For some victims, the fact that they are dealing with a support person who is independent of government may be very important, but to the extent this is not possible (for example due to funding) then we would expect the expanded specialist adviser role to be exercised as independently as is reasonably possible and with the interests of the victim uppermost.
- 4.127 We also recommend that further thought should be given to the expertise and specialist knowledge required of people who are recruited to the expanded specialist adviser role. Submitters suggested that they need to be able to communicate and co-ordinate with sexual violence sector service providers³³¹ and may need training on cultural sensitivity, age appropriateness, and disability awareness. We are told that the initial recruitment for the role of specialist sexual violence victims’ adviser, when first created, was done quickly in order to roll out the service as soon as possible.
- 4.128 This proposal may be a less resource-intensive method of introducing some of the benefits of the ISVA model, without having to create an entirely new role. However, we would also recommend that further thought be given to establishing a fully independent adviser to eventually take on this role under the commission entity proposed in Part D of this Report.

Information for complainants

- 4.129 We also recommend that the Ministry of Justice should fund the sexual violence sector to create a comprehensive and detailed guide, written for laypeople, to inform complainants and their support people about the whole trial process in a sex offence case, the ability to give evidence via alternative means, and other important information. Funding should be on an ongoing basis so the guidance can be regularly updated as required.
- 4.130 Some guidance, aimed specifically at complainants, is currently in existence but it is either outdated or does not cover all the areas of the process. The factsheet currently published

³³⁰ Law Commission, above n 232, at [446].

³³¹ At [433].

through the Ministry of Justice Victims Centre does not set out legal information such as what constitutes a sex offence or the criteria that must be met for prosecution.³³² The “Rape Survivors Legal Guide”³³³ does this more comprehensively. It was a local initiative undertaken through the Wellington Community Law Centre, but the terminology has not been updated to reflect the passing of the CPA 2011. The Police publication *Information for Victims of Sexual Assault* deals mainly with the early stages of reporting and investigation.³³⁴

- 4.131 These may be compared to information released by the United Kingdom’s Crown Prosecution Service in its *Policy for Prosecuting Cases of Rape*.³³⁵ That policy is “particularly designed for those who support victims of rape, whether professionally or personally”.³³⁶ It provides a layperson’s explanation of the entire process from initial reporting through to trial. It lets victims and their supporters know what they can expect in terms of the process, obligations and support available from various agencies during each stage of the investigation and prosecution:³³⁷

The CPS is fully committed to taking all practicable steps to help victims and witnesses through the often difficult experience of becoming involved in the criminal justice system.

Initiatives such as special measures, meetings between the CPS and witnesses, and the creation of dedicated Witness Care Units staffed by CPS and police personnel are all designed to increase the confidence of victims within the criminal justice system...

When a witness attends court, the CPS prosecutor presenting the case or the CPS caseworker will introduce themselves and answer any general queries that a witness may have. However, they are not permitted to discuss the detail of the case with a witness.

- 4.132 Our recommendation is that the Ministry of Justice should fund the creation of a guide that is similarly comprehensive, but that the sexual violence sector and the legal community should be tasked with creating the guide itself. It should be written in such a way that it will be accessible, coherent, and will provide answers to the kinds of questions that most commonly arise for complainants who are in court or are contemplating laying a complaint with Police. It should be published both in hard copy and online in a fully accessible format, and translated into languages identified as appropriate. In addition, if the recommendations in Part C are accepted, this guide should include an explanation of what alternatives to trial exist and how to access them.

RECOMMENDATIONS

- R9 The Ministry of Justice should, in collaboration with the Ministry of Social Development, consult on extending the role of the specialist sexual violence victims’ advisers as outlined in paragraphs 4.119 to 4.128 of this Report.

332 Victims Information *For victims of sexual violence: Moving through the criminal justice system - What happens and how to get support* (Ministry of Justice, 2014).

333 Wellington Community Law Centre “Rape Survivors Legal Guide: Navigating the Legal System after Rape” (Wellington, 2011).

334 *Information for Victims of Sexual Assault* (New Zealand Police, 2013).

335 Crown Prosecution Service (UK) *CPS Policy for Prosecuting Cases of Rape* (2012).

336 At [1.1].

337 At [7.20]-[7.21].

R10 The Ministry of Justice should fund the sexual violence sector and the legal community, on an ongoing basis, to create a comprehensive and up-to-date guide for laypeople explaining how sex offences are investigated and prosecuted and providing information regarding any alternatives to a criminal trial that may be available.

ISSUE FOUR: COURT FACILITIES AND PHYSICAL ENVIRONMENT

4.133 The design of the courtroom, in a criminal case, permits a defendant to be put “on trial” in a place that is open to the public in the interests of transparent justice. However, as a place where complainants must come to give intimate evidence of a sexual nature, the courtroom and the court buildings themselves tend to be intimidating and poorly designed. Complainants may have to mingle with defendants and jurors in waiting rooms and, when giving evidence in court, the feeling that they are the ones “on trial” may be exacerbated by their isolation in the courtroom.

Court facilities

4.134 Guidance for prosecutors notes that sex offence complainants may need special arrangements at trial, including an allocated room,³³⁸ but that will depend on the facilities of the particular court. Based on our consultation it seems that New Zealand’s court buildings are lacking in this area, although the Crown is often well provided for. Particularly in the District Courts, complainants may be required to wait in the common waiting areas along with jurors, the defendant, and his or her supporters or family members.

4.135 *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* records the following comment from a lawyer during consultation:³³⁹

I have direct experience of complainants and prosecution witnesses being verbally abused, spat at and harassed when entering court to give evidence. There are often no facilities for a separate entrance for witnesses, and some judges have refused to allow judicial access points to be used because they do not wish their private passageways to be intruded upon by witnesses.

Many witness waiting rooms are appalling places, with no natural light, and no access to refreshments: often witnesses and complainants have to go out for morning tea or lunch, risking running the gauntlet of defendant’s families and supporters. More should be done to make the courthouse experience for complainants and witnesses, and indeed defendants and their witnesses, more civilised.

4.136 This may be compared to specialist court facilities for sexual violence cases in South Africa, for instance, which include separate waiting rooms for complainants, separate entrances, and other amenities to make those complainants feel more comfortable.³⁴⁰

4.137 Ideally, court buildings should include safe parking, a separate entrance and waiting rooms, and facilities and resources to accommodate victims and their support people.³⁴¹ Separate access routes, waiting rooms, and refreshment and toilet facilities are desirable to ensure complainants or witnesses are not brought into contact with the defendant or the defendant’s family or supporters. Undoubtedly, establishing courts with facilities of this kind would go some way

338 Crown Law, above n 257, at [15].

339 Finn, McDonald and Tinsley “Identifying and qualifying the decision-maker: The case for specialisation” in McDonald and Tinsley (eds), above n 228, 221 at 273.

340 Ministerial Advisory Task Team on the adjudication of sexual offence matters *Report on the re-establishment of sexual offences courts* (South Africa Department of Justice, 2013).

341 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (Ministry of Justice, 2009) at [59].

towards minimizing the stress of trial for complainants in sexual violence cases (and would also be of benefit to vulnerable witnesses in other proceedings). However, it would also require significant investment.

- 4.138 In the first instance, we suggest that funding should be focused on the areas of greatest need. We recommend that the Ministry of Justice consider setting aside some funding to develop separate entrances, separate waiting rooms, and separate refreshment facilities in those District Courts which have high volumes of sexual violence cases. Complainants in sexual violence cases, and their supporters, should be entitled to the use of those facilities.
- 4.139 We would also strongly suggest that whenever new court buildings are being constructed or existing buildings refurbished, thought should be given to how those buildings could be designed in a way that permits separation of sexual violence complainants and other vulnerable witnesses from areas used by defendants, jurors, and the general public.
- 4.140 We also believe that a greater focus and effort should be put on ensuring that, wherever reasonably possible, a complainant in a sexual violence case is given access to a separate entrance and separate waiting room and refreshment area at court. To help give effect to this we recommend that the VRA 2002 include a right of complainant witnesses in sexual violence cases to access these facilities where available.

Courtroom configuration

- 4.141 There might be a benefit in enabling judges to reconfigure the courtroom in cases where that is appropriate, for instance so that a complainant in court does not have to give evidence on the stand but can do so from a more comfortable part of the courtroom and one that is more amenable to having support people close by. A judge could direct, for instance, that this should occur where he or she considers it is required to avoid causing unnecessary harm to a complainant witness.

The view of the complainant on a change of court venue

- 4.142 Under section 157 of the CPA 2011, a judge can direct a change of court venue if satisfied that this is required in the interests of justice. The High Court has previously said that one of the relevant considerations to a decision to change venues is the interests of the complainant or of the relatives of a victim.³⁴² However, the section itself is silent as to interests of complainants and witnesses, and consideration of their interests is neither mandatory nor decisive.
- 4.143 This is surprising when considered in light of recent amendments to the VRA 2002, which have put a greater focus on taking account of victims' views or their right to certain information in respect of court proceedings. For example, the Act now requires that for specified offences the victim's view on the release of an accused or offender on bail be ascertained and communicated to the court.³⁴³
- 4.144 *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* makes a recommendation to this effect.³⁴⁴ The position has not changed subsequently. We believe that this remains a desirable measure, and therefore recommend that the CPA 2011 require the court to take account of the views of the victim, as ascertained and conveyed by the prosecutor, when considering a change of venue in cases of sexual violence. We also recommend that the VRA 2002 be amended to include a right of a victim in a sexual violence case to be informed by the

342 *R v Te Kahu* [2006] 1 NZLR 459; *Warren v Police* [1995] 3 NZLR 411 at 414.

343 Victims' Rights Act 2002, s 31.

344 McDonald "Complainant desire for information, consultation and support: How to respond and who should provide?" in McDonald and Tinsley (eds), above n 228, 168 at 181.

prosecutor of an application to change the court venue and to have their views conveyed to the court.

Power of a judge to direct clearance of the court

- 4.145 Currently, section 199 of the CPA 2011 provides that the court *must* be cleared when the complainant gives oral evidence in a sexual violence case (excepting the key participants at trial such as the judge and jury, the defendant, counsel, the officer in charge of the case, and necessary court staff). We have given some thought to whether the Act should also provide for the court to be cleared during other parts of a sexual violence proceeding.
- 4.146 One such time, for example, is sentencing. We were told of one example of a woman who attended the sentencing of her kidnapper and rapist and found that law students were giggling and whispering in court. Also of note is that at sentencing, a victim impact statement may be read, sometimes by the victim him or herself.³⁴⁵ If a record of the effect on the victim of the offence is being read aloud at court, one might expect that the statute would provide for the court to be cleared at that time in the interests of the victim, or at the least that the judge would consider whether that should be done.
- 4.147 Under section 197 of the CPA 2011 the court can make an order to clear the court in any proceeding, where satisfied that this is necessary to avoid one of the outcomes in section 197(2) of the CPA 2011³⁴⁶ and where satisfied that a suppression order would not be sufficient. Thus, a judge has the power to clear the court at all stages of any proceeding, including at all stages of a sexual violence proceeding. But section 197 of the CPA 2011 does not make reference to the risk of harm to complainant witnesses as one of the outcomes that would justify clearing the court. An explicit legislative direction on the potential desirability of clearing the court at *any* stage of a sexual violence proceeding would be beneficial.
- 4.148 As such, we recommend that a provision be included in the CPA 2011 which authorises a judge to consider at any point in a proceeding involving sexual violence, whether closure of the court is required to avoid causing unnecessary harm to a complainant witness. We recommend that an order under that provision should be able to be made subject to an exception for members of the media, as is currently the case for orders to clear the court under the general power contained in section 197 of the CPA 2011.

³⁴⁵ Victims' Rights Act 2002, s 22.

³⁴⁶ The outcomes listed in section 197(2)(a) are:

- (i) undue disruption to the conduct of the proceedings; or
- (ii) prejudicing the security or defence of New Zealand; or
- (iii) real risk of prejudice to a fair trial; or
- (iv) endangering the safety of any person; or
- (v) prejudicing the maintenance of the law, including the prevention, investigation and detection of offences.

RECOMMENDATIONS

- R11 The Ministry of Justice should consider funding the development of separate entrances, separate waiting rooms, and separate refreshment facilities in those District Courts where they would be particularly beneficial. Complainants in sexual violence cases, and their supporters, should be entitled to the use of those facilities.
- R12 The Victims' Rights Act 2002 should include the right of a complainant in a sexual violence case to a separate entrance at court, a separate waiting room, and separate toilet and refreshment facilities wherever reasonably possible.
- R13 Legislation should provide that a judge in a sexual violence case may, either on the application of a party or on his or her own initiative, reconfigure the courtroom in which the case is to be heard to avoid causing unnecessary harm to a complainant witness.
- R14 The Criminal Procedure Act 2011 should require the court to take account of the views of the victim, as ascertained and conveyed by the prosecutor, when considering a change of venue in cases of sexual violence.
- R15 The Victims' Rights Act 2002 should include the right of victims in a sexual violence case to be informed by the prosecutor of an application to change the court venue and to have their views conveyed to the court.
- R16 The Criminal Procedure Act 2011 should authorise a judge to clear the court at any point in a proceeding involving sexual violence, where he or she is of the view that the order is necessary to avoid causing undue emotional distress to a complainant witness. An order under that provision should be able to be made subject to an exception for members of the media.

Chapter 5

Court specialisation for sexual violence cases

INTRODUCTION

- 5.1 In this chapter we discuss the advantages of court specialisation for sexual violence cases and what form that might take in New Zealand. Court specialisation involves applying a specialist approach to a particular area of law, to better address the complexities or sensitivities that area of law raises.
- 5.2 We note that a proposal for a “specialist sexual violence court”, operating post-guilty plea, was put forward in our Issues Paper. The court as proposed was limited to cases where the perpetrator had pleaded guilty and agreed to receive treatment interventions which would be taken into account at sentencing. The proposal received a great deal of support from submitters although some individual submissions raised concern as to resource feasibility of such a court.³⁴⁷ We comment on this proposal in this chapter.
- 5.3 We also look at other possible ways of adopting a specialised approach to the handling of sex offences in the court system: a specialist court designed to reduce secondary victimisation; specially accredited or trained judges to sit on sexual violence cases; and specially accredited or trained lawyers to prosecute or defend sexual violence cases.

THE THEORY AND RATIONALE OF COURT SPECIALISATION

- 5.4 Arguably it is appropriate to deal with an area of the law that raises particular complexities or sensitivities by a specialist court, which can better recognise, and target, those complexities and sensitivities. Participants in the court process can refine their skills by accruing specialist expertise. Court cases can be handled more consistently, more efficiently, or more appropriately, depending on the inherent features of those difficult cases and the barriers that they might otherwise encounter in the courts.³⁴⁸
- 5.5 Court specialisation can be in the form of a separate listing procedure for certain cases or an entirely separate court. It may target a particular area of the law (such as family law) or particular groups of people (such as young people). Judges and lawyers may be required to become specialised by obtaining some form of special designation or accreditation before they can sit in or appear at court.
- 5.6 A considerable amount of court specialisation already occurs both in New Zealand and overseas. Local examples include specialist courts established through statute (such as the Family Court and the Youth Court), and specialist courts established as initiatives of the judiciary (such as the Rangatahi Courts, the Family Violence Court, and the Alcohol and other Drugs Treatment Court). Separate court lists operate within the High Court³⁴⁹ which

³⁴⁷ Law Commission *Alternative Pre-trial and Trial Processes: Summary of Submissions to Consultation* (December 2012).

³⁴⁸ Attorney General's Department of New South Wales *Responding to sexual assault: The way forward* (2005) at 148.

³⁴⁹ The Judicature Modernisation Bill 2013 (178-2) will replace the lists with a panel system: see clause 18.

recognise that certain types of cases warrant separate court management because of their urgent, important, or specialist subject matter, or because groups of cases with similar characteristics can be managed so that those with precedential value are heard first.³⁵⁰

THE CASE FOR COURT SPECIALISATION IN THE AREA OF SEXUAL VIOLENCE

- 5.7 Court specialisation is well established in the New Zealand criminal justice system. Family violence and youth offending are recognised as distinctive social and criminal justice issues and, as noted above, they are dealt with in specialist criminal courts. Different rules and procedures apply in those courts, justified by the unique challenges posed by the relevant field of law.
- 5.8 We discuss in Part A the distinctive impacts of sexual violence on its victims, which means that victims of sexual violence come to the courts with needs of a different order than victims of other kinds of criminality. Court staff may need training and education to ensure complainants feel they are being dealt with sensitively. So too may training and education be required to overcome cultural conceptions or “myths” which tend to accumulate around acts of sexual violence (see Part A). Such myths tend to be culturally and socially ingrained and therefore not well-understood or obvious to those who have no prior knowledge or experience in the area. Judges, lawyers, and court staff that are not aware of such myths and misconceptions are less well-equipped to interact appropriately with victims and may be less able to handle cases in an impartial manner.³⁵¹
- 5.9 The Victorian Law Reform Commission has identified a number of possible advantages of court specialisation in this area, including: recognition of the uniqueness of sex offence cases and sex offence complainants; reductions in delay; an opportunity to develop support services for complainants alongside the criminal justice process; and a symbol that sexual violence is taken seriously by the criminal justice system.³⁵²
- 5.10 Court specialisation provides an opportunity to develop targeted supports for victims that are integrated within the court system.³⁵³ A proposal for court specialisation in the area of sexual violence will fit well with the proposals we make in Part D relating to victim support. Also, in Chapter 4 we recommend extension of the role of the specialist victims’ advisers for sexual violence which currently operate within the New Zealand criminal courts. A more formalised and widespread form of court specialisation could provide opportunities for that adviser role to gain more recognition, to be well supported, and to be thoroughly integrated and recognised within the court system.

Consultation, submissions, and other views

- 5.11 Advocates in the sexual violence area from organisations including Project Restore and HELP emphasised to us the importance of specialisation when dealing with sexual violence, because it is very different in nature to other forms of criminal offending and specialisation builds best practice. They noted that people who are the victims of sexual violence must be interacted with in a very specific, specialised way if they are to feel supported and consequently willing to

350 “High Court lists” Courts of New Zealand < www.courtsofnz.govt.nz > .

351 This may also be a reason for introducing specialisation into the fact-finding part of sexual violence cases – that is, requiring some expert understanding of sexual violence from the person or people who are tasked with determining whether or not the offence occurred, based on the facts. We discuss the arguments for and against changing the fact-finder in sexual violence cases in Chapter 6.

352 Victorian Law Reform Commission *Sexual Offences: Law and Procedure – Final Report* (Victorian Law Reform Commission, Melbourne, 2004) at 171-172.

353 Victorian Law Reform Commission *Sexual Offences: Law and Procedure – Final Report* (Victorian Law Reform Commission, Melbourne, 2004) at 172; Jeremy Finn “Decision-making and decision makers in sexual offence trials: Options for Specialist Sexual Offence Courts, Tribunals of Fact and Giving of Reasons” (2011) 17 *Canta LR* 96; and Australian Law Reform Commission and NSW Law Reform Commission *Family Violence – A National Legal Response* (ALRC Report 114, NSWLRC Report 128, October 2010).

- engage with the criminal justice system. This was a consistent theme of our discussions with those in the sexual support sector.
- 5.12 The Issues Paper had options for specialisation in the form of specialist judges and accredited counsel.³⁵⁴ A number of submitters who commented on those proposals supported the concept and objectives of specialisation,³⁵⁵ although the point was also made that specialisation should not put those judges and counsel at risk of burn out, cynicism or trauma.³⁵⁶
- 5.13 Some people we spoke to and some submitters, however, sounded a note of concern about the potential risks of “treating sexual violence differently” in the court system.
- 5.14 One concern was about creating a perception that sexual violence is less important than other kinds of offending. The submission to our Issues Paper from the Roundtable on Violence against Women noted that they did not wish to see the serious impact of sexual violence minimised through the establishment of specialist courts or to see its seriousness diminished in the eyes of the community.³⁵⁷
- 5.15 This does not appear to have been the case in instances where court specialisation is employed in the area of sexual violence overseas. Nor does it seem to have been the result of a specialised court response to family violence in New Zealand. People we spoke to in the family violence sector suggested that family violence courts need to be better resourced and present all throughout the country, but raised no concerns about the diminishment of seriousness in the eyes of the community as a result of specialist courts, or as a result of family violence having been singled out as an area where a specialist approach is required.
- 5.16 Another potential concern about a specialist court response to sexual violence is the perception of a loss of impartiality or objectivity in how the court deals with certain kinds of criminality.³⁵⁸ This does not appear to have been the experience of sexual violence courts overseas.
- 5.17 Such apprehension may reflect a broader principle of certain criminal law theorists, that we have a generalist criminal law system and it is not appropriate for the law to single out particular areas or groups of people as requiring a specific or different response. Yet we note that specialisation is now a feature of our criminal justice system in various forms. This is demonstrated for instance by the singling out of youth offending for specific treatment in the Youth Court and by the more recent focus on family violence as a social and criminal justice issue and establishment of special courts to address it. We believe there are benefits to be gained from implementing some form of court specialisation for sexual violence.

THE EXPERIENCE OVERSEAS

- 5.18 Court specialisation in the area of sexual violence occurs in a number of overseas jurisdictions and takes a variety of forms.

South Africa

- 5.19 The first specialist court designed to deal specifically with sex offences was established in Wynberg, South Africa in 1993 and several more were subsequently set up throughout the country.

354 Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012), proposals 3D and 3E.

355 Law Commission, above n 347, at [237- 238] and [268].

356 At [239] and [270].

357 At [504].

358 Finn, above n 353, at 102.

- 5.20 The South African sex offence courts took a complainant-focused approach to achieve their objectives. They were established in part to address the very high rate of reported rapes in the country and as a mechanism to reduce the secondary victimisation experienced by victims when they engaged with the criminal justice system.³⁵⁹ In that vein, the first court established at Wynberg had three objectives, which were:³⁶⁰
- to reduce the insensitive treatment of victims in the criminal justice system by following a victim-centred approach;
 - to adopt a coordinated and integrated approach among the various people who dealt with sexual offences; and
 - to improve the investigation and prosecution, as well as the reporting and conviction rates, of sexual offence cases.
- 5.21 After four years in operation, the Wynberg Court was positively evaluated³⁶¹ and the South African Department of Justice was called upon to draft a “Blueprint for Sexual Offences Courts in South Africa” that would permit the national roll-out of these courts.³⁶² By March 2004, 47 such courts had been established. From 2005 the courts declined due to concerns about distribution of court resources. However, a ministerial advisory team has recently recommended that they be re-established.³⁶³

New South Wales, Australia

- 5.22 A specialist court to deal with sexual violence against children was established as a pilot in Sydney, Australia in March 2003, on the back of recommendations made by the Legislative Council Standing Committee on Law and Justice.³⁶⁴
- 5.23 The pilot court was focused on improving the experience for victims. An independent assessment of the court determined that the court’s features were variously aimed at (1) reducing delays, (2) improving the physical environment of the court, or (3) increasing the skills of the legal professionals involved.³⁶⁵ The overall purpose of the pilot project was to assess whether the implemented measures would “improve the experiences of child sexual assault complainants and/or the success rates of prosecutions”.³⁶⁶ However, the evaluation, which was conducted in 2005, found that the specialist court was not wholly successful in achieving its objectives, in part because although judicial and prosecutorial training was available, it was not always taken up.³⁶⁷

359 Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters *Report on the Re-Establishment of Sexual Offences Courts* (Department of Justice and Constitutional Development, 2013) at 17.

360 S Stanton, M Lochrenber and V Mukasa *Improved justice for survivors of sexual violence? Adult survivors’ experiences of the Wynberg Sexual Offences Court and associated services* (Rape Crisis Cape Town, African Gender Institute, Cape Town, 1997) at 148.

361 South African Human Rights Commission *Report on Sexual Offences Against Children: Does the Criminal Justice System Protect Children?* (April 2002) at 29.

362 At 29.

363 Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, above n 359.

364 NSW Standing Committee on Law and Justice *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No. 208, Report 22, 2002) recommendation 43 at [7.38].

365 Judy Cashmore and Lily Trimboli *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005) at ix.

366 NSW Standing Committee on Law and Justice *Report on Child Sexual Assault Prosecutions* (Parliamentary Paper No. 208, Report 22, 2002) at 208.

367 Cashmore and Trimboli, above n 365, at 61.

Victoria, Australia

- 5.24 A special listing procedure for sexual violence cases is currently in operation in Victoria, as a result of recommendations made by the Victorian Law Reform Commission in 2003.³⁶⁸ An evaluation in 2011 reported that those lists were speeding up the preparation of cases and improving the efficiency of court hearings.³⁶⁹

England and Wales

- 5.25 In England and Wales, Crown court judges are required to complete a three-day specialist training course before they are permitted to sit on sexual violence cases, and judges must also be considered suitable to conduct such trials. The completion of the necessary requirements results in the judge obtaining what is colloquially referred to as a “sex offences ticket”.
- 5.26 The original intention was to create a separate court, but it soon became apparent that, given the high volume of sexual violence cases within the courts, it was not possible to staff a separate sex offences court and there would not be enough judges willing to work only in that court.³⁷⁰ The sex offences ticket aims to overcome this problem in that it does not single out a specific pool of judges to only hear sex offences.
- 5.27 Uptake of the sex offences ticket has been widespread. As at 2010, 496 of the 686 circuit judges of England and Wales had the qualification as did approximately 200 part-time judges.³⁷¹

New York

- 5.28 Sexual violence courts of a slightly different kind exist in New York. Those courts are “a bridge over the traditional divide between the criminal justice system and the correctional system”.³⁷² They are involved not only in the prosecution of cases, but also in the ongoing monitoring of compliance with sentences after conviction.³⁷³ Their objective is to increase the accountability of people found guilty of sexual violence offences and to enhance community safety while also protecting the rights of defendants.³⁷⁴
- 5.29 Based on the latest available information, there are currently seven such courts in operation in different counties of New York and they form part of each county’s Supreme Court.³⁷⁵ They are complemented by specialised police units.³⁷⁶ Court personnel receive special training and the courts provide counselling and information to victims.

OPTIONS FOR NEW ZEALAND

- 5.30 We examine three overarching forms of court specialisation as options for the New Zealand criminal jurisdiction: a separate court list for sexual violence cases; an entirely separate court; and specialisation of the judges and lawyers who are involved in sexual violence cases.

368 Victorian Law Reform Commission, above n 352, at 183-185.

369 Department of Justice *Sexual Assault Reform Strategy – Final Evaluation Report* (Department of Justice, Melbourne, 2011) at ii.

370 Record of phone conversation between Joyce Plotnikoff and the Law Commission regarding questioning of vulnerable witnesses (27 February 2015).

371 Vivian Stern *The Stern Review: An Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (UK Home Office, 2010) at 92.

372 Annie Cossins *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee 2010) at [5.106].

373 At [5.111].

374 “Problem-Solving Courts: Sex Offense Courts Mission & Goals” (7 December 2012) < www.nycourts.gov > .

375 “Problem-Solving Courts: Sex Offense Courts Overview” (5 August 2015) < www.nycourts.gov > . The counties are Orange County; Westchester County; Nassau County; Suffolk County; Queens County; Tompkins County; and Oswego County.

376 Cossins, above n 372, at [5.105].

A separate court list for sexual violence cases

- 5.31 Separate court lists enable particular classes of case to be separately managed and overseen. A longstanding example is the Commercial List in the High Court. It has been joined relatively recently by a separate list for judicial review cases (2013), a special list for cases about leaky buildings (2012), and a separate list in the Christchurch High Court for cases arising from the Christchurch earthquake (2012).³⁷⁷ By way of example, the Christchurch list seeks to “promote expedition, to resolve important cases early, to facilitate settlement, and to ensure that the parties get their respective cases ready for hearing in a timely fashion”.³⁷⁸
- 5.32 In *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* a separate list for sexual violence cases was proposed.³⁷⁹ A separate list could ensure those cases are afforded proper priority, that they are scheduled in courtrooms with appropriate facilities and that they are heard by judges with experience and training.
- 5.33 A separate list for sexual violence cases is in operation in Victoria and has led to positive gains in the disposition of sexual violence cases in that jurisdiction.³⁸⁰
- 5.34 We have considered the option of a separate list for sexual violence cases and how it would fit into imminent changes to New Zealand’s court structure as encompassed in the Judicature Modernisation Bill.³⁸¹ The Bill is currently in Parliament and reflects recommendations made in the Law Commission’s 2012 review of the Judicature Act.³⁸² The Bill will introduce some structural changes to the court system, including the ability to establish “panels” in the High Court to hear certain kinds of proceedings³⁸³ and the consolidation of the District Courts into a single court of various divisions.
- 5.35 At the time of writing the Bill had completed its second reading. With these changes on the horizon, we would be hesitant to recommend establishment of a new list for sexual violence cases which might run counter to policy decisions about the structure of the High Court and the District Courts that have already been made by the Government in this area. It might be better, before implementing a new procedure for sexual violence cases in those courts, to wait until the structural changes have had time to “bed in”.
- 5.36 Another possibility, however, is the establishment of a separate court for sexual violence cases. Introduction of a whole new court could run parallel to the modernisation of the existing courts under the Judicature Modernisation Bill. The court could run on its own rules.

A specialist court for sexual violence cases

- 5.37 A specialist court for sexual violence cases could potentially provide the mechanism by which to address a number of the issues faced by complainants in sexual violence cases in New Zealand.
- 5.38 For instance, and purely by way of example, special rules and procedures could apply in the court to expedite the hearing of case, to govern the conduct of cross-examination and who is involved in that cross-examination, and to facilitate the giving of evidence in alternative ways.

377 “High Court lists” Courts of New Zealand < www.courtsofnz.govt.nz > .

378 HD Winkelmann, Chief High Court Judge *Christchurch Earthquake Litigation List Report* (New Zealand High Court, 30 September 2014) at 1.

379 Jeremy Finn, Elisabeth McDonald and Yvette Tinsley “Identifying and qualifying the decision-maker: The case for specialisation” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 272.

380 Note that the original recommendation of the Victorian Law Reform Commission was for a specialist list only for sexual offences against children and people with a cognitive impairment: see Victorian Law Reform Commission, above n 352, at [3.129].

381 Judicature Modernisation Bill 2013 (178-2).

382 Law Commission *Review of Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

383 Judicature Modernisation Bill 2013 (178-2), cl 18(3).

In terms of its rules and procedures, the court would need to operate in a way that gives effect to defendants' fair trial rights and maintains the confidence of the public in the criminal justice system to "do justice" both for perpetrators and victims. The court could occupy a separate physical facility, although the resourcing implications of this would require consideration.

- 5.39 We also wish to address at this point the question of where, within the existing court structure, such a court could sit, since sexual violence cases are currently heard in both the District Courts and the High Court. This does not preclude suggesting a separate court, but we are alive to the issue and have considered how best to address the design and institutional location of a special sexual violence court within our existing court structure. We return to this issue below.
- 5.40 In concluding that a specialist court in some form would be beneficial to the handling of sexual violence cases we note that such a court can be established by organisational decisions and practice, without needing new legislation or a separate jurisdiction.³⁸⁴ It can be implemented on a pilot basis if that were considered desirable. Thus, there are numerous options for design, which we consider in more detail below.
- 5.41 Before moving on from the discussion of specialist courts, however, we wish to draw attention to the distinction between specialist courts per se and what have been called "problem-oriented courts".³⁸⁵

What is a "problem-oriented court"?

- 5.42 The Australian academic Arie Freiberg has written about problem-oriented courts, and has discussed their distinctive features as opposed to specialist courts generally.³⁸⁶ Problem-oriented courts, in essence, adopt a problem-solving approach to offending. This is characterised by:³⁸⁷
- a judicial approach that focuses on the broader issues of improvements in the health and well-being of the offender, of public safety, and of the social problems which may give rise to criminality;
 - ongoing judicial supervision of the offender's progress;
 - integration of service provision within the court and the court building;
 - judges talking directly to defendants as part of the process of making the court more meaningful for participants; and
 - an approach that is not focused on determining guilt or innocence – most problem-oriented courts require a guilty plea or, if they operate pre-plea, an acknowledgement of guilt.
- 5.43 As such Freiberg points out that, while a problem-oriented court can be conceived of as a specialised court, not every specialised court is a problem-oriented court.³⁸⁸
- 5.44 The distinction is important for this project because the proposal in our Issues Paper was for a specialist sexual violence court which would be the means to provide treatment and interventions to perpetrators who plead guilty.³⁸⁹ The proposal departed from the problem-

384 See for example the Alcohol and Other Drug Treatment Court, which is a pilot court operating in the Auckland and Waitakere District Courts. It is "a specialist District Court and operates under general legislation and judicial discretion": Report prepared for the Ministry of Justice *Formative Evaluation of the Alcohol and Other Drug Treatment Court Pilot* (March 2014) at 1.

385 Arie Freiberg "Innovations in the Court System" (Australian Institute of Criminology, paper presented to Crime in Australia, Melbourne, 30 November 2004).

386 See for example Arie Freiberg (2001) "Problem-oriented Courts: Innovative Solutions to Intractable Problems?" 11 *Journal of Judicial Administration* at 8–27.

387 Freiberg, above n 385, at 2–3.

388 Freiberg, above n 385, at 3.

389 Law Commission, above n 354, at 44–47.

oriented court model as described above in some respects (for instance, it did not involve extensive ongoing judicial supervision) but it did share some features of the problem-oriented model. The proposal received significant support from submitters and from consultees who we subsequently talked to in the drafting of this Report. We come back to the possibility of a court of that kind later in this chapter.

Specialisation of judges and counsel

- 5.45 The third form of specialisation assessed in this chapter is training and/or accreditation of judges and counsel in sexual violence cases.

Judges

- 5.46 New judges receive some initial orientation and training when they take up their role through the Institute of Judicial Studies, which also runs ongoing programmes focused on core judicial skills and knowledge for judges from all courts. The Institute also runs programmes focused on specialist skills and knowledge for judges from individual courts, such as the Family Court, covering developments in the law, jurisprudence, and disciplines associated with the work of specialist benches.
- 5.47 There are at present no judges formally specialising in sexual violence cases, nor is there any requirement for judges to undertake specialist education on how to deal with matters arising in sexual violence cases, although it might be covered in continuing legal education.
- 5.48 The proposal in the Issues Paper was for specialist judges who would complete a special education programme relating to sexual violence. That proposal was supported by the New Zealand Law Society, all of the sexual violence sector agencies who commented on it, some other organisations, and a number of individuals.³⁹⁰
- 5.49 Auckland Sexual Abuse HELP supported judicial specialisation, on the grounds that the process of a trial will be more effective with judges who enable complainants to feel comfortable to share their stories, feel respected, listened to, and included in the process. It could also avoid insensitive or inappropriate remarks being made by judges which can be emotionally harmful.³⁹¹
- 5.50 The Criminal Bar Association did not support the proposal for specialisation of judges as it was framed in the Issues Paper, raising the risk of burnout due to stress from specialisation and the risk of judicial cynicism.³⁹²
- 5.51 In subsequent consultation, a proposal for judicial specialisation of some form received support. We received the collated views of over 20 District Court judges who saw training and education as being “of the utmost importance”. They suggested that a number of District Court judges are leaders in these fields with sufficient expertise to contribute to the delivery of those programmes, but emphasised the need for adequate resources.³⁹³ It was also strongly supported by the reference group of experts in criminal law and sexual violence that commented on parts of this Report (that group is discussed in paragraph 1.60).
- 5.52 There is a clear case for judicial specialisation of some kind but a need for careful consideration as to how that is best achieved, given the concern frequently raised by submitters of the risk of

390 At 56-60.

391 Law Commission, above n 347, at [246].

392 At [242].

393 Letter from Jan Doogue (Chief District Court Judge) to Law Commission regarding alternative trial processes practice reference (6 October 2015) at 4.

“judicial burnout”. Below, we set out a proposal for judicial specialisation that takes account of this risk and other relevant considerations (see “Proposal for judicial specialisation”, below).

Counsel

- 5.53 As with judges, at present there is no need for lawyers to have specialist expertise in order to appear in court to prosecute or defend cases involving sexual violence. Generally speaking, any lawyer with a practising certificate may conduct a trial involving sexual violence.
- 5.54 Undesirable outcomes can result from a less experienced or non-specialist prosecutor or defence counsel acting in a sexual violence case. Non-specialist defence counsel are likely to be unaware of the best cross-examination techniques to thoroughly test the evidence, but in a way that is least likely to cause harm or distress to a complainant witness. Specialisation may also be beneficial on the prosecution side; for example, prosecutors in sexual violence cases may need to be particularly alive to the forms of cross-examination that are inappropriate in terms of section 85 of the Evidence Act 2006 in sexual violence cases.
- 5.55 Specialisation of counsel is desirable, either through requiring counsel to become accredited in some fashion, or by encouraging counsel who appear in sexual violence cases to complete special education. But a different approach may be needed for prosecution counsel and for defence counsel, given the need to avoid infringing on the rights of a defendant to consult and instruct a lawyer of their choice under the New Zealand Bill of Rights Act 1990.³⁹⁴ We discuss this further below.

A SPECIALIST SEXUAL VIOLENCE COURT FOR NEW ZEALAND

- 5.56 We reach the conclusion above that a specialist court for sexual violence in some form would be beneficial. In the following paragraphs we deal with how such a court might be designed and might operate in New Zealand. We explain our conclusion that it should begin operation as a pilot, with potential for expansion later on.

Could the court deal with sex offences at High Court level?

- 5.57 We considered whether a new sexual violence court could hear all sexual violence cases, even ones that, because of their seriousness or for other reasons, must be heard in the High Court (see Chapter 3). Although the High Court hears a much smaller number of cases, we note in Chapter 3 that the issues faced by a complainant in the High Court are likely to be similar. According to our consultation, the same issues as to delay, courtroom facilities, communication with the prosecutor and others may arise whether a case is being heard in the High Court or a District Court.
- 5.58 We therefore considered whether it might be possible to establish a unified court that could hear all sexual violence cases, whether they would otherwise have been heard before a District Court or the High Court. There is a court of this kind in the United Kingdom in the form of the Crown Court, in which judges from various court levels can sit. In New Zealand, however, such a court would need to be designed from scratch and might entail considerable amendments to the existing court structure.
- 5.59 Alternatively, the categorisation of sexual violence offences under the Criminal Procedure Act 2011 would need to be revisited, as would the “court of trial” protocol,³⁹⁵ so that all

³⁹⁴ New Zealand Bill of Rights Act 1990, s 24(c).

³⁹⁵ The protocol identifies cases and classes of cases which must always be considered for transfer to the High Court in accordance with section 66 of the Criminal Procedure Act 2011: see Chapter 3.

sexual violence offences could go before a specialist court sitting at District Courts level. That would involve stepping outside the existing categorisation system of criminal offences. It might require wider consultation on how offences involving sexual violence should be categorised and potentially broader questions about the substance of the offences themselves, which is beyond the scope of this review.

- 5.60 Our recommendation, therefore, is that the specialist court should sit at District Courts level. However, the reform proposals we make in Chapter 4 would apply to *all* court cases involving sexual violence, whether in the High Court or the District Courts. It would also be worth contemplating whether the pilot sexual violence court proposed in this chapter could be a “testing ground” for new rules and procedures that, eventually, could be applied to sexual violence cases heard at High Court level.

Should the court be set up through new legislation?

- 5.61 The literature distinguishes between a court established through separate legislation (which we will refer to as a “legislated court”) and a court established by organisational decisions and practice (which we will refer to as a “dedicated court”).³⁹⁶
- 5.62 That distinction is evident in the array of existing New Zealand specialist courts. The Family Court and the Youth Court are both legislated courts; they exercise a separate jurisdiction carved out by statute. The Family Courts Act 1980 provides for the establishment of Family Courts, the appointment of Family Court judges, and rules about how the court should operate. The Children, Young Persons, and their Families Act 1989 performs the same function in respect of the Youth Court.
- 5.63 The Family Violence Courts, by comparison, are dedicated courts, established through organisational decisions and practice. They were created to respond to concerns about growing rates of family violence in New Zealand.³⁹⁷ There are now eight in operation throughout the country.³⁹⁸ They have no statutory basis, and to the extent that different rules and procedures apply in those courts, this is done by the judiciary and the Ministry of Justice implementing special policies and practices for those courts, which enable them to work to meet an identified need.³⁹⁹
- 5.64 Legislated and dedicated courts are both a form of court specialisation and share broadly the same rationale.⁴⁰⁰ A key difference, however, is that a legislated court would operate throughout the country. The Youth Court and Family Courts, for instance, sit at every District Courts location in New Zealand. This brings the advantage of nationwide access, a higher public profile, and more permanence. But it is also more resource-intensive.
- 5.65 Also relevant is the fact that a legislated court at District Courts level would hear all sexual violence cases at District Courts level throughout the country. This would be a large workload, as sexual violence constitutes a significant proportion of the District Courts’ current criminal work. In 2014/2015 (up to 23 October 2015) 429 sex offence trials were heard at the District Court (out of a total of 8,372 criminal trials) and 22 at the High Court (out of a total of 87 criminal trials).⁴⁰¹ A legislated court would, therefore, need to be properly resourced to take on

396 See Attorney General's Department of New South Wales, above n 348, at 148.

397 A Mills and others *Family Violence Courts: A Review of the Literature* (Centre for Mental Health Research, 2013).

398 At the District Courts in Whangarei, Auckland, Waitakere, Manukau, Palmerston North, Porirua, Masterton and Hutt Valley.

399 Family Violence Courts National Operating Guidelines (Ministry of Justice, 1 September 2008).

400 Antony Altbeker *Justice through Specialisation?: The Case of the Specialised Crime Court* (Institute for Security Studies, Pretoria, 2003) at ch 3.

401 Figures provided by the Ministry of Justice (4 November 2015).

- all cases of sexual violence throughout the country. Proper resourcing would be critical to the success of the proposal.
- 5.66 Judicial rostering would need to be carefully managed. Sufficient judges would need to be rostered to the court so that cases are heard in a speedy manner, while also permitting frequent rotation of judges to avoid the risk of “burnout” by sitting in a court that hears only sexual violence cases. This might require judges to be redirected from other District Courts work and could impact on non-sexual violence cases.
- 5.67 A dedicated court could be rolled out progressively, rather than being required to take on the full workload of sexual violence cases throughout the country. It could begin operating in those areas where there is a disproportionately higher incidence of sexual violence and/or where there is particular demand and judicial and community buy-in. The Rangatahi Courts, for example, have been established at 13 locations throughout the country and in each case this is the result of a coordinated effort between the marae that hosts the court, local kaumātua, and Youth and District Court judges.⁴⁰²
- 5.68 We therefore recommend that a specialist sexual violence court be implemented, first as a dedicated pilot court in one or more of the District Courts throughout New Zealand where there is a high concentration of sexual violence cases and also judicial capacity and resourcing to implement the pilot.
- 5.69 We note comments received in the drafting of this Report that this does not go far enough and that a specialist court should be implemented by legislation as a permanent measure. We would support our proposal being used as the platform for further consideration and analysis of the value of a permanent, legislated court. As such, we recommend that after two years’ operation, the pilot court should be formally evaluated and further analysis done of whether a specialist sexual violence court should be legislated to hear all sexual violence cases across the country, potentially as a division of the District Court under changes to be introduced through the Judicature Modernisation Bill.⁴⁰³ Two years would, we think, be sufficient time for the pilot to “bed in”. We also recommend that while an evaluation is underway, further thought be given to what rules of evidence should apply in that legislated court, and who the fact-finder in that court should be.

How should the court operate?

- 5.70 We have not set out in detail the practices or procedures that should be implemented in a specialist sexual violence court. To the extent that the practices and procedures diverge from what happens in the usual criminal courts, this would be achieved by judicially-implemented operational guidelines to enable the court to work in a different way in particular respects.⁴⁰⁴ Those guidelines should be designed by the Ministry of Justice in collaboration with the bench of the District Courts and experts from the sexual violence sector.
- 5.71 In essence, the specialist sexual violence court should seek to, and should be designed to, bring specially trained judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant. The court must facilitate a coordinated and integrated approach among the various people who deal with complainants in sexual violence cases.
- 5.72 The overseas experience with sexual violence courts may be drawn on in designing the court guidelines. We note that in Wynberg, South Africa, the sexual offences courts adopted a

402 Te Ururoa Flavell “Rangatahi Court opens in Tauranga” (press release, 14 March 2015).

403 Judicature Modernisation Bill 2013 (178-2), cl 190.

404 See for example Family Violence Courts National Operating Guidelines, above n 399.

victim-centred approach, with a full-time coordinator appointed to coordinate and provide intermediary, counselling and other appropriate services for victims.⁴⁰⁵ As constituted, the court had two special, allocated prosecutors, with one in charge of investigatory out-of-court matters while the other was in court.⁴⁰⁶ These are features that could be adopted in New Zealand.

- 5.73 We also recommend that administrative staff in the court receive training and education on what constitutes good practice when dealing directly with complainants.

The piloting of new initiatives through the court

- 5.74 In the course of our review we heard about various initiatives and measures that would be worth exploring further and potentially implementing at some stage in the future. The pilot sexual violence court could serve a useful secondary purpose as a forum for further investigation, assessment, and testing of certain reform measures. One such measure could be independent counsel appointed to assist the court, who could be specially trained to do the cross-examination of all witnesses in the proceedings.

RECOMMENDATIONS

- R17 A specialist court for sexual violence should be implemented in New Zealand.
- R18 The specialist court should be implemented first as a pilot in one or more District Courts throughout New Zealand.
- R19 The objectives of the specialist court should be:
- to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant; and
 - to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants in sexual violence cases.
- R20 Administrative staff in the court should receive training and education on what constitutes good practice when dealing directly with complainants.
- R21 The pilot court should be evaluated after two years and consideration should be given to whether a sexual violence court should be legislated as a division of the District Court to hear all sexual violence cases across the country and, if so, what rules of evidence should apply in that court and who the fact-finder should be.

PROPOSAL FOR JUDICIAL SPECIALISATION

- 5.75 We recommend that judicial specialisation should be achieved by requiring judges to hold a designation before they may sit on sexual violence cases. The “ticketing” system of judges in the United Kingdom is similar to this. Combined with cultural change being led from within the judiciary itself, the “ticketing” system is said to have brought about real progress in the United Kingdom.⁴⁰⁷ Although it is a form of specialisation, the requirements to obtain the ticket are not overly onerous and as such most judges have it.

405 Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, above n 359, at 17.

406 At 18.

407 Letter from Emily Henderson to the Law Commission regarding alternative trial processes reference (14 September 2015).

- 5.76 Similarly, we suggest that the requirements to obtain the designation in New Zealand should not be too burdensome so that most judges will feel able to acquire it. There could be two basic preconditions to obtaining the designation: (1) that the judge has completed the necessary education requirements; and (2) that the judge is considered a suitable person to deal with matters of sexual violence by reason of their training, experience and personality.
- 5.77 An approach of this kind is already taken for judges who sit on family law and youth justice proceedings. In each case the designation is conferred by the Chief District Court Judge who is empowered to do so under legislation.⁴⁰⁸ A similar, non-statutory system has been developed internally for the designation of judges to exercise the civil jurisdiction of the District Courts.⁴⁰⁹ Either of these approaches could be readily applied to a designation for judges to sit on sexual violence cases.
- 5.78 We do not recommend that appellate judges who hear sexual violence appeals should be required to be designated. It will not be necessary for judges at appellate level to complete education on directing the jury and controlling cross-examination, because at appellate level there is no cross-examination and no jury.
- 5.79 We recommend that the Institute of Judicial Studies be properly funded to create and deliver judicial education, in consultation with both the judiciary itself and the sexual violence support sector.

RECOMMENDATIONS

- R22 Every District Court and High Court judge who sits on a sexual violence case should be required to have a designation to do so.
- R23 The Institute of Judicial Studies should be funded to develop, in consultation with the judiciary and the sexual violence support sector, specialist training courses for judges on sexual violence cases.

PROPOSALS FOR PROSECUTORIAL SPECIALISATION

- 5.80 We recommend that prosecutorial specialisation be achieved in two ways: (1) through the publication and dissemination of specific guidelines for the prosecution of cases involving sexual violence; and (2) through a requirement for prosecutors in sexual violence cases to have completed special training and education.

Prosecution guidelines dealing specifically with sexual violence cases

- 5.81 New Zealand's guidance for prosecutors is currently generic to all victims and offences.⁴¹⁰ Prosecutors might draw some benefit from more comprehensive guidance that is aimed specifically at prosecuting sexual violence. In particular a comparison may be drawn with the *Solicitor-General's Prosecution Guidelines*, used in New Zealand, and the United Kingdom Crown Prosecution Service's *Legal Guidance: Rape and Sexual Offences*.⁴¹¹

408 Children, Young Persons, and Their Families Act 1989, s 435.

409 Judges of the District Courts of New Zealand "Submission to the Justice and Electoral Committee on the Judicature Modernisation Bill 2013" at [97].

410 Crown Law *Victims of Crime - Guidance for Prosecutors 2014* (2014); Crown Law *Solicitor-General's Prosecution Guidelines* (2013).

411 The Crown Prosecution Service "Legal Guidance: Rape and Sexual Offences" The Crown Prosecution Service < www.cps.gov.uk > .

- 5.82 The latter document provides comprehensive guidance on each step of the case-building and prosecution of rape and other sexual offences, including:
- (a) information on dealing with victims;⁴¹²
 - (b) the need for early discussion about special measures for giving evidence;⁴¹³
 - (c) the need to do a pre-court familiarisation visit;⁴¹⁴
 - (d) how to make best use of medical evidence at trial, including that the doctor who carried out the examination should be called as a live witness at the trial unless there are reasons not to do so, and that prosecutors must ensure that doctors acting on behalf of the Crown “are at least as well prepared as those acting for the defence to ensure equality of arms”;⁴¹⁵ and
 - (e) directing prosecutors to be alert to any technical issues with video evidence including poor sound and picture quality and advice on how those can be improved.⁴¹⁶
- 5.83 The United Kingdom guidance demonstrates that significant thought has gone into both the effective prosecution of sexual violence cases and the compassionate treatment of complainants. Going through a similar exercise in New Zealand may be beneficial. We therefore recommend that specific prosecutorial guidelines be implemented in New Zealand and suggest that the United Kingdom guidelines could be a useful resource in that exercise.
- 5.84 We note that, in order to give full and proper effect to more comprehensive guidelines, Crown solicitors must have sufficient resources to train their staff on those guidelines and, if necessary, to enable those staff to devote extra time and expertise to ensure those guidelines are properly followed.

RECOMMENDATION

R24 The Solicitor-General should be resourced to publish specific guidelines for the prosecution of cases involving sexual violence.

SPECIALISATION OR ACCREDITATION OF COUNSEL IN SEXUAL VIOLENCE CASES

- 5.85 In the Issues Paper for this review, the Law Commission suggested that prosecution and defence counsel should both be required to be “accredited” before they can take on sexual violence cases.⁴¹⁷ In other words, training, education and potentially other mandatory requirements would need to be completed before a prosecutor or a defence lawyer could take on a case.
- 5.86 We consider the issue of accreditation for prosecutors and defence counsel separately. We note though that the proposal for prosecutor and defence specialisation in the Issues Paper was supported by a number of submitters including all sexual violence sector agencies who commented on it.⁴¹⁸ The New Zealand Law Society supported specialisation (although not in the form proposed in the Issues Paper).⁴¹⁹ Subsequently, most lawyers we spoke to were amenable to training and education sessions, if they were properly resourced to complete them. Specialists

412 At ch 5.

413 At ch 6.

414 At ch 5.

415 At ch 9.

416 At ch 6.

417 Law Commission, above n 354, proposal 3E.

418 Law Commission, above n 347, at 62–63.

419 Letter from the New Zealand Law Society to the Law Commission regarding alternative trial processes Issues Paper (3 May 2012).

in the sexual violence field were very supportive of some degree of training and education for counsel, noting that some degree of education and training is a pre-requisite to lawyers fully understanding the nature of secondary victimisation (of complainants of sexual violence offences) and how their conduct can exacerbate or reduce the risk of secondary victimisation.

Accreditation for prosecutors

- 5.87 Our consultation process suggested variations in current prosecution practice across the country which might be brought into line through a requirement for prosecutors to be accredited.
- 5.88 For instance, it seems that different prosecutors hold different views as to how much one may appropriately explain to a complainant about what they can expect to happen at trial. Some may give the complainant an idea of what kinds of questions they will be asked at trial (without telling them how they should answer those questions). Others see that as falling outside the proper role of the prosecutor and at risk of being perceived as “briefing” the complainant on how to give their evidence. “Briefing” a complainant would conflict with the prosecutorial duty to present the prosecution case “fully and fairly and with professional detachment”.⁴²⁰ Striking the right balance is difficult and practice, it seems, varies throughout the country.
- 5.89 Practice may also vary in terms of the seniority and experience of lawyers who prosecute sex offences. In some areas of the country there are de facto specialist prosecutors who handle all of the sexual offence trials in their region and some providers (such as the Auckland branch of Doctors for Sexual Abuse Care) offer training to prosecutors in certain areas of the country.⁴²¹ One law firm we spoke to said they would not assign an inexperienced prosecutor to a sex offence case. But some in the sector said they had come across relatively junior counsel prosecuting sexual violence cases (although not necessarily rape or sexual violation cases) on their own.
- 5.90 These variations in practice are not beneficial to complainants or to the effective prosecution of sexual violence cases. In our view they justify the introduction of a requirement for prosecutors in sexual violence cases to be accredited (to have completed appropriate training and education on the prosecution of sexual violence cases and to know how to deal with complainants in that process). This will help introduce consistency and may also facilitate the sharing of ideas and good practice approaches between prosecutors.

RECOMMENDATION

R25 Every prosecutor who appears in a sexual violence case, whether in the High Court or the District Courts, should be required to be accredited (i.e., to have completed appropriate training and education on the prosecution of sexual violence cases and to know how to deal with complainants in that process).

Proposals for defence counsel

- 5.91 There are arguments in favour of requiring defence counsel to also complete training and education requirements before they can appear in sexual violence cases. Doctors for Sexual Abuse Care submitted, for example, that lawyers who are not familiar or comfortable with the

420 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 13.12.

421 Law Commission, above n 347, at [277].

complexities of sex offence trials can present evidence in an inappropriate way, and can be unduly aggressive or oppressive in their manner.⁴²²

- 5.92 However, care must be taken with any proposal to require accreditation of defence counsel given the right of defendants to counsel of their choosing.⁴²³ One might argue that the right is infringed upon if the defendant is limited to a pool of defence lawyers who have completed the necessary requirements to become accredited to appear in sexual violence cases.
- 5.93 As such, we have considered two possible mechanisms by which defence counsel in sexual violence cases could be encouraged to complete training and education requirements, without making those a necessary precondition to appearing as defence counsel.
- 5.94 The Legal Services (Quality Assurance) Regulations 2011 set out the experience and competence requirements for lawyers appearing in criminal matters on a legal-aid basis.⁴²⁴ The schedule to the Regulations set out experience and competence requirements for criminal matters in a generic way (with approval levels from one to four and the list of requirements that must be met before each approval level can be obtained). The schedule also sets out specific competence requirements before a legal-aid funded lawyer can act in certain other proceedings, including: family law proceedings; mental health proceedings; and refugee proceedings.
- 5.95 The vast majority of lawyers in sexual violence cases will be funded through legal aid. As such, the Regulations could include a requirement to reach a specific level of competency in criminal proceedings that involve sexual violence, and we make a recommendation to this effect.
- 5.96 We also note that, since 2013, all lawyers must complete continuing professional development (CPD) in order to hold a practising certificate.⁴²⁵ Defence counsel who wish to appear in sexual violence cases could be expected to incorporate training or development into their CPD plan and record which is specific to sexual violence cases.

RECOMMENDATION

R26 The Legal Services (Quality Assurance) Regulations 2011 should include experience and competence requirements applicable to defence counsel who appear in sexual violence trials on a legal-aid basis.

ISSUES PAPER PROPOSAL FOR A SPECIALIST SEXUAL VIOLENCE COURT OPERATING POST GUILTY-PLEA

- 5.97 A proposal was made in the Issues Paper for a specialist sexual violence court to which a perpetrator who pleaded guilty to a sex offence could be referred. The key features of that court are summarised below, and are more fully set out in the Issues Paper:⁴²⁶
- Following entry of a guilty plea in the normal manner, a court would refer cases that appeared to meet the governing criteria to the specialist court for consideration.
 - Once referred to the specialist court, the judge would remand the case for a full assessment by a team of specialists to ensure its suitability.

422 At [277].

423 New Zealand Bill of Rights Act 1990, s 24.

424 Legal Services (Quality Assurance) Regulations 2011, schedule “Experience and competence requirements”.

425 Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013.

426 Law Commission, above n 354, proposal 5.

- Any cases not meeting the criteria or otherwise being found unsuitable would progress to sentencing in the usual way.
- After assessment, a report addressing the suitability of the case for the specialist court process and the development of an intervention plan would be delivered to the court, with an intervention plan comprising a tailored set of actions for the individual to complete, including treatment, education, reparations, apologies or other actions as appropriate.
- If the specialist court judge was satisfied on the basis of the report that the case was suitable, the offender would be offered entry into the court and asked to commit to the proposed intervention plan.
- Supervision of the intervention would be the responsibility of a specialist team, with the specialist court judge being able to seek periodic reports on the offender's progress and bring the offender back before the court if necessary.
- If the offender was declined entry to the specialist court or refused to commit to the intervention (or entered but later withdrew the agreement to participate), the case would proceed to sentencing in the usual manner.
- At the conclusion of the intervention, the offender would receive a sentence that would reflect his or her participation in and progress after the intervention, which may or may not include imprisonment.

5.98 This proposal was very strongly supported by submitters to the Issues Paper⁴²⁷ and in subsequent consultation it also received support from a number of quarters. Submitters suggested it could address a range of problems, for example:⁴²⁸

- it could remove or mitigate the incentive to plead “not guilty” in sexual violence cases, by encouraging acceptance of responsibility and participation in treatment and providing greater flexibility in sentencing where appropriate;
- it could help increase reporting of sexual violence, since imprisonment would not be the only possible outcome of a conviction; and
- it could reduce reoffending by the provision of treatment.

5.99 To these arguments we would add another, which relates to our proposal in Part C of this Report. In Part C we recommend a process outside the criminal justice system that victims and perpetrators could go through, which would not result in conviction but might involve a perpetrator making certain undertakings (for example, to complete treatment for harmful sexual behaviours). But the gap between an outcome of this kind and a criminal trial (conviction and imprisonment) could be viewed as disproportionately large. If a treatment court were also in operation, that could provide a middle-ground. For instance, an outcome of the treatment court could be a criminal conviction but with a suspended sentence and no imprisonment if treatment is completed. Put another way, the treatment court would add to the “suite” of options available to deal with an act or acts of sexual violence, that goes from least interventionist (an apology offered as part of an alternative process) to most interventionist (imprisonment) with a treatment court option in the middle.

5.100 However, what also became apparent during consultation was the degree of extra research required to give effect to this proposal. One reason is because the design of the court, and

427 Law Commission, above n 347, at 99-105.

428 At 99.

whether it would address the problems raised by submitters, relies on empirical evidence that has not yet been gathered or is not yet available.

- 5.101 To discuss these matters we met with researcher Danica McGovern who is currently completing a PhD thesis that examines what would be required to implement a model similar to that proposed in the Issues Paper.⁴²⁹ The initial intention was to develop a model for a “treatment track” for those who plead guilty to sexual violence offences which could be implemented in New Zealand, but it became clear in the early stages of the research that much more work was needed before such a model could be developed or its feasibility evaluated. As such, the thesis will examine three areas of further work required: the aims of a treatment track; its theoretical framework; and the development of a risk assessment framework for use in that context.⁴³⁰
- 5.102 Therefore we note the support expressed for the proposal and its potential to address the problems above, depending on how it is designed. We note the need for additional research to be undertaken before those design questions can be resolved. We recommend that the Government consider the desirability of funding a long-term research project to examine these matters.

RECOMMENDATION

- R27 The Government should consider the desirability of funding a long-term research project to examine the feasibility and design of a specialist sexual violence court to operate post-guilty plea, in the form proposed in the Law Commission paper *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012).

⁴²⁹ The model explored in the thesis differs in some respects from the model outlined in the Issues Paper, but both would rely on evidence and research of a similar nature to support their design and implementation.

⁴³⁰ Email correspondence between Danica McGovern and the Law Commission (9 November 2015). The thesis is due to be completed at the end of 2016.

Chapter 6

The fact-finder in sexual violence cases

INTRODUCTION

- 6.1 This chapter considers whether trial by jury should continue to be the model of fact-finding in sexual violence cases and, if there are justifiable reasons for moving away from that model, what it could be replaced with.
- 6.2 Most sexual violence cases are tried by jury, on the election of the defendant. The right to be tried by jury for any criminal case carrying a penalty of more than two years' imprisonment is guaranteed by the New Zealand Bill of Rights Act 1990 (NZBORA 1990). Trial by jury may also be conceived of as a fundamental feature of our adversarial criminal justice system. Any proposal to limit the right to trial by jury for a specific class of criminal cases needs careful consideration.

THE FUNCTION OF THE JURY IN A CRIMINAL TRIAL

- 6.3 The function of the jury in a criminal trial is 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 “fact-finder”. When fulfilling this function it is expected that the “diversity of knowledge, perspectives and personal experiences of a representative jury enhances the collective competency of the jury as fact-finder”.⁴³¹ In addition, juries:⁴³²
- act as an expression of democratic involvement in the criminal justice system and provide a means for prevailing community values to be expressed in that system;
 - safeguard against arbitrary or oppressive government by acting as a check on potential abuses of power, and helping to promote public confidence in the system; and
 - provide a tool for educating the public by using the jury as a mouthpiece to connect the community to the courts.
- 6.4 A jury is not an expert in the law or in the conduct being tried before the court. Their function is to make a determination, from a layperson's perspective, on whether or not the conduct in question has been established to the criminal standard of proof. Juries are not to apply moral judgments to the people involved, but jurors are to bring their collective life experience and common sense to bear on the facts of the case before them.
- 6.5 The juror decision-making model is a core feature of common law (that is, English-based) criminal jurisdictions, which are adversarial in nature and rely on a “battle” to get to the truth between defence and prosecution, conducted in front of a jury. This is not the case in civil law European jurisdictions, which apply an inquisitorial model of decision-making to determine whether a criminal offence has occurred.⁴³³

431 Law Commission *Juries in Criminal Trials Part One: A discussion paper* (NZLC PP32, 1998) at [24].

432 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) and Law Commission, above n 431.

433 See Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012), appendix 1.

- 6.6 Criticisms have been levelled at the jury-based model of fact-finding. These include that many juries are not truly representative of society, that jurors may allow themselves to be improperly influenced by things that are not relevant to the trial and that some cases are too detailed or specialised for lay jurors.⁴³⁴ The Criminal Procedure Act 2011 (CPA 2011) enables trial by judge-alone in cases likely to be long and complex (except where the offence has a maximum penalty of imprisonment for life or 14 years or more).⁴³⁵
- 6.7 Despite any criticisms, trial by jury remains a core feature of the New Zealand criminal justice system. It has been described as “central in New Zealand law”.⁴³⁶

THE RIGHT TO TRIAL BY JURY IN NEW ZEALAND

- 6.8 In New Zealand, the right to trial by jury is guaranteed by section 24(e) of the NZBORA 1990 for offences carrying more than two years’ imprisonment. It is one of the criminal procedural protections that guard a defendant against the “overwhelming power” of the State in a criminal prosecution.⁴³⁷ The New Zealand Supreme Court has likewise noted the weight to be given to the right to trial by jury.⁴³⁸
- 6.9 The CPA 2011 has reduced the number of criminal offences that are automatically eligible to be tried by jury. Trial by jury is the default position only in respect of category 4 offences (which include such things as murder, manslaughter, treason, corruption and so on). For category 3 offences the defendant can elect to be tried by jury, but the default position is trial by judge-alone (see Chapter 3).⁴³⁹ Previously the right to trial by jury in the NZBORA 1990 extended to all offences carrying a penalty of three months’ imprisonment or more; it is now limited to offences carrying a penalty of two years’ imprisonment or more.⁴⁴⁰
- 6.10 Almost all sexual violence offences on the statute book fall into category 3 (with the exception of a few minor category 2 offences). As such, the position under the CPA 2011 is that most sexual violence offences are tried by judge-alone unless the defendant elects trial by jury. The majority of sexual violence offences carry penalties of two years’ imprisonment or more and so will engage the right to trial by jury in section 24(e) of the NZBORA 1990.

JUROR DECISION-MAKING IN SEXUAL VIOLENCE CASES: THE ISSUES

- 6.11 In the following paragraphs we assess the issues with relying on juries as fact-finders in sexual violence cases. These fall into two broad categories:⁴⁴¹
- questions about the information and experience on which jurors tend to rely when making decisions in sexual violence cases (which may be called the “decision-making” problem); and
 - the harmful effect on complainants of the presence of the jury at trial (which may be called the “harm” problem).

434 See Law Commission *Juries in Criminal Trials*, above n 432. Issues relating to jurors accessing and sharing extraneous material with other jurors are also covered in Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at ch 5.

435 Criminal Procedure Act 2011, s 102.

436 *Siemer v Siemer* [2004] 1 AC 1118, 1131-1132 (HL).

437 Note that it has been argued that the right to a fair trial in New Zealand does not include the right to elect a jury in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington 2005) at 900.

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

439 Criminal Procedure Act 2011, s 73.

440 See *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the proposed amendment to s 24(e) of the New Zealand Bill of Rights Act 1990 in the Criminal Procedure (Reform and Modernisation) Bill* (2010).

441 This is also the division made by the Law Commission in *Juries in Criminal Trials*, above n 432 at [120].

The decision-making problem

- 6.12 The field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual violence: see Chapter 1. Although the jury is intended to apply combined common sense and life experience to ascertain the facts in a criminal case, one might suggest this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings.
- 6.13 As such, the role of fact-finder might be better filled by someone with prior training and education in the particularities of sexual violence. In this vein, in a previous Law Commission review of juries generally, one submitter said, speaking particularly to the use of juries in sexual violence cases that:⁴⁴²
- experts who have a thorough knowledge of rape trauma would understand aspects such as shock, impact, further contact with rapist etc. ... Only those who are thoroughly educated in the area of rape trauma are properly equipped to make informed judgements – a jury is not.
- 6.14 The dominant model for understanding juror decision-making generally is that jurors create a narrative structure – a “story” – to interpret and measure the evidence presented to them at trial.⁴⁴³ However, different jurors construct different stories based on the same evidence, which researchers have concluded is the result of jurors’ different experiences and beliefs about society – their “social world” knowledge.⁴⁴⁴ This has ramifications for decision-making in sexual violence cases, because it has been established that a layperson’s “social world” knowledge about sexual violence – where it occurs, and against whom, and how the perpetrator and victim react to it – is frequently wrong or misconstrued. It does not align with established research into sexual violence and sometimes runs directly counter to it. Thus, assuming that a juror relies heavily on his or her social world knowledge to construct a narrative structure and understanding of a sexual violence case, the decision that a juror reaches in that case may be based on knowledge that is fundamentally incorrect.⁴⁴⁵
- 6.15 These issues should not be overstated. There is research evidence that jurors are generally extremely conscientious in approaching their task and, to the extent that individuals bring prejudices and myths to the jury room, these may be counteracted or at least mitigated by the collective jury process.⁴⁴⁶
- 6.16 However, the core problem with jurors deciding sexual violence cases is not necessarily one of individual juror prejudice. In one jury study it was noted that in some of the sexual violence trials, individual male jurors expressed “strongly sexist” views either about their fellow jurors or about the case itself.⁴⁴⁷ Such views, when they are presented by individual jurors, may be able to be overcome in the process of collective decision-making that a jury goes through, and in the case referred to, that is what happened: the rest of the jury over-rode those views and the defendant was convicted. But the problem is not necessarily individual juror prejudice or

442 At [123].

443 W Lance Bennett “Storytelling in criminal trials: A model of social judgement” (1978) 64 *Quarterly Journal of Speech* 1; Nancy Pennington and Reid Hastie “A cognitive theory of juror decision-making: The story model” (1991) 13 *Cardozo L Review* 519.

444 Michael P Weinstock and Robin A Flaton “Evidence Coverage and Argument Skills: Cognitive Factors in a Juror’s Verdict Choice” (2004) 17 *Journal of Behavioural Decision Making* 191 at 192; Nancy Pennington and Reid Hastie “A cognitive theory of juror decision-making: The story model” (1991) 13 *Cardozo L Review* 519.

445 Jeremy Finn, Elisabeth McDonald and Yvette Tinsley “Identifying and qualifying the decision-maker: The case for specialisation” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 228.

446 Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP 37(2), 1999).

447 As reported in Law Commission *Juries in Criminal Trials*, above n 432, at [122].

sexist views; rather, it is the idea that “common sense” and experience can be applied to the facts of a specific form of criminal offending which, because of its distinctive features,⁴⁴⁸ is at risk of illegitimate reasoning and incorrect decision-making when handled by people who have no prior expertise in the area.

- 6.17 The Australian Institute of Criminology carried out two studies of juror decision-making in sexual violence cases in 2009. The studies revealed that jurors had pre-existing attitudes about sexual violence that they brought to trial; that these influenced their views on whether the complainant was credible and whether the defendant was guilty; and that those pre-existing attitudes were *more* influential than the facts of the cases and the manner in which evidence was given in the cases.⁴⁴⁹
- 6.18 Previous research also suggests that jurors sometimes do not feel comfortable convicting in the absence of “hard” evidence, even if they are satisfied that a complainant is telling the truth and feel sure of the guilt of the accused. Research that the Law Commission was involved in as part of its *Juries* project in 1999 indicated that some jurors felt that a charge could not be “proved” in the absence of tangible evidence to verify their view.⁴⁵⁰ While “hard” evidence can quite legitimately be expected to make a case more robust, that has ramifications for sexual violence cases where there is often no conclusive evidence of physical harm or injury resulting from the incident.
- 6.19 A study by Blackwell and Seymour looked at trial outcomes in 137 trials related to charges of sexual violence against children.⁴⁵¹ They found that the three individual variables most predictive of conviction in those cases were propensity evidence, evidence from an actual witness to the offending, and positive medical evidence or DNA.⁴⁵² The authors concluded that, given the particular characteristics of sexual violence cases and that corroborative evidence is usually absent, a more inquisitorial approach with specialist courts and judges might be required, at least in cases of sexual violence against children.⁴⁵³
- 6.20 Another associated problem is that 12 individual jurors in a sexual violence case may find it more difficult to come to a verdict if they are affected by cultural misconceptions about sexual violence or if they are apprehensive about convicting in the absence of conclusive physical evidence, even if they are satisfied that the requirements of the offence are made out. “Hung” juries may be more common in sexual violence cases. A hung jury usually results in a retrial and retrials put complainants at significant risk of re-traumatisation because they are required to go through the whole process again.
- 6.21 One senior prosecutor we spoke to said that they are “reasonably often” in the position of asking complainants to go through trial again because a jury has been unable to agree and a retrial has been ordered. Figures from the Ministry of Justice do suggest that retrials are more common for cases involving sexual violence than for cases involving other kinds of criminal offending. In 2014/2015, 37 of the trials in the District Courts that involved sexual violence were retrials. Expressed as a percentage of the total number of cases of sexual violence heard in the District Courts that year, this amounts to eight per cent. In contrast, only 0.8 per cent of the total number of criminal trials heard in the District Courts that year were retrials.

448 See Chapter 1.

449 Natalie Taylor “Juror attitudes and biases in sexual assault cases” (2007) Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice 344.

450 Law Commission *Juries in Criminal Trials*, above n 432, at [3.23].

451 Suzanne Blackwell and Fred Seymour “Prediction of Jury Verdicts in Child Sexual Assault Trials” (2014) 21 *Psychiatry, Psychology and Law* 567.

452 At 567.

453 At 568.

The harm problem

- 6.22 The second main problem in sexual violence cases is the “harm” problem. The need to give evidence of the alleged sexual violence in front of a group of 12 strangers may put complainants at risk of harm. It can be expected that it is often more difficult to give evidence before a jury than before a single person who is acting as a fact-finder (such as a judge). In small towns, it is possible the complainant could cross paths with jurors in the future. One consequence may be that the complainant’s anxiety at having to give evidence may affect the fullness of their disclosure and therefore the quality of their evidence.
- 6.23 Another concern goes to the nature of the questions asked by defence lawyers in the presence of the jury. Questions may draw on rape myths and stereotypes, seeking to engage juror misconceptions and “social world” knowledge about how victims or perpetrators of sex offences *should* behave, but which is usually not borne out by the research. The presence of the jury may exacerbate the problem because jurors can bring pre-existing, misconstrued knowledge about sexual violence into the court room, which defence lawyers can use to benefit their client’s case.
- 6.24 We observe in Chapter 4 that cross-examination is a fundamental feature of the criminal trial in New Zealand, but when conducted in front of a jury it can encourage the “theatre” of the criminal trial, in a way that causes harm to a complainant which is beyond what is necessary in the process of testing his or her evidence.

Views of submitters and consultees

- 6.25 Submissions to the Issues Paper made various arguments against the current jury system. Some individual submitters expressed their lack of faith in juries to come to the right decision to the effect that “there is no place for juries in a creditable justice system”.⁴⁵⁴
- 6.26 Some submitters, though, had faith in the jury to come to the right decision. One submitter who had acted as a lawyer on or observed a number of sexual violence cases said:⁴⁵⁵
- I cannot recall a trial where I have walked away from the Courtroom after a not guilty verdict with misgivings about the verdict. I have never felt that I had been party to a miscarriage of justice in that a guilty person has been acquitted... almost always the jury’s decision has been a sensible one.
- 6.27 Submitters made other arguments against the current jury system including that:⁴⁵⁶
- Modern trials can be highly complex and lengthy, and use a great deal of resources for jurors, staff, and judges.
 - Jury composition is based on an “arbitrary lottery” and members are not considered representative of the community – many professional people excuse themselves due to work commitments leaving mainly unemployed or retired people to act as jurors so that the modern jury no longer constitutes trial by one’s peers.
 - Some jurors have difficulties evaluating the evidence and/or maintaining objectivity and jurors do not have the skills or experience in estimating or evaluating demeanour, inference, probability, cumulative facts and other abstract issues involved in a trial.
- 6.28 The New Zealand Law Society and the Criminal Bar Association, in their submissions on the Issues Paper, did not support a move away from the jury model for a number of reasons, including that citizens should be able to sit on juries and participate in the criminal justice

454 Law Commission *Alternative Pre-trial and Trial Processes: Summary of Submissions to Consultation* (December 2012) at [172].

455 Submission to Law Commission regarding the alternative pre-trial and trial processes Issues Paper (2012).

456 Law Commission, above n 454, at [178].

system.⁴⁵⁷ The Public Defence Service communicated a similar view, noting that “juries allow for public involvement in the criminal justice system, creating confidence as a result”. They warned against “assuming” that juries are vulnerable to misconceptions about sexual violence or are incapable of following directions regarding their task.⁴⁵⁸

- 6.29 They also noted that “[t]o find that jurors’ decision-making is suspect in sexual trials would necessarily undermine the use of juries in all trials”.⁴⁵⁹ We do not think this is necessarily the case given that certain features of sexual violence that make it less amenable to trial by jury are not inherent in all forms of criminal offending.
- 6.30 The reference group with whom we corresponded during the drafting of this Report (see paragraph 1.60) said that the framework of the jury system and the requirements it imposes are the cause of most of the damage done to complainants in the current trial process. The jury is the source of “the essence of the trial problem and poor complainant experience.”⁴⁶⁰
- 6.31 That reference group also noted the disadvantages of the lay juror model in terms of resourcing, time, and legal complexity. If the current jury model were changed, that would significantly cut down time and resources required to be spent on admissibility of evidence, modes of evidence, propensity and veracity evidence, counter-intuitive evidence, and judicial directions required for a lay jury of 12 – with this workload being repeated in every jury trial.⁴⁶¹ The same could be said of all jury trials, but for a trial involving sexual violence, speedy case disposal is likely to be particularly desirable for the complainant (see Chapter 4).

Conclusion

- 6.32 The nature of sexual violence is such that, as a form of criminal offending, it is not well suited to fact-finding by a jury comprised of 12 laypersons. Both the decision-making problem and the harm problem need to be addressed through legal and policy reform of some kind.
- 6.33 A number of people consulted on this issue believed that the only effective reform proposal that can meet these problems is to change the fact-finder in sexual violence cases. This requires consideration, then, of what could replace the jury as fact-finder in sexual violence cases, which we do below.

ALTERNATIVES TO JURY AS FACT-FINDER IN SEXUAL VIOLENCE CASES

- 6.34 We have considered two principal alternatives to trial by a jury of 12 laypeople. The first is to require that all sexual violence cases be heard by a judge sitting alone in the role of fact-finder. The judge could be specially trained and educated. The second alternative is for the role of fact-finder in sexual violence cases to be filled by a small group of “assessors” (two or three) who would be required to come to the trial with prior knowledge and understanding of sexual violence, either by virtue of their work history and experience in the area, or by having been trained and educated specifically for the purpose of sitting on sexual violence cases.

Trial by judge-alone

- 6.35 Under this model, the right to elect trial by jury would be removed for all sexual violence cases and all trials would be tried by judge-alone. Trials by judge-alone are already an established part

457 At [148].

458 Letter from Public Defence Service to Law Commission regarding “Public defence service response to Law Commission draft report: The criminal justice response to victims of sexual violence” (9 October 2015) at 8.

459 At 8.

460 Letter from Jonathan Temm and others to Law Commission regarding alternative trial processes (sexual offences trials) (28 October 2015) at 2.

461 At 2.

- of the criminal justice system, so there is an established body of rules for how these trials should be conducted and what special requirements apply to them (such as the requirement to provide reasons for the verdict). This proposal would therefore be relatively easy to implement.
- 6.36 It would also lead to cost and resource savings, because it would obviate the need for the complex evidential rules that are required to insulate juries from certain evidence. Trial by judge-alone tends to be faster and therefore potentially less trying for complainants (and a speedy trial also has advantages for defendants).
- 6.37 Importantly, judges are not normally experts in sexual violence and as such are no less susceptible to inaccurate social world knowledge about sexual violence than are jurors. Training and education would be required, but it would likely be more practical to train and educate a limited pool of judges than to do so afresh for each new jury that is empanelled on a sexual violence case. Also, that training and education can be ongoing, whereas it cannot for jurors, who complete their jury duties once the trial is over.⁴⁶²
- 6.38 To our knowledge there is no empirical research that directly compares the two fact-finding models.⁴⁶³ One would want to be sure that the judges who act as fact-finders (which might need to be a large proportion of judges, certainly in the District Courts at least) were properly educated about the best ways to interact with complainants to avoid re-traumatisation. That would need to be a key part of the proposal. One would expect, however, that the “theatre” of the trial would be minimised or eliminated if counsel knew that they were presenting the case to a fact-finder who was educated about the statistics of sexual violence and who could in principle be relied upon to make their decision uninfluenced by prejudices or misconceptions.
- 6.39 Against this is that the removal of juries from sexual violence trials means the loss of the functions outlined above, at least in the area of sexual violence – the expression of democratic involvement; the safeguard against arbitrary or oppressive government by acting as a check on potential abuses of power; and the promotion of public confidence in the system.

Trial by a judge sitting with assessors

- 6.40 The second alternative is to confer the role of fact-finder on a smaller group or people (referred to as “assessors”) who would sit as fact-finders with some prior knowledge and understanding of sexual violence.
- 6.41 The Issues Paper for this project looked at features of a number of inquisitorial criminal justice systems including those that rely on lay assessors to hear criminal cases.⁴⁶⁴ In Germany, the *Landgericht* (High Court) hears more serious sexual violence cases in front of a judge and two lay assessors. Lay assessors in that system are different from both jurors and judges in our system. They rarely ask questions of a witness, and if they wish to do so, some presiding judges will expect that the questions are directed to the witness through them.⁴⁶⁵ However, judges and lawyers agree that the lay assessors play a significant role in decision-making and are not unduly dominated by the professional judges. They are regarded as being particularly useful in determining factual issues that depend upon assessments of credibility. Lay assessors have the same voting power and there must be a two-thirds majority decision for both conviction and

462 Jeremy Finn “Decision-making and decision makers in sexual offence trials: Options for specialist Sexual Offence Courts, Tribunals of Fact and Giving of Reasons” (2011) 17 Cant LR 96 at 111.

463 In 1998 the Law Commission said suggested that “little is known empirically about the effect the jury’s presence has on complainants in sexual cases” but there is “impressionistic evidence to suggest that complainants view the jury’s presence as a factor contributing to their trauma”: Law Commission, above n 431, at [197].

464 Law Commission, above n 433, at appendix 1.

465 At 63.

sentence. It is common for lay assessors to be selected by a committee upon application for five-year terms and to sit about 10 times a year.

- 6.42 An assessor system is also used in Samoa. Under section 87 of their Criminal Procedure Act 1972, the Supreme Court (which is the trial court) sits with assessors on the trial of any person for an offence punishable by death or imprisonment for more than five years. The Registrar of the Supreme Court compiles and keeps a list of assessors who “are qualified to be assessors...by reason of their character, education, ability and reputation”.⁴⁶⁶
- 6.43 If lay assessors were to be used in New Zealand the first question is what their role would be. They might advise the judge without voting on a case, or they might have independent voting power, as is the case for assessors in Germany. That would then influence who could be employed in that role.
- 6.44 One submitter suggested that jurors could be drawn from a panel of people selected for their special experience in or knowledge of the particular matters to be featured at trial. Another option is that the assessors could be laypeople who have gone through training and education to sit on sexual violence cases and do so as “professional jurors”. Since they would not be full-time jurors, but would sit on a rotational basis, they would need to be available as and when required, so would need some flexibility in their other employment.
- 6.45 A third option would be to introduce a system utilising the services of Justices of the Peace (JPs). There is a cohort of JPs in New Zealand who have judicial training and who deal with adjournments, bail applications, and minor offences so they already have some introduction to the judicial role and required neutrality. They would, however, need additional training and education to deal with sexual violence cases specifically. Consideration might also need to be given to whether the current cohort of JPs is sufficiently representative of a wide range of ethnicities, of social demographics, and of all genders.
- 6.46 In favour of the lay assessor model is that the training and expertise brought to bear by these individuals would better equip them to set aside common misconceptions about sexual violence and to deal with the full evidence and its weight. An element of the collective decision-making model of the jury would be retained, in a way that would not be present in the judge-alone model. The trial process would be simplified given most of the substantial and complex array of evidence rules that currently dictate what can be presented to the jury could be removed.

Conclusion

- 6.47 In an earlier Report on juries in 2001, the Law Commission ultimately decided that juries should continue to be used in trials where the matters alleged are the most serious, and offences involving sexual violence fall into this category. The “powerful community interest” in having cases of this kind decided by the community prevailed, even though it might be difficult for complainants.⁴⁶⁷
- 6.48 Having looked at the matter again, in the specific context of a review which examines the criminal justice response to sexual violence, and in light of subsequent research, we think that there is a case for conferring the decision-making function in sexual violence cases on some entity other than the jury. We note the possible gains that may come from removal of the jury. As noted by the reference group with which we corresponded during the writing of this Report (see paragraph 1.60), the need to insulate the jury from certain evidence is removed and weight

⁴⁶⁶ Criminal Procedure Act 1972 (Samoa), s 92.

⁴⁶⁷ Law Commission *Juries in Criminal Trials*, above n 432, at [127].

of evidence, rather than admissibility, becomes more central. The need for directions from the judge is diminished. There is likely to be reduction in time to trial and length of trial.

- 6.49 The design of an alternative, however, needs to be carefully considered, and it would need to be justified as a reasonable limit on the right to jury trial in the NZBORA 1990. At this stage we make no recommendation to change the fact-finder in sexual violence cases, but we recommend that future consideration be given to this issue as part of the evaluation of a new specialist court (see Chapter 5). Ideally, that would be grounded in reliable data as to the levels of accuracy achieved in decision-making by different kinds of fact-finding bodies.

WHAT SHOULD BE DONE AT THIS STAGE?

- 6.50 In light of the conclusion that more analysis is required of the alternatives to the jury model in sexual violence cases, we consider what should be done at this stage to address the problems outlined.
- 6.51 In Chapters 4 and 5 we make recommendations seeking to minimise the harm problem through increasing access to alternative modes of giving evidence and improving court facilities.
- 6.52 Some changes are also required to target the decision-making problem while more long-term alternatives to the jury model are assessed. We look at the range of current tools to minimise illegitimate reasoning by jurors and make suggestions for how they might be put to use as effectively as possible.

Guidance to jurors from the judge in the form of judicial directions

- 6.53 Judicial directions are directions given by a judge to the jury that provide guidance on how it should approach evidence that has been put before it at trial. They provide juries, who are not specialists on evidence law, with information about the limitations and risks that attach to certain forms of evidence.⁴⁶⁸ Such directions are intended to reduce the risk of illegitimate reasoning by juries, by encouraging them to focus on the probative value of evidence (being the value of the evidence in determining whether the offence occurred) and not to be influenced by assumptions, prejudices or misunderstandings that the evidence could otherwise give rise to.⁴⁶⁹
- 6.54 Judicial directions may be particularly important in sexual violence cases to counteract stereotyped thinking or misconceptions about violence which individual jurors may bring with them into trial. Hence in the literature they are often discussed in terms of their potential as a form of juror education; that is, a way of informing jurors about the stereotypes or misconceptions about sexual violence that they should avoid when making their decision.⁴⁷⁰ Guidance must always be tailored to suit the factual issues – giving jurors a number of “conventional” or generic directions without noting the relationship to the facts is not helpful and should be avoided.
- 6.55 The effectiveness of judicial directions has been questioned, with research suggesting that jurors may not follow directions or will not necessarily understand them.⁴⁷¹ Despite that, if judicial directions remain part of our law, they should be as effective as possible.

468 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.113].

469 The paradigm example is the use of evidence from an eyewitness who says they saw the accused; research has shown that many jurors appear to believe eyewitnesses too readily and have problems distinguishing between accurate and inaccurate eyewitnesses, and that assumptions people make about reliability are not necessarily correct. There is an ability to give judicial directions about identification evidence under section 126 of the Evidence Act 2006: see Law Commission, above n 468, at [11.113].

470 See for example Emily Henderson and Duncan Harvey “Myth-busting in sex trials: judicial directions or expert evidence” [2015] Archbold Review 5.

471 Finn, McDonald and Tinsley “Identifying and qualifying the decision-maker: The case for specialisation” in McDonald and Tinsley (eds), above n 445, 221 at 237–239.

Judicial directions on sexual violence under the Evidence Act 2006

6.56 At present, the only judicial direction in the Evidence Act 2006 that pertains specifically to misconceptions in sex offence cases is section 127, which provides for a direction on delayed complaints or failures to complain. It first appeared in the legislation in 1985. In its current form it provides as follows:

127 Delayed complaints or failure to complain in sexual cases

- (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
- (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

6.57 Parliamentary debate at the time that the direction was first introduced noted that “it is well recognised that, for reasons such as shame and shock, rape victims do not immediately tell another person about the offence”.⁴⁷² Also, the period following an incident of sexual violence is for many victims a period of “acute psychological distress”⁴⁷³ and a person’s priorities are likely to be their health and social needs rather than reporting the incident to Police.

6.58 In *DH v R*⁴⁷⁴ the Supreme Court briefly raised the question of whether other areas (such as retractions of a complaint, normalisation of complainant response, or complainant demeanour) would be amenable to being the subject of judicial directions to be included in the Evidence Act 2006.⁴⁷⁵ We note that quite specific provisions are included in the Evidence Regulations 2007 in terms of directions that judges can give to juries in any trial involving a witness aged less than six years. The judge may direct the jury, among other things, that young children may not report memories in the same manner or to the same extent as an adult would, but this does not mean they are any less reliable than an adult witness.⁴⁷⁶

6.59 We would not, however, recommend that new judicial directions pertaining to sexual violence be included in the Evidence Act 2006 without research into the prevailing misconceptions that affect jurors in sexual violence cases and how those misconceptions are most effectively targeted via judicial direction. It may be that the research confirms that judicial directions are not necessarily desirable in all circumstances, in which case little would be gained by adding new directions to the Act. Also, any directions included in the Act would be unable to be readily updated in light of subsequent knowledge about the effect of rape myths on juror decision-making, which is always evolving.

Guidance in non-statutory form

6.60 However, there is good reason to provide more comprehensive guidance to judges on how and when it might be appropriate to address the jury on certain counter-intuitive matters in sexual violence trials. Judges must be well-informed and educated about when it is appropriate to make such directions and how they should be framed.

472 (13 August 1985) 465 NZPD 6269. The predecessor to section 127 was section 23AC of the Evidence Act 1908.

473 Ilene Seidman and Susan Vickers “The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform” (2004) 38 Suffolk UL Rev 467 at 482.

474 *DH v R* [2015] NZSC 35 at [107].

475 At [107].

476 Evidence Regulations 2007, reg 49.

6.61 We draw attention to Chapter 17 of the Crown Court Bench Book issued by the Judicial Studies Board of England and Wales, which contains a number of model directions dealing with matters such as “avoiding judgements based on stereotypes” and “effect of trauma on demeanour in evidence”. We recommend that judges who sit on sexual violence cases should have access to detailed and up-to-date guidance on the instances in which guiding judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed.

6.62 This is supported by comments of the reference group (see paragraph 1.60), who said:⁴⁷⁷

Framing directions if the jury is retained are critical but need consistency. There should be an agreed direction used in every case because our experience is that there is a great unevenness in judicial trial directions. Not just as to what is said; but sometimes nothing at all is deployed.

6.63 We strongly recommend increased judicial guidance on these issues.

A note on the judicial direction in section 122(2)(e) and the effect of CT v the Queen

6.64 We note the effect of the Supreme Court decision in *CT v the Queen*⁴⁷⁸ and the different interpretations of the direction in section 122(2)(e) of the Evidence Act 2006. Further research should be done on the interpretation and potential amendment of that provision (see “The rules of evidence in sexual violence cases”, below).

Expert evidence

6.65 The giving of expert psychological evidence under section 25 of the Evidence Act 2006 is another way of countering illegitimate reasoning. In 2015 in *DH v R*,⁴⁷⁹ the Supreme Court confirmed the legitimacy of using expert opinion evidence (among other things) to counter fact-finders’ erroneous beliefs or assumptions in sexual violence cases. It noted that the evidence presented should be confined to what is substantially helpful; that there should be a focus on the live issues at trial; that it should not be unduly lengthy or repetitive, and that it should be “expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial”.⁴⁸⁰

6.66 In 2003 the Court of Appeal in *R v B*, referring to expert evidence, said:⁴⁸¹

We of course accept that expert evidence concerning, for example, battered wife syndrome or [Post Traumatic Stress Disorder] may be admissible in the context of the trial of sexual abuse allegations, where such syndrome or disorder may be directly relevant to the conduct of a complainant at the time of the allegations. That a complainant remained in an abusive relationship is the obvious example where expert opinion evidence may be of assistance to a jury.

6.67 We understand that there are currently variations in practice in the giving of counter-intuitive evidence throughout the country, which may be due in part to the availability of experts who are willing to give that counter-intuitive evidence. At present, as far as we are aware, this type of evidence has only been used in cases where the complainant is a child, or was a child at the time of the alleged offending.

6.68 The sexual violence support sector noted there is a shortage of people who are able and willing to give counterintuitive evidence. It is a big time commitment as the experts need to prepare at

477 Letter from Jonathan Temm and others to Law Commission regarding alternative trial processes (sexual offences trials) (28 October 2015) at 6.

478 *CT v the Queen* [2014] NZSC 155 at [40]–[49] (Elias CJ, McGrath and William Young JJ) (and [61]–[72] (Glazebrook and Arnold JJ)).

479 *DH v R* [2015] NZSC 25.

480 At [110].

481 *R v B* [2003] 2 NZLR 777 at [28].

length. We were also told that consideration needs to be given to the effectiveness of counter-intuitive evidence, including how barriers to understanding counter-intuitive evidence within the jury might be overcome.

- 6.69 We do not think the giving of expert psychological evidence in person in court, as a means of addressing misconceptions in sexual violence cases, should be ruled out. Its use should be assessed on a case-by-case basis according to whether there is someone who is well-placed to do it and whether the prosecution thinks it is required. We make no recommendations to change the status quo in terms of the use of expert counter-intuitive evidence, but its use should be addressed in the prosecutorial guidance recommended in Chapter 5. In addition, a government-level initiative to undertake an expert evidence programme including resourcing, monitoring and staffing is worthy of consideration.

Section 9 statements

- 6.70 Section 9 of the Evidence Act 2006 enables parties to agree to the admission of evidence in any way or form. The Court of Appeal has suggested that admission of an agreed statement by consent under section 9 of the Evidence Act 2006 could obviate the need for evidence to be given by an expert. Evidence that would otherwise be given by the expert appearing in person at trial could instead be admitted in written form by the consent of both parties.⁴⁸²
- 6.71 The cases in which an admission of evidence under section 9 is possible will, however, be small because it requires the consent of the defence. Where defendants do not understand the nature of the expert evidence (and may also be under misconceptions about sexual violence) they are unlikely to agree to a section 9 statement. Nonetheless, we recommend that parties should be encouraged to agree on the content of any expert evidence to be presented at trial, and should wherever possible admit it under section 9 by way of a written statement.

Pre-trial education for jurors

- 6.72 Another option is to seek to educate jurors after they have been empanelled through the provision of information packs covering the difficult features that sometimes arise in sexual violence cases and what is or is not relevant to the fact-finding exercise. In a survey conducted by the Ministry of Women's Affairs, those surveyed called for "jurors [to] be educated on the nature of sexual violation, either by being given information before evidence is presented ... [or] through a public education campaign".⁴⁸³
- 6.73 We make no recommendation on this. It may be that training and education, in order for juror education to be truly effective, needs to be given on an ongoing basis and that the people making the decisions need to build up some familiarity with the area. It has been noted that any information "given without context before trial would need to be very carefully framed" so as to avoid possibly reinforcing false information or causing jurors to become biased against the defendant before the trial has begun.⁴⁸⁴

Conclusion and the need for future analysis of the alternatives

- 6.74 There is a strong basis for arguing that sexual violence, as a form of criminal offending, is not amenable to fact-finding by 12 lay jurors. There are alternatives, but they need further analysis before they can be implemented. In the interim, the recommendations made in this chapter

482 *M v R* [2011] NZCA 191 at [33].

483 Elaine Mossman and others *Responding to Sexual Violation: Environmental Scan of New Zealand Agencies* (Ministry of Women's Affairs, Wellington, 2009) at xxi.

484 Finn, McDonald and Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in McDonald and Tinsley (eds), above n 445, 221 at 240.

and in Chapters 4 and 5 should be implemented as a means to address the harm problem and the decision-making problem which are both caused and exacerbated by the presence of the jury in sexual violence trials. In addition, analysis of complete alternatives to the current jury model, and testing of those alternatives if appropriate, should take place during evaluation of the specialist court proposed in Chapter 5.

RECOMMENDATIONS

- R28 Judges who sit on sexual violence cases should have access to detailed and up-to-date guidance on the instances in which guiding judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed.
- R29 In court proceedings involving charges of sexual violence, the parties should be encouraged to agree upon expert evidence or a written statement for the jury dealing with myths and misconceptions around sexual violence. Wherever possible a written statement should be admitted by consent as a joint statement under section 9 of the Evidence Act 2006.

THE RULES OF EVIDENCE IN SEXUAL VIOLENCE CASES

- 6.75 As has been touched on in this chapter, our criminal justice system contains detailed rules of evidence governing what may and may not be put before a jury, on the basis that certain evidence is so prejudicial that a jury would be unable to separate its probative value from its prejudicial effect. Many of these rules could be simplified or removed if juries in sexual violence cases were replaced by an expert decision-maker who was able to assess all the evidence without being exposed to prejudicial effect. However, because we do not propose changing the fact-finding model in sexual violence trials, at this stage the rules of evidence in sexual violence cases will continue to be necessary.
- 6.76 The Evidence Act 2006 contains the rules about evidence in criminal trials and includes some that are specific to sexual violence cases (such as section 44, which requires an application to be made before evidence can be put before the court of a complainant's sexual history with any person other than the defendant). A number of the rules in the Evidence Act were put forward in 2011 as having a problematic effect in sexual violence cases.⁴⁸⁵
- 6.77 The Evidence Amendment Bill 2015 will amend section 44 so that applications under that section can only be made if certain legislative requirements are complied with as early as practicable before trial.⁴⁸⁶ The purpose of that amendment is to prevent complainants being "ambushed" with a question about their sexual history with a person other than the complainant. However, many other rules in the Evidence Act 2006 remain potentially problematic. The rules as to what evidence can and cannot be admitted in a sexual violence case are fundamental to the trial itself and to the complainant's experience of it, and we have reached the view that the rules as currently framed need review.

485 McDonald and Tinsley "Evidence issues" in McDonald and Tinsley (eds) above n 445, at 279.

486 Evidence Amendment Bill 2015 (27-1), cl 16: A party who proposes to offer evidence about the sexual experience of a complainant must provide every other party with a written notice stating the party's intention to offer the evidence; the name of the person who will give the evidence; and the subject matter and scope of the evidence, and a party who proposes to ask any question about the sexual experience of a complainant must provide every other party with a written notice stating the party's intention to ask the question; and the name of the person who will be asked the question; and the question; and the scope of the questioning sought to flow from the initial question.

- 6.78 On this point, we also note the potential impact of recent comments of the Supreme Court judges in *CT v the Queen*.⁴⁸⁷ The Court was considering how evidence of conduct alleged to have occurred over 10 years ago should be dealt with in a sexual violence trial, in terms of what the judge should say to a jury about that evidence and its probative value. At issue on appeal was whether the proceedings should have been stayed because of the risk of unfairness caused by delay and if not, whether the summing up given by the trial judge in relation to the delay was adequate to overcome any risk of unfairness arising from the effect of the delay on the reliability of the evidence.
- 6.79 Section 122(2)(e) of the Evidence Act 2006 provides that a judge must consider giving a warning about the reliability of evidence about the conduct of a defendant alleged to have occurred over 10 years ago. The judge may warn the jury of the need for caution in deciding whether to accept the evidence, and the weight to be given to the evidence.⁴⁸⁸ Section 122(2)(e) is not confined to trials involving historical sexual abuse, but it commonly arises in that context. A warning given under section 122 need not follow any particular form of words; the judge has the discretion to tailor the direction to the case in question.⁴⁸⁹
- 6.80 The Supreme Court spent some time discussing the policy behind section 122(2)(e).⁴⁹⁰ Previously, the Court of Appeal has taken an approach which suggests that section 122(2)(e) targets reliability concerns arising from the complainant's memory. In such cases the jury may be warned of the effect of the passing of time on the reliability of the complainant's evidence. This can explain why the Court of Appeal has previously said that a section 122(2)(e) warning is not necessary in cases where the defence case is that the complainant is lying, because lapse of time is irrelevant to fabrication.⁴⁹¹
- 6.81 Elias CJ and McGrath and William Young JJ took the view, however, that section 122(2)(e) is intended to address the concern that a lengthy lapse of time between the conduct at issue and the evidence at trial may raise issues of reliability that bear on the fairness of the trial.⁴⁹² They did not think that a section 122 direction was limited to cases where the evidence itself may be unreliable because of the passing of time.⁴⁹³ Other concerns may also be relevant, such as the fact that delay has made it more difficult for the defendant to check or answer the allegations.⁴⁹⁴ As such, Elias CJ and McGrath and William Young JJ considered that a judge may conclude that evidence may be unreliable for the purposes of section 122(2)(e) for reasons other than the effect of delay on the memory of the complainant – such as, in the case in question, the ability of the defendant to check and challenge the evidence of the complainant.⁴⁹⁵
- 6.82 Glazebrook and Arnold JJ did not agree with that interpretation of section 122(2)(e) and in their decision said that such an interpretation suggests that “evidence could be considered possibly unreliable under section 122(2)(e) solely because of delay-related prejudice and even where there is nothing about the particular circumstances that would suggest that the evidence may be unreliable”.⁴⁹⁶ They considered that this amounted to suggesting that it is dangerous

487 *CT v the Queen* [2014] NZSC 155.

488 Evidence Act 2006, s 122(1).

489 Evidence Act 2006, s 122(4); *CT v the Queen* [2014] NZSC 155 at [41].

490 *CT v the Queen* [2014] NZSC 155 at [40]–[49] (Elias CJ, McGrath and William Young JJ) and [61]–[72] (Glazebrook and Arnold JJ).

491 *S (CA514/08) v R* [2009] NZCA 622 at [63]–[65]. Another case to the same effect is *N (CA298/2012) v R* [2013] NZCA 17 at [24]–[26].

492 *CT v the Queen* [2014] NZSC 155 at [43].

493 At [48].

494 At [46].

495 At [49].

496 At [70].

- to convict without corroboration in cases where the offending occurred more than 10 years previously.⁴⁹⁷
- 6.83 Depending, therefore, on courts' subsequent interpretation and application of section 122(2)(e), it may be argued that the decision in *CT v the Queen* will make it more difficult for sexual violence cases from over 10 years or more before to succeed in the absence of corroborating evidence.
- 6.84 This would be an undesirable outcome of *CT v the Queen* and would run counter to the now widely held accepted legislative position that a jury should not be warned about the danger of convicting in a sexual violence case in the absence of corroborating evidence. The Evidence Act 2006 reversed the previous situation to make it clear that a judge is not required to give a direction to the jury that it may be dangerous or unsafe to convict a defendant in the absence of corroboration in a sexual violence case.⁴⁹⁸
- 6.85 At least six appeal cases involving sexual violence have since referenced the discussions of the Supreme Court on this point in *CT v the Queen*.⁴⁹⁹ A review of the rules of evidence could include an examination of section 122(2)(e) and whether its intended purpose and effect needs to be clarified by legislative amendment.

Conclusion and recommendation

- 6.86 It has not, in this review, been possible to separate the substantive matters of evidence that are raised by the rules in the Evidence Act 2006, from the matters of criminal procedure that we are focusing on. This is a fine line and we do not suggest that there are no issues with the rules of evidence in sex offence trials. Rather, we recommend that consideration be given to future review of the laws of evidence in sexual violence cases.
- 6.87 The Law Commission would be well-placed to undertake such a review. The Commission is closely associated with the Evidence Act 2006, having a long history with the laws of evidence and the Act itself having been the result of a Law Commission review.⁵⁰⁰ The Commission is also tasked with reviewing the Evidence Act for operational purposes at successive five-yearly intervals.⁵⁰¹ A review of the rules of evidence in sexual violence cases could be referred to the Commission to coincide with the commencement of its next operational review of the Evidence Act (which is likely to be in 2016).
- 6.88 Undertaking a review of the substantive rules is a significant task, however, and if such a reference were made, consideration would need to be given to the timeframe for completing the project. We suggest that the Commission could draw on a team of willing experts to advise it on these matters.

497 At [71].

498 Evidence Act 2006, s 121.

499 *R v J W G* [2015] NZHC 1418; *Oquist v R* [2015] NZCA 310; *R v Tranter* [2015] NZHC 2038; *L v R* [2015] NZSC 53; *R v P* [2015] NZCA 346; and *Bruce v R* [2015] NZCA 332.

500 See Law Commission *Evidence* (NZLC, R55, 1999).

501 The most recent review was completed in 2013: Law Commission, above n 468.

RECOMMENDATION

R30 Future consideration could be given to reviewing the substantive rules of evidence in sexual violence cases. Such a review could take place at the same time as the next review required under section 202 of the Evidence Act 2006.

Part C
**ALTERNATIVES
TO TRIAL**



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Chapter 7

The case for an alternative justice mechanism

INTRODUCTION

- 7.1 In this part of the Report, we consider the case for an alternative justice mechanism to be used in sexual violence cases instead of, or in conjunction with, the criminal justice system. We envisage an alternative justice mechanism complementing the criminal justice system, in the sense that victims who do not wish to enter that system will have an alternative mechanism for meeting their “justice needs” (as defined in this chapter).
- 7.2 As long as the relevant processes are appropriate, safe, and have protections for participants there may be room for creative approaches towards development of the alternatives themselves. On that basis, rather than as a replacement to the criminal justice system, it is helpful to view our recommendations for an alternative justice mechanism as being complementary, so that the “strengths [of an alternative justice mechanism] are the weaknesses of the adversary system”.⁵⁰²
- 7.3 This chapter presents the case for providing an alternative justice mechanism, in addition to the recommendations for reforming the criminal justice system made in Part B. Chapters 8 and 9 set out our recommendations as to the shape and form of such an alternative justice mechanism.

THE CRIMINAL JUSTICE SYSTEM AND VICTIMS’ JUSTICE NEEDS

What are the justice needs of victims?

- 7.4 In Part B we consider a range of reforms to minimise the potential trauma of the trial process for victims of sexual violence. An improved trial process may encourage more victims to report sexual violence.
- 7.5 However, many victims will simply never want to go to trial, believing that their justice needs are unlikely to be met – or perhaps because their individual needs are simply unrelated to any form of justice outcome (for example, the victim wants only therapy to help deal with the effects of sexual violence).
- 7.6 Kathleen Daly, a Professor of Criminology and Criminal Justice at Griffith University in Brisbane, suggests that we should look beyond victim satisfaction, a subjective and isolated concept, to find a way to empirically assess the usefulness of different justice mechanisms. Building on the work of both herself and others, Daly refers to the “justice interests” or “justice needs” of victims.⁵⁰³ These interests are linked to justice outcomes rather than to survival,

502 Elisabeth McDonald and Yvette Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 377 at 399, n 72 quoting F W M McElrea “Restorative Justice as a Procedural Revolution: Some Lessons From the Adversary System” (paper presented to the first plenary session of the Fourth International Winchester Restorative Justice Conference, 10 October 2007) at 2.

503 In this Report we have tended to use the term “justice needs” but when we do so we are referring to the construct of justice interests or needs that Daly has identified and which are defined above.

physical, psychological, security and support needs, all of which must also be addressed in the aftermath of sexual violence.

- 7.7 The five elements identified by Daly as being necessary to give effect to a victim's justice needs/interests are:⁵⁰⁴
- participation (being informed of the case and having the opportunity to ask questions and give an opinion as to the development of the case);
 - voice (also known as “truth-telling”, providing an opportunity for the victim to tell their story and for public acknowledgement of it);
 - validation (affirmation that the victim is believed, independent of any admission of guilt by the defendant);
 - vindication (that the actions were legally and morally wrong, both in a general sense and when perpetrated against that particular victim); and
 - perpetrator accountability (whereby the perpetrator and anyone else with some form of responsibility acknowledges it and expresses remorse and regret).
- 7.8 Daly suggests that an effective “justice mechanism”⁵⁰⁵ for addressing the justice needs/interests of victims could be identified with reference to these elements, or, as described by Koss and Achilles (drawing on several studies from the United States) as the:⁵⁰⁶
- need to tell their own stories about their experiences, obtain answers to questions, experience validation as a legitimate complainant, observe offender remorse for harming them, receive support that counteracts isolation and self-blame and above all have choice and input into the resolution of their violation.
- 7.9 Judith Herman, a Professor of Psychiatry at Harvard Medical School, has found that most victims studied in her research are not overly punitive in their views and that they do not necessarily want retribution for the crime.⁵⁰⁷ Additionally, although some victims agreed unanimously that rehabilitation of the perpetrator would be desirable and something the victim could sanction, they tended to doubt the likelihood of this occurring.⁵⁰⁸ In Herman's study, most victims wanted acknowledgement of the harm done to them, the harm to be validated by their community, to know they were not to blame and for the “burden of disgrace” to fall on the accused, rather than themselves.⁵⁰⁹
- 7.10 A study by the Ministry of Women's Affairs concludes that the types of outcomes sought by victims of sexual violence are to ensure that the perpetrator is held accountable, to protect others, and to protect themselves from the perpetrator.⁵¹⁰ Work by Shirley Jülich and Fiona Landon in New Zealand has looked at what “justice” means to adult survivors of sexual violence, noting that “recovery, healing and justice were interdependent”.⁵¹¹

504 Kathleen Daly “Reconceptualizing sexual victimization and justice” in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds) *Justice for Victims* (Routledge, Abingdon, 2014) at 388.

505 Traditional mechanisms would include criminal prosecution, sentencing or victim impact statements which could then be measured against alternative or “innovative” justice mechanisms.

506 Mary Koss and Mary Achilles *Restorative Justice Responses to Sexual Assault* (National Online Resource Center on Violence Against Women, 2008) at 2.

507 Judith Herman “Justice From the Victim's Perspective” (2005) 11 *Violence Against Women* 571 at 597.

508 At 597.

509 At 585.

510 *Restoring soul: Effective interventions for adult complainant/survivors of sexual violence* (Ministry of Women's Affairs, 2009) at 68.

511 Shirley Jülich and Fiona Landon “Restorative Justice and Sexual Violence: Overcoming the Concerns of Victim Survivors” in T Gavrielides (ed) *A Victim-Led Criminal Justice System: Addressing the Paradox* (Independent Academic Research Studies, London, 2014) 41 at 45.

Are victims' justice needs currently being met within New Zealand's existing criminal justice system?

- 7.11 The criminal justice system has a specific set of functions which limits its ability to meet the justice needs of victims of sexual violence. The justice needs of one victim will differ from the justice needs of another victim and, for some victims, justice needs may not even be a pressing consideration. Yet there is currently only one justice response to sexual violence: the criminal justice system.
- 7.12 Research indicates that participants in the criminal justice system find it to be “an artificial, alienating and disempowering process that does not produce an outcome in which they have confidence”.⁵¹² Doctors for Sexual Abuse Care stated in their submission on the Issues Paper that “many complainants choose not to report offending due to the negative experiences of a court process and the prescribed rigid consequences for the offender”.⁵¹³
- 7.13 Victims' justice needs are complex, individualised, and unlikely to be easily met within the criminal justice system. The failure to accommodate the complex needs of victims within the criminal justice system can inadvertently cause trauma, distress, and secondary victimisation. Judith Herman argues that “if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law”.⁵¹⁴
- 7.14 Herman writes that “the wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings” and that “the victim's vision of justice is nowhere represented in the conventional legal system”.⁵¹⁵ She argues that more victims might be willing to participate in legal proceedings if they believed there were outcomes that could potentially make the ordeal worthwhile. However, she notes that “even a successful legal outcome does not promise much satisfaction, because [victims'] goals are not congruent with the sanctions that the system imposes”.⁵¹⁶
- 7.15 Thus, reform of the criminal justice system may result in a less traumatic experience for the victim. The recommendations in this part of our Report do not seek to displace the function of the criminal justice system, which rightly prioritises fair trial protections for defendants whose liberty is at stake. However, because the criminal justice system is designed to punish offending and is offender-focused, it is not well-placed to give effect to the diverse justice needs of victims.
- 7.16 We know that on the one hand, a failure to address the justice needs of victims of sexual violence can have significant long-term consequences for victims and society, as discussed in Part A. On the other hand, there are certain types of sexual violence for which, because of its seriousness or other characteristics, there is a public interest in dealing with it in the criminal justice system.
- 7.17 Accordingly, there will be a portion of sexual violence where the victim seeks a justice-type outcome but does not wish to engage with the criminal justice system (regardless of any changes made). In these circumstances, it is preferable that victims have an alternative justice mechanism to access.
- 7.18 There is a justified case for looking at innovative justice mechanisms to deal with sexual violence outside of the criminal justice system. Concerns have been raised by submitters to this project regarding any alternative justice mechanism that sits outside of the criminal justice

512 *Restoring soul: Effective interventions for adult complainant/survivors of sexual violence* (Ministry of Women's Affairs, 2009) at 37.

513 *Law Commission Alternative Pre-trial and Trial Processes: Summary of Submissions to Consultation* (December 2012) at [535].

514 Judith Herman “Justice From the Victim's Perspective” (2005) 11 *Violence Against Women* 571 at 574.

515 At 575.

516 At 575.

system. Submitters noted the criminal justice system plays an important role in society. We realise that constitutional issues must be dealt with when introducing an alternative to criminal trial (for instance, an alternative process could be perceived as merging executive and judicial functions) and that there are certain protections, such as fair trial rights of the defendant, which must be upheld.

The role of victims in the criminal justice system

7.19 The role of the criminal justice system is to determine beyond reasonable doubt whether or not an accused person is guilty of alleged offending and if so, to determine an appropriate criminal sentence.

7.20 Some criminal legal theorists⁵¹⁷ are wary of expanding the role of victims in the criminal justice system because it is the responsibility of the State, not individuals, to “ensure that there is order and law-abidance” and to shoulder the “burden” on behalf of citizens of bringing offenders to justice.⁵¹⁸ Doak, in critiquing that view, has described it thus:⁵¹⁹

Conceptually, victims have no role to play in the modern criminal justice system other than to act as “evidentiary cannon fodder”. ...Therefore, although many victims may feel as though they are “owed” a right to exercise a voice in decision-making processes, such as prosecution...the criminal justice system places such rights or interests in a firmly subservient position to the collective interest of society in prosecuting the crime and imposing a denunciatory punishment.

7.21 The issue of what role should be played by the victim in the context of the criminal justice system is not new. The Ministry of Justice has noted that there are benefits in providing for greater victim involvement in the criminal justice system, and thought that such involvement should extend from the time a crime occurs until the offender completes his or her sentence.⁵²⁰ The Ministry stated in a 2009 Report on victims’ rights that “a greater focus on victims will assist in reducing the cost and impact of crime on individuals and on society in general”.⁵²¹ It went on to note that:⁵²²

improved responsiveness to victims will enhance the effectiveness of, and the public confidence in, the criminal justice system. Such confidence is necessary for those victimised by the crime and for the whole community.

7.22 Indeed, the criminal justice system is increasingly using innovative means by which to address offending, in ways that seem to be compatible with greater recognition of victims’ needs. For example, youth criminal offending can be dealt with in family group conferences held completely outside of the Youth Court or criminal justice system.

7.23 Even if the criminal justice system is able to fulfil its functions and accommodate greater victim participation in the trial process, the question being considered here is whether it is possible to meet all the justice needs of victims within the criminal justice system.

517 See A Ashworth "Responsibilities, Rights and Restorative Justice" [2002] British Journal of Criminology 578 at 579.

518 A Ashworth, above, at 579; Jonathan Doak “Victims’ Rights in Criminal Trials: Prospects for Participation” (2005) 32 JL & Soc’y 294.

519 Jonathan Doak *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford, 2008) at 35–36.

520 *A Focus on Victims of Crime: A Review of Victims’ Rights* (Ministry of Justice, 2009) at 4.

521 At 4.

522 At 4.

THE PROPOSAL IN THE ISSUES PAPER

Proposal

- 7.24 The Issues Paper proposed an alternative process to resolve certain sexual violence cases outside of the criminal justice system.⁵²³
- 7.25 The Issues Paper proposed that the suitability of the case would be determined by specialist providers, and would include an assessment of the risk to community safety. This would be done in consultation with Police and other agencies where appropriate. The exact process, however, would be tailored to the nature of the case, the victim's wishes, and the need to ensure victim safety.
- 7.26 One important aspect of the proposal was how it would interrelate with the criminal justice system. It was proposed that nothing said by a perpetrator in the course of the alternative process could be used as evidence in criminal proceedings. However, if the information provided related to other offending, this could trigger further police investigation and any information obtained as a result of that further investigation could be used in criminal proceedings.
- 7.27 The proposal also explored what such a process might look like. It was suggested that:
- The process would require an acceptance that a sexual encounter had occurred and would then result in a set of agreed outcomes. If one agreed outcome was treatment, a further assessment would determine the suitability of the perpetrator to participate in treatment.
 - If the process did not result in a set of agreed outcomes, or if the agreed outcomes included undertakings by the perpetrator which they then failed to fulfil, it would be open to Police to commence criminal proceedings.
 - If the perpetrator fulfilled all undertakings and participated in good faith, there would be a bar against bringing a criminal prosecution for the same incident.
 - Cases that resulted in agreed outcomes would need protocols setting out what constituted acceptable participation, and circumstances in which the alternative process would be ceased (and criminal proceedings potentially commenced) if later information emerged that revealed the case was unsuitable for this process.

Submissions

- 7.28 Our recommendation in this Report builds on the proposal in the Issues Paper, taking into account the submissions received on the Issues Paper and subsequent consultation.
- 7.29 Concerns raised by submitters included: the potential risk to the community if the offender was not in custody; risk to the victim if the process was not properly managed (including as a result of delay and insufficient resources); the potential for discrepancy in the process between offenders; and the perception that this process lacks a strong public statement against sexual violence.⁵²⁴ One submitter considered the proposal unworkable and that victims would not want the perpetrator to be “free and able to offend against others”.⁵²⁵

523 Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 48–52.

524 Law Commission *Alternative Pre-trial and Trial Processes: Summary of Submissions to Consultation* (December 2012) at [546].

525 At [553].

7.30 This proposal received very strong support from submitters who saw the utility of such a proposal in terms of being able to include more victims and perpetrators in a justice process. For example, JustSpeak said:⁵²⁶

an alternative process provides the opportunity for lower-level offenders who would otherwise plead not guilty – and in many cases would not be convicted due to a lack of evidence or subjective interpretations of the events – to be held accountable and engage in a process of redress with the victim.

7.31 Submitters who supported the proposal commented on its potential to work well in cases involving offending between peers or within families, and in those cases where there is not a strong evidential basis. They thought it would provide an opportunity for a healing process for the victim in a safe, supportive environment where they are in control, with a flexible process that is tailored to their needs, and that it would enable greater participation by the victim and give them validation, as well as a greater range of options for addressing the behaviour, which were all rated as important among victims who submitted.

7.32 Doctors for Sexual Abuse Care (DSAC) submitted in favour of the proposal, stating that “for victims who are well supported, it can be a liberating and healing experience to confront the offender and have their pain acknowledged and be given the opportunity to reclaim a sense of control”.⁵²⁷

7.33 Submitters to the Issues Paper expressed dissatisfaction and disappointment with the way that criminal trials are currently conducted. There was clearly a desire amongst submitters, reinforced by people we spoke to, for alternative ways of dealing with sexual violence in which victims have more control and input. Comments included:

I feel the enquiries and investigation could be more inclusive between the victim and offender, giving both the strength to tell the truth and the confidence to move forward with greater knowledge as to why and where the real fault lay. ... I feel a case like this could be dealt with in a far more civil environment, a more open forum with more discussion and closure.⁵²⁸

A restorative justice process would allow closure for the victim and the defendant earlier than the drawn out legal process.⁵²⁹

Restorative justice used in certain circumstances can give complainants and their families an opportunity to experience a sense of justice that is not always available within the criminal justice system.⁵³⁰

7.34 Many submitters commented on the particular features of the proposal they considered to be extremely important. These included: the need for informed consent; the need for guidelines taking account of community safety and eligibility factors; consideration of when it would be appropriate to refer cases back to the criminal justice system; the potential waste if a process was started and then abandoned; the need to incorporate multi-cultural perspectives including those of Māori; and the need for specialised and properly resourced providers and effective cross-agency communication.

526 At [545].

527 At [535].

528 At [138].

529 At [549].

530 At [535].

WHAT KIND OF AN ALTERNATIVE JUSTICE MECHANISM?

- 7.35 In New Zealand, with the operation of Project Restore, we already have an example of an alternative justice mechanism (embracing the restorative justice model, which is discussed further below) being applied in sexual violence cases. Project Restore is an Auckland-based restorative justice provider that operates specifically in the area of sexual violence. It emerged in 2005 as a pilot in response to the frustrations victims experienced with the conventional justice system and is now funded by the Ministry of Justice. Project Restore provides two kinds of restorative justice services: court-referred services (cases that have been referred from the courts under the Sentencing Act 2002); and community referrals (cases that are self-referred or referred from community organisations). It aims to provide victim-survivors with an experience of a sense of justice, to support offenders to understand the impacts of their behaviour, and to facilitate the development of an action plan, which might include reparation being made to the victim and therapeutic programmes for the perpetrator. The model offered by Project Restore is not the only way of offering an alternative to trial. It would be possible to vary the location, the number of people involved, the specific cultural practices and the nature of the outcomes.
- 7.36 Before we discuss our proposal in further detail in Chapter 9, we briefly consider whether there currently exist means in New Zealand to address victims' justice needs which could be built upon, rather than an entirely new programme being implemented.⁵³¹

Pre-sentence restorative justice conferencing (status quo)

- 7.37 In New Zealand, restorative justice is recognised as part of the criminal justice system. Legislation encourages the use of restorative justice where possible and allows for restorative justice processes to be taken into account in the sentencing and parole of offenders. Restorative justice is available at several stages of the criminal justice system, for instance a victim may request to meet with an offender to resolve issues relating to an offence under section 9 of the Victims' Rights Act 2002. This could occur post-sentence and we are aware that conferences have been held at this point. However, in practice, most restorative justice conferences occur at the pre-sentence stage in accordance with section 24A of the Sentencing Act 2002, which provides that proceedings in a District Court must be adjourned before sentence, if an offender has pleaded guilty, to determine if restorative justice would be appropriate. The outcome of any restorative justice process must be taken into account at sentencing.
- 7.38 Restorative justice pre-sentence conferencing for sexual violence has only been available for the last few years. In 2014, there were 128 sexual violence restorative justice referrals. 116 of these were to Project Restore⁵³² and 12 were to other providers (and of those 128 referrals, 92 went to pre-conference stage and 38 continued to a restorative justice conference).
- 7.39 Following the introduction of section 24A of the Sentencing Act 2002, this figure increased, so that there were 105 sexual violence referrals (all to Project Restore) in the first three months of 2015 alone.⁵³³ Section 24A of the Sentencing Act 2002 requires an adjournment of a sentencing hearing in designated circumstances to allow pre-sentence restorative justice conferencing to be considered.

⁵³¹ Appendix B provides a discussion of overseas models of alternative justice mechanisms.

⁵³² Project Restore was inspired by the RESTORE programme in Arizona, the Hollow Waters programme (associated with the Ojibway First Nation peoples in Manitoba) and the research of Doctor Shirley Jülich. Its services and practice model arose from extensive collaboration between victim advocates, community organisations, and Project Restore personnel. Although it incorporates the core values of restorative justice and the practices outlined by the Ministry of Justice for best practice in restorative justice cases, the processes carried out by Project Restore are tailored specifically for use in cases involving sexual violence. See Shirley Jülich and others *The Project Restore Report: An Exploratory Study of Restorative Justice and Sexual Violence* (AUT, 2010) and Shirley Jülich and others "Yes, there is another way!" (2011) 17 Cant LR 222.

⁵³³ Email from Jared Walton (Ministry of Justice) to Law Commission (11 May 2015).

- 7.40 In our view, although there is certainly still a place for restorative justice-type processes and conferences to be held at the pre-sentence, post-guilty plea stage, this will not effectively meet all victims' justice needs by itself. Such conferences will be helpful in meeting the justice needs of those victims who do report to Police and where the perpetrator pleads or is found guilty. However, this is dependent on victims reporting in the first case and being willing to engage with the criminal justice system. In addition it does not address the fact that some victims will want access to restorative justice, but not at the risk of the perpetrator receiving a term of imprisonment.
- 7.41 One option is to continue with the existing complementary approach of having sexual violence addressed through both the criminal justice system and through a pre-sentence restorative justice process (where deemed appropriate). This would ensure that those who were found guilty of sexual violence would face the punitive sanctions of the criminal justice system, but that the justice needs of victims to participate, to have a voice, and to hold the perpetrator accountable and so on could be addressed through restorative justice conferencing.

Diversion into an alternative justice mechanism

- 7.42 Diversion of sexual violence into an alternative justice mechanism would require oversight. One option is creation of a new oversight body for the purpose of monitoring the alternative justice mechanism and the associated functions and risks of such a mechanism. Another option is some form of judicial oversight (a method of police diversion using the courts for a public risk assessment) coupled with administrative support from the Ministry of Justice.
- 7.43 Judicial oversight would require cases to first go before the court, which means a complaint would need to be made to Police who would investigate and, if there was sufficient evidence (and it was otherwise appropriate to do so), file charges. Where the court assessed there to be no public risk or risk to the victim, the case could be diverted into an alternative process, with charges being withdrawn if the programme was successfully completed. This approach already occurs for low level offending and cases involving young offenders, with Police having the ability to divert charges where an offender pleads guilty and a victim agrees.
- 7.44 There are issues with this option, in terms of being better able to meet victims' justice needs. A diversionary approach relies firstly on a formal complaint being made by the victim to Police and secondly on there being sufficient evidence for charges to be laid. Yet many victims do not wish to make a formal complaint to Police and of those that do, many are abandoned due to a lack of evidence. Lastly, as it currently stands, Police diversion is reserved for low level offending and, by its nature, sexual violence is considered to be serious.

Centre for Innovative Justice model

- 7.45 Another option is to adopt an approach similar to the model suggested in the report of the Centre for Innovative Justice in Australia (discussed in Appendix B), which was commissioned by the Federal Attorney-General's Department and looks at innovative responses with the potential to better meet the needs of sexual violence victims.⁵³⁴
- 7.46 That report seeks to place emphasis on a victim-driven model, whilst upholding the public policy desire to prosecute offending wherever possible. Under this model there is the option for a victim to enter into an alternative process prior to reporting to Police and at all stages of criminal proceedings. However, once the Police are involved, the alternative process would only be available if, after investigation, there was found to be insufficient evidence to prosecute

534 Centre for Innovative Justice *Innovative justice responses to sexual offending - pathways to better outcomes for victims, offenders and the community* (2014).

or, after prosecution had commenced, the prosecutor believed there to be little likelihood of the case succeeding. There would also be the possibility of pre-sentence, post-guilty plea restorative justice and post-sentence alternative processes. At all points, including at the pre-reporting and pre-charging stages, the option of criminal prosecution would remain – so a perpetrator who went through an alternative process may also subsequently face criminal prosecution. This model requires agreement from perpetrators to participate.

- 7.47 In our view this model places too much priority on prosecution over victim choice. We consider the victim should be able to choose between the alternative process and making a formal complaint, even after reporting to Police. The Centre for Innovative Justice proposal only allows a referral to the alternative process if the case is not suitable for a referral to prosecution, for example due to lack of evidence.
- 7.48 Although the Centre for Innovative Justice model does provide access to alternative processes prior to reporting to Police, the fact that under the model the victim can then choose to report to Police, leaving open the option of criminal prosecution, may discourage participation by perpetrators.
- 7.49 A variation based on this Centre for Innovative Justice Report would be to afford privilege to a perpetrator who participates in the alternative process (whether successfully or unsuccessfully), while leaving open the possibility of criminal prosecution. Admissions made during the process, or the fact of participation in the alternative process, would be privileged and unable to be used in any future criminal proceedings. This could encourage more participation, although, in our view, it is unlikely to be as much of an incentive as a statutory bar to future prosecution.
- 7.50 Project Restore is in favour of this kind of model, as it considers that a statutory bar may discourage the participation of some victims if the right to prosecute a perpetrator in the future is precluded. Project Restore also believes that there is a risk that perpetrators could manipulate an alternative process, and not be required to adopt the same level of accountability, if there is a possibility that they will not be prosecuted.⁵³⁵ Currently, the community referral cases that Project Restore conducts and which operate completely outside of the court are largely historic child sex offending cases. Project Restore comments that the perpetrators are motivated to participate due to reasons of family connectedness.⁵³⁶ However, this motivation will not necessarily exist with other cases that may be eligible for an alternative process. Furthermore it is likely that perpetrators without the same motivation will receive legal advice not to participate in an alternative process that does not provide a statutory bar against future prosecution of offending. It is our view that incentives and protections for perpetrator participation are needed.

RESTORATIVE JUSTICE

- 7.51 Restorative justice is both a way of thinking about crime and a process for responding to crime,⁵³⁷ however there is no consensus on what does or does not amount to restorative justice.⁵³⁸ The philosophy of restorative justice views crime as a violation of people in relationships, causing harm for which perpetrators and communities are accountable and have an obligation

535 Meeting between the Law Commission and Project Restore (19 October 2015).

536 Meeting between the Law Commission and Project Restore (19 October 2015).

537 Ministry of Justice *Restorative Justice in New Zealand - Best Practice* (2004) at 7.

538 The United Nations states restorative justice is “any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”: United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* (New York, 2006) at 100.

to repair. It is commonly agreed that, in essence, restorative justice practices are aimed at repairing harm. Howard Zehr gives the following working definition:⁵³⁹

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.

- 7.52 Examples of restorative justice practices from around the world include victim-perpetrator mediations/dialogues,⁵⁴⁰ group conferences of family and/or community members, diversion or treatment, circle models, community panels and, arguably, truth commissions. In Europe, the 2012 European Union Directive establishing minimum standards on the rights, support, and protection of victims of crime requires member states to implement national laws so that victims who choose to participate in restorative justice processes have “access to safe and competent restorative justice services” subject to the minimum conditions set out in the directive.⁵⁴¹
- 7.53 One of the most commonly cited examples of a restorative justice practice in the literature is New Zealand’s family group conference (FGC) model, used in the youth justice area and legislated by the Children, Young Persons, and Their Families Act 1989. FGCs are a conferenced-based form of restorative justice that allow a young person, his or her family, a complainant, Police and other youth justice professionals to collaboratively address the underlying causes of offending while still holding the young person accountable. FGCs can occur at a variety of times and for a number of related purposes. The two most common are the “court-ordered FGC” and “intention to charge FGC”.
- 7.54 An intention to charge FGC may be convened in order to determine whether an offence in respect of which proceedings have been commenced should be dealt with by the court, or whether the matter can be dealt with by way of a plan that is completed and monitored outside of the court process. If a plan is formulated, this might require a young person to undertake treatment, do community work, or make redress. The plan is not filed with the court, but is monitored by Police and Child, Youth, and Family. If the plan is successfully completed this is the end of the matter and no charges are laid. In effect this amounts to pre-charge diversion. However, if the plan is not fulfilled, charges may be laid.
- 7.55 Sexual violence in the youth justice area is more likely to be dealt with by a court-ordered FGC. In those cases the purpose of the FGC is to formulate a plan to address the consequences and the causes of offending which will then be presented to and monitored by the Youth Court.
- 7.56 Although restorative in nature, FGCs are focused on the young person who is alleged to have offended, and do not target the justice needs of victims. However, the “intention to charge” FGC does demonstrate the potential for certain types of offending to be dealt with outside of the court. Police act as gatekeepers of the public interest at the outset, before acting in conjunction with Child, Youth, and Family to monitor the plan, completely outside of the court. If the plan fails the court exists as a “backstop”. And the use of FGCs even in cases of alleged sexual violence demonstrates the application of restorative practices in this area, although in a way that is focused on the offender rather than the victim/complainants.

539 Howard Zehr *The Little Book of Restorative Justice* (Good Books, New York, 2002) at 40.

540 According to Koss and Achilles, whether a restorative justice practice uses the word “dialogue” or “mediation” in its title appears to be arbitrary because in both cases the processes are identical: Mary Koss and Mary Achilles *Restorative Justice Responses to Sexual Assault* (National Online Resource Center on Violence Against Women, 2008) at 5. Note, however, that Sherman draws a distinction between “victim-offender mediation” and “victim-offender conferencing”. The former involves a mediator who negotiates between the parties to achieve a satisfactory outcome. The latter involves a facilitator who provides a forum in which the parties negotiate directly with each other: Lawrence W Sherman and Heather Strang *Restorative Justice: The Evidence* (Smith Institute, 2007) at 33.

541 Directive 2012/29 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/22/JHA [2012] OJ L315/57.

The use of restorative justice in cases involving sexual violence

- 7.57 Restorative justice practices need to be specially tailored for use in sexual violence cases. It is possible that programmes that are not specially designed or delivered by those with expertise cause further harm. This was emphasised to us in submissions and has been remarked on by commentators. Mary Koss, for example, in describing the restorative justice pilot programme RESTORE, notes that:⁵⁴²
- Although there is great enthusiasm for R[estorative] J[ustice] in many countries, careful and well-reasoned analyses raise concerns that these methods could create new risks and potential harms for [victims] of intimate crime... [In designing our programme] we recognized that our planning must acknowledge the unique features of sexual assault, consider how alternative justice practices might improve [victim] experiences in documented areas of dissatisfaction, involve [perpetrators] without violating their constitutional or statutory rights, and anticipate and minimize potential risks of restorative methods.
- 7.58 In New Zealand, the Ministry of Justice defines restorative justice as “a process for resolving crime that focuses on redressing the harm experienced by victims, while also holding the offender to account for what they have done.”⁵⁴³
- 7.59 In New Zealand, there is now no restriction on using restorative justice processes in sexual violence cases. However, Ministry of Justice “best practice” states that the use of restorative justice processes in cases of family violence and sexual violence must be very carefully considered, and advice from those knowledgeable in responding to family violence and/or sexual violence should always be sought.⁵⁴⁴ Restorative justice conference services for sexual violence cases are conducted by four restorative justice providers, including Project Restore.⁵⁴⁵
- 7.60 The Ministry of Justice has recognised that there are particular risks with the provision of sexual violence programmes in court-mandated restorative justice services, and therefore, together with Project Restore, has developed standards for the design and delivery of restorative justice in sexual violence cases.⁵⁴⁶ The Ministry of Justice standards list the principles that guide how restorative justice should be used in cases of sexual violence⁵⁴⁷ and how providers should design and deliver the restorative justice service, including the need for a case management approach, consideration of timing and pacing, and the role of support people.⁵⁴⁸ The standards of service and delivery of programmes are covered by each provider’s contract with the Ministry of Justice, rather than the programmes and providers being assessed and accredited (although facilitators are accredited).
- 7.61 In order to ensure that programmes are safe, we considered whether one specific programme should be endorsed for use by all providers of an alternative justice mechanism dealing with sexual violence. One option would be to roll out the programme developed by Project Restore throughout the country and utilise the Ministry of Justice standards already in place.
- 7.62 However, throughout consultation, it was emphasised to us by those who work in the area that a range of programmes to suit different victims is preferable. As sexual violence can occur in a

542 Mary Koss “Chapter 10: Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” in James Ptacek (ed) *Restorative Justice and Violence Against Women* (Oxford University Press, Oxford, 2009) 218 at 222.

543 “Restorative justice” Ministry of Justice < www.justice.govt.nz >.

544 Ministry of Justice *Restorative Justice in New Zealand - Best Practice* (2004) at 19.

545 Meeting between Roslyn Hefford and Jared Walton (Ministry of Justice) and the Law Commission regarding restorative justice in New Zealand (15 May 2015).

546 *Restorative justice standards for sexual offending cases* (Ministry of Justice, 2013).

547 These principles build on the principles issued in 2004 regarding the use of restorative justice generally in the criminal justice system.

548 *Restorative justice standards for sexual offending cases* (Ministry of Justice, 2013).

- variety of different contexts, and given that not all victims will want the same outcomes or have the same needs, a range of programmes is preferable rather than a “one size fits all” programme. Therefore, rather than endorsing one specific programme, we recommend that an accreditation framework be developed which covers the key values and components that should be present in every programme established under this model.
- 7.63 We acknowledge the criticisms of restorative justice measures, including the view that there is a power imbalance inherent in sexual violence which risks being exploited in a restorative justice conference. The focus on reconciliation or forgiveness is not appropriate for all victims and some victims can be further traumatised in such a setting.⁵⁴⁹ Some of the concerns such as the willingness and capacity of a victim and/or perpetrator to participate, the potential for a perpetrator to take advantage of the system, and the physical safety of the victim can be dealt with (as we discuss in Chapter 9).
- 7.64 Our preference is to give victims the ability to decide which route to take, but with a public interest override. If an alternative process is elected but a case is unsuitable, that will be identified through an assessment process (discussed in Chapter 8). As such, the model proposed in this Report has parallels with restorative justice practices and may draw upon them, however we wish to present an alternative process as unattached and unaligned to other restorative justice approaches in New Zealand and elsewhere.
- 7.65 Pre-sentence restorative justice referrals (such as to Project Restore) would continue to be available as an option.

CONCLUSION

- 7.66 This chapter has set out the case for an alternative justice mechanism, which will be developed in Chapters 8 and 9. We have argued above that an alternative justice mechanism would be valuable in terms of meeting victims’ justice needs and in addition we consider that such a process could be especially useful in addressing the range of incidents of sexual violence. For example, in consultation we heard about incidents of sexual violence being dealt with privately in a restorative way. Police are not necessarily involved and any outcomes agreed to are carried out as a matter of good faith. In one instance we were told of a psychologist who acted as one of two co-facilitators (one of whom was a lawyer) in privately facilitated sessions between victims and perpetrators of historic sexual violence. All of the victims involved explicitly stated that they did not want to go to court, not necessarily because they were afraid of the trial experience, but because they felt that this process was more fitting. The whole process occurred completely separately of the criminal justice system.
- 7.67 We have also heard of similar restorative-type meetings occurring in the New Zealand university context, with co-facilitators working with a victim and perpetrator respectively and successfully bringing them together to address sexual violence committed against the victim. One university highlighted to us that, although it is very supportive of the use of restorative processes, such as restorative justice, and is seeking to use these in its disciplinary procedures, it is cautious about using such processes in cases of sexual violence, due to the seriousness of the conduct in question and the university’s inability to protect any student who may make admissions within such a process.

549 One study found that 25 per cent of youth victims felt worse after restorative justice conferencing: Gabrielle Maxwell and Allison Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Institute of Criminology, Victoria University of Wellington, 2003). See also Howard Zehr *The Little Book of Restorative Justice* (Good Books, New York, 2002).

- 7.68 If, however, there was a safe way to utilise restorative processes, the university in question expressed strong interest for such processes to be put in place, as many students do not wish to make a complaint to Police. Some wish to continue in a relationship with the perpetrator, whilst wanting the perpetrator to know the effect of the behaviour complained of and that it is unacceptable. Conversely, there is currently no incentive (due to the risk of imprisonment) for any perpetrator to acknowledge the sexual violence that occurred, nor is there any protection for those perpetrators who do wish to acknowledge what occurred and make redress. Our consultation has highlighted that any alternative process needs to be thoroughly thought through in order to pre-emptively address these issues.
- 7.69 During the course of writing this Report it has become apparent that an alternative justice mechanism could be an appropriate option for victims in a variety of workplaces and institutional settings (such as secondary schools, the military, and hospitals) where incidents of sexual violence have occurred but where victims do not wish to, or are not easily able to, come forward to Police but want some way to address the incidents in question.

IS THERE A PUBLIC INTEREST FACTOR IN AN ALTERNATIVE JUSTICE MECHANISM?

- 7.70 In proposing an alternative justice mechanism we are aware of the need to also balance concerns about protecting the public interest (one of the functions of the criminal justice system) while providing an alternative process to better address the needs of victims. As Daly writes:⁵⁵⁰
- Finding the right balance between censuring wrongs, validating and vindicating victims, protecting society, and providing support and services for offenders and victims in a democratic society that is committed to the rule of law and due process for citizens is a significant and far-reaching task. It requires imaginative and innovative ways of thinking about justice beyond the standard approaches of prosecution and trial, or of increasing punishment.
- 7.71 Any proposal for an alternative justice mechanism that sits outside the criminal justice system must be established in such a way that the public can have confidence in it, that the public interest is protected, and that there are statutory protections relating to the rights and obligations of those participating in the alternative process (for example related to confidentiality, privilege, and double jeopardy). It must meet certain quality standards and be subject to oversight and monitoring.
- 7.72 Chapter 8 turns to address these factors before Chapter 9 outlines our proposal for an alternative process.

550 Kathleen Daly *Conventional and innovative justice responses to sexual violence* (Australian Centre for the Study of Sexual Assault, Issues Paper 12, 2011) at 27.

Chapter 8

Key issues concerning the alternative process

INTRODUCTION

- 8.1 In this chapter we consider two difficult issues presented by a proposal for an alternative justice mechanism: whether there should be any filtering of cases; and how an alternative justice mechanism should be designed in order to appropriately incentivise the participation of perpetrators.

WHICH CASES CAN PROCEED THROUGH THE ALTERNATIVE PROCESS?

- 8.2 Our proposal for an alternative justice mechanism, which we outline in the next chapter (and which we call the “alternative process”), would operate on a voluntary basis at the election of a victim, completely outside of the court process, and with the participants “tak[ing] on responsibility and control for the outcome”.⁵⁵¹ There is a question, however, whether there should be any filtering out of cases or any limits placed on victims’ choices as to which cases can proceed through the alternative process.
- 8.3 There are four principal reasons why some limits on the eligibility of cases might be imposed, and these are based on victim safety or public safety:
- (a) In some cases, the perpetrator may pose an ongoing risk of committing acts of sexual violence against others in the community.⁵⁵²
 - (b) The public might consider the acts of sexual violence to be of such a character that they must be dealt with in the criminal justice system.
 - (c) In cases involving intimate partner violence, the alternative process might not be appropriate.
 - (d) The dynamics of some cases may make them unsuitable for the alternative process – for instance, where the victim is at risk of secondary victimisation or further emotional harm from the perpetrator, where there is a significant age gap between the parties, or where there are coercive pressures on the victim or parties to participate.
- 8.4 We deal with each of these in turn and consider whether there are safeguards or steps that should be taken to address the situations described above.

551 Elisabeth McDonald and Yvette Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 377 at 421.

552 We are primarily talking here of the risk of a perpetrator committing further acts of sexual violence. There is some evidence that those who have been convicted and imprisoned for sexual offending against an adult tend to be generally antisocial and are just as likely to reoffend in a violent non-sexual way as to reoffend sexually and more likely to commit a general offence – such as burglary. However there is little research available regarding the likelihood of reoffending in sexual or other ways of those amongst the population who would not normally be convicted of a sexual offence – for the very reason that they usually escape detection. They may in part escape detection because they are not generally antisocial and therefore not perceived as “real rapists”. We are grateful to Danica McGovern of Victoria University of Wellington (PhD candidate in the area of risk assessment and treatment track for sexual offence court) and Professor Devon Polaschek of Victoria University of Wellington for their insights on these issues and other matters addressed in this chapter including risk assessment mechanisms, reoffending, and public interest factors.

RISK OF PERPETRATOR COMMITTING FURTHER ACTS OF SEXUAL VIOLENCE

- 8.5 As noted in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*, in an alternative process,⁵⁵³ particularly one operating outside of “formal criminal justice mechanisms”, where an offender is deemed to be dangerous to the community, “the wishes of the victim may need to be over-ridden in assessing the needs of the wider population”.⁵⁵⁴ The difficulty is providing the mechanism that can determine in which cases victims’ wishes should be overridden by broader community interests. A balance needs to be struck, given that overriding victims’ wishes could disempower them by denying their option to seek redress in an alternative way.⁵⁵⁵
- 8.6 On the other hand, where there is a chance of the perpetrator committing acts of sexual violence against some other person or persons and compromising community safety, the community needs to be protected and the prosecutorial and protective functions of the criminal justice system may be required. If found guilty the perpetrator will likely be imprisoned and, in some instances, will be provided with treatment programmes, thus enhancing the prospect of community safety.⁵⁵⁶ An alternative process would place the perpetrator outside the criminal justice system and, the argument goes, this could result in a risk to the public.
- 8.7 The view that the outcome of sexual violence is of significant public interest and the State needs to act accordingly has been expressed by Professor Jeremy Finn, who observed in correspondence to us that:⁵⁵⁷
- There are issues of public safety and the safety of potential future victims of reoffending by a sexual offender which cannot be adequately addressed in a restorative justice context. However unless the case is fully investigated and prosecuted the factual basis for predicting likely reoffending will not be established and there will not be a basis for determining whether the public interest really requires a severe or indeed incapacitating sentence.
- 8.8 However, the ability of the criminal justice system as it stands to protect society from potential reoffending is doubtful. It is also open to argument as to whether imprisonment addresses the safety of the community in the long term, other than removing offenders from the community for a period whereupon, at release, they may still pose a risk to others (unless they have received treatment and this has been successful).
- 8.9 Project Restore considers that any “risk” to community safety exists regardless of the alternative process and this “risk” does not change just because the victim comes forward and discloses sexual violence in the process (which, without the process, they may not have

553 They were particularly discussing a restorative justice-type process.

554 Elisabeth McDonald and Yvette Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 377 at 421. We have understood “dangerous” to mean in the sense that there is a chance of the perpetrator committing further acts of sexual violence against some other person or persons and compromising community safety, however it may be that even though the risk of the perpetrator committing such further acts is low, that initial act of sexual violence committed was of such a character that society is not prepared to take the risk of a further act of sexual violence being inflicted on any other person. The latter interpretation is more akin to the second concern described in paragraph 8.3 above and will be discussed further below.

555 McDonald and Tinsley, above n 554, 377 at 421.

556 Some offenders may receive treatment in prison. However, most programmes are targeted at those who offend against children (Kia Marama and Te Piriti). There is a relatively recent programme for offending against adults that has been extended to three prisons, Spring Hill, Waikeria and Christchurch Men’s. The criteria for entry is that the offender is serving a sentence of imprisonment of five years or more for an offence of serious sexual assault against a victim aged over 16 years and is assessed as medium-high or greater on the Automated Sexual Recidivism Scale (medium-high is a 24 per cent rate of sexual recidivism over 10 years). The offender needs to accept responsibility for the offending and consent to participate in the programme. See Nick J Wilson, Glen Kilgour and Devon LL Polaschek “Treating high-risk rapists in a New Zealand intensive prison programme” (2013) 19 *Psychology, Crime & Law* 511.

557 Email from Professor Jeremy Finn (Canterbury University) to the Law Commission regarding alternative trial processes (8 October 2015).

disclosed at all).⁵⁵⁸ Project Restore believes the risk that a perpetrator may commit other acts of sexual violence can be managed.⁵⁵⁹

- 8.10 In the opinion of Project Restore it could be better for a perpetrator to proceed through an alternative process and receive treatment for the causes of the sexual violence (with the possibility that this could increase the safety of the community). The effect of imprisonment may actually be to increase, rather than reduce, the likelihood of reoffending.⁵⁶⁰ Victims who have not reported to Police but opt for the alternative process may be exposed to secondary victimisation if their cases are precluded from proceeding due to perceived risks to community safety posed by the alternative process.⁵⁶¹
- 8.11 It needs to be acknowledged that there will always be some level of risk that a perpetrator may commit other acts of sexual violence if allowed to proceed through the alternative process. The decision then is one of policy: at what point is the risk unacceptable and how should this be measured?

Risk assessment mechanism

- 8.12 In the Issues Paper it was proposed that “specialist providers would assess the circumstances of the case, in consultation with police, to determine whether it was suitable for an alternative resolution process. They would consider factors such as the risk posed by the accused person, the nature and strength of the evidence, and the nature of the offending”.⁵⁶²
- 8.13 In this Report we continue to recommend that it would be providers who would conduct suitability assessments of cases to proceed through the alternative process (discussed further below). In our view those providers should also conduct a risk assessment to determine whether the case poses an unacceptable level of risk to community safety and therefore should not proceed through the alternative process.
- 8.14 However, rather than providers relying on intuitive decision-making or each provider applying its own risk assessment mechanism, we recommend that these assessments should be conducted using a comprehensive risk assessment mechanism to ensure consistent, robust, and quality decision making.
- 8.15 We discuss below some of the risk assessment mechanisms currently available and whether a new risk assessment mechanism or tool is required to implement our proposal for the alternative process.

What risk assessment mechanism?

- 8.16 Various risk assessment mechanisms have been developed to assess the likelihood of a perpetrator reoffending again in the same way in the future or reoffending generally. For instance a New Zealand tool, the “Risk of Conviction X Risk of Reimprisonment” (known as “RoC*RoI”) is used by the Department of Corrections as a measure for deciding who should receive treatment and who can be released on parole. “Static-99” is a United States tool that

558 Correspondence from Project Restore to the Law Commission regarding alternative trial processes (7 September 2015).

559 Meeting between Project Restore and the Law Commission (19 October 2015).

560 Correspondence from Project Restore to the Law Commission regarding alternative trial process (7 September 2015). Daly argues that punitive strategies, such as increased criminalisation and penalisation, can deepen social and economic inequalities and in fact entrench reoffending (amongst other problems): Kathleen Daly *Conventional and innovative justice responses to sexual violence* (Australian Centre for the Study of Sexual Assault, Issues Paper 12, 2011) at 25.

561 Correspondence from Project Restore to the Law Commission regarding alternative trial process (7 September 2015).

562 Law Commission *Alternative Pre-trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 51.

was developed to assess the risk of sexual and violent recidivism by sex offenders.⁵⁶³ Such assessments necessarily look at a person's past record of general criminality and antisocial behaviour. However, these may not be good predictors in respect of those who have not traditionally been imprisoned for sexual offending.⁵⁶⁴

- 8.17 There are a number of drawbacks with the existing sex offender risk assessment tools:⁵⁶⁵
- They were designed for those who predominantly or exclusively commit acts of sexual violence against children, not adults.⁵⁶⁶
 - They have been developed for those who have been convicted of a sexual offence, whereas the population that is being targeted in the alternative process may not be typical of the same population and it is not known how well the tools might work with that population.
 - Most existing assessment tools have been developed for North American offenders and are therefore based on their characteristics and rates of reoffending.
- 8.18 The Report of the Centre for Innovative Justice and the Ministry of Justice standards for restorative justice sexual violence cases set out the kinds of matters a risk assessment would need to incorporate. Broadly, these include:⁵⁶⁷
- the characteristics of the victim, including age, background, cognitive capacity, sensitivities, needs, and psychology;
 - the characteristics of the perpetrator, including age, background, cognitive capacity, sensitivities, needs (including drug and alcohol abuse), and psychology, including an assessment of personality pathology in any previous antisocial behaviour or previous criminal history;
 - the level of insight and remorse demonstrated by the perpetrator;
 - the nature, seriousness and circumstances of the act of sexual violence including whether the behaviour was ongoing and chronic or circumstantial; whether violence or other criminal offending was involved; or whether deception or concealment was involved;
 - whether multiple perpetrators or multiple victims were involved; and
 - the broader family, cultural and community context in which the act of sexual violence occurred, including any cultural distortions of notions of shame or the harm caused.

Typology of perpetrators

- 8.19 Researchers have attempted to categorise those who commit sexual violence in order to, amongst other things, provide appropriate programmes to different perpetrator “types”. The categorisations or “typologies” attributed to those who sexually assault adults are based on the primary motivations of those perpetrators: pervasive anger; vindictiveness; opportunism;

563 LW Bakker, David Riley and James O'Malley *ROC, risk of reconviction* (Department of Corrections, Wellington, 1999) and Andrew Harris and others *STATIC-99 Coding Rules* (Corrections Directorate Canada 2003). Email from Danica McGovern to the Law Commission regarding repeat undetected perpetration (7 October 2015).

564 Email from Danica McGovern to the Law Commission regarding risk issues (29 September 2015).

565 Email from Danica McGovern to the Law Commission regarding risk issues (29 September 2015).

566 Those who sexually abuse children differ from those who sexually abuse adults. Although we envisage there will be some perpetrators who go through the alternative process in respect of historic sexual abuse against children, and these risk tools may be relevant to them, we anticipate that the majority would be perpetrators of sexual violence against adults, and therefore these tools will not be appropriate. Email from Danica McGovern to the Law Commission regarding risk issues (29 September 2015).

567 Centre for Innovative Justice *Innovative justice responses to sexual offending - pathways to better outcomes for victims, offenders and the community* (2014) at 48–50; *Restorative justice standards for sexual offending cases* (Ministry of Justice, 2013) at 19. The latter draw on Project Restore *Restorative Justice for Sexual Violence: Principles of good practice* (Project Restore NZ, 2010).

or sexual gratification. (These are split, in turn, into subcategories).⁵⁶⁸ It may be that certain typologies (possibly those motivated by non-sadistic sexual gratification) are better suited to participation in the alternative process and therefore this may need to be considered in preparing the risk assessment framework.⁵⁶⁹

Previous offending or perpetration of acts of sexual violence

- 8.20 Consideration needs to be given to whether all cases in which a perpetrator has a history of previous sexual offending or has committed acts of sexual violence should be automatically ruled out under any risk assessment framework. Previous offence history is not a watertight indicator of whether or not a perpetrator will commit an act of sexual violence in the future. A “recidivist offender” may have committed an act of sexual violence which, with the right preparation, could be suitably addressed through the alternative process and “first-time offenders” may have in fact committed acts of sexual violence previously but not been detected or reported.
- 8.21 Research from the United States spanning a 32 year period (from 1979 to 2011) highlighted that apparent “first-time” sexual offending may actually be the first *detected* instance of offending.⁵⁷⁰ These studies, which used self-reporting questionnaires with samples of non-incarcerated men usually from universities or the military, found that between 6.4 and 24.5 per cent of the 5098 participants reported attempting or completing rape since the age of 14. Two-thirds of the men who acknowledged perpetrating an act of sexual violence said they did so more than once.
- 8.22 No comparable research has been conducted in New Zealand, but these studies would suggest that caution should be exercised in placing too much weight on the lack of a previous criminal history when considering so called “first-time offenders” for participation in the alternative process. We do envisage, however, that the information held by Police and other agencies about a perpetrator, including any previous offending, will be an important part of any risk assessment mechanism.

Specific mechanism

- 8.23 There are currently no mechanisms that are completely appropriate or readily adaptable for the alternative process. It also needs to be acknowledged that no mechanism or tool will be perfect at predicting risk.
- 8.24 Nevertheless, we consider that a standardised mechanism is needed. We therefore recommend that a specific risk assessment framework be developed for the alternative process, with, at a minimum, input from the sexual and family violence sectors, forensic mental health/psychological experts, and researchers. The aim would be that through application of the specific risk assessment framework, providers would be able to determine whether a case posed an unacceptable risk to community safety were it to proceed through the alternative process.

568 Raymond A Knight “Validation of a Typology for Rapists” (1999) 14 *Journal of Interpersonal Violence* 303 at 311.

569 Danica McGovern notes that many of the typology studies have been conducted with perpetrators who have been imprisoned; it is not clear whether a population of non-incarcerated perpetrators would fit within these typical typologies: email from Danica McGovern to the Law Commission regarding repeat undetected perpetration (7 October 2015).

570 Figures extrapolated from the following studies: Esther J Calzada, Elissa J Brown and Megan E Doyle “Psychiatric Symptoms as a Predictor of Sexual Aggression among Male College Students” (2011) 20 *Journal of Aggression, Maltreatment & Trauma* 726; Stephanie K McWhorter and others “Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel” (2009) 24 *Violence and Victims* 204; David Lisak and Paul M Miller “Repeat Rape and Multiple Offending Among Undetected Rapists” (2002) 17 *Violence and Victims* 73; Neil M Malamuth and others “Using the Confluence Model of Sexual Aggression to Predict Men’s Conflict With Women: A 10-Year Follow-Up Study” (1995) 69 *Journal of Personality and Social Psychology* 353; Heidi M Zinzow and Martie Thompson “A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in US College Men” (2015) 44 *Archives of Sexual Behavior* 213; and Antonia Abbey and others “Patterns of Sexual Aggression in a Community Sample of Young Men: Risk Factors Associated with Persistence, Desistance, and Initiation Over a 1-Year Interval” (2012) 2 *Psychology of Violence* 1.

- 8.25 Once developed, the risk assessment framework would need to be applied by all providers to ensure consistency of decision making.

RECOMMENDATIONS

- R31 A risk assessment framework should be developed specifically for the alternative process, with, at a minimum, input from the sexual and family violence sectors, forensic mental health/psychological experts, and researchers in the field.
- R32 Providers should apply the risk assessment framework to determine whether cases pose an unacceptable risk to community safety and should not proceed through the alternative process.

PUBLIC INTEREST

- 8.26 There will be cases which are of such a character that there is a compelling public interest in prosecuting them within the criminal justice system, in order that the conduct can be publicly denounced and the perpetrator punished. These may be cases that involved, for instance, a weapon, multiple perpetrators, or extreme physical violence. Regardless of any measure of the risk of the perpetrator committing another act of sexual violence, the public interest would demand such cases be dealt with through the criminal justice system and precluded from the alternative process.
- 8.27 Therefore, any desire that a victim may have to opt for the alternative process may be legitimately overridden in these sorts of cases.⁵⁷¹
- 8.28 It should be noted that the cases primarily envisaged as entering the alternative process are not those cases that engage significant public interest, but those that would not otherwise be reported or dealt with through the criminal justice system. It is more likely that they will involve perpetrators who do not conform to the stereotype of the “real rapist” and thus be less likely to be perceived by the public as in need of denunciation and punishment.
- 8.29 Nevertheless, where there is a compelling public interest, as described above, we accept that certain cases will need to be precluded from entering the alternative process. Again, the question is how this should be determined. The options would be to:
- rule out altogether particular offences by reference to the relevant section in the Crimes Act 1961;
 - rule out cases that meet a certain description, for instance cases involving use of a weapon, multiple perpetrators, or excessive physical violence; or
 - rather than deeming certain cases ineligible, rule out cases on a case-by-case assessment through application of the risk assessment framework discussed above.
- 8.30 In our view, excluding cases by offence type will catch too many cases. For instance, if cases of “sexual violation” as defined under section 128 of the Crimes Act 1961 were prohibited from going through the alternative process this would cover a huge range of cases, many of which might in fact be appropriate to proceed through the alternative process. Because it is our

⁵⁷¹ It is highly likely that in such a situation that there would be sufficient other evidence for a prosecution to succeed and conviction to result without a victim’s evidence, should a victim not make a complaint to Police.

preference, where appropriate, to provide as many victims as possible with the choice of the alternative process, we do not favour this approach.

- 8.31 The Report of the Centre for Innovative Justice, in making its case for the use of restorative justice in sexual violence at all stages of the court process including pre-court, argues that distinguishing between types of offences suggests that some sexual violence is more serious than others. This may have the effect of denying the subjective experience of victimisation and the harm suffered by each victim, and removing the autonomy of victims to decide on whether to elect the alternative process or court.⁵⁷² Its view was that there ought to be a case-by-case assessment of whether a case should be permitted to proceed through a restorative justice process. Although we are attracted to this approach, assessing on a case-by-case basis may put too much onus on providers who would be making the assessments (see below) and may risk subjective decision-making.
- 8.32 Our preference, therefore, in cases where the public has a compelling interest in seeing a perpetrator publicly denounced, is to exclude those cases from entry into the alternative process by way of a description set out in the legislation (which we refer to as a “public interest legislative descriptor test”).
- 8.33 We acknowledge that it may not be easy to frame such a description, but ultimately it will be a policy decision as to how it is worded. We would suggest that cases be excluded from the alternative process where the public has a compelling interest in seeing conduct publicly denounced, including where there are factors such as use of extreme physical violence, multiple perpetrators and use of a weapon.
- 8.34 As a matter of practicality, there will still need to be a person or body assessing cases as to whether or not they are excluded based on the public interest legislative descriptor test. We therefore recommend that the providers should conduct the assessment of whether cases meet the legislative descriptor test when conducting the risk assessment.

RECOMMENDATIONS

- R33 Cases where the public has a compelling interest in seeing conduct publicly denounced should be excluded from entry into the alternative process by way of a description set out in statute (the “public interest legislative descriptor test”). Such cases should include those where there are factors such as use of extreme physical violence, multiple perpetrators, and use of a weapon.
- R34 Providers should conduct the assessment of whether cases meet the public interest legislative descriptor test as part of conducting the risk assessment (see R 32).

USE OF ALTERNATIVE PROCESS IN CASES INVOLVING INTIMATE PARTNER VIOLENCE

- 8.35 As noted in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*, concerns have been expressed at the use of mediation or restorative-type processes in situations involving intimate partner violence.⁵⁷³ Intimate partner violence can be characterised as a harmful pattern of relating in which the perpetrator manipulates or exercises power and control over a victim, often over a long period of time, and may be indicative of an inherent power imbalance

⁵⁷² Centre for Innovative Justice, above n 567, at 60.

⁵⁷³ McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 554, at 419.

between the partners in a relationship. It is likely to be difficult to properly address that power imbalance within an alternative process and achieve a fair outcome. Another concern is that, by conducting these processes outside the criminal justice system, the seriousness of intimate partner violence is potentially diminished.⁵⁷⁴

8.36 A further concern expressed during consultation was that, as there is a potential benefit to perpetrators in participating in the alternative process (because if the process is completed then there will be a statutory bar on prosecution of the same incident), victims may be coerced into participating against their will or subjected to physical, emotional or psychological abuse during or as a result of the process.

8.37 In consultation, members of the Family Violence Death Review Committee (FVDRC) expressed the view that restorative justice processes for sexual violence (particularly in cases involving ongoing family violence) are potentially unsafe. That view has also been expressed by a number of academics including Julie Stubbs and Anne Cossins.⁵⁷⁵ Before any restorative justice-type processes could be applied to cases involving intimate partner violence, the FVDRC would want to see:⁵⁷⁶

a stronger evidence base for improved outcomes in terms of victim safety and satisfaction and reduced recidivism before introducing restorative justice into situations that involve ongoing offending. Such interventions are a particular concern in family violence cases where remorse and apology can be part of the abuse process and where offender programmes in New Zealand do not accord with international standards of safe practice.

8.38 Others have taken a different view and argued that some form of restorative type process or innovative justice mechanism may be possible in response to acts of sexual violence sexual and/or intimate partner violence in a way that does not subject victims to secondary victimisation.⁵⁷⁷ This has been demonstrated in respect of sexual violence (and, more recently, in respect of intimate partner violence) in New Zealand by the use of restorative justice-type processes through Project Restore. Advocates suggest that restorative justice-type processes may be an effective option for cases of “acquaintance rape” or acts of sexual violence within a family context. However, as noted in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*, the category of “acquaintance rape” contains a large variety of acts of sexual violence, not all of which may be properly dealt with outside the traditional criminal justice process.⁵⁷⁸

It has not been established to date that (all) rape cases can be effectively dealt with, from a victims’ perspective, by a restorative justice process. The indications are that it may be possible, but not in every case, not for every victim, and not without thoughtful development of the best process.

8.39 The key question that arises here in the context of the alternative process is: whether the risks to victims of sexual violence (where that occurs in the context of intimate partner violence) can be sufficiently and safely managed in the alternative process proposed.

8.40 As this Report is focused on sexual violence, not intimate partner violence, we accept that there may well be concerns about the provision of the alternative process to cases that involve both

574 At 419.

575 Anne Cossins “Prosecuting Child Sexual Assault Cases: To specialise or not, that is the question” (2006) 18 *Current Issues in Criminal Justice* 318; Julie Stubbs “Chapter 17: Gendered Violence and Restorative Justice” in Hayden, Anne and others (eds) *A Restorative Approach to Family Violence* (Ashgate Publishing, Surrey, UK, 2014).

576 Letter from Family Violence Death Review Committee to the Law Commission regarding alternative trial processes reference (16 September 2015).

577 We note, however, that the alternative process is not a restorative justice process per se, although some programmes may use a tailored restorative justice-type approach.

578 McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 554, at 420.

sexual violence and intimate partner violence. We do not wish to propose a process that may inadvertently cause more harm to victims of intimate partner violence.

- 8.41 Project Restore has, in the last year, been undertaking more cases involving sexual violence in the context of intimate partner violence. In its experience, such cases are far more complex, time intensive and difficult to safely manage than cases involving only sexual violence. It has urged caution in including such cases until such time as programmes are properly developed and the lack of coordination in the family violence sector is addressed.⁵⁷⁹
- 8.42 We agree that it would help to continue building the evidence base, developing programmes, and building capacity so that there are providers with the understanding of the dual dynamics of both intimate partner and sexual violence.⁵⁸⁰ However, we are also reluctant to exclude a significant group of people (mostly women) from the alternative process because the sexual violence they are subjected to is occurring in the context of intimate partner violence.
- 8.43 We therefore consider that where the alternative process is determined to pose a safety risk to victims, those cases should be assessed as ineligible under the suitability assessment, which is discussed in the next section.

RECOMMENDATION

R35 Where sexual violence occurs within the context of intimate partner violence, and where the alternative process would put the victim at a risk of harm, those cases should be assessed as ineligible under the suitability assessment (see R 36).

SUITABILITY OF INDIVIDUAL CASES

- 8.44 The last of the four concerns noted at the outset of this chapter concerns the suitability of individual cases to proceed through the alternative process, given the potential risk that the victim will be subjected to further victimisation by the perpetrator within the alternative process and may be emotionally unsafe. This may be due to the young age of the victim and/or perpetrator, the age gap or power imbalance between the victim and perpetrator, coercion to be involved in the process, or the perpetrator not taking responsibility for the acts in question.
- 8.45 There is also the possibility, discussed above, of victims in intimate partner relationships being subject to physical violence (or other forms of violence) or being coerced into participation.

“Suitability assessment”

- 8.46 To counter these risks, we propose that providers of programmes under the alternative process should conduct a “suitability assessment” of the case. It would be the responsibility of the provider to determine through the suitability assessment if it was suitable for the victim and perpetrator to proceed through the alternative process or whether there was a risk of the victim being subject to secondary victimisation, coercion, or physical or other forms of violence. There may also be a risk to the perpetrator’s physical safety from the victim’s family/whānau or others, that the provider would need to consider.
- 8.47 As we discuss in the next chapter, in order for a perpetrator to be eligible for the alternative process, we propose that a perpetrator will (amongst other things) have to acknowledge that the

⁵⁷⁹ Meeting between Project Restore and the Law Commission (19 October 2015).

⁵⁸⁰ Our understanding is that at present, specialists in the sector tend to operate in the area of intimate partner violence/family violence or sexual violence but not both.

sexual encounter or act occurred.⁵⁸¹ Therefore, as part of the suitability assessment, a provider would need to assess the perpetrator's ability to accept responsibility for the act and to move to a point of acknowledging the harm caused to the victim and to make redress. The capacity of the perpetrator to do so is an important part of the alternative process. If the perpetrator is unable to do so, continuing with the alternative process may cause the victim further harm as the perpetrator will neither be offering a genuine apology nor inclined to make other redress or address the causes of the behaviour.

- 8.48 This is currently the basis on which Project Restore assesses perpetrators for inclusion in restorative justice conferences. This assessment (as part of the whole suitability assessment) is undertaken within Project Restore by a multi-disciplinary team comprising a psychologist and two specialists in sexual violence, one operating from the perpetrator perspective and one from the victim perspective.⁵⁸²
- 8.49 Also in terms of the model proposed, the suitability assessment may also need to take into account:
- whether it would be appropriate for young victims (or perpetrators) to participate in the alternative process;⁵⁸³
 - whether there are any indications that the victim (or perpetrator) is being coerced to participate;
 - whether there is a risk of physical violence to the victim (or perpetrator) from participation (including relationships where there is intimate partner violence, as discussed in the previous section); and
 - any history of attempts to use the alternative process to resolve the current incident or other incidents of sexual violence.
- 8.50 We do not envisage that the alternative process will be able to be used by a perpetrator on multiple occasions, as previous participation may indicate a previous lack of genuine engagement in the process (and may have a bearing on the likelihood of the perpetrator committing further acts of sexual violence). However, there may be instances where a perpetrator is assessed by the provider as suitable to participate, despite having previously participated in the alternative process.
- 8.51 As a result of the assessment, a provider may determine that the case is suitable to proceed through the alternative process. Alternatively a provider may decide that it would be unsafe, in a physical, psychological, or emotional sense, for the victim (or perpetrator or others, such as family members) if the case were to proceed through the alternative process or that, due to the presence of factors such as those outlined above, it would not be suitable for the case to proceed through the alternative process.
- 8.52 The suitability assessment needs to be ongoing throughout the delivery of the programme. Project Restore has told us of instances where they have commenced working with a victim and a perpetrator, preparing them for a restorative justice conference, but some way along the process decided it would be detrimental to the victim were the process to continue and have

581 This does not necessarily equate, at this point in the process, to the perpetrator acknowledging that it was an act of violence or that harm has been caused to the complainant as a consequence, but the suitability assessment *would* involve consideration of whether a perpetrator is likely to be able to move to that point: see Chapter 9.

582 Shirley Jülich and others *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (AUT University, May 2010).

583 See Appendix C.

therefore stopped the process (for instance, the perpetrator has not moved from the position of blaming the victim for what occurred, thus putting the victim at risk of further victimisation).⁵⁸⁴

- 8.53 The suitability assessment is necessarily subjective and its effectiveness will rely to a large extent on the knowledge and experience of the providers conducting the assessments. As we set out in the next chapter, those assessing the cases and providing programmes must be trained and experienced in working with, and understanding the dynamics of, sexual violence.

RECOMMENDATION

R36 Providers should conduct suitability assessments of individual cases to proceed through the alternative process. Such suitability assessments should consider the dynamics of the individual case, taking into account the matters outlined in Chapters 8 and 9 of this Report, and including an assessment of whether the perpetrator has the capacity to move to a point of acknowledging the harm caused to the victim by the act of sexual violence; to offer a genuine apology; and to make redress.

INCENTIVISING PERPETRATOR PARTICIPATION IN THE ALTERNATIVE PROCESS

- 8.54 Throughout our consultation process it was made clear that one of the key concerns with the criminal justice system is that there is no impetus for perpetrators to acknowledge their wrongdoing in any form, because any acknowledgement exposes them to the risk of a long term of imprisonment. Coupled with this is the fact that in cases of sexual violence there is often little evidence, other than the word of the victim and perpetrator, which makes establishing proof beyond reasonable doubt an unlikely outcome in a criminal trial. Perpetrators may therefore be advised or be prepared to risk pleading “not guilty”, if charged with an offence, as the likelihood of conviction in such cases is low.

- 8.55 Perpetrators who *do* wish to engage in mediation, discussion or some sort of informal process outside of court are not currently protected, as what they say could be used to initiate criminal proceedings against them or used in the course of criminal proceedings. This is an issue that must be considered in respect of perpetrator participation in our proposed alternative process.

- 8.56 A perpetrator may not be prepared to engage in the alternative process unless what is said, and the fact of participation, is “privileged” – that is, protected from use in any subsequent court proceedings. The risk for perpetrators, with the current situation, is highlighted in a 2010 exploratory study of the work of Project Restore:⁵⁸⁵

Victim-survivors can withdraw from the restorative process at any time and place charges with the police. Offenders are [therefore] urged to seek legal advice before agreeing to participate. If the offender does choose to continue, Project Restore labels the conversations as “therapeutic interventions” with the expectation that conversations will be protected, although this is a protection that has not yet been challenged in court. Project Restore keeps limited information on self-referred cases to help protect confidentiality and privacy.

- 8.57 The study highlighted that if the information disclosed in a restorative justice process could be legally protected, “in the same way [as] a therapeutic conversation between a doctor and a patient”,⁵⁸⁶ there would be a greater chance of honest and full participation from perpetrators. Feedback we received in submissions and during consultation, including from those working

584 Meeting between Project Restore and the Law Commission (19 October 2015).

585 Jülich and others, above n 582, at 53.

586 At 29.

with victims of sexual violence, emphasised the importance of perpetrators being protected against inadvertently incriminating themselves. We therefore consider that any disclosures made in the alternative process should be privileged, as a necessary incentive for perpetrator participation.

- 8.58 In the previous chapter we outlined various models (including that proposed in the report of the Centre for Innovative Justice) that confer privilege on disclosures but leave open the option of criminal prosecution. However, in our view, this approach may discourage participation by many perpetrators, as we consider that it is likely that perpetrators will be advised not to participate in the alternative process without the further protection of a statutory bar against prosecution of the same incident of sexual violence. As we wish the alternative process to be available for as many victims as is possible, we consider that a statutory bar to prosecution also needs to be one of the protections of the alternative process. We discuss this in more detail in the next chapter.
- 8.59 However, regardless of what incentives are put in place, there may still be some perpetrators who do not wish to engage with the alternative process. This may particularly be the case where there is insufficient evidence for a perpetrator to be charged with, let alone convicted of, an offence, and consequently little impetus to participate in the alternative process.
- 8.60 In such situations the victim will, unfortunately, be unable to progress a case through the criminal justice system (for lack of evidence) and yet may also be unable to utilise the alternative process (if a perpetrator does not wish to participate). We therefore consider that the alternative process should, where possible, be able to be used by victims to meet their justice needs in ways that do not involve the perpetrator (for instance, by using the process to reconcile with family or to receive validation from their community of support).
- 8.61 In the next chapter we discuss the alternative proposal in more detail and the range of programmes we think could be made available to meet the various justice needs of victims.

Chapter 9

Proposal for reform

INTRODUCTION

- 9.1 This chapter sets out in detail our reform proposal for an alternative justice mechanism, which we call the “alternative process”, to deal with cases of sexual violence.
- 9.2 Our proposed reform is based on the Law Commission’s 2012 Issues Paper⁵⁸⁷ and informed by *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*⁵⁸⁸ and by subsequent submissions, consultation with key stakeholders and by recent literature and reports concerning the use of restorative justice in sexual violence cases.
- 9.3 We have also drawn to some degree on the 2014 report of the Melbourne Centre for Innovative Justice (based at RMIT University) on the use of innovative justice processes to deal with sexual violence.⁵⁸⁹ A significant part of the 2014 report deals with introducing restorative justice conferencing for sexual violence, including at a pre-court stage.⁵⁹⁰
- 9.4 For the purpose of clarity, in this chapter we will refer to our proposal as the “alternative process”. As part of the alternative process there will be “alternative programmes”, but we use the broader term of “alternative process” to refer to the whole process, covering the initial approach to a provider to be accepted into a programme; the provider’s assessment of the victim and perpetrator (including any review of that assessment); and participation in, and completion of, the programme.

OVERVIEW OF PROPOSAL

- 9.5 We propose that victims of sexual violence have the option of an alternative process as an alternative to (or, in some instances, as well as) participation in the criminal justice system. Victims could contact an accredited programme provider to discuss the range of options available and help determine what programme would best meet the victim’s justice needs.
- 9.6 Victims may wish to meet with a perpetrator to tell their story and seek redress (for example reparation, an apology or undertaking to complete a treatment programme) or they may, for example, wish to reconcile with or be validated in front of family members or their relevant support community. The process would be adapted to meet the needs and wishes of the relevant victim (and perpetrator), and therefore would not operate to a set model. The goal in all cases, however, would be for the victim to achieve what they felt was justice and for perpetrators

587 Law Commission *Alternative Pre-trial and Trial Processes* (NZLC IP30, 2012).

588 Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

589 Centre for Innovative Justice *Innovative justice responses to sexual offending - pathways to better outcomes for victims, offenders and the community* (2014) at 6. As far as we are aware there have not yet been any plans to implement the proposal set out in the Centre for Innovative Justice’s report.

590 However, the key difference between what we are proposing and the Centre for Innovative Justice model is that under the latter model the option to bring criminal proceedings would still be open to victims, whereas under the model we are proposing if the alternative process was completed there would be a statutory bar against bringing proceedings against the perpetrator in respect of the same incident of sexual violence committed against the same victim.

(where involved or, if relevant, family members) to take responsibility for their actions, and where appropriate give redress and address the causes of their behaviour.

- 9.7 In a programme where the perpetrator was involved, the provider would monitor any outcome agreement and, if the alternative process was satisfactorily completed by the perpetrator, there would be a statutory bar against the perpetrator being prosecuted in relation to the same incident of sexual violence. In a programme that did not involve a perpetrator, a victim would still have the option to make a complaint to Police and proceed through the criminal justice system.
- 9.8 A programme may include:
- preparing the victim and perpetrator for meeting;
 - a safe meeting of the victim and perpetrator (for example through a facilitated conference or hui on a marae; or through an exchange of letters);
 - the victim telling her or his story and the impact or harm caused by the perpetrator's actions;
 - the perpetrator acknowledging responsibility for his or her actions and the harm caused, offering redress and committing to actions to address causes of behaviour and to prevent further sexual violence; and
 - preparing an outcome agreement, which might include an apology, reparation to the victim, treatment for harmful sexual behaviour or education programmes for the perpetrator.

Features of the alternative process

- 9.9 The various features of the alternative process are summarised here and elaborated on in more detail throughout this chapter.
- 9.10 The process would be voluntary and therefore the victim and/or perpetrator could withdraw from the process at any time, up until the time the process was completed. A victim who withdrew would have the option to make a complaint to Police and proceed through the criminal justice system. A perpetrator who withdrew would face the prospect of a complaint being made by the victim to the Police.
- 9.11 There will be a number of incentives for a perpetrator to participate in the alternative process:
- participation and statements made would be privileged;
 - as noted above, if the alternative process is completed by the perpetrator there would be a statutory bar against the perpetrator being prosecuted in relation to the same incident of sexual violence against the same victim; and
 - there would be no criminal record as a result.
- 9.12 A record of those who had completed the alternative process would be maintained, but disclosed only in limited statutorily-permitted circumstances.
- 9.13 There would be provision for access to legal advice for the victim and perpetrator, and the fact of participation and any statements made would be privileged and confidential.
- 9.14 Where the victim elected a programme that involved meeting or interacting with a perpetrator, then the victim and perpetrator would need to meet certain statutory eligibility criteria (see paragraphs 9.88 to 9.107) including, for the perpetrator, an acknowledgement that the incident

- occurred. The case would then be put through the risk assessment.⁵⁹¹ Where the provider determined that the case did not pass the risk assessment, a victim or perpetrator could apply for the decision of the provider to be reviewed.
- 9.15 The provider would then subject the case to a suitability assessment based on the dynamics between the victim and perpetrator.
- 9.16 The alternative process differs from the criminal justice system in that it does not involve a fact-finding forum which can attribute guilt and punish a perpetrator (and thus the victim does not have any input into a sentencing outcome, in the traditional sense). And, unlike existing court-mandated restorative justice programmes, the alternative process would operate outside the umbrella of the court and judicial oversight.
- 9.17 In our view some degree of oversight is desirable to give those programmes credibility and authority, and to inspire public confidence in the process. At the end of this chapter we discuss the oversight functions that need to be performed in respect of these programmes.

REFORMS REQUIRED FOR THE PROPOSAL

- 9.18 Key to the proposal will be providers and programmes, who will be independently assessed, accredited, and monitored. In addition, some legislative provision will need to be made and some policy infrastructure required.
- 9.19 New legislation would be required to:
- outline the guiding principles of the alternative process;
 - set down eligibility criteria and definitions of certain matters regarding victim and perpetrator participation in the alternative process;
 - set out the criteria for excluding those cases in which there is such a compelling public interest, that they will not be permitted to proceed through the alternative process (the “public interest legislative descriptor test”);
 - provide for a bar on criminal proceedings being commenced when the perpetrator completes the alternative process;
 - provide certain protections for those who participate in the alternative process; and
 - set out a mechanism for review of certain decisions by providers.
- 9.20 Some changes will also be required to the Evidence Act 2006 in order to provide protections for participants in the process.
- 9.21 Finally, the functions set out below will need to be performed if this reform proposal is to be given proper effect. Depending on the form of oversight, the functions, which may either be set out in new legislation or administratively assigned to an existing body, include:⁵⁹²
- developing a framework for accreditation of programmes and providers;
 - assessment, accreditation and ongoing monitoring/auditing of programmes and providers;
 - developing guidelines/good practice standards to govern the delivery of programmes;
 - building provider capacity;

591 See Chapter 8.

592 We discuss who might fulfil those functions at the end of this chapter.

- encouraging the development of programmes;
- developing a risk assessment framework for cases seeking entry to the alternative process (in order to assess what is an unacceptable risk to community safety);
- reviewing certain decisions of providers; and
- maintaining records and a central registry regarding completion of the alternative process.

GUIDING PRINCIPLES

9.22 We recommend that the following guiding principles be set out in legislation regarding the alternative process:

- to enhance the rights of victims of sexual violence by acknowledging the impact of sexual violence; the resulting specific justice needs of victims, including victims' needs to hold perpetrators accountable through an alternative process; the need for power to be rebalanced between the victim and perpetrator; and to provide an alternative process outside of the criminal justice system that provides programmes that take these matters into account;
- to empower victims to make decisions about how to repair the harm done to them by sexual violence,⁵⁹³ and
- to provide programmes that, in addition to the above:
 - recognise the over-representation of Māori as both victims and perpetrators and that are responsive to their needs;
 - are culturally and socially responsive and flexible enough to accommodate the widest range of cases including those involving cognitive impairment, mental illness and physical disability;
 - respect and protect the rights of both victims and perpetrators in the alternative process; and
 - enable access to the alternative process for victims who elect it, but reserve access to the criminal justice system as it applies in sexual violence cases where a perpetrator does not participate in or complete the alternative process.

RECOMMENDATION

R37 A new statute should be passed which sets out the guiding principles for the alternative process and the other matters covered in Chapters 8 and 9 of this Report.

DIVERSITY OF PROGRAMMES

9.23 As set out in Chapter 7 we consider that it should be possible for there to be a range of programmes offered under the alternative process. Therefore, rather than endorsing one programme, we recommend that an accreditation framework is developed which covers the key values and components that should be present, whilst allowing a diversity of programmes to be developed to meet the differing needs of victims.

⁵⁹³ See Crimes (Restorative Justice) Act 2004 (ACT), s 6(a).

9.24 For instance, in some cases, an intensive approach in the nature of that developed by Project Restore will be appropriate with its “team” of a victim specialist, offender specialist, and a conference facilitator.⁵⁹⁴ In other cases, it might be more appropriate for co-facilitators, with specialist input, to conduct the process on a shorter timeline.⁵⁹⁵ Programmes could be tailored to provide, for instance, for different ethnicities, those with particular disabilities, or young people. There could also be variation in location (for instance, a marae or church), the number of people involved, or specific cultural practices that apply.

Models without perpetrator

9.25 In some instances the victim may not wish to engage with a perpetrator, yet may wish to tell their story to a formal body. In such cases an alternative approach might nonetheless still be appropriate, such as restorative justice-type practices which draw on “truth-telling” – where the victim is able to go before a formal body, perhaps including their own community, and tell their story of sexual violence.⁵⁹⁶ This could provide validation and vindication of the complainant’s experience and the wrong committed against him or her. Therefore, some programmes may be developed to address these kinds of situations.

9.26 We are told that, in the experience of Project Restore, it is often in the preparatory work with victims that extremely valuable work is done in providing validation and support to victims, even if a conference does not result.⁵⁹⁷ The experience of the South-Eastern Centre Against Sexual Assault (SECASA) in Melbourne is that, in the majority of its cases, victims do not opt to involve a perpetrator but rather they choose to work on reconciliation or strengthening family relationships that have been affected by the act of sexual violence.⁵⁹⁸

9.27 Alternatively a perpetrator may be unwilling, or deemed inappropriate, to participate in the alternative process and so an adapted programme or model without the perpetrator could be utilised by the victim.

Marae justice model

9.28 Restorative justice providers who work with Māori have told us that there is a demand for services that are targeted to sexual violence, but that are also underpinned by kaupapa Māori and that allow for participation of whānau and hapū. Mana Social Services and Korowai Tumanako, respectively based in Rotorua and the far north of New Zealand, are, amongst other things, providers of restorative justice services to complainants of sexual violence who have been referred from the courts under the Sentencing Act 2002. They service heavily Māori-populated communities.

9.29 In the Māori world view, sexual violence impacts not only on the mana of a whānau member who is the victim, but on the whole whānau.⁵⁹⁹ A possible model could emphasise the collective and might, for instance, be based on the approach to dispute resolution described by Valmaine

594 Project Restore has also provided feedback to us that it does have the ability to be flexible in its programmes, and adapt them to the participants involved: Meeting between Project Restore and the Law Commission (19 October 2015).

595 For instance, we have been told of this approach where sexual violence occurs in university halls of residence. This may be more appropriate where there is less of an entrenched power dynamic and the issues involved relate to consent, communication of consent, and the use of alcohol.

596 Leigh Goodmark “‘Law and Justice Are Not Always The Same’: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Violence” (2015) 42 Florida State University Law Review 707.

597 Email from Project Restore to the Law Commission (7 September 2015).

598 Email from Bebe Loff (Monash University) to the Law Commission (6 September 2015) enclosing the Monash University Human Research Ethics Committee application form for their restorative justice pilot project. Bebe Loff is director of Michael Kirby Centre for Public Health and Human Rights of Monash University in Melbourne and is leading the evaluation of the SECASA pilot project.

599 McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 588, 377 at 428.

Toki. She describes a process where the marae is the forum for resolution and the imbalance in the community caused by the individual's actions is addressed as follows:⁶⁰⁰

[T]he principle of kotahitanga (inclusiveness) in participation and accountability underpin any process of Māori dispute resolution. All parties to a dispute must be represented and given an opportunity to be heard. In contrast to the present criminal justice system, it is not essential that the individual be present as it is the collective that is the defendant and it is the collective that is the plaintiff. But the individual would suffer a loss of mana if they did not attend.

If the wrongdoing is not admitted by the group or the offender, it is passed to the living relations by whanaungatanga ... The offender is encouraged to accept responsibility and in doing so re-establish the mana amongst the group. The group then decides what actions are required by the offender to establish utu [reciprocity to restore the balance] with the victim and their community.

- 9.30 To fit within the alternative process model, there would still need to be an election by the victim to a collective approach as well as consent by the perpetrator (and the involvement of specialist facilitators/providers in the process) but, in our view, as long as the relevant processes comply with the key values and accreditation standards, there would be room for creative approaches towards development of the programmes themselves.
- 9.31 Such a model may also be appropriate amongst other cultures which emphasise the impact of harm on the individual and also on the individual's community and wider family.

Key values

- 9.32 From our research we identified the key values and features that need to be incorporated into programmes, which are that:⁶⁰¹
- the safety of the victim and others is ensured on an ongoing basis throughout the programme, thus the programme design and delivery needs to guard against secondary victimisation or risk of physical harm to the victim;
 - all aspects of the programme reflect an in-depth understanding of sexual violence and are delivered by specialists in sexual violence;
 - the programme is victim-driven in terms of timing, pace, and how the process is delivered;
 - the programme addresses the justice needs of the victim including providing the victim the chance to tell his or her story, to be validated and vindicated, and for the perpetrator to be held to account;
 - the programme is flexible: it is responsive firstly to the victim's needs and the context in which the incident occurred, and, where the perpetrator is involved, to the needs of the perpetrator and others involved; and
 - the programme involves the victim's and the perpetrator's family/whānau/support networks or communities for the purposes of accountability and support.
- 9.33 Where the perpetrator is involved in the programme, the following aspects should be incorporated:
- the perpetrator is supported to understand the impacts of their behaviour and how to make redress; and

600 Valmaine Toki "Are Domestic Violence Courts working for indigenous peoples?" (2009) 35 CLB 259 at 276, cited in McDonald and Tinsley "Rejecting 'one size fits all': Recommending a range of responses" in McDonald and Tinsley (eds), above n 588, 377 at 430.

601 We have drawn here on Project Restore *Restorative Justice for Sexual Violence: Principles of good practice* (Project Restore NZ, 2010); Ministry of Justice *Restorative Justice in New Zealand - Best Practice* (2004); and Centre for Innovative Justice *Innovative justice responses to sexual offending - pathways to better outcomes for victims, offenders and the community* (Centre for Innovative Justice, 2014).

- the perpetrator is treated fairly.

KEY COMPONENTS OF PROGRAMMES

9.34 As discussed above, there will be flexibility for programmes to differ from each other. We expect there will be key components, but their inclusion may vary depending on the programme.⁶⁰²

Preparation

- 9.35 Time spent with the victim and perpetrator preparing them for meeting is an extremely important part of the process. Preparation time with the victim provides support and validation; establishes what the victim's justice needs are and how the process will be delivered (where, when, who is to be at a meeting or whether there should even be a meeting); and prepares them for what the perpetrator might say. In some programmes, this will be the main or only step if the victim does not go on to meet the perpetrator.
- 9.36 Preparation time with the perpetrator can challenge a perpetrator's understanding and acknowledgement of his or her behaviour, open the perpetrator's eyes to understand the harm caused and have him or her consider what redress to offer.

Meeting

- 9.37 This may be a facilitated conference, whānau meeting, or a series of meetings. Alternatively the meeting may involve a letter or some other communication from the victim, but should involve the perpetrator and the perpetrator's community of support and accountability – unless the meeting is between the victim and his or her family/whānau.
- 9.38 At the meeting the victim and perpetrator (or victim and his or her family/whānau) are to be brought together in a safe way to address the incident of sexual violence, perhaps through the victim telling his or her story and detailing the harm caused, and with the perpetrator accepting responsibility and acknowledging the harm. A family/whānau member may acknowledge the harm that occurred, affirm the victim's story and apologise for not previously believing a victim, or apologise for their role in the abuse.

Outcome agreement

- 9.39 When the victim and perpetrator both participate in an alternative process, they may wish to draw up an outcome agreement in order to specify the redress the perpetrator will make to the victim. The outcome will depend on the victim and perpetrator involved and on the provider's expert views as to what is appropriate in the circumstances. In order to be workable, the agreed outcomes would need to be specific, measurable, achievable, and able to be monitored, as well as broadly proportionate.⁶⁰³ It may be helpful for anticipated dates of completion of terms (if relevant) to be included. Parameters and guidance on appropriate outcomes would need to be included in guidelines/good practice standards (see Appendix D).
- 9.40 Possible outcomes might include:
- an apology from the perpetrator;

602 See Project Restore *Restorative Justice for Sexual Violence: Principles of good practice* (Project Restore NZ, 2010); Ministry of Justice *Restorative Justice in New Zealand - Best Practice* (2004); and Centre for Innovative Justice *Innovative justice responses to sexual offending - pathways to better outcomes for victims, offenders and the community* (Centre for Innovative Justice, 2014).

603 Sometimes the acronym "SMART" is used to describe outcomes that are specific, measurable, achievable, results-focused, time-oriented. Outcomes would also need to be broadly proportionate, as perpetrators may offer something extreme in the intensity of the meeting, but then be advised against it or renege. It would not be beneficial for complainants if the perpetrator reneged, and therefore it is better for the agreement to be realistic.

- an agreement from the perpetrator to enter into treatment for harmful sexual behaviour, drug and alcohol addiction or education programmes;
- an agreement that the perpetrator pays reparation to the complainant or makes a donation to a charitable body of the complainant's choosing;
- an agreement that the perpetrator will not associate with the complainant or other people or will not do certain things (for example we were told of an informal mediation outcome where the perpetrator agreed, at the complainant's request, to no longer play the organ at the local church); or
- an agreement that the perpetrator will consent to the Family Court making a protection order (on the application of the victim).

9.41 We are aware that some outcome agreements reached in pre-court or community referral sexual offending restorative justice conferences involve ongoing commitments – such as for a perpetrator not to have contact with children.⁶⁰⁴ However, for the purposes of the alternative process, a condition of this sort would present difficulties as it cannot be easily monitored, nor would it be achievable within a certain time frame given its perpetual nature. This in turn has implications for the bar on prosecution – as a completed process is a bar on prosecution but the alternative process cannot be completed if the conditions are unable to be fulfilled. Therefore an agreement needs to consist of a set of conditions which are quantifiable and can be completed within a certain timeframe.

9.42 We would be reluctant to recommend that such terms ought not to be permissible in an outcome agreement and therefore consider that there could be ongoing terms which would be “undertakings” made by the perpetrator,⁶⁰⁵ but would not be “conditions” of the agreement. There would need to be a distinction between “conditions” and “undertakings” in the agreement.

Monitoring of agreement

9.43 The provider would be responsible for monitoring the perpetrator's compliance with the conditions agreed to in the outcome agreements and for providing any necessary assistance towards fulfilling the terms. This will require being in contact with the perpetrator and encouraging him or her in fulfilling the terms, but not being given any specific additional powers to ensure compliance. Guidelines/good practice standards will need to provide guidance for providers in this regard.

Completion of process

9.44 Once the conditions of the outcome agreement have been fulfilled, the alternative process will be deemed to be completed. There may be a meeting (which the complainant could choose whether or not to attend) or some other process to acknowledge the completion of the agreement and provide some closure. The provider will keep a record of the fact of completion and notify the appropriate bodies (discussed later in this chapter). A definition of “completion” will need to be set out in legislation.

Non-completion of process

9.45 Non-compliance or failure to fulfil all the conditions of the outcome agreement will result in the alternative process not being completed. The victim would have the option to make a complaint

⁶⁰⁴ Meeting between Project Restore and the Law Commission (19 October 2015).

⁶⁰⁵ These would not be “undertakings” in the sense that they could be sued upon.

to Police about the incident of sexual violence.⁶⁰⁶ We discuss the additional implications for both the victim and perpetrator later in this chapter.

ACCREDITATION FRAMEWORK

- 9.46 As noted in Chapter 7, the “Restorative justice standards for sexual offending cases” prepared by the Ministry of Justice list the principles which guide how restorative justice should be used in cases of sexual violence, and how providers should design and deliver the restorative justice service itself, including the need for a case management approach, consideration of timing and pacing, and the role of support people.⁶⁰⁷ The standards of service and delivery of programmes are covered by each provider’s contract with the Ministry of Justice, rather than the programmes and providers being assessed and accredited (although as noted below, facilitators are accredited).
- 9.47 However, there is not any accreditation or assessment process relating to the safety and effectiveness of programmes. We do not wish to imply from this that processes being delivered by providers currently are not safe, yet in the context of new programmes being developed as part of the alternative process, it is imperative, in our view, that programmes are assessed as appropriate, safe and effective before they can be delivered.
- 9.48 All the programmes we are aware of that have been applied in cases of sexual violence, such as RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) Arizona, Project Restore, and the Australian SECASA pilot,⁶⁰⁸ have been based on research and developed over a long period of time. New programmes should be required to prove that they too are sound and evidence-based.
- 9.49 Therefore, in order for the public and those participating in the alternative process to be assured that the process consists of safe programmes that work, we recommend that a rigorous accreditation framework be developed which includes the key values and components required for safe and effective programmes. This framework should be developed with input from the sexual violence sector and programmes (and the providers who design and deliver them) must meet the standards of, and be assessed in accordance with, an accreditation framework.⁶⁰⁹ The framework could expand upon the existing Ministry of Justice standards or a new framework could be developed with those standards as the starting point.
- 9.50 The accreditation framework would need to be flexible enough to cover any programme approach or model that complied with the standards of the framework. The RESPECT Accreditation Standard, developed in the United Kingdom (RESPECT Standard)⁶¹⁰ is a model used to accredit domestic violence prevention programmes and is an example of an accreditation framework that encompasses practice standards, programme design and delivery, and which we believe could be drawn on in establishing an accreditation framework for the alternative process.

606 Whether or not Police would then file a charge against the alleged offender would be subject to Police discretion and depend on there being, for instance, sufficient evidence.

607 *Restorative justice standards for sexual offending cases* (Ministry of Justice, 2013). These principles build on the principles issued in 2004 regarding the use of restorative justice generally in the criminal justice system in Ministry of Justice *Restorative Justice in New Zealand - Best Practice* (2004).

608 See Appendix B for discussion of these models.

609 We also envisage that framework will be broad enough to encompass the practices of providers and facilitators and that they will be also accredited in accordance with the framework.

610 *The RESPECT Accreditation Standard* (RESPECT, 2012).

- 9.51 Under the RESPECT Standard, organisations seeking accreditation must have a “written model of work which includes the content and structure of the work with clients, theory underpinning [it] and the methods of delivery”.⁶¹¹ Any model of work can be chosen providing it adheres to the aims of a RESPECT accredited service.⁶¹² Experience in the United Kingdom has shown that the RESPECT Standard “provides a strong framework in which different approaches and models can be and are used safely and effectively”.⁶¹³
- 9.52 Utilising such an approach would ensure that programmes meet certain standards and incorporate key values in their design, yet have the flexibility to respond to the specific needs of different demographic groups – this could be for Māori, other ethnicities, youth, those with disabilities, etc.
- 9.53 We recommend that, once accredited, programmes are then audited on a regular basis (perhaps twice a year).

RECOMMENDATIONS

- R38 A rigorous accreditation framework should be developed against which programmes can be assessed and which incorporates the key values and components described in paragraphs 9.32 to 9.45 of this Report, yet which is sufficiently flexible to allow the development of creative, safe, effective, and robust programmes.
- R39 The new statute (see R 37) should include a definition of “completion of a programme”, which should include the perpetrator fulfilling all “conditions” agreed to in an outcome agreement but should exclude any “undertakings” made by the perpetrator.
- R40 The programmes should be audited on a regular basis (perhaps twice a year).

PROVIDERS AND SPECIALIST FACILITATORS

- 9.54 Providers, as the first point of contact and the ones responsible for risk assessments, will be the gatekeepers into the alternative process. Under the alternative process victims and perpetrators will also be relying on the process and the providers, rather than the court.
- 9.55 The public and those participating in the alternative process need to be assured that providers and facilitators are specialists, skilled at what they do, robust in their practice and processes, operating to a high standard, and capable of safely delivering the alternative programmes.
- 9.56 We consider it fundamental that provider organisations are comprised of staff or contractors with specialist skills who are trained in working with sexual violence and able to deliver safe programmes in this context.⁶¹⁴

611 At 4.

612 The eight aims of a RESPECT accredited service are: to increase the safety of complainants; to assess and manage risk; to be part of a coordinated community response to domestic violence; to provide services which recognise and respond to the needs of diverse communities; to promote respectful relationships; to work accountably; to support social change; and to offer a competent response: at 4–5.

613 At 4.

614 Writing on this point, McDonald and Tinsley also stress the possible damage to victims unless those involved in programmes understand the dynamic of sexual violence. This in turn, they note, will require a commitment to fund and support providers: McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 588, 377 at 420–421.

Providers

- 9.57 Currently, the Ministry of Justice standards require providers who conduct restorative justice sexual violence cases to have links with family violence and sexual violence specialist agencies; to have a team of victim and offender specialists; and a system of allocating cases to specialist restorative justice facilitators.⁶¹⁵ At present, providers are not accredited but the standards of service and delivery of programmes are covered by each provider's contract with the Ministry of Justice. Providers report regularly and are evaluated.
- 9.58 In our view, in order to ensure at the outset that such standards are met and that providers are competent and staff are skilled specialists, there is a case for requiring that all providers (and programmes) are assessed on a one-on-one basis for competency against rigorous standards. In our view this is preferable to relying only on providers' contractual obligations to comply with standards, although that too will assist in ensuring on an ongoing basis that standards are met. If providers meet the standards then they will be accredited.
- 9.59 Accreditation of providers is also necessary as it would be theoretically possible for providers to set up and offer programmes through the alternative process without Ministry of Justice funding. Such providers would not be bound by any contractual terms to abide by the Ministry of Justice standards.
- 9.60 We therefore recommend that the accreditation framework should also incorporate standards and competencies relating to providers against which they are assessed and accredited. The standards and competencies could draw on those already set out in the Ministry of Justice standards.
- 9.61 In our view, after accreditation, providers should be regularly monitored and their accreditation renewed on a regular basis (such as twice a year).

Facilitators

- 9.62 Currently the Ministry of Justice requires that only a facilitator who is accredited to do so can deliver restorative justice services for sexual violence, and only four providers have accredited facilitators. The process for accreditation of facilitators is paper-based, which means that a facilitator must be first accredited as a general restorative justice facilitator, and then an application is made for accreditation as a sexual violence facilitator.⁶¹⁶
- 9.63 Our understanding is that the Ministry of Justice has, as a result of recent tendering processes, contracted with an external organisation to conduct the training and accreditation process for facilitators. This means there will be a transfer of responsibility for accreditation of facilitators from the Ministry of Justice to an independent party.
- 9.64 The new accreditation processes conducted by the independent party will be based on a training and accreditation framework developed to identify and confirm key skills and competencies required to deliver services, whether these are standard restorative justice services or apply to family violence or sexual violence cases.⁶¹⁷ The aim is to provide assurance that facilitators are

615 *Restorative justice standards for sexual offending cases* (Ministry of Justice, 2013).

616 Facilitators are accredited after successfully completing modules; receiving generic training on restorative justice technique; co-working some cases and then being assessed by an external assessor. However any who wish to work in specialist areas (such as sexual violence) are then further accredited "on the papers". An application is made (including a statement of support from the provider), which details a person's knowledge and experience. In response, accreditation may be conferred in full; not conferred if there is insufficient evidence of the skills, knowledge and experience; or provisionally granted (some oversight is required while the applicant gains further skills, knowledge or experience). Email from Andrea King (Ministry of Justice) to the Law Commission regarding alternative trial process project (18 September 2015).

617 Email from Andrea King (Ministry of Justice) to the Law Commission regarding alternative trial processes project (18 September 2015).

competent. The Ministry of Justice has advised that it is likely that training and individualised assessments of sexual violence facilitators will be the new standard.⁶¹⁸

- 9.65 In our view, this is an improvement on the current situation, where, although the general accreditation standards have been well developed by the Ministry of Justice, facilitators' expertise in relation to sexual violence is only assessed on paper, rather than in a one-on-one assessment of a facilitator's skills, competency, and any qualifications.
- 9.66 We also consider that those seeking accreditation for sexual violence facilitation should be, at a minimum, specifically trained and preferably also hold qualifications in psychology, social work or law (with a focus on alternative dispute resolution).⁶¹⁹ SECASA requires its facilitators to undertake specific training on sexual violence dynamics and assessment of perpetrators based on forensic psychiatry.⁶²⁰
- 9.67 If the change to accreditation processes does not eventuate as anticipated by the Ministry of Justice, then we recommend that the accreditation framework we are recommending, discussed above, should also incorporate standards and competencies relating to facilitators against which they are assessed and accredited.
- 9.68 After accreditation, facilitators should be regularly monitored and their accreditation renewed on a regular basis (such as twice a year).

Statutory prohibition

- 9.69 In our view, significant harm could result to victims and possibly to the public if providers who are not accredited are responsible for entry of cases into the alternative process (through the assessment process) and offer programmes that are not accredited. We consider that no one should be permitted to deliver alternative process programmes unless they are an accredited provider, using accredited facilitators (if relevant to the programme model) and delivering accredited programmes. To support this we recommend that it should be a breach of the legislation to do so.

RECOMMENDATIONS

- R41 Providers and facilitators should be specialists who are trained and experienced in working with sexual violence.
- R42 The accreditation framework against which programmes are assessed (see R 38) should also incorporate standards and competencies against which providers and facilitators can be assessed, accredited, and regularly monitored.
- R43 Providers and facilitators should be required to renew their accreditation every few years or (for providers) earlier if there are significant changes to the structural operation of the provider.
- R44 It should be a breach of the statute to deliver a programme unless the person or body is accredited and the programme and facilitators are accredited.

618 Phone conversation between Andrea King and the Law Commission regarding alternative trial processes project (1 October 2015).

619 Email from Bebe Loff to Law Commission regarding SECASA (7 September 2015).

620 Email from Bebe Loff to Law Commission regarding SECASA (7 September 2015).

ENTRY INTO THE ALTERNATIVE PROCESS

Referral to alternative process

- 9.70 We envisage that complainants would self-refer to a programme provider or be referred from one of several possible points – for instance through a doctor, a sexual violence support agency, including through a Sexual Abuse Assessment and Treatment Service (SAATS) centre; Police; a hospital; a lawyer or via an 0800 phone line or website (as discussed in Part D).
- 9.71 In Part B we recommend that the role of the specialist victims’ advisers under the Ministry of Justice be extended so that they can offer support independently of any trial process. If that recommendation is accepted these advisers could also be expected to inform victims of their options regarding an alternative process.
- 9.72 If a victim was to first approach Police regarding an incident of sexual violence, Police will need to advise the victim of the alternative process as an option for dealing with the incident. Even if Police considered there to be sufficient evidence to file a charge in court in relation to the sexual violence, the option of the alternative process would still need to be put to a victim, with the possibility that the victim may choose not to lay a formal complaint. If the victim does make a complaint, and subsequently the Police decide after investigation not to lay charges, or if prosecution is commenced but discontinued, the victim could be referred or could self-refer to the alternative process.
- 9.73 As is the situation with current Police policy, the decision whether or not to make a formal complaint would continue to lie with the victim.⁶²¹ Police would still be entitled to investigate and bring a prosecution without the victim’s evidence, even if the victim does not make a formal complaint. However, our understanding is that the Police/Crown prosecutor would be unlikely to force an unwilling victim to give evidence (as a hostile witness) in any proceedings, unless it involved a matter of significant public interest. Therefore, unless there was strong external evidence and it was in the public interest, Police would be unlikely to proceed without a victim’s evidence.⁶²²

OVERVIEW OF ASSESSMENT BY PROVIDER AND RIGHT OF REVIEW

First contact with provider

- 9.74 When a victim seeking participation in the alternative process contacts a provider, the provider should discuss the various options available to a victim in respect of an incident of sexual violence, including the criminal justice option.
- 9.75 If the victim wishes to continue down the alternative process route, the provider would need to advise the victim as to the programme it provides, its key features, and any possibility of the programme being adapted to meet the victim’s justice needs (for instance if the victim did not wish to meet with the perpetrator but wished to reconcile with her or his own family). The provider should also supply information regarding any other programmes that are operating in the geographical area, in case the victim preferred a different programme.

Eligibility criteria

- 9.76 If the victim wishes to participate in a programme *without* a perpetrator and the victim is assessed by the provider as eligible to participate in the alternative process (as per the criteria

621 The current policy is to work with a victim and offer a choice of whether a report made to Police should be treated as a formal complaint or not: New Zealand Police *Adult sexual assault investigation (ASAI) policy and procedures* (2013) at 13.

622 At 31.

discussed later in this chapter), the programme can proceed and the victim must be advised of his or her continuing right to file a complaint with Police.⁶²³

- 9.77 If the victim wishes to participate in a programme involving a perpetrator, the provider will need to meet with the victim and perpetrator separately and, in accordance with the legislative eligibility criteria and guidelines/good practice standards, determine the respective eligibility of the victim and perpetrator to participate in the process.⁶²⁴ At this point the provider should also confirm the identity of the perpetrator, for instance through the perpetrator providing appropriate identification, such as a passport and driver's licence. This seeks to mitigate the possibility that the perpetrator may give a false name and thus escape further consequences if he or she subsequently commits a further act of sexual violence.⁶²⁵
- 9.78 If the perpetrator is not eligible or does not wish to participate in the process, the victim may be offered a place in an adapted programme, if appropriate.

Risk assessment

- 9.79 If the perpetrator wishes to and is eligible to participate in the alternative process, the provider would conduct a risk assessment in accordance with the risk assessment framework in order to determine firstly whether the case is one that meets the "public interest legislative descriptor test" (see Chapter 8). As part of the assessment the provider would also determine if the case poses an unacceptable risk to community safety and therefore should not proceed through the alternative process.⁶²⁶
- 9.80 If, after conducting the assessment, the provider concludes that the case is prohibited from proceeding due to public interest factors or an unacceptable risk to community safety, the provider would advise the victim and perpetrator of its decision; the reasons for it; and the right of the victim and perpetrator to seek a review of this decision.

Suitability assessment

- 9.81 If the provider assesses that the case is safe to proceed, then the provider will then need to conduct a suitability assessment. In conducting this assessment the provider needs to take into account the individual dynamics of the case in order to assess whether it is suitable for the victim and perpetrator to proceed through the process or whether, for instance, the victim may be subjected to secondary victimisation through the process or be at risk of physical violence (particularly in the case of intimate partner violence).⁶²⁷ As part of this assessment the provider would also need to ascertain the perpetrator's capacity to move to a point of accepting and acknowledging the harm caused by his or her actions to the victim.
- 9.82 If the provider determines that the case is not suitable, the provider would advise the victim and perpetrator of its decision and the reasons for it and a place in the relevant alternative programme would not be offered. We consider that there should be no review of a provider's decision to deny entry to the programme based on the suitability assessment, as this decision must be based on the provider's specialist expertise and opinion on the particular case in question and with all the relevant information before them.

623 The victim should also be advised of her or his other options at other points in the assessment process where the alternative process is not made available to the victim and perpetrator – for instance if the perpetrator did not wish to participate; the case was unsuitable to proceed through the process; or the provider determined that the case posed an unacceptable risk to community safety. It may be possible at that point for the victim to participate in a programme without a perpetrator.

624 See discussion below regarding the development of guidelines and the legislative eligibility criteria.

625 This point was highlighted to us by Police as being a necessary precaution. Email from Tina Chong (Police Policy Group) to the Law Commission regarding alternative trial process (8 September 2015).

626 This assessment is conducted using the risk assessment framework to be developed: see Chapter 8 and further discussion below.

627 See detailed discussion on what constitutes suitability and the suitability assessment in Chapter 8 and further discussion below.

- 9.83 If, having done the assessment, the provider determines that the case is appropriate to go through the programme offered, the victim and perpetrator would be:
- offered a place in an alternative process programme;
 - informed of the voluntary nature of participation, the applicable rules/protocols of the programme, and the implications of participation and withdrawal from the process; and
 - given the opportunity to seek legal advice.
- 9.84 If the victim and perpetrator still wish to proceed and (having obtained legal advice if desired) provide written consent, the programme would commence.

Review

- 9.85 If sought by a victim or perpetrator, a review of the provider's decision under the risk assessment would be conducted by a review panel, which, as is discussed further below, we recommend be constituted for the purpose of carrying out that review.
- 9.86 If, after review, the review panel determined that the initial decision was made incorrectly by the provider, it could identify the errors and refer the case back to the provider for reconsideration.
- 9.87 However, if the review panel determined that the initial decision was made correctly, it would advise the victim and perpetrator of its decision. That would not exclude the right, if any, of the parties involved applying for that decision to be judicially reviewed.

ELIGIBILITY FOR PARTICIPATION IN THE ALTERNATIVE PROCESS

Victim eligibility criteria

- 9.88 Any victim who has experienced sexual violence should be able to elect to participate in the alternative process (with the exception of cases that meet the “public interest legislative descriptor”, see Chapter 8) as long as the victim meets a list of initial eligibility criteria to be set out in legislation.⁶²⁸
- 9.89 In the case of victims the criteria should be that:
- the victim has consented to participate in the alternative process; and
 - the victim is 16 years or older, *or* the victim is aged over 12 years but under 16 years and has been assessed by the provider as nonetheless eligible to participate.

Consent⁶²⁹

- 9.90 A definition of “consent” will need to be set out in legislation. In our view, in this context consent to participate should be defined as the victim:
- having full legal capacity (for instance, not being subject to any disability or court order which affects their capacity);⁶³⁰
 - having been assessed as wishing to participate of his or her own free will, without pressure or coercion from others;

628 However as we go on to discuss, although a victim may pass the initial eligibility test, the subsequent assessments or other factors may mean the case cannot continue in the alternative process.

629 For more detailed discussion see Appendix C.

630 Such as a welfare or property order under the Protection of Personal and Property Rights Act 1988.

- having had the opportunity to take legal advice;⁶³¹
- understanding his or her legal rights and the implications of participation, including the protocols of the particular process they are undertaking;⁶³² and
- having given consent in writing.

9.91 It would be the responsibility of the provider to assess and confirm the eligibility of the victim to participate, including obtaining their written consent.

Age restriction⁶³³

9.92 In the interests of legal certainty, we consider that it is appropriate for the minimum age of eligibility to participate (as an adult) to be 16 years.

9.93 We also consider it appropriate that some young people under the age of 16 years should be eligible to participate in the alternative process. Determining a lower age limit is difficult and also somewhat arbitrary, as children develop differently. However, 12 years of age is a significant developmental point for children and some will be undergoing puberty and becoming sexually active, and therefore this may be an appropriate age.

9.94 We have been advised during consultation that for this age group it is crucial:

- to assess any external factors or people that may be influencing a young person either into or out of the alternative process;
- that the young person has a strong network of support around them in proceeding through the alternative process.

9.95 We therefore consider that victims between the age of approximately 12 years and 16 years should be eligible to participate in the alternative process and recommend that rather than setting a lower age, the guidelines/good practice standards should provide guidance for a provider in making that decision. There should, however, be some criteria set out in legislation that a provider must consider in assessing the suitability of the victim to participate in the alternative process, namely:

- his or her competence and maturity to participate;⁶³⁴
- whether he or she is consenting freely to participate and without coercion;
- the likelihood of the young person benefitting from the alternative process; and
- the young person having sufficient and appropriate family, whānau or other support.

Perpetrator eligibility criteria

9.96 We recommend that the following eligibility criteria apply to perpetrators. The perpetrator:

- consents to participate (in accordance with the legislative definition of consent);

631 See discussion on legal advice in the section on protections later in this chapter.

632 For instance, a victim would need to understand that if the alternative process is completed, a perpetrator will not be able to be prosecuted in respect to the same incident of sexual violence against her or him. See further discussion below.

633 For more detailed discussion see Appendix C.

634 This based on the “*Gillick*” competency test for minors – that children are individuals who grow in intelligence, competence and autonomy as they move towards adulthood and therefore a child has legal competence in making decisions, provided that she or he has sufficient understanding and intelligence to enable full understanding of what is proposed: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL). See also Chantelle Murley “Does the *Gillick* Competency Test Apply in New Zealand, Given the Special Nature of Sexual Health Care Services?” (2013) 1 Public Interest Law Journal of New Zealand 92.

- is 16 years or older or is aged over 12 years but under 16 years and has been assessed by the provider as nonetheless eligible to participate;
- acknowledges he or she committed the act of sexual violence complained of, or, at a minimum, acknowledges that a sexual encounter occurred; and
- is willing to take steps to address the causes of his or her behaviour including, if appropriate, being assessed for a treatment programme.

*Choice to participate*⁶³⁵

9.97 In respect of an adult perpetrator, it is an accepted principle of restorative justice that the victim and perpetrator engage on a voluntary basis. Similarly in our view it is much more likely to result in a positive outcome for the victim and perpetrator, and perhaps also the public, if a perpetrator consents to participate in the alternative process and is fully engaged (albeit only after the initial election of the victim), rather than being coerced into participation.⁶³⁶

Acknowledgement of the act and willingness to address

9.98 Second, the perpetrator needs to acknowledge that he or she committed the act of sexual violence complained of, or at a minimum, that a sexual encounter occurred. As the alternative process is not a fact-finding process, for it to be of any benefit or any progress to be made there needs to be some level of responsibility and acknowledgement. This does not necessarily equate, at this point in the process, to the perpetrator acknowledging that it was an act of violence or that harm has been caused to the victim as a consequence.

9.99 The perpetrator also needs to be willing and prepared to address the causes of his or her behaviour that led to the act of sexual violence – such as education on sexual communication or if appropriate assessment for a treatment programme or a programme to address alcohol use.

9.100 As noted below the perpetrator will subsequently be assessed as to whether he or she has the capacity, during the course of the programme, to move beyond acknowledgement of the act, to a point of accepting responsibility for the harm caused.

*Age restriction*⁶³⁷

9.101 The considerations relevant to setting the minimum age for perpetrators to participate in an alternative process should be similar to those outlined in respect of the victim,⁶³⁸ but with allowance for the current legislative provisions addressing the age at which a child can be prosecuted or convicted of a crime.⁶³⁹ In light of relevant provisions, and as discussed further in Appendix C, we consider that 12 years as a minimum age would appear to be appropriate for participation. However, in our view, a young person between the ages of 12 and 16 would need the consent of his or her guardian or adult nominee to participate in the alternative process.

635 For more detailed discussion see Appendix C.

636 We accept, as various commentators have pointed out, that participation may be “relatively voluntary”, in the sense that there is a strong incentive to participate given that the criminal justice route may lead to incarceration. McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 588, 377 at 417 (referencing Anne McAlinden “The use of shame with sexual offenders” (2005) 45 *British Journal of Criminology* 373 at 373) and at 425 (referencing Bernd-Dieter Meier “Restorative justice – A New Paradigm in Criminal Law?” (1998) 6 *Eur J Crime Cr L Cr J* 125 at 134).

637 For more detailed discussion see Appendix C.

638 In Appendix C, we elaborate on the relevant considerations in proposing a minimum age for victims.

639 Section 21 of the Crimes Act 1961 provides that children under 10 cannot be convicted of any offence. Section 272 of the Children, Young Persons, and their Families Act 1989 provides that children of 10 years and over can be prosecuted for murder and manslaughter and that children aged 12 and 13 years can be prosecuted in the Youth Court for serious and/or persistent offending (including sexual offending).

- 9.102 Although there will be different considerations for young people who are perpetrators to those who are victims, we believe it would still be appropriate for providers to carry out an assessment of perpetrators aged over 12 and under 16 years, to ensure they consent to participating, have the capacity and maturity to participate, acknowledge responsibility for the sexual act and have parental or adult consent and support.

Overlap with youth justice

- 9.103 There is the potential for a positive overlap with the system of youth justice under the Children, Young Persons, and Their Families Act 1989. Some concern was expressed to us during consultation that victims of sexual violence, particularly victims who are young people, do not fare well in the family group conferencing process under the justice model; particularly, that there is a lack of preparation and support for the meeting between the victim and young offender. Auckland Sexual Abuse HELP submitted:⁶⁴⁰

Children and young people are left emotionally unsafe in these processes which fail to protect them as victims through the lack of acknowledgement of what it means to be a victim of sexual abuse, the informality of the conference process which fails to protect them from the person who has caused them sexual harm, and the focus on the safety and well-being of the person who has caused the harm which seems to often occur at the victim's expense. Being a 7 year old who has been sexually violated by your 14 year old baby-sitter is no less traumatising than being an adult woman sexually violated by an acquaintance.

- 9.104 In our view where an “intention to charge” family group conference is convened in respect of a young person aged 12 or older who has committed an act of sexual violence,⁶⁴¹ consideration could be given to whether one of the possible outcomes of that conference is for the perpetrator who acknowledges responsibility for the act of sexual violence to further participate in the alternative process. This would only be the case, however, if that is desired by the victim, and both participants are otherwise assessed as suitable and safe to participate.
- 9.105 Given that the focus of the legislation and the family group conference model is on youth offenders, this would need to be managed carefully to ensure that the youth justice process and its focus on prevention of youth reoffending is not undermined. There would need to be specialists involved in both processes, who understand both the dynamics of sexual violence and youth justice offending and who can ensure the welfare and needs of the perpetrators and victims respectively are considered.

Children

- 9.106 As discussed above, we consider that the appropriate minimum age for participation in the alternative process is 12 years old for perpetrators and approximately 12 years old for victims. We do not believe that, generally speaking, it would be appropriate for children younger than 12 years old to go through the alternative process or for parents to go through the process on their behalf, as this would then preclude that child being able to have his or her own justice needs met, either through the alternative process when old enough to participate, or through the criminal justice system (as, under our model, if the perpetrator completed the alternative process in respect of the incident of sexual violence then it could not go back through the criminal justice process).
- 9.107 For further discussion on this point and our consideration of whether parents could go through the process on behalf of children see Appendix C.

⁶⁴⁰ Submission from Auckland Sexual Abuse HELP to Law Commission on Issues Paper (April 2012) at 23.

⁶⁴¹ See the discussion in Chapter 7 on the youth justice system and family group conferences.

RECOMMENDATIONS

- R45 The statute should provide that the alternative process may be initiated only at the election of a victim of sexual violence.
- R46 The definition of “consent” to participate in an alternative process should be provided for in the statute as set out in paragraph 9.90.
- R47 The statute should set out the eligibility criteria for both victims and perpetrators to participate in the alternative process as set out in paragraphs 9.88 to 9.102.
- R48 Consideration should be given to whether one of the possible outcomes of an “intention to charge” family group conference would be for the young offender and victim to engage in an alternative process on the basis that this is desired by the victim; that both participants are otherwise assessed as suitable and safe to participate; and that specialists skilled in youth offending and sexual violence are involved in both processes.

TWO ASSESSMENTS: “RISK” AND “SUITABILITY”

9.108 After a perpetrator and a victim have been assessed as eligible to participate in the alternative process, two further assessments need to occur: first, whether a case should be excluded based on public interest criteria, or because it would pose an unacceptable risk to community safety (the risk assessment); and second, whether the case is otherwise suitable to proceed through the alternative process (the suitability assessment). These assessments are discussed below and in greater detail in Chapter 8.

Risk assessment

- 9.109 The risk assessment should be conducted through application of the risk assessment framework discussed in Chapter 8. The operational guidelines/good practice standards (see Appendix D) will need to set out how a provider should apply the risk assessment.
- 9.110 We recommend that all providers should receive training on how to apply the framework. This decision of providers regarding the risk assessment would be subject to review by our proposed independent review panel: see further below.

Suitability assessment

- 9.111 Operational guidelines/good practice standards (see Appendix D) should set out the matters that providers will need to consider in making this assessment, as well as the actual process of conducting the assessment including identifying and dealing with intimate partner violence.⁶⁴² There are a number of risk assessment tools in existence for assessing family violence and these could be drawn on.
- 9.112 We recommend that providers should receive training on conducting suitability assessments, and that their decision regarding suitability should not be subject to review by our proposed independent review panel, for the reasons set out later in this chapter.

⁶⁴² For instance, outlining the information required to be obtained in addition to meeting with the victim and perpetrator and from whom (i.e. from Police, the perpetrator’s criminal history and details of any protection or restraining orders).

RECOMMENDATIONS

- R49 The matters to be considered by providers when conducting a suitability assessment (see R 36) and how a provider should apply the risk assessment framework (see R 32) should be set out in guidelines/good practice standards.
- R50 Training should be given to providers to conduct suitability assessments (R 36) and to apply the risk assessment framework (R 32).

REVIEW PROCESS

- 9.113 Although the alternative process is voluntary, arguably it may be considered to be “quasi-judicial”, as there are justice outcomes that flow from completion of the alternative process – in that there would be a statutory bar on the perpetrator being prosecuted for that specific incident of violence.
- 9.114 Therefore, in our view, in order to ensure that there is transparency of provider decision-making and broad consistency around entry into the process, some decisions of providers should be subject to review by an independent review panel.
- 9.115 We do not consider that there should be review of a provider’s decision regarding the suitability of the victim and perpetrator to enter the alternative process (the suitability assessment). This is a more subjective assessment which the provider is best placed to make based on their expertise and skills, having met and worked with the victim and perpetrator. It also needs to be borne in mind here that the alternative process is not available as of “right” to a perpetrator, since the initial election to participate is that of the victim and a perpetrator must meet the eligibility and suitability tests to participate.
- 9.116 However, the more objective decisions of providers made in applying the risk assessment framework,⁶⁴³ for instance to deny a perpetrator entry into the alternative process or suspend or cease provision of a programme due to community safety concerns, are ones that ought to be reviewable.
- 9.117 We do not consider there should be any review or appeal of the outcome of any agreements reached through the alternative process programmes, as the victim and perpetrator are engaged in a voluntary process; any outcome agreements are reached by the victim and perpetrator themselves (albeit with the oversight of the provider); and the victim and perpetrator are able to access legal advice prior to confirming the outcome agreement.

A multi-disciplinary panel approach

- 9.118 The review function could be conducted by a review panel comprised of a multidisciplinary “team” of experts from a number of fields, but especially those with an understanding of sexual violence.⁶⁴⁴
- 9.119 As noted in Chapter 8, the approach of Project Restore in assessing community referral and court-mandated restorative justice cases is to have a team made up of two sexual violence

643 See Chapter 8: this risk assessment incorporates a decision of whether to exclude cases based on a public interest descriptor test set out in legislation, and a decision of whether the perpetrator poses an unacceptable level of risk to community safety.

644 To ensure an understanding, amongst other things, of “rape myths” (see Chapter 1) and the power dynamic that may be present in sexual violence.

specialists, a clinical psychologist, and a specialist restorative justice facilitator. The Report of the Centre for Innovative Justice recommended a multidisciplinary assessment panel approach to risk assessment. It endorsed the approach of Project Restore and that of the Therapeutic Treatment Board used in Victoria, Australia. The Report made a recommendation for an assessment panel consisting of a forensic mental health professional, a representative of the Office of Public Prosecutions, a senior restorative justice conference provider, and victim and offender specialists.⁶⁴⁵

- 9.120 If our proposal for a multi-disciplinary panel is accepted, we would suggest that panel members should be comprised respectively of specialists in forensic mental health, child psychology and development, criminal justice, restorative justice, and sexual violence, from the perspective of both victims and perpetrators. We also suggest that the membership could be representative of New Zealand's cultural and ethnic make-up, particularly bearing in mind that Māori are overly represented in the victim and offender populations for sexual offending.
- 9.121 We also note that, if a panel of this kind is created, it could share resources with the new commission entity that we propose in Part D of this Report.

Procedure for review

- 9.122 The grounds for an application for review should be set out in legislation and specify that an application for review of a provider decision could be made to the review panel where, for instance, the provider failed to correctly apply the risk assessment framework (including the public interest legislative descriptor test); based its decision on erroneous or irrelevant information; or failed to take into account relevant information.
- 9.123 We recommend that the review panel should set its own procedures for review and that applicable policies and procedures are developed to guide the panel in carrying out its reviews. On most occasions we envisage that the reviews would be paper-based, with information provided to the review panel by the provider who conducted the initial triage, but the review panel could seek further information that would be of assistance to it. The review panel may not need to meet the victim or perpetrator unless it considers that necessary.
- 9.124 If, after review, the review panel determined that the initial decision was incorrectly made by the provider, we consider it should be able to identify any errors and refer the case back to the provider with a direction to reconsider. However, if the review panel determined that the initial decision was made correctly, it would need to advise the victim and perpetrator of its decision.

RECOMMENDATIONS

- R51 The function of reviewing the decisions of providers in applying the risk assessment framework (including decisions to suspend or cease provision of programmes) should be conducted by an independent review panel.
- R52 The statute should set out the grounds for review of risk assessment decisions of providers.

645 The Therapeutic Treatment Board (TTB) comprises a member of the Victoria police, a member of the Office of Public Prosecutions, an approved health services representative and a Department of Human Services representative. The TTB was established by section 339 of the Children, Youth and Families Act 2005 (Vic) to provide advice on the making of therapeutic treatment orders (TTOs). TTOs were developed to provide a therapeutic rather than criminal response to young people aged 10 to 15 years exhibiting sexually abusive behaviours. The TTB is comprised of 16 members, who are each members of one of four subgroups. The subgroups meet fortnightly to determine referrals for TTOs. Centre for Innovative Justice, above n 589, at 42.

R53 Policies and procedures should be developed to guide the panel in carrying out reviews.

R54 The panel should have a statutory power to confirm a decision or refer it back to the provider with a direction to reconsider.

PROTECTIONS REGARDING PARTICIPATION IN THE ALTERNATIVE PROCESS

9.125 As the law currently stands, the victim and/or the perpetrator could suffer prejudicial or negative effects through engaging in the alternative process. For example, statements that a perpetrator makes during the process could be used to initiate subsequent legal proceedings against him or her, or a victim could have their statements used to discredit their testimony in any subsequent criminal proceedings brought against the perpetrator. We now go on to outline proposed protections to address these risks.

9.126 We envisage that some of the protections in favour of the perpetrator will only be available in respect of the incident of sexual violence giving rise to the alternative process. Therefore if the perpetrator was to commit a further act of sexual violence after completion of the alternative process those protections may not apply, or not in their entirety. The effect of having only partial protections may, for a perpetrator, act as a disincentive to participating in the alternative process. However, in our view, any perpetrator who is anticipating committing a further act of sexual violence at the time of embarking on the alternative process may not be suitable for the alternative process in any event.

Voluntary

9.127 The alternative process is voluntary, which protects both the perpetrator and the victim, although in different ways and to different extents. For instance, the perpetrator is protected from jeopardy, in so far as he or she is not compelled to participate and can withdraw at any time. The victim is protected in so far as he or she, too, can withdraw at any time and still retain the right to make a complaint to Police about the incident of sexual violence. These protections will need to be set out in legislation.

9.128 It does need to be acknowledged that the balance of control of the alternative process is in favour of the victim, as the perpetrator has a stronger incentive to participate, given that completion of the alternative process precludes criminal prosecution. It has been acknowledged that, in this sense, “true choice for offenders may be illusory”.⁶⁴⁶ However, in our view this “incentivising” of perpetrator participation is not objectionable, due to the existence of other protections which we outline below: privilege of statements made during the alternative process and confidentiality of disclosures made during participation in the alternative process.

Consent

9.129 As set out in the section regarding eligibility to participate in the alternative process, the victim and perpetrator must consent to participate. The test for consent should be set out in legislation and the provider will have a role in confirming the consent of the victim and perpetrator.

⁶⁴⁶ McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 588, 377 at 417.

Legal advice

- 9.130 In order to freely consent to participate in the alternative process both the victim and perpetrator will need to be aware of the legal implications of participation and how this will affect their rights in relation to the criminal justice system. For instance the victim and perpetrator will need to be advised that a completed programme will be a bar to criminal prosecution and understand the implications of that for their respective positions; that privilege and confidentiality will apply to participation and discussions and the effect of this; what privilege does and does not cover;⁶⁴⁷ and when information may be released and to whom relating to completion of the alternative process.
- 9.131 In our view in order for the victim and perpetrator to fully understand all the legal implications of participation in the alternative process, they will need access to legal advice. We therefore recommend that the victim and the perpetrator should be advised of the desirability of taking legal advice prior to participation in the alternative process and prior to signing any outcome agreement reached during the programme.
- 9.132 To enable access to legal advice for victims and perpetrators who wish to participate in the alternative process, we recommend that legal aid should be extended in order to cover the alternative process.

RECOMMENDATIONS

R55 The statute should make it clear that:

- the alternative process is voluntary for both the victim and perpetrator; and
- the victim and perpetrator may withdraw from the alternative process at any time prior to the completion of the process; and
- withdrawal from the process prior to completion will not affect the right of the victim to make a complaint to Police about the incident of sexual violence.

R56 Legal aid should be extended to victims and perpetrators who participate in the alternative process where they would otherwise be eligible for legal aid in accordance with the income and asset tests set out in relevant legislation.

CONFIDENTIALITY

- 9.133 We consider that in order for the victim and perpetrator to engage freely in and receive the most benefit from the alternative process, any statements and communications made during the alternative process need to be confidential. The question of whether the *fact* of participation of the victim and perpetrator in the alternative process should itself also be confidential is a somewhat more vexed question.
- 9.134 Negative inferences could be attributable to a perpetrator who participates in the alternative process, because in order to participate the perpetrator needs to accept there was a sexual encounter (which, at a minimum, the victim does not accept was consensual, as otherwise he or she would not be seeking to participate in the alternative process). Yet the victim may wish to

⁶⁴⁷ See the discussion below on legislative protections for participants. For instance, a perpetrator may freely admit to committing an act of sexual violence within the context of the alternative process, but (if the process were to break down), in any subsequent criminal proceedings may deny any wrongdoing. This may be emotionally harmful for the victim and he or she should be forewarned of this possibility before engaging in the alternative process.

talk about participation in the process with family and friends or for example seek counselling support. A victim who withdraws from the alternative process will also need to be free to advise Police that she or he had attempted the alternative process, withdrawn from it and now wished to make a complaint regarding the sexual violence committed against her or him.⁶⁴⁸

- 9.135 One possibility to address this would be to prohibit information about participation in the alternative process being commented on in the public arena in such a way that the perpetrator's participation in the alternative process is able to be identified. Some guidance may be drawn from the law around name suppression and court suppression orders, although this may extend further than what is needed or appropriate in this context.
- 9.136 The protection of confidentiality would need to be set out in legislation, with any breach through publication being a punishable offence. How confidentiality is defined will be a policy decision, and the implications of the definition chosen will need to be further worked through.
- 9.137 We do consider however that any protection of confidentiality should be enduring (subject to the exceptions noted below) because the damage to somebody's reputation, career prospects and livelihood could be considerable, even a long time after the event.

Exceptions

Disclosures/admissions of commitment of acts of sexual violence against others

- 9.138 There would be need to be a number of exceptions to confidentiality, firstly to enable reporting by the facilitator or provider of disclosures or admissions made in the context of the alternative process (including at the initial intake and risk assessment stage) where a risk to community safety or a current risk to the safety of a child or children was indicated.⁶⁴⁹
- 9.139 Further thought would need to be given as to how this exception would be framed. One possibility may be to have a qualified exception to confidentiality to enable a facilitator to make a report to Police or Child, Youth and Family and for that agency or body to investigate. If an attempt were made to disclose that information in subsequent criminal proceedings, a judicial direction could be made under section 69 of the Evidence Act 2006 to prevent disclosure of the information.

Disclosure of record of completion

- 9.140 We consider that there would also need to be a further exception to confidentiality so that a record of completion of the alternative process (see discussion below as to what this would contain) could be disclosed or used in certain circumstances as outlined below.
- 9.141 First, disclosure of the record of completion should be made to Police when each perpetrator completes the alternative process. This would be to ensure that they did not prosecute the perpetrator in respect of the same incident of sexual violence.
- 9.142 However, it should be noted that for particular perpetrators there would be significant implications of the Police having this information in their possession: if the perpetrator had committed an act of sexual violence against a child, an elderly person or an otherwise vulnerable person and then sought a paid or unpaid role with one of those groups, the Police would be able

648 However, if the victim then referred to statements made during the alternative justice process, these would need to be disregarded by Police and not used in any investigation or prosecution of the alleged offence. We do not consider, however, that a victim in that situation should be held criminally responsible for any such disclosures.

649 Although there is no mandatory reporting of child abuse under the Children, Young Persons, and their Families Act 1989, the recent passing of the Vulnerable Children Act 2014 makes it clear that all government agencies working with children are required to have child protection policies which encourage reporting of child abuse. Given this policy direction, it would be out of step for disclosures of acts of sexual violence against children not to be able to be reported by providers to Child, Youth and Family or to Police.

to disclose the record of completion to a prospective employer/organisation seeking the vet, in accordance with Police vetting procedures and/or various statutory obligations.⁶⁵⁰

- 9.143 We acknowledge that this may be prejudicial to some perpetrators, but accords with the general direction of current government policy regarding protection of vulnerable children. A perpetrator in this position would therefore need to be made specifically aware of this prior to consenting to participate in the alternative process. The other option would be to limit when Police could use the record of completion.⁶⁵¹
- 9.144 There would also be an implication for all perpetrators, in that the record of completion may factor into future decisions of Police as to whether or not to prosecute a perpetrator for subsequent or other sexual violence.
- 9.145 Second, if the perpetrator committed a further act of sexual violence, the Department of Corrections could be provided with a record of completion for the purposes of preparing a presentence report for the court or for considering matters related to parole.
- 9.146 We discuss the need for a central registry and for the maintenance of records later in this chapter.

RECOMMENDATIONS

- R57 The statute should provide that statements and communications made during the alternative process are confidential, with a breach made a punishable offence, with the exception that the record of a completed alternative process may be disclosed to Police and the Department of Corrections as described in Chapter 9 of this Report.
- R58 Further thought should be given to an exception to confidentiality to enable the provider to advise Police or Child, Youth and Family of any disclosures made by the perpetrator in the course of the alternative process regarding acts of sexual violence committed against others.
- R59 Confidentiality obligations should allow a victim to have support and work through issues arising from participation in the alternative process but should prohibit publication of any facts that would lead to disclosure of the perpetrator's participation in the alternative process.

PRIVILEGE

Privilege for perpetrator – statements made in process

- 9.147 As the law currently stands, anything the perpetrator says during the alternative process could lead to subsequent criminal prosecution of the perpetrator or could be used against him or her in criminal proceedings, thus exposing the perpetrator to the risk of self-incrimination and the possibility of a criminal penalty.⁶⁵²

650 Education Act 1989, ss 78CB–78CD; Health & Safety in Employment Act 1992, ss 13B–13E; Vulnerable Children (Requirement for Safety Checks of Children's Workers) Regulations 2015, reg 6.

651 This would run counter to current government policy regarding vulnerable children. We do not anticipate that there would be any current acts of sexual violence dealt with in the alternative process that were committed against a child under the age of 12, although an alternative process may apply to historic acts of sexual violence committed against an adult victim when he or she was a child.

652 Although section 25(d) of the New Zealand Bill of Rights Act 1990 provides for the right of every person charged with an offence not to be compelled to be a witness or to confess guilt, a perpetrator participating in an alternative justice process has not been charged with an offence, and therefore this protection is not applicable.

- 9.148 We recommend that an amendment is made to the Evidence Act 2006 so that there is a privilege for the benefit of any perpetrator for any statements made, information given or communications between the perpetrator and any person involved in the delivery of the alternative process or any person participating in the alternative process.
- 9.149 In order for there to be sufficient incentive for the perpetrator to participate in the alternative process, we consider privilege would attach regardless of whether the alternative process was completed.
- 9.150 In our view, privilege in respect of statements made, information given and communications during the course of the alternative process should only be for the purpose of protecting the perpetrator against prejudice in any subsequent court proceedings in relation to the same incident against the same victim. As noted in the section on confidentiality, whilst there would be confidentiality for any admissions or disclosures during the alternative process regarding the perpetrator having committed other acts of sexual violence (against a person or people other than the victim) they would not be privileged. Therefore, a provider may report the disclosure to Police who could investigate those acts of sexual violence, but those disclosures would not be able to be automatically admitted in court in any subsequent proceedings brought by Police in relation to the other disclosed acts.

Privilege for perpetrator – fact of participation in process

- 9.151 As a perpetrator can only participate in the alternative process by accepting the sexual conduct in question occurred, the fact of participation itself could be prejudicial to the perpetrator as it may lead to subsequent criminal prosecution or be used in criminal proceedings.
- 9.152 Therefore in order to encourage participation and to protect a perpetrator against self-incrimination we recommend the privilege noted in the above section should also cover the fact of participation in the alternative process.
- 9.153 As noted in the section above, in order for there to be sufficient incentive for the perpetrator to participate in the alternative process, we consider privilege would attach regardless of whether the alternative process was completed.

Exceptions

Propensity

- 9.154 As noted in the introduction to this section, if a perpetrator committed further acts of sexual violence after participation in or completion of the alternative process, the protection of privilege would not continue. After receiving feedback and submissions on the point, we consider that the fact of participation in the alternative process, statements made during the alternative process, and the record of completion of the alternative process would, in principle, qualify as propensity evidence that could be offered to the court under section 40 of the Evidence Act 2006 in respect of any future prosecution for other sexual violence (not the sexual violence which gave rise to the alternative process). That is, the rules would be the same for these matters as for a criminal conviction or any prior criminal conduct.
- 9.155 Whether or not the matters in question would be admitted as evidence of propensity would be subject to the usual rules and tests concerning admission of propensity evidence under section 43 of the Evidence Act 2006. The likelihood of this evidence being admitted as propensity evidence, based on the current legal test,⁶⁵³ would appear to be low and we would hope that that

653 Evidence Act 2006, ss 40–43. See also *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

judges would exercise considerable caution in admitting as propensity evidence things that have arisen in the course of the alternative process, due to the prejudicial effect this could have on a jury sitting as fact-finder (the Evidence Act governs what evidence may and may not be put before a jury, on the basis that some evidence is so prejudicial that a jury would be unable to separate its value as evidence from its prejudicial effect: see Chapter 6).

- 9.156 We acknowledge that this may act as a disincentive to some perpetrators wishing to participate in the alternative process. However as noted earlier, any perpetrator who was anticipating committing a further act of sexual violence at the time of embarking on the alternative process, or who had committed multiple acts of sexual violence, is unlikely to be suitable for the alternative process.

RECOMMENDATION

R60 The Evidence Act 2006 should be amended as outlined in paragraphs 9.147 to 9.153 of this Report to provide a privilege for the benefit of any perpetrator for participation in the alternative process and for statements made, information given, or communications between the perpetrator and any other person during that process, including any person involved in the delivery of the process. There should be an exception for propensity evidence as outlined in paragraphs 9.154 to 9.156.

Privilege for victims

- 9.157 In our view statements made by the victim or matters disclosed in the alternative process should not be able to be used to discredit the victim's witness testimony in any subsequent criminal proceedings brought against the perpetrator (if the alternative process was unsuccessful).⁶⁵⁴
- 9.158 We considered whether it may be sufficient for the victim's statements and participation in the alternative process to be confidential. However, due to common misconceptions about sexual violence (see Chapter 1), information that is prejudicial to a victim could end up being admitted in court proceedings.⁶⁵⁵ Therefore in our view, to satisfactorily protect victims in the alternative process, the Evidence Act 2006 should be amended to afford a privilege to victims in respect of participation in and statements made during the course of the alternative process.

RECOMMENDATION

R61 The Evidence Act 2006 should be amended to provide a privilege to victims in respect of participation in the alternative process and for statements made, information given, or communications between the victim and any other person during that process, including any person involved in the delivery of the process.

PROTECTION AGAINST "DOUBLE JEOPARDY": BAR TO SUBSEQUENT CRIMINAL PROSECUTION

- 9.159 As the law currently stands, if a perpetrator fully engages in an alternative programme and fulfils agreed outcomes, it would still be possible for a criminal prosecution to be brought in

⁶⁵⁴ For instance, if the victim expressed feelings of responsibility or self-blame for what had occurred without the protection of privilege, this could be used in subsequent proceedings to undermine that victim's testimony.

⁶⁵⁵ We consider that there is still a risk that this information could be admitted in evidence despite the fact that the court making a decision under section 69 must have regard to the privacy of victims of sexual offending: Evidence Act 2006, s 69(3)(g).

respect of the same conduct.⁶⁵⁶ There is an argument that a perpetrator should not be subjected to more one than penalty,⁶⁵⁷ nor have to defend themselves against simultaneous “actions”, relating to the same wrongful conduct.

- 9.160 As outlined in Chapter 8, in order to provide sufficient incentive for a perpetrator to participate in the alternative process, we recommend that where a perpetrator participates in the alternative process and completes the entire process, including fulfilling the terms of any outcome agreement, there would be a statutory bar to subsequent prosecution of the perpetrator in respect of the same incident of sexual violence against the same victim.
- 9.161 We therefore recommend that provision be made in legislation so that where a perpetrator participates in and completes the entire alternative process conducted by an accredited provider using an accredited programme, including fulfilling the conditions of any outcome agreement, there would be a bar to subsequent prosecution of the perpetrator in relation to the same incident of sexual violence against the same victim.
- 9.162 The statutory bar would *not* apply and it would be open to the victim to lay a complaint with Police in respect of the sexual violence, which may result in criminal prosecution, in the following circumstances:
- if the alternative process was not completed, which would include the situation where either the victim or the perpetrator withdrew from the process prior to completion of the process;
 - if, at the provider’s discretion, it ceased the programme;
 - if the terms of an outcome agreement were not fulfilled by the perpetrator; or
 - if disclosures were made during the alternative process concerning acts of sexual violence against other victims or new disclosures were made concerning other acts of sexual violence against the same victim.⁶⁵⁸

RECOMMENDATION

R62 The statute should provide that where a perpetrator participates in and completes the alternative process, there is a bar against subsequent prosecution of the perpetrator for the same incident of sexual violence against the same victim, except in the instances noted in paragraph 9.162 of this Report.

OTHER PROTECTIONS DURING THE COURSE OF THE PROCESS

- 9.163 During the course of the alternative programme there would be some ongoing protections. For instance, if at any stage the programme provider believed that it was inappropriate to continue the programme due to concerns that the victim may be at risk of secondary victimisation or that the victim’s physical or emotional safety or the safety of any other person (including the

656 Section 26 of the New Zealand Bill of Rights Act 1990 states that “no one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.” As no charges are laid in an alternative justice process, the sexual violence cannot properly be described as an offence and so this protection would not apply.

657 There is a question as to whether participating in an alternative process is a form of second punishment or penalty, but regardless, it would be a second process. Some commentators argue that some outcome agreements may have a punitive or penalising aspect to them. Kathleen Daly “Revisiting the Relationship between Retributive and Restorative Justice” in Heather Strang and John Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Ashgate, Aldershot, 2000) referenced by McDonald and Tinsley “Rejecting ‘one size fits all’: Recommending a range of responses” in McDonald and Tinsley (eds), above n 588, 377 at 417 and fn 145.

658 It is conceivable (and cases have been recounted to us during consultation) that during the alternative process a perpetrator may disclose drugging and raping the victim on a previous occasion. It may be agreed to include the newly disclosed incident as part of the alternative process. However, if the victim does not agree to include the incident, this would be a separately alleged incident of sexual violence that could be dealt with by way of complaint to Police.

- perpetrator) would be compromised by continuing with the programme, the provider could choose to discontinue the programme. In our view this decision would not be reviewable, as the provider would be best placed to make this decision.
- 9.164 If, due to disclosures made by the perpetrator during the course of the programme, the provider considers that the perpetrator poses an unacceptable risk to community safety, it may report the disclosures to the Police or Child, Youth and Family, and suspend the programme. We consider that this decision ought to be reviewable because it concerns more objective issues of community safety.
- 9.165 If the provider considers that, despite any such disclosures, the victim was not at risk of further harm and that the victim and perpetrator would benefit from continuing with the programme, then the provider may continue with the programme.

RECORD OF COMPLETION

- 9.166 The effect of participating in the alternative process is that the incident of sexual violence would not be noted on the perpetrator's criminal record, as it would have been dealt with outside of the formal criminal justice system, without any criminal charges being laid. Nor would the perpetrator's name be included on any sex offender register, for instance, and it would not affect a perpetrator's career or travel prospects.
- 9.167 We have therefore considered whether there should be any record or a register kept of participation in an alternative justice process that would link the victim, the perpetrator, the sexual violence committed and the perpetrator's acknowledgement of responsibility for the incident of sexual violence; and whether this record should be publicly available.
- 9.168 In the same way that providing protections as to confidentiality and a bar to criminal prosecution provide an incentive to participate in an alternative justice process, so would the absence of a record of participation. Without this protection as part of the "package" of incentives, the other statutory protections and incentives for perpetrator involvement may be insufficient. In this regard we note that the Centre for Innovative Justice report concluded that perpetrators would be unlikely to agree to be involved if their participation was recorded, as this would be weighed up against the fact that there would be no consequences if the offence remained unreported and unprosecuted.⁶⁵⁹
- 9.169 Those we consulted were divided on this point. Some felt there needed to be some sort of record available in order to protect the public, although at the same time acknowledging that keeping no records would provide an incentive to perpetrator participation. Others were clear that a whole package of incentives (for instance no record of participation, the privilege for participation in the alternative process, and a statutory bar against prosecution) would be needed.
- 9.170 We have also weighed up the possible risk to community safety if a perpetrator was not noted as a sexual offender on a publicly available record or register. We consider that the fact that the Police would be given a record of completion and would be able to disclose this to anybody considering employing, in a paid or unpaid role, a perpetrator who had committed sexual violence against a child, an elderly person or any other vulnerable person, will be sufficient protection in most instances.

659 Centre for Innovative Justice, above n 589, at 68-69.

- 9.171 We have concluded that there should not be a public record or public register of those who have gone through the alternative process. However, in our view there should be a central register of those who have completed the alternative process, but this would not be public. Information from the central register of those perpetrators who have completed the alternative process (“record of completion”) should be disclosed in certain limited circumstances, as was outlined above in the section on exceptions to confidentiality.
- 9.172 We now go on to discuss the oversight functions that need to be performed in relation to the alternative process, including that of maintaining a central register of records.

RECOMMENDATION

R63 A central register should be maintained of those who have completed the alternative process.

OVERSIGHT FUNCTIONS

- 9.173 We consider that there are three broad oversight functions that need to be performed in relation to the alternative process, which are:
- oversight of providers, programmes and facilitators (paragraphs 9.174 to 9.185);
 - risk management (paragraph 9.186); and
 - maintenance and release of information regarding participation and completion of the alternative process (paragraphs 9.187 to 9.192).

OVERSIGHT OF PROVIDERS, PROGRAMMES, AND FACILITATORS

- 9.174 The general oversight of providers, programmes and facilitators would include the functions of:
- developing an accreditation framework for providers, facilitators and programmes and assessing and accrediting them in accordance with the framework;
 - developing guidelines or good practice standards for the alternative process;
 - monitoring and evaluating provider and facilitator performance and auditing programmes; and
 - building capacity in the sector and identifying the need for programmes in underserved geographic or demographic areas.

Accreditation framework, assessment, and accreditation process

- 9.175 An accreditation framework should be developed in consultation with the sexual violence sector (including current providers of pre-sentence restorative justice programmes for sexual violence), academics and researchers in the field, and other relevant stakeholders. The accreditation framework would set the standards for providers and facilitators and for the design and delivery of alternative programmes, against which those programmes would be assessed and accredited.

Guidelines/good practice standards

- 9.176 Given the potential diversity of alternative programmes on offer, and in order to ensure consistency and continuity as to how alternative programmes are implemented and delivered

across the country, guidelines or practice standards are crucial to ensure that good practice is being upheld and applied consistently across the sector.

- 9.177 Some of this guidance may be naturally incorporated into the accreditation framework, but a separate set of guidelines or practice standards is also needed. Guidance/standards will need to cover a range of topics including the principles underpinning the alternative process and practical operational issues regarding cases moving through the alternative process.
- 9.178 We therefore recommend guidelines/good practice standards regarding the alternative process are developed in consultation with, at a minimum, the sexual violence sector, and covering, at a minimum, the topics indicated in Appendix D.
- 9.179 Consideration will need to be given as to whether these guidelines or practice standards should be incorporated into regulations or form a voluntary code of practice.

Ongoing monitoring and auditing

- 9.180 Once providers, programmes and facilitators have been accredited, they will need to continue to operate to the best possible standards to ensure confidence of the public and participants in the process. They will therefore need to be monitored and periodically evaluated, and programmes audited, which may be in addition to any periodic renewal of accreditation required of providers and facilitators.
- 9.181 Outcome agreements reached through the alternative process should also be periodically monitored to ensure general consistency and fairness in the types of outcomes being agreed to across the range of providers.

Building capacity and identifying need for programmes

- 9.182 From our consultation with the sexual violence sector it is clear that many in the sector desire alternative approaches for dealing with sexual violence and some may be interested in developing programmes. For instance, Project Restore has indicated that it would be keen to expand their services and they have already begun a process of expansion throughout the country.
- 9.183 However, whilst providers may emerge and programmes may be developed to meet demand, we are advised by the sector that investment needs to be put into building capacity.⁶⁶⁰ We do not want to propose a model which promises better results and access to justice but, because of lack of capacity in the sector, cannot deliver on that promise.
- 9.184 We therefore recommend that capacity is built in the sector to ensure there are sufficient numbers of accredited providers and programmes to meet demand. This may involve training and support being provided for those seeking accreditation as providers or facilitators and identification of the need for, and development of, programmes in underserved geographic or demographic areas.
- 9.185 We also note that, for the alternative process to work effectively, there must be sufficient community-based programmes for treatment of harmful sexual behaviours perpetrated by adults against adults. We are advised at present that there are no such treatment programmes available

⁶⁶⁰ This is true of providers, but also of specialist facilitators for programmes, like Project Restore, that operate with a restorative justice model. We note the symposium on Restorative Justice held in October 2014, in which it was noted that although the desire and enthusiasm to expand restorative justice was encouraging, the sector's capacity still needs to be built in order to ensure any rapid expansion will not lose the focus on victims: Lydia O'Hagan and Chris Marshall "The Present State and Future Direction of Restorative Justice Policy in New Zealand" (2014) 1 Occasional Papers in Restorative Justice Practice.

in the community, although we understand that an appropriate programme has been developed and awaits implementation.

RECOMMENDATIONS

- R64 Guidelines or practice standards for the alternative process should be created in consultation with the sector, covering the topics outlined in Chapter 9 and Appendix D of this Report.
- R65 Providers and facilitators should be periodically monitored and programmes should be periodically audited.
- R66 Outcome agreements should be periodically monitored.
- R67 Capacity should be built in the sector; training and support should be provided for providers and facilitators seeking accreditation; and the need for alternative process programmes should be identified and those programmes developed in underserved geographic or demographic areas.

RISK MANAGEMENT

9.186 The risk management role would involve:

- developing the risk assessment framework, as set out in Chapter 8, in consultation with (at a minimum) the sexual and family violence sectors, forensic mental health/psychological experts, researchers in the field and others; and
- providing training for providers in making suitability assessments and risk assessments.

MAINTAINING RECORDS AND REGISTER

9.187 The oversight function in relation to records and the central register would involve:

- maintaining the records of those assessed for participation in and those who completed the alternative process; and
- maintaining a centralised register of those who complete the alternative process and releasing this information to certain bodies in certain situations.

Maintenance of records

9.188 In our view it is important that records are maintained centrally in order to:

- enable providers to have access to this information when conducting risk assessments, so they can ascertain if a perpetrator had been through the alternative process previously or if the same victim and perpetrator had already been assessed and denied access to the alternative process by another provider;⁶⁶¹ and
- be available in case a party seeks review of a decision of a provider.

661 Multiple attempts at acceptance into the alternative process may indicate a situation where coercion may be at play from the perpetrator toward the victim, or external pressure on the victim and perpetrator from others (such as peers or family).

Register of perpetrator completion of programmes

- 9.189 As noted above, in our view it would be necessary for a register to be maintained of those perpetrators who have completed the alternative process.
- 9.190 In our view the register should include:
- identifying information in respect of the perpetrator and victim (including name, date of birth, sex, and address);
 - details of the act/s of sexual violence as agreed during the alternative process (including the date or period of the act/s of sexual violence) and addressed by the perpetrator;
 - the date of the completion of the programme; and
 - any conditions that had been agreed to and the dates they were fulfilled.
- 9.191 As outlined above, disclosure of information on the register in the form of a “record of completion” should only be able to be released:
- to the Police at completion of the alternative process. This should be done as a matter of course in order to ensure the perpetrator is not prosecuted for the same incident of sexual violence.
 - if the perpetrator is convicted of a subsequent sexual offence, upon request, to the Department of Corrections for the purpose of preparing a court presentence report or in respect of parole decisions.
- 9.192 In other respects, the records and registers would be confidential to the provider and would not be publicly available or able to be disclosed under the Official Information Act 1982, although individuals could apply under the Privacy Act 1993 for information about themselves.

RECOMMENDATIONS

- R68 Records of the assessment decisions of a provider should be maintained in a central register (see R 63).
- R69 The statute should provide that information may only be released from the central register in the form of a “record of completion” in the situations noted at paragraphs 9.140 to 9.145 of this Report.

PERFORMANCE OF THE OVERSIGHT FUNCTIONS

- 9.193 As we have identified at the beginning of this chapter, oversight of the alternative process is required to give it credibility and authority, to inspire public confidence, to assure independence, and to attribute responsibility for the functions outlined in this chapter.
- 9.194 The question is which body, or bodies, should be allocated these oversight functions.

Court oversight

- 9.195 We have ruled out the court or tribunal as an appropriate oversight body, as the aim is to provide victims with an option outside of the criminal justice model, that may align more appropriately with the needs and interests of victims including in cases where there is otherwise insufficient evidence for a prosecution to be brought.

9.196 Nevertheless, some of those we consulted with, including the Family Violence Death Review Committee (FVDRC), considered that ideally the court should have oversight of these processes. The concern of FVDRC was that where cases of sexual violence also involved family violence, to have a different entity having oversight would cause yet another fragmentation of information within the system which will put victims of family violence at risk.

9.197 During consultation on our draft report Professor Leigh Goodmark, a practitioner and academic from the United States, commented to us that an oversight body needs to be independent of the criminal justice system:⁶⁶²

because one of the major reasons that women are refusing to come forward is that they are not interested in having the criminal justice system intervene, particularly when the criminal justice system intervenes in ways that rob them of autonomy. Having the [alternative] process affiliated with the courts or police, for example, could lead some women to fear that their matters will become public despite their wishes or they will lose control of their right to terminate the process. Whether this is in fact true or not, the perception that the [alternative] process will be a criminal justice system-run process could dissuade people from using it.

9.198 We continue to be of the view that a body outside of the criminal justice system is needed.

Ministry of Justice

9.199 A possibility would be for a body to sit within the executive branch of government. From a cost and efficiency perspective, we have considered whether it may be possible for some of the oversight functions to sit within the Ministry of Justice – given that it already has experience working with presentence restorative justice providers, particularly those working with cases of sexual violence. For instance the Ministry of Justice is responsible, amongst other things, for contracting with, funding and evaluating restorative justice providers and accrediting facilitators, and has prepared the Ministry of Justice standards referred to above, outlining what is required of providers and programmes operating in cases of sexual violence.⁶⁶³

9.200 Therefore on one view the Ministry's role could be extended in order to conduct the functions outlined above of:

- developing an accreditation framework for providers and programmes;
- conducting the assessments according to the accreditation framework;
- contracting with providers;
- building capacity and encouraging the development of programmes, and
- developing guidelines or good practice standards.

9.201 However, our preferred view is for an oversight body to be independent of the executive arm of government, given the “justice outcomes” that result when the alternative process is completed by a perpetrator (there would be a bar on prosecution of the same incident). In our view such independence is necessary in order to ensure transparency and freedom from actual or perceived executive influence.

9.202 At a minimum, we consider that the function of maintaining records and a central register (and the review panel function) should be carried out by an entity that is independent of government.

662 Email from Leigh Goodmark to the Law Commission regarding review of criminal justice response to victims of sexual violence (10 September 2015).

663 We understand that the Ministry of Justice has recently awarded the contract to a body that will be responsible for training and assessment of facilitators, and possibly including further specific training in sexual violence. It may be appropriate for this same body to take on the process of training and assessing providers and programmes and accrediting, under contract with the Ministry of Justice.

A new independent entity

- 9.203 Our preference is that a specific body be established that has responsibility for the alternative process and that conducts all the functions discussed above.
- 9.204 In Part D of this Report we highlight that a certain number of coordination and oversight functions in the sexual violence sector are not being fulfilled, and propose a new oversight body (that we call a “commission”) to fulfil these functions. Should that recommendation be accepted, this commission would be well placed to exercise the oversight functions set out in this chapter. The accreditation and oversight functions proposed in this chapter in respect of providers and programmes in the alternative process could easily be extended to the sexual violence sector.
- 9.205 However, there would need to be a clear separation between the parts of the commission that fulfil those roles (oversight of the sector and oversight of the alternative process). The first function is based on improving the wider victim experience and increasing uptake and follow-through participation in the justice process. That function may conflict or be seen to conflict with the second function, part of which would involve assessing entry of perpetrators into programmes and ensuring fair processes for perpetrators.
- 9.206 One possibility may be for the commission to split those responsibilities between two commissioners. Another possibility is to follow the model employed in the Human Rights Commission, in which the Office of Human Rights Proceedings sits under the Human Rights Commission but is independent of it and has an independently-appointed director.

Other independent entity

- 9.207 If our recommendation for a commission is not accepted, we recommend that the independent review panel be set up by statute to perform the functions attributed to it in this chapter, with the additional responsibility of maintaining records and the central register. The other oversight functions discussed throughout this chapter should be performed by the Ministry of Justice.

RECOMMENDATIONS

- R70 The commission recommended in Part D of this Report should perform the oversight functions described in paragraphs 9.173 to 9.192 of this Report.
- R71 The commission should be structured in such a way that its function of overseeing alternative processes is conducted independently of its other functions.
- R72 If R 70 is not accepted, the oversight functions in Chapter 9 of this Report should be performed by the Ministry of Justice, except for the function of maintaining records and a central registry, which should be performed by the newly-established independent review panel (see R 51).

PILOT PROGRAMME

- 9.208 We recommend that the alternative process is first implemented as a pilot, perhaps in Auckland where there is a concentration of population and already some history of using alternative processes with sexual violence (the three main providers of pre-sentence restorative justice

programmes in respect of sexual violence are in the north of the North Island).⁶⁶⁴ The pilot should be monitored and evaluated and necessary changes made to the alternative process before it is rolled out any further.

RECOMMENDATION

R73 The alternative process should first be implemented as a pilot programme which is monitored and evaluated and necessary changes made before it is rolled out further.

⁶⁶⁴ Email from Andrea King (Ministry of Justice) to Law Commission regarding alternative trial processes project (18 September 2015).

Part D
**SUPPORT FOR
VICTIMS**



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Chapter 10

Is there a need for reform to help sexual violence victims engage with the justice system?

INTRODUCTION

- 10.1 This part of the Report examines whether there are gaps in meeting the support and service needs of sexual violence victims that if addressed could increase victim engagement with the criminal justice system and/or an alternative justice process and assist with the greater achievement of victims' justice needs.
- 10.2 Chapter 10 is concerned with the assistance provided by the sexual violence support sector, including government departments with responsibilities in the field of sexual violence. Chapter 11 focuses on addressing the gaps in services that have an impact on the extent to which victims engage with a justice process (it does not provide a review of frontline services, which is currently being undertaken as part of the Ministry of Social Development's Inquiry into Funding of Sexual Violence Services). Chapter 12 proposes that a government body with responsibility for sexual violence is needed to address the gaps identified and to lead reform for that purpose.

Terminology

- 10.3 Part D uses the term "sexual violence support sector" to refer to the range of organisations, departments, and individuals that provide support to victims of sexual violence, whether of a practical, therapeutic, or medical nature ("support and service needs"). This includes those that are located in the community ("community service providers"),⁶⁶⁵ such as specialist sexual violence organisations, victim support organisations, doctors and nurses, and a wide array of other organisations and individuals that a victim may encounter in the aftermath of an incident of sexual violence, or while sexual violence is ongoing in their lives. In addition to, but independent of, community service providers, there are a range of government bodies that also provide services to victims, which are also discussed in this section ("government service providers").⁶⁶⁶
- 10.4 The sexual violence support sector deals with the support and service needs of victims that arise independently of what we refer to in this Report as the "justice system" or a "justice process" (which is when victims are involved with the courts or an alternative process). When victims participate in a justice process they are usually helped by individuals from within the justice sector, for example Ministry of Justice court victim advisers. This assistance may run parallel with external support but for the purposes of this discussion it is viewed as independent of the help given by the support sector.

665 For example, HELP, START, Shine, Aviva, and Rape Crisis.

666 For example, ACC and Ministry of Social Development.

WHY ARE WE LOOKING AT THE SUPPORT SECTOR IN A PROJECT RELATING TO JUSTICE PROCESSES?

- 10.5 Our terms of reference direct us to examine the legal framework for dealing with sexual violence placing “emphasis upon the extent to which a new framework and/or new processes should be developed to deal with sex offence cases”. However, it is artificial to divorce a review of the legal framework from a broader examination of the support received by victims as we consider that the two are inextricably linked. There are three reasons for this.
- 10.6 Firstly, deciding whether or not to enter into the justice system is more likely to be a mid- to long-term priority for victims, who will probably focus in the short-term on their immediate well-being (for example the short-term support needs of security, shelter, and medical assistance). The extent to which a victim feels supported or further victimised will impact upon whether a victim is willing to engage in a justice process including a criminal trial or an alternative process. This Report has highlighted the various challenges that the criminal justice system currently presents to victims, thus it is essential that victims’ support and service needs are met before they are ready to face the hurdles that may arise in meeting their justice needs.
- 10.7 Secondly, “support and information needs may change over time or across situations... [and] an additional range of factors come into play with the involvement of different criminal justice agencies”.⁶⁶⁷ Accordingly, there is not a clear demarcation between when a victim needs help relating to their support and service needs and help relating to their justice needs. Consideration must therefore be given to the wider victim experience and not just what happens when a victim participates in the justice system.
- 10.8 Thirdly, we suggest that recognising the individualised support and service needs of victims, and responding in a timely and appropriate manner to those needs, can help empower those victims to then make decisions relating to justice and legal processes – including whether the victim is able and willing to engage with a justice process. Because victims do not conform to a stereotype, the approach to helping each victim will be different and will require time and resources.⁶⁶⁸ This is just as true in relation to the support and service needs of victims as it is to victims’ justice needs. We believe the support and service needs and justice needs of victims will often overlap and require cross-organisational coordination to ensure these needs are met.
- 10.9 Research has illustrated that “implementing law reform, whether substantive or procedural, is inadequate to bring about real justice unless accompanied by other long-term community-wide initiatives”.⁶⁶⁹ The package of reform proposals presented in this Report will require broader initiatives to support and complement them. It is appropriate to examine the nature of support external to the justice system, as it impacts upon participation in that system.
- 10.10 It follows that to better serve victims of sexual violence, this Report needs to consider the whole picture of support services that are potentially engaged after sexual violence occurs. Simply addressing the experience of sexual violence victims within the trial process and providing an alternative justice process is, of itself, insufficient.

667 Denise Lievore *No Longer Silent: A study of women’s help-seeking decisions and service responses to sexual assault* (Australian Institute of Criminology for the Australian Government’s Office for Women, 2005) at vii.

668 Jennifer Nixon and Cathy Humphries “Marshalling the Evidence: Using Intersectionality in the Domestic Violence Frame” (2010) 17(2) *Social Politics* 137 at 153.

669 Elisabeth McDonald and Rachel Souness “From ‘real rape’ to real justice in New Zealand Aotearoa: The reform project” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 32.

WHAT IS INTERNATIONAL GOOD PRACTICE WHEN MEETING THE SUPPORT AND SERVICE NEEDS OF VICTIMS OF SEXUAL VIOLENCE?

- 10.11 Referring to the approaches taken in other countries to support sexual violence victims can help to determine what improvements can be made in meeting the service and support needs of victims in New Zealand. In particular, it is useful to examine whether overseas models lead to increased engagement in the justice system.
- 10.12 Appendix E provides an overview of several good practice models (but is not a comprehensive review of the various approaches taken internationally). Nor have the models presented in Appendix E been extensively evaluated. Rather, they paint a picture of what is viewed internationally as good practice in terms of meeting the support and service needs of victims of sexual violence. Each of the models discussed in Appendix E has a strong focus on meeting the varied and complex support and service needs of sexual violence victims, which is in turn linked to increased engagement of victims with the relevant justice mechanism. Several themes that have emerged from our analysis of these international good practice models are considered below.

Cooperative and coordinated relationships between service providers and those working in the justice sector better enable service providers to facilitate victim participation in the justice system.

- 10.13 The overseas models draw on several different approaches and organisational methods, but a strong priority in all of them is the fostering of cross-organisational relationships (across both the public and private spheres). Open and ongoing channels of communication between providers in the support and justice sectors, as well as with victims, are essential to understanding what services exist, where and how they are delivered, and where the gaps in service provision lie.
- 10.14 In addition, coordination helps identify where there is an overlap of services, helping to minimise wastage and to better direct resources. Good case management, ensuring victims have the full range of services and that these services are not doubling up, requires clear communication and referral pathways. Referral pathways which assist the victim from crisis management to participation in the justice system and then beyond require strong cross-organisational relationships.

When victims are required to take fewer steps to access the justice system, and victims feel prepared to enter into the justice system, they are much more likely to effectively participate in that system.

- 10.15 In many jurisdictions a one-stop-shop model is used to reduce “the number of steps that a woman must take to access justice”.⁶⁷⁰ This in turn has been linked to reduced rates of attrition and increased rates of conviction, as seen in South Africa with the Thuthuzela Care Centres (which are crisis response centres located in central hospitals and established by the National Prosecuting Authority).⁶⁷¹
- 10.16 The number of physical and psychological steps to be taken by the victim must be reduced. Providing victims with good access to support services requires that victims have access to those services as early as possible after sexual violence has taken place. Early intervention is linked to victims understanding how the justice system works and being more likely to participate in that system.⁶⁷²

670 Laura Turquet and others *Progress of the World's Women 2011–2012: In Pursuit of Justice* (UN Women, 2011) at 63.

671 South Africa National Prosecuting Authority *Thuthuzela Care Centre: Turning Victims into Survivors*.

672 Turquet and others, above n 670, at 63.

- 10.17 Key features are that the support services are free, physically close, consistent in the provision of information, and offered for an extended period of time. They must adequately and accurately inform victims of their rights and how these rights can be exercised.
- 10.18 Failing to offer a minimum service with these features negatively impacts victim participation in the justice system, as it puts the onus on victims at a time when they also must address the personal impact of the sexual violence that has occurred.
- 10.19 Gender, sexuality, culture, religion, and educational background can influence a victim's support and service needs and accordingly there is a need for individualised, and where necessary, specialised care.⁶⁷³ Disability and language can seriously impact on a victim's ability to understand the choices open to them and their ability to make and communicate that decision. This needs to be recognised in the nature of support offered to victims of sexual violence who are disabled.⁶⁷⁴
- 10.20 Being a victim of sexual violence while incarcerated or in an institutional setting likewise presents challenges for the victim and those assisting the victim. Victims may use drugs and alcohol as a coping mechanism in the aftermath of sexual violence,⁶⁷⁵ which can seriously inhibit their ability to participate effectively in the justice system and make decisions regarding participation. Age can also have an impact in terms of the most appropriate response – for example, there is limited recognition that senior citizens can also experience sexual violence and that their support and service needs will vary accordingly.
- 10.21 Early assistance which is tailored to the unique support and service needs of victims – what we express as “wraparound care” in this Report – is more likely to place the victim in a stronger position when entering the justice system.

Wraparound care does not necessarily require centrally located support services.

- 10.22 The one-stop-shop model has proven popular in many countries including the United Kingdom, South Africa and the United States of America. As pointed out in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*, however, it is not the fact that service providers are affiliated with one particular body that is important, as “no one group need have a monopoly”. Instead, the important features of the one-stop-shop system are “availability, continuity and quality of adequately funded support”.⁶⁷⁶ The objective is to prevent victims from feeling “shuttled between agencies”.⁶⁷⁷ Having one source of advice and assistance that can help in all matters in the aftermath of the violence and during the justice process may help victims feel a greater sense of control.
- 10.23 There is no clear evidence that the one-stop-shop model of care in itself leads to greater engagement of victims with the justice system. Rather, it is the fact that the care provided at a one-stop-shop facility wraps around the victim. Indeed, investing what is already limited funding into one-stop-shop facilities may direct funds away from other services, which was one

673 826 submissions were received by the Ministry of Social Development on the Inquiry into the funding of social services in the sexual violence sector, highlighting the failure to address the individualised needs of victims as a problem. Barriers identified in submissions included “a lack of culturally appropriate and responsive services ... discrimination against some vulnerable groups, including men; the stigma of having experienced sexual assault; navigating a complex service system; service affordability; and a lack of understanding about the range of behaviour that makes up sexual violence”: Ministry of Social Development *Report on submissions to the Inquiry into the funding of specialist sexual violence social services* (2014) at 5.

674 Lievore, above n 667, at 95.

675 Ministry of Justice *2014 New Zealand Crime and Safety Survey: Main Findings* (2015).

676 Elisabeth McDonald “Complainant desire for information, consultation and support: How to respond and who should provide?” in McDonald and Tinsley (eds), above n 669, 168 at 214.

677 Amanda Robinson *Independent Sexual Violence Advisors: a process evaluation* (Home Office, 2009) at 27.

of the criticisms made in the United Kingdom of the Sexual Assault Referral Centre (SARC) system.⁶⁷⁸

- 10.24 On that basis it is not necessary to reorganise service providers into centralised facilities, but service providers should be given the appropriate assistance to ensure wraparound care is provided to victims.
- 10.25 We endorse calls across the support sector for a greater focus of support services to be put on providing a coordinated and wrapped around response to victims. While a one-stop-shop model might be appropriate in certain urban centres, another way to provide wraparound care could be the use of recognised and qualified sexual violence victim advisers, such as the Independent Sexual Violence Advisor (ISVA) model in the United Kingdom and the Sexual Assault Nurse Examiner (SANE) model in the United States. The ISVA system has been described as “an example of a reform to a system that is effective, cost-effective and affordable [and] hard to beat”.⁶⁷⁹
- 10.26 The examples of wraparound care from overseas share several characteristics.⁶⁸⁰ These models:
- (a) are tailored to the individual victim’s support and service needs;
 - (b) are collaborative, with referral pathways established rather than the victim having to seek out assistance;
 - (c) are ongoing, and take into account the long-term nature of harm that must be addressed, for example multiple assaults may require sustained care that extends over a period of years;
 - (d) involve and inform the victim of choices and options to empower the victim to be active in their own care;
 - (e) are culturally competent, which may require characteristics of age, gender, ethnicity and disability being taken into account; and
 - (f) utilise services that are already based in the community including hospitals, support providers, and churches.

Service providers must be specially trained and educated in order to provide the most effective care to victims. Effective education programmes benefit from specialised research in the field of sexual violence.

- 10.27 Denmark presents the gold standard in terms of having a dedicated research centre, however all the models we discuss in Appendix E have strong educational and training programmes for those who have contact with victims of sexual violence. In South Africa prosecutors are specially trained; in the United Kingdom there are specialist advocates whose training reflects their roles and whose practice is measured against a recognised qualification; and in the United States there are specialist nurses who receive specialist training in addition to their standard nurse training.
- 10.28 In all these models there is an implicit awareness, judging from the resources invested into education and training programmes, that sexual violence is a discrete area of violence that must be recognised and understood as such. Failure to ensure adequate training leads to the risk of inadvertent re-traumatisation of victims.

678 Yvette Tinsley “Investigation and the decision to prosecute in sexual violence cases” in McDonald and Tinsley (eds), above n 669, 120 at 146.

679 *The Stern Review: A report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales* (Home Office and Government Equalities Office (UK) 2010) at 105.

680 See also interview with Dr Ruth Gammon “How can we break the cycle of family violence?” (Kathryn Ryan, Nine to Noon, Radio New Zealand, 13 July 2015).

WHAT ARE THE GAPS IN MEETING THE SUPPORT AND SERVICE NEEDS OF VICTIMS OF SEXUAL VIOLENCE IN NEW ZEALAND?

- 10.29 Despite a large number of community service providers and government service providers working in the field of sexual violence, we consider that gaps exist in meeting the support and service needs of victims, which negatively impact on victim engagement with the justice system.
- 10.30 For several years, the Ministry of Social Development has been active in reviewing the sexual violence sector and identifying issues in service provision. In a 2013 Review Report to Hon Paula Bennett, then Minister for Social Development, the sexual violence sector was described as “[u]nplanned, under-resourced, lacking in strategic over-view or universal access and messaging”.⁶⁸¹ That 2013 Report was produced near the beginning of a cross-agency review of the sector. The review made findings, secured interim funding for the sector, and identified priorities, marking the beginning of improved agency collaboration.
- 10.31 The findings of the Ministry are broader than the matters covered in this Report (see Appendix F for an overview of services in New Zealand), but we endorse the Ministry’s finding that the provision of sexual violence support services in New Zealand is disjointed, underfunded (and accordingly unsustainable), and lacking oversight and coordination to ensure care is wrapped around the victim and that the victim is assisted to engage with the justice system.
- 10.32 With reference to the themes that we identified in looking at overseas models, our knowledge of the work being conducted by the Ministry of Social Development, our discussions with individuals and organisations working in the service sector and in light of our focus on how the victim experience impacts upon engagement with the justice system or an alternative justice process, we understand the relevant gaps to be the following:⁶⁸²
- (a) Depending on the location, there is a lack of consistently available and comprehensive wraparound support to meet the unique needs of each victim. Factors include:
 - (i) limited funding and service delivery options across the country, especially in the provinces;
 - (ii) limited number of ethnicity-specific specialist services and those working with male survivors;
 - (iii) increasing demand for services across the sector;
 - (iv) providers contracting to multiple government agencies each with different requirements;
 - (v) potential inefficiencies from the operation of multiple independent services; and
 - (vi) a lack of national governance, coordination, and overarching strategy.
 - (b) There is a lack of adequate training, education or agreed quality standards, accreditation and monitoring to ensure that those interacting with sexual violence victims respond appropriately.
 - (c) There is inadequate research into sexual violence and dissemination of research findings.
 - (d) There is no method for collecting statistics and data arising from sexual violence and effectively applying that information in order to address sexual violence and assist victims.

681 Ministry of Social Development *Specialist Sexual Violence Sector Review Report to Hon Paula Bennett, Minister for Social Development* (2013) at 10.

682 At [46].

WHAT IS THE IMPACT OF GAPS IN FUNDING ON THE SEXUAL VIOLENCE SECTOR?

- 10.33 We note that the issue of funding of the sexual violence sector is being considered by the Social Services Select Committee as part of an inquiry into the funding of specialist sexual violence social services. Although funding does not fall within our terms of reference, we consider that it is appropriate to comment briefly on the funding challenges experienced by those in the sector, given that this in turn impacts upon their ability to address the support and service needs of sexual violence victims.
- 10.34 We understand that community service providers consider that inadequate funding negatively affects the ability to offer a model of wraparound care. For example, funding can help establish and maintain community service providers' channels of communication and cooperation. Another example is that greater funding allows service providers to advertise their services so that victims do not have to identify and locate service providers able to meet their needs. To the extent that victims have experienced difficulties in seeking help (including money spent, psychological fatigue, and time lost) they are then less likely to be inclined or prepared to engage in the justice system.
- 10.35 The lack of funding has impacts, in turn, on the wider victim experience. The first impact that lack of funding has on the wider victim experience is that failures in communication and consultation between service providers and funders inhibit effective distribution and use of the available funding. Funding of community service providers currently comes from a mixture of sources including Child, Youth and Family, ACC, the Ministry of Health (via the relevant District Health Board) and the Ministry of Social Development, with some top-ups by private donors. There is also funding provided by the Department of Corrections, the Ministry of Social Development and the Ministry of Justice to address harmful sexual behaviour. We understand that there is some consultation between the relevant government department and community service providers (principally those focused on crisis intervention) but that there are concerns as to the risk of wastage and doubling up given the limited communication between funding providers.⁶⁸³
- 10.36 The second impact on the wider victim experience relates to the amount of funding available. Community service providers receive government funding to varying degrees. The combined estimated government funding for providers in 2012/13 totalled \$29.07 million,⁶⁸⁴ of which \$23 million funded support for victims and \$6 million funded treatment for those exhibiting harmful sexual behaviours. As discussed in Chapter 2, the cost of reported sexual violence in 2012 totalled \$1.8 billion, or \$72,130 per reported incident,⁶⁸⁵ thus there is a discrepancy between the money currently invested in addressing the issue of sexual violence and the cost of sexual violence to New Zealand. While this can be said of many health and societal issues, in regard to sexual violence there are specific areas in which increased funding would make a significant

683 Meeting between TOAH-NNEST and the Law Commission (21 May 2015).

684 Ministry of Social Development, above n 681, at [7]. From a total budget of \$29.07 million, \$16 million was contracted to non-governmental service providers and the remainder was allocated to victim access to the criminal justice system. In addition, \$33.6 million of ACC funding was also allocated to sensitive claims. In 2015 the Ministerial Group on Family and Sexual Violence reported that:

The portfolio analysis [of the Government's current spend on family violence and sexual violence] raised some concerns... that:

- spending decisions are made without a view of the overall system
- the current "system" is therefore a default one, rather than a planned one
- there appears to be some duplication in roles and services
- spending is not always aligned with effectiveness in achieving outcomes or client need.

Cabinet Paper "Progress on the Work Programme of the Ministerial Group on Family Violence and Sexual Violence" (22 July 2015) SOC (15) 68 at [28].

685 Ministry of Social Development, above n 673, at 85.

- impact, specifically in ensuring wraparound services for victims that support and encourage victims to engage and participate in the justice system or an alternative justice process.⁶⁸⁶
- 10.37 The Law Commission has been told by community service providers that some staff contribute their own money and time to ensure victims are not left without support. The sector relies heavily on volunteers who donate their time free of charge to assist victims of sexual violence. The cost of these donated hours is not reflected in the current level of government funding to the sector. Furthermore there is no monitoring to ensure that this voluntary workforce is adequately trained to work with sexual violence victims and meet their support and service needs.
- 10.38 There is a risk that funding deficits affect the comprehensiveness of the support that providers can offer. There are several examples of strong practice by community service providers in New Zealand, often based on models that have achieved significant progress overseas, yet funding shortfalls prevent those practices from being rolled out more comprehensively, in terms of being sustained and implemented throughout the country.
- 10.39 Some community service providers (such as the HELP Programme in Auckland) provide support advocates to victims 24 hours a day so there is someone able to be with the victim when meeting with Police and during the medical examination. Yet, resources restrict the availability of support persons to a limited period, rather than this support continuing into and beyond the justice process (which can span several months and years). At the heart of wraparound care is the need for assistance to victims throughout the lifecycle of response and recovery. We consider that the issue of funding needs to be addressed by government to ensure wraparound care is provided for victims.
- 10.40 Sustainable funding is clearly required in order to allow community and government service providers to offer front line services that wrap around the victim while at the same time planning for the future,⁶⁸⁷ and carrying out research projects or policy development.⁶⁸⁸ Without stable, long-term funding it is difficult to take on staff (especially those who are more highly skilled and trained), who seek certainty and security in their employment. In such circumstances there is heavy reliance on an unqualified voluntary sector.

686 Estimates vary on how much funding is missing from the sector. We understand from our discussions that while the funding boost of \$10.4 million in the 2014 Budget to stabilise the sector provided relief to service providers in the short term, there are concerns as to what will happen when this funding is exhausted, such as whether funding will continue and at what rate. Dr Kim McGregor, Chief Victims' Advisor and former Executive Director of Rape Prevention Education, has estimated that the sector needs an additional \$10 million per year with a 10 year plan to increase that funding. This figure excludes funding for Doctors for Sexual Abuse Care, services for individuals exhibiting harmful sexual behaviours, and restorative justice programmes: Ministry of Social Development, above n 673, at 10.

687 The short-term stabilisation funding of \$10.4 million allocated for specialist sexual violence services in the 2014 budget ends 30 June 2016.

688 Meetings between TOAH-NNEST and the Law Commission (May–June 2015).

Chapter 11

What change can improve the sexual violence support sector to better assist victims to engage with the justice system?

INTRODUCTION

11.1 In this chapter we look at those areas where we consider change is required to improve the provision of support services, in the context of better assisting victims in terms of engaging with the criminal justice system or an alternative justice process. Firstly, we consider who should lead the change. Secondly, we consider the idea of wraparound care as underlying the various functions to be carried out. Thirdly, we outline the functions themselves.

WHO SHOULD LEAD CHANGE?

11.2 A lack of resources and political power mean that non-governmental agencies can only do so much, yet there is currently no ministerial or departmental lead to assume responsibility for the improvements that are required in the field of sexual violence.⁶⁸⁹ We note the work underway across government and endorse calls for government to adopt a greater leadership role and responsibility in reforming the response to sexual violence victims in New Zealand. We believe that government should assume a leadership role for five reasons:

- (a) Government is the principal funder of the sexual violence sector and has a responsibility to ensure that money is being effectively spent and is addressing the support and service needs it is designated to meet.
- (b) A targeted strategy to implement key areas of reform in the sexual violence sector is needed, as opposed to an ad hoc reactive response to each problem as it arises.
- (c) The extent of cross-organisational coordination and consultation that is required means that government is realistically the only body with the resources to facilitate this.

⁶⁸⁹ We note that the Ministerial Group on Family Violence and Sexual Violence was recognised by way of a Cabinet Paper but consider a more formalised and specialised mandate is preferable: Cabinet Paper “Progress on the Work Programme of the Ministerial Group on Family Violence and Sexual Violence” (22 July 2015) SOC (15) 68.

- (d) The work of the Law Commission is part of a wider government-led review of the sexual violence sector⁶⁹⁰ thus any changes that arise as part of this review could be implemented as part of a package of reform by government.⁶⁹¹
- (e) The impetus for the change recommended here lies in strengthening the justice responses to sexual violence, and justice falls within the domain of governmental responsibility.

WRAPAROUND CARE

- 11.3 We have considered what change is required to ensure that support services wrap around the victim, to support the victim throughout the lifecycle of recovery (which may extend beyond the justice process) and to best prepare the victim to engage in the justice process. Improvements are needed to ensure victim support is accessible, ongoing, professional, informed, consistent, and designed to meet the support and service needs of each victim, and that it places every victim in the strongest possible position to be willing and able to engage with the justice system.
- 11.4 Our analysis suggests that the best response to victims is not necessarily based on services that are centrally located; instead, it is the quality and accessibility of those services that are crucial. Quality can be defined in many ways but for the purposes of our discussion, and in turning to consider the wider victim experience in New Zealand, the definition of quality should include the victim's engagement in a justice process. There is a crucial link between wraparound care and victim engagement with the justice system.
- 11.5 We consulted on the desirability of a one-stop-shop model for New Zealand. While this model has enjoyed considerable success in overseas jurisdictions, it has been pointed out that the one-stop shop model might not necessarily be a good fit for New Zealand.⁶⁹² Firstly, New Zealand's many rural towns might not be able to sustain a resource intensive one-stop-shop clinic or premises (although transport could be provided to rural centres. For example depending on the availability of medical forensic clinicians on the West Coast at any given time, victims are frequently transported from there to Christchurch for medical forensics). Secondly, service providers will already have their own premises, management structures (where appropriate) and organisation and may not wish to be integrated into a centralised location. Thirdly, some victims seek help some time after the sexual violence occurred and may feel alienated by a centre that is designed to respond only in the immediate aftermath of sexual violence (for instance, if the services offered are not designed to meet the support and service needs of historic sexual violence victims). Fourthly, our consultation process suggests that service providers seek greater coordination across the sector, but do not wish to relinquish their autonomy to a centralised agency.
- 11.6 Concern has been expressed by organisations such as TOAH-NNEST that there is insufficient funding in New Zealand to be invested into a one-stop-shop model despite the potential

690 The Ministry of Social Development is advancing a sexual violence work programme which includes the following priorities that overlap with matters covered in this Report (Cabinet Paper "Progress on the Work Programme of the Ministerial Group on Family Violence and Sexual Violence", above n 689, at [36]):

- Develop a long-term (operational) policy framework for responding to sexual violence, to drive the operating model.
- Develop an approach for service purchasing and planning to support good quality and sustainable services, and improve outcomes and access.
- Improve sector infrastructure, including data collection systems; protocols with community agencies; good practice standards; and workforce development and training.

691 We note work being done across government, including the Ministry of Social Development's Community Investment Strategy, the justice sector's Stronger Response to Family Violence programme of work, Policing Excellence: the Future, and the Internal Police Family Violence Change Programme, Whānau Ora, the Children's Action Plan, the Youth Crime Action Plan, the Whole-of-Government Gang Action Plan, and the Ministry for Women's focus on ensuring women and girls are free from violence.

692 Meeting between Doctors for Sexual Abuse Care and the Law Commission (12 June 2015).

advantages of that model. Our preferred approach is therefore “utilisation and support of existing services, with additional funding to allow for a more consistent multi-agency approach”.⁶⁹³

- 11.7 Keeping in mind the emphasis on wraparound care, without necessarily centralising support services, we identify several key functions that need to be carried out in order to strengthen the quality of care provided by service providers and provide leadership in that field.

KEY FUNCTIONS

- 11.8 Government should focus on the following key functions to improve the wider victim experience by working with service providers to ensure wraparound care, thus reducing the steps the victim must take to enter into the justice system:
- (a) Coordination of community service providers and support services to eliminate doubling up or wastage and to ensure comprehensive coverage (both geographically and in the nature of the services available) to wrap around each victim.
 - (b) Establishing and supporting compulsory training and education programmes for all individuals and organisations that interact with sexual violence victims.
 - (c) Oversight to ensure quality and consistency of services throughout New Zealand, by identifying and implementing good practice standards.
 - (d) Resourcing and enabling greater research of sexual violence and the collection of data for that purpose.

FUNCTION ONE: COORDINATION OF SERVICES AND STRONG CROSS-ORGANISATIONAL RELATIONSHIPS BETWEEN BOTH GOVERNMENT AND COMMUNITY SERVICE PROVIDERS

- 11.9 As we have noted, a large number of often disparate agencies and organisations have contact with victims of sexual violence and greater coordination of both the services provided and those providing the services is needed.
- 11.10 Failures in coordination can negatively impact on a victim’s ability to access information that is timely, accurate, and comprehensive and that permits the victim to make informed decisions.⁶⁹⁴ As noted by Elaine Mossman, in the aftermath of sexual violence, victims “will be interacting with institutions and systems oriented towards professional control and procedural efficiency at a time when the victim/survivor is struggling...to regain a sense of autonomy and personal agency”, which can result in victims “feeling controlled and subordinated” rather than informed and supported.⁶⁹⁵
- 11.11 At a practical level, to support a victim service providers should work together to remove obstacles and barriers to victims accessing help, which can drain the energy, will and resources that are needed for the victim to heal and to prepare for entering into the justice system. This is happening in certain contexts and certain centres, for example many Sexual Abuse Assessment & Treatment Services (SAATS)⁶⁹⁶ centres have made significant progress in the nature and

693 Yvette Tinsley “Investigation and the decision to prosecute in sexual violence cases” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 120 at 146.

694 Law Commission *Women’s Access to Legal Advice and Representation* (NZLC MP9, 1997) at 6.

695 Elaine Mossman and others *Responding to Sexual Violence: A Review of Literature on Good Practice* (Ministry of Women’s Affairs, Wellington, 2009) at 28.

696 See Appendix F for a fuller description of SAATS centres.

- wraparound quality of support provided to victims. However, this type of assistance is neither consistently nor comprehensively available.
- 11.12 Coordinated services are needed to help guide victims from crisis survival to being willing and able to make decisions and partake in the justice system. Strengthening the victim is important because, as it stands, there are many aspects of the criminal justice system that weaken victims.
- 11.13 In addition, victims are at risk of secondary victimisation when they are unable to access help for their unique support and service needs. To the extent that a victim does not feel supported by (or at worst is traumatised as a result of having engaged with) the social and governmental support services in the immediate aftermath of sexual violence, the victim is likely to feel less prepared to engage in the justice system. Access problems relate to geographic coverage, a lack of specialist services, inconsistent follow-through, and an absence of clear signposts for victims telling them how to access the help needed.⁶⁹⁷
- 11.14 Following the trauma of sexual violence, victims are required to not only assimilate what has physically happened to them, they are then required to mobilise and seek assistance and to process large volumes of information about options, processes and how to access various forms of help.⁶⁹⁸
- 11.15 Without a clear and coordinated strategy to respond to victims' support and service needs in a timely manner, there is the risk that tasks such as collecting evidence take priority over the victim's individual support and service needs.⁶⁹⁹ In its report on submissions to the inquiry into funding of sexual violence services, the Ministry of Social Development agreed that "specialist sexual violence service delivery is currently fragmented. The impact of which is that those affected by sexual violence do not necessarily experience a joined-up and wrapped-around approach that addresses all presenting issues, and includes family, whānau and other support people".⁷⁰⁰
- 11.16 Failures in coordination have led to significant gaps in the services being made available to victims. However, we consider that these gaps (and failures in coordination) do not appear related to the number of support services already in existence (with the exception of a need for greater coverage in rural areas). Indeed the current service provider community is large and has invaluable and irreplaceable institutional knowledge.
- 11.17 Instead we consider that the lack of coordination is a consequence of, firstly, significant pressures on time and finances faced by service providers which limit their ability to enter into dialogue with other service providers; secondly, the increasing demand on services (including that understanding and responding to the nuances of sexual violence and the varied support and service needs of victims absorbs considerable resources) and thirdly, the lack of a leadership body to undertake a coordinating role.⁷⁰¹

697 Ministry of Social Development *Report on submissions to the Inquiry into the funding of specialist sexual violence social services* (2014) at 6.

698 One example of where victims' needs have been responded to proactively is the launch in 2015 by ACC of its "Integrated Services for Sensitive Claims" programme, which seeks to mainstream the services provided. We understand this has been favourably received by community service providers.

699 An example of a clear strategy currently in use is the Wellington SAATS centres, based on the national DSAC (Doctors for Sexual Abuse Care) manual and its Wellington policies and resource manuals.

700 Ministry of Social Development, above n 697, at 41.

701 It appears that one of the reasons the sector is fragmented is the ideological and philosophical differences between service providers, although great progress is being made amongst service providers to work together and find solutions to the problems faced by the sector. Although TOAH-NNEST has strong links throughout the sector, we consider that there is no existing service provider body in the sexual violence support sector that is currently in a position to fulfil the function of assisting in the coordination of delivery of services and overseeing how those services are delivered.

- 11.18 There is an opportunity for an independent body to assist community and government service providers to effectively carry out their functions. We believe that some form of high-level coordination is needed to support service providers in ensuring victims' support and service needs are met and to promote integration of services where possible. This does not necessarily mean physical integration; it can instead refer to greater awareness of what each body (governmental and community based) does in the relevant region and the ability to refer victims to the appropriate service provider at the appropriate time. There would need to be a two-stage process: firstly to audit the sector to identify where there are gaps in service provision; and secondly to determine how these gaps can be collaboratively addressed.
- 11.19 The ideal would be for a lead body to support the service providers to ensure that victims of sexual violence are able to easily access help as soon as possible after the violence has occurred, by way of face-to-face contact (if desired) with a support person assigned to the victim.⁷⁰² That support person would be trained and educated to deal with sexual violence victims; would have knowledge of the entire path that the victim will have to travel, including medical and legal concerns; would be able to make the necessary referrals across sectors and providers; and would remain available to the victim throughout the days, weeks and months following sexual violence. In Part B we recommend the extension of the role of the specialist victim advisers who currently support victims of sexual violence at court. Their role could be extended in this way.
- 11.20 Even if the expanded adviser model is not possible, we would still recommend that a lead body be established that would have full knowledge of all parties in the sector and what they do, and that would serve as both a repository and a conduit for that information. The body would seek to reduce the barriers to victims accessing services, for example by providing an 0800 phone number that is staffed 24/7 and that can refer the person phoning (be it a victim, family member or another service provider) to the appropriate service provider/s. (This could also reduce the resource cost of service providers who currently operate 0800 facilities, though consultation with the sector would be needed before existing 0800 numbers were combined). This body would need to know what each service provider did, where, and within what limitations (for instance location, time and available resources, or being specialised to a particular cohort such as male victims). The ability to provide answers and information to victims when requested, in a timely and accurate manner, is crucial to improving victim experience.⁷⁰³ In addition, the body would be enabled to facilitate communication and consultation between the relevant parties, for example by developing protocols to enable service providers to work together.⁷⁰⁴ Formal agreements or protocols would seek to maximise service provision by organising services to communicate and work together, rather than taking power away from service providers.
- 11.21 In our opinion, service providers should continue their work in accordance with their self-identified limitations and ideologies. At the same time we believe that all services need to be centrally co-ordinated by a lead coordinating body (which as described above requires the sharing of information about services offered and cooperating to meet any gaps in service provision).
- 11.22 Both community and government service providers would need to link their services through designated and coordinated service streams (that relate to location, service provided and the support and service needs met). This would allow service providers to create a care-plan tailored

702 This is not a completely new concept in New Zealand. We note that the offender levy is used to finance the role of the sexual violence survivor advocate, which seeks to link victims to support services to encourage ongoing engagement with the criminal justice system. This is centralised through Victim Support.

703 Denise Lievore *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault* (Australian Institute of Criminology for the Australian Government's Office for Women 2005) at 153.

704 Cabinet Paper "Progress on the Work Programme of the Ministerial Group on Family Violence and Sexual Violence" (22 July 2015) SOC (15) at [51].

to the current and future support and service needs of each victim, allowing referrals amongst service providers and thereby encouraging services to be delivered effectively and efficiently (for the benefit of both victims and service providers).

- 11.23 Coordination is needed to ensure the system is working effectively and not at cross-purposes. An effective sexual violence support sector would provide enhanced and streamlined access to medical, social/therapeutic and legal services for all victims, including those victims who are currently under-represented in terms of accessing support services and entering the criminal justice system. There will always be some victims who choose not to enter into any form of justice mechanism in order to address their justice needs, but a coordinated support sector will at least ensure these victims receive the assistance they need to meet their support and service needs.
- 11.24 We understand that some victims currently do not engage with the justice system because their survival needs are not being met. Greater coordination of the support sector could improve the provision of support services, assisting more victims into a position where they are willing and able to engage with the justice system.

TASKS FOR GOVERNMENT

- Audit the sector to identify what services are operating and where they are operating (in order to prevent doubling up of services); address any gaps in service provision (for example due to geographic location); ensure services are sign-posted to victims; and identify gaps in types of services in consultation with the sector (for example identify funding to ensure a LGBTI-friendly (lesbian, gay, bisexual, transgender and intersex) facility).
- Coordinate the support service sector with the goal that as many victims as possible receive timely and ongoing support after an incident of sexual violence including medical, social/therapeutic and legal assistance.
- Exercise leadership through consultation, collaboration, communication, cooperation and innovation to bring about seamless delivery of support services to victims (that includes, where appropriate, medical, social/therapeutic and legal support).
- Continue to consider the most suitable service delivery models for different parts of New Zealand, taking into account the following:
 - A one-stop-shop model might be appropriate for areas such as a larger metropolitan centre where there are several hospitals in which such a service could be located. Alternatively SAATS centres could be supported and resourced to provide more comprehensive support to victims.
 - Consider whether consultation is required to determine if a centralised 0800 number to direct victims to the relevant support service is an effective tool for coordinating and presenting a seamless service delivery.

FUNCTION TWO: IMPLEMENTATION OF APPROPRIATE TRAINING AND ACCREDITATION PROGRAMMES

- 11.25 Research shows that “the psychological impact of victimisation can be considerably exacerbated by insensitive treatment and a lack of understanding of victims’ needs by agencies and organisations within the criminal justice system.”⁷⁰⁵ Best intentions in working with victims of sexual violence may be insufficient to overcome social and cultural norms and preconditioning, or to counteract socially entrenched preconceptions or judgments which are sometimes referred to as “rape myths” (see Chapter 1). What is needed is specialist (in terms of being trained) rather than dedicated workers (having good intentions but not necessarily appropriate skills and knowledge).
- 11.26 Effective training can equip those working with victims of sexual violence to pre-empt the sort of needs and questions that victims might have, further easing the experience for the victim. For example, a victim who has the court process explained to them in advance might be more willing to participate in that process knowing that they can give certain evidence by CCTV or by video link. Service providers that have staff who understand aspects of the criminal justice process, for instance what investigating and prosecuting a complaint involves, will be able to respond to victims’ queries straight away.
- 11.27 Those working in the sexual violence sector require adequate training and education. *Training* relates largely to process (for example, a forensic examination is undertaken by step 1, step 2, step 3 and so on). *Education* concerns the nuances of sexual violence and how to respond to the presenting victim’s specific support and service needs (for example, using child appropriate language when dealing with a child victim) rather than providing a generic response to the act of sexual violence.
- 11.28 Reform is required to implement nation-wide, ongoing education and training programmes based on international research and delivered by qualified instructors and educators or to support service providers such as Doctors for Sexual Abuse Care (DSAC) in doing so. The programmes should be available throughout the country and provide a standard qualification. A corollary to this would be working with sector providers to identify good practice standards around which training programmes should be conducted.
- 11.29 One way to approach this could be to adopt a similar practice to the Police specialist interviewers, who internally review and identify where lessons can be learnt from practice. To the extent that such an exchange of ideas is normalised in the sector, the need for ongoing training can be limited to expertise in a particular area, for example understanding legislation. A good practice example is the Advisory Group on Sexual Crime in Scotland which brings together experts including prosecutors, NGOs, and Police to consider best practice in the prosecution of sexual violence cases.⁷⁰⁶ In addition, training courses for prosecution staff on sexual violence cases are provided using resources from the Advisory Group and medical staff.
- 11.30 The need for training and education extends to anyone who interacts with victims of sexual violence, including judges, lawyers, police officers, and medical personnel (as also touched upon in Parts B and C). We acknowledge training programmes already in existence, including those offered by Police and DSAC to police officers and doctors who work with victims of sexual

705 Elisabeth McDonald “Complainant desire for information, consultation and support: How to respond and who should provide?” in McDonald and Tinsley (eds), above n 693, 168 at 169, quoting Jonathan Doak *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford, 2008) at 51.

706 Scotland Police News < www.scotland.police.uk > .

- violence.⁷⁰⁷ Similarly, sector organisations such as the National Collective of Rape Crisis offer a limited number of training courses. However, these training programmes are not available throughout the country nor are they available to everyone who interacts with victims of sexual violence. The reasons for this are inevitably linked to lack of funding, but may also be due to a lack of political investment and lack of awareness of the value of training and education.
- 11.31 In addition to the need for education and training, there should be accreditation of those individuals who need to exercise a high skill level when working with victims. These include medical professionals involved in examining victims, counsellors, psychologists, and those who would be working within the alternative justice process covered in Part C. Accreditation provides a mechanism to ensure a provider's priorities are clearly defined and credible and that good practice models are being used. Monitoring ensures compliance with those standards.
- 11.32 Accreditation does occur in New Zealand in the field of sexual violence. DSAC, for example, offers a system with full accreditation (as a DSAC-accredited doctor) approved by the Royal New Zealand College of General Practitioners.⁷⁰⁸ However, we note that there are also doctors that may undertake DSAC training but not be DSAC accredited. There is no monitoring and supervisory oversight to ensure consistent accreditation.
- 11.33 One overseas accreditation model is the RESPECT Accreditation Standard found in the United Kingdom and discussed in Part C.⁷⁰⁹ Providers start with a Safe Minimum Practice assessment focusing on safety and risk management, which is offset against the cost of accreditation, and then if they elect to seek accreditation they undergo a full panel-led assessment. The purpose of RESPECT accreditation is not to dictate a certain work model, but is to focus on the quality of service delivery and outcomes and to seek to enhance the risk management procedures and safeguarding functions identified as existing in the original Safe Minimum Practice Assessment (for example reporting functions and length of intervention are important factors). The standards are reassessed every three years in consultation with sector providers, academics and other research bodies in order to reflect changes in thinking. This model applies to organisations rather than individuals.
- 11.34 The RESPECT model illustrates the different functions of training on the one hand (which equips individuals with the knowledge and skills to respond in a given context) and accreditation on the other (which objectively identifies that the services being provided – for example training services – have been assessed as meeting objective standards of assurance relating to quality, safety and risk management). Both training and accreditation are needed to strengthen “a coordinated community response”.⁷¹⁰
- 11.35 We consider steps should be taken to consult with the sector for the purpose of establishing good practice standards. Although it may not be government's role to actually design and deliver training programmes, government should be involved in ensuring that these programmes come into existence (including through funding support) and assuring the quality of those programmes, as associated with the recommended oversight role. We recommend that government oversight would require taking an active role in the accreditation process, where

707 Examples of training programmes run by DSAC include an advanced paediatric course on “Medical Assessment of Sexually Abused Children and Adolescents” conducted every two years (over four days) and a forensic training weekend on “Medical/Forensic Management of Adult Sexual Assault” held in general once a year and usually in Auckland. In addition there is a formal mentoring programme for DSAC doctors who start to see patients and following completion of the initial training course. Nurses currently attend existing DSAC training rather than undergoing separate training. DSAC clinicians also run a medical examination training session at the Police's adult sexual assault investigators' training, and ad hoc community training sessions as requested.

708 We note that DSAC doctors also provide the SAMS (Sexual Abuse – Assault Medico-Legal) service to provide expert medical forensic opinions for court cases involving sexual violence.

709 RESPECT is a community domestic violence perpetrator programme: “Accreditation” (2015) RESPECT < www.respect.uk.net > .

710 RESPECT *The Respect Accreditation Standard* (Respect, 2012).

accreditation was deemed necessary. One way this might happen is by delegating to an appropriate body (for example to District Health Boards and/or DSAC, for accrediting doctors, or to a newly established multi-disciplinary advisory group).

- 11.36 There may be some crossover between the accreditation discussed here and the recommendations made in Part C for accreditation of providers, facilitators and programmes operating under the alternative process.

TASKS FOR GOVERNMENT

- Take the lead role in implementing or facilitating (through supporting existing providers of training programmes) nation-wide training and education in order to bring providers in line with the designated accreditation standards (where relevant) and accepted good practice standards.
- Work with service providers and academic institutions to provide ongoing education and training programmes (that may complement but run parallel to any relevant and required accreditation standard) based on international research and delivered by qualified instructors and educators. This may include resourcing service providers to themselves offer training programmes to, for example, volunteers working at crisis centres.
- Consider the establishment of a multi-disciplinary advisory group to identify training requirements of those working with sexual violence victims and potentially lead training initiatives on the basis of expertise within the advisory group.
- Determine the interface between good practice minimum standards and existing professional standards and make the necessary adjustments to ensure consistency and coherency.
- Identify and implement an accreditation model for provision of the alternative process and for those individuals/organisations working with sexual violence victims where appropriate (for example, for medical practitioners conducting forensic examinations).

FUNCTION THREE: NATIONAL LEVEL OVERSIGHT TO ENSURE THE COMPETENCY OF THOSE INTERACTING WITH SEXUAL VIOLENCE VICTIMS

- 11.37 Linked to the provision of training is the need for oversight and monitoring of those who interact with victims of sexual violence victims (including not only those in the support sector but also those in the justice sector and throughout the post-violence response and recovery period). There may be individuals or organisations that are carrying out services in a well-meaning way, but that do not have adequate training or facilities to support them in offering these services to vulnerable victims who need the best care possible. This can place victims at risk of re-traumatisation, regardless of the best intentions of the organisations involved. People who deal with victims of sexual violence need ongoing, expert training and education (as also highlighted in Parts B and C).⁷¹¹ Service providers should, and do, strive to take account of how their behaviour and response can have a significant impact on victims, both positive and negative, for example stereotypes about victims of sexual violence may influence treatment of a victim and entrench or aggravate a victim's potential feeling of reduced self-worth.

⁷¹¹ The Ministry of Social Development received 645 submissions that “recognised standards of good practice for specialist sexual violence social services do exist but are not necessarily used to inform practice”: Ministry of Social Development, above n 697, at 6. For examples of good practice guidelines in use in New Zealand see ACC *Sexual Abuse and Mental Injury: Practice Guidelines for Aotearoa New Zealand* (March 2008) and Taskforce for Action on Sexual Violence *Mainstream Crisis Support Services Responding to Sexual Violence Perpetrated Against Adults: Good Practice Project – Round 1* (December 2009).

- 11.38 Service providers should and do strive to have an acute awareness and comprehension of matters such as the psychological presentation of victims of sexual violence and how this can manifest. A negative reaction to disclosure might cause the victim to withdraw and not tell anyone what has happened for many years, if at all. What are required are educational programmes based on extensive research, international good practice, and foundational theories, which are conditional upon high-level organisation and resourcing.
- 11.39 We recommend a government-led strategy that seeks to professionalise the community of individuals who interact with victims of sexual violence, therefore ensuring that those who work with victims of sexual violence effectively help and support victims within the relevant context, whether medical care, the justice system, or therapeutic assistance. This should be achieved by three discrete competency policies (to be explored in depth below), which are ongoing education programmes, continuing skills training obligations, and accreditation prerequisites where appropriate (for example counsellors and forensic examiners).
- 11.40 In order to ensure ongoing quality and competency assurance we consider that a monitoring system, external to the support sector, is required to avoid the negative impact that can arise if “sexual violence services are not being delivered in a safe way”.⁷¹² We acknowledge that ongoing monitoring and reporting functions are onerous for a community of individuals, departments and organisations that are under significant resource pressure, however we consider that in order to effectively coordinate the sector and the services in the best interests of victims and for the best use and distribution of funding, it is reasonable to expect those working within the sector to reach a minimum standard of competence.
- 11.41 Specifically, we consider that government should coordinate and lead external oversight of the sector and, where appropriate, assure the competency of and monitor those working within the sector. Crucial to this reform is support of those working with victims of sexual violence by the adoption and implementation of a robust training, education, and accreditation programme.
- 11.42 Again, there could be a functional crossover here between oversight of the sexual violence sector and the recommendations made in Part C around the monitoring of providers in the alternative process.

TASKS FOR GOVERNMENT

- Develop an oversight and monitoring mechanism (which could extend to the providers of the alternative process) related to the accreditation framework based on research and negotiation with stakeholders.
- Provide pre-accreditation support such as onsite pre-assessment or pre-application meetings and ongoing post-accreditation monitoring.
- Consider establishment of a monitoring body to monitor training and audit effectiveness of training and to share case studies and lessons learnt from an audit process.

712 Ministry of Social Development *Specialist Sexual Violence Sector Review Report to Hon Paula Bennett, Minister for Social Development* (2013) at [46].

FUNCTION FOUR: DEDICATED RESEARCH CAPACITY FOCUSED ON SEXUAL VIOLENCE INCLUDING SUPPORT TO IMPLEMENT ROBUST DATA COLLECTION PRACTICES THROUGHOUT THE SECTOR

- 11.43 Sexual violence has intersections with other forms of violence while also being a form of harm with an impact that far exceeds the act of violence itself. Without a dedicated research unit and data on which to base that research, there is reduced insight into the nature of the violence, the experience of victims, methods of preventing sexual violence, the impact of sexual violence for victims, their families and the wider community and how best to support victims and their families in the criminal justice system and beyond.⁷¹³
- 11.44 There is the need for a research unit, either independent of a research facility already in existence or as an extension of a current facility (for example, based in a hospital or academic institution), but with its own independent research agenda and funding. The scope of potential projects is significant and encompasses not only more theoretical and conceptual areas such as the nature of victimisation but also more practical areas that would help victims of sexual violence in New Zealand today. These could include:
- the utility of an 0800 number and/or a website;
 - collection and analysis of data about the mention of sexual violence in applications to the Family Court for protection orders;
 - research as to what constitutes consent and preconceptions held about sexual violence (for instance amongst the public and lawyers, judges, medical staff and those working in the sexual violence sector) and how these can best be overcome;
 - research into the extent to which the criminal justice system is able to respond to victim's needs;
 - research into adherence with the Victims Code overseen by the Ministry of Justice; and
 - collection and analysis of data regarding cases that proceed through the alternative process.⁷¹⁴
- 11.45 Throughout this Report (and other research including *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand*) the need for further research is highlighted. The dedicated research centre would be an ideal place to centralise these projects, ensuring an effective use of resources, access to stakeholders and experts in the field, and a conduit to ensure those across the sector know of and can participate in this research agenda.
- 11.46 An important component of research is the collection of data pertaining to sexual violence. Data collection informs funding allocation and demand, as well as increasing knowledge relating to the prevalence and characteristics of sexual violence. As highlighted in New Zealand's state reports issued by the United Nations monitoring bodies, there is a need to "ensure systematic collection and publication of data, disaggregated by sex, ethnicity, type [and characteristics] of violence, and by the relationship of the perpetrator to the victim; to collect data on the number of women killed by partners or ex-partners; and to monitor the effectiveness of legislation,

713 We note with interest the Family Violence Clearinghouse, which is a national centre for research and information on family and whānau violence in New Zealand. It provides information and resources for people working towards the elimination of family violence and is based at the School of Population Health at the University of Auckland. It has both a sector advisory group and an academic advisory group, thus has an academic base and seeks to exchange knowledge between the Government, NGOs and the public, while remaining independent. In a similar vein we acknowledge the work done by the Social Policy Evaluation and Research Unit (Superu) that addresses issues across the social sector.

714 Another topical area for further research is the nature of sexual violence that occurs in a social media context, as highlighted in New Zealand with the Roast Busters incident: Linda Beckett "Care in Collaboration: Preventing Secondary Victimisation Through a Holistic Approach to Pre-Court Sexual Violence Interventions" (PhD in Criminology Thesis, Victoria University of Wellington, 2007) at 257.

policy and practice relating to all forms of violence against women and girls”.⁷¹⁵ This statement highlights the range of statistics and data that can be collected and the use made of that information.⁷¹⁶

- 11.47 Good data is crucial to creating an accurate picture of sexual violence in New Zealand. Researchers and policymakers need good data to understand the problem of sexual violence and propose solutions. Underreporting of sexual violence creates a barrier to the collection of good data through official channels, which means that Police crime statistics alone cannot be relied on.
- 11.48 The issue of centralisation also needs to be addressed. At present, potentially useful data is held across a range of different government and community service providers. During this review we contacted Police, the Ministry of Justice, ACC, and a number of community service providers to request quantitative and qualitative data on sexual violence. Inevitably, different organisations recorded their data in different ways and some were more comprehensive than others. Some responsibility needs to be taken at a national level for collating data from the various organisations, keeping it current, and making it accessible to researchers, policy makers, and the general public.
- 11.49 Greater consideration is required of methods by which data can be obtained, including alternative reporting models such as the “You Have Options” programme in the United States of America, which allows anonymous reporting of sexual violence and thus collection of data even if the victim elects not to report formally to Police.⁷¹⁷ Programmes such as this allow access to information that would not otherwise be available and would permit exploration of alternative approaches to meeting the justice needs of victims. For example, with the “You Have Options” programme, there is capacity for Police to draw on data that might be used to prevent future offending even where the victim has chosen not to pursue the complaint to trial.

TASKS FOR GOVERNMENT

- Identify and put in place data collection programmes at police stations, courts, medical centres and crisis centres. Assume responsibility for resourcing the collection of data and then gathering, analysing and disseminating the data.
- Explore the potential for developing a centre of excellence in research attached to one of the universities or polytechnics, where we understand there are already isolated projects being undertaken.
- Explore anonymous reporting mechanisms that would allow the collection of data in order to, for example, identify patterns and geographic prevalence. There are currently models in both Australia (<www.sara.org.au>) and the United States of America (“You Have Options”) that warrant further consideration.
- Work closely with individuals and organisations based in the sector to identify those issues that require investigation and research.

715 United Nations Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [25(e)].

716 We note that in August 2012, Cabinet approved the new Tier 1 statistics list, which includes “family violence” in the Safety and Security category. We would suggest that statistics on sexual violence could also be added to this category as “the most important statistics for understanding how well New Zealand is performing”: “Tier 1 statistics” (17 September 2013) Statisphere <www.statisphere.govt.nz>.

717 See “You Have Options” programme <www.reportingoptions.org>.

REFORM OF FUNDING OF THE SEXUAL VIOLENCE SECTOR

- 11.50 One of the biggest factors underlying the issues raised in this section of the Report and elsewhere in the wider Government review is funding.⁷¹⁸ This is two-fold – firstly, in terms of the availability of funding to implement the reform proposals in this Report and secondly, in terms of the distribution of funding to existing community and government service providers. The issue of funding does not come directly within our terms of reference but the comments here reflect our understanding that adequate funding is crucial in order to improve the experience of victims before, during, and after the justice process.
- 11.51 As part of the wider Government review of how sexual violence services are conducted in New Zealand, it may be that the sector receives increased funding. We consider that there needs to be reconsideration of the funding arrangements of service providers, which are currently dispersed and decentralised and operate counter-intuitively to the victim-centred, wraparound model advocated for in this Report.⁷¹⁹
- 11.52 There is a risk that centralising funding would alienate service providers across the sector, if it was perceived as a shift towards government seeking to assume control over the sector. However, a funding allocation panel or committee that worked alongside community service providers to determine a more seamless means by which funding can be allocated from government to service providers may be a more attractive approach.

RECOMMENDATIONS

- R74 Government should invest the necessary resources and facilitate the following improvements to the sexual violence support sector:
- Development and implementation of training and education programmes across the sexual violence sector and made available to all those interacting with sexual violence victims in a professional capacity.
 - Consideration of whether a recognised accreditation programme based on good practice guidelines to promote the growth of a skilled workforce in the sexual violence sector should be rolled out nationally.
 - Creation of an effective monitoring system attached to the accreditation programme.
 - Creation of a dedicated research unit (this may be located within an established body) funded to facilitate the application of research into practice standards, with a clear agenda and charged with fostering international collaboration for this purpose. This includes the adoption of data collection programmes.
- R75 A sexual violence commission (see R 76) should be given responsibility for:
- coordinating the scope and nature of services provided; and
 - promoting communication and consultation across the sector.

718 See Ministry of Social Development, above n 712.

719 Currently, funding is allocated by the following government agencies/departments (with the funds allocated in 2012/2013 following in brackets): ACC (\$12.86 million), New Zealand Police (\$1.46 million), Ministry of Health (\$2.72 million), Ministry of Justice (\$3.12 million), Ministry of Social Development (\$7.88 million) and the Department of Corrections (\$1.03 million).

CONCLUSION

- 11.53 In Part C we refer to the concept of “victims’ justice interests”.⁷²⁰ Part D of the Report is concerned with meeting victims’ support and service needs or interests as they arise in the immediate aftermath of sexual violence, in the period prior to any justice process being undertaken and after any justice process has been concluded. In our view, meeting victims’ support and service needs is essential to victim engagement with any justice process.
- 11.54 The period prior to any justice process taking place is crucial as it provides an opportunity to place the victim in the strongest position possible before entering the justice system. As it currently stands victims often exit the criminal justice system with an enduring sense of injustice. For this reason it is important that victims receive the best possible assistance and support outside the justice system.
- 11.55 The conclusion we have reached is that reform is needed and that this programme of reform should be led by government.⁷²¹ As noted, despite several government departments/agencies currently working in the field of sexual violence, these departments have discrete areas of responsibility and tend to work in isolation. What is lacking is a lead government body focusing on the issues relating to sexual violence, which is mandated to coordinate other government agencies and departments with interests in the field and that has a strong relationship with the community service providers that make up the sexual violence support service sector. Our principal reform proposal is for the Government to establish a new entity to focus on sexual violence and this is the focus of our discussion in the next chapter.

720 Kathleen Daly “Reconceptualizing sexual victimization and justice” in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds) *Justice for Victims* (Routledge, Abingdon, 2014) at 388.

721 In addition to the needs of victims of sexual violence, we note increased calls for services to assist those demonstrating harmful sexual behaviours. Addressing the issues relating to this group of individuals is beyond the scope of this project, however we note that this presents another challenge for service providers and thus for government in the future: Ministry of Social Development, above n 697, at 5.

Chapter 12

The case for a government body

INTRODUCTION

12.1 In this chapter we recommend the establishment of a new statutory body, as the primary mechanism to implement a government-led strategy for helping the sexual violence support sector and in turn sexual violence victims. This new body should provide direction and leadership while relying on and supporting those already in the sector to carry out frontline services.

THE CASE FOR A NEW PUBLIC BODY

12.2 In our view, reform would be best implemented through the establishment of a new statutory body tasked with operating specifically in the sexual violence sphere. What is currently lacking in the sexual violence area is whole-of-sector coordination and oversight of how the response to victims is managed at a macro level. There is no single public body that is currently tasked with that role⁷²² and existing government bodies act in accordance with their respective culture and area of responsibility (for example the Ministry of Justice inevitably has a justice focus).⁷²³

12.3 We recognise the work of the Ministry of Justice on a Victims Code and a chief adviser for victims, and in the field of family violence. We consider that there are important features that distinguish sexual violence and thus victims of sexual violence, which mean that sexual violence should be treated as a distinct policy area.

12.4 The focus in this Report is on how victims of sexual violence can be best supported before, during and after entering a justice process. This has a justice element but also concerns victims' medical and therapeutic needs and their social circumstances. For that reason, the functions highlighted here would be better fulfilled by a body that can take those various elements into account, rather than the Ministry of Justice which is limited to the justice sphere.

Why an independent public body?

12.5 We consider an independent public body is required to fulfil the functions outlined in Chapter 11, for the following reasons.

12.6 Firstly, an independent public body can promote and manage cross-agency coordination and collaboration, thereby breaking down silos and promoting cooperation and cohesion across the sector. We acknowledge that this may be perceived as necessitating some loss of control by the sector but we consider this is an inevitable and necessary consequence of effective coordination, which is currently missing, negatively impacting the provision of services to and support of victims. In order to collaborate across the sector with service providers, the lead coordinating body requires independence and the ability to communicate across the sector without being influenced by the culture or area of responsibility of a particular organisation.

⁷²² Similar issues have faced government in the past. The Family Violence Taskforce was set up in July 2005 by the Labour Government to advise the Family Violence Ministerial Team seeking to increase coordination and leadership in addressing family violence.

⁷²³ Productivity Commission *More Effective Social Services: Draft Report* (2015).

- 12.7 Secondly, an independent public body would realistically be the sole body with adequate resources to fulfil this role and the mandate to implement the scope of reform identified in this Report.
- 12.8 Thirdly, an independent public body is best placed to have access to both community and government service providers (including Police and the courts) and, for instance, to traverse the divide currently in place that requires Ministry of Justice victims' advisers to remain in the domain of the courts.
- 12.9 Fourthly, an independent public body would promote specialisation, increasing the quality and effectiveness of services offered to victims. Sexual violence is a unique field of behaviour and both academics and those in the sector have said that specialist experience and expertise is necessary to address the violence and its after-effects.⁷²⁴ By comparison, if the functions that we argue must be fulfilled were farmed out to several different agencies, none of those agencies would be in a position to build up a bank of specialist expertise in sexual violence or develop a network for collaboration across government and community providers. Growth in specialisation will also be assisted by greater coordination across the sector and understanding of what expertise exists and where.
- 12.10 Fifthly, satisfying the functions identified earlier requires long-term and ongoing investment. We believe that an independent public body charged with leading the Government's response and working with the sector would be better placed to sustain continued oversight, independent of any restructuring or rationalising that may occur with future changes of government or departmental reorganisation. We recommend the body be created by statute, so that it has the necessary powers to fulfil its functions and is not affected by political change.
- 12.11 It is our view that an independent public body is the ideal vehicle for New Zealand to be a world leader in terms of innovative reform supporting victims of sexual violence to meet both their survival and justice needs.⁷²⁵

THE FORM OF A NEW PUBLIC BODY

- 12.12 We recommend establishment of an independent public body modelled under the Crown Entities Act 2004 and charged with the key functions discussed in Chapter 11. Crown entities are appropriate where there is a compelling need to have the function performed "at arm's length" from government and in this case we consider that an independent Crown entity is necessary to promote confidence across the sexual violence sector and the community.
- 12.13 Establishing a new Crown entity is the preferred option. Consideration will need to be given to whether the default Crown entities regime would apply in full or any amendments would be made, and whether this entity would be subject to the Official Information Act 1982, Ombudsmen Act 1975, Public Audit Act 2001, and Public Records Act 2005.
- 12.14 A principal enabling statute would set out the core functions, constitution and appointment as well as the powers and duties of what we recommend is the establishment of a commission on sexual violence. Statute would also establish review and reporting requirements. Delegated legislation in the form of regulations and codes would also likely be required in order to implement policies and reforms and to keep up to date with changes in strategy, for example ensuring good practice and accreditation standards are current.

724 Elisabeth McDonald and Rachel Souness "From 'real rape' to real justice in New Zealand Aotearoa: The reform project" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 40; Ministry of Women's Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009) at 70.

725 Advice to the Law Commission from Dr Linda Beckett (June 2015).

- 12.15 Should our recommendation to establish a commission not be taken up, consideration should be given to the support structure needed to facilitate the other proposals in this Report, namely the training and accreditation of alternative providers and programmes. If a support office were established for this purpose, costs would inevitably be incurred – costs that could otherwise be shared amongst and absorbed within the broader operational costs of a commission (for example, rent and personnel).
- 12.16 The Law Commission’s Māori Liaison Committee has recommended to us that it would not be appropriate to have a single commissioner to fulfil the functions set out here.⁷²⁶ This is on the basis that one person cannot represent the full diversity of victims of sexual violence, including Māori, ethnic minorities, disabled victims, elderly victims, and children.⁷²⁷ With a single commissioner model, there is a risk of alienating certain people or groups of people. The Committee expressed the view that any new public body needs to reflect the faces of the community, and thus a “commission” or a number of commissioners was preferable. We recommend that one commissioner should be appointed to focus on issues and concerns relating to Māori victims. A range of ethnicities and victim groups should also be represented in the commissioners appointed.
- 12.17 The appointment of a prominent individual or someone with public standing as a figurehead could give mana to the organisation and raise the profile of the organisation and the issues being tackled. This comes with the risk that the public body becomes closely linked with the individual rather than the issues at hand, namely sexual violence. Commissioners should have knowledge of and contacts within the sexual violence sector. The relevant individuals may for example have a legal, medical, political or educational background but would need a deep understanding of sexual violence and the sexual violence response sector. The vision of those individuals should be broader than that of the body or enabling statute and should draw on their history and experience.
- 12.18 We consider the best approach to be a full “commission” against sexual violence or a hybrid commissioner/commission model, such as the Health and Disability Commissioner.⁷²⁸ Led by high profile individuals, the commission could be driven by a steering committee populated by a multidisciplinary team of experts and community leaders representing a broad spectrum of stakeholders (including for example Māori, Pasifika, and representatives from the LGBTI and disabled communities).⁷²⁹ Subject to the ability of the steering committee to set the agenda, it could then be appropriate to have a series of sub-committees to focus on the discrete functions

726 There is a number of options for the size and structure of a new body. A single commissioner model might resemble the model used in the United Kingdom for their “Victims’ Commissioner”. That office is currently occupied by Baroness Newlove, whose function is to promote the interests of victims and witnesses, encourage good practice in their treatment, and regularly review the Code of Practice for Victims which sets out the services that victims can expect to receive. The Victims’ Commissioner model in the United Kingdom resembles the design of the new chief victims’ adviser for New Zealand.

727 Māori Liaison Committee meeting minutes (21 August 2015) (on file with the Law Commission).

728 The Health and Disability Commissioner sits above two deputy commissioners (responsible for complaints resolution and disability), one mental health commissioner, a director of advocacy, a director of proceedings, and two associate commissioners. The Commissioner is supported by an executive assistant and the office has a corporate services manager. Thus, even though there is only one “commissioner”, the office contains a number of staff. There are 62.58 FTE employed by the Commissioner as at 30 June 2014 (Health and Disability Commissioner *Annual Report 2014*, at [5.4]). In 2014 the Commissioner had total revenue of \$11,309,694 (comprising \$10,920,000 from the Crown, \$63,233 in interest and \$326,461 from other sources) and a total expenditure of \$11,655,265 (of which personnel costs totalled \$5,847,848). This was broken down into complaints resolution (\$4,357,101); advocacy (\$4,935,902); proceedings (\$733,884); education (\$561,481); and monitoring and systemic advocacy (\$1,066,897): Health and Disability Commissioner *Annual Report 2014* at ch 9.

729 In addition, the steering committee/board would need to be constructed on the model outlined in the State Services Commission *Statutory Crown Entities – A Guide for Departments* (June 2014) at 6, which highlights: (1) competencies needed to understand purpose and functions of the commission and to operate in accordance with the Crown Entities Act 2004 and any enabling legislation if constructed as a statutory Crown entity; (2) ability to articulate robust strategic direction; (3) management accountability systems in place; (4) effective and mentored chair/chief executive; (5) performance review with reference to Minister’s set expectations and succession plans in place; (6) clear understanding of place of commission within wider government structure and interaction with other departments accordingly.

of the commission, namely sector coordination; research; training and education; and accreditation and monitoring.⁷³⁰

- 12.19 A further reason for adopting a model similar to the Health and Disability Commissioner is to appropriately accommodate functions relating to oversight of the alternative process within the commission. To retain independence of function and process we consider the ideal would be to have a separate sub-commissioner or director (as with the Director of Advocacy) who has responsibility for coordinating the alternative process (see Part C).

Extent of contact with victims

- 12.20 A commission should be established to operate as a platform from which service providers within the sexual violence sector are supported to best help victims and enable victims to enter into the justice system. This commission would have limited direct contact with victims⁷³¹ and instead the focus would be on supporting and facilitating the work of service providers; for example, establishing relationships between providers in a given area. The commission would be charged with promoting collaboration and innovation amongst service providers and in conjunction with, amongst others, research bodies and government departments with responsibilities in this area.

FUNDING A COMMISSION

- 12.21 The establishment of a commission would inevitably involve costs. The extent to which this could be redistributed funded and the extent to which additional government funding is required is unclear and requires detailed financial analysis. We note the \$10.4 million funding boost to stabilise the sector in the short term (provided in the 2014 Budget) and that there are already significant drains on this funding pool.
- 12.22 Financing decisions remain within the scope and domain of Cabinet and accordingly we do not address the financial implications in great depth here, however we do make some comments in accordance with the focus on reform being discussed here.⁷³²
- 12.23 The traditional model for funding a commission is Crown funding with some limited additional revenue from, for example, interest and investment payments. The budget for a commission can be relatively modest so for example, in 2014 the Children's Commissioner received total revenue of \$2,271,000.⁷³³

730 Another possibility is to house a new commissioner within the Human Rights Commission. That Commission has up to eight Human Rights Commissioners including a Chief Commissioner, an Equal Employment Opportunities Commissioner, a Race Relations Commissioner, and up to five part-time commissioners. A risk with this approach may be that sexual violence ends up being subsumed into a broader set of issues, and as a result fails to get the attention that it needs. The current revenue from the Crown for the Human Rights Commission sits at \$9,396,000 for 2013/14 (with total income for the year at \$9,720,000) which finances several portfolios including race relations, equal opportunities, disability rights and human rights: Human Rights Commission *Annual Report* (2014) at 44.

731 One possibility that must be explored is the need for a victim referral capability such as an 0800 number or website to advise victims of where and how they are able to access help in their area. To the extent that the commission had a high public profile it is likely that victims could seek assistance directly from the commission, in which case there needs to be an adequate mechanism in place to respond to such queries. There are already several 0800 numbers and helplines in existence, but they operate with limited resources so that (for example) the hours of operation may be limited. Accordingly another 0800 number is not recommended unless it seeks to achieve a clear and distinctive objective, such as channelling all inquiries from victims, families/whānau and service providers themselves to the appropriate service provider, but without requiring the victim to repeat their story several times.

732 We note the current interest in the social impact bond (SIB) model and ongoing work by the Ministry of Health to explore the potential for adopting the SIB model in New Zealand. In its Social Bonds Cabinet Paper, the Ministry of Health defined social bonds as “an innovative form of social sector investment in which private capital and expertise are deployed for a social purpose. Social bonds enable working capital to be raised from investors to meet the costs of new services, or to scale up existing services. If better outcomes are achieved, government repays the capital invested, plus a return”: Cabinet Paper “Social Bonds Cabinet Paper – Proposal for a New Zealand Pilot” (August 2013) at [3]. We do not, however, consider that the SIB model would be suitable for crisis management in the direct aftermath of sexual violence. This is an area that requires sustainable and guaranteed funding, and in addition the desired outcomes (linked to a positive victim experience) are different for every victim and accordingly not measurable as required pursuant to the SIB model.

733 Children's Commissioner *Annual Report* (2014) at 26.

- 12.24 In 2014 the Health and Disability Commissioner received approximately \$11 million in Crown funding, but we note that the Health and Disability Commissioner has a vast mandate across the health system.⁷³⁴
- 12.25 An alternative option to meet some of the costs of a commission is the model provided by the Productivity Commission. The Commission is staffed by three Commissioners and a Board (as required per the Crown Entities Act 2013) but the “overall approach to resourcing is to employ people who can add significant value to any inquiry, supplemented by secondments, fixed-term contractors and, as required, use of specialist consultants to bring fresh perspectives and experience”, totalling 20 staff on a mix of fixed term and permanent contracts (including internships).⁷³⁵ The benefit of this arrangement is that it permits specialists to be employed for discrete topics, ensuring the level of expertise remains high and the work-plan remains issues-focused.
- 12.26 Accordingly, there are several models in terms of size and budget for a commission entity in New Zealand. Given the scope of functions highlighted above and the need for a strong profile, wide representation and consultative abilities, we would anticipate that a commission would be comparable in size either to the Children’s Commissioner (which has 13 staff, a lead commissioner and deputy commissioner and operates on a budget of approximately \$2.3 million dollars) or the Productivity Commission (which has three commissioners, a staff of 15 and a budget of approximately \$5 million dollars).

INCORPORATING MĀORI PERSPECTIVES

- 12.27 Māori are disproportionately represented amongst victims of sexual violence. The objective of assisting victims who identify as Māori arises from government’s responsibilities under Te Tiriti o Waitangi. These obligations and imperatives have been recognised by the Law Commission and highlighted both throughout our consultation and in discussions with the Law Commission’s Māori Liaison Committee.
- 12.28 Time has prevented us from consulting with Māori groups and iwi as to the form, design and structure of a new entity,⁷³⁶ though we support the recent statement of the Productivity Commission that the “development aspirations of Māori, the desire to improve the outcomes of whānau, and the tikanga around manaakitanga, whanaungatanga, and rangatiratanga mean that iwi and other Māori groups are obvious candidates for active participation in devolved commissioning and the delivery of social services”.⁷³⁷
- 12.29 One model which could be looked at and is already found within the sexual violence support sector (in the design of TOAH-NNEST) is the two-sided whare (house). The commission would be represented by the whare. On the left there would be consideration of the issues and problems arising from sexual violence, based on Māori kaupapa and taking a tikanga Māori worldview. On the right there would be consideration of issues and problems arising from sexual violence with a Pākehā worldview.
- 12.30 Another way to address the need for greater consideration of Māori is to appoint a commissioner whose role is focused specifically on issues relating to meeting the needs of Māori victims, as discussed above.

734 Health and Disability Commissioner *Annual Report* (2014) at 60.

735 Productivity Commission *Annual Report* (2014) at 3.

736 Productivity Commission, above n 723, at 20.

737 At 20.

12.31 For the purposes of this project we highlight the need for proper consultation with Māori in the implementation of this proposal. We acknowledge the first Waitangi Tribunal Report to consider social policy and the Treaty of Waitangi, *Te Whānau o Waipareira*, which noted that the principle of tino rangatiratanga (autonomous management) was to be taken into account in all Māori relationships with the Crown including those relating to delivery of social services.⁷³⁸

RECOMMENDATIONS

- R76 A sexual violence commission should be established with a number of commissioners and a core staff with expertise in the field of sexual violence. One commissioner should focus on issues and concerns relating to Māori victims.
- R77 The commission should be established by statute in the form of an independent Crown entity.
- R78 In addition to coordinating the sector (see R 75), the commission should fulfil the following functions:
- establishing a dedicated sexual violence research unit;
 - developing and implementing training and education programmes for those who work with sexual violence victims; and
 - establishing and monitoring an accreditation system for those who work with sexual violence victims, which might extend to the providers of the alternative justice processes and the programmes recommended in Part C of this Report.
- R79 The commission, in consultation with sector providers, should give consideration to the most effective model for allocating and distributing funding to ensure wraparound care.
- R80 The commission's performance should be measured against a detailed set of output measures, agreed with the commission's monitoring agency, and reflecting the core functions set out in this Report.
- R81 The commission, in consultation with sector providers, should provide a statement of intent every three years and report annually to government on its financial accounts.
- R82 The commission should have a board of governance and membership with an emphasis on diversity and expertise in the field including multiple representatives from the sexual violence service provider sector, different ethnic and cultural groups (including tangata whenua and representatives from migrant and non-English speaking communities), the LGBTI community, the disability community and the medical/counselling profession.

CONCLUSION

12.32 This chapter has recommended establishing a commission on sexual violence, to implement the key areas of reform that have been identified in this Report as necessary to ensure the sexual violence sector is better able to assist victims to meet both their support and service needs and their justice needs, which we believe are inter-related.

⁷³⁸ Waitangi Tribunal *Te Whānau o Waipareira Report* WAI 414 Waitangi Tribunal Report 1998.

- 12.33 We argue that government must respond strongly to the issue of sexual violence including assuming a governance role to work closely with those already providing frontline assistance to victims. A commission is the ideal mechanism for government and the sexual violence response sector to robustly engage with one another.
- 12.34 There is significant potential to develop the commission beyond the concept as outlined here, and for the commission to become a globally-recognised model for how governments can engage with and help victims of sexual violence. The core objective, however, remains that of better meeting victims' justice needs.

Appendix A

Sexual violence offences

The following is a list of most of the offences involving sexual violence in the Crimes Act 1961. Note that this does not include all offences categorised as sexual offending under the ANZSOC (Australia-New Zealand Standard Offence Classification).⁷³⁹

CRIMES ACT 1961 SECTION	OFFENCE	MAXIMUM TERM OF IMPRISONMENT
99AA	Dealing in people under 18 for sex	14 years
128B	Sexual violation	20 years
129B(1)	Attempted sexual violation	10 years
129B(2)	Assault with intent to commit sexual violation	10 years
129A(1)	Sexual connection with knowledge of consent induced by threat	14 years
129A(2)	Indecent act on another with knowledge of consent induced by threat	5 years
130(2)	Incest	10 years
131(1)	Sexual connection with a dependent family member under 18	7 years
131(2)	Attempted sexual connection with a dependent family member under 18	7 years
131(3)	Indecent act on a dependent family member under 18	3 years
131B	Meeting young person following sexual grooming	7 years
132(1)	Sexual connection with child under 12	14 years
132(2)	Attempted sexual connection with child under 12	10 years
132(3)	Indecent act on a child under 12	10 years
134(1)	Sexual connection with person under 16	10 years
134(2)	Attempted sexual connection with person under 16	10 years
134(3)	Indecent act on a person under 16	7 years
135	Indecent assault	7 years
138(1)	Exploitative sexual connection with impaired person	10 years
138(2)	Attempted exploitative sexual connection with impaired person	10 years
138(3)	Exploitative indecent act on impaired person	5 years
142A	Compelling indecent act with animal	14 years
204A	Female genital mutilation	7 years

⁷³⁹ For instance, it does not include offences for the making of intimate visual recordings (Crimes Act 1961, ss 216H-216J) or inducing or compelling a person to provide sexual services (Prostitution Reform Act 2003, s 16).

Appendix B

Overseas alternative justice mechanisms

INTRODUCTION

- 1 This appendix reviews examples of alternative justice mechanisms available to victims of sexual violence in overseas jurisdictions. The models are discussed in no particular order and are not comprehensive.

RESTORE – ARIZONA

- 2 Project Restore in New Zealand was inspired by this 2003 pilot project conducted in Arizona – Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience (RESTORE).⁷⁴⁰ This programme utilised a specially designed restorative justice model for resolving sexual offending and was developed by a number of community and government groups. Participation was voluntary, and acknowledgement of the sexual act needed to be admitted by the perpetrator. It focused around a conference model (pre- or post-charging) that followed a set agenda of perpetrator’s description of acts, victim statement and development of a redress plan.
- 3 The process covered four stages, briefly outlined as follows:⁷⁴¹
- Referral/intake – if both parties agree to participate and the perpetrator is accepted into the programme, the parties undergo an examination by a psychosexual forensic evaluator who must approve their participation in the programme.
 - Preparation – by the victim, perpetrator and their respective support networks, in conjunction with RESTORE.
 - The conference – the perpetrator describes the incident and acknowledges responsibility; the victim describes the incident and the impact/effect it has had; the perpetrator summarises what the victim has said; friends and family (of both the perpetrator and victim) describe the impact – and again the perpetrator summarises what has been said; a redress agreement is decided upon.
 - Accountability and reintegration – the programme personnel supervise the perpetrator for the next 12 months while they complete the requirements of the redress agreement, and at the end period, there is a final meeting (the victim may attend). The perpetrator reads a letter of reflection indicating progress throughout the year. If the perpetrator fails to complete the programme or reoffends, the case is referred back for conventional prosecution.⁷⁴²

740 Shirley Jülich and others “Yes, there is another way!” (2011) 17 Cant LR 222.

741 Mary Koss “Chapter 10: Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes” in James Ptacek (ed) *Restorative Justice and Violence Against Women* (Oxford University Press, Oxford, 2009) 218 at 230–234.

742 Koss, above and Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 405.

CENTRE FOR VICTIMS OF SEXUAL ASSAULT – DENMARK

- 4 The Centre for Victims of Sexual Assault in Copenhagen, Denmark, offers a mediation programme similar to RESTORE. The aim is to provide the victim a chance to address the offender directly and give the offender an opportunity to take responsibility.⁷⁴³ The Centre is primarily focused on treatment and recovery, involving doctors, nurses, psychologists and social workers. The victim-offender mediation is an innovative step in victim recovery and is now an integral part of the help offered by the centre. Communication between the victim and the offender is often initiated by a letter, before a more formal mediation occurs.⁷⁴⁴

THE ELLIS PROCESS – AUSTRALIA

- 5 This process was established by John and Nicola Ellis to work with Australian victims of sexual violence, particularly in the context of those abused by the Catholic Church.⁷⁴⁵
- 6 Unlike the RESTORE model, conferencing with the offender is not a major element, as in their experience, most victims of sexual abuse in the church do not want to restore the relationship with their abuser. Instead, the Ellis Process looks to restore the individual's sense of self-worth and self-respect through "more tempered and less confronting interactions and a process that is restorative of the individual's sense of self-worth and self-respect, irrespective of whether there is any restoration of the connection with church personnel".⁷⁴⁶
- 7 The process incorporates therapeutic jurisprudence, the "conversation model" of psychotherapy and trauma-informed care and practice. It involves three phases: first, the victim is provided with stabilisation; second, victims meet with therapists to process the trauma; and third, an external support network or linking with other victims is built to integrate and rehabilitate victims.⁷⁴⁷

CEDAR COTTAGE – NEW SOUTH WALES

- 8 Cedar Cottage was a programme run in New South Wales to deal with intra-familial sexual violence outside of the conventional justice system. It provided treatment that aimed to:⁷⁴⁸
- help child victims and their families resolve the emotional and psychological trauma they have suffered;
 - help other members of the offender's family avoid blaming themselves for the offender's actions and to change the power balance within their family so the offender is less able to repeat the sexual assault; and
 - stop child sexual assault offenders from repeating their offences.
- 9 The eligibility criteria required that the perpetrator was in a parental relationship with the child victim, the perpetrator had no previous convictions and the perpetrator pleaded guilty to all offences and passed a rigorous eight-week assessment process. The treatment programme

743 KS Masden "From victim to action" (paper presented to Associação Portuguesa de Apoio à Vítima (APAV), Lisbon, July 2008) at 1.

744 At 3.

745 John Ellis and Nicola Ellis "A new model for seeking meaningful redress for victims of church-related sexual assault" (2014) 26 *Curr Issues Crim Justice* 31.

746 At 38.

747 At 37.

748 "Cedar Cottage - About the Programme" NSW Government: Health Western Sydney Local Health District < www.wslhd.health.nsw.gov.au > .

lasted two to three years and included “cognitive-behavioural therapy and invitational practice to address criminogenic needs” and supported offenders in behaviour change.⁷⁴⁹

- 10 It was a remarkably successful programme, with evaluations showing it reduced recidivism amongst treated perpetrators by more than two-fifths.⁷⁵⁰ However, the Cedar Cottage programme was discontinued by the state government in 2012,⁷⁵¹ seemingly in response to public pressure that it was providing a soft punishment in response to child sexual abuse.⁷⁵²

CIRCLES OF SUPPORT AND ACCOUNTABILITY – US, UK AND CANADA

- 11 Circles of Support and Accountability (COSAs) emerged in Canada in the 1990s as a response to the release of high-risk sex offenders into the community without a formal process of community supervision and aftercare.⁷⁵³ This model has been replicated in the United Kingdom and the United States as well.⁷⁵⁴ COSAs involve a high-risk offender who is in need of support and a team of four to six screened volunteers who commit to weekly meetings for one year, as well as training and a signed “contract” of terms and conditions for all parties.⁷⁵⁵ This establishes the norms and behaviours appropriate to the group and clarifies the circle’s expectations and the consequences of failing to meet those expectations. Confidentiality and honesty are emphasised.⁷⁵⁶ In the initial two to three months, a member of the circle meets with the offender daily.⁷⁵⁷
- 12 COSAs work to provide reintegration support to the released offender, to support them to make good choices and to ensure accountability.⁷⁵⁸ Research into the efficacy of the COSA in Canada showed that, following participation, sexual reoffending was reduced by 83 per cent, violent reoffending by 73 per cent and all other reoffending by 71 per cent.⁷⁵⁹ The United Kingdom project monitored behavioural outcomes for the 22 COSA participants over three years, and none of these offenders committed a new sexual offence.⁷⁶⁰

CIRCLE SENTENCING – AUSTRALIA

- 13 Circle Sentencing in Australia is an alternative method of court procedure and sentencing, similar to the family group conferences that occur in New Zealand. Models are currently in operation in South Australia, Queensland, Western Australia and Victoria.⁷⁶¹ The model was developed to provide a more culturally appropriate court process for indigenous Australians.

749 Jane Goodman-Delahunty and Kate O’Brien “Parental sexual offending: Managing risk through diversion” (2014) 482 *Trends & Issues in Crime and Criminal Justice* at 3.

750 Jane Goodman-Delahunty *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Programme: An Evaluation of Treatment Outcomes* (Charles Sturt University, 2009) at 9.

751 “The NSW Pre-Trial Diversion of Offenders Programme (Cedar Cottage)” NSW Government: Health Western Sydney Local Health District < www.wslhd.health.nsw.gov.au > .

752 Anna Patty “Axe for sex offender treatment programme” *Sydney Morning Herald* (online ed, NSW, 4 September 2012) < www.smh.com.au > .

753 RJ Wilson, F Cortoni and AJ McWhinnie “Circles of Support & Accountability: A Canadian National Replication of Outcome Findings” (2009) 21 *Sex Abuse J Res Treat* 412 at 414.

754 Kathryn J Fox *Circles of Support & Accountability: Final Report Prepared for the State of Vermont Department of Corrections* (University of Vermont 2013) at 3.

755 At 3.

756 Ian Elliott, Gary Zajac and Courtney Meyer *Evaluability Assessments of the Circles of Support and Accountability (COSA) Model, Cross-Site Report* (Pennsylvania State University, 2013) at 34.

757 Wilson, Cortoni and McWhinnie, above n 753, at 415.

758 At 415.

759 At 420.

760 At 416.

761 Arie Freiberg “Innovations in the Court System” (Australian Institute of Criminology, paper presented to Crime in Australia, Melbourne, 30 November 2004) at 1.

- 14 Circle sentencing occurs after the entry of a guilty plea by an indigenous perpetrator. The court does not sit in a normal court room but in a culturally appropriate place for the community. Participants sit in a circle and include community elders, an Aboriginal Project Officer and support people for both the victim and the perpetrator. Circle members discuss and agree to an appropriate sentence plan for the perpetrator. After a few months, the circle is reconvened to assess the perpetrator's progress.⁷⁶²
- 15 In a New South Wales evaluation report, circle sentencing was found to increase the confidence of Aboriginal communities in the sentencing process, enhance the cultural competency of court officials and the legal literacy of Aboriginal participants, support victims through the sentencing process, and increase participation of offenders in the sentencing process.⁷⁶³ However, despite stakeholder qualitative perception that reoffending was reduced through circle sentencing, it did not seem to have a specific impact on recidivism.⁷⁶⁴

SOUTH EASTERN CENTRE AGAINST SEXUAL ASSAULT & FAMILY VIOLENCE (SECASA) – MELBOURNE

- 16 SECASA has been undertaking informal restorative justice-type sessions for the last 20 years.⁷⁶⁵ In 2015, it announced a new pilot programme that would enable a structured programme to be developed and evaluated by academics at Monash University.⁷⁶⁶
- 17 SECASA operates in a similar manner to Project Restore, providing structured conferences with concurrent counselling for both parties. Uniquely, the SECASA process can happen between the victim and perpetrator or between the victim and someone who has been complicit or exacerbated harm such as a family member or institutional representative. Community or institutional representatives may also attend victim-perpetrator conferences if appropriate.
- 18 Victims are given the option to engage in a restorative justice process and must fully consent before the other party is asked for consent. The programme has specific criteria, ensuring the competence of both parties to consent, the safety of the parties and the likelihood of remedying the harm of sexual violence. Parties are also warned of the legal ramifications and the statutory responsibility on parties to disclose sexual violence against children to the authorities.

ALTERNATIVE MEASURES – BRITISH COLUMBIA

- 19 The Canadian Criminal Code has provision for a form of restorative justice called “alternative measures”.⁷⁶⁷ A perpetrator may be referred to a programme of alternative measures, rather than having charges laid, if certain criteria are met. To be eligible, a perpetrator must accept responsibility for the alleged offence and agree to participate, and participation must not be inconsistent with the interests of society and the victim.⁷⁶⁸ Acceptance of responsibility cannot be used as evidence in any future criminal proceedings.⁷⁶⁹ There must also be sufficient evidence that would enable a case to proceed, to prevent net widening.⁷⁷⁰ Use of alternative

762 At 9.

763 NSW Attorney-General's Department *Evaluation of Circle Sentencing Programme* (May 2008) at 33.

764 At 84.

765 Melissa Davey “Victims face their molester in Victoria's world-first restorative justice program” *The Guardian* (online ed, UK, 17 June 2015).

766 Email from Dr Bebe Loff (Director of the Michael Kirby Centre for Public Health and Human Rights) to the Law Commission regarding the SECASA Restorative Justice for Sexual Violence Pilot (22 July 2015).

767 Criminal Code Canada RSC 1985 c C-46, s 717.

768 Criminal Code Canada RSC 1985 c C-46, s 717(1)(b).

769 Criminal Code Canada RSC 1985 c C-46, s 717(3).

770 “Net-widening” refers to the process by which an alternative diversionary programme actually results in an increase in the number of individuals engaging with the justice system, often due to relaxed evidence requirements.

measures itself is not a bar to future proceedings, but if a charge is laid and the perpetrator has totally complied with the terms and conditions of the alternative measures, the charge must be dismissed.⁷⁷¹

- 20 As referral must be in the interests of society and the victim, the Public Prosecution Service states that a sexual offence will usually preclude the option of alternative measures.⁷⁷²
- 21 However, some jurisdictions do allow alternative measures to be used in rare cases for family violence. In British Columbia, alternative measures can be used for cases of sexual violence if there is special approval from the Regional or Deputy Regional Crown Counsel. It is stated that “[s]uch approvals may be granted only where exceptional circumstances exist so that the use of alternative measures is not inconsistent with the protection of society”.⁷⁷³

VICTIM-OFFENDER MEDIATION

- 22 Victim-offender mediation (VOM) operates as a form of diversion whereby the Police or prosecutorial authority elect not to prosecute if there is an agreed resolution between the victim and perpetrator. As we understand it, this model of mediation is used in Europe including Norway, Austria and Germany (Tater-Opfer-Ausgleich) but, in general, is not currently applied to sexual violence cases (with some exceptions) as it is not considered in the public interest, given the serious nature of the offending.⁷⁷⁴
- 23 VOM started in the 1970s in Kitchener, Ontario, before spreading into the United States and Europe. It began as a probation-based/post-conviction sentencing alternative whereby the probation office was satisfied that a meeting between the victim and perpetrator would lead to a positive outcome. Some form of reparation is characteristic of the agreed outcome, and we note that, for some victims, the provision of financial compensation can be a practical outcome.
- 24 As a form of negotiation there are inevitably some related risks (from the victim’s perspective), hence there is a heavy reliance on screening, perpetrator admission of guilt and victim willingness.

TRUTH COMMISSIONS

- 25 Truth commissions are an alternative justice model that are often used to respond to widespread crimes that occur across a society, such as in apartheid South Africa, civil war in Sierra Leone or lynching in North Carolina.
- 26 These commissions seek to “investigate, gather evidence, [and] create a public record” and to make recommendations about how to heal individuals and broader society.⁷⁷⁵ As such, there is a strong emphasis on restorative justice. Victims are invited to speak about their suffering, and individuals and institutions are visibly shamed.⁷⁷⁶ However, there is no formal punishment, and so such commissions may only be seen as appropriate when the wide scale of perpetration (due to war or institutionalism) may limit other models of sanctions. Further, such commissions

771 Criminal Code Canada RSC 1985 c C-46, s 717(4)(a).

772 Public Prosecution Service of Canada Deskbook, pt 3.8 at [3.3].

773 British Columbia Criminal Justice Branch *Crown Counsel Policy Manual: Alternative Measures for Adult Offenders* at 3.

774 We note the “Istanbul Convention”, which states that “parties shall take the necessary legislative or other measures to *prohibit* mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention”; Council of Europe Convention on preventing and combating violence against women and domestic violence CETS 210 (opened for signature 11 May 2011, entered into force 1 August 2014), art 48.

775 Leigh Goodmark “‘Law and Justice Are Not Always The Same’: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Violence” (2015) 42 Fla State Univ Law Rev 707 at 709.

776 Brenda V Smith “Battering, Forgiveness and Redemption” (2003) 11 Am Univ J Gend Soc Policy Law 921 at 944.

usually examine a wide range of crimes and human rights abuses, so sexual violence is not the primary focus.⁷⁷⁷ There is some controversy as to whether truth commissions are forms of restorative justice or should be considered separately.

RECOMMENDATIONS OF THE MELBOURNE CENTRE FOR INNOVATIVE JUSTICE

27 In May 2014, the Centre for Innovative Justice based at RMIT University, Melbourne, published a report on innovative justice responses to sexual offending, arguing:⁷⁷⁸

it is time for an adult sexual offence restorative justice conferencing programme to be piloted in the Australian context. When too few victims of sexual assault have options in the criminal justice process, or the prospect of any real justice outcomes; and when evidence suggests that restorative justice conferencing meets victims' justice needs to a greater extent than the conventional criminal justice system, it is difficult to justify any further reluctance to embrace reform.

28 They wrote that caution is necessary but that safeguards could be put in place to address many of the concerns raised. They pointed to New Zealand's Project Restore as a model to be built on. As part of a suite of measures, the report set out a proposal for a best practice model of sexual violence restorative justice conferencing. However, as we understand it, there is no plan as of yet to implement the model proposed.

⁷⁷⁷ Margaret Maisel "Have Truth and Reconciliation commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future" (2012) 20 *Cardozo J Int Comp Law* 143.

⁷⁷⁸ Centre for Innovative Justice *Innovative justice responses to sexual offending – pathways to better outcomes for complainants, offenders and the community* (Centre for Innovative Justice, 2014) at 36.

Appendix C

Eligibility for entry into the alternative process

INTRODUCTION

- 1 This appendix elaborates on some matters raised in Chapter 9 regarding eligibility for entry into the alternative process.

VICTIM ELIGIBILITY CRITERIA

Consent and coercion

- 2 A number of submitters expressed concern that care needs to be taken to ensure complainants are not pressured or coerced by others into participation in the alternative process. Risk factors may be when there is a significant age gap between the parties; where the perpetrator is a prominent member of society; where the complainant is young or in a heightened position of vulnerability, for example, due to dependence in some form; or where the parties are related or in an ongoing relationship. Particular care needs to be taken where the sexual violence forms part of a pattern of intimate partner or family violence (as there is the potential that the power and control dynamic may place a victim at greater risk of coercion and increased risk of physical danger).
- 3 Pressure or coercion may even be well-meaning – for instance, family members or the Police may encourage participation in the alternative process, believing a criminal prosecution may be difficult or unlikely to be successful.
- 4 As a part of considering statutory eligibility, the provider should assess whether the victim is truly consenting and obtain a victim's written consent to participate in the alternative process.

Age restriction

- 5 We have considered at what age it would be appropriate for young people to participate in the alternative process and whether, due to their relative immaturity and vulnerability, young people would need the consent of an adult to participate in an alternative process.
- 6 There are potential issues with young people needing the consent of an adult:
 - (a) Family members may not consent to the young person participating if they do not believe the young person, if the family member is the perpetrator, or if family members are complicit in the offending.
 - (b) Conversely, a young person may wish to make a complaint to the Police but be pressured by family or others into the alternative process (for instance, in order to avoid a family member facing likely imprisonment through the criminal justice system).

- (c) A young person may not have any key adult relationships outside of the family who would consent to their participation.
- 7 In consultation, Rape Crisis was of the view that participation in the alternative process could be of great benefit to young teens, but it would depend on the young person’s level of maturity and development and the level of support available. Rape Crisis felt that a young person should only engage in the alternative process with the support of family or whānau. However, in their view, the consenting adult may not need to be from the immediate family member and could be from wider whānau or “surrogate” family and friends.⁷⁷⁹
- 8 We therefore consider that participation in the alternative process may be particularly appropriate for young teens, where the victim and perpetrator are of a similar age and are learning to communicate about sexual boundaries and behaviour. Setting an actual age can be somewhat arbitrary, as children develop differently. Therefore, rather than setting a firm lower age, we recommend that victims of around the age of 12 and up to 16 years should be eligible to participate subject to the provider assessing the young person’s suitability to participate having regard to:
- their competence and maturity;
 - whether they were consenting freely to participate and without coercion;
 - the likelihood of the young person benefiting from the alternative process; and
 - the young person having sufficient and appropriate family, whānau or other support.
- 9 The first of the above factors is drawn from the *Gillick* “mature minor” competency test – that children are individuals who grow in intelligence, competence and autonomy as they move towards adulthood and therefore a child has legal competence in making decisions, provided that they have sufficient understanding and intelligence to enable full understanding of what is proposed.⁷⁸⁰ Operational guidelines/good practice principles should also set out the sorts of things the providers should have regard to in making this assessment.
- 10 We have further considered at which point young people should be able to make the decision to participate as if they were an adult. We note that there are varying ages set out in legislation for determining who is considered a child, and, above that age, an adult. The Care of Children Act 2004 defines a child as anyone less than 18 years,⁷⁸¹ and in general, the consent of a child’s guardian in respect of important welfare decisions is required up to that age.⁷⁸² However, a child aged 16 years or older can consent to or refuse to have a medical procedure,⁷⁸³ and a child of any age may consent to or refuse an abortion.⁷⁸⁴ The Children, Young Persons, and their Families Act 1989 (CYPF Act) defines a child as a person under the age of 14 and a young person as anyone over the age of 14 but under 17 years.⁷⁸⁵ Under section 134 of the Crimes Act 1961, sexual conduct with a young person under the age of 16 years is an offence.
- 11 Although setting an age limit is somewhat arbitrary, for legal certainty and in light of the varying definitions highlighted above, we consider that it would be appropriate for the minimum age of eligibility to participate as an adult to be set at 16 years.

779 Meeting between Rape Crisis and the Law Commission regarding alternative trial processes project (19 June 2015).

780 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) at 188. See Chantelle Murley “Does the Gillick Competency Test Apply in New Zealand, Given the Special Nature of Sexual Health Care Services?” (2013) 1 Public Interest Law Journal of New Zealand 92.

781 Care of Children Act 2004, s 8.

782 However, the court cannot make an order regarding the care arrangements in respect of a child over the age of 16.

783 Care of Children Act 2004, s 36.

784 Care of Children Act 2004, s 38.

785 Children, Young Persons, and Their Families Act 1989, s 2(1).

PERPETRATOR ELIGIBILITY CRITERIA

Choice to participate

- 12 Although there is more risk of a perpetrator coercing a victim into participation, the provider should still consider whether there may be pressure or coercion brought to bear on a perpetrator from family members or those in authority.
- 13 In our view, to freely choose and consent to participation in the process, the perpetrator must fulfil the same conditions as described in the discussion on victim consent (see “Victim eligibility criteria”, above).
- 14 The only separate point to note here is that the legal rights, implications of participation, and protocols, in respect of which the perpetrator needs to be advised, will be different for perpetrators than for victims. For instance, perpetrators will need to understand that a record of successful participation (if the process is successfully completed) may be disclosed in certain circumstances if they commit another act of sexual violence in the future.

Age restriction

- 15 The considerations regarding the minimum age for a perpetrator to participate in the alternative process should be similar to those outlined above in respect of the victim, although it is also useful to consider the relevant provisions of the Crimes Act 1961 and the CYPF Act.⁷⁸⁶ Those pieces of legislation provide that children under 10 cannot be convicted of any offence,⁷⁸⁷ children of 10 years and over can be prosecuted in cases of murder and manslaughter,⁷⁸⁸ and children aged 12 and 13 years can be prosecuted in the Youth Court for serious and/or persistent offending (including sexual offending).⁷⁸⁹
- 16 In light of these pieces of legislation and the earlier discussion regarding victims, we consider that 12 years as a lower age would appear to be appropriate for participation. However, in our view, a young person between the ages of 12 and 16 would need the consent of their guardian or adult nominee of their choice to participate in the alternative process.⁷⁹⁰ In coming to this view, we have taken into account the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the “Beijing Rules”.⁷⁹¹ These provide that any action taken without resorting to a formal trial needs to have the consent of the young person or his or her parents or guardian.⁷⁹² This may bring risks, for example, family members may not consent if they do not believe the young person was the perpetrator. However, in order to ensure a fair process for perpetrators, we believe that adult consent is necessary.
- 17 Although there will be different considerations for young people who are perpetrators to those who are victims, we believe it would still be appropriate for providers to carry out an assessment of perpetrators aged over 12 years and under 16 years to ensure they consent to participating and take responsibility for their offending, have the capacity and maturity to participate and have parental or adult consent and support.

786 Of course, the definition of “victim” under the Victims’ Rights Act 2002 would not apply.

787 Crimes Act 1961, s 21.

788 Children, Young Persons, and Their Families Act 1989, s 272.

789 Children, Young Persons, and Their Families Act 1989, s 272(1)(b) and (c).

790 Similar to the concept of a “nominated person” in the Children, Young Persons, and Their Families Act 1989, s 222.

791 Nessa Lynch *Youth Justice in New Zealand* (Thomson Reuters, Wellington, 2012) at 38.

792 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* A/RES/40/33 (1985), r 11.3.

- 18 Based on the considerations noted in the section on victims, we consider that it is appropriate that the minimum age for perpetrator involvement in the alternative process without adult consent is 16 years.

CHILDREN

- 19 There is some attraction in the idea that parents may go through the alternative process on behalf of a child, as this would avoid the need for a child to go through a difficult court experience yet could hold the perpetrator accountable. Under the Victims' Rights Act 2002, a parent or guardian of a child who has suffered sexual violence is viewed as a victim of the offending.⁷⁹³
- 20 This raises the question of whether it is appropriate for a parent to take on the "justice needs" of a child. A number of submitters and others we consulted with were concerned that an alternative justice process should not preclude a child being able to go through the process on their own account once old enough to do so, and as noted in Chapter 9, a parent going through the alternative process of behalf of a child would also prevent the child being able to have their own justice needs met through the criminal justice system.
- 21 We have therefore considered whether there may be a way for parents to commence the alternative process when a child is young but defer the completion until the child is old enough to go through the process on their own behalf. However, suspending the process like this would delay closure and would be problematic to administer and potentially unfair on perpetrators.
- 22 Set alongside these concerns is the strong public interest in ensuring that someone who has sexually offended against children should not have the opportunity to offend against others. If the alternative process was not available in respect of current offending against children, this would be an added safeguard (along with the risk assessment process) to ensure that fewer of those who may pose a community safety risk in respect of children would be able to participate in the process. It would not completely rule out those who have offended against children, as an adult victim who had experienced sexual violence as a child at the hands of a perpetrator would be eligible to participate in the process.
- 23 We believe that it is preferable at this stage to exclude parents or guardians from participating, on behalf of children, in the alternative process.

793 Victims' Rights Act 2002, s 4, definition of "victim", para (a)(iii).

Appendix D

Guidelines/good practice standards for providers of alternative justice programmes

ENTRY AND PROCESS

- 1 Guidelines or good practice standards should include when and how a provider will undertake the risk and suitability assessments (including how to apply the risk assessment framework), guidance on determining the consent of the victim and perpetrator when applying the eligibility criteria, factors to consider in determining whether a young person has the appropriate maturity and capacity to participate and the appropriate age of participation and so on.
- 2 Guidelines/practice standards need to set out the matters that participants need to be advised of prior to participation in the programme, including how their legal rights will be affected by participation and completion (for instance, a completed programme would be a bar on criminal prosecution), what privilege does and does not cover, what constitutes completion of the programme, what kind of outcomes might be considered, the circumstances in which a provider may cease provision of the programme, the review rights of participants, the participants' rights to legal advice and how the information collected will be used and disclosed.
- 3 The guidelines/practice standards will need to set out how, practically, the provider will go about applying the suitability assessment, the information to be sought from the victim and perpetrator, and what other information should be sought.⁷⁹⁴

OUTCOMES AND COMPLETION

- 4 The guidelines/practice standards need to set out guidance for providers on the parameters of outcomes and how to assess whether an outcome is broadly proportionate, appropriate and able to be monitored.
- 5 As the provider will be responsible for monitoring the perpetrator's compliance with the terms of the outcome agreements and providing any agreed assistance towards fulfilling the terms, the guidelines/practice standards will need to provide guidance for providers in this regard.
- 6 If an outcome agreement is not fulfilled, it would be open to the victim to lay a complaint with Police in respect of the sexual violence. The guidelines/practice standards would need to provide guidance for the provider on when and how it should advise the complainant of their rights regarding an unfulfilled outcome agreement and seeking enforcement of any term of the outcome agreement.

⁷⁹⁴ Relevant information may include a perpetrator's previous criminal offending and any other information, such as the granting of a restraining order under the Harassment Act 1991; a protection order under the Domestic Violence Act 1995; a community treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Protection of Personal and Property Rights Act 1988; and Child, Youth and Family notifications of concern.

- 7 Guidelines/practice standards should cover what constitutes completion of the relevant alternative process. The guidelines/practice standards should also indicate when and how to conclude the process – for instance, the provider may choose to convene a meeting (which the victim could choose whether or not to attend) once the perpetrator had completed the terms of the outcome agreement, in order to acknowledge the completion of the agreement and provide some closure, or there may be some other guidance on concluding the process. Guidelines/practice standards should also give information to providers as to when and what information needs to be provided for monitoring purposes at the conclusion of the programme and process.
- 8 Guidelines/practice standards should indicate when it would be appropriate for a provider to cease provision of the programme, how to do this and what information to provide to the participants concerning rights of review.
- 9 The guidelines/practice standards should provide detail as to exactly what information should be retained regarding the participants, how information concerning participants should be recorded and when and how information should be provided to the central register, and when and how it is permitted to disclose any information held by it.

Appendix E

Overseas models of support services

- 1 Appendix E provides an overview of the approaches taken to sexual violence support services overseas.

SOUTH AFRICA – A ONE-STOP-SHOP MODEL

- 2 Thuthuzela Care Centres (TCCs)⁷⁹⁵ have been held out by the United Nations as a “best practice model”.⁷⁹⁶ TCC response centres are located in hospitals but were established by the Sexual Offences and Community Affairs Unit (SOCA) of the National Prosecuting Authority in 1998. SOCA is responsible for strategic policy and case management relating to sexual violence, namely through developing best practice and policies that improve prosecution rates. Accordingly, TCCs are designed “to address the medical and social needs of sexual assault survivors” but also to “reduce secondary victimization, improve conviction rates and reduce delays” in the criminal process.⁷⁹⁷
- 3 TCCs are staffed 24 hours a day by specialised medical staff, social workers and Police. A victim assistance officer also explains the procedures and assists the victim throughout the medical examination and when reporting to Police. A site coordinator ensures follow-through of services, with the objective of such coordination being the prevention of secondary victimisation. Services include:⁷⁹⁸
- a victim-appropriate welcome and immediate removal of the victim from environmental factors that could upset the victim, for example, stimulating noises;
 - medical examination by staff who are trained in dealing with sexual violence victims;
 - an investigating officer available to take a statement;
 - counselling;
 - a nurse facility to arrange follow-up medical treatment and referral for long-term counselling;
 - facilities to transport the victim and ensure the victim’s physical safety;
 - provision of a victim assistance officer and meeting with a prosecutor trained in dealing with sexual violence victims; and
 - child-friendly and victim-friendly safe spaces, examination spaces and interviewing tools, including anatomically correct and culturally appropriate dolls for child interviews.
- 4 The management model of the organisation relies on an integrated effort of designated community-based service providers and government departments including Health, Treasury, Police, Justice, Education, Corrections and Social Development.

795 “Thuthuzela” is a Xhosa word (the second largest ethnic group in South Africa), meaning comfort.

796 Laura Turquet and others *Progress of the World’s Women 2011–2012: In Pursuit of Justice* (UN Women, 2011) at 57.

797 At 57.

798 South Africa National Prosecuting Authority *Thuthuzela Care Centre: Turning Victims into Survivors* at 7.

- 5 TCCs have a close relationship with the specialist sexual offences courts in South Africa and are charged with increasing “communication between prosecutor, Police and victim”.⁷⁹⁹ The idea of the one-stop-shop model in these cases is not just to centralise medical and counselling facilities but to co-locate investigation and prosecution facilities, seeking to improve the victim’s experience while waiting for the justice process to begin.
- 6 TCCs are credited with helping decrease the trial completion time for cases (from two years to just over seven months)⁸⁰⁰ and conviction rates that sit between 84 and 89 per cent.⁸⁰¹ Literature from the TCC programme states that:⁸⁰²

at the heart of the success of the Thuthuzela approach is the professional medical and legal interface and a high degree of cooperation between victim and service providers from reporting through investigation and prosecution of the crime, leading up to conviction of the offender. This has led to an increase in conviction rates.

UNITED KINGDOM: SPECIALIST VICTIM ADVOCATE PROVIDING A WRAPAROUND MODEL

- 7 Sexual Assault Referral Centres (SARCs) are specialist medical and forensic services available to anyone who has been raped or sexually assaulted. They aim to provide a one-stop-shop service providing medical care and forensic examination in a single location. Once a rape or sexual assault is reported to the Police, the complainant is taken to the nearest SARC for forensic medical examination. The SARC may also have facilities onsite for the victim to give a Police statement, rather than at a Police station (although the model varies, for example, in some locations, the SARC is located beside a Police station with officers responsible for attendance at the relevant SARC). Support is funnelled through a dedicated crisis worker and may include long-term support such as counselling and advocacy, although this might be referred out to other agencies.
- 8 SARCs are funded and run in partnership, usually between the NHS, Police and sometimes the voluntary sector. SARCs offer medical services to anyone, including those who do not wish to report the assault to the Police (self-referrals). Service users can then choose whether they would like to inform the Police at a later stage and have their samples stored whilst they are considering what to do next. Figures show that rates of reporting to the Police when a victim has used a SARC service are at least 77 per cent.⁸⁰³
- 9 The distinguishing feature in the United Kingdom (England, Wales, and Scotland) is that since 2006, Independent Sexual Violence Advisors (ISVAs) – and also Independent Domestic Violence Advisors – are now available to support individual victims. ISVAs are located either in a SARC or within an alternative service provider. The Home Office provides ongoing funding for ISVAs, and in 2011, a framework for the qualification of ISVAs was announced.⁸⁰⁴
- 10 The responsibilities of an ISVA are “providing crisis intervention and non-therapeutic support from time of referral; giving information and assistance through the criminal justice process if requested/required; providing other types of practical help and advice; and, working with partner agencies to ensure coordinated service planning on behalf of individual victims”.⁸⁰⁵ In

799 At 74.

800 Turquet and others, above n 796, at 57.

801 K Schenck-Gustafsson and others *Handbook of Clinical Gender Medicine* (Karger Medical and Scientific Publishers, Basel, 2012) at 121.

802 South Africa National Prosecuting Authority, above n 798, at 6.

803 Amanda Robinson *Independent Sexual Violence Advisors: a process evaluation* (Home Office, 2009) at 28.

804 *The Government Response to the Stern Review: An independent review into how rape complaints are handled by public authorities in England and Wales* (Cabinet Office, March 2011) at 13.

805 Robinson, above n 803, at 10.

other words, the services offered by an ISVA wrap around the victim to provide holistic support designed to meet the victim's individual support and service needs at all stages in the victim's experience.

- 11 The benefits of this model are the knowledge and training of the ISVA and the continuity of support an ISVA can provide a victim into and beyond the justice process and/or alternative process. In addition, although the Police are not directly involved in either SARCs or with the ISVA programme, there is access to Police and Police processes. One evaluation of the model funded by the Home Office noted that "ISVAs were seen to be necessary to encourage victims to engage with key stages of the criminal justice sector (e.g., reporting to police, making a statement, attending court etc.)",⁸⁰⁶ although it was acknowledged that ISVA activities "may not easily translate into a reduction in attrition" in terms of data that could link the role of the ISVA and victims' decisions to remain in the justice system.⁸⁰⁷
- 12 In the same evaluation, participant victims noted that they considered the support they received from an ISVA and the ongoing nature of that support beyond the victim's decision whether or not to report to Police as positive aspects of their experience.⁸⁰⁸ The evaluation commented that multi-agency cooperation was an essential component of enabling the ISVA to have the resources to continue supporting the victim through and beyond the justice process.

UNITED STATES OF AMERICA: LINKING WRAPAROUND CARE TO JUSTICE OUTCOMES

- 13 The model that operates in almost every state is a federal government-funded Sexual Assault Response Team (SART) that is based around a Sexual Assault Nurse Examiner (SANE) but also uses the services of doctors, medical staff, Police, lawyers and other support service staff, thereby adopting a one-stop-shop model. The victim receives wraparound medical, social, and legal support, all free of charge. The model operates under the auspices of the Department of Justice.⁸⁰⁹
- 14 The SART and SANE programmes have been linked to increased conviction rates and form part of other ongoing initiatives, including forensic examination outside of a hospital setting.⁸¹⁰ The SART model has garnered a great deal of respect from the policing and legal communities to the extent that, in some courts, written evidence from a SANE-accredited physician is accepted, due to the credibility associated with these individuals.
- 15 Evaluations of the SART and SANE programmes have linked the model to:⁸¹¹
- better-quality healthcare for victims;
 - improved quality of forensic examination evidence;
 - increased filing of charges; and
 - increased rates of prosecution.

806 At 30.

807 At 31.

808 At 31.

809 "SART Toolkit: Resources for Sexual Assault Response Teams" Office of Justice Programs < www.ovc.ncjrs.gov > .

810 John Jungpa Park *Sexual Violence Services: International Overview* (Department of Health, UK, 2012) at 13.

811 See "Responses to Sexual Violence: Effectiveness of SANE/SART" (30 May 2012) Office of Justice Programs: National Institute of Justice < www.nij.gov > ; CS Crandall and D Helitzer *Impact Evaluation of a Sexual Assault Nurse (SANE) Programme* (Albuquerque SANE Collaborative, Albuquerque, 2003); Campbell and others *Systems Change Analysis of SANE Programs: Identifying the Mediating Mechanisms of Criminal Justice System Impact* (Michigan State University, 2009).

- 16 The one-stop-shop model is just one of the tools adopted in the United States to enhance the victim’s experience and address gaps in assisting victims. There are a range of additional programmes and projects that have been adopted and that have objectives linked to promoting justice outcomes as well as positive victim experience. One such example is the “You Have Options” programme, which helps identify serial perpetrators by providing victims with anonymous reporting options. This gives law enforcement agencies access to information that might not have otherwise been available, while allowing the victim more control over the decision of whether or not to report.⁸¹²
- 17 Another programme that is of interest is the American Bar Association’s Commission on Sexual and Domestic Violence.⁸¹³ The Commission seeks to “increase access to justice for victims of domestic violence, sexual assault and stalking by mobilizing the legal profession” and plays a large role in promoting the Violence Against Women Act 1994. The Commission is a subsidiary of the American Bar Association and has five staff members with high-level legal backgrounds, 16 commissioners from around the country and 28 liaison staff from various sector bodies and interest areas, including the National Network to Prevent Forced Marriage and the Coalition Against Sexual Assault.⁸¹⁴
- 18 Funding for promotion and protection projects supplementary to the Act are authorised by US Congress and relevant non-governmental partners. The Commission undertakes a number of functions including:⁸¹⁵
- development of best practices manuals and web-based seminars;
 - development of policies supporting access to justice for victims;
 - identifying experts in the field and related fields;
 - identifying topical issues, for example, domestic violence as a feature in Hague Convention child abduction cases;
 - providing materials for lawyers to encourage pro bono cases;
 - reviewing, publishing and helping to draft training materials;
 - providing case law and statutory materials to practitioners;
 - hosting community roundtables to address local and national systemic challenges;
 - identifying local or national experts for lawyers needing additional support and resources;
 - working toward principles and ethical standards, including the Standards of Practice for Lawyers Representing Victims of Domestic Violence and principles on the Sexual Assault and Stalking in Civil Protection Order Cases;
 - offering training programmes, for example “Fundamentals of Representing LGBTQ Victims of Domestic/Intimate Partner Violence” and “Representing Victims of Sexual Violence who are Deaf, Hard of Hearing and/or with Disabilities”;
 - giving advice across the spectrum of interrelated areas including civil protection orders, family law and custody, indigenous concerns, courts and judiciary, criminal, international law, non-legal responses, legal research and precedents, housing, mediation and gun laws;
 - pooling data and statistics; and

812 < www.reportingoptions.org > .

813 < www.americanbar.org > .

814 < www.americanbar.org > .

815 < www.americanbar.org > .

- providing advice on resources for survivors including access to domestic shelters, hotlines (for example, a Teen Dating abuse hotline), a victims of crime resource centre and legal advice relevant to women.
- 19 The above model is one being driven from outside government and from within the legal community. The aim is to increase access to justice for victims of sexual violence. However, the methods employed do not necessarily directly assist victims post-crisis, which is a role left to the SART/SANE model identified above. The United States illustrates the use of complementary programmes working side by side, recognising that the wider victim experience impacts upon the participation of the victim in the justice process.

VICTORIA, AUSTRALIA: STRONG CROSS-ORGANISATIONAL RELATIONSHIPS

- 20 Despite having a large social service sector Victoria is a positive example of a well-coordinated and collaborative community sector characterised by a clear delineation of the role performed by community-based service providers on the one hand and government agencies on the other hand. Even the funding model adopted across Victoria was developed through consultation between government and community-based service providers, and it promotes flexibility in terms of service delivery within the framework of a fixed envelope of funding.
- 21 Some of the features of multi-agency coordination in Victoria include dedicated Police investigators and liaison services to keep channels of communication open as victims pass between social and justice services. In addition, some services are co-located in multi-disciplinary centres that have several agencies working together. Protocols exist to manage relationships between government and community-based service providers such as the Protocol between the CASA Forum (Victorian Centres Against Sexual Assault Forum) and the Office of the Public Advocate.
- 22 Within the sexual violence support sector, there are also levels of cooperation between agencies who take responsibility for a 24-hour phone line and a state-wide Sexual Assault Workforce Development programme, which, in the period from February to June 2015, ran at least 10 different training courses.
- 23 Victoria is notable due to the scale of reform undertaken in areas of policing, legislation, funding and judicial practices and procedures. The strongest feature of the Victorian model is the degree of cross-organisational coordination that has been linked with successful reform of the sector.

DENMARK: ONE-STOP-SHOP MODEL WITH A FOCUS ON RESEARCH

- 24 A key feature of the Danish response to sexual violence is a designated Centre of Excellence, which is usually located in a hospital, attached to a Centre for Rape Victims (CRV) and funded by the Ministry of Interior and Public Health and private organisations.⁸¹⁶ While viewed as a Nordic model, there are similar research centres found in Ireland and in Jordan. They are well funded and nationally recognised as centres of research and innovative policy development in the field.
- 25 The Centre of Excellence operates in conjunction with a CRV, which in turn provides specialist wraparound care for victims of sexual violence and education services. The CRV will treat victims aged 15 years or older who can consent to services (there is also a process for ad hoc court guardianship to be acquired in order to get consent for younger victims). All services are

816 Health services in each county are responsible for establishing CRVs.

- available 24 hours a day including provision for acute medical examination, evidence collection and care; Police questioning in a separate room; standardised routines for providing a referral to or establishing contact with a psychologist; sheltered accommodation for the first night; Police being on-call for collecting samples and written statements; and follow-up medical care and advice on contacting a lawyer. Statistics for the CRV model show significant rates of reporting. For example, in 2009, 65 per cent of victims who contacted a CRV made a formal Police report.⁸¹⁷
- 26 CRVs are run by multidisciplinary committees including representatives from Police, Department of Forensic Medicine, psychology and emergency medicine. They have close relationships with university and research bodies who undertake research projects relating to the utility of group therapy, countertransference and burnout, false Police reports, the provision of services to family members of victims and the risk of developing post-traumatic stress disorder.⁸¹⁸
- 27 Education projects have included the development of standardised practice guidelines for professionals, guidelines on dealing with media in high profile cases, development of a standard rape kit for collection of forensic evidence, and instructional videos for, amongst others, Police and nurses. In addition research findings have been presented at international conferences and work-shopped at a parliamentary level, highlighting the credibility attached to the work done and the implication that it is taken into account in policy development.⁸¹⁹
- 28 The so-called Nordic model illustrates the one-stop-shop model and also highlights the role of collaboration between those working directly with victims and researchers. The scope of research that has been undertaken by the Centres of Excellence is broad and relates to all aspects of the victim's experience, including participation in the justice process, such as examining barriers for reporting sexual violence, considering the epidemiology of rape focusing on legal outcomes and developing new methods for detecting date rape drugs.⁸²⁰

817 Rikke Holm Bramsen "A Danish model for treating victims of rape and sexual assault: The multidisciplinary public approach" (The Second International Conference on the Survivors of Rape, Utrecht, 2 October 2010).

818 Rikke Holm Bramsen, Ask Elklit and Louise Hjort Nielsen "A Danish Model for Treating Victims of Rape and Sexual Assault: The Multidisciplinary Public Approach" (2009) 18 *J Aggress Maltreatment Trauma* 886 at 896–897.

819 At 898–899.

820 At 886.

Appendix F

The sexual violence support sector in New Zealand

INTRODUCTION

- 1 Having met with Te Ohaakii a Hine – National Network Ending Sexual Violence Together (known as TOAH-NNEST) and service providers such as HELP, START, Shine, Aviva and Rape Crisis, the Law Commission has found a sector that is wholeheartedly committed to assisting victims of sexual violence but that currently operates without a coordinated and integrated government-supported framework to back it up.

THE ROLE OF COMMUNITY-BASED SERVICE PROVIDERS

- 2 New Zealand has a large number of community-based specialist sexual violence service providers that cover the full range of support services from the initial clinical and forensic stages through to counselling, social work, and ongoing support. These include sexual violence-specific services such as Rape Crisis; services that cover both sexual violence and family violence such as Women's Refuge; medical help such as sexual health clinics or GPs, mental health services and counselling; and more targeted services for those from a particular cultural background such as the Waka Hourua project, Te Korowai Wakaea (a marae-based programme for sexual violence victims and their whānau) and Paiakatia Te Riri, which provides support for women who identify as Māori.⁸²¹
- 3 Service providers operate according to their own agenda and philosophy and, in general, rely on funding from the relevant government department and private investors to finance themselves. There is a greater concentration of services in urban centres, and the range of services depends on each service provider. Some service providers are available throughout the week, and some operate 0800 numbers. We understand that funding has a big impact on when services are available – and that some service providers have amalgamated in order to deal with demand. Following the closure of the Survivors of Sexual Violence Trust in July 2014, the Ministry of Social Development provided temporary funding for Aviva and START to work together to ensure ongoing access to crisis response services in Christchurch. Since 28 July 2014, Aviva and START have been providing a 24/7 crisis response service called Sexual Assault Support Service Canterbury. Each victim's experience will be different depending on the service provider they choose to engage with and the services that provider is able to offer. There is a large amount of informal cooperation between service providers.
- 4 Below, we give a brief summary of some of the main community-based service providers to give an idea of the sector.

⁸²¹ Elsewhere in this Report we note that Māori are overrepresented as victims of sexual violence, for instance ACC sensitive claims data put Māori claimants at 31.6 per cent of total new claimants in 2012/13 (whereas Māori comprised 14.9 per cent of the population in the 2013 Census).

TOAH-NNEST

- 5 TOAH-NNEST is what is described by the Ministry of Social Development as “the sector’s national umbrella group”.⁸²² TOAH-NNEST was formed in 2005 and works within a bicultural framework to formally represent approximately 39 service providers and individual specialists working in the sector (representing many more service providers in an informal capacity). In addition, there are a number of associate members. Despite being described as an “umbrella group”, we understand that, while TOAH-NNEST has strong links throughout the sector (more so than any other organisation), it does not represent the entire sector. Different service providers have different cultural and ideological views, including approaches relating to organisation and how funding should be distributed.

Rape Crisis

- 6 One high-profile sector service provider in New Zealand is Rape Crisis, which works as a collective. The National Collective of Rape Crisis and Related Groups Aotearoa is a bicultural umbrella organisation formed in 1982 to represent specialist sexual violence agencies that operate in accordance with the organisation’s philosophy.⁸²³ The National Collective aims to operate without hierarchy so that management and governance issues are open to all women and Māori wāhine. Rape Crisis provides services ranging from counselling and support, crisis callouts (responding immediately after an incident of sexual violence to support victims) and provision of information resources and educative workshops. Rape Crisis is one example of a sexual violence sector support provider aiming to help as many victims as possible while also addressing broader issues such as rape prevention, all within a limited budget.

SAATS centres

- 7 In addition to sector-based service providers that have a sexual violence focus such as Rape Crisis, there are medical services that specialise in caring for sexual violence victims. Sexual Abuse Assessment & Treatment Services (SAATS) centres provide treatment to victims of sexual violence in a specially designed environment (for example, a space that is culturally and physically safe, with toilet and shower facilities, privacy and adequate space for support people and that is suitable for collection of forensic samples in accordance with best practice and New Zealand standards).⁸²⁴ These are delivered through existing DHB facilities. Specially trained and mostly accredited doctors, with the support of nurses, deliver medical and forensic services at the SAATS centres.⁸²⁵ SAATS centres do not, however, provide a wraparound service. Every centre is different, but in general, SAATS centres do not conduct investigative interviews, offer long-term medical support or counselling or provide health services for related support and service needs (for example, dealing with unwanted pregnancies as a result of sexual violence, although a referral to an appropriate provider may be made).
- 8 ACC is scheduled to lead an evaluation of SAATS centres on behalf of itself and the other SAATS co-funders, the Ministry of Health and New Zealand Police. The evaluation is anticipated to be completed by March 2016. The evaluation will seek to identify best practice models for paediatric, adolescent and adult services, develop an outcomes framework for performance measurement and monitoring, determine how to maintain and expand the SAATS

822 Ministry of Social Development *Report on submissions to the Inquiry into the funding of specialist sexual violence social services* (2014) at 19.

823 The constitution is based upon a survivor-led philosophy created in the 1970s, which views rape as a violation of freedom and self-determination.

824 SAATS centres are funded by Police, ACC, and the Ministry of Health and are contracted through DHBs. We understand that there are SAATS centres attached to all but two DHBs. See “Sexual Abuse Assessment & Treatment Services (SAATS)” ACC (26 February 2015) < www.acc.co.nz > .

825 DSAC representatives have told us that there are moves to ensure all doctors will be accredited in the future.

workforce and develop a long-term funding model (in line with the current Government focus on improvement of contracting processes that have built-in outcomes performance measures). The provision of distinct paediatric, adolescent and adult services will be a focus of the evaluation.

Specialist needs services

- 9 A small number of providers deal specifically with child complainants, but they do not operate across the country. The Kimiora sexual assault centre run by the New Plymouth Police Child Sexual Assault Team is a specialised unit designed to meet the unique support and service needs of children who have been victims of sexual violence. In addition, Starship Paediatric Te Puaruruhau and Te Pou Herenga Waka are specialist child-centred response units provided by the Auckland DHB and Counties Manukau DHB respectively. We understand, however, that the current availability of DSAC-trained paediatricians is limited and that children will need to either travel to a rural centre to be seen in a SAATS centre or be treated in a mainstream service where staff are not specifically trained to meet the unique needs of children as victims of sexual violence. As noted above, this lack of child-specific capability will be considered in the context of the ACC-led review of SAATS.
- 10 There are fewer instances of services having the resource capacity and specialised knowledge to address the individualised support and service needs of adult victims, such as victims with disabilities and male victims.⁸²⁶
- 11 Culture is another important factor in the provision of support for victims of sexual violence in New Zealand that may necessitate specialised care. Sector service providers that operate through a single cultural lens (generally Pākehā) can “place those who belong to minority cultural groups at risk”.⁸²⁷ We heard many times when meeting with service providers and in receiving feedback on the project of the need for greater integration of Māori tikanga in responding to Māori victims and similarly awareness of Pasifika ways and culture. There is widespread awareness that “an absence of cultural competence is likely to leave people feeling dissatisfied, disrespected, demeaned and disempowered – and lead to misunderstandings”,⁸²⁸ yet the resources to address this need is lacking.
- 12 One example of a specialised service that is operating in New Zealand is Shakti Women’s Refuge, which describes itself as offering “culturally competent support services for women, children and families of Asian, African and Middle Eastern origin” but whose focus is on family violence.⁸²⁹ Migrant groups and people who identify with specific cultural beliefs and practices present specific challenges when they present to providers as victims of sexual violence, but there are limited services available to meet those challenges.⁸³⁰

826 Some do exist, including The Next Step (based in Dunedin) and Male Survivors of Sexual Abuse Trust (based in Christchurch). Furthermore, all doctors trained through DSAC have training specifically on male examinations and on seeing patients with disabilities and can see those patients within the standard service provision. There is no funding for specialised services for such groups.

827 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Family Violence Death Review Committee, 2014) at 30.

828 At 30.

829 “Shakti New Zealand” Shakti < shakti-international.org > .

830 See Women’s Refuge as an example of a support provider highlighting the different needs of women with disabilities, older women, migrant and refugee women and Māori wāhine (“We work for all women” Women’s Refuge < womensrefuge.org.nz >). For further discussion, see Jemaima Tiatia *Sexual Violence and Pacific Communities Scoping Report* (Ministry of Pacific Island Affairs, September 2008) at [3.1]; and Marlene Levine and Nicole Benkert *Case Studies of Community Initiatives Addressing Family Violence in Refugee and Migrant Communities* (Ministry of Social Development and Ministry of Women’s Affairs, August 2011) at 4, 5 and 30. Another issue in the context of the increasing immigrant population in New Zealand is the issue of forced marriage (as distinct from arranged marriage), which is often accompanied by sexual violence that may occur both before and after the marriage.

- 13 Victims of sexual violence require a wide range of services to meet their individual support and service needs, however, the scope of services available in New Zealand will vary by region. Furthermore, we understand from our discussions with providers that the availability of services in rural communities can be restricted and that care is needed in small communities to robustly address privacy and confidentiality matters. We acknowledge that, in certain communities, however, great steps are being made to provide services in an innovative and considered manner given the resource challenges faced.

THE ROLE OF GOVERNMENT-BASED SERVICE PROVIDERS

- 14 There are several government departments and agencies that work alongside service providers to assist victims. Various roles are played by the Police (with the “tripartite response” of crisis support, SAATS centres and safe facilities),⁸³¹ Child, Youth and Family, ACC, Ministry of Justice, Ministry for Women (which has undertaken research in sexual violence)⁸³² and Ministry of Social Development (which has played a large role in reviews of the sector for the last few years).⁸³³
- 15 There is, however, a clear lack of coordination between government-based service providers and community-based service providers.⁸³⁴ For example, in relation to funding of the sector, one service provider can receive funding from several different government bodies with no oversight or coordination of how those funds have been allocated.
- 16 We understand from our discussions that some sector service providers consider that government agencies do not draw on the experience and knowledge of the support sector and are therefore failing to benefit from what should be an ongoing consultation with sector service providers and the wider community and missing an opportunity to develop well informed policies.⁸³⁵ This can lead to doubling up of awareness campaigns, wasting time and resources.

CONCERNS RELATING TO NEW ZEALAND’S RESPONSE TO SEXUAL VIOLENCE BY HUMAN RIGHTS MONITORING BODIES

- 17 The United Nations human rights monitoring committees have released three reports since 2012 that have considered the way in which New Zealand addresses and helps victims of sexual violence.⁸³⁶ In summary, the committee reports have stressed the need to “address effectively the barriers that may prevent women from reporting acts of violence against them”, highlighting

831 *Response of the NZ Police to the Commission of Inquiry into Police Conduct: Third Monitoring Report* (Controller and Auditor-General 2012) at [3.32].

832 Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, 2009); Elaine Mossman and others *Responding to sexual violence: A review of literature on good practice* (Ministry of Women’s Affairs, 2009); Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women’s Affairs, 2009); Venezia Kingi and Jan Jordan *Responding to sexual violence: Pathways to recovery* (Ministry of Women’s Affairs, 2009); Ministry of Women’s Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009).

833 Ministry of Social Development, above n 822; Ministry of Social Development *Specialist Sexual Violence Sector Review Report to Hon Paula Bennett, Minister for Social Development* (2013).

834 Two exceptions being the Family Violence/Sexual Violence Ministerial Work Programme and the Taskforce for Action on Sexual Violence.

835 Meeting between Rape Crisis and the Law Commission regarding alternative trial processes project (19 June 2015). For example, it was suggested that the campaign “Are You That Someone” run by the Ministry of Social Development in 2014/15 suffered from a lack of prior consultation with sexual violence support sector experts, risking the perpetuation of rape myths.

836 New Zealand is party to several international instruments dealing with human rights, including the right to be free from sexual violence (United Nations Convention on Elimination of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981), arts 5–6; the United Nations International Covenant on Civil and Political Rights 999 UNTS 171 (open for signature 16 December 1966, entered into force 23 March 1976), arts 7, 26 and 27; the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 19 and 34; the Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 7; and art 22(2) of the United Nations Declaration on the Rights of Indigenous Peoples which provides “states shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination”. New Zealand’s compliance with these instruments is assessed by the relevant committee body of the United Nations on a regular basis.

the lack of an effective, coherent and sustainable action plan to tackle sexual violence and its aftermath, the need for data to be collected and research to be undertaken, and the need for awareness-raising, training and a clear pathway for victims to the support services available.⁸³⁷

United Nations Committee against Torture

18 The most recent review comes from the *Concluding observations on the sixth periodic report of New Zealand* by the United Nations Committee against Torture, which noted that “90 per cent of cases of sexual violence remain unreported [in New Zealand]” and expressed concern at “the lack of proper funding for specialist sexual violence support services that reflect the diversity in [New Zealand’s] communities”.⁸³⁸ The Committee urged New Zealand “to redouble its efforts to prevent and combat all forms of violence against women” by, amongst other things:⁸³⁹

- taking necessary measures to encourage and facilitate the lodging of complaints by victims;
- ensuring that education professionals, healthcare providers and social workers are fully familiar with relevant legal provisions, trained to recognise the signs of violence against women and are capable of complying with their obligation to report cases;
- ensuring the effective enforcement of the existing legal framework by promptly, effectively and impartially investigating all reports of violence and prosecuting and punishing perpetrators in accordance with the gravity of their acts;
- guaranteeing in practice that all victims benefit from protection of and have access to adequately funded medical and legal aid, psychosocial counselling and social support schemes; and
- removing the cultural and financial barriers to accessing protection orders by removing or reducing the associated costs.

19 At the time of writing this Report, we understand the Ministry of Justice has yet to formally respond to the Committee’s observations.

United Nations Committee on the Elimination of Discrimination against Women

20 In 2012, the United Nations Committee on the Elimination of Discrimination Against Women likewise expressed concern “about the continued high and increasing levels of violence against women and the low rates of reporting and conviction, particularly relating to sexual violence...not[ing] with concern insufficient statistical data on violence against women, especially on violence against Māori women, migrant women and women with disabilities”.⁸⁴⁰ The Committee called upon New Zealand to:⁸⁴¹

- take the necessary measures to encourage the reporting of family and sexual violence cases, including by ensuring that education professionals, healthcare providers and social workers are fully familiar with relevant legal provisions and are sensitised to all forms of violence against women and are capable of complying with their obligation to report cases;
- strengthen training for the Police, public prosecutors, the judiciary and other relevant government bodies on family and sexual violence;

837 United Nations Committee against Torture *Concluding observations on the sixth periodic report of New Zealand* CAT/C/NZL/CO/6 (2015) at [11(a)].

838 At [11].

839 At [11].

840 United Nations Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [24].

841 At [25].

- provide adequate assistance and protection to women victims of violence, including Māori and migrant women, by ensuring that they receive the necessary legal and psychosocial services;
- ensure systematic collection and publication of data, disaggregated by sex, ethnicity, and type of violence and by the relationship of the perpetrator to the victim; to collect data on the number of women killed by partners or ex-partners; and to monitor the effectiveness of legislation, policy and practice relating to all forms of violence against women and girls.

21 In its follow-up report, New Zealand failed to comment on the Committee’s findings in relation to sexual violence. The next state report is due in 2016.

United Nations Committee on Social, Economic and Cultural Rights

22 Finally, the United Nations Committee on Social, Economic and Cultural Rights noted in 2012 that it was “concerned that, in spite of the measures taken by [New Zealand], family violence and sexual violence continue to be a problem, affecting in particular Māori women”.⁸⁴² The Committee recommended that New Zealand “intensify its measures to combat family violence and also adopt, as a priority, a framework for the implementation of the recommendations of the Taskforce for Action on Sexual Violence”, requesting that, in its 2017 report, New Zealand provide “updated statistical data on the incidence of family violence and sexual violence”.⁸⁴³ Currently, there is no body charged with collecting comprehensive data relating to sexual violence in New Zealand.

23 These three recent commentaries highlight that the United Nations monitoring bodies likewise consider there to be a link between under-reporting and attrition on the one hand and measures to assist victims such as adequate training of service providers and access to support services on the other hand.

842 United Nations Committee on Economic, Social and Cultural Rights *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: New Zealand E/C12/NZL/CO/3* (2012) at [18].

843 At [18].