

## Supporting victims through the legal process

### The role of sexual assault service providers

Debra Parkinson

At present, most crime victims decline to get involved in the legal system, apparently preferring to suffer the injustice rather than compromise their family or community ties, their privacy, their safety, or their mental health ... Among rape victims, for example, in spite of legal reforms designed to mitigate the most flagrant forms of institutional bias, still only a small minority choose to report the crime.

(Herman, 2003, p. 161)

The secondary victimisation suffered by women<sup>1</sup> in sexual assault court cases is well documented (Koss, Bachar, Hopkins, & Carlson, 2004; Maier, 2008; Morrison, 2008; Tjaden, 2009) and is a factor in women's reluctance to report sexual assault. Over recent years, state, territory and national governments have attempted to minimise the negative impacts of the law. Tasmania, for example, has introduced initiatives to increase access to Legal Aid and court support for victims of sexual assault and domestic violence (Department of Families Housing Community Services and Indigenous Affairs [FaHCSIA], 2010). The ACT has offered specialist training to police, prosecutors and victim support workers, with new legislation in 2008 providing victims with improved protection during the court process (Australian Labor Party, 2010). In NSW, the Attorney-General's Criminal Justice Sexual Offences Taskforce developed 70 recommendations on ways to improve the responsiveness of the criminal justice system to victims of sexual assault (Attorney-General's Criminal Justice Sexual Offences Taskforce, 2006).

These government initiatives affirm a general awareness that women's experience of the criminal justice system must improve if more women are to pursue justice through the courts.

This Wrap examines one initiative to improve women's experience the criminal justice system through the provision of support for victims throughout the process. It is informed by consultations with sexual assault counsellors who have worked extensively in helping women navigate the legal system, and by other key informants. It draws on their expertise to distil strategies for effective practice.<sup>2</sup>

1 Revictimisation or secondary victimisation refers to the capacity of elements of legal process to traumatise victim/survivors (e.g., through cross-examination) such that the process is experienced by survivors as a "second rape" (see Madigan & Gamble, 1991; Martin & Powell, 1994).

Throughout this article we refer to victims as women as 83% of all sexual assault victims seen by Australian police in 2006 were female (Australian Bureau of Statistics [ABS], 2007).

2 Using ACSSA's communication networks with sexual assault services, police and legal professionals, 10 stakeholders were consulted for their expertise. They represented different parts of the legal and sexual assault sectors, and different geographic regional across Australia, both rural and metropolitan.



## Australian Government

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The Australian Centre for the Study of Sexual Assault aims to improve access to current information on sexual assault in order to assist policy makers and others interested in this area to develop evidence-based strategies to prevent, respond to, and ultimately reduce the incidence of sexual assault.

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The case studies at the end of this publication illustrate a range of initiatives designed to improve justice outcomes for victims of sexual assault. The role sexual assault services play in the legal process in each state is summarised in Web Appendix 1: The role sexual assault services play in the legal process available at: <[www.aifs.gov.au/acssa/w8](http://www.aifs.gov.au/acssa/w8)>.

## The philosophy of sexual assault services

The key concepts directing sexual assault work are independence, belief and empowerment: sexual assault counsellors are *independent* from the criminal justice system, *believe* the client and ensure that the client *decides* what counselling and court options she will take up (Maier, 2008; Ullman & Townsend, 2008; Zweig & Burt, 2007). For example, the Brisbane Rape and Incest Survivors Support Centre (BRISSC) states its philosophy is for clients to “be listened to, believed and supported; be treated with respect, dignity and understanding; deal with your own life, in your own way and at your own pace” (BRISSC, 2010). CASA House states: “We respond to every victim/survivor with belief, respect, sensitivity and recognition of their struggle and ability to survive” (CASA House, 2010). *Best Practice Guidelines for NGOs Supporting Women Who Have Experienced Sexual Violence*, by the Rape Crisis Network Europe (2003) stated that “believing, listening, taking appropriate action, building understanding and responding effectively are the dimensions of the model of good practice” (p. 26). As one stakeholder stated:

The role for us is about presenting the smorgasbord of all possible options to the person. We’re not police, so the flavour is not about reporting. We’re not family so the flavour is not about anger and vengeance and “you must”. It is an independent service, for the client. (Rural Centre Against Sexual Assault [CASA] Counsellor Advocate)

Within the area of sexual assault, the counsellor’s is unique in its independence from the legal system (Robinson, Hudson, & Brookman, 2008). Within the court process, victim/survivors are witnesses for the Crown’s case; they do not have direct legal representation. Sexual assault counsellors focus on the client’s wellbeing within and outside the courtroom and beyond the verdict—perhaps to ongoing counselling and reports for victim assistance programs. Sexual assault counsellors are the only participants able to focus on the victim’s

experience, as the police role is essentially investigatory, and witness assistance programs are limited to courtroom proceedings (Robinson et al., 2008).

Some sexual assault services prioritise attending court every day with a client, while others have policies that sexual assault counsellors attend only on the first day (because of resource issues) to link clients with the key people involved in their case:

Some counselling services do not provide court support ... I just see it as part of the whole continuum of care. If you've got someone you've been counselling and preparing to go to court, why would you say, "Goodbye, good luck. Tell me what it was like". (Director, Gold Coast CASV)

The philosophical "empowerment" approach of sexual assault services is often based on feminist principles and has been variously defined, for example, as the path to individual recovery; the development of skills and self-esteem; or the process of gaining some control (Ullman & Townsend, 2008). In the US context, Riger (1993, cited in Ullman & Townsend, 2008) questioned the extent to which empowerment theory considers power and structural elements in victimisation, suggesting instead that it privileges an "individualistic, cognitive focus on autonomy, separateness, and control over one's own behaviour and circumstances". Australian sexual assault services address the structural causes of sexual assault and actively work for change to improve the experience of the legal system for clients (National Association of Services Against Sexual Violence, 1998). Although a long-term endeavour, some successes have been achieved:

I've been here for 19 years and 17 years of that would be lobbying for legislative change. (Director, Gold Coast CASV)

## The practice of sexual assault service providers

The facilities and resources available to victims of sexual assault depend on location. In well-resourced areas, "one-stop shops" or "crisis care units" offer specialist immediate response to victims, with police, medical and counselling services provided in the one place and available all hours. They usually include showers, a change of clothing, and kitchen and living facilities (Criminal Justice Sexual Offences Taskforce, 2005). Where these facilities are not available, sexual assault service providers may link women into services provided by Sexual Assault Nurse Examiners (SANEs), a model adapted from the US and trialled in NSW with the aim of protecting victims from "secondary victimisation" and "substandard care" (Tjaden, 2009). In Victoria, Forensic Nurse Examiners offer this service (Boyd, 2008). Where this service is unavailable, sexual assault counsellors may provide the first point of contact support, advise on potential courses of action, liaise between the client and police, accompany her during forensic examinations, and then support her through the legal process.

Some of the sexual assault counsellors we consulted spoke about their role in helping women organise their thoughts and the sequence of events before, during and after the sexual assault. This clarity assists them if they decide to make a statement to police. Once a report is made, sexual assault counsellors help navigate the complex, formal and intimidating legal process and act as interpreters in an alien and seemingly hostile environment. Indeed, this hostile environment has been referred to as contributing to the "re-victimisation", "secondary victimisation" or even "secondary rape" of sexual assault complainants and is well documented in the literature (Beckett, 2007; Campbell, 2006; Maier, 2008; Tjaden, 2009). The role of sexual assault counsellors in preparing clients for court, teaching them the processes and building their skills to testify is vital, as complainants may only meet the Crown Prosecutor<sup>3</sup> on the day of court. This preparation goes beyond court visits and the practicalities of what will happen in the courtroom, to anticipating how they might be feeling and strategies to cope:

We will work with a client for two months leading up to it. They only meet the person from the OPP the morning of the trial usually ... so them knowing that somebody is there that they feel comfortable with, makes a difference ... We explain it all the way

<sup>3</sup> Throughout this paper we refer to the office of the Crown Prosecutor as the Office of Public Prosecutions (OPP), unless directly quoting stakeholders. Other states/territories refer to the Office of the Director of Public Prosecutions (ODPP) or the Director of Public Prosecutions (DPP).

through. These are people who are experiencing trauma and being introduced to the legal process [may] re-trigger that trauma ... It could be a year later before committal and all of a sudden they have to remember everything and go back to that moment. (Rural CASA Counsellor Advocate)

Before the court case begins, the sexual assault counsellor may arrange safe spaces within the court complex to minimise the chance of confrontation with the offender, or may make requests on their behalf under special provisions for vulnerable witnesses. The sexual assault counsellor's experience allows her to anticipate and avert potential problems that would be outside the purview of the client because, mostly, they haven't been to court before:

Clients often, because they're anxious, nervous, frightened don't have the confidence to ask certain questions. (Rural CASA Counsellor Advocate)

## Working in complex systems

The sexual assault counsellor's unique role in the criminal justice system inevitably leads to interactions with other key players. Sexual assault counsellors and managers stressed that good outcomes for their clients could only be achieved through positive working relationships and collaborative effort. A 2007 US study found that legal advocacy was most beneficial when agencies interacted with the legal system and other community agencies (Zweig & Burt, 2007). Almost a decade earlier, D'Amora and Burns-Smith (1999) wrote that collaboration—characterised by shared mission, member investment, trust, respect, willingness to learn new ways and open communication—underpins effective response to sexual assault.

A key role, then, for sexual assault services is to foster positive relationships with the OPP, prosecution lawyers, police, victim liaison officers and court registrars, victims of crime compensation associations, and forensic doctors and nurses:

You try and have good relationships ... That's how you make very complex systems work by having good relationships with the people who represent the different parts of the system. (Manager, South Eastern Centre Against Sexual Assault [SECASA])

Multi-agency work poses enormous challenges, but promises “remarkable rewards”—improved information gathering, increased reporting and increased conviction rates are all part of a “victim-focused system” based on a deeper understanding of victims (Robinson et al., 2008). Unfortunately, Lievore (2005a) found that, despite examples of very good collaboration operating in Australia, a nationwide approach had not been institutionalised at government, service systems or practice levels.

The primary relationship sexual assault counsellors have in their work in the legal system is with police. Police refer women to sexual assault services when they attend a crime scene or emergency department, or when women report to them. The protocol used by police is usually that women must consent for any such referral to take place. Sexual assault counsellors also refer women to police—preferably to specialist sexual assault units or to a known and trusted police officer. Sexual assault counsellors interviewed as part of this project stated the strength of the relationship often depends on personalities, and police officers interviewed also agreed that the success of the collaboration relies on the approach and experience of individual sexual assault counsellors and the service within which they operate:

The more experience workers have, the more valuable they are ... If I have a concern, I will ring sexual assault workers. We have confidence and trust in each other and this leads to good outcomes for women. (Sexual Offences and Child Abuse Unit [SOCAU] Police Officer)

I think we're valued by police. It's not without its hiccups from time to time but this comes down to individual personalities on those occasions. (Manager, NT Sexual Assault Referral Centre [SARC])

When relationships are strong, police value the presence of the sexual assault counsellor, seeing it as releasing them from a support role and potentially “making the victim a stronger person, hence then being a solid witness” (SOCAU Police Officer).

For many years, I think, police saw us as likely to contaminate the evidence or say something stupid ... Once the police realise our role is not interfering in the process but supporting the victim through the process, and that this actually gives them some space to do their work ... then they see the benefit. (Director, Gold Coast CASV)

Collaboration between the OPP and sexual assault counsellors, can also lead to a more streamlined service and a better experience for clients:

I think sexual assault workers are highly valued and the other parties appreciate they have a place within the system ... It makes [our] job easier in that it makes the complainant feel more comfortable and not so daunted at having to meet prosecutors and lawyers. (Victim Liaison Office, ODPP, Qld)

Yet, the place of sexual assault counsellors is not formally recognised, and the hierarchy of the criminal justice system, combined with high workloads often conspire to marginalise the role of the sexual assault counsellor:

I've never seen a diagram of the legal system with a CASA worker on there, have you? I think that says something. (Rural CASA Counsellor Advocate)

I don't think judges or magistrates really have sexual assault workers or the organisations in their scope. They assume DPP will be looking after that. They are so busy with other things. (Lawyer, Springvale Monash Legal Service)

## The impact of sexual assault counsellors in the legal system

There does not appear to be empirical evidence that sexual assault counsellors influence rates of reporting. However, in the US context, Maier (2007) posited that any influence may work both ways. If rape complainants are supported through the legal process, this is likely to enhance both their willingness to participate in a prosecution and their ability to provide complete and accurate evidence (Ellison, 2007). Yet Maier (2007) also suggested that “advocates have a somewhat limited grasp of laws intended to aid rape victims, [and] they have an overall negative view of the legal system” (p. 55), so their own fears of the potential treatment of victims could influence against their reporting. Echoing this, a NSW survey in 2005 reported concerns from NSW Police that counsellors and hospital staff were dissuading victims from undergoing a forensic medical examination (Criminal Justice Sexual Offences Taskforce, 2005).

Other US research suggests rates of reporting do, in fact, increase with support through the justice system: women supported by an advocate “were significantly more likely to have police reports taken and were less likely to be treated negatively by police officers” (Campbell, 2006, p. 30). It appears that re-victimisation by the legal system is reduced when people feel believed by a professional and prepared for trial (Ellison, 2007).

UK research has shown that sexual assault counsellors can improve communication across the legal system and that collaboration reduces re-victimisation (Robinson et al., 2008). As Robinson et al. (2008) found, “there would appear to be a genuine appreciation of the role that victim advocates can play in this area” by partners in multi-agency partnerships (p. 425). This appears to result in significant outcomes, as women who have the support of an advocate have reported improved experiences and lower secondary victimisation (Maier, 2008). Additionally, the literature points to lower attrition rates as women are encouraged to continue their participation in the criminal justice system (Campbell, 2006).

In Australia, only some aspects of supporting women through the legal system have been studied. For example, Lievore (2005a) was concerned that Australian women were further harmed through their involvement with the legal system and “felt ‘fobbed off’ or that they were ‘wasting’ justice officials’

and doctors' time" (p. vi-vii) and she reported higher satisfaction with service delivery among sexual assault counsellors with input into the provision of forensic medical services. *Time for Action: The National Plan to Reduce Violence Against Women and Their Children* acknowledged that family violence specialist courts can "produce high levels of satisfaction in complainants and perceptions of success from professional stakeholders. However, they sometimes generate limited evidence of improved conviction, penalty, reporting and withdrawal rates" (National Council to Reduce Violence Against Women and Their Children, 2009, p. 116). There is no Australian evidence to determine if supporting women through the legal process increases rates of reporting and conviction.<sup>4</sup>

From stakeholders we consulted during the development of this publication, it appears that victims who have the early support of sexual assault counsellors are more likely to report the offence against them to police:

With the support of CASA, women report where they would not otherwise. (Sexual Offences and Child Abuse Police Officer)

In this region, more women are deciding to report to police and some of that can be attributed to us developing better relationships with police. (Director, Gold Coast CASV)

Yet, in the absence of nation-wide implementation, issues of equity emerge. What happens to victims who do not have sexual assault counsellor support—either through lack of awareness or lack of access?

In the following section, key challenges facing counsellor advocates in supporting women through the legal process are identified.

## Ongoing challenges

The coercive power of the criminal justice system can intimidate women and vex sexual assault counsellors. In particular, sexual assault counsellors identified the low conviction rates in sexual assault cases as an ongoing challenge. That sexual assault is among the hardest offences to prosecute successfully is well recognised (Steck-Flynn, 2007; Taylor, 2007).<sup>5</sup>

Although little is written in the literature about the Australian context, stakeholders we consulted identified ongoing obstacles to women's participation. Four key areas were discussed as presenting particular challenges:

- reporting to police;
- the subpoenaing of counsellor notes or testimony;
- the plea-bargaining process (which may exclude the victim); and
- supporting survivors after a not-guilty verdict.

## Reporting to police and preparing statements

Women may be surprised to learn that the decision to "press charges" is not theirs and be distressed by the diminution of their role to "witness" (Konradi & Burger, 2000). They can make a statement and the police may investigate, and if there is deemed to be a case to answer, a committal hearing before a magistrate will take place to decide if the case may proceed through the courts. Equally, a woman cannot necessarily stop a case going ahead. Police may want the case heard "in the public interest".

It is a fine line that sexual assault counsellors tread when they help clients prepare to make a statement to police. Ellison (2007) noted that pre-trial preparation holds potential benefits such as increasing

4 Between the Women's Safety Survey (ABS, 1995) and the Personal Safety Survey (ABS, 2005), the number of women reporting sexual assault to police has increased. This has been attributed to changes to policing practice and responses to victim/survivors (for example through specialist police).

5 Reporting rates for sexual assault crimes in Australia are low (Lievore, 2003; Stubbs, 2003)—estimated at 19% in 2005 (Morrison, 2008). Conviction rates are even lower—at one in eight or ten (Lievore, 2003; NSW Rape Crisis Centre & Cossins, 2007; Zweig & Burt, 2007)—and in many countries are falling (Cossins & NSW Rape Crisis Centre, 2007; Daly & Curtis-Fawley, 2006; Lievore, 2003; Morrison, 2008; National Council to Reduce Violence against Women and their Children, 2009).

willingness to participate, minimising trauma and enhancing witness credibility, yet pointed to the ambiguity between preparation and coaching. The danger for sexual assault counsellors is that defence counsel could argue they manipulated the client:

Is this person going to be seen as prepped by me as a sexual assault worker and therefore as a man-hating, soap-box-standing counsellor who's forcing this client to make up stories about this wonderful man? (Counsellor/Advocate, SECASA)

However, the obvious benefit to women and police is that the woman is ordered in her thinking and has clarified what happened to her. The potential danger can be managed by sexual assault counsellors being vigilant to ensure they are simply organising the client's own words into a factual timeline.

## Subpoenas for notes—and counsellors

A subpoena is a court order requiring a person to give evidence and/or notes to a trial, usually requested by defence lawyers so they can point to inconsistent statements by the complainant (Lynch & Clark, 2009). Larcombe argued further that it is an extension of a long-established defence strategy of exposing intimate details about the victim to discredit and intimidate her (Larcombe, 2002).

Australian states and territories have different legislation relating to the subpoenaing of notes and counsellors.<sup>6</sup> All except Queensland have some level of protection (Lynch & Clark, 2009). Consequently, sexual assault services report varying experiences of subpoenas:

It's rare for our counsellors to give evidence. I've been here two years and none of the counsellors have had to give evidence. (Manager, NT SARC)

Subpoenaing of notes is happening more, and if they're not doing that they're subpoenaing the counsellors. (Rural CASA Counsellor/Advocate)

It's a big issue in Queensland because it's the only state with no protection of counselling notes so they are routinely subpoenaed. (Director, Gold Coast CASV)

Bronitt (1997) argued that there needs to be “an absolute shield for confidential counselling communications” (p. 291) yet the current attitude of sexual assault counsellors towards this practice is varied. One reason for ambivalence is that the notes or testimony may be detrimental to the defendant as they detail the damaging effects of the sexual assault on the victim. In other cases, despite ongoing objections and protests from sexual assault services, subpoenas can still be issued, potentially damaging the trust between sexual assault counsellor and client.

Sexual assault counsellors have developed ways of minimising these potentially harmful effects. One strategy is to advise a client at the first meeting that a subpoena may be issued. Another is to be vigilant about what is written in the notes. Lynch advocates viewing the notes as if by “other audiences” (Lynch & Clark, 2009, p. 7). Equally, sexual assault counsellors are developing strategies to cope personally with being subpoenaed and to preserve counsellor/client trust:

It's a breach of the safe space you've created with the client ... We are very careful about what we keep. We have this conversation with clients at our very first meeting. (Rural CASA Counsellor Advocate)

I would go back to what was being asked of me at the beginning and have supervision throughout to make sure I'm doing what the original brief asked of me—because the questions that will be asked of me in court will have nothing to do with my original brief. If I'm clear I can say: “That wasn't my brief. My brief was this, and I followed this, and the outcome was this.” (Counsellor/Advocate, SECASA)

<sup>6</sup> In the second phase of evidence reforms, the Standing Committee of Attorneys General is working on model vulnerable witness provisions and model sexual assault communications privilege that would apply across Australia. The Standing Committee of Attorneys General (SCAG) comprises the Attorneys General of the Commonwealth and States and Territories and the Attorney General of New Zealand. The Attorney General of Norfolk Island has observer status at the meetings. See <<http://tinyurl.com/24bk2b2>>

## Plea-bargaining

Although defendants plead guilty in most criminal cases (Anleu & Mack, 2009), the rate is lower for sexual assault cases (Stubbs, 2003). In Australia, it is mandated that a reduced sentence will be imposed “in recognition of a guilty plea” (Anleu & Mack, 2009, p. 3). Plea-bargaining constitutes a “legitimate and generally accepted legal tactic” (Gerber, 2003, p. 2):

Defendants plead guilty for a variety of reasons, including: to benefit from any sentence discount, a sense of guilt or remorse, wanting to get the matter out of the way, shame, or a desire to protect another person. Guilty pleas may occur with or without legal advice. Plea negotiations between the prosecutor and a defendant’s legal representative may result in reduced or different charges to which the defendant will plead guilty. The most frequent type of plea-bargaining in Australia is discussions between defence and prosecution resulting in a charge reduction, which usually occur in the defendant’s absence and outside the formal court proceedings ... Australian law is clear that judicial officers have no role in any discussions between the defence and prosecution regarding the charge, plea or likely sentence. (Anleu & Mack, 2009, pp. 1–2)

Sexual assault counsellors report that the effect on clients is highly individual and the challenges facing them are several.

Some victim/survivors are relieved that they will not need to give evidence and will settle for a guilty plea by the offender on any charge that will acknowledge the wrong that was done:

Everyone is very different. For some women, the fact that the police take them seriously and do an investigation is affirmation enough ... There’s not a one size fits all. For some, they may well want it over and done with and ... if it’s going to get a guilty plea for anything then that’s OK. (Manager, NT SARC)

For others, a plea bargain is a betrayal. It can be traumatising when the instances where they felt the most violated are not included in the list of offences:

It would be very distressing and as if they’ve been discredited and not believed and that what’s happened to them has been reduced in its impact or significance. (Manager, NT SARC)

[It could start out as] three counts of rape, two of sexual assault, one of grievous bodily harm and may end up as one rape and one grievous bodily harm charge. Then the complainant will ask: “How did everything that happened to me get reduced to that?” ... particularly when someone says, “this part was the worst and it didn’t even end up in court”. (Director, Gold Coast CASV)

Sexual assault counsellors deal with this by providing accurate information about the process and potential consequences of any decisions made, and by advocating for the client. They explain that the OPP is reluctant to press charges that cannot be proved:

They have to prove all the elements of the offence and they don’t want to put something up that’s just going to be knocked down ... I might ask [the] ODPP what the legal basis for a decision is, and then relay that to the complainant. It needs to be clear that the decision doesn’t mean they are not believed. It usually means [the] ODPP simply have to go with the charges that have the best chance of being proven beyond reasonable doubt. (Director, Gold Coast CASV)

Plea-bargaining and obtaining guilty pleas require both legal parties to agree on the charges or on the statement of events. Where clients are included in the plea-bargaining discussion, their decisions have to be made immediately, with no opportunity for consideration:

I’ve had clients say “I wished I’d never agreed to that” because they didn’t have a chance to comprehend and they just wanted to get out of there ... And let’s say, we’ve got to a trial, it’s taken up to 3 years to get to this stage. Imagine what that’s done to a client. Then we get to trial, we’re all there, they’ve picked a jury ... For 2 days we’re ready to go, the client’s



anxiety levels are high because she's been waiting to be called to the witness stand. As they're about to be called, the perpetrator pleads guilty. They get less of a sentence because they pleaded guilty. My belief is ... there should be a penalty for that, not "you've been such a good boy". It's far more damaging. (Rural CASA Counsellor Advocate)

Every woman, every story is different and I don't like those easy ways out of men pleading guilty. (Counsellor Advocate, SECASA)

There may indeed be value to women in having their day in court, of looking their offender in the eye knowing he now has more to lose and is perhaps more terrified than she, and of recounting to the judge and jury that he sexually assaulted her. Although Taylor and Joudo's (2005) Australian study found that jurors are not more likely to convict when a victim gives evidence in person, they nevertheless write:

Many prosecutors believe that the emotion expressed in open court is important in influencing juries to believe the complainant and increasing the likelihood of a conviction. (Taylor & Joudo, 2005, p. 4)

One stakeholder we consulted in the development of this publication felt that defence lawyers prefer victims to give evidence by video, believing it places a distance between judge and jury and the woman, reducing her to an image on a screen. Seeing the actual person can be more powerful:

[I say to her] "All the breathing, the hesitations, the anxieties, everything—we want them to see it, taste it, feel it and the only person who can do that is you". (Rural CASA Counsellor Advocate)

## Use of DNA to reduce "not guilty" pleas

In Australia, it appears that cases are more likely to proceed to court, and convictions are more likely when there is DNA evidence available (Morrison, 2008; Stubbs, 2003). The Victorian Ombudsman (2006) reported that critical forensic evidence may be lost when people are reluctant to undergo an examination within 72 hours of the assault. In the Northern Territory, it is routine practice to offer a forensic medical examination where evidence is collected and kept at the SARC premises for six months, allowing clients time to think about whether they want to report to police. This allows women time to decide if they want to proceed with a court case (Macleod, Stevenson, Walker Windmill, Wilk, & Clark, 2007). The Northern Territory experience suggests a further benefit in that having forensic evidence in safe storage appears to facilitate more guilty pleas:

In the territory a lot of our court cases are very quick. I think we have a high percentage of guilty pleas and/or convictions. I like to think that's because of good forensic evidence. (Manager, NT SARC)

Without a guilty plea, the case goes to trial, where women are required to testify and be cross-examined: "an experience that can be very traumatic for victims" (Stubbs, 2003, p. 17). There are clearly benefits for women—and the possibility of increased conviction rates - where evidence exists and can be used to facilitate a guilty plea:

I would like to see women report sexual assaults early to allow for more evidence gathering. With corroborating evidence, there will be more guilty pleas, and less need for women to go to court. (Sexual Offences and Child Abuse Police Officer)

Timely forensic medical examinations are not equally accessible across the service system (National Council to Reduce Violence against Women and their Children, 2009). Du Mont and White (2007) commented that globally "the settings, staff and protocols of [medico-legal] services operate on different models and are unevenly developed and implemented across and within regions" (p. 1). According to the National Council, this applies equally to Australia.

## Supporting clients after a “not guilty” verdict

After enduring the long legal process that finally leads to a verdict, it can be devastating for a victim to hear “not guilty”.

Sexual assault counsellors spoke of the critical importance of preparing clients for this from the first discussion about going to court. They may show clients statistics on how few sexual assault cases make it to court, and even fewer end with a conviction and sentence.

Criminal justice courts are predicated on the notion of finding a defendant guilty “beyond reasonable doubt”, so evidence is critical. The admissibility and reliability of evidence strengthens a case and often determines whether it is prosecuted (Lievore, 2003). The problem for sexual assault cases is that many are not taken forward due to “evidential sufficiency” concerns resulting from the lack of witnesses and the fact that delayed disclosure is common (Lievore, 2003, 2005). The *Time for Action* report (National Council to Reduce Violence against Women and their Children, 2009) stated that without an understanding of “the realities of rape ... cases which do not fit a narrow template dictated by myths and stereotypes will continue to be filtered out of the criminal justice system, resulting in further trauma and injustice to women” (p. 111). The most consistent theme from counsellors we consulted for this paper was that the legal process is primarily about evidence. They recognised that in the criminal justice system proving all the elements of an offence to the required standard (beyond reasonable doubt) was the responsibility of the prosecution. Cases ending in acquittals or guilty verdicts for lesser offences did not mean that the offence did not occur:<sup>7</sup>

It’s about distinguishing a legal process from the truth. A legal process doesn’t determine whether something happened or not. It’s looking at facts or evidence and I make sure my clients are aware [of that] ... The system is not about fairness or truth. (Counsellor Advocate, SECASA)

It is not about whether this crime was committed or not. That’s not on the agenda. What’s on the agenda is without a shadow of a doubt, proof and evidence. (Rural CASA Counsellor Advocate)

In the face of a “not guilty” finding, sexual assault counsellors reiterate to clients that it does not mean they are not believed, just that it could not be proven. They spoke of the need to act professionally and not become angry themselves:

It’s when you want [sexual assault workers] to be really professional because they don’t need you to be angry as well. You can say, “I think that’s unreasonable and unfair, clearly the judge got it wrong” but you need some professional distance otherwise everyone’s angry and it’s not useful. (Manager, SECASA)

A sexual assault counsellor spoke of the practice of debriefing after a “not guilty” finding with the team of police and prosecutor which clients find particularly validating:

It’s the team approach too—that the person is not just left. Now there is a lot more of sitting down with the person, spending time looking at why it happened the way it did. Just taking the time. The police and the counsellor and the prosecutor will do that. (Counsellor/Advocate, SECASA)

## Strategies for sexual assault counsellors in navigating the legal system

The case studies below encapsulate practice wisdom and emphasise that: collaboration with police, prosecutors and other court staff; training for legal officers delivered by sexual assault services; and collaborative service provision are important strategies for effectively navigating the legal system.

<sup>7</sup> This understanding is also reflected by legal professionals and scholars. In assessing cases to proceed against, the Victorian DPP stated that “in most instances in which I agree with the police assessment of the case, I am satisfied that a sexual offence has been committed but nevertheless endorse the decision because I am not satisfied that a jury would convict the offender” (Rapke, 2009). (On the distinction between legal guilt and factual guilt, see Grano 1992, 1996; Samaha 2006; and on the advantages and disadvantages of the adversarial system in criminal proceedings see Van Caenegem, 1999).

Sexual assault counsellors advised that their effectiveness relies on a sound understanding of the legal system regarding sexual assault cases. Effective workers know the roles and responsibilities of key players and seek both formal and informal learning opportunities:

We're not always as effective as we should be. I'm not sure how well some understand the system ... I think you need to train sexual assault workers. [They] need to know what a committal is, how many times it can be adjourned. It's not hugely difficult and you need to know who the players are so you're not nervous when you get there. (Manager, SECASA)

We do a lot of professional development and get in the Women's Legal Service and Aboriginal Legal Services—being informed about different cultures and different disciplines involved in this legal stuff. We support each other and connect with other organisations. (Counsellor Advocate, SECASA)

Formal education may be through seminars, such as “Expert Evidence Training” which may be offered by victim of crime compensation agencies, government departments or family violence networks. Informal education includes self-directed learning—such as reading, asking questions and conducting research on the Internet. Sexual assault services encourage their workers to share knowledge and actively engage in one-to-one or group conversations. This in-house teaching ensures the institutional knowledge is kept through the years and through staff turnover:

It would be a case-by-case briefing before she went to court and ensuring she is clear about her role ... We just really pass on experience from the other workers to the new staff [about] what's going to happen, how they might feel, and debrief them afterwards. (Manager, NT SARC)

Sexual assault counsellors spoke of specific case discussions to prepare each other before entering the courtroom. The pre-court briefing could involve role-plays and a touch of irreverence to ease the fear:

We role play ... I really want a wig and a gown. I do the stance and the vocal tones and the eyes, and I say: “Ms blah blah, I put to you that ...” (Rural CASA Counsellor Advocate)

One sexual assault service has produced a manual to educate employees and clients about the legal system (Macleod et al., 2007):<sup>8</sup>

[We would say] “Read the STEP book. Is there anything that's not clear? Be aware of key players and their roles and responsibilities.” When people work in the legal system that becomes their world and they talk in jargon and think everyone understands that. It's about communication, understanding legal terms. (Director, Gold Coast CASV)

## Words of advice to new sexual assault counsellors

Sexual assault counsellors with many years court experience offered the following advice to newcomers:

- The first concern must always be with the client. Don't lose sight of this because of your own reactions.
- Build solid relationships with key players in the legal system. Identify which police officers operate in a constructive and sensitive way, and are willing to enter positive relationships with you.
- Organise good supervision.
- Be clear. Listen very carefully to the client. If a client decides to report and the case is taken to court, prepare well for what is likely to happen and what is required of witnesses:

Make sure you can dot point and communicate efficiently and clearly. (Counsellor/Advocate, SECASA)

I work with my clients to get smart about how they are being heard and ... to save their emotions for places they are safe and where they can be heard. (Counsellor/Advocate, SECASA)

<sup>8</sup> See Case Study 1: Gold Coast Centre Against Sexual Violence

When counsellors need to go into court, I say to them: You tell them what you saw, what you were told ... and when they ask you anything else you say, "I'm not in a position to comment on that". You need to be really clear about your file so you don't think for 5 minutes, you say, "Yes, that was the date" and, "No, that didn't happen". (Manager, SECASA)

## Conclusion

Across Australia, governments have recognised the need for complainants of sexual offences to have support and advocacy as they traverse the justice system. Some sexual assault counsellors offer exemplary practice. They do this through a sound understanding of the legal system, and by developing and maintaining constructive professional relationships with other players in the system. Key challenges for sexual assault counsellors lie in the way in which they assist women to prepare their statements for police, the still current practice of subpoenaing notes and sexual assault counsellors themselves as witnesses, and the effect on clients of plea-bargains and "not-guilty" findings. Experienced sexual assault counsellors we consulted said the advice they would give to a new worker is to focus on the client, identify and work with allies, organise ongoing supervision, and be very clear about the brief and the parameters of their role:

The adversarial system ... definitely leans to looking after a defendant rather than a victim. The only thing a complainant can do is make sure they are very well supported when going through court. (Lawyer, Springvale Monash Legal Service)

### Case Study 1

#### Gold Coast Centre Against Sexual Violence—good practice examples

##### Relationship with police

Our relationship with police has certainly improved over time. What used to happen was informal interaction mostly when things went wrong. I'd be constantly contacting them and every interaction with the police was problem driven. I think at that time, 17 years ago, the police had a particular view of the agency, probably as trouble-makers. Now, we have an MoU with police that looks at our roles and responsibilities, and we have established formal monthly meetings with police, the social worker from the emergency department of the hospital and Gold Coast CASV. We look at what's progressing and what's not and why; issues women have raised in the last month; and we try and get them sorted out as soon as possible. I think the good relationship is demonstrated by the increase in referrals from the police to us.

##### Constructive collaboration

The most recent example is in relation to a woman with an intellectual disability. Because the woman was not required to attend the committal hearing but she wanted to know the outcome, we worked together—the crown prosecutor, the victim liaison officer, myself,

the counsellor and police. We looked at a strategy to feed the information back to her. We decided to do that by getting together in the one room and phoning her on the speaker-phone so we could all speak to her collectively. Each person had something they wanted to say to her, and she was able to ask questions while everyone was there. It was really successful for her because she didn't have to make 100 calls to clarify. Normally her process would have been to call each of us one by one and engage us all on the phone for a very long time. We agreed it saved us time. We'd respectfully passed the information to the client, she had the opportunity to hear that information, to ask questions and clarify anything she wasn't clear about and we each heard that. The idea came about because of that particular client but we agreed we would follow that process again in the future.

##### Joint training with the ODPP

The Gold Coast CASV has been involved in training with the ODPP. For the first time in Queensland, a training module was developed for legal officers, crown prosecutors and victim liaison officers. It was offered as a full day session fourteen times all around the state. If people missed out in their own region,

they could travel to another region to participate. It was very comprehensive, covering a range of legal and practical issues for adults and children who had experienced sexual violence. The Gold Coast CASV role was to focus on adult rape complainants in the criminal justice system. The training received really good feedback and a number of participants said they hadn't really thought about the impact of some of the things they said and did. For example, the business practice of walking up and shaking someone's hand, or walking into a small room with a client and then closing the door. Workers just hadn't considered that if you have been sexually assaulted maybe you don't like people coming up and touching you and if you've been abused behind closed doors, you might be freaked out when someone shuts the door behind you. We've had

## Case Study 2

### NT Sexual Assault Referral Centre – option to hold forensic evidence for 6 months

The Sexual Assault Referral Centre is a Northern Territory government service within the Department of Health and Families. In our Darwin and Alice Springs offices we have a forensic medical service that provides forensic medical examinations and medicines to victims of sexual assault. We have medical suites in both those locations with counselling staff as well. We provide the doctors with additional training like Expert Evidence Training. They do a specialist course in child forensic examination.

The examination room is part of the SARC complex. We hold one file for the client. It's the file the doctor uses and the counsellor uses. The forensic area is not a separate entry. The suite is at one end of the complex but we're not huge. It's just down the hall and we're all in together. We have a vulnerable witness interview area, which is predominantly used for kids but can be used for other vulnerable witnesses, like women, and it's where police take the victim statement or videotape the statement.

We are either contacted directly by clients [or they are referred]. If they want to report then we provide them with information regarding their options. They can make a report to police or they don't have to. They can see a counsellor or have a forensic medical examination without having to report to police. We conduct a forensic

feedback from ODPP that workers are now putting alternative strategies into practice.

### Stepping Through the Process

When we employ workers, their biggest worry is often lack of knowledge of the legal system and we often had other services ringing asking for advice. That's what led to us to write the STEP resource.<sup>9</sup> It's for advocates as well as clients going through the legal system. We do training based on this resource for our new workers as well as workers in other agencies.

Di Macleod  
Director, Gold Coast CASV

<sup>9</sup> *Stepping Through the Process: For Adult Rape/Sexual Assault Complainants Entering the Criminal Justice System and Their Advocates* (Macleod et al., 2007).

medical examination at the person's request and if they don't sign the release, we can hold it for 6 months so they can change their mind. Sometimes the woman might not want the forensics but still might want to talk to the doctor. [The doctor] might not collect any evidence but will still examine her and provide a morning after pill, or treatment for STIs.

It's always been a policy to make the offer to the person for a forensic medical examination. The value is that often people are distressed when they come in. Sometimes they have others involved, friends, family trying to tell them what they should or shouldn't be doing. We say, "You can have this forensic medical examination. You don't have to, but it gives you an option. However you feel now, in a day or two, you might want to reconsider or change your mind. So by having the forensic medical examination you have those options open to you. You can decide if you want us to hand it to police or if you want us to destroy it. When you've thought about it and had other support from people, you can make the decision." We hold onto it for 6 months. Generally we find most people will sign a consent to release. Of those who don't, most will sign in the next couple of weeks.

In terms of the rest of the Territory the centre can provide phone advice support to other professionals who are responding to an acute case of sexual assault

in adults. Most doctors don't have any experience in genital examination let alone in doing forensic examination and get very anxious about it. For example, if an adult is raped in Tennant Creek where we don't have a SARC medical service, the doctor there generally will become very anxious

about doing a Sexual Assault Investigation Kit (SAIK). We promote the fact that they can call our on-call doctor who will talk them through doing the SAIK.

Barbara Kelly, SARC NT Manager

### Case Study 3

#### Peninsula Sexual Assault Centre (PenSAC) – pilot program with Victoria Police

PenSAC was launched in April 2007 as Victoria's first specialised sexual assault centre, which brings police, counsellors and medical staff together under the one roof so that victims no longer have to deal with different agencies in different locations.

I work as part of a pilot project PenSAC, which is a joint initiative between Victoria police, sexual assault workers and the Department of Human Services. We work together under the one roof. We've already smoothed the way in terms of building bridges of communications through each of the systems.

It models openness and communication that can really benefit the client. Because professional planning occurs together and includes the client, there is more transparency about what's happening and who's doing what. If, at the

end of the day there will be a negative outcome, like an acquittal, that won't be a surprise for the client. They will have been kept in the loop throughout. There are such gains through this project for us and the client.

One client, I first saw when she was 9 years old, and now she's 21 or so and I've seen her at different developmental life stages. That person did not want to make a statement in other stages but now, by the mere fact that I can say, "How about I go down the hallway, and get a policeman, one of my colleagues, and we'll do an options talk and see with your story from the legal side what they could offer you?" That has brought people to engage in the legal process and be supported by all of us. It's been a good process.

Susan McDougall  
Counsellor/Advocate, SECASA

### Case Study 4

#### South Eastern Centre Against Sexual Assault/Springvale Monash Legal Service Joint Clinic

Legal students who do their Advanced Professional Practice (APP) in the clinic learn how other people live. I don't want to use the word "privileged", but a lot of law students are from fairly conservative backgrounds and it is a well rounding experience to find out what goes on in the households of people who aren't quite as fortunate as themselves.

It's invaluable experience in dealing with clients who can be quite emotionally fragile. APP helps students understand interviewing techniques and that these techniques have to be specifically tailored to take into account the needs of people who can be emotionally drained.

Students come in each Monday night for about 3-and-a-half months. We're usually there from 2 pm till 11 pm at night. All of the students come to APP having previously done Professional Practice, so they do have experience in interviewing clients but usually, Professional Practice is less challenging because students deal with things like fencing disputes. It's a different kettle of fish to the kind of clients we deal with in the Advanced Professional Practice SECASA course. We have clients that have mental health issues and we're dealing often with parents of young children who've been assaulted so they are going through a grieving process themselves. There's a certain kind of clientele and it presents

an opportunity for students to hone their client relationship skills and appropriately deal with people who are in quite a fragile state at times.

We receive a faxed referral first from one of the SECASA counsellors and that gives us the bare basics and of course, that information has been sent with the authority of the client. It has the nuts and bolts of why the client requires advice. The first port of call for our students is to call the SECASA counsellor to be briefed before seeing the client. That sets the stage for an ongoing relationship. We usually let SECASA counsellors know the outcome of the case, with client authority, so they're involved from start to finish.

With particular cases, the client won't want to come in without the counsellor because the counsellor is their security and they feel they might feel like a duck out of water on their own. The interview takes place between the student, client and SECASA counsellor. Particularly with counsellors who've been around the traps for some time, we have a fabulous relationship with them whereby they are able to receive emails on any queries we have, and vice versa.

Additionally, when we have a new intake of students we have a counsellor from SECASA attend the legal service to

give the students a run down on the full gamut of services SECASA provides.

In the preliminary discussions counsellors have with students, they run through how to engage with clients. They explain the basic notion of trauma and how it can impact on the client's ability to recall and provide instructions. The counsellors explain how someone might be feeling when having to go into detail about the assaults. This helps students become more aware that people will often put on a brave face but they may be feeling decidedly

uncomfortable so to be aware of that and be looking for tell tale signs.

There is no pressure on the workers at our joint clinic to make legal costs, as there is in private practice. [At the joint clinic] we simply don't need to concern ourselves with that. We can put as much time and energy into a case as it requires and there is real benefit in that for our clients.

Meghan Butterfield, Lawyer  
Springvale Monash Legal Service

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