

The legal system's response to sexual assault

Do specialist courts offer the best way forward?

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On 5 September 2006, the Institute of Criminology, at the University of Sydney presented a seminar, "The legal system's response to sexual assault: Do specialist courts offer the best way forward?" The seminar's objective was to consider reform proposals—particularly specialist courts—that have arisen from sustained criticisms of the legal system's response to sexual assault, and that have been gaining support from some legal practitioners and researchers nationally as well as internationally. The seminar was chaired by the Institute's Deputy Director, Julie Stubbs, and comprised three speakers from the New South Wales Criminal Justice Sexual Offences Task Force: Annie Cossins, Laura Wells and Karen Willis. Robyn Holder, ACT Victims of Crime Co-ordinator, provided commentary. The speakers' different backgrounds, perspectives and approaches to the subject provided a broad and interesting address of the issue of responding to sexual assault.

Currently Australian jurisdictions operate under what is known as the adversarial system, which involves a contest between two parties. In cases of sexual assault, the parties usually comprise the defendant, i.e. accused of the offence, and a Crown Prosecutor, who is representing the State (the victim is usually involved as a key witness only) and most of the evidence is produced through questioning witnesses. The judge plays a relatively passive role, participating infrequently and generally to rule on objections. By contrast, the inquisitorial system aims to provide an inquiry into the case. Evidence is produced upfront and witnesses are questioned almost exclusively by the judge. Inquisitorial systems are commonly used throughout Europe.

Anne Cossins: Considering a less adversarial, more inquisitorial approach to specialist courts

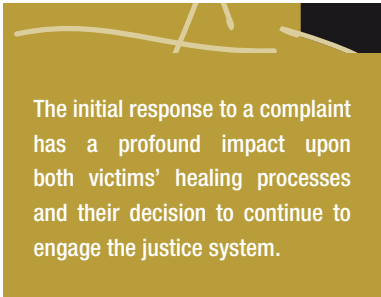
Anne Cossins, University of New South Wales Faculty of Law, addressed the potential to adopt a less adversarial approach (i.e. an inquisitorial model) for sexual assault trials in NSW. Cossins drew on her investigative work into the prosecution of cases of child sexual assault, which she conducted for the National Child Sexual Assault Reform Committee, and added that many of her findings could be applied to sexual assault cases more broadly. Cossins proposed that in order to counteract low rates of reporting, high levels of attrition, low conviction rates, long delays, trauma suffered by victims at the hands of the system and reportedly high rates of recidivism among offenders, a package of reforms is necessary, in which specialist sexual offence courts would be central. Cossins questioned what the aims of prosecuting sexual offences actually are, and referred to the notion of public interest both in increasing conviction rates and reducing incidents.

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Cossins highlighted research that indicates that although witness protection schemes have gone some way in reducing the level of trauma experienced by complainant-witnesses, they have not impacted upon the trial process and outcomes. If an increase in prosecution and conviction rates is a desired aim of reform, then, Cossins argues, serious thought needs to be given to ways of overcoming evidentiary burdens that feature in cases of sexual assault (such as a lack of witnesses and injuries). One possibility of meeting this would be through the use of specialist courts based on the inquisitorial system. In such a system all evidence—including hearsay, coincidence and tendency—is initially considered. Another feature of such a system is that the court proceedings are controlled by the judge rather than the parties, which means that the focus of the trial shifts from a contest between the accused and the State, to an inquiry into the guilt or innocence of the offender. The process removes the centrality of the credibility of the victim's evidence and the proof of a criminal charge. The less adversarial approach also offers the capacity for jury-free or judge-only trials. Cossins argues that the less adversarial approach would be particularly appropriate for cases involving vulnerable complainants, such as Indigenous children or people who have cognitive impairments.

Cossins also dealt with the presumption that a specialist, inquisitorial system would necessarily undermine the right to a fair trial, proposing that current legislation poses no barriers for state courts to use a less adversarial system. Rather, greater acknowledgement could be given to community interests in determining what is actually meant of the notion of "fairness" as it applies to the principle of a fair trial.

Karen Willis: Considering victim/survivors in specialisation



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Karen Willis, Manager of the NSW Rape Crisis Centre, drew on her research into the management of sexual assault complaints in South Africa, Canada and the US to present the potential benefits of specialisation for victims in NSW. Willis advocated the need for specialised, coordinated response units—or "one stop shops"—that prioritise victims' needs for recovery and healing. Willis reinforced the need to establish well-resourced, proactive measures throughout the entire system that are governed by established principles of best practice. Crucial elements of best practice were nominated to include: a commitment to justice

and respectful treatment of victims/complainants, provision of regular information to victims, victim involvement in decision-making, specialist training and coordinated responses for all sectors involved, service provider consistency and case-management, minimised time delays and quality assurance at all levels.

Willis identified two areas as requiring significant improvement. These were the initial response to a complaint and the role of expert prosecution. In NSW, victim/survivors enter the criminal justice system through three avenues: directly through the police sexual assault units, at a hospital or community health centre, or via the NSW Rape Crisis Centre. According to Willis, the initial response to a complaint has a profound impact upon both victims' healing processes and their decision to continue to engage the justice system. Thus, it is critical to "get it right" from the start. Willis argued that getting it right could be better achieved by offering "one stop" units at local major hospitals or community health centres, as such units will create a safe, familiar and informative environment where victim/survivors feel comfortable and are known.

Willis also spoke of the gross miscarriage of justice for victim/survivors that continues to occur in NSW courts. In South Africa, Willis observed first-hand the benefits of specialisation, including a greater involvement of prosecution. Willis said the South African model permits the prosecutor to spend weeks to months getting familiar with the complainant, resulting in both a stronger case and greater satisfaction for victims. Willis advocated for a similar model to be adopted in Australian jurisdictions. She concluded by reinforcing that for specialisation to be effective, courts need to reflect contemporary understandings of sexual assault, to dispel myths and to shift from starting from the presumption that all allegations are untrue.

Laura Wells: Considering legal professionals in specialist courts

Laura Wells, Director of the Criminal Law Review Division, Attorney General's Department of NSW, spoke of her own experience as a Crown Prosecutor and possible implications that specialisation may have on legal professionals and the court process. Wells held a different opinion of specialisation to the other speakers, favouring the maintenance of mainstream criminal justice over specialisation. Specialisation, Wells emphasised, is a relatively new concept within Australian jurisdictions. Given this, Wells stressed that precaution needs to be taken when diverting from traditional criminal justice practices, questioning how unintentional outcomes would be dealt with. Specifically, Wells highlighted that processing sexual assault cases has a unique impact upon legal professionals, and expressed concerns about the level of consideration that would be afforded to ensuring the wellbeing of the legal professionals involved. Wells emphasised that legal professionals' health is critical to the smooth running of courts, and feared that changes may not properly account for the position of legal professionals and therefore face the potential of staff burnout, high turnover rates and loss of objectivity. Wells also reiterated that specialist courts located outside of current courts need to be protected from the potential to marginalise the crime of sexual assault or detract from the seriousness of the offence.

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Robyn Holder: Commentary and the consideration of victim inclusion

The seminar was closed by commentary given by Robyn Holder who spoke briefly about the concept of participatory justice, particularly as it relates to victim inclusion and participation in justice processes, greater consideration being forwarded to victims' rights and needs, and the potential for a range of forums to be used to meet these. Holder also advocated the need to further develop the role of the prosecution and the need to stop defaulting the rights to a fair trial to the rights of the accused; that public interest, including victims", ought to be better accounted for in the criminal justice system.

Concluding remark

Overall, the seminar provided insight into issues surrounding specialisation and the processing of sexual assault cases and the treatment of victim/survivors within the criminal justice system. Speakers emphasised, that such a direction would need to come with certain precautions. In particular, consideration needs to be given to the provision of adequate resources, research, clear policy aims and strategies, and a commitment to best practice at every level.

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