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The last two decades have witnessed significant reforms to the laws and procedure governing the investigation of sexual offences. Although there have been many changes to the statute book in many jurisdictions, some reforms have not had the desired impact on courtroom practice. An important objective of reform has been to prevent the re-victimization of vulnerable complainants by the legal process. To this end, rape shield laws have been enacted to prevent the degrading and abusive cross-examination. Other reforms have enabled complainants (adults and children) to give evidence 'live' through video link or in a pre-recorded interview format. In this briefing paper, the team of researchers report their findings from New Zealand study of prosecutors on the perceived utility of some of these reforms, revealing that prosecutors were divided over whether the pre-recorded interview format provided 'better evidence'. This reveals uncertainty among many lawyers over whether these reforms will either assist, or conversely hamper, the prosecution case. This division of opinion reflects the tension between the desire on the one hand to improve the legal system's treatment of victims, and on the other hand the broader public interest in increasing the likelihood of bringing serious offenders to justice.



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With support from:



Prosecutor Perceptions of Video Recording Complainant Interviews to Improve Rape Prosecutions

Ms Nina Westera, Associate Professor Mark Kebbell & Dr Rebecca Milne

Background

In New Zealand the introduction of the *Evidence Act 2006* (NZ) extended the ability to use pre-recorded police interviews¹ as evidence-in-chief from primarily children to adults under certain circumstances.² Rape complainants are one type of witness likely to be eligible for this alternative way of giving evidence under several grounds such as the trauma suffered, intimidation, the nature of both the offence and the type of evidence they will give. Promisingly, in these types of cases where evidence is often sparse, memory research suggests there are a number of reasons why using a rape complainant's pre-recorded police interview as evidence-in-chief is likely to benefit the forensic quality of the testimony. First, the contemporaneousness of the recording means the complainant's memory for events is less likely to be subjected to forgetting and distortion that occurs over time. Secondly, the police using the scientifically validated cognitive interview³ (CI) method, which includes an emphasis on using open questions to encourage free narrative responses, is likely to promote both the reliability and completeness of the account. Indeed, the likely benefits of these effects to investigations are the very reason that police video-record complainant interviews and use the CI method.

The likely improvements in the forensic quality of testimony may however mean very little if using pre-recorded interviews diminishes the credibility and persuasiveness of the evidence to a jury. For example, the appropriateness of police investigative interviews as evidence has come under scrutiny from both prosecutors and judges. Criticisms include that interviews can be unduly long, and lack focus and clarity. Previously these limitations have not been systematically explored and could be ascribed to poor interviewing practices. Another possibility is that these previous concerns are due to the CI encouraging the complainant to report information as it is remembered which may not be in a chronological order. This is coupled with the long free narratives generated. This format is in contrast to testimony elicited by a prosecutor which generally involves the use of strategic questioning to elicit short responses in a chronological order.

¹ In this article a pre-recorded interview means an audio-visual electronic recording

² Similar legislation exists in Australia and the UK. Cross-examination is still conducted in the usual way.

³ The CI uses a series of mnemonics or memory enhancing techniques to enhance the amount of information elicited during interview without comprising on the accuracy.

Research Questions

Our research examined prosecutor perceptions of pre-recorded police interviews of rape complainants as their evidence-in-chief. Understanding prosecutor perceptions is particularly important as they decide whether to apply to use pre-recorded evidence. A jury may therefore never have the opportunity to view the video interview if prosecutors perceive it as ineffective evidence. Further a critical component of their role is to assess how impactful evidence will be to jurors. Thus, they are likely to be sensitive to the impact pre-recorded evidence is likely to have on a jury.

The primary research questions were:

- (1) Do prosecutors take question and interview format into account when making judgments about complainant accuracy, credibility, and decisions to charge?
- (2) What are prosecutor perceptions about the advantages and disadvantages of using pre-recorded police interviews as evidence?
- (3) Do prosecutor perceptions of what represents effective practice for interviewing in investigations differ from those that provide the best evidence for a jury trial?

Method

Thirty lawyers in New Zealand who are involved in the prosecution of adult sexual assault cases completed a four-section questionnaire. The first section required prosecutors to rate the accuracy and credibility of a series of excerpts from a mock transcript of an adult rape complainant's video-recorded interview. Prosecutors received one of two versions of an identical transcript, with one exception, the type of questioning used by the interviewer differed with the use of either; (i) closed and leading questions, or

(ii) open and probing questions. After the final excerpt, prosecutors also rated the likelihood that they would recommend the police charge the alleged offender.

The second section contained a series of open questions that sought prosecutor views on the advantages and disadvantages of using an adult rape complainant's pre-recorded police interview as evidence-in-chief. The third section required prosecutors to rate a list of characteristics of the complainant's account according to what they considered provided the best information for investigations. The prosecutors were then asked to rate the same characteristics according to what the prosecutor considered provided the best evidence for a jury trial. The final section gathered demographic details.

Results and Discussion

When the interviewer's questioning in the mock rape complainant transcript was closed and leading compared to open, prosecutors rated the complainant as less accurate, less credible and that they were less likely to recommend police charge the alleged offender.⁴ These findings suggest prosecutors are assessing how certain types of question negatively affect the actual accuracy of the response provided by the complainant, which would not have been possible without access to the video recorded interview.

A thematic analysis⁵ on the content of responses about the advantages and disadvantages to prosecutions of using a pre-recorded police interview as evidence-in-chief rather than live testimony supports the importance of good questioning to prosecutors. The potential for 'poor interviewing

skills' (31%) to detract from credibility judgments about the complainant was mentioned as one of the disadvantages to using pre-recorded evidence. These findings suggest it is imperative police maintain a high standard of interviewing, as a failure to do so may result in the prosecutor perceiving the case as less evidentially sufficient and less worthy of proceeding to trial.

The most frequently cited advantage to prosecutions of pre-recorded evidence rather than traditional oral evidence was categorised as 'enhances forensic quality' (76% of all responses). This category included improvements to reliability, detail, completeness and a lack of prior inconsistent accounts that could be exposed through cross-examination. For example:

The video is usually made much closer to the time of the alleged offence. It is therefore more likely that the complainant will have a more detailed recollection as to what occurred. The reduced stress may also improve the complainant's ability to recall and his/her willingness to divulge details that might otherwise be embarrassing. The interviewer will be specially trained in this area, and may do a better job at obtaining an account of the alleged offending than the prosecutor at trial.

These finding suggests that pre-recorded interviews of adult rape complainants may be a valid means of improving the reliability and completeness of rape complainant testimony. Tensions existed however between prosecutors perceptions over whether an investigative interview would provide credible and persuasive evidence. Some prosecutors perceived using a pre-recorded interview was 'better evidence' (52%):

⁴ An ANOVA with follow-up t-tests indicated this was significant (p<.001).

⁵ After all responses were coded by one researcher, another researcher coded a random selection of 20% of responses. Inter-rater reliability was high and statistically significant (Cohen's K=.95 advantages; K=.94 disadvantages; p<.001).

If it's recorded close in time to the event, the jury get to see the complainant as he/she was at the time, rather than a year down the track when time has usually reduced the impact on a victim. If done well, it's a complainant's opportunity to get their account out in their own time without the pressure surrounding being in the witness box in front of a group of strangers.

Contrastingly, some prosecutors also perceived the recorded 'interview format is not good evidence' (55%):

The accounts are often not in a chronological order, particularly in historic cases. Sometimes to make sense of an account for drafting an indictment, the interview has to be analysed over many hours. The jury do not have this opportunity: they only see it once, and more often than not without a transcript. In order for the jury to make sense of a story, it needs to be in a chronological order.

It may be that the CI instructions to

report everything in detail and in the complainant's own order has caused this concern. This possibility is supported by prosecutors giving higher ratings to the structured interview than the CI for use as evidence at trial. Further, the CI mnemonics of "context reinstatement" and "change temporal order" were rated in the bottom five characteristics for a complainant's evidence. Somewhat paradoxically prosecutors expressed a preference for open questioning, but did not like the long free narratives that this type of questioning promotes. Similar findings in research about child interviewing suggests prosecutors want the improved reliability generated by open questions but also want greater control of the interview for jury presentation reasons.

A minority of prosecutors also perceived the 'video not is good evidence' (31%) when compared to live evidence, due to a reduction in the impact of the complainant giving live testimony from the box. These concerns may be largely unfounded as simulation research suggests that effects of the change in medium from live to video are negligible in terms of both credibility judgments

and case outcome (Davies, et al., 1994). Importantly, 'better for the complainant' (24%) was cited by prosecutors as a benefit. Using the police interview as evidence was thought to reduce the stress of giving evidence for a complainant. This is consistent with the views of complainants themselves, as supported by recent reviews of special measures suggest rape complainants would like the option of using their police interview as evidence in chief (Stern, 2010).

Conclusions

These findings suggest that video recorded interviews may be one way to enhance the reliability and completeness of rape complainant testimony. Tension exists, however, between how improvements in accuracy translate into credible evidence compatible with the adversarial justice system. Communication between interviewing experts and prosecutors, and ongoing innovation will help ensure the benefits are realized in the court room. Using pre-recorded evidence is a promising means of improving the court process for rape complainants and the evidential sufficiency of their testimony.

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