Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives

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In this article, the authors, a forensic psychologist and police officer, explore how pre-recorded police interviews with complainants may be presented as evidence-in-chief and used to support the prosecution case for alleged rape offences. They discuss the advantages and disadvantages of pre-recording, and how its introduction will necessitate a profound shift in police culture and the conventional "case construction" model used by police. The article concludes by identifying the range of reforms to current police practice required to address some of problems associated with using pre-recorded evidence in rape trials.

INTRODUCTION

The investigation and prosecution of sex crimes has advanced considerably over the past 30 years in response to sustained and justified complaints, particularly concerning how the police and courts treat victims. The purpose of this article is to outline ways in which prosecutions for alleged rape offences may be further enhanced with the provision of pre-recorded police interviews with complainants that can be tendered as evidence-in-chief. First, the authors outline some of the common challenges associated with prosecuting rape before presenting some of the advantages of pre-recorded evidence. Next, they discuss the impact of these innovations on police culture and in particular on case construction models, and identify some of the perceived drawbacks before identifying ways to enhance the forensic and evidential quality of pre-recorded evidence.

THE CHALLENGES OF PROSECUTING RAPE OFFENCES: 20 YEARS OF PROGRESS

A persistent criticism of rape prosecutions is that prosecution rates are low.² The recent Stern Review of the treatment of rape complainants by the legal system in England and Wales reported a conviction rate for rape of 58% for persons of all ages.³ Notwithstanding common claims in the media suggesting that the conviction rate for rape is as low as 6%, the Stern Review found that the available empirical data presented a very different profile of rape conviction which is "at least comparable with other offences where the jury has to establish a state of mind rather than a fact".⁴ This profile seems to apply in Australia. Justice Marcia Neave, a Victorian Court of Appeal judge, former law reform commissioner and legal scholar, reported in a recent extra-curial address that although there are high

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¹ For example, Kelly L, Lovett J and Regan L, A Gap or a Chasm? Attrition in Reported Rape Cases (Home Office, 2005); Lees S, Carnal Knowledge: Rape on Trial (The Women's Press, 1996). 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 & Wales (Government Equalities Office, 2010) (Stern Review).

² For a review see Daly K and Bouhours B, "Rape and Attrition in the Legal Process: A Comparative Analysis of five Countries" (2010) 39(1) Crime and Justice: An Annual Review of Research 565.

³ Stern Review, n 1. These data were based on all prosecutions instituted in England and Wales between 2006 and 2008.

⁴ Stern Review, n 1, p 92.

rates of attrition, overall the rate of conviction for rape between 2005 and 2009 was about 50% in cases that went to trial in the County Court, noting that the rate had fallen to 38% in the past 12 months.⁵

That said, rape cases remain inherently difficult to prosecute for a number of reasons. When they are contested in court it is usually on the grounds that the complainant consented (or was believed by the defendant to have consented) to the sexual act. This means the jury has to decide between two opposing accounts and often has only the testimony of the complainant and defendant and the credibility of their respective accounts to rely upon. In most cases there is no supporting forensic evidence or other corroborative evidence that bears on the issue of consent or lack of consent. In some cases, it is the *threat* of violence (or other forms of coercion) rather than its actual use that procures compliance, which of course leaves no forensic trace.

A further obstacle is that many cases do not cohere with jurors' preconceived ideas about rape. For instance, the victim may not report the matter immediately, may not appear outwardly distressed and may have had previous, consensual sex with the defendant. These are all factors that do not fit well with jurors' beliefs about the circumstances of rape and may undermine the complainant's credibility. Indeed, many complainants are intoxicated by alcohol and drugs at the time of the alleged incident, a factor that can lead some jurors to believe complainants are partly responsible for what has happened to them. Alcohol may also impair the ability of complainants to recall what happened and impair their capacity to resist their attacker – factors which jurors tend to believe are inconsistent with lack of consent. (It should be noted that such prejudices operate notwithstanding the mandatory legal requirement in some jurisdictions, including Victoria, to direct juries that proof of physical resistance is not required, and that intoxication by alcohol or drugs negate free agreement or consent. Finally, jurors' beliefs about the frequency of false allegations may have an impact, if they believe the rate to be higher than it is, and this is a moot question, then they may be more likely to acquit than is warranted by the evidence.

When all the challenges associated with prosecuting rape cases are taken together, it might be thought that there is little room to increase conviction rates without increasing the risk of wrongful convictions through weak cases proceeding to trial, which is manifestly not in the public interest – as noted by the Stern Review. However, one method that may assist the prosecution to present the best evidence is the use of pre-recorded video evidence.

Achieving best evidence in rape trials

A number of jurisdictions have enacted "special measures" for complainants in rape trials. These include measures such as making available dedicated victim support workers in the court, permitting complainant evidence to be given "in camera", behind a screen or via closed circuit television, as well as allowing the use of pre-recorded video evidence. Whilst these measures are diverse the aims behind these reforms are consistent: to make the provision of the evidence less stressful; to enhance the

⁵ Farouque F, "Judge Calls for Sex Trials Rethink", *The Age* (8 September 2011). In 2004, Justice Neave chaired a major review of the law governing sexual offences: Victorian Law Reform Commission (VLRC), *Sexual Offences – Final Report* (2004).

⁶ See the Stern Review, n 1, noting that "The question with rape is not whether sexual intercourse took place and if the defendant was a participant. That is rarely what is being argued. The question is whether the complainant consented to sexual intercourse and the defendant reasonably thought he or she did"; see also Edwards J, "Medical Examinations of Sexual Assault Victims: Forensic Use and Relevance" (2003) 15(8) *Judicial Officers' Bulletin* 65; Konradi A, "Too Little, Too Late: Prosecutors' Pre-court Preparation of Rape Survivors" (1997) 22(1) *Law and Society Inquiry* 1.

⁷ See Lees, n 1; Temkin J and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008); Ellison L and Munro V, "A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13(4) *New Criminal Law Review* 781.

⁸ See Bronitt S and McSherry B, *Principles of Criminal Law* (3rd ed, Thomson Reuters, 2010) for a discussion of the reforms in Australia that introduce a positive consent standard, and the mandatory jury directions relating to absence of resistance.

⁹ For a review of measures in Australia, see VLRC, n 5; for the United Kingdom, see Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance in Interviewing Victims and Witnesses, and Using Special Measures* (2011), http://www.cps.gov.uk/publications/prosecution viewed 4 November 2011. For discussion of the equivalent New Zealand reforms, see Mahoney R, McDonald E, Optican S and Tinsley Y, *The Evidence Act 2006: Act and Analysis* (Brookers, 2007).

forensic quality of evidence; and to make reports more likely. This article will focus on pre-recorded video evidence because this has, in the authors' view, the greatest potential to satisfy these three aims.

Traditionally, the police have interviewed rape complainants and have produced a written statement that the complainant then signs. There are well-documented problems with this approach from a psychological perspective. Analysis of interviews conducted in this manner show that traditionally police officers tend to dominate the interview, constraining witness responses by asking closed and leading questions. Further, what is recorded in the statement is often an edited or selective version of the complainants' account with many omissions. Whilst the written-statement approach has the advantage of being focused, producing a statement that is quick and easy to read, increased police awareness of the above limitations have led to development of more effective interview protocols and increasing experimentation with video recording of complainant interviews in cases where serious crimes are alleged.

A more effective model of the police interview today is the "cognitive interview". Drawing on insights from psychological research, "best practice" police interviews are increasingly conducted using the cognitive interview or related interview strategies.¹² The cognitive interview uses memory retrieval techniques such as instructions for the witness to reinstate context and report everything to increase the amount of information recalled.¹³ Recalling events in a variety of orders and from a different perspective are other cognitive interview mnemonics, but are seldom used in practice.¹⁴ The cognitive interview requires the use of enhanced social and communication skills by the interview officers.¹⁵ This means that witnesses are encouraged actively to search their memory and recall information in their own order and at their own pace and in response to open (rather than closed) questions. A meta-analysis of the cognitive interview showed similar accuracy rates with control interviews (that is, proportion of correct to incorrect answers); the accuracy rate was 85% for the cognitive interview and 81% for the control interviews.¹⁶ Importantly for rape investigations, which often have access to limited evidence,¹⁷ on average 41% more details were elicited using the cognitive interview conditions than in the control interviews. The effectiveness of contemporary police interviewing, combined with video-recording of the interview, means that the interview can be used either as evidence-in-chief or to supplement evidence-in-chief.

Advantages of using pre-recorded interviews as evidence-in-chief

There are several reasons why using pre-recorded interviews as evidence-in-chief is preferable. First, it allows for the interview to be scrutinised at trial for evidence of best practice, less good practice, or even worst practice – a matter of interest for the defence as well as for the prosecution. A substantial

¹⁰ Fisher R, Geiselman R and Raymond D, "Critical Analysis of Police Interview Techniques" (1987) 15 *Journal of Police Science & Administration* 177; Clifford B and George R, "A Field Evaluation of Training in Three Methods of Witness/Victim Investigative Interviewing" (1996) 2 *Psychology, Crime & Law* 231.

¹¹ Lamb M, Orbach Y, Sternberg K, Hershkowitz I and Horowitz D, "Accuracy of Investigators' Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims" (2000) 24 *Law and Human Behavior* 699; Köhnken G, Thurer C and Zoberbier D, "The Cognitive Interview: Are Interviewers' Memories Enhanced, Too?" (1994) 8 *Applied Cognitive Psychology* 13.

¹² Fisher R and Geiselman R, *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (Thomas, 1992); Ministry of Justice, n 9.

¹³ See Fisher and Geiselman, n 12.

¹⁴ Dando C, Wilcock R and Milne R, "The Cognitive Interview: Novice Police Officers' Witness/Victim Interviewing Practices" (2009) 15 *Psychology, Crime & Law* 679; Kebbell M, Milne R and Wagstaff G, "The Cognitive Interview: A Survey of its Forensic Effectiveness" (1999) 5 *Psychology, Crime & Law* 101.

¹⁵ See Fisher and Geiselman, n 12; Fisher R, Geiselman R, Raymond D, Jurkevich L and Warhaftig M, "Enhancing Enhanced Eyewitness Memory: Refining the Cognitive Interview" (1987) 15 *Journal of Police Science & Administration* 291.

¹⁶ Köhnken G, Milne R, Memon A and Bull R, "The Cognitive Interview: A Meta-analysis" (1999) 5(1) *Psychology, Crime & Law* 3; For a more recent meta-analysis see Memon A, Meissner C and Fraser J, "The Cognitive Interview: A Meta-analytic Review and Study Space Analysis of the Past 25 Years" (2010) 16(4) *Psychology, Public Policy and Law* 340.

¹⁷ See Edwards, n 6; Konradi, n 6.

body of the research literature alluded to above¹⁸ suggests that the manner in which a witness is questioned can have a substantial impact on the accuracy and volume of detail provided in her testimony. In particular, the use of leading and suggestive questions by police investigators has been shown to consistently and negatively influence responses especially in vulnerable individuals such as people with intellectual disabilities.¹⁹ Thus, having a way of determining how evidence has been elicited potentially provides the defence with material for challenging poor interview practice. A further advantage of this scrutiny is that it encourages better police investigation because interviews can be subsequently checked, and the strength of complainant's allegations can be further tested. In this respect, the introduction of recording interviews with complainants is analogous to the recording of interviews with suspects and children, which has improved the quality of both police investigative practice and the resulting evidence obtained.²⁰

Secondly, recording the police interview of a complainant has a further advantage that the complainant will be providing an account closer in time to the alleged incident, rather than attempting recall events much later at trial. (This would avoid the ritualised "refreshing of memory" by complainants using "adopted" police-prepared statements.) Research suggests that witnesses will remember more when interviewed closer in time to an event rather than later on. In a recent study of prosecutors' attitudes to the use of recorded evidence, one respondent noted:

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.²¹

It also would mean that the evidence is "fresh" and untainted by memory degradation or distortion through the "rehearsal" of the (police-prepared) statement of the complainant. A further advantage is that a complainant's emotions close to the time of the alleged offence are recorded. Later on, in court proceedings many months later the witness may appear less distressed and this has been shown in simulation studies to have a substantial impact on juries.

Thirdly, recording the interview allows the evidence to be elicited in an environment that is less pressured and overall more conducive to accurate recall.²² Many of the aspects of sex offences are difficult for complainants to talk about, especially the sexual nature of the allegation. Hence, recalling this information in an environment where there is usually only one interviewer is more likely to facilitate accurate reports than when this occurs in front of a whole court. As one prosecutor stated:

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 ²³

In addition, the fact that the evidence has already been collected and is available pre-trial for disclosure to the defence may encourage early guilty pleas. This is because the defence is not required to wait to see if the complaint will proceed to testify in court or "come up to proof" when giving her evidence. Indeed, with pre-recorded evidence there is even the potential for unco-operative witnesses to be declared hostile and for the prosecution to adduce pre-recorded evidence. This may help the

¹⁸ For a review see Kebbell M and Wagstaff G, Face Value? Evaluating the Accuracy of Eyewitness Information (Home Office, 1999).

¹⁹ Clifford B and Scott J, "Individual and Situational Factors in Eyewitness Testimony" (1978) 63(3) *Journal of Applied Psychology* 352; Loftus E and Palmer J, "Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory" (1974) 13 *Journal of Verbal Learning and Verbal Behavior* 585.

²⁰ Gudjonsson G, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, 2003). The advent of audio-visual recorded interviews for suspects has also led to a reduction in the numbers of complainants about verballing and police misconduct: Dixon D, *Interrogating Images* (Sydney Institute of Criminology, 2007).

²¹ Westera N, Kebbell M and Milne B, "It is Better, but Does it Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence" (in review) *Psychology, Crime & Law.* See also Kebbell and Wagstaff, n 18; Read J and Connolly A, "The Effects of Delay on Long-term Memory for Witnessed Events", in Toglia M, Read J, Ross D, and Lindsay R, *Handbook of Eyewitness Psychology: Memory for Events* (Lawerence Erlbaum Associates, 2007) pp 117-155.

²² Westera et al, n 21.

²³ Westera et al, n 21.

prosecution but also mean that complainants are less likely to be intimidated by defendants because their evidence is already available to the court. There is less of a reason for an accused to intimidate a witness if the evidence to be adduced at trial has already been recorded.

In sum, pre-recording interviews with complainants has the following advantages: the jury is likely to receive better quality information – the best available evidence – from the complainant; that evidence is more likely to be elicited in a fair manner and, at least initially, it will be obtained in a less stressful environment. That said, there are also some disadvantages with using pre-recording.

DISADVANTAGES OF USING PRE-RECORDED INTERVIEWS AS EVIDENCE-IN-CHIEF

The Stern Review's examination of the treatment of rape victims in England and Wales revealed that the advent of video recording interviews with complainants (introduced in 2003) was "universally welcomed", it found "substantial problems with the effectiveness of this procedure and we recommend it be reviewed".²⁴ In particular, the Review proposed a revised approach to the interview techniques police officers used for pre-recorded interviews. Whilst Stern was somewhat vague about the exact nature of these critical issues, a study by Westera, Kebbell, and Milne²⁵ of 30 New Zealand prosecutors' perceptions of pre-recorded evidence sheds more light on the specific challenges.

In Westera et al's study, about half of responses were that the interview *format* was not good evidence. Respondents identified problems with a lack of logical order, rambling accounts, the interviewer expressing empathy for the witness, and the inclusion of inadmissible and irrelevant detail. In the words of one interviewee:

Very discursive and hard to follow at times. Lots of irrelevant stuff. Often admissible material is intermingled with inadmissible material. Often inherent contradiction which can be used by the defence in a way that if the interview was done in the traditional manner wouldn't be the case.

To the authors' knowledge, only one study has examined the usefulness of the cognitive interview as means of eliciting credible evidence. Fisher et al²⁶ investigated if the cognitive interview might enhance perceived credibility due to the extra detail and other attributes known to affect credibility judgments such as confidence.²⁷ When an audio-recorded cognitive interview was compared to a standard interview, participants' ratings did not vary for witness credibility, confidence and memory accuracy judgments. However, the interviews in this study were only 15 minutes long, far shorter than actual interviews criticised for being overly long. Further research is required in this area.

Whilst the use of effective evidence-based interview protocols does increase the volume and accuracy of details produced, complainants may still be reluctant to provide details that are inconsistent with the allegation or portray them in a negative light. Thus, a biased account may be given. Arguably this is also the case with evidence-in-chief but at this stage of proceedings the defence argument may have been made explicit and can also be addressed in the evidence-in-chief.

A further one-third of responses to the study by Westera et al expressed the view that the video-recorded evidence had a lessened impact compared with live testimony. As one respondent put it:

For the assessment of demeanour, nothing compares to *viva voce* evidence being given during the trial. That is a major disadvantage because demeanour is often the main clue to credibility.²⁸

²⁴ Stern Review, n 1, p 15.

²⁵ See Westera et al, n 21

²⁶ Fisher R, Mello E and McCauley M, "Are Jurors' Perceptions of Eyewitness Credibility Affected by the Cognitive Interview?" (1999) 5 *Psychology, Crime and Law* 167.

²⁷ Wells G and Leippe M, "How do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail can be Misleading" (1981) 66(6) *Journal of Applied Psychology* 682; Wells G, Lindsay R and Ferguson T, "Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification" (1979) 64(4) *Journal of Applied Psychology* 440.

²⁸ See Westera et al, n 21.

Or, as one legal expert cited in the Stern Review put it, "[j]uries prefer theatre to film".²⁹ In contrast, Taylor and Joudo³⁰ reviewed 18 studies that had compared different modes of presentation at trial including live testimony in court, giving evidence via closed-circuit television (CCTV), and the use of pre-recorded video. The effect of the mode of delivery (remarked upon by lawyers) was not so profound. In some studies there was a greater impact of live testimony but in the majority there appeared to be no difference, there certainly did not appear to be data to support the hesitancy expressed in the Stern Review over the use of video-recorded interviews. There are caveats to this though. Many of the studies cited by Taylor and Joudo³¹ concerned children and cross-examination via CCTV and are therefore not directly comparable to pre-recorded testimony with adults using police interviews.

A further disadvantage identified both by the Stern Review and the study by Westera et al is that in cases where an interview was poorly conducted by the police, and this fact is clear to the jury, there will be an adverse impact on the credibility of the witness's accounts. As discussed previously, arguably, this potential impact on the prosecution's case may nevertheless serve the broader interests of justice because it places real pressure on the police to interview effectively and fairly, as well as providing the defence with an opportunity to fully scrutinise the complainant's interview, and thereby exposing potentially biased and inaccurate accounts.

BEYOND CASE CONSTRUCTION: A NEW PARADIGM OF POLICING?

The advent of the admission of pre-recorded evidence as evidence-in-chief at trial represents a profound change in dynamics within courtrooms. Traditionally, the role of eliciting the "facts" from witnesses (including complainants) has been entrusted to the lawyers at trial – an essential attribute of the adversarial system. Placing a duty on police to obtain the best available evidence for criminal proceedings would require police not only to consider their investigative needs in making the strongest case, but also what is needed by the ultimate decision-maker (judge and/or jury) to render a fair verdict according to law. This presents a serious cultural challenge for police.

Criminological research in the United Kingdom has revealed how police investigation is a continuous process of "case construction" in which the investigators, working as gatekeepers of the facts, construct knowledge about "suspects" and "what happened" through a continuous process involving the "interpretation, addition, subtraction, selection and reformulation" of facts. Imposing a duty on police to obtain the best available evidence (and to use processes like video-recording to achieve this), the interview now serves two purposes – the immediate purpose is to assemble a case for prosecution, but at the same time, also secure the best available evidence (irrespective of whether it serves the case for the prosecution or defence). At present, as mentioned above, there is a perception by lawyers that present police interviewing practices and processes are deficient. As such, it is important to examine ways in which they may be improved in terms of impact, content and quality.

Impact

A simple, yet critical, concern about the impact of pre-recorded interviews with witnesses is that the quality of recording varies from jurisdiction to jurisdiction, and is often poor. Many police officers have difficulty operating complex recording equipment³³ and this is a skills deficit that needs to be addressed. Further, factors such as poorly focused cameras and poor sound quality mean that jurors may find it difficult to concentrate on the evidence being given. Finally, distracting extraneous noise and interruptions have a negative impact on the quality of recordings as well as distracting the witness

²⁹ See Stern Review, n 1, p 90.

³⁰ Taylor N and Joudo J, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-making: An Experimental Study* (Australian Institute of Criminology: Research and Public Policy Series, 2005).

³¹ See Taylor and Joudo, n 30.

³² McConville M, Saunders A and Leng R, The Case for the Prosecution (Routledge, 1991) pp 7-9.

³³ McGookin J, *How do Suspects Perceive the Police Interview?* (unpublished manuscript, University of Portsmouth, United Kingdom, 2011).

and impairing her recall.³⁴ Whilst this may seem a mundane suggestion, the poor quality of a recording is exaggerated and amplified by presentation to a court via projection systems or large television screens and amplified speakers.

There have been many experimental studies of jury decision-making and how the mode of giving evidence impacts on credibility. These studies usually use mock juries to determine the influence of various factors that impact on jurors' decision-making. Several of the findings from these studies are relevant to the use of pre-recorded testimony and how police should (as a matter of best practice) elicit evidence from witnesses. Loftus and Bell³⁵ found that when more detail was included jurors were more likely to convict. Thus, pre-recorded evidence should be more effective as a form of evidence-in-chief in terms of impact since questioning (through evidence-in-chief or cross-examination) in court encourages a less elaborated account than the questions asked during a cognitive interview.³⁶ The time delay between reporting and trial is likely to further diminish the ability of the victim to recall detail. The police should therefore use this opportunity to obtain detailed accounts concerning the most critical aspects of the case.

Further, if evidence is particularly vivid or gruesome then it is more impactful.³⁷ This would seem particularly relevant to pre-recorded evidence as the potential exists to elicit more detail concerning a sex offence with the more open questioning and more conducive atmosphere of an interview room compared with the witness box in an open court. Obtaining more detail of an alleged sex offence should be more vivid to a jury and therefore have a greater impact on a jury's decisions. The additional emotion associated with detailed recall of a traumatic event is likely to encourage belief of the veracity of an allegation.

Content

Using pre-recorded testimony means far more evidence is available to be scrutinised and this can be both positive and negative. This is concisely articulated by a judge interviewed in the Stern Review, who stated:

If there were always a proper investigation and evaluation by the police and the CPS [Crown Prosecution Service] of all the evidence uncovered in the initial stages of the investigation (not just the parts which support the prosecution case), I am confident the conviction rate would be improved in two ways. First, if the investigation reveals a serious flaw in the prosecution case the decision should be made that the prosecution should not proceed. Second, if the investigation reveals a sensible answer to or explanation for the apparently damaging evidence, the chances of obtaining a conviction will be greatly improved.³⁸

Pre-recorded evidence and effective police interviewing techniques have the potential to increase the content and volume of information available to the investigation and in turn to the court. However, this does not mean that complainants will naturally or spontaneously volunteer information during interviews that discredits them or the explicit or graphic details of the alleged offence.

Clearly, for these police recordings of complainant interviews to replace conventional evidence-in-chief, the interviews must carefully address the elements of the offence and explore potential defences upon which a defendant may later rely, especially concerning consent or (mistaken) belief in consent. In principle this is no departure from present investigative best practice; however, three challenges arise from this.

First, the interview of the victim is typically conducted early in the investigation which limits the ability seek the complainant's response to any discrepancies or inconsistencies with other evidence.

³⁴ See Fisher and Geiselman, n 12.

³⁵ Bell B and Loftus E, "Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details" (1989) 56(5) *Journal of Personality and Psychology* 669.

³⁶ Kebbell MR, Hatton C and Johnson SD, "Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence Do they Have?" (2004) 9 *Legal and Criminological Psychology* 1.

³⁷ Bright D and Goodman-Delahunty J, "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-making" (2006) 30 Law and Human Behavior 183.

³⁸ See Stern Review, n 1, p 88.

Consent and other common defences should be explored but less apparent defences may not yet be known. Further, at this stage in the investigation the role of police is (or should be) to act as an impartial investigator. An exclusive focus on case construction is not only unethical, but may also compromise the quality of the investigation and prevent the case from proceeding to prosecution. Secondly, police may be reticent to test the complainant's account against inconsistent evidence or identify discrepancies in that account because that may indicate that she is not believed which has been a consistent criticism of police practice.³⁹ Thirdly, there is concern that more open forms of interviewing such as the cognitive interview place greater emphasis on the witness "taking control" of the interview and may mean that information that may cast the complainant in a negative light is not always volunteered. This leaves the complainant vulnerable to later cross-examination and the potential for important exonerating evidence for the suspect is unexplored.⁴⁰ In most cases the complainant is known to the defendant and so it is unlikely the defence will remain unaware of this material. Further, even if the defendant is unknown to the complainant, the role of the police to investigate the matter fairly means that these issues should be explored.

Clearly, following an interview practice informed by research outlined above may address many of these challenges. By explaining the interview process to the complainant, the police investigator could express the importance of providing *all* the information even if the complainant is concerned she may be viewed negatively. All avenues that are relevant to the investigation need to be explored. Indeed, with new advances in technology a complainant's claim of "no prior contact" or relationship with the defendant can be tested in various ways. There is anecdotal evidence that police are now using call data (text messages and phone calls), and the triangulation of mobile phone connections to test the veracity of allegations. Police and prosecutors should communicate with each other about the benefits of testing such claims by the complainant in another police interview or as supplementary evidence-in-chief.

Perhaps one of the most important aspects of the police interview is the subject of the sex offence itself. For understandable reasons, both complainant and police interviewer are often reluctant to discuss in detail the precise sexual acts. From a strictly legal perspective, only enough detail is required to prove the elements of the offence, namely the physical elements (lack of consent, act of sexual intercourse) accompanied by the requisite fault (intention, knowledge or recklessness depending on the jurisdiction), as well as rebutting any defences which the defendant raises. Indeed, simply recording the "bare bones" of the complainant's allegation that a "sexual act occurred causing upset" may not convince a jury to render a guilty verdict. As mentioned previously, the level of detail provided in the complaint has a direct impact on jury decision-making. Furthermore, if the description given of the sexual acts is consistent with consensual sex (or the jurors *conception* of consensual sex), then jurors are less likely to convict. Thus the more detail that is elicited concerning the sex acts in rape cases that differ from consensual sex, the more a jury is likely to see that the sex acts differed from consensual sex and in turn are more likely to convict. This would seem particularly relevant to emotions. Anecdotally, from the authors' experience, both police interviewers and complainants seem reluctant to explore detail concerning the sexual elements of the alleged offence, as well as

³⁹ Jordan J, The Word of a Woman: Police, Rape and Belief (Palgrave MacMillan, 2004).

⁴⁰ Westera N, Kebbell M and Milne R, "Interviewing Witnesses: Do Investigative and Evidential Requirements Concur?" (2011) 13(2) *British Journal of Forensic Practice* 103.

⁴¹ There is limited research on police use of new communication technologies, such as social networking sites (SNS). For a recent examination of the investigative uses of SNSs, and some of the ethical and legal issues, of this largely unregulated domain of policing in the United Kingdom, see Floinn M and Ormerod D, "Social Networking Sites, RIPA and Criminal Investigations" [2011] *Criminal Law Review* 766.

⁴² Schuller RA, McKimmie BM, Masser BM and Klippenstine MA, "Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender and Victim Stereotypes" (2010) 13 New Criminal Law Review 759.

⁴³ Dahl J, Enemo I, Drevland G, Wessel E, Eilertsen D and Magnussen S, "Displayed Emotion and Witness Credibility: A Comparison of Judgements by Individuals and Mock Juries" (2007) 21 Applied Cognitive Psychology 1145; Kaufmann G, Drevland W, Overskeid E and Magnussen S, "The Importance of Being Earnest: Displayed Emotions and Witness Credibility" (2003) 17 Applied Cognitive Psychology 21.

discussing in detail indications of lack of consent where this is an issue, and also issues such as fear of the offender. This is important, as noted above, to counter common rape myths that jurors hold in relation to "proper" victims of rape. For instance, the belief that rape victims should fight back against attacker may be dispelled by the complainant explaining she did not fight because the attacker was so much bigger than her, was very aggressive and she thought he would kill or harm her if she resisted. Finally, such improvements may also have a flow on effect by increasing the likelihood of corroboration of the complainant's account with other independent evidence.

Quality of interviewing

As has been noted above, pre-recorded evidence allows for police interviewing to be scrutinised to the same degree as has been occurring for suspects and child witnesses for many years. ⁴⁴ Interviewing skills have been shown to be difficult to develop and retain, so police managers need to ensure that interviewers are properly supported. ⁴⁵ Concerns about the quality of police interviewing can be addressed through training, selecting the right interviewers, and monitoring what goes on in interview rooms. Simply stated, so the police do not have a negative influence, the police must interview effectively. There may be some discrepancies between what police investigators and prosecutors believe are good interviewing skills and this is something that needs to be resolved through communication between the two professional groups. This will need to include awareness from prosecutors that police departures from scientifically validated methods of best practice may be detrimental to accuracy and completeness of the brief of evidence, reducing the likelihood of an investigation progressing to prosecution.

CULTURAL CHANGE: ENHANCING POLICE AND PROSECUTION COMMUNICATION

Critically, and again central to case construction discussed above, is that from the moment an allegation is made officers are considering what the case for prosecution looks like. This focuses attention on satisfying the "legal proofs"; that is, the elements required for particular offences in terms of relevant physical elements, mental elements and availability of potential defences. Importantly, the police (as well as prosecutors) should not forget the legitimacy of defence concerns. Case construction undertaken with these concerns in mind may help ensure effective and fair investigation and prosecution.

Many rape victims are not physically harmed and forensic examination does not reveal injury beyond that which could be explained by rough or overly enthusiastic consensual sex. The important issue is whether or not consent was coerced through fear or threats. In these cases, factors that relate directly to why the complainant would have legitimate fears of the defendant are relevant and admissible. Thus, if a defendant had a history of violent behaviour, particularly against the complainant, this evidence would ordinarily be inadmissible because it risks prejudicing the jury. That said, when presented in this context, clearly exploring the basis of the complainant's fear of the suspect is relevant, and appropriately explored during interviews with the complainant, other witnesses, as well as the suspect.

To make effective judgments about the suitability of adducing pre-recorded evidence, prosecutors need to spend the time reviewing the actual interview rather than a transcript or summary, which is unlikely to capture the likely impact factors explored above. Early during the investigation, time is also required to identify if and how an interview might be edited from raw footage without limiting cohesiveness or distorting the complainant's evidence. This is no departure from practice with video interviews of child witnesses, but may prove more onerous due to the additional detail likely to be generated by adult complainants. As a matter of fairness, the raw unedited recording ought to be disclosed to the defence. The extra time spent by police and prosecutors on these activities should be weighed against the potential long-term benefits noted above.

⁴⁴ See Gudjonsson, n 20.

⁴⁵ Clifford and George, n 10 at 231; Clarke C and Milne R, *National Evaluation of the PEACE Investigative Interviewing Course* (University of Portsmouth, 2001); Powell M, Fisher R and Wright R, "Investigative Interviewing" in Brewer N and Williams K, *Psychology and Law: An Empirical Perspective* (Guilford, 2005) pp 11-42.

CONCLUSIONS

Pre-recorded evidence has the potential to improve the quality of information from rape complainants (whether they be children, adults or vulnerable persons). Adducing the best available evidence can be a positive influence on the ability of juries to reach just outcomes. To achieve this, police investigators need to work more closely with prosecutors in case construction, to assist not only the impact of that evidence, but also to ensure that interviews proceed in a demonstrably fair manner. Only then will the system fully exploit the opportunities provided by pre-recorded evidence. Using pre-recorded evidence of complainant int erviews has the potential to improve the court process for rape complainants, enhance the quality of evidence presented in court and help increase the likelihood of achieving justice – in other words, to promote both the interests of crime control and due process in equal measure. 46

⁴⁶ A point that has been similarly made in relation to the police use of audio-visual recorded interviews of suspects: Dixon, n 20, p 263.