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PRECIS

Sexual Crimes: Trial Process Needs Review

The Public Issues Committee of the Auckland District Law Society calls for a review of the procedures by which rape and other sexual offences are tried in the criminal justice system, in light of the substantial under reporting of sexual crimes. Its concern is for the social consequences of under-reporting, both for victims and society generally.

A review of trial processes should examine whether there are aspects of the criminal justice system itself which inhibit the reporting and prosecution of sexual crimes. The Committee urges the government to establish a task force to review New Zealand and overseas trial processes and consider changes that will promote real access to justice for victims of sexual crimes such as:

- alternative methods of giving evidence;
- allowing the rape victim to be represented by her or his own lawyer;
- use of an inquisitorial process based upon seeking the truth where the Judge has a role in inquiring into the facts; and
- a reparations process between the victim and offender which follows conviction but before sentence.

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SEXUAL CRIMES: TRIAL PROCESS NEEDS REVIEW

The Public Issues Committee of the Auckland District Law Society calls for a review of the procedures by which rape and other sexual offences are tried in the criminal justice system.

Despite there being many positive reforms of the rape law in the past 20 years it is evident that there is still a substantial degree of under-reporting of sexual crimes. For example, Rape Crisis Centre reports that less than a third of the people who contact it have reported the sexual crime to the police.

The social consequences of non-reporting negatively impact upon society in multiple ways such as giving perpetrators the message that they can behave in this manner with impunity and reinforcing for the victim the fact she or he is powerless. These role modelling patterns and perceptions reverberate out to a wider circle of friends and family. Such consequences erode and undermine the criminal justice system itself.

It is extremely concerning that there are aspects of the justice system itself that may inhibit the reporting and prosecution of sexual crimes. It is frequently reported that victims who do elect to make a complaint experience the criminal justice system process as a trauma which is often as destructive as the rape itself.

Factors suspected to affect the reporting and prosecution of these crimes include the long delays in the case coming to court; the inevitable trauma for the victim of recounting in public, in evidence in chief and then in cross examination (and possibly again in re examination) every relevant but intensely private detail of the sexual crime; including reliving the denigration and humiliation she or he has experienced; the fact this evidence is being tested in a hostile public forum by a lawyer whose role in the process is to attack his or her credibility.

The Law Commission has already proposed alternative ways of hearing evidence which would go some way to reforming the barbarism of trials of sexual crimes. For example sections 103 and 105 of the proposed Evidence Code (not yet enacted) would enable a judge to direct that, because of the nature of the proceeding, evidence by an adult witness should be given while the witness is screened from the defendant; or by way of video recording made before the trial. The Public Issues Committee encourages the government to consider these changes.

In addition the Committee urges the government to establish a task force to consider additional changes to the processes by which sexual crimes are tried so that victims of sexual crimes are not denied real access to justice.

The Task Force should review current New Zealand trial processes and those that are employed in other jurisdictions and assess whether processes used overseas should be part of our criminal justice system. Examples of these include:

- The rape victim being represented by her or his own lawyer. While the Crown prosecutor fills that role to some extent there are many respects in which the Crown's interest in gaining a conviction differs to the victim's specific needs and interests. If the victim had a lawyer she or he would then be represented at every stage in the process (as is the perpetrator currently) including the dropping or reduction of charges; whether a line of questioning should be allowed to be pursued against him or her; argument upon admissibility of evidence; and, prior to sentencing, whether and what is the appropriate reparation that should be paid to the victim.
- An inquisitorial process based upon seeking the truth, where the judge inquires actively into the facts, rather than letting prosecution and defence lawyers fight it out with all witnesses in an adversarial setting.
- The complainant and accused telling their story as it happened i.e. to give narrative evidence as opposed to having their story forced out via a line of questions.

- The judge questioning the complainant and defendant with lawyers representing the parties allowed to do so only after the judge has done so and only on supplementary matters.
- Both parties being allowed to have a support person with them while they gave their evidence.
- Exclusion of insulting, degrading, humiliating and irrelevant questions.
- An entitlement to request and be given breaks in giving evidence.
- Removal of the right to silence- presumptions are allowed to be drawn from a decision not to give evidence.

Other aspects of reform that should also be considered include:

- A 'reparations' process to be attached to the criminal process following conviction and prior to sentencing in which the defendant is called to atone to the victim for the behaviour he or she has just been convicted of. In the process the victim and perpetrator would continue to be represented by lawyers.
This process could include the making of apologies and admissions and explanations, if the perpetrator chose to; the 'hearing out' by the perpetrator of the complainant and her or his whanau; the payment of reparations by the perpetrator (which agreement could later become a court order via sentencing); adequate time for the perpetrator's financial situation to be fully discovered and properly disclosed during the process and any other action that would serve the purpose of atonement for the parties. This process would not work as a reduction in sentencing, except that where reparations were agreed the judge would make an order for these.
- Require that matters of sexual behaviour; responses and consent and the law on these matters be taught as part of life skills/health studies curriculum.

In conclusion the Public Issues Committee calls for a fairer and more effective outcome for victims of rape and other sexual offences and for society than

currently exists. While changes should not be made that would erode an accused person's rights under the New Zealand Bill of Rights Act, law reform is needed to ensure that perpetrators are held to account and that victims can report crimes and have these crimes prosecuted in a manner that enables the victim to survive the legal process and see justice done, the latter being for the greater social good.

Frances Joychild/Katherine Anderson
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