

Office of the  
Status of Women

**Prosecutorial Decisions in  
Adult Sexual Assault Cases:  
An Australian Study**



Australian Government

Department of the Prime Minister and Cabinet  
Office of the Status of Women



*Women 04*



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**A report prepared for the Australian Government's Office of the Status of Women  
by the Australian Institute of Criminology 2004**

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ISBN 1 877042 296 X

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# Acknowledgements

This research was made possible by the efforts and assistance of many people.

Grateful acknowledgement is made for the support of the Directors of Public Prosecutions in the Australian Capital Territory, Mr Richard Refshauge, SC, New South Wales, Mr Nicholas Cowdery, AM QC, the Northern Territory, Mr Rex Wild, QC, Tasmania, Mr Tim Ellis, SC, Western Australia, Mr Robert Cock, QC and Victoria, Mr Paul Coghlan, QC.

Further appreciation is extended to the Crown Prosecutors who willingly and candidly participated in interviews and to witness assistants and others in the victim support sector who engaged in informative dialogues. Sincere thanks also go to the staff of the participating Offices who were unfailingly gracious and helpful when negotiations to access data were underway and during the data collection stage of the study. The support and generosity of the Victorian Law Reform Commission, which provided access to Victorian OPP data, is also gratefully acknowledged.

I am indebted to Tamara Blakemore for her perceptive comments and collaboration. Her skills in statistical data analysis and ongoing availability were integral to the timely completion of this report.

I am obliged to Robyn Holder, Ken Archer and Tony Krone for their sound advice and informative discussion on various aspects of the report.

As always, my colleagues at the Australian Institute of Criminology deserve a special mention, particularly Holly Johnson and Jenny Mouzos, whose expertise in the area of violence against women is in itself an invaluable resource and whose personal support and collegiality mean so much. Thanks also to the staff of the JV Barry Library for their proactive help with identifying and locating relevant literature.

Funding for this report is provided through the National Initiative to Combat Sexual Assault – an Australian Government Initiative administered by the Office of the Status of Women.

## **Disclaimer**

This research paper does not necessarily reflect the policy position of the Australian Government.

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# Executive Summary

The exercise of prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. Most research that examines prosecutorial decision-making in sexual assault cases has been conducted in the United States, where prosecutors' roles often differ from that of their Australian counterparts. These studies have demonstrated that prosecutors' case processing decisions in adult sexual assault cases are shaped by both structural and attitudinal factors. To a large extent, prosecutorial decisions are driven by legal considerations relating to evidentiary sufficiency and the prospects of conviction. There is also substantial empirical evidence that, in some circumstances at least, prosecutors' decisions are influenced by variables that are extraneous to the legal elements of the case. The finding that some prosecutors actively look for factors that discredit victims and provide a legal rationale for rejecting cases has raised a particular concern about biased decision-making on the basis of gender stereotypes.

To inform the evidence base of the Australian Government's *National Initiative to Combat Sexual Assault*, the Office of the Status of Women commissioned the Australian Institute of Criminology to conduct a multi-jurisdictional study of decisions made by Crown Prosecutors in adult sexual assault cases. The objective of the study was to describe and analyse factors influencing prosecutorial decisions to proceed with, discontinue, or enter into charge negotiations in cases referred to state and territory Offices of the Director of Public Prosecutions (DPP).

The analysis was based on a sample of 141 case files, involving 148 victims and 152 defendants, which were referred to the DPP in five jurisdictions between 1999 and 2001. The statistical analysis was supplemented by a qualitative analysis of interviews with 24 Crown Prosecutors who were experienced in prosecuting sexual assault cases.

## Disposition of cases

The key statistical findings were as follows:

- 38 per cent of all cases were withdrawn from prosecution;
- 72 per cent of these were withdrawn prior to an indictment being filed;
- decisions to withdraw cases were almost equally divided on the basis of prosecutors' assessments of the cases and victims' reluctance to proceed;
- 33 per cent of all cases were finalised by way of a guilty plea;
- approximately half of the guilty pleas were entered as a result of negotiations to reduce the number or level of the charges;
- 29 per cent of all cases proceeded to trial; and
- 38 per cent of cases that proceeded to trial resulted in a guilty verdict.

## Factors underlying prosecutorial decisions

The results were largely consistent with overseas research, although victim characteristics were less influential than in previous studies. There were statistically significant differences between cases that were withdrawn from prosecution and those that proceeded to trial or sentencing. Cases were significantly more likely to proceed to trial or sentencing when:

- the victim physically or verbally expressed non-consent;
- the victim was injured during the attack;
- there was evidence linking the defendant to the assault;
- the defendant used force during the assault;
- the assault was severe;
- the defendant was a stranger; and
- the defendant was non-Caucasian. This is likely to reflect the over-representation of Indigenous offenders in the sample.

Most of these variables are related to the prospects of securing a conviction. Regression analyses showed that prosecutors' decisions to proceed or withdraw from prosecution were predicted by an interaction between non-consent and force. The level of force is likely to be commensurate with the level of resistance, while the presence of both factors helps to establish the mental element of the offence.

Decisions to negotiate charges were associated only with the number of defendants: no cases involving multiple defendants resulted in charge negotiations. Field notes showed that charge negotiations usually reflected evidentiary factors.

Defendants who pleaded or were found guilty were significantly more likely to have threatened the victim during the assault and to have been linked to the offence by additional evidence such as DNA, video footage showing the two together, or objects found at the crime scene.

## Qualitative results

Interviews with Crown Prosecutors largely supported the statistical results. Prosecutors said that they tend to be conservative about discontinuing cases, but that they routinely look for opportunities to negotiate charges rather than risk an acquittal. They are experiencing increasing pressure to prosecute, even when it is their assessment that the prospects of conviction are poor. At the same time, they are more aware of victims' autonomy and welfare. The potential for revictimisation during the trial process was cited as a fundamental consideration in decisions to withdraw cases where victims were reluctant to proceed.

The prosecutors stated that they do not assess victim credibility on the grounds of moral or gender stereotypes. While they are aware that biased jury perceptions could influence the trial outcome, they do not attempt to pre-empt the way a jury might view the victim. Prosecutors can be personally affected by the low level of guilty verdicts and by the social and emotional factors surrounding these cases. The inherent difficulties of prosecuting sex crimes are compounded in the geographically large states and territories that have bigger Indigenous populations.

## Key conclusions

The findings suggest that existing prosecution policies and guidelines provide a reasonable safeguard against biased decision-making in sexual assault cases. However, the study highlights tensions between the lawyer's and the "outsider's" perspective on various matters.

The significantly higher withdrawal of cases involving prior relationships raises the question of whether prosecutors continue to regard "acquaintance rapes" as less serious crimes than "real rapes" (i.e. stranger rapes). From a critical perspective, these decisions may reflect stereotypical assumptions about the nature of violence in relationships. From a lawyer's perspective, the defendant/victim relationship has considerable relevance for decision-making because of the difficulties it poses for proving non-consent.

There is a further tension between the victim's interests and the prosecutor's role as an independent officer who represents the community. Strictly speaking, the prosecutor's paramount role is to ensure that the criminal law fulfils its objectives. From this perspective, victims should have little say concerning prosecutorial decisions. However, almost half of the cases that were withdrawn were attributed to victims' reluctance to proceed and prosecutors were unlikely to exercise their discretion to subpoena victims. This decision may be based on the pragmatic view that a reluctant witness is likely to undermine the case at trial, but it may also place many victims in danger of repeat victimisation. The study could not ascertain the reasons underlying victim retractions, including whether this was prompted by subtle discouragement from prosecutors. However, previous studies show that one of the most common complaints voiced by victims stems from their feeling that they are not adequately informed about criminal justice processes and that there is a lack of communication with prosecutors. The disparity between the "outsider's" and the lawyer's view of what is relevant and admissible often underlies victims' feelings that they are on trial. Prosecution agencies, victims and victim support agencies have much to gain through increased inter-sectoral dialogue.



# Introduction

Prosecutors play a key role in determining which victims of crime have access to justice and which defendants will be processed through the criminal justice system. Together with police, they have been described as gatekeepers to the criminal process (Kerstetter 1990) and their decisions are integral to the way the criminal justice system is viewed by the community.

*Prosecutors...hold the key to the door of the criminal trial process. Apart from the quite exceptional case of private prosecution there is no trial unless the prosecutor initiates legal action against the accused. The prosecutor's authority then, is of pivotal importance in the administration of criminal justice...In short, these decisions, in partnership with the laws that define crime and prescribe penalties, delineate the outer limits of the State's right to stigmatise and punish offenders.* (Potas 1984: 37)

Despite the importance of prosecutorial decision-making, it is one of the least understood aspects in the administration of criminal justice. In Australia, the considerable discretionary powers vested in prosecutors employed by the state and territory Offices of the Director of Public Prosecutions (DPP) are exercised in accordance with prosecution policies and guidelines, but the decision-making process is regulated by few laws or court rulings and is rarely subject to external scrutiny.

In the past few decades the performance of the criminal justice system in general has come under fire for low prosecution and conviction rates in sexual assault cases, for reinforcing rape myths and for being unresponsive to victims. Prosecution agencies have been criticised for establishing barriers to the successful prosecution of sexual assault. This includes prosecutors dropping cases without adequate or any explanation to victims, treating victims with disrespect, and having an inadequate understanding of the consequences of sexual assault (Kelly & Regan 2001).

Concern about the appropriateness and lack of transparency of prosecutorial decisions in sexual assault cases has resulted in reviews of prosecution policy and processes in Australia and the United Kingdom (Crime and Misconduct Commission (CMC) 2003a, 2003b; HM Crown Prosecution Service Inspectorate (HMCPIS) 2002; Samuels 2002). Australian reviews have noted that the guidelines are generally adequate but that they are not always followed and that there is room for better communication between prosecutors, victims and police (CMC 2003a; Samuels 2002). Adding to concerns about the fairness of the criminal justice system, there have been indications that attrition rates for sex crimes are higher than for other types of offences (e.g. Chambers & Millar 1986).

Most Australian studies that track attrition processes are conducted in single jurisdictions (e.g. Criminal Justice Commission (CJC) 1999; Heenan & McKelvie 1997). While this limits the generalisability of the findings, taken together these studies indicate that:

- the proportion of defendants pleading guilty to sexual assault is low relative to other offence types;
- the high proportion of cases proceeding to trial is reflected in high numbers of acquittals compared to other offences;
- case attrition is highest at the police stage, but prosecutors regularly exercise their discretion to discontinue cases; and
- in recent years there has been an increase in the numbers of persons charged with sexual assault, but this is not reflected in conviction rates.

These findings are consistent with comparative international data, which show a widening gap between numbers of cases reported, prosecuted and convicted, lower conviction rates for sexual offences than for other violent crimes against women, and relatively high levels of charge negotiations and discontinued cases. Attrition at the prosecution stage is usually ascribed to evidentiary difficulties (see Appendix A for selected Australian and overseas data). Low prosecution and conviction rates are at least partially attributable to the nature of the evidence, which is often word against word, and to lengthy delays in reporting, which complicate investigation and evidence gathering and reduce witness credibility due to fading memories (Australian Capital Territory Director of Public Prosecutions 2001).

There is growing recognition in Australia that understanding the exercise of prosecutorial discretion constitutes an important step towards improving criminal justice outcomes for sexual assault (ACT Victims of Crime Coordinator 2002; Australian Bureau of Statistics (ABS) 2003b). To inform the evidence base and ensure a sound policy platform for the Australian Government's *National Initiative to Combat Sexual Assault*, the Office of the Status of Women commissioned the Australian Institute of Criminology to conduct a multi-jurisdictional study of prosecutorial decisions in adult sexual assault cases. The study analyses the discretionary decisions made by prosecutors employed by the DPP. It focuses on cases involving indictable sexual offences (sexual assault and rape) against adults, where the defendant was tried as an adult.<sup>1</sup>

<sup>1</sup> Consent is proscribed for some persons with intellectual impairments and those under the age of consent, which may range from 16 to 21, depending upon the jurisdiction, the nature of the act and with whom it occurs (Whitney, Flynn & Moyle 2000). As the central issues differ according to the age of victims and offenders, the literature review does not include studies dealing with the prosecution of child sexual assault or juvenile offenders.

The report begins with a brief discussion of the concept of discretion as it applies within the local context, as much of the literature on this topic has been written in the United States, where the role and function of prosecutors differs from that of their Australian counterparts. The literature review provides a comprehensive if not exhaustive overview of current issues and debates in the field. As far as possible, the review focuses on studies conducted after the introduction of major legal reforms.

This report is written with a broad audience in mind and from the perspective of a social scientist, not a legal scholar or practitioner. During the course of the study, through discussions with prosecutors and victim support agencies, it became clear that legal understandings often differ markedly from an “outsider’s” perspective on issues such as victim credibility or the defendant/victim relationship. Given that most sexual assault victims and their support networks are not trial lawyers, this has some important implications. This issue will be taken up in the discussion.

## Key terms and understandings

The report adopts the convention of reflecting the gendered nature of sexual assault. Feminine terms are used to refer to victims and masculine pronouns to refer to defendants.

The parties to sexual assaults are referred to by different terms throughout the criminal justice process and by different sectors. These terms include victim, victim/survivor, complainant, witness, suspect, defendant, accused and offender. For simplicity, this report refers to victims and defendants.

A case can involve one or more defendants against whom charges have been laid and which are heard together by a court. The charges usually relate to the same criminal incident and appear together on the same indictment. An indictment is a formal accusation charging a person with a serious crime.

Sexual offences against competent persons are essentially classified according to two levels of seriousness: acts of indecency and penetrative offences, which are uniformly regarded as the more serious type of offence (Whitney, Flynn & Moyle 2000). The study focuses on indictable sexual offences against adults; that is, sexual assault or rape. Indictable offences are serious offences that carry heavy penalties and are usually finalised by way of a trial or guilty plea in a Higher Court. They include crimes such as murder, manslaughter and kidnapping. Summary offences are considered less serious than indictable offences and are dealt with in the Lower Courts.

To secure a conviction, the prosecution must prove all elements of the offence for which the accused is charged. The substantive law of sexual offences varies among the Australian jurisdictions. The basic offence is rape in some jurisdictions, while others have adopted a graded system of sexual assault that distinguishes levels of harm or seriousness. The terms are used interchangeably through the review, but “rape” is primarily used to reflect the wording of the original source. The selected legal definitions in Appendix B show that “rape” and “sexual assault” are often roughly equivalent, but that in some instances, “sexual assault” is closer in meaning to “indecent assault”.

The common determinant of criminal responsibility is when a person is forced to engage in non-consensual sexual activity.

*The most basic substantive element of rape is nonconsent of the victim. This is what renders criminal otherwise ordinary conduct... The legal standard of rape – more precisely, the standard adopted by law as the objective indicator of non-consensual intercourse – determines the type and quantum of evidence needed to prove the crime. If the actor’s conduct (physical force or threat of force) is the legal criterion, then evidence pertaining to the victim’s prior unchastity becomes mostly irrelevant for proving that element. But if victim’s conduct (resistance) is determinative, past sexual conduct can be material. Consequently, the definitional standard is the most important conceptual issue in rape law. (Loh 1980: 548)*

To secure a conviction for a sexual assault, the prosecution must prove all elements of the offence beyond reasonable doubt. That is:

- the sexual act took place between the complainant and the accused;
- the complainant did not consent to the act; and
- the accused knew that the complainant did not consent or was reckless as to whether or not she consented (that is, intended to have sex regardless of consent).

The first two elements comprise the *actus reus* (guilty act); the third is the *mens rea* (guilty mind) requirement, which refers to the subjective mental state of the accused. In sexual assault, the crucial ingredient of the *actus reus* is proof that penetration occurred, but an act alone does not make a person guilty: the mental element is essential. Therefore, the prosecution must prove beyond reasonable doubt that the accused knew that the victim was not consenting or was reckless as to consent. The jury must acquit if it finds that the accused held an honest belief that the complainant was consenting to sexual activity. In some jurisdictions this is the case even if the belief in consent was unreasonable (Model Criminal Code Officers Committee 1996).<sup>2</sup>

<sup>2</sup> It is beyond the scope of this report to deal with the controversial *mens rea* element, which has been extensively discussed elsewhere. Some Australian discussions include Henning 2000; VLRC 2003; and Whitney Flynn & Moyle 2000.

# The Concept and Exercise of Discretion

Suspected sexual offences are not automatically subject to prosecution. Given the finite resources of the criminal justice system, it is neither possible nor desirable to prosecute all crime. Moreover, the decision to prosecute a person accused of sexual assault has a substantial impact on the victim, the suspect and the wider community. Prosecutorial decision-making therefore involves determining which cases should be prosecuted in the best interests of the community and is based on a policy of “selective” prosecutions (Refshauge 2002).

While it is common to speak of “the” decision to prosecute, this is not an accurate description of the criminal justice process. From the point where a victim decides to report a sexual offence to police – and the majority never do (see Lievore 2003) – various decision makers exercise discretion at multiple decision points, based on a range of criteria, so that only a small proportion of all sex crimes ever reach trial and conviction (Figure 1. Also see Appendix C for a broad overview of processes from charging to sentencing). This filtering of cases begins with police decisions to record and investigate a complaint and to charge a suspect with the offence. The exercise of police discretionary powers means that they are perhaps the most significant gatekeepers to the criminal justice system (Kerstetter 1990).

Once the police charge a suspect, DPP lawyers review the file to determine whether the case should be prosecuted. Cases that proceed are subject to continuous reassessment because the circumstances of the case can change over time. In addition, different evidentiary standards apply at each decision-making stage: the police decision to charge is based on the *prima facie* test, which is a more inclusive standard than the *reasonable prospects* test applied by the prosecutor, while the jury’s decision to convict is based on the stringent standard of *beyond reasonable doubt* (R. Holder<sup>3</sup>, personal communication, 15 April 2004; also see CMC 2003b).

Each Australian state and territory, as well as the Commonwealth, has a statutorily appointed Director of Public Prosecutions who is responsible for prosecuting indictable offences<sup>4</sup>. The DPP gives effect to prosecutorial decision-making and employs solicitors and prosecutors who exercise delegations of the Director. These include Crown Prosecutors, lawyers who represent the public interest in court on behalf of the Crown. In this report references to decisions made by the Director are generally intended to encompass Crown Prosecutors. The Directors of the various states and territories have similar powers, aimed at ensuring that their Offices meet four crucial standards for a successful prosecution service:

- 1. Independence:** The DPP is independent of police functions; it is not an investigative agency but it can request police to undertake actions and can provide advice and other assistance during the investigative stage. It is important to note that this is not the case in all countries. For example, in some United States jurisdictions prosecutors are politically appointed or are involved in the investigation of crimes and in decisions to charge suspects (Krone 2003). These differences are likely to impact on the level of filtering at the prosecutorial stage.
- 2. Fairness:** It is usually in the public interest that people who are guilty are brought to justice, that innocent people are not wrongly convicted and that individual cases or classes of case are treated uniformly.
- 3. Openness and accountability:** Decision-makers can be publicly called to justify and explain their policies, actions and decisions to prosecute or not, as long as this does not conflict with the interests of suspects.
- 4. Efficiency:** The service should achieve its objectives with minimum delay and efficient use of resources (Refshauge 2002).

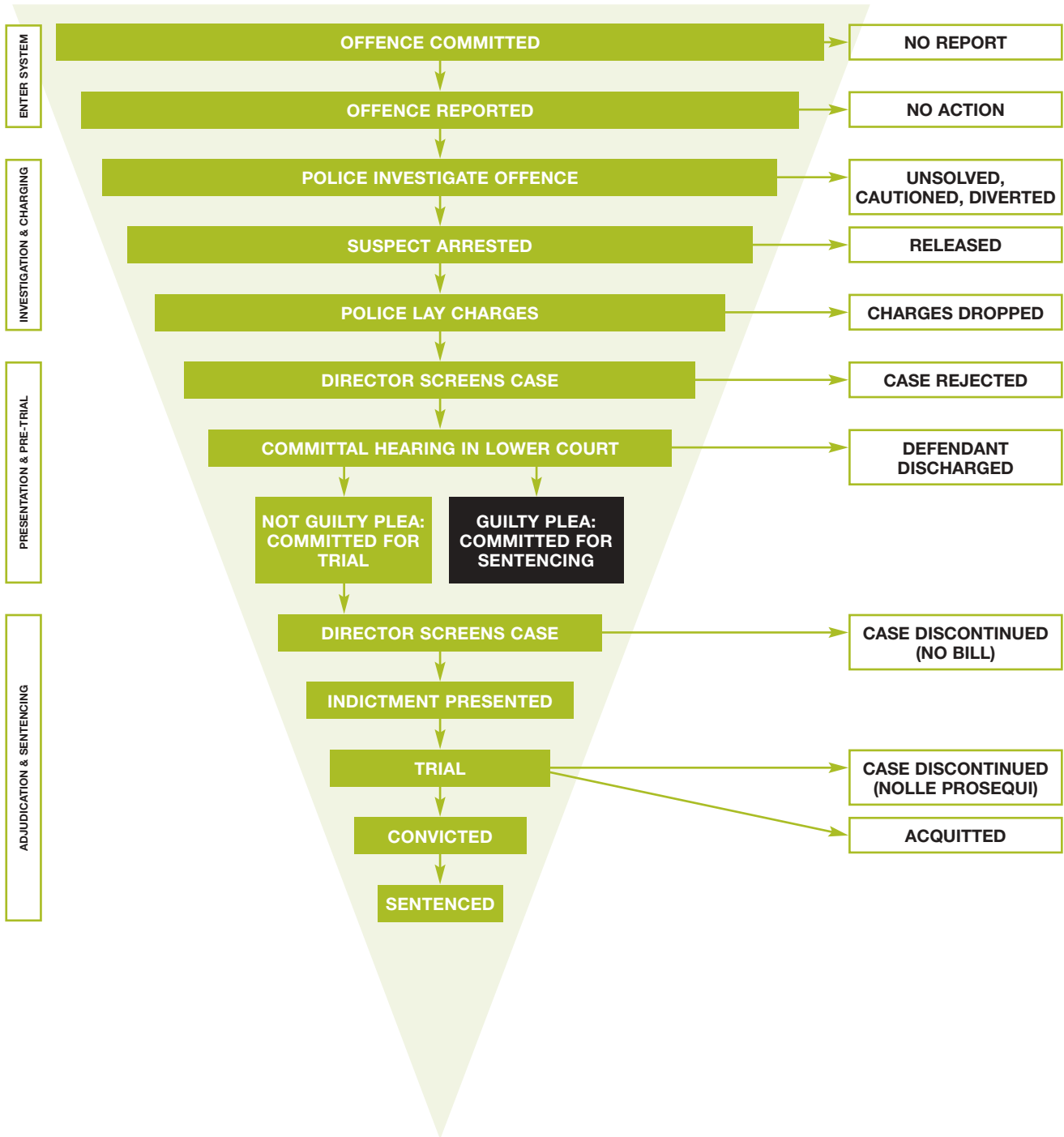
The purpose of criminal trials is to determine whether the allegations against the defendant can be proved beyond reasonable doubt. Until such time, the defendant is regarded as innocent of the offence in question. For indictable sexual offences, the case for the prosecution is usually presented by Crown Prosecutors who act on behalf of the Director and are subject to his or her general direction in the exercise of their professional duties. The directions that can be given by the Director to Crown Prosecutors are limited in some jurisdictions (K. Archer, personal communication, 23 March 2004).<sup>5</sup>

<sup>3</sup> Robyn Holder is the ACT Victims of Crime Coordinator and the Chairperson of Victim Support Australasia.

<sup>4</sup> The primary role of the Commonwealth Director of Public Prosecutions is to prosecute offences against Commonwealth law. Sexual assaults are offences against state and territory law.

<sup>5</sup> Ken Archer was formerly Deputy Director of the ACT DPP and is now at the private bar.

Figure 1: Decision Points for Indictable Sexual Offences



The prosecutor represents the community and is not the legal representative of the police or victims of crime. While victims may act as witnesses, they do not formally participate in legal proceedings by identifying the issues, producing evidence or questioning witnesses. In most Australian jurisdictions, they do not have a legally recognised right to have input into or challenge prosecutorial decisions relating to commencing, discontinuing or conducting criminal proceedings. However, DPP lawyers in some jurisdictions are required to consult with victims and police officers about these decisions and other Offices tend to take victims' views into account:

*In prosecuting charges of assault, especially sexual assault, there should be particular concern for the position of the victim...[W]here a victim does not wish the prosecution to proceed because, for example, the resultant trial would cause further humiliation and/or trauma, those wishes should receive due consideration. However, in some instances, the interests of the wider community may demand that the prosecution proceed.* (Australian Capital Territory Director of Public Prosecutions 2003)

The concept of "discretion" encompasses the power of the prosecutor to choose among a variety of procedural alternatives in disposing of a case, in accordance with his or her judgment (Refshauge 2002). This power is not unlimited, as unconfined discretion could lead to arbitrary, impartial and unaccountable decisions. Together with decisions to screen out cases prior to committal, the most important discretionary decisions made by prosecutors include:

- the decision to proceed with or withhold consent to prosecution;
- if the prosecution is to proceed, the decision of which charges should be laid;
- whether to negotiate concessions on charges and facts to be presented to the court in exchange for a guilty plea;
- whether to terminate a case by not finding a bill of indictment or not proceeding (no bill or *nolle prosequi*);
- the decision to discontinue prosecution where the defendant has been committed for trial; and
- decisions made in relation to conducting the prosecution, such as material to be disclosed and witnesses to be called (Refshauge 2002).

In Australia, the primary mechanism for controlling prosecutorial discretion has been the development of a prosecution policy and guidelines by each Director of Public Prosecutions<sup>6</sup>. As it is beyond the scope of this report to address differences in the various guidelines, the following discussion provides a broad overview of relevant issues.

## Proceeding with prosecutions

All guidelines identify two elements to be considered in determining whether to prosecute, although the requirements are put differently in various guidelines (Refshauge 2002). Firstly, there must be sufficient evidence to justify prosecution. The prosecutor must consider how strong the case will be when it is presented in court and whether the evidence provides a reasonable prospect of conviction. This determination takes into account factors such as:

- the competence, credibility and availability of witnesses and the impression they are likely to make on the judge or jury;
- the admissibility of evidence or any alleged confession;
- lines of defence open to the alleged offender; and
- any other factors that could affect the likelihood of a conviction.

The second and paramount concern is whether it is in the public interest for the matter to proceed. The public interest is not a question of political or popular pressure and relevant factors may be either objective or private, including:

- the seriousness and prevalence of the offence;
- the need for deterrence, either general or personal;
- various factors related to the victim and the defendant (e.g. age or health);
- mitigating or aggravating factors;
- the length and expense of a trial;
- the availability and efficacy of alternatives to a trial; and
- the need to maintain public confidence in institutions such as the Courts.

Because the decision to prosecute often involves evidential or legal issues that are matters of professional judgment and involve a degree of subjectivity, different prosecutors may take different perspectives on a matter (CMC 2003a; HMCPSI 2002). In Australia, the court does not have the power to review the decision to commence proceedings, as this would involve interfering with the function of the Director (Refshauge 2002).

<sup>6</sup> State and Territory policies are broadly similar, but there are differences among them. Most are available online.  
<http://www.dpp.act.gov.au/policy.htm> (viewed 02/07/03)  
<http://www.odpp.nsw.gov.au/guidelines/guidelines.html> (viewed 11/11/03)  
<http://www.nt.gov.au/justice/dpp/html/criteria.html> (viewed 11/06/03)  
[http://www.legalonline.vic.gov.au/CA256902000FE154/Lookup/PDFOPP/\\$file/Prosecutorial\\_guidelines.pdf](http://www.legalonline.vic.gov.au/CA256902000FE154/Lookup/PDFOPP/$file/Prosecutorial_guidelines.pdf) (viewed 02/07/03)  
<http://www.dpp.wa.gov.au> (viewed 02/07/03)

Some victims are reluctant to pursue cases that have a strong evidentiary basis and may be uncooperative or hostile witnesses. Under these circumstances prosecutors must ensure that the victim is not being intimidated or coerced and should give due consideration to the nature and intensity of the divergent views. The reasons for her reluctance may determine how much weight is given to her objections and whether the common good outweighs personal concerns. Victims can be subpoenaed to give evidence, but there is a view that using coercive measures with sexual assault victims may perpetuate the harm and further infringe on their interests, either through secondary victimisation as a result of the legal fact finding process, or by exposing them to further threat or danger from the defendant. Some victims face considerable risks in testifying and have a genuine fear of reprisal, while uncooperative witnesses can find ways to thwart the prosecution. Flatman & Bagaric (2001) note that a prosecutor's decision not to proceed with such cases can result in criticism that violence and intimidation do pay, and perpetrators remain at liberty to offend again. However, they argue that in other contexts people are not required to face personal risks to promote the good of the community.

## Discontinuing proceedings

The Director's responsibility includes assessing at the earliest possible stage whether the evidence supports the charges, whether there are reasonable prospects of conviction and whether the public interest in the case supports prosecution. A decision to terminate the proceedings may be made after the initial review of the file or at a later stage. Some cases are discontinued against victims' wishes, while others are withdrawn when the victim refuses to testify.

Cases may be discontinued by means of a "no bill" or a *nolle prosequi*. Technically there are differences between the two situations, although their outcome is essentially the same. Some reports distinguish between them (CMC 2003a), but they are often treated interchangeably (Willis 1984). A "no bill" is sometimes used to terminate a case before an indictment is presented to the court and often indicates that insufficient evidence exists for an indictment on a criminal charge. After an indictment has been filed, a case may be discontinued by entering a *nolle prosequi* – often referred to as a *nolle* – which is a formal notice that the Crown declines to proceed on some or all of the charges. This step is generally taken only under special circumstances or when the Director is satisfied that there is no reasonable prospect of conviction (Law Reform Commission of Victoria (LRCV) 1991). A *nolle* is entered either because the Director decides to proceed no further, or following an application by the defence to the Director. The *nolle* does not operate as an acquittal, but

effectively brings to an end the proceedings on the particular indictment presented to the court. It does not preclude initiation of fresh proceedings for the same matter, but in practice further action is rarely taken on the same offence (Willis 1984).

Refshaug (2002) notes that the various Australian guidelines have little to say about *nolles*, perhaps because the considerations are similar to those in the decision to commence proceedings. Because the basis for *nolles* is rarely publicised or open to scrutiny, it is not clear whether they are being entered for the right reasons. Having said that, a recent inquiry in Queensland highlighted the importance of clearly documenting the basis of the decision-making process (CMC 2003a, 2003b). In 2002 the Queensland Director declared a no bill in respect of sexual offence charges against Scott Volkens, a high-profile swimming coach. This decision led to extensive media coverage and two CMC investigations. The first investigation into the handling of the case did not find evidence of official misconduct, although it found that the basis of the Director's decision-making was unsatisfactory (CMC 2003b). The second inquiry into broader systemic issues considered, among other matters, the adequacy of DPP guidelines and procedures governing decisions in sex cases. Many submissions to the inquiry expressed concerns about the lack of transparency and possible inconsistencies in the decision-making process, or in dealings with the defence. The inquiry recommended the implementation of procedures to ensure that all decision processes are supported by documentation that is completed by the officer responsible (CMC 2003a).

Some data are available on the extent of *nolles* in the various jurisdictions. The New South Wales study, *Heroines of Fortitude*, reported that 26 per cent of the 233 hearings in the sample were no billed (Department for Women 1996). More recently, Stubbs (forthcoming) analysed data provided by the NSW Bureau of Crime Statistics and Research. In 2001, 24 per cent of sexual offence matters in the Higher Courts did not proceed to trial on the advice of prosecutors.

Approximately 35 per cent of sexual offence matters committed to the Queensland Higher Courts between 1994 and 2001 were discontinued either through *nolles* or no bills (CMC 2003a). Another Queensland study found that 40 out of 200 of sexual offence cases in the Magistrates and District Courts did not proceed (Briody 2002).

Studies of rape cases in Victoria have found that the proportion of *nolles* has steadily increased from under two per cent in 1988/89 (LRCV 1991), to five per cent of a sample of cases processed in 1992 and 1993 (Heenan & McKelvie 1997) and eight per cent of cases initiated in the two fiscal years from 1997 to 1999 (VLRC 2001).

An early multi-jurisdictional study found that the majority of persons whose cases were finalised by a *nolle* were completely discharged in relation to the incident from which the original charges arose. *Nolles* were filed for between five per cent and six per cent of all cases finalised in the Victorian, New South Wales and South Australian Higher Courts. The defendant was cleared of all charges by entry of a *nolle* in over 15 per cent of sexual offences cases in the South Australian courts (Willis 1984).

### Choice of charges and charge negotiations

Criminal acts often give rise to multiple possible offences, which may have summary and indictable versions. While police exercise the initial charging discretion, the Director can lay alternate or additional charges, or discontinue some or all of the charges. The charges must adequately and appropriately address the criminality alleged and enable the matter to be dealt with fairly and efficiently according to law.

Prosecutors may also negotiate concessions on charges and penalties in exchange for the promise of the defendant to plead guilty. In some Australian jurisdictions, either the prosecution or the defence may initiate charge negotiations, although other guidelines prevent prosecutors from initiating the process (Samuels 2002). Charge negotiation is not a matter of the victim's choice and, while it is desirable for the prosecution to seek her views before agreeing to plea arrangements, this is not always required. Seifman & Freiberg (2001) interviewed 50 Victorian barristers to determine the extent and form of charge negotiations. They found that the interviewees favoured three main categories of concessions in exchange for a guilty plea:

*The first category consists of the practice of "charge bargaining". It assumes two forms:*

1. *where the prosecution drop several charges in exchange for the defendant pleading guilty to a single (usually the most serious) charge or to a number of alternative offences (usually those which the prosecutor is able to justify on the facts of the case) and*
2. *where the prosecution agrees to withdraw the more (or most serious) charge(s) in exchange for a guilty plea...*

*The second most favoured category of concession exchanged for a guilty plea involves an agreed form of sentence recommendation. This may assume one of two forms:*

- (a) *the prosecution making a recommendation to the court that the accused receive a specific form of sentence disposition;<sup>7</sup> or*
- (b) *a modified form of (a) whereby the prosecution consents to a proposal on sentencing put forward by counsel for the defence...*

*The third most popular form of concession sought by the respondents was a favourable summary. This involves counsel agreeing to his or her client pleading guilty in exchange for an agreed summary of what is alleged to have occurred. (Seifman & Freiberg 2001: 70-71)*

Charge negotiations are a legitimate means of resolving criminal litigation. The process is widely viewed as fundamental to the efficient operation of an under-resourced system and comprises a relatively informal process that incorporates both adversarial and cooperative aspects. In a situation of uncertainty, the prosecution and defence exchange risks and benefits to achieve mutually satisfactory goals. Prosecutors avoid a costly trial and the risk of an acquittal, while the defendant avoids the risk of additional charges or facing a maximum sentence (Slovenko 1998). Still, the process is not universally favoured (see Appendix D). Advocates argue that the process of negotiating charges offers advantages to all actors and are "attractive, efficient, and ethical" (Palermo et al. 1998: 115; Wright & Miller 2002). Opponents argue that it subverts the system (Palermo et al. 1998) and favours "expediency over justice" (Slovenko 1998: 109).

Most Directors have made guidelines to minimise the disadvantages of charge negotiations, but because the public fact-finding procedures of the jury trial give way to behind-the-scenes discussions of evidence, it can appear that deals are being done. Safeguards have been imposed so that the guilty plea must have a factual underpinning and the charge must adequately reflect the criminality involved and allow scope for the Court to impose an appropriate sentence (Refshaug 2002; Samuels 2002). Still, the process is not open to review and negotiations may turn on factors that go beyond the strength of the evidence or the elements of the offence. Only the parties involved know the actual issues that determine the outcome (Wright & Miller 2002).

<sup>7</sup> This phrase is no longer in common use in the Australian jurisdictions. The term "charge negotiation" is a more accurate reflection of the process.

<sup>8</sup> This may not be common practice in other Australian jurisdictions (K. Archer, personal communication, 23 March 2004).

Consideration of victims' welfare is an appropriate and common reason for negotiating charges. The process is often prompted by the prosecutor's appreciation that:

- some victims may be further scarred by giving evidence;
- a reluctant witness forced to give evidence is unlikely to present well to a jury;
- a victim's evidence may be unpersuasive, even though there is no suggestion that the account is untrue;
- where there are multiple charges, the degree of criminality would probably not increase substantially if all charges were proved, but this would place an inordinate emotional burden on the victim; and
- in other cases, the evidence points to criminal conduct that constitutes an offence against different laws, but it is usually not appropriate to charge a person with a number of different offences in respect of one act. Negotiating charges may be preferable to facing the prospect of an acquittal on all charges (Samuels 2002).

Settling a case in this way can be to a victim's advantage, but without adequate communication victims can experience charge negotiations as a betrayal or secondary victimisation (Lees 1996; Madigan & Gamble 1989). In 2001, media reports sparked controversy over the New South Wales DPP's failure to communicate with a sexual assault victim about charge negotiations and about disparities between the agreed facts and the victim's original statement to police.<sup>9</sup> A subsequent review concluded that there was no evidence of widespread deviation from the guidelines, although they were not adequately followed in this particular case. The report noted that victims' understandings and expectations of the prosecution process may be misinformed and unrealistic, and can lead to bewilderment, suspicion and feelings of marginalisation. The consideration due to the victim means that it is the prosecution's responsibility to ensure that she is informed of the progress of proceedings, including charge negotiations, and fully understands her role in the proceedings (Samuels 2002). These recommendations are reflected in recent revisions to the guidelines.

The extent to which Directors alter charges from those originally preferred by the police has not been systematically studied. A recent Queensland study found that the most serious offence faced by the defendant in court was almost always the same as that laid by police. This may partially reflect the characteristics of the sample, which was skewed towards serious offences, with 71 per cent finally being charged as rape offences in the district courts (Briody 2002). The extent of charge negotiations across all types of cases is unknown, but it may be extensive (Samuels 2002; Seifman & Freiberg 2001). No Australian studies were located that deal specifically with charge negotiations in sexual assault cases.

### Concerns about prosecutorial decision-making

Recent reviews in New South Wales and Queensland indicate that by and large prosecution policies provide adequate guidelines for decision-making. There is room for improved record keeping about the basis of decisions and for better communication between prosecutors, police and victims (CMC 2003a; Samuels 2002). However, lack of transparency in the decision-making process means that there is little knowledge about the specific criteria considered in case-by-case decisions.

Prosecutorial discretion has been described as a matter "belonging to the twilight zone between law and morals" (Pound 1930 cited in Potas 1984: 38). Some authors argue that discretionary decisions in sexual assault cases "reflect a patriarchal foundation of reasoning and beliefs about gender roles in our present-day society. The judgments are not necessarily moral and certainly not absolute" (Madigan & Gamble 1989: 130). In particular, various researchers and other commentators have expressed concerns about the influence of extralegal reasoning on prosecutors' appraisals of victim credibility, the prospects of conviction, and ultimately on their discretionary decisions. The literature review engages more fully with these issues.

<sup>9</sup> *R v AEM (jnr) & AEM (snr) & KEM*



# Literature Review

Most of the research that examines prosecutorial decisions in sexual assault cases has been conducted in the United States. As previously noted, there are differences between Australia and the United States in respect of procedural requirements and the role of the prosecutor. This becomes most evident in the focus of previous studies, which tend to centre on prosecutors' decisions to file or reject charges against suspects, or if filing charges, whether to charge the defendant with a felony (indictable) or misdemeanour (summary) offence. Therefore, United States prosecutors may be filtering cases at a different level and based on different criteria from those used by Australian prosecutors. Despite these differences, there are many similarities in the broader cultural contexts of the two countries, particularly in terms of the way that socio-cultural understandings about women and their rights to sexual autonomy are reflected in the criminal justice system's manner of dealing with sexual assault (Lees 1996; Naffine 1994; Schulhofer 1998; Temkin 2002).

Prosecutorial decisions to proceed with or discontinue sexual assault cases are shaped by both structural and attitudinal factors. The research literature shows that to a large extent, the exercise of prosecutorial discretion is driven by legal considerations and by guidelines relating to evidentiary sufficiency, the prospects of conviction and the public interest. There is also evidence that organisational goals, systemic processes, personal understandings, and wider community attitudes towards women and sexual assault influence these important decisions.

## Legal and extralegal variables

One of the key issues examined in the research literature is whether prosecutorial decisions are primarily driven by case-related, legal variables, or by extralegal variables. Legally relevant variables include the statutory elements of the offence; the severity or seriousness of the crime; the type, strength and admissibility of the evidence; and the culpability of the defendant. Extralegal variables are thought to come into play as a result of ideological power struggles and serve to perpetuate existing social stratification systems. They include socio-demographic and personal characteristics of the victim and the defendant; the relationship between them; and subjective assessments about the victim's character and reputation, particularly any deviation from normative gender and moral codes (Kerstetter 1990; Kingsnorth et al. 1998).

The distinction between legal and extralegal variables is by no means unproblematic. The terms are not always defined precisely or consistently and some variables may be assigned to either category, or to a third category of quasi-legal factors. Moreover, researchers or readers from legal and non-legal backgrounds could take different views about the most appropriate classification for a given variable. The following example from a Scottish study illustrates the problems of the legal/extralegal dichotomy:

*A rape case may be dropped by the prosecutor because there is no evidence of penetration. This would be a decision based on **legal** criteria because it is an element of the crime of rape that there has to be penetration. Such a decision could be characterised as being founded on **quasi-legal** criteria if made because the victim had no visible signs of injury or because she delayed reporting the crime until the next day. Such **quasi-legal** criteria are not constituent components of any definition of the crime of rape but could be used to infer or deduce the existence of legal criteria such as resistance and consent. **Extra-legal** criteria are factors which are extraneous to the case itself and indeed irrelevant to deciding upon the actual facts of the case. They might include such factors as the financial situation of the accused in the case, the sexual habits of the complainant or her general morality. (Chambers & Millar 1986: 28)*

Given the difficulty of assigning variables to these dichotomous categories, Spohn and her colleagues have undertaken a number of studies that analyse how prosecutors' case processing decisions are influenced by three groups of variables. These are:

- defendant characteristics, such as race, age and prior convictions;
- case characteristics, including corroborating evidence or the location of attack; and
- victim characteristics, which are differentiated into: background characteristics, such as age and race; and "blame and believability" factors relating to victims' moral character, risk-taking behaviour, resistance to the attacker and time taken to report the offence.

Blame and believability factors tend to be invoked in cases involving "non-traditional" women who do not adhere to gender stereotypes. They result in suspicion of victims, doubts about their credibility and victim blaming. The frequency with which they are associated with case screening decisions indicates that gender stereotyping often comprises an implicit, perhaps unconscious, element of prosecutors' assessments (Horney & Spohn 1996; Spears & Spohn 1996;

Spohn, Beichner & Davis-Frenzel 2002; Spohn & Horney 1993). Some prosecution guidelines acknowledge that legal factors may not be sufficient to warrant presenting an indictment:

*The reasons calling into question the utility of presenting an indictment when there is a prima facie case may be divided into those that are strictly legal and those that are social in character. An example of a legal reason is where there is no reasonable prospect of conviction; an example of a reason that is social in character is the age of the offender. (Director of Public Prosecutions Queensland 2000: 57)*

It is assumed that the impact of social factors is minimised by the careful selection of jurors, the rules of evidence, and procedural laws that limit questions by the defence and the prosecution (Briody 2002). Still, there is ongoing debate about the extent to which victim characteristics and stereotypes about “real” rapes and “genuine victims” impact on prosecutors’ decisions in sexual assault cases. This debate addresses the important question of whether women who deviate from dominant gender norms are likely to be judged as less deserving of protection under the law, or whether the effect of victim characteristics is mediated by other factors, such as the nature of the case.

## Studies of prosecutorial decision-making

There is empirical evidence that case processing decisions in sexual assault cases, as in other types of cases, are largely influenced by legally relevant variables related to the ability to secure a conviction, such as the strength of the evidence or the seriousness of the crime. For example, Myers and LaFree (1982) compared sexual assault with other violent crime and property crimes and found that, when factors such as victim and defendant characteristics were controlled for, there were few significant differences in decisions to prosecute or dismiss cases. Any differences in the processing of the two types of offences were based on evidentiary considerations and reflected the nature of evidence needed and the unique difficulties of prosecuting sexual assaults.

The studies reviewed below demonstrate that cases that proceed to trial tend to be those that are the most serious and have the strongest evidentiary basis. At the same time, there is substantial evidence that that prosecutors’ case decisions are also open to influence by factors that are extraneous to the legal elements of the case, such as race, the relationship between the victim and the defendant, the defendant’s criminal history and the victim’s promptness in reporting the offence to police.<sup>10</sup>

A Home Office study found that prosecutors discontinued just over a quarter of cases referred by police to the Crown Prosecution Service (CPS). The majority were dropped on evidential grounds and the remainder on public interest grounds. The latter involved non-stranger cases where the victim was reluctant to attend court and a summons to force attendance was considered inappropriate. Cases involving intimates were most likely to be discontinued due to victim withdrawals and insufficient prospects of conviction (Harris & Grace 1999).

In the United States, Frazier and Haney (1996) found that the majority of suspects referred to prosecutors were charged and convicted. Attrition at the prosecution stage was usually due to insufficient evidence and prosecutorial decisions were most affected by the severity of the assault, so that only the strongest and most serious cases proceeded to trial. Suspects in stranger and acquaintance cases were equally likely to be charged, plead guilty, or go to trial. Because suspects in acquaintance rapes were more likely to be identified and questioned, these cases were more likely to be referred to prosecutors. However, there is evidence that acquaintance cases may be taken less seriously across the criminal justice system: they tended to result in less serious charges, fewer convictions and more lenient sentencing.

Kerstetter (1990) found that prosecutors’ decisions to file felony charges were predominantly associated with the statutory elements of the crime, the seriousness of the offence and evidentiary considerations. In stranger cases, the decision not to prosecute was predicted by evidentiary factors such as the victim’s inability to identify the assailant, or delayed reporting. The decision to file charges was predicted by instrumental factors, such as the victim’s willingness to prosecute, which are necessary to bring about the processing of a complaint, but are not totally within officials’ discretion. Weapon use was the only significant predictor of the decision to prosecute in acquaintance cases. Weapon use has evidentiary dimensions and supports the victim’s claim that she did not consent to sexual activity. However, prosecutors were more likely to deny felony charges when the victim and defendant were acquainted. Evidentiary matters are most complex in these cases.

Kingsnorth et al. (1998) found that decisions to prosecute, reject or dismiss a case, or to resolve the case through charge negotiation, were influenced by legally relevant variables such as witness cooperation, offence severity, and the defendant’s prior charges and convictions for indictable offences. The racial/ethnic composition of the victim/defendant dyad did not predict prosecutors’ decisions,

<sup>10</sup> In most Australian jurisdictions, evidence of recent complaint enhances the victim’s credibility but does not prove the commission of the offence (e.g. Wood 2003). This rule may differ in other countries.

but cases involving white perpetrators and white victims led to a greater number of charges than any other racial/ethnic combination. These findings may indicate that the cases in the sample were more serious in nature, or they may reflect issues stemming from socio-economic status. For example, victims with a higher socio-economic status may be more assertive in pressing charges, or law enforcement officers may perceive these incidents as more serious.

In another study, Kingsnorth and colleagues (1999) found that the only significant predictors of prosecutorial decisions to proceed to trial were legally relevant variables related to the ability to obtain a conviction. At the same time, stranger cases were almost twice as likely to go to trial than non-stranger cases, but non-stranger cases were more likely to proceed to trial when there were accomplices. The decision to go to trial rather than negotiate a plea was influenced by the criminal history of the defendant. As factors such as criminal history or accomplices are likely to increase the sentence if convicted, these defendants may prefer to take the chance of being acquitted at trial. Victims in acquaintance cases were held to a higher reporting standard, as delayed reporting was related to decisions not to proceed in non-stranger cases only. This points to a concern with victim credibility rather than a loss of evidence caused by delay.

Spohn and colleagues (2002) found that there were important differences between cases that proceeded and those that were rejected. Prosecutors were less likely to reject or dismiss charges if the suspect used a weapon during the attack, if the victim was injured, if there were witnesses to corroborate her testimony, or if the assault took place somewhere other than the victim's or suspect's home. Cases were less likely to be prosecuted if the victim was from a minority racial group, if the suspect was black, if the victim was aged between 13 and 16 years, and if there were questions about her moral character. Stranger cases were substantially less likely to be prosecuted than cases involving other types of relationships.

There is some evidence that race/ethnicity has an effect on prosecutorial decisions, but the race of the individual defendant or victim appears to be less important than the racial composition of the dyad. In addition, race interacts with other variables, such as prior relationship or victim behaviour, in complex and sometimes contradictory ways.

In the United States, La Free (1980) found that black men arrested for raping white women were charged with more serious offences and received harsher sentences than defendants in intra-racial cases. By contrast, Loh (1980) found that while most prosecutors denied that race was a factor in their charging decisions, the decision to *decline* prosecution was predicted by a white victim and a minority suspect, an absence of aggravating circumstances, the use

of moderate physical force and a lack of corroborative evidence. The latter three factors diminish the prospects of conviction, but there is no adequate explanation for the failure to prosecute cases involving black suspects and white victims.

Spohn et al. (2002) found that cases were more likely to be rejected where the victim was a racial minority or the suspect was black. It is possible that interactions with unidentified confounding factors are implicated. Spohn and Spears (1996) found that prosecutorial and sentencing decisions were impacted in a complex manner by interactions between race and other factors. Blacks charged with sexually assaulting whites were more likely to have all charges dismissed prior to trial, but received longer sentences than for other racial dyads for those cases that did proceed. Black men charged with sexually assaulting white women who engaged in risk-taking behaviour at the time of the attack were treated more leniently than any other type of offender. They also found that the racial composition and prior relationship of the pair interacted, resulting in a greater likelihood of charges being dismissed and less severe sentences for black offenders charged with assaulting black acquaintances.

## Physical evidence

Different types of physical or forensic evidence may be used as evidence of non-consent, ranging from the presence of genital and other bodily injuries, to deoxyribonucleic acid (DNA) evidence from semen or other biological samples. However, juries can be confused by conflicting accounts put forward by doctors called for the prosecution and the defence, or by the absence or presence of particular types of physical evidence. For example, consensual sex can cause injuries under some circumstances, while non-consensual intercourse may leave no evidence of trauma. Evidence of semen may be absent due to late reporting, or because the accused used a condom, did not ejaculate, or ejaculated away from the victim's body (Edwards 2003).

DNA evidence can be a significant predictor of prosecutorial decisions, although it has no probative value where consent is the issue at trial, as it only confirms the suspect's admissions that sexual intercourse took place. Briody's (2002) study of rape cases in Queensland found that cases where DNA evidence was available were more than twice as likely to reach court than a matched non-DNA control group, but DNA evidence was only one factor influencing prosecutors' decisions. They were more likely to discontinue cases if the defendant made no statement to police, if the offence was less serious than rape, or if the victim had used drugs or

alcohol at the time of the attack. These factors are likely to be related to the strength of the case, because:

- successful prosecution is more difficult where there is insufficient admissible evidence;
- a defendant who does not make a statement has time to prepare a defence, usually based on consent; and
- the credibility of a victim who had been using substances could be undermined during cross-examination.

Various studies have found that physical evidence, such as injury or genital trauma, is significantly associated with prosecutors' decisions to file charges (e.g. Frazier & Haney 1996; Jeffords 1984; Spohn & Holleran 2001) and with the likelihood of a guilty verdict (Grace, Lloyd & Smith 1992; Henning 2000; LRCV 1991). These results support the view that prosecutorial decisions are predicted by the severity of the offence, evidentiary sufficiency, or by reduced discretion in serious cases.

However, medical findings from an examination performed after a sexual assault may be either extremely important forensically or almost totally irrelevant. The majority of victims sustain minor, if any, physical or genital injuries or other visible signs of sexual assault (Lincoln 1996). Circumstances that can lead to a lack of injury include forced compliance through threats and weapon use; 'freezing' through fear; drug-facilitated sexual assault; and delayed reporting, which enables injuries to heal (Edwards 2003). The absence of injury allows the defence to argue that the defendant believed the woman was consenting because she did not resist and uninformed juries accept absence of injury as evidence of consent. A prosecutor who is not knowledgeable about sexual assault may fail to rebut allegations that sexual assault should result in physical and vaginal injuries or to adequately emphasise that, in the face of violence and threats, women and men are often paralysed by fear, and that lack of resistance can be an instinctive, life-preserving tactic (Lees 1996).

Henning notes that "evidence of injury might reasonably be expected to provide quite cogent objective evidence of non-consent" (2000: 46). However, forensic evidence, including major injury to the face and body, does not necessarily ensure a conviction. Even where evidence of injuries sustained during the attack is supported by independent evidence such as photographs or statements from medical practitioners or witnesses, defendants are often not deterred from claiming consent or mistaken belief in consent during rough or sado-masochistic sex (e.g. Henning 2000; Lees 1996; LRCV 1991). Rathus (1994) comments that as long as the belief exists that sex and rape are difficult to distinguish, physical injuries and bruising can be construed as an

outcome of rough but normal "love play". Where the defence is consent, violence is reconstructed as sex. Sexual violence becomes normalised as "a sex parody, a pastiche of soft pornographic representation... to allow for the maximum opportunity for acquittal" (Edwards 1996: 346). While forensic evidence must be given due weight, there are good grounds for arguing that greater weight should be given to the complainant's testimony as to the absence of consent, rather than to physical indicia pointing to the "presence of dissent" (Lees 1996: 116).

### Victim characteristics

There is persuasive empirical evidence that victim characteristics are influential factors in prosecutors' assessments of the prospects of conviction and therefore in their case processing decisions. This has raised concerns about the role of stereotyping in prosecutorial decision-making.

Estrich (1987) has put forward the influential argument that police, prosecutors and the judiciary do not treat all women and all sexual assaults equally. She argues that decisions in rape cases are not based on an indiscriminate, sexist mistrust of all victim/survivors, but are mediated by an interaction between the type of rape alleged and how closely victims conform to a set of characteristics attributed to "genuine victims". From this perspective, a victim's believability is evaluated by distinguishing between "aggravated" and "simple" rapes, which differ on the characteristics of the attack and the victim-offender relationship. Aggravated rape ("real" rape) features extrinsic violence, such as weapon use, threat with a weapon, or physical force, and is perpetrated by a stranger or by multiple assailants. In a simple rape, a sole perpetrator who knows the victim carries out the assault without using weapons or physical force. The relationship between the victim and offender determines whether resistance is required or non-resistance is plausible. Resistance is not required in "inappropriate" relationships where it is presumed that sexual access would be denied, so suspicion falls only on women in potentially appropriate relationships, who might be confused, ambivalent, or having belated regrets about sexual activity. The profile of the "genuine victim" has been summarised as:

*a woman whose moral character is not in question, who did not engage in any type of risk-taking behavior at the time of the incident, who was raped by a stranger, who demonstrated her nonconsent by both screaming and physically resisting her attacker, and who reported the crime to the police immediately.* (Spears and Spohn 1996: 192)

Few victims meet these criteria. Estrich (1987) argues that victim characteristics, behaviour, background and morals are more important in simple rapes, as the defendant does usually not contest the fact of sexual intercourse and consent is the central issue of the trial. Without evidence of physical force, victims of simple rapes are less likely to be believed and more likely to be judged and blamed for their own victimisation (Estrich 1987).

Bryden & Lengnick (1997) advance a similar argument, noting that the issues posed for the prosecution and defence are quite different when the victim and the defendant are strangers and when they are acquainted. In the case of strangers, the assailant's identity assumes centrality. As there is an inherent lack of credibility in a claim that a woman consented to sex with a man she did not know, the defendant tends to acknowledge that a sexual assault occurred, but argues that he was misidentified. There is usually nothing to be gained by impugning the victim's character. More often however, victims and defendants in sexual assault cases have a prior or current social or sexual relationship. Therefore, the central issue of most trials is whether the sexual activity in question was consensual and/or whether the defendant believed the victim was consenting. These cases almost invariably involve a challenge to the victim's credibility, character and recall, as the case for the defence is strengthened if the jury can be persuaded that she is lying, vindictive or promiscuous. Cross-examination questions often intrude on her personal circumstances and way of life and may be designed to suggest that her behaviour led the defendant to believe that consent was given (HMCSI 2002).

Spears and Spohn (1996) found that, for adolescent and adult victims, "blame and believability" characteristics were stronger predictors of prosecutors' charging decisions than the strength of the evidence. Prosecutors were significantly more likely to file charges if the victim reported the offence within an hour and there were no questions about her moral character or behaviour. Qualitative analyses of investigators' reports supported the statistical findings. They were more likely to cite victims' lack of credibility or unwillingness to cooperate as rationales for not filing charges than they were to cite insufficient evidence. The results are consistent with assertions that women who violate gender norms will not be seen as "genuine victims" and that prosecutors use victim characteristics to avoid uncertainty by screening out cases where the prospects of conviction are questionable (Albonetti 1987).

Support for the theory that victim characteristics assume greater importance in acquaintance rapes than stranger rapes is equivocal. Spohn and Horney's (1993) research in Detroit found a significant increase in the number of acquaintance cases proceeding to trial following reforms to the laws of sexual assault. This may indicate that legal reforms have resulted in changes in screening criteria used by prosecutors, leading to a climate that facilitates prosecution of cases that would previously have been rejected.

Horney and Spohn (1996) found that neither "blame and believability" characteristics nor the type of rape predicted prosecutorial decisions: aggravated rapes were no more likely than simple rapes to proceed to trial or be rejected by prosecutors. These findings may indicate that in some jurisdictions rape law reforms have resulted in decreased suspicion of sexual assault victims and increased sensitivity to different types of sexual assaults. Cases that do not resemble the "real" rape or "genuine victim" stereotypes are being prosecuted and some are leading to convictions.

Spohn & Holleran (2001) found that charging decisions for an entire sample of cases were based on a combination of legally relevant and irrelevant variables, including:

- victim characteristics, such as gender, race, age, resistance, recent report, moral character and risk-taking behaviour;
- defendant characteristics, such as age, race and prior criminal record; and
- case characteristics, such as the seriousness of the offence and the strength of evidence;
- but not the victim/defendant relationship.

These findings do not support the view that crimes between people known to each other are held to be less serious than those perpetrated by strangers. However, the researchers concluded that prosecutors do not necessarily use the same criteria to determine the likelihood of conviction for cases in different relationship categories. Spohn and Holleran (2001) found that the effect of victim characteristics on prosecutorial decisions was more important when the victim and defendant were known to each other, a finding that supports the views of Estrich (1987) and Bryden and Lengnick (1997). In stranger cases, charging was more likely in the presence of legally relevant variables, but was not influenced by the victim's character or behaviour. In acquaintance cases, charging was significantly less likely if there were questions about the victim's reputation, character, or behaviour at the time of the incident. When the suspect was or had been an intimate partner, charging was more likely if the victim was injured

during the attack and less likely if she had engaged in risky behaviour or physically resisted the attack. These findings reflect the fact that in stranger cases, conviction usually hinges on the prosecutor's ability to prove that the defendant was correctly identified. In non-stranger cases, the defendant typically claims consent or fabrication and the prosecutor's assessment of the case relies on factors that could cause jurors to question the victim's credibility or blame her for the attack (Spohn & Holleran 2001).

Comparison of two Home Office studies that examined data recorded in 1985 (Grace, Lloyd & Smith 1992) and 1996 (Harris & Grace 1999) shows that the total number of recorded rapes increased threefold over the period, but the proportion of stranger rapes decreased from 30 per cent to 12 per cent. This change was accompanied by markedly fewer cases reaching court or securing convictions. Both studies found that attrition was related to evidentiary matters, which are most complex in cases where the victim and the defendant are acquainted and where the defence of consent is more likely to succeed if there has been prior consensual sex.

## The context of prosecutorial decision-making

Prosecutorial discretion is exercised within "the organizational context of the prosecutor's office, the institutional structure of the court system, and the political context of the community" (Frohmann 1997: 535). These structural factors have the potential to influence case screening in sexual assault cases, which have "unique evidentiary issues and may involve victims who are reluctant to prosecute or whose credibility is in question" (Spohn et al. 2001: 16). Within this context, women and victims of sexual offences have historically been viewed as categories of "suspect witnesses", whose evidence was potentially unreliable. Specific evidentiary rules and judicial warnings were developed for sexual assault trials. These rules have been extensively criticised for presenting major barriers to the prosecution and conviction of sexual assault (e.g. Boniface 1994; Doyle & Barbato 1999; Taskforce on Women and the Criminal Code 2000; Temkin 2002; Wood 2003).

Prosecuting agencies are charged by statute to fulfil particular obligations to the community, so prosecutors' decisions and their interactions with victims are routinely oriented towards institutional requirements to proceed with cases that have a reasonable prospect of conviction (Gomme & Hall 1995; Martin & Powell 1995). Research findings indicate that prosecutors' discretionary decisions are oriented towards avoiding uncertainty in pursuit of successful outcomes

(Albonetti 1987; Spohn & Holleran 2001). They are motivated to reject cases because the organisational requirement of obtaining a conviction conflicts with their knowledge that they are unable to control the behaviour of the defendant, the defence counsel and the jury. As a result, the probability of proceeding with a prosecution is significantly increased by the presence of legal and extralegal factors (or case, victim and defendant characteristics) that boost the likelihood of success and decrease uncertainty over potential outcomes. In line with this theory, there are indications that case characteristics are determinative of decisions in more serious sexual assaults, where prosecutors are likely to have less discretion and fewer opportunities to consider extralegal factors. Victim characteristics seem to be more influential when the charges are less serious or where the prospects of conviction are less certain, such as where there is a prior relationship between the victim and the defendant (Spohn & Holleran 2001).

The finding that prosecutors are more likely to proceed with cases when there are reasonable prospects of conviction and to reject cases when conviction seems less likely is not problematic *per se*. However, contemporary prosecutors are faced with an increased number of cases where the parties are known to each other, the defendant is less likely to plead guilty and the prospects of conviction are reduced (Harris & Grace 1999; Kingsnorth et al. 1999; Spohn & Holleran 2001). In an under-resourced criminal justice system that emphasises efficiency, prosecutors can become preoccupied with convictability. In attempting to avoid uncertain outcomes, they may look for weaknesses and reasons to reject cases, rather than trying to proactively build stronger cases (Frohmann 1991, 1998; Spears & Spohn 1996; Temkin 2002).

Contemporary prosecutors work in bureaucratic organisations at a time of considerable social and legal change. These changes contribute to role overload, a state that reflects the interaction of workplace conditions with personal and professional capacities. Quantitative overload occurs when prosecutors are faced with responsibility for a wide range and volume of duties, extensive court backlogs, insufficient time, and scarce material resources. Qualitative overload occurs when prosecutors are unable to carry out work-related tasks satisfactorily within these conditions, due to the complexity of the work and the high skill levels required to prosecute cases successfully (Gomme & Hall 1995). In sexual assault cases, qualitative role overload is compounded by a number of factors, including:

- the changing nature of the work;
- the intricacies of procedural, evidentiary and substantive laws;

- ongoing reforms to existing statutes;
- creation of new legislation;
- the sensitivity of cases now being brought before the courts;
- intense public interest; and
- increased calls to protect and cater to the needs of emotionally distraught victims.

To successfully prosecute sexual assault cases, prosecutors now require a broader base of knowledge and expertise, increased time to prepare cases and an added degree of emotional resilience. Role overload results in role strain, which manifests through a range of physical and psychological symptoms, from demoralisation and insomnia to mental burnout and reduced quality of social interactions. Because burnout and stress are not conducive to effective performance, role overload and role strain also impact on the functioning of the criminal justice system and are linked to difficulties in retaining prosecutors. In an overtaxed system, cases are often allocated to prosecutors who are available, rather than those best equipped to process them. This increases the chances of unsuccessful prosecutions and the likelihood of appeals that might otherwise have been unnecessary (Gomme & Hall 1995).

### Victim credibility

Organisational concerns with public accountability, convictability, smooth case processing and the need to effectively allocate scarce resources, mean that prosecutors have a “downstream orientation” (Frohmann 1991: 535). Their decision-making processes are often oriented towards anticipating how a judge and jury will respond to a case. In particular, their assessments of the probability of a guilty verdict are underpinned by their ability to account for jurors’ biases and construct a plausible account that enables jurors to understand the events from the victim’s perspective (Frohmann 1997).

Australian prosecutors are required to consider victim credibility in their case decisions and it is crucial in sexual assault cases that come down to the word of the victim against that of the defendant. As the probability of conviction relies on the victim’s ability to articulate the events and convince a jury that a crime occurred, prosecutors will be reluctant to proceed if her credibility, character or behaviour is questionable or open to adverse inference. Assessments of convictability may therefore be grounded in predictions about the way that jurors will evaluate the victim’s characteristics (Spohn & Holleran 2001). This is not inherently problematic, but what is of concern is that legal judgments about credibility may be filtered through stereotypical images

about “real rapes”, “appropriate” victim behaviour, victims’ blameworthiness, or assumptions about the nature of heterosexual relationships (Stanko 1982).

Credibility is not an objective trait that exists independently of prosecutors’ assessments; it is actively constructed and maintained through ongoing interactive processes and “is a socially based resource from which prosecutors draw legally relevant information” (Stanko 1982: 73). Prosecutors’ screening decisions are not based solely on substantive law, but on subjective assessments about the prospects of conviction. Stanko argues that these assessments are filtered through various social and contextual lenses and are substantially impacted by stereotypical assumptions about women and their behaviour as women and victims. In particular, the victim’s respectability is an indication of her credibility as a witness. Other researchers have found that victims are aware of and take steps to present themselves in terms of what is perceived as a plausible victim, avoiding representations that could be damaging to their case (Ekström 2003; Konradi 1996).

Ekström notes that while both victims and defendants are assessed in terms of character and credibility, the standards for qualifying as credible are distinct. His archival research showed that the victim was judged against “a narrowly defined *ideal femininity*, while the man was weighed up against a much wider idea of *male normality*” (Ekström 2003: 218). Arguably, it is more difficult to live up to an ideal than to meet the criteria for normality:

*Credibility in rape cases thereby became a juridically acknowledged quality, which was won on moral merits. Although the court rarely spoke in the value-laden terms that occurred so often in the men’s own stories and in the defence counsel’s rhetoric, the fact that both general good behaviour (for the men) and the more sexualised morality (for the women) were among the things that the police and prosecutor were anxious to inquire about meant that the moral categories nevertheless entered the courtroom through the back door.* (Ekström 2003: 215)

### Willingness to prosecute

The victim’s willingness to prosecute is an important but not necessarily determinative factor in official decisions to invoke the criminal law. However, victims’ views may diverge from the course suggested by the guidelines and by the prosecutor’s assessment of the case. Some victims want the case to proceed when public interest considerations point to the desirability of withdrawal. While they might be disappointed by charge negotiations or discontinuance, “trials are not run for therapeutic reasons and to proceed in such circumstances would constitute a blatant waste of public

resources” (Flatman & Bagaric 2001). Others are reluctant to pursue cases that have a strong evidentiary basis and may be uncooperative or hostile witnesses if forced to give evidence.

Where there is a prior relationship between the parties, prosecutors may assume that the victim will prioritise the relationship over legal redress and research results support the view that victim withdrawals are more likely when the defendant is an acquaintance or an intimate partner (Grace, Lloyd and Smith 1992; Harris & Grace 1996). There are a number of reasons why women are reluctant to proceed with prosecution and even why the decision may in some cases be considered a rational course of action (Lievore 2003; Spohn et al. 2002). Still, some women view testifying as integral to regaining control over their lives and those who are determined to prosecute must sometimes overcome stereotypes and convince the prosecutor that they are willing to pursue the matter fully (Fitzgerald 1997; Stanko 1982).

While the victim’s willingness to prosecute is often regarded as “an unproblematic, extrasystemic factor” (Kerstetter & van Winkle 1990: 269), it is more complex than a simple matter of volition. One study found that willingness to pursue prosecution increased in the presence of evidentiary and instrumental factors, such as whether there were witnesses to the offence, the defendant was in custody, or where aggravating factors added to the seriousness of the incident (Kerstetter 1990). Other research has demonstrated that victims’ choices are influenced and sometimes manipulated by police and prosecutors, although this should not be taken to suggest that they are unable to independently choose their course of action (Kerstetter & van Winkle 1990).

When prosecutors determine that a case has reasonable prospects of conviction, they need to establish an environment of trust to overcome victim ambivalence. When there is a likelihood that the case will be rejected or discontinued, they must establish a legal rationale for this decision and may subtly invite the victim to choose not to proceed. Rather than telling victims what to do, prosecutors construct persuasive arguments and shape victims’ choices by reducing their options (Frohmann 1998). As shown in Table 1, this objective can be achieved in various ways, although it should be stated that prosecutors might be acting altruistically in at least some instances. A complainant who voluntarily withdraws from prosecution is saved the embarrassment of being told that a jury would not find her a credible witness, even if the prosecutor believes she is telling the truth.

## Justifications for rejecting cases

Frohmann’s (1991, 1997) qualitative analyses of prosecutors’ justifications for case rejection led her to conclude that prosecutors who are concerned with case convictability actively look for factors that discredit victims and provide a legal basis for rejecting cases. To assess whether a victim will be seen as believable by a judge and jury, prosecutors draw on a repertoire of personal and cultural knowledge, or *typifications* about:

- rape scenarios, or how sexual assaults are committed;
- victims’ post-incident interactions with offenders;
- rape reporting; and
- general post-rape demeanour.

Although it is now recognised that there are many reasons why disclosing sexual assault is a difficult step to take and that there is no “typical” reaction to sexual victimisation (see Lievore 2003), a prosecutor might disbelieve a victim’s allegations based on her “atypical” behaviour after the incident; because she delayed reporting the attack to police; or because her demeanour deviates from that of a “genuine victim”. Prosecutors also look for inconsistencies in victims’ accounts of the incident, for ulterior motives that suggest fabrication, or view the victim’s account with suspicion – even when there is no doubt that a sexual assault was committed – perhaps because she is trying to hide her own criminal behaviour, such as prostitution or drug use (Frohmann 1991). Spohn and colleagues (2002) also found that prosecutors often used these techniques to justify case rejection. In a number of cases in their study, rationales for case rejection centred on the victim’s lack of cooperation, rather than on assessments about her character or behaviour.

In another study, Frohmann (1997) found that prosecutors find reasons to reject cases through the interplay of person and place descriptions. Characteristics associated with suburbs, towns or regions often invoke racial and class identities of residents, with the result that place and person interact to construct moral character. Prosecutors evaluate whether cultural distance between jurors and victims is likely to cause difficulties for juries in making accurate judgments about the victim and case facts. These differences may constitute grounds for case rejection due to diminished prospects of conviction. These micro-level interpretive practices have significant sociolegal implications, because they reinforce institutionalised inequities and ideologies. By pre-empting the views of the jury, prosecutors exclude from justice victims who, on the basis of class, race, gender, sexuality, socio-economic status or other extralegal variables,



Table 1: Prosecutors' Strategies for Achieving Victim Cooperation

STRATEGY	INTENTION TO PROCEED	INTENTION TO REJECT
<b>DISPLAYS OF CONCERN</b>	<b><i>Physical safety and emotional well-being</i></b>	
	Mobilise legal resources to protect victim from retaliation  Suggest counselling for altruistic reasons (recovery from trauma) and organisational interests (traumatised victim does not make a good witness)	Withhold offer of protection or information about services  Build on victims' fears by not responding to concerns about retaliation
<b>SPECIFYING DOWNSTREAM POSSIBILITIES</b>	<b><i>Share knowledge of legal system, possible case outcomes and consequences</i></b>	
	Dispel fears about the process  Tutor victim on how to testify/be a good witness	Highlight difficult or embarrassing aspects of the process  Frame potential defence strategies and juror's interpretations of case facts as legal rationale for case rejection
<b>SHIFTING PARADIGMS</b>	<b><i>Translate victims' personal experiences into the legal paradigm</i></b>	
	Interview focuses on specific details salient within the legal framework, passing over 'non-criminal' acts	
	Victim is socialised into the legal system by being helped to 'see' through a legal lens  Victims' affective and personal concerns are secondary to organisational concerns	

Source: Frohmann 1998

are unlikely to be viewed as "genuine victims". As a result they fail to challenge and expand the bounds of convictability by dealing with actual juries to learn how to win believable but risky cases.

A review of United Kingdom CPS files highlights the way that various attitudinal and structural factors come together to influence prosecutorial decisions and hinder the success of the prosecution. The evaluation found that not all cases were reviewed consistently, that relatively few case files contained adequate review notes on the reasoning behind decisions, and that some files contained inappropriate comments that reflected prosecutors' value judgments of the victim's credibility (HMCPSI 2002). Interviews with prosecutors highlighted various factors that influenced case decisions:

- Decisions not to proceed were influenced by poor police investigations and the quality of evidence contained in the file submitted to the CPS.
- Instructions to counsel were often poorly prepared. Summaries of the issues and instructions on the acceptability of pleas were often inadequate; corroborating evidence or details of a defendant's previous conviction for rape as evidence of propensity were not included; and case analysis contained inappropriate language that cast aspersions on the victim's character.
- Prosecutors generally examined each case on its own merits, looking for flaws or weaknesses. The presence or absence of supporting evidence was not necessarily a major determinant of the decision to prosecute or not. In effect, they often looked for reasons to discontinue cases, rather than looking for strengths and ways of developing a case to proceed.
- Mistaken analyses of the central issue of the case often confused consideration of which evidence should be led. Medical evidence was not adequately assessed or exploited in cross-examination and victims' post-rape behaviour continued to be evaluated against stereotypical views of "logical, common sense and natural responses to a crime" (HMCPSI 2002: 55).

## Limitations of previous research

Prosecution policies and guidelines are not intended to be prescriptive, but to encourage consideration of the facts in each case. If the organisational context is such that prosecutors are overly focused on the prospects of conviction, and if their judgments about convictability are based largely on predictions about jury reactions to victims, they may be too ready to find reasons to discontinue cases, and not ready enough to look for ways of strengthening the evidentiary basis or challenging juror's preconceptions. Arguably, this is not in the best interests of the community.

Most studies that have examined decision-making processes have been conducted in the United States and it is not clear whether the findings can be generalised to the Australian criminal justice system due to differences in approaches to criminal prosecutions and in the role of the prosecutor. United States studies have tended to focus primarily on prosecutors' decisions to file charges or reject cases, but less attention has been given to decisions to discontinue cases after charges have been filed. It cannot be assumed that the same variables are implicated in case rejection at initial screening and discontinuance at subsequent stages, as cases rejected in the early stages are less visible or subject to scrutiny. There is also relatively little information available about the extent and appropriateness of charge negotiations in sexual assault cases. Accurate charging decisions are required to ensure appropriate criminal sanctions. For offenders at high risk of sexual recidivism, charge negotiations that result in fewer and less serious charges may lead to inadequate sentencing (see Lievore 2004).

There are some very informative Australian studies that provide quantitative data on cases that are screened out of the criminal justice system, but they tend to focus on the points at which filtering occurs and on attrition rates, rather than on prosecutors' decision-making processes (Heenan & McKelvie 1997; LRCV 1991; VLRC 2001). These studies are also restricted to single jurisdictions and, given jurisdictional differences in substantive, procedural and evidence laws, it is difficult to generalise the results to other states and territories. Some of the studies were conducted a number of years ago and it is possible that prosecutors' treatment of sexual assault victims may have been influenced by legislative and attitudinal changes during the interim. Kerstetter (1990) notes that quantitative analyses cannot capture gradations of human interactions that also impact on official decision-making. There is a need for more research that investigates the reasons or justifications for prosecutors' decisions, as documented in Frohmann's (1991, 1997) qualitative studies and a recent multiple-method study conducted by Spohn and colleagues (2002).

Frohmann's (1997) analysis of the interaction of person and place raises concerns about racial discrimination in prosecutorial decisions. There is a notable gap in information about the prosecution of sexual assault among minority racial and ethnic groups in Australia. While Indigenous women are over-represented as victims of violent crime and women from other culturally and linguistically diverse groups may be more vulnerable to sexual violence, these groups are also less likely to seek legal redress (Department for Women 1996; Lievore 2003).

## Research focus and objectives

This study focuses on prosecutors' discretionary decisions to proceed with, discontinue, or engage in charge negotiations in cases involving indictable sexual offences against adult victims. The aims of the research are to:

- establish attrition and conviction rates for a sample of cases referred to the Director of Public Prosecutions in five Australian jurisdictions;
- analyse and describe key variables that predict prosecutors' decisions to proceed with or discontinue prosecution;
- analyse and describe characteristics of cases that are open to charge negotiation; and
- analyse prosecutor's accounts of the impact of extra-legal variables on case processing decisions.

# Case File Survey: Methods and Results

While some caution is warranted in generalising the results of overseas studies to the Australian context, there are likely to be similarities in social and attitudinal factors that impact on prosecution decisions. To provide some basis of comparison, the research methodology was largely based on the work of Cassia Spohn and her colleagues, who have produced a considerable body of work on the topic (see literature review).

## Research design

This was a retrospective study of prosecutorial decisions and case outcomes for a sample of sexual assault cases that were referred to the DPP in the Australian Capital Territory, New South Wales, the Northern Territory, Western Australia, and Tasmania.<sup>11</sup> Statistical data were collected through a survey of DPP case files. Qualitative data were generated through semi-structured interviews with Crown prosecutors. This approach allows triangulation of interview and statistical data with field notes relating to each case and maximises the validity of the interpretations (Mason, 1996). This chapter deals with the procedure and results for the case file survey only.

### Case file survey

The Directors of Public Prosecutions in five jurisdictions gave approval for the primary researcher to access and record data from case files that were identified and extracted by DPP staff. To ensure consistency across the sample and to control for substantive and procedural differences across the jurisdictions, cases were selected according to the following criteria.

1. Cases were referred to the DPP between 1 July 1999 and 30 June 2001. They had since been finalised, either through a court determination or by discontinuance.
2. The victims were adults (i.e. over the age of consent and deemed competent to consent to sexual intercourse). The age of consent is 16 years and over in the Australian Capital Territory, New South Wales, the Northern Territory and Western Australia and 17 years and over in Tasmania.
3. The defendants were or would have been tried in the adult Courts.
4. When referred to the DPP, the primary charge was rape or an equivalent sexual assault. The offences correspond to the Australian Standard Offence Classification (ASOC) Subdivision 0311 Aggravated Sexual Assault:

...*Sexual assault, involving any of the following aggravating circumstances:*

- *sexual intercourse (i.e. oral and/or penetration of either the vagina or anus by any part of the human body or by any object);*
- *infliction of injury of violence on the person;*
- *possession/use of a weapon;*
- *consent proscribed; or*
- *committed in company (i.e. by two or more persons) (ABS 1997: 34).*

ASOC Subdivision 0311 includes rape and unlawful fellatio/cunnilingus and excludes acts of indecency. The relevant offences under state and territory legislation are:

- *Australian Capital Territory Crimes Act 1900 ss 51 – 54 (previously ss 92A – 92D: sexual assault in the first degree, sexual assault in the second degree, sexual assault in the third degree, sexual intercourse without consent);*
- *New South Wales Crimes Act 1900 ss 61I – 61JA (sexual assault, aggravated sexual assault, aggravated sexual assault in company);*
- *Northern Territory of Australia Criminal Code Act s 192 (sexual intercourse and gross indecency without consent);*
- *Tasmanian Criminal Code Act 1924 ss 127A and 185 (aggravated sexual assault and rape); and*
- *Western Australian Criminal Code ss 325 – 328 (sexual penetration without consent, aggravated sexual penetration without consent, sexual coercion, aggravated sexual coercion).*

### Data collection

A data collection form was designed for recording case file information (see Appendix E for explanations of the categories). The primary researcher recorded the relevant information and brief narratives about each case onto an Access database.

Some studies examine the impact of legal and extralegal influences on prosecutorial decision-making, but there is debate about whether some variables are best classified as legally relevant or irrelevant variables. This problem is overcome by a typology used by Spohn and colleagues (e.g. Spohn et al. 2002), which categorises variables in terms of victim characteristics, defendant characteristics or case characteristics and case outcomes (Table 2). Case characteristics relate to the victim or the defendant, but differ from the previous two categories in that these factors usually have evidentiary dimensions.

<sup>11</sup> The Victorian OPP had recently provided data to the Victorian Law Reform Commission for its review of sexual offences laws (VLCRC 2001, 2003). As file extraction is a costly resource exercise for the OPP, the VLCRC and OPP kindly made the dataset available for this research project. As the data covered a different reference period and different variables from the current study, they were not included in the analysis.

This typology enables a better analysis of the effect of victim characteristics on case decisions (Spohn et al. 2001). In addition, Temkin (2002) argues that a more fine-grained analysis of defendant categories, and the way they interact with legal and evidentiary factors, is needed to determine the circumstances under which victim characteristics are more or less influential in predicting prosecutorial decisions. Accordingly, this study differentiated between cases involving strangers, current partners, former partners, family members and other relationships where the defendant and victim knew each other. Data were also collected to allow analysis of the influence of prompt reporting, race/ethnicity and the defendant's criminal history. Other variables reflect the strength of the evidence and the seriousness of the assault.

### Data quality

Overall the files yielded a relatively comprehensive dataset, although as other researchers have noted (CJC 1999; VLRC 2003), there were variations in the type and amount of information recorded in the files:

- The most common missing information related to victims' socio-demographic characteristics, particularly race/ethnicity.

- Inconsistent recording practices meant that it was not possible to reliably document changes between the number of charges laid by police and the number of charges on the indictment. Files often contained several police documents with different numbers of charges and indictments were sometimes missing.
- As far as could be ascertained, police charged most defendants with two or more offences; only 37 defendants were initially charged with one offence. Six defendants were charged with 11 or more offences, with one defendant charged with 16 offences.
- In respect of the number of charges on the indictment, as far as could be ascertained, most defendants were charged with one (n = 47) or two (n = 20) offences. One defendant was charged with 10 offences and another with 13.
- The most serious final offence tended to be the same as that charged by police (usually rape or sexual intercourse without consent), unless the prosecution negotiated charges.
- The most common ancillary charges were acts of indecency, aggravated indecent assault, attempted rape, or various assault charges (e.g. aggravated assault, assault occasioning actual bodily harm). Other charges included deprivation of

**Table 2: Variables Collected During Case File Survey**

VICTIMS	DEFENDANTS	CASE	CASE OUTCOMES
Gender	Gender	Number of victims	Case withdrawn
Age	Age	Number of defendants	Who initiated withdrawal
Relationship status	Relationship status	Victim injury	Most serious final offence
Race/ethnicity	Race/ethnicity	Additional evidence	Charges negotiated
Employment	Employment	Type of evidence	Court level
Substance use	Substance use	Weapon use	Outcome for major charge
Offence reported to	Criminal history	Force	
	Relationship to victim	Threat	
		Physical resistance or verbal non-consent	
		Victim incapacitated	
		Time taken to report offence	
		Location of assault	

liberty/unlawful confinement, abduction, theft, robbery, burglary, threats to kill, contravention of apprehended violence orders, breaching parole.

- Reasons for case withdrawal were usually documented through a memo or letter, particularly after an indictment had been filed and the Director's approval was required to discontinue the case, or where a victim did not wish to proceed with the case.
- Charge negotiations tended to be less formally documented. While some files included letters from the defence, they were more likely to contain brief annotations written by the prosecutor.

### Results: Sample characteristics

A total of 141 cases were analysed. The sample comprised:

- 17 cases from the Australian Capital Territory;
- 34 cases from New South Wales;
- 52 cases from the Northern Territory;
- 11 cases from Tasmania; and
- 27 cases from Western Australia.

The sample represents all relevant case files that were identified for the reference period in the Australian Capital Territory, the Northern Territory and Tasmania. It was not possible to extract and analyse all relevant cases for New

South Wales and Western Australia, due to time and resource constraints and the much larger volume of cases handled in these states. Staff in these Offices were asked to select up to 50 of the most recent cases that met the inclusion criteria. Some of these were excluded as they did not meet the criteria and the final samples comprise the remaining files.

It is not clear whether the New South Wales and Western Australian samples are representative of all adult sexual assault cases referred to the DPP in those states. However, the samples reflect the diversity in victim, defendant and case characteristics and case outcomes observed in the files from the other three Offices. They were also drawn from metropolitan and regional areas, so there is no reason to suspect sampling bias.

Given the small numbers of cases for some jurisdictions, statistical analyses were conducted for the pooled sample only. This results in more weight being given to the Northern Territory than would otherwise be the case in a random sample. The results may therefore be biased by the particular characteristics of the Northern Territory population.

The following statistics are based on different units of analysis, which are explained for each sub-section of the results. The first set of statistics, which refer to socio-demographic details, is based on information about individual victims and defendants.

Table 3: Number of Victims or Defendants per Case

NUMBER OF VICTIMS PER CASE	CASES		NUMBER OF DEFENDANTS PER CASE	CASES	
	N	%		N	%
1	135	96	1	134	95
2	5	4	2	4	3
3	1	1	3	2	1
			4	1	1
<b>Total</b>	<b>141</b>	<b>100</b>		<b>141</b>	<b>100</b>

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
Note: Percentage totals may not equal 100 due to rounding

The 141 cases related to 148 victims and 152 defendants. There were six cases with multiple victims and seven cases with multiple defendants. Table 3 identifies the number of cases in which there were multiple victims or multiple defendants. There were no cases involving multiple victims and multiple defendants.

## Victim and defendant characteristics

Socio-demographic information about individual victims and defendants was not always consistently recorded in the case files. Table 4 provides a summary of the socio-demographic characteristics of victims and defendants for whom data were recorded, as well as information on substance use at the time of the offence. The proportions in each category are calculated in relation to the number of persons for whom the information was recorded.

Aside from expected gender differences, there is a strong correspondence between victim and defendant profiles. The majority of victims and defendants were younger than 35 years of age, had a current partner, were not in paid employment and were drinking alcohol at the time of the offence. This profile reflects risk factors for sexual victimization and sexual offending to some extent, although there are some differences. For example, women who are most vulnerable to sexual victimization tend to be single and younger than 24 years, while sexual offenders also tend to be single (see Lievore 2003 for an overview of risk factors for sexual victimization and Lievore 2004 for a review of characteristics of sex offenders).

### A note on race/ethnicity

Information on race/ethnicity was recorded for only half of the victims. While Indigenous women are over-represented as victims of violent crime, the case files may reflect different recording practices for various racial/ethnic groups. Based on contextual information recorded in the files, it was possible to infer that racial or ethnic information was more likely to be recorded for victims of Aboriginal or Torres Strait Islander background or appearance than for women of Caucasian background or appearance. It is not possible to verify this observation, but if this were the case, the number of Caucasian victims in the sample would increase substantially. As a result of this missing information, the effect of the victim's race or the racial composition of the defendant/victim dyad on prosecutors' decisions was not analysed.

Defendants' race/ethnicity was often self-identified during police interviews, but in some instances was noted on police apprehension records only. This information is not entirely reliable, as it reflects the police officer's assessment of the defendant's racial appearance.

There were significant differences across the jurisdictions in the reported race/ethnicity of victims. In particular, Western Australia and the Northern Territory had higher percentages of victims and defendants identified as Aboriginal or Torres Strait Islander (Table 5). This is expected, given the larger Indigenous populations in these jurisdictions. A new dichotomous variable was formed by combining the three non-Caucasian categories (Caucasian/Non-Caucasian). This variable continued to show significant jurisdictional differences in the racial/ethnic profile of victims and defendants.

## Victims

### Gender and age

All but two of the 148 victims were female. Age at the time of the attack was recorded for 95 per cent of victims and ranged from 16 to 69 years (sd = 12). The mean age of female victims was 30 years. The two male victims were aged 30 and 23 years.

### Relationship status

Information on relationship status at the time of the attack was available for 82 per cent of victims. Half of these had current partners, although their partners were not always the defendants.

### Employment

Information about employment status was available for 86 per cent of victims. The majority (55 per cent) were not in paid employment. Compared to defendants, victims were more likely not to be in the labour force; that is, they were either in receipt of some type of welfare benefit, or were financially dependent on a partner.

### Substance use

Information about substance use at the time of the attack was available for 85 per cent of victims. Most (67 per cent) were using a substance of some kind, usually alcohol, which was often consumed at social gatherings in parks and other outdoor locations. This reflects the high proportion of Indigenous victims and defendants in the sample. Case file notes indicate that while some victims reported only light alcohol consumption prior to the attack, many were heavily intoxicated.

### Time taken to report assault

Information on the time taken to report the attack to a third party was available for 142 victims. The majority (86 per cent; n = 122) first reported the assault within one week of its occurrence. Over half (58 per cent; n = 82) reported the assault within three hours.

Table 4: Victim and Defendant Characteristics

CHARACTERISTICS	VICTIM		DEFENDANT	
	N	% OF PERSONS KNOWN	N	% OF PERSONS KNOWN
<b>GENDER</b>				
<b>Total</b>	<b>148</b>	<b>100</b>	<b>152</b>	<b>100</b>
Female	146	99	0	0
Male	2	1	152	100
<b>AGE GROUP</b>				
<b>Total persons known</b>	<b>140</b>	<b>100</b>	<b>151</b>	<b>100</b>
16-19	28	20	14	9
20-24	28	20	35	23
25-34	41	29	58	38
35-44	22	16	31	20
45-54	17	12	10	7
55+	4	3	3	2
<b>RELATIONSHIP STATUS</b>				
<b>Total known</b>	<b>122</b>	<b>100</b>	<b>128</b>	<b>100</b>
Single	39	32	36	28
Partner	60	49	59	46
Separated, divorced, widowed	23	19	33	26
<b>RACE/ETHNICITY</b>				
<b>Total known</b>	<b>71</b>	<b>100</b>	<b>134</b>	<b>100</b>
Caucasian	20	28	54	40
Aboriginal/Torres Strait Islander*	47	66	64	48
Asian	2	3	2	2
Other	2	3	14	10
<b>EMPLOYMENT STATUS</b>				
<b>Total known</b>	<b>127</b>	<b>100</b>	<b>143</b>	<b>100</b>
Employed	46	36	63	44
Student	11	9	7	5
Unemployed	37	29	64	45
Not in labour force	33	26	9	6
<b>SUBSTANCE USE</b>				
<b>Total known</b>	<b>126</b>	<b>100</b>	<b>126</b>	<b>100</b>
No	42	33	15	12
Yes alcohol	73	58	86	68
Yes drugs	6	5	11	9
Yes both	5	4	14	11

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]

Note: Percentage totals may not equal 100 due to rounding

\*These figures reflect the over-representation of the Northern Territory population.

Table 5: Ethnicity of Victims and Defendants by Jurisdiction

RACE/ETHNICITY (NUMBER)							
		CAUCASIAN	ABORIGINAL & TORRES STRAIT ISLANDER	ASIAN	OTHER	TOTAL NON -CAUCASIAN	TOTAL
VICTIMS	ACT	1	0	0	1	1	2
	NSW	7	2	0	1	3	10
	NT	7	*31	1	0	*32	39
	TAS	0	0	0	0	0	0
	WA	5	*14	1	0	*15	20
	<b>Total</b>	<b>20</b>	<b>47</b>	<b>2</b>	<b>2</b>	<b>51</b>	<b>71</b>
DEFENDANTS	ACT	4	2	0	4	6	10
	NSW	19	6	0	6	12	31
	NT	14	*35	2	1	*38	52
	TAS	8	0	0	0	0	8
	WA	9	*21	0	3	*24	33
	<b>Total</b>	<b>54</b>	<b>64</b>	<b>2</b>	<b>14</b>	<b>80</b>	<b>134</b>

\* p<.01 chi-square test of significance

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]

### To whom assault was reported

Information on the person to whom the first complaint was made was available for 141 victims. The first complaint was most commonly made to:

- a family member or friend (44 per cent; n = 62);
- the police or other authority (28 per cent; n = 40);
- a rape crisis or medical service (11 per cent; n = 16); and
- another person, such as the resident of a house close to the site of the attack (16 per cent; n = 23).

### Injury

Just over half of the victims (52 per cent; n = 76) were injured in some way during the course of the sexual assault. Injuries ranged from superficial abrasions to various parts of the body, vaginal and anal bleeding, to life-threatening injuries and respiratory failure requiring admission to an intensive care unit.

### Non-consent

Slightly more than 61 per cent of victims (n = 88) actively expressed non-consent to sex. Non-consent was either expressed verbally – by saying “no”, pleading with the

attacker not to do this, crying or screaming – and/or through physical resistance, including struggling, pushing or punching the attacker, or trying to escape. Victims who did not express non-consent often said that they were frozen with fear or too afraid to resist.

A small but sizable percentage of victims (12 per cent, n = 18) were unable to consent to or refuse sexual activity because they were either asleep or unconscious, often as a result of intoxication.

### Location of assaults

A substantial proportion of attacks took place in the victim's residence (41 per cent; n = 66). In some instances this was also the defendant's residence (n = 18), either because the assault involved a cohabiting couple or people sharing accommodation. A further 16 per cent (n = 25) took place in the defendant's residence, while 35 per cent (n = 55) occurred in other locations. The relatively high proportion of assaults in the latter category reflects the fact that stranger assaults tended to occur in public places, such as nightclub car parks or streets and many assaults on Indigenous victims occurred when they were drinking outdoors.



Table 6: Severity of Assault Experienced by Victims

INDICATORS OF SEVERITY	N	%
Victim experienced no threat, force, weapon use or injury	32	22
Victim experienced one of the following: threat, force, weapon use or injury	27	19
Victim experienced two of the following: threat, force, weapon use or injury	48	33
Victim experienced three of the following: threat, force, weapon use or injury	26	17
Victim experienced all of the following: threat, force, weapon use and injury	14	10
<b>Total</b>	<b>146</b>	<b>100</b>

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
 Note: Percentage totals may not equal 100 due to rounding

### Severity of attacks

The severity of the assaults can be assessed by examining combinations of the four variables “weapon use”, “force”, “threat” and “injury” (see below for further analysis). This information was available for 146 victims. Table 6 highlights the seriousness of the cases in the sample: almost 60 per cent of the victims were subjected to sexual assaults involving at least two of these case characteristics. In part, the severity of the offences reflects the fact that the criteria for the study specified indictable sexual offences. On the other hand, cases forwarded for prosecution probably do belong to an objectively more serious category and are not representative of all sexual assaults.

### Defendants

#### Gender and age

All of the 152 defendants were males. They ranged in age from 17 to 60 years, with a mean age of 31 years (sd = 9).

#### Relationship status

Information on relationship status at the time of the assault was available for 84 per cent of defendants. Almost half had current partners.

#### Employment

Information on employment status was available for 94 per cent of defendants. They were equally likely to be employed or unemployed, but were more likely to be employed than victims.

### Substance use

Information on substance use at the time of the assault was available for 83 per cent of defendants. The majority (88 per cent) were reported to have been under the influence of a substance at the time of the assault, with 68 per cent reported as having been drinking alcohol.

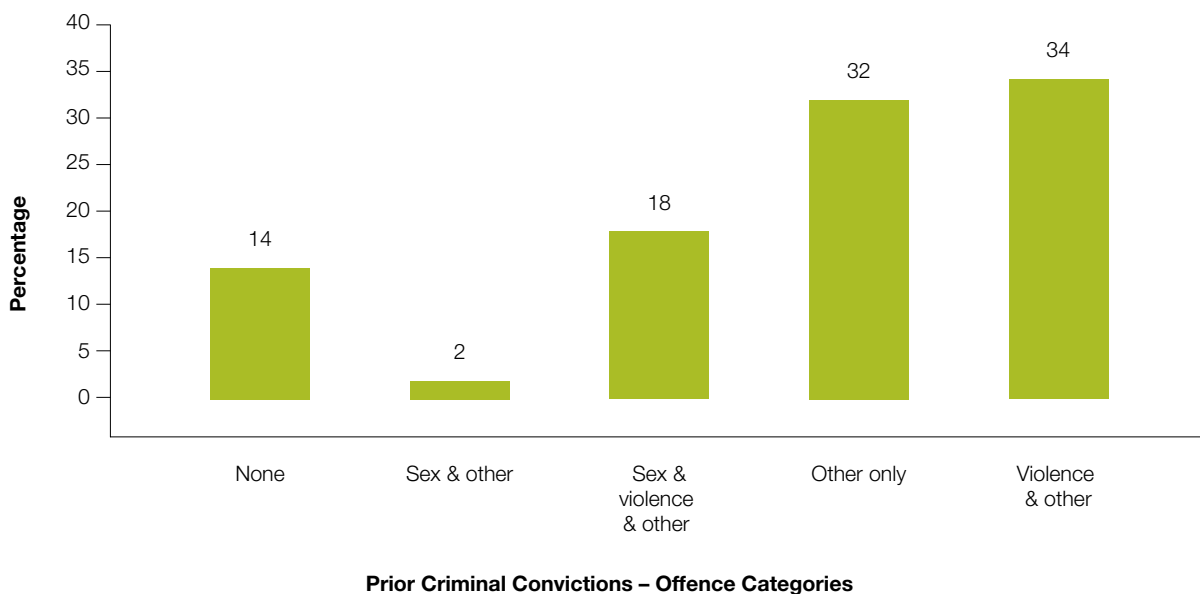
### Criminal history

The case files of 126 defendants contained documents relating to their criminal histories. It is not known whether the absence of antecedents indicates that the remaining defendants had no previous contact with the criminal justice system. The available histories pointed to a high level of general and violent recidivism (Figure 2):

- all defendants who had prior criminal convictions for sexual offences (n = 3), violent offences (n = 43), or both (n = 23), also had convictions for “other” offences, such as property, drugs or traffic offences;
- a relatively large number had convictions for “other” offences only (n = 40); and
- only 17 had no prior convictions.

A history of general offending consistently figures in profiles of sexual offenders and is a risk factor for sexual recidivism (see Lievore 2004).

Figure 2: Prior Criminal History of 126 Defendants



Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
 Note: Percentage totals may not equal 100 due to rounding

### Relationship to victim

Information regarding the relationship between the victim and the defendant was available for 149 defendants. Most defendants and victims were known to each other (76 per cent;  $n = 114$ ). Almost 42 per cent of defendants were the victims' current partner ( $n = 23$ ), former partner ( $n = 17$ ) or a family member ( $n = 22$ ) (Figure 3).

### Weapon use, force and threat

Information was available on weapon use for 146 defendants. The majority did not use a weapon during the assault (80 per cent;  $n = 117$ ). Those who did used various objects, including tree branches and sticks, rocks, pickets, belts, whips, torches and guns. The most common weapons were sharp objects such as knives, broken bottles and glasses, scissors, garden shears, axes and hacksaws ( $n = 18$ ).

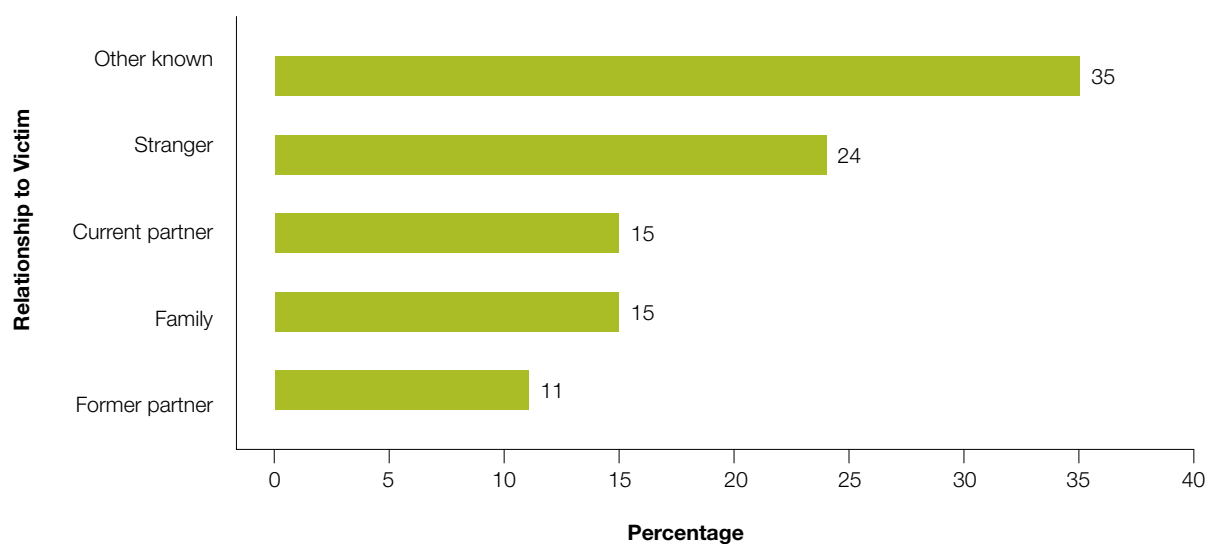
Physical force was used by 72 per cent of defendants ( $n = 105$ ). Methods of force included holding the victim down, forcing her legs apart, pulling her hair, holding her in a headlock, hitting, punching, dragging, kicking, biting, throwing her against the ground or a building, head butting, smashing her head against the steering wheel of a car, choking and twisting her arms.

The majority of defendants did not use verbal threats to force compliance (70 per cent;  $n = 102$ ). The most common threat was a threat to kill the victim or someone close to her (30 of 44 defendants). The remainder made less specific threats of bodily harm, for example, that they would "smash her head in", or that she could "expect more of this".

### Additional evidence

The files for 146 defendants contained information about whether there was additional evidence linking them to the attack (i.e. evidence that corroborated the victim's allegation, aside from physical injury, weapon use, force or threat). No evidence was available for the majority of defendants (60 per cent;  $n = 87$ ). Where evidence was available, the most common single form was DNA (49 per cent,  $n = 29$ ). Multiple forms of evidence were available for 27 per cent of defendants ( $n = 6$ ), including eyewitnesses to the circumstances, fingerprints, objects found at the defendant's home or the crime scene, video footage of the defendant with the victim, statements made by the defendant to other people, and telephone records.

Figure 3: Relationship of Defendants to Victims (%)



Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
 Note: Percentage totals may not equal 100 due to rounding

### Prosecutorial decisions and other outcomes

This section provides information about variables associated with case withdrawal, charge negotiations, pleas and verdicts. Different units of analysis are used, based either on the case or on the individual defendant (Table 7). This approach was adopted partially due to coding considerations arising from cases involving multiple victims and defendants. As previously noted, a case can involve one or more defendants against whom charges have been laid and which are heard together by a court. The charges usually relate to the same criminal incident and appear together on the same indictment.

The sample comprises 141 cases relating to 148 victims and 152 defendants. This includes six cases with multiple victims and seven cases with multiple defendants. Preliminary analyses of cases involving differing numbers of victims or defendants showed that prosecutorial decisions to proceed or withdraw applied to the entire case, not to individuals.

As a result, analyses relating to these decisions were conducted on a case basis, by selecting the first victim and first defendant in each case and excluding data on additional individuals.

On the other hand, decisions about charge negotiations, pleas and trial outcomes such as jury verdicts, relate to individuals. In most cases involving multiple victims or defendants, the outcomes were the same for all defendants. The exception was one case in which two of the four defendants were found guilty and two were acquitted. Figure 4 summarises the disposition of prosecutions for the sample.

Table 7: Unit of Analysis for Dependent Variables

DEPENDENT VARIABLE	UNIT OF ANALYSIS
Case withdrawal	Case
Plead guilty or not guilty	Individual defendant
Charge negotiation	Individual defendant
Trial outcome (if pleading not guilty)	Individual defendant

### Cases withdrawn

Previous studies conducted in a single jurisdiction have analysed the proportion of cases discontinued at or after the committal hearing in the lower courts (e.g. Heenan & McKelvie 1996). In the present study, case withdrawal was analysed either prior to or after indictment, to control for procedural differences between the jurisdictions. For example, Western Australia and Tasmania no longer hold committal hearings for sexual assault cases; the DPP review process in these states should lead either to discontinuance or an indictment being filed. There may also be different outcomes where hand-up committals are more common than oral committals. The major findings were:

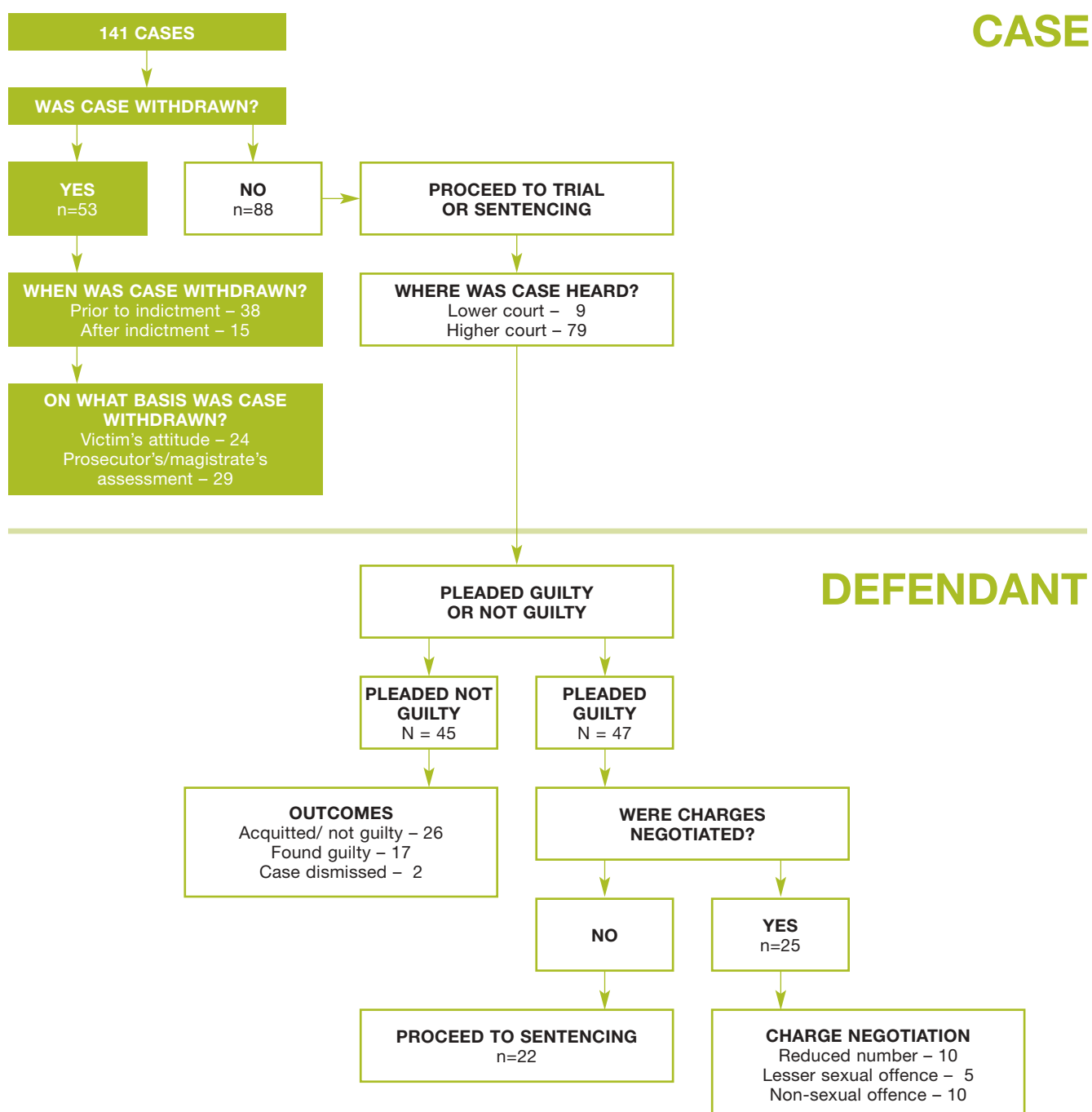
- a total of 53 cases were withdrawn, including one case with multiple victims and three cases with multiple defendants;
- 55 per cent of all discontinued cases were withdrawn because there were insufficient prospects of conviction and/or problems with victim credibility (n = 29). Most of these were withdrawn by the prosecution; three cases were dismissed by magistrates;
- the remaining 24 cases were discontinued because the victim did not wish to proceed. This includes five cases where the victim failed to appear at the committal hearing;
- 72 per cent of all discontinued cases were withdrawn prior to indictment (n = 38). The decision to withdraw prior to indictment was equally divided on the basis of the prosecutor's assessment of the case and the victim's reluctance to proceed. Most of the cases withdrawn after an indictment was filed were discontinued on the basis of the prosecutor's assessment (n = 10).

The discontinued cases involved seven strangers, 11 current partners, nine ex-partners, five family members and 21 defendants who were otherwise known to the victim. The files indicated that prosecutors believed that victims who chose to withdraw from prosecution were telling the truth. In some of

the cases listed below it is clear that the prosecution would face evidentiary difficulties, but it is not possible to determine whether prosecutors subtly encouraged victims to withdraw, even if for altruistic reasons. Victims' reluctance to proceed often reflected anticipation of revictimisation through the court process, or fear of the defendant, which was sometimes related to ongoing domestic violence:

- Two Indigenous victims who alleged that they were assaulted by family members withdrew because their families had dealt with the matter. It is not clear what this means.
- A woman who was afraid of her partner refused to testify against him.
- The victim did not want her partner to go to jail; she simply wanted an apprehended violence order.
- A woman who was allegedly sexually assaulted by her partner felt sick at the thought of giving evidence at the committal hearing. The file contained a note that there was little prospect of success.
- In another case involving intimate partners, there had been no further incidents of violence, their life had become more settled, and the victim was concerned about giving evidence.
- Another woman wanted to save herself from embarrassment and was happy to withdraw the case because her partner was getting help for his problems.
- A woman did not want to face the emotional trauma of giving evidence against her ex-partner.
- The victim was terrified of her ex-partner and there was a history of domestic violence in the relationship. She could not go through with the trial despite being informed about protective measures available.
- The victim alleged that she was sexually assaulted and threatened with a knife by her ex-partner when he visited her house to see their children. She was terrified of the defendant and changed her story, saying that she consented to sex.

Figure 4: Disposition of Prosecutions



Source: Australian Institute of Criminology, DPP Data 1 July 1999 - 30 June 2001 [Computer file]

- The victim was terrified of the defendant, a social acquaintance who has a reputation for violence.
- A woman who was allegedly sexually assaulted by a friend had since formed a relationship and was going through a difficult pregnancy. She did not want to jeopardise the pregnancy by going through the stress of a trial.
- A woman who alleged that she was sexually assaulted by a man whom she met that night at a bar and took to her home was afraid that her sexual history would emerge in court.
- A victim with an intellectual disability was allegedly sexually assaulted when she asked a stranger for help. She was concerned that cross-examination would be a worse trauma than the sexual assault and would impact on her health.

### Factors associated with cases proceeding or being withdrawn

Cases that were withdrawn differed significantly from cases that proceeded in respect of seven variables (Table 8). The majority of these variables are case-related, or legally relevant variables. Cases were significantly more likely to proceed when:

- the victim was injured;
- the victim physically or verbally expressed non-consent;
- the assault was more severe (i.e. involved some level of threat, force, weapon use or injury);
- there was additional evidence linking the defendant to the assault;
- the defendant used force;

Table 8: Comparison Between Cases that Proceeded and Cases That Were Withdrawn

VARIABLES	CASES PROCEEDED		CASES WITHDRAWN	
	N	%	N	%
<b>Victim Injury</b>				
No	35	40	31	56
Yes	52	*60	22	42
<b>Expressed non-consent</b>				
No	26	31	27	51
Yes	59	*69	26	49
<b>Severity of assault</b>				
No threat, force, weapon, injury	11	13	18	34
Threat, force, weapon or injury	76	*87	35	66
<b>Additional evidence</b>				
No	46	53	39	74
Yes	41	*47	14	*26
<b>Force</b>				
No	17	20	23	43
Yes	70	*81	30	57
<b>Defendant race/ethnicity</b>				
Caucasian	15	32	5	23
Non-Caucasian	32	*68	17	77
<b>Relationship to victim</b>				
Known	61	70	45	87
Stranger	26	30	7	*14

\*p<.05 chi-square test of significance

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]

Table 9: Codes for Dependent and Independent Variables

VARIABLE	CODE
<b>Dependent variables</b>	
Case withdrawn	0 = No 1 = Yes
Charge negotiation	0 = No 1 = Yes
Plead/found guilty	0 = No 1 = Yes
<b>Independent variables</b>	
Victim injury	0 = No 1 = Yes
Non-consent	0 = No 1 = Yes
Severity of assault	0 = No threat, force, weapon or injury 1 = Some threat, force, weapon or injury
Additional evidence	0 = No 1 = Yes
Force	0 = No 1 = Yes
Defendant ethnicity	0 = Caucasian 1 = Non-Caucasian
Relationship to victim	0 = Known 1 = Stranger

- the defendant was non-Caucasian. This finding should be considered in light of the large proportions of Indigenous defendants in the Northern Territory and Western Australian samples; and
- the defendant was a stranger.

### Factors predicting cases proceeding or being withdrawn

The bi-variate analyses in the previous section show that the cases that were withdrawn differed significantly from those that proceeded on a total of seven variables. Statistically significant differences point to some association between those variables and the prosecutor's decision to proceed with or discontinue a case. However, they do not indicate which variables are most important in predicting case withdrawal, nor do they explain whether those variables remain important when other variables of interest are controlled for.

To answer these questions, six of the seven statistically significant variables were entered simultaneously as predictor variables into a direct logistic regression model. "Severity of assault" was excluded because, as a composite variable, it is not independent from the other variables, particularly victim injury and force. Information regarding 121 cases was available for analysis. The dependent and independent variables and their codes are listed in Table 9.

A test of the full model with all six predictor variables against a constant only model was statistically reliable ( $\chi^2(6, 121) = 18.15, p = .006$ ). This indicates that the predictors, as a set, reliably distinguished between cases that were withdrawn and cases that proceeded. The variance accounted for in case withdrawal is relatively small (Nagelkerke's R Square = .191). Prediction success was adequate; the model correctly predicted around 81 per cent of the cases that proceeded and 36 per cent of the cases withdrawn, with an overall success rate of 65 per cent.

However, when the regression coefficients, Wald statistics and odds ratios were considered for each of the six predictor variables, it was found that none of the individual variables in the model were, on their own, significant predictors of case withdrawal.

Examination of the predictor variables showed that some of the variables were significantly correlated with each other. In particular the variables “force” and “victim injury” and “force” and “non-consent” showed significant correlations of medium strength. To examine the potential of these correlated variables to interact with each other, interaction terms composed of these pairs of variables were added to the logistic regression model.

When assessed against a constant only model, the regression model containing eight predictor variables was found to be statistically significant ( $\chi^2(8, 121) = 22.36, p = .004$ ). Again, this indicated that the predictors, as a set, reliably distinguished between cases that were withdrawn and cases that proceeded. The variance accounted for in case withdrawal is slightly larger with the increased number of predictors (Nagelkerke’s R Square = .231). The prediction success increased slightly: around 83 per cent of cases proceeding to trial and 46 per cent of cases withdrawn were correctly predicted, with an overall success rate of around 69

per cent. Table 10 shows the regression coefficients, Wald statistics, odds ratios and 95 per cent confidence intervals for odds ratios for each of the 8 predictors.

When the interaction terms are added to the logistic regression model the predictor term “force and non-consent” is found to reliably predict cases proceeding. The odds ratio of the significant predictor (.138) indicates that a case is less likely to be dropped if the victim was forced and actively expressed non-consent.

### Cases that proceeded

The majority of the 141 cases (62 per cent;  $n = 88$ ) proceeded to trial ( $n = 41$ ) or sentencing ( $n = 47$ ). These cases represented 94 victims and 95 defendants. Due to missing information the defendant outcomes in Figure 4 refer to 92 defendants only. The majority of cases that proceeded (90 per cent;  $n = 79$ ) were heard or sentenced in a Higher Court and involved one defendant and one victim (95 per cent;  $n = 84$ ). Approximately six per cent of cases proceeding to trial or sentence involved multiple victims and approximately five per cent proceeding to trial alone related to multiple defendants (Table 11).

Table 10: Logistic Regression Analysis of Cases Proceeding, Including Interaction Terms

	B	WALD	SIG.	ODDS RATIO	95% CONFIDENCE INTERVALS FOR ODDS RATIO	
					LOWER	UPPPER
Injury	.013	.000	.984	1.013	.276	3.714
Additional evidence	-.784	2.554	.110	.456	.174	1.194
Force	-1.024	2.163	.141	.359	.092	1.406
Defendant race/ethnicity	-.591	1.908	.167	.554	.239	1.281
Defendant/victim relationship	.412	.533	.465	1.510	.500	4.561
Non-consent	-.073	.022	.883	.930	.352	2.453
Force and injury	-.366	.077	.781	.693	.052	9.198
Force and non-consent*	-1.980	3.947	.047	.138	.020	.974
Constant	-.340	.857	.355	.712		

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]



Table 11: Disposition of Cases by Number of Victims or Defendants

DISPOSITION OF CASES	VICTIMS PER CASE N			DEFENDANTS PER CASE N			
	1	2	3	1	2	3	4
Proceed	83	4	1	84	2	1	1
Withdrawn	52	1	0	50	2	1	0

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
Note: Percentage totals may not equal 100 due to rounding

The cases that proceeded to trial involved 13 strangers, four current partners, five former partners, eight family members and 15 defendants who were otherwise known to the victim.

Defendants who pleaded guilty included 14 strangers, eight current partners, three former partners, eight family members and 14 who were otherwise known to the victim.

### Charge negotiations

Twenty-five defendants engaged in charge negotiations. The major outcomes were:

- a reduction in the number of charges for 10 defendants. This form of negotiation involved three strangers, one current partner, two former partners, one family member and four defendants who were otherwise known to the victim;
- reduction of the most serious offence to a non-sexual offence for another 10 defendants. These negotiations involved two strangers, four current partners, one family member and three defendants who were otherwise known to the victim; and
- reduction of the most serious offence to a lesser sexual offence (i.e. an act of indecency) for the final five defendants. These negotiations involved one family member and four defendants who were otherwise known to the victim.

### Factors associated with charge negotiation

The only statistically significant difference associated with charge negotiation is that none of the cases involving multiple offenders resulted in charges being negotiated.

Field notes indicate that charge negotiation often pointed either to evidentiary difficulties for the prosecution, or to a strong case against the defendant:

- Ten defendants had made some type of admission about sexual or other contact with the victim, but on the evidence available, it would have been difficult to prove all of the charges, or the most serious charge, beyond reasonable doubt.
- Factors related to the victim underpinned charge negotiations for another 10 defendants. This included victims who were extremely intoxicated at the time of the offence or during the trial, who delayed reporting the offence, were reluctant to give evidence, or where there were concerns about credibility on the basis of inconsistent evidence.
- Five defendants assaulted the victims after meeting them for the first time in a bar. They initially denied committing the offences but agreed to plead guilty when identifying evidence became available. The evidence included DNA, video footage from a train station, objects found at the site of the attack and eyewitnesses to the circumstances immediately after the attack.

### Pleas and court outcomes

For the purposes of this analysis court outcomes include a guilty plea, a guilty finding by a judge and/or jury, acquittal by a judge and/or jury, or dismissal of the case by a magistrate or judge.

- Half (n = 47) of the 95 defendants whose cases proceeded entered a guilty plea to some offence.
- Almost two-thirds of the 45 defendants who defended charges were acquitted (62 per cent; n = 28).
- When guilty findings and guilty pleas are combined, the conviction rate equates to 42 per cent of all defendants, 68 per cent of defendants whose cases proceeded to trial or sentence (Table 12), or 38 per cent of those proceeding to trial only.

Table 12: Court Outcomes as a Proportion of all Defendants and of Defendants Whose Cases Proceeded to Trial or Sentencing

	OUTCOMES FOR ALL DEFENDANTS (N = 152)		OUTCOMES FOR DEFENDANTS PROCEEDING TO TRIAL OR SENTENCE (N = 95)
	N	%	%
Withdrawn	57	38	--
Plead guilty	47	31	50
Found guilty	17	11	18
Acquitted	28	18	30
Missing	3	2	3

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]  
Note: Percentage totals may not equal 100 due to rounding

In terms of relationship to the victim, defendants who were acquitted included four strangers, four current partners, four former partners, five family members and 11 who were otherwise known to the victim.

Defendants who were found guilty included nine strangers, one former partner, three family members and four who were otherwise known to the victim.

### Factors associated with pleas and court outcomes

Defendants who pleaded guilty were significantly more likely to have threatened the victim ( $\chi^2(1, 91) = 4.26, p = .039$ ). Forty per cent of those who pleaded guilty threatened the victim during the attack, compared to 21 per cent of those who did not plead guilty.

A dichotomous variable was formed by classifying defendants who pleaded or were found guilty as “guilty”, and those who were acquitted or whose cases were dismissed as “not guilty”. Two variables were significantly associated with these outcomes: “additional evidence” and “threat.”

#### Additional evidence

Defendants who pleaded or were found guilty were significantly more likely to have been linked to the offence by additional evidence ( $\chi^2(1, 91) = 8.83, p = .003$ ). Where additional evidence was available, 84 per cent of defendants pleaded or were found guilty.

#### Threat

Defendants who pleaded or were found guilty were significantly more likely to be those who threatened the victim during the assault ( $\chi^2(1, 91) = 5.16, p = .023$ ). Eighty-six per cent of defendants who threatened the victim pleaded or were found guilty.

### Factors predicting pleas and court outcomes

To assess their predictive capacity, the variables “threat” and “additional evidence” were entered simultaneously into a direct logistic regression analysis. Information from 91 cases was available for analysis. A test of the full model with both predictors against a constant only model was statistically reliable ( $\chi^2(2, 91) = 14.36, p = .001$ ). This indicates that together, the two predictors reliably distinguished between defendants who pleaded or were found guilty and those who were acquitted or whose cases were dismissed. While only a small amount of variance in court outcome was accounted for (Nagelkerke’s R Square = .206), the overall prediction success was adequate at 69 per cent. The model correctly predicted 61 per cent of defendants found not guilty and 69 per cent of those found or pleading guilty. Table 13 shows regression coefficients, Wald Statistics, odds ratios and 95 per cent confidence intervals for odds ratios for each predictor.

Table 13: Logistic Regression Analysis of Court Outcomes as a Function of Evidentiary Factors

	B	WALD	SIG.	ODDS RATIO	95% CONFIDENCE INTERVALS FOR ODDS RATIO	
					LOWER	UPPPER
Additional evidence <sup>1</sup>	1.457	7.872	.005	4.292	1.551	11.875
Threat <sup>1</sup>	1.314	4.471	.034	3.720	1.101	12.574
Constant	.612	4.639	.031	1.845		

<sup>1</sup>p<.05 chi-square test of significance

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]

Examination of the Wald statistics finds that both predictor variables reliably predicted court outcomes. The odds ratios for both variables indicate that, if additional evidence is present or a threat was made, the defendant is more likely to plead or be found guilty. The odds of pleading or being found guilty increase by a factor of more than four (4.29) where additional evidence is available, whilst the odds of pleading or being found guilty increase by a factor of more than three and a half (3.72) if threats were made.

### Summary of statistical findings

The key statistical findings are:

- 38 per cent of all cases were withdrawn from prosecution;
- 72 per cent of these were withdrawn prior to an indictment being filed;

- decisions to withdraw cases were almost equally divided on the basis of prosecutors' assessments of the cases and victims' reluctance to proceed;
- 33 per cent of all cases were finalised by way of a guilty plea;
- approximately half of the guilty pleas were entered as a result of negotiations to reduce the number or level of the charges;
- 29 per cent of all cases proceeded to trial; and
- 38 per cent of cases that proceeded to trial resulted in a guilty verdict.

Cases involving strangers and other known defendants were more likely than cases involving intimate or family relationships to proceed through the criminal justice process and to end in conviction (Table 14).

Table 14: Disposition of Cases by Relationship

RELATIONSHIP	TOTAL KNOWN	WITHDRAWN	PLEADED GUILTY	ACQUITTED/ DISMISSED	FOUND GUILTY	CHARGE NEGOTIATION
Stranger	35	7	14	4	9	5
Current partner	23	11	8	4	0	5
Former partner	17	9	3	4	1	2
Family	22	5	8	5	3	3
Other known	52	21	14	11	4	10
<b>TOTAL</b>	<b>149</b>	<b>53</b>	<b>47</b>	<b>28</b>	<b>17</b>	<b>25</b>

Source: Australian Institute of Criminology, DPP Data 1 July 1999 – 30 June 2001 [Computer file]

Note: Row totals are not included: due to missing information they do not always sum to the same totals as columns

## Interviews with Crown Prosecutors

The literature review indicates that attitudinal factors can play an important role in the exercise of prosecutorial discretion. In particular, it raises concerns that stereotypical assumptions about women and sexual assault can impact on prosecutors' assessments of the prospects of conviction. Qualitative analyses of interviews with Crown Prosecutors can help to elucidate the case-by-case situations that figure in their decision-making, as well as their ways of accounting for those decisions. The aim of the interviews was to explore the perceptions and attitudes of Crown Prosecutors and to gain an understanding of the practical considerations that turn prosecutorial guidelines into action.

### Procedure for interviews

Approval to interview Crown Prosecutors was obtained from the Director or the Chief Crown Prosecutor of participating Offices. Each Office was sent a brief background paper about the research and the purpose of the interviews and was asked to provide a list of experienced prosecutors who were willing to take part in semi-structured interviews. Interviews were conducted in person or by telephone and lasted from half an hour to an hour. The researcher recorded the responses in note form. While every effort was made to ask a standard set of questions, there were some variations in the interviews, usually when prosecutors indicated that they had limited time to talk. These interviewees were asked to comment on two key areas highlighted in the literature review: factors influencing decisions to proceed with or discontinue cases and how they assessed victim credibility. Prosecutors were not asked to comment on specific cases.

The interviews covered a range of topics. Aside from the two key areas mentioned above, the interview schedule included questions about charge negotiation; whether particular types of cases are more difficult to prosecute than others; how organisational requirements impact on decision-making; and whether there are regional factors that impact on prosecution outcomes. Prosecutors were also given an opportunity to suggest ways of improving prosecution outcomes, with the understanding that this could have different meanings, such as higher conviction rates or a better experience for victims.

### The Crown Prosecutors

Twenty-four Crown Prosecutors were interviewed: four from the Australian Capital Territory; eight from New South Wales; three from the Northern Territory; two from Tasmania; and seven from Western Australia. There were no discernable gender differences in the responses of the thirteen males and eleven females, although two male prosecutors said that they had to exercise extreme care with sexual assault victims, given that most perpetrators are males. While duration of

employment is not necessarily a guide to experience with sexual assault cases, the minimum length of employment with the DPP was four years, and the interview pool included senior Crown Prosecutors, a deputy Director and a Director. Two prosecutors had been previously been police prosecutors and three had worked as criminal defence lawyers.

A common criticism of self-report measures such as interviews centres on the difficulty of determining whether participants' responses are distorted by self-presentational or social desirability biases (Webb et al. 2000). I adopt a "middle position" (Smith 1995: 10), acknowledging that interviewees are likely to want to present themselves in a positive light, but accepting that their accounts bear some relation to reality. My observations of the prosecutors who took part in the interviews led to the view that they were genuinely interested in contributing to the study and gave candid answers to the questions, which was no doubt helped by the promise of anonymity and confidentiality. This observation is supported in other ways. Triangulation of the interview data with the statistical results and with field notes about the case files suggests a reasonable degree of consistency. Patterns in the qualitative data also indicate that the interviewees were not simply sticking to the "party line". To the extent that prosecution policies are effective in guiding prosecutors' decisions, one would expect to see some degree of uniformity or convergence across interviews. At the same time, the guidelines are not intended to be prescriptive and discretionary decisions are influenced by personal experience. Differences across the interviews would be expected if the prosecutors were responding honestly to the questions. The emergence of both convergent and divergent patterns across the interviews indicates that prosecutors were not simply giving socially acceptable answers.

### Thematic analysis

The following thematic analysis identifies the major patterns that emerged in relation to six topics:

- What is the degree of discretion available to prosecutors?
- What distinguishes between cases that are continued or discontinued?
- Under what circumstances is charge negotiation considered?
- How do prosecutors determine whether a victim is likely to be viewed as credible?
- Is it more difficult to prosecute sexual assault than other offences?
- Do organisational factors such as under-resourcing impact on prosecutorial decisions?

Interviewees' suggestions about improving the prosecution process have been incorporated into the recommendations at the end of the report. Because their responses were recorded in note form, quotes in this section are not necessarily verbatim, although every attempt was made to use prosecutors' own language. Interviewees often gave more than one type of reason for case decisions, with the result that it is possible to estimate the frequency of some but not all responses.

The responses have not been categorised along the lines of Frohmann's (1991, 1997) typology, but it is apparent in the following sections that prosecutors justify case decisions by reference to typifications about rape scenarios, victims' post-incident interactions with offenders, rape reporting and general post-rape demeanour.

### Degree of discretion

The literature notes that prosecutors exercise "considerable" discretionary powers. After a number of interviews had been conducted I became aware that prosecutors might have different perceptions about the extent of their discretionary powers. Fifteen interviewees were asked to comment on this issue. They all noted that there are some matters where prosecutors do not make the final decision in a formal sense. In particular, the decision to discontinue a case by entering a *nolle prosequi* ultimately rests with the Director. Nevertheless, the majority (n = 11) felt that they have relatively "broad discretionary powers within a set frame of reference; that is, within the framework of the guidelines, which ensure that the tests are appropriately applied". The Director may occasionally disagree with a prosecutor's recommendations, but the recommendation is usually "rubberstamped by the Director's chambers", in acknowledgement that prosecutors have a better feel for the way victims view matters.

Four prosecutors felt that their discretionary powers have been strictly constrained in recent years. This is largely due to policy changes and revised guidelines, which have resulted in increased scrutiny within the DPP. None of the interviewees suggested that these changes are unwarranted, as they are often prompted by greater recognition of victims' needs and wellbeing. Some of the senior prosecutors noted that personal discretion increases with experience and that their recommendations are less likely to be rejected than those of junior prosecutors. Even so, they still tend to discuss their recommendations with colleagues.

In the case files examined for this study, not one recommendation to discontinue a case was overruled by the Director. Files for cases that were discontinued usually contained either a statement from the victim, to the effect that

she was withdrawing of her own free will, and/or the prosecutor's summary of facts and opinions as to whether the elements of the offence could be proven, the prospects of conviction, and the attitude of the victim and the investigating officers. These documents establish a clear rationale for the prosecutor's recommendation, which is important if the decision is later questioned. A Senior Crown Prosecutor who regularly reviews recommendations of other prosecutors believes that the guidelines are generally adequate and that this is reflected in the soundness of prosecutors' decisions. He notes that the DPP is "a human institution: no-one makes correct decisions all of the time and different perspectives can lead to different decisions, particularly in cases where different inferences can be drawn from circumstantial evidence".

### Proceeding with and discontinuing prosecutions

The prosecutor's most important discretionary decision is whether or not to proceed to trial. Within that, the decision of whether to proceed to finality encompasses a series of stages. Some prosecutors noted that different issues impact on discretion at various stages of the prosecution process. For example, decisions in the pre-indictment stage tend to be based on the papers in the brief and the technicalities of whether there is a *prima facie* case. Subsequent decisions are more likely to be based on assessments of the victim's credibility and reliability as a witness and her attitude to prosecution. Some prosecutors noted that they have most discretion in deciding how to run a trial (n = 4), rather than whether to run it. One interviewee noted that there can be vast differences in the way that individual prosecutors approach trials and view various matters, such as which witnesses to call and which evidence to lead and focus on.

Assuming that a *prima facie* case has been established, a number of factors and circumstances enter into decisions to proceed or discontinue. The ultimate assessment rests on consideration of a range of factors, mentioned by the majority of interviewees, which are presented in Table 15. Additional factors not listed in the table include the view of the police officer and the cultural circumstances of the victims. Some prosecutors are inclined to persist with Indigenous women who are subject to repeat victimisation by a known offender but are reluctant to proceed.

The most problematic and common cases are those that come down to the word of the victim against the word of the defendant. Attitudes towards proceeding or withdrawing in these cases were generally supportive of proceeding, but all prosecutors acknowledged that there are cases when they would be more likely to withdraw. Most prosecutors' attitudes

towards proceeding fall into two main categories, which generally result in cases going forward, with a third, much smaller group that is more inclined to discontinue. A typical response was:

*The law doesn't require corroboration, but it's an uphill battle to secure a conviction without it. I'm generally inclined to proceed rather than discontinue, unless the victim's story is inconsistent with other facts.*

Given the complexity of this issue, it is not possible to quantify prosecutors' responses:

1. The majority see no reason to discontinue most cases. The word of the victim is sufficient grounds for prosecuting, as long as her evidence is inherently credible. The judgment of the truth of the matter is a question of fact for the jury.
2. Within this group, some prosecutors advise the victim that the prospects of conviction are poor. However, they acknowledge that jury decisions in sexual assault cases are often unpredictable, so they offer the victim the choice to proceed or withdraw.
3. A small number of prosecutors (n =3) would not run a case unless they had to, although they are aware that not all prosecutors use their discretion to discontinue cases. These prosecutors discuss options with victims, but would recommend discontinuing against the victim's wishes. They emphasised that ultimately this is not the victim's decision.

### **Pressure to proceed**

These findings reflect a general underlying theme, which was explicitly stated by several interviewees in different jurisdictions, that prosecutors "tend to be conservative about discontinuance"; and that "there is more pressure to proceed than to withdraw", both "for the general protection of women and as a general deterrence". One senior prosecutor noted that "there is increasing public pressure to prosecute rape cases. You must have a clear, unarguable case not to proceed". There is societal pressure to proceed to trial, as well as pressure from victims, although prosecutors do not always feel that this is in victims' best interests:

*I go to some lengths to explain why the prospects of conviction are not good, but most victims seem surprised when there's a not guilty verdict. They think their trial will be different. I can't destroy their hopes of conviction before going to trial – I would be seen as defeatist – but I sometimes will tell them there's no chance.*

### **Reluctant victims**

All prosecutors said that they try to establish and overcome the source of reluctance among victims who are hesitant to proceed. They rarely force a reluctant victim to give evidence, partially because they are aware of the potential for

revictimisation, but also because a reluctant victim is likely to undermine the case. Victims who have been subpoenaed, have been known to state in court that the sex was consensual: even with the strongest corroborating evidence, it is not possible to secure a conviction if the basic element of the offence cannot be proven.

Some prosecutors noted that there are times when the public interest overrides the individual's wishes. This is most likely to involve violent relationships where the victim has reconciled with the defendant, or where she is subject to improper influence or intimidation by the defendant or his supporters. When a victim does not want to proceed, prosecutors have to consider the seriousness of the offence; whether the victim is making a free choice; and whether she retracts the allegation and states that it was fabricated. The prosecutor may have to take a stand for the victim's sake and in the public interest where a case involves more serious offences, especially injury; when the victim does not state that she fabricated the allegation; and where there is a suspicion that the withdrawal is a result of intimidation. Otherwise, the prosecution risks the possibility of repeat offences or even domestic homicide.

In practice, it may be uncommon for prosecutors to override the victim's wishes. In the current study, the victim's reluctance to proceed to trial was overruled by the public interest in only one particularly serious case, where an ex-partner deprived a victim of domestic violence of liberty, threatened her and subjected her to various types of sexual and physical assault, with the use of weapons, over a considerable period of time. By the time the case was heard in court she no longer wanted to talk about the assault, but she was subpoenaed and the defendant was found guilty.

### **What are reasonable prospects of conviction?**

Prosecutors' assessments of case convictability are anything but formulaic. One interviewee noted that "if prosecutors were to proceed only in cases in which they somehow calculated that there was a 51 per cent chance of success and a 49 per cent chance of failure, few cases would go forward". Another explained that prosecutors are looking for anything "that will elevate the victim's version in the jury's mind to a point where they accept it beyond reasonable doubt". Other considerations include:

*How to assess reasonable prospects of conviction? I can't predict what the jury will believe, so I don't try to pre-empt the decision. In one case the victim gave inconsistent versions of the event and I didn't expect a conviction, but there were more inconsistencies in the defendant's evidence and he was convicted.*

Table 15: Factors Influencing Prosecutors' Decisions to Proceed With or Withdraw Sexual Assault Cases

	PROCEED	DISCONTINUE
<b>VICTIM</b>	Credible, reliable	Defence has access to material to that will undermine victim's credibility e.g. psychiatric history of delusions
	Willing to proceed; ability to withstand trial processes	Reluctant – makes informed decisions not unduly influenced by the defendant or others associated with him. This would not apply where there are strong public interest reasons to proceed e.g. schoolteacher and pupil, serial offender
	Consistency, although some degree of discrepancy is understandable	<i>Inexplicable</i> internal inconsistencies in the victim's story
	Can recall and relate the facts	Memory affected by drug or alcohol use, or even the shock of the attack
	Distress	Vindictiveness or other circumstances that could indicate motive to lie
	Corroboration: visible injuries, bruises, eyewitnesses, medical evidence	Victim's account conflicts with other evidence or eyewitness accounts
<b>DEFENDANT</b>	Factors that undermine the defendant's version e.g. motive to offend, lies Inconsistencies e.g. admission followed by denial; denial followed by claim of consensual sex when DNA proves sex took place	Age, health, mental condition
<b>CASE</b>	Fresh complaint	Delayed complaint
	Age of matter (recent)	Historical offence
	Level of offence – rape	Indecent assault
	Relationship evidence that is admissible and will assist jury in determining truth	Reconciliation between victim and defendant (not determinative but a factor)

*What is a reasonable prospect of conviction? This varies from individual to individual and is difficult to gauge. These days, decisions to proceed or discontinue are more driven by the victim's attitude – their wishes to proceed are a very strong factor in the prosecutor's decision, even if the case shouldn't go on. Prosecutors tend to err on the conservative side and run cases that can't win.*

### Charge negotiation

Twenty prosecutors were asked about the circumstances under which they would consider negotiating charges. In some states and territories, the prosecution cannot initiate this process. All interviewees noted that they would consider whether the victim was willing to accept a plea, although her wishes are not determinative. The primary motivation is to save the victim from giving evidence, but the decision also

relies on the strength of the evidence. The decision to negotiate charges reflects an interaction between three factors:

1. Concerns for or about the victim
  - a. Is she able to withstand the stress of the trial and to face the defendant in court?
  - b. Could the case be lost because she is likely to be a “shaky” witness?
  - c. What is her attitude towards prosecution? Is she reluctant to give evidence and if so, why? What are her expectations, what outcomes does she want? Some victims are happy to accept a plea because the defendant admits some level of guilt. Moreover, a defendant who pleads guilty cannot subsequently claim innocence or wrongful conviction. Alternatively, some victims want their day in court, either because they are driven by retributive or punitive motives, or because it is important to them to tell their story, even if the defendant is not convicted.
2. The prospects of conviction
  - a. There is an inherent uncertainty or risk in going to court. The prosecutor cannot predict the outcome and there is no surety of convictions. Some prosecutors noted that jury decisions in sexual assault cases are among the most perverse they have seen.
  - b. Charge negotiation is more attractive if the case is not strong and the prospects of conviction are poor.
3. The plea must reflect the criminality alleged.

A substantial number of interviewees who addressed this question (n = 12) indicated that they often look for opportunities to explore a compromise in the charges, although they were more likely to reduce the number of charges than compromise on the level of charges. Discretion to negotiate the level of charges is somewhat constrained by the requirement that the charges reflect the criminality alleged. The motive of avoiding uncertainty was evident in their responses.

*I'd consider it in every matter, because there is no surety of conviction. It's a matter of how much you're prepared to negotiate.*

*Take what you can get, rather than an acquittal.*

*When the defendant pleads guilty, the prosecutor is not rolling the dice of the jury.*

*I constantly look at the possibility of negotiating charges. I look at the gap between the charge and what the defence is prepared to plead in light of the antecedents. For example, if the defendant has a long history of a similar nature, he's likely*

*to be convicted anyway. It's okay to bargain as long as the lesser charge addresses the essential criminality of the offences. It saves the state money, reduces the workload and the victim doesn't have to go to trial but still gets a conviction.*

*I don't negotiate simply to get a conviction. Once the charges are laid, I tend to stick to the indictment unless the defence puts forward a persuasive reason. For example, doubts about whether penetration was digital or penile would lead to reasonable doubts about the prospects of conviction for rape.*

*I don't compromise on the facts about the level of sexual assault, but I would compromise somewhat on the number of charges, especially if I'm not able to prove all of the offences. It's a judgment of practicality, discretion, commonsense and responsibility to the community; a balance between a practical result and what is to be achieved in the community interest.*

*There is no leeway to negotiate charges. I will charge whatever the evidence supports. If penetration can't be proven, then I can only reduce the charge to indecent assault, but if the victim states that penetration occurred, there is no room to bargain.*

## Credibility

All interviewees were asked to describe what makes the difference between victims who are perceived as credible or not credible. The prosecutors were unanimous about the importance of victim credibility in sexual assault trials. They all stated that most victims were credible and that they were more inclined to believe than disbelieve their stories. Three prosecutors felt that they were more suspicious about victims' stories than their colleagues. Prosecutors' narratives were based on four underlying categories of personal characteristics that go towards establishing credibility and are not discrete. They overlap to a considerable extent with Frohmann's (1991) analysis of rationales and typifications used to justify case decisions. The most commonly cited factor contributing to credibility is consistency.

1. Consistency:
  - a. in her statements at various times;
  - b. between her statements and those given by witnesses;
  - c. in her post-assault behaviour.



## 2. Genuine and trustworthy:

- a. she tells the story as it happened, without “gilding the lily”. Some embellish their stories to make sure they are believed, but this is “fatal” to the case. Others “understate the amount of alcohol they’ve consumed. They tend to look at what they did and they think will look bad and downplay these aspects. They do themselves a disservice because this leads to inconsistencies”;
- b. the story rings true;
- c. she makes eye contact with the prosecutor, defence and judge;
- d. she is herself – she acts, speaks and dresses as she usually would;
- e. there are no other factors that “set off alarm bells”, such as allegations of sexual assault made against a husband during a Family Court custody case.

## 3. Demeanour:

- a. she is not aggressive, smart or argumentative towards the defence;
- b. she is confident and relaxed;
- c. where there is a prior relationship, she is motivated by a level of anger at what the defendant has done but does not show animosity to an extent that raises doubts about her motive to lie;
- d. she shows some distress, but is not withdrawn or numbed by having to recall and relate the offence; and
- e. she is curious – she finds out about what will happen in the trial and why, and informs herself about how to withstand cross-examination (see Konradi 1996 re victims’ preparations for court).

## 4. Memory and communication skills:

- a. she can recall what happened;
- b. she is intelligent and articulate – she accurately and coherently describes the events;
- c. she focuses on the elements of the offence and the circumstances of the act when giving evidence, rather than expressing her opinion of or feelings towards the defendant.

While there was considerable overlap in prosecutors’ views about what determines credibility, there were also some differences, which probably reflect personal experience. In general, their statements indicate that credibility is not simply a matter of the prosecutor’s personal belief in the victim’s truthfulness.

*There is no real distinction between credibility and lack of credibility, except that the defence does a hatchet job on some victims (for example, if she has a history of schizophrenia). Prejudice is the determinant of perceptions of credibility; the same witness could sway one jury but not another.*

*I have not come across a victim who’s not credible; they’re all believable.*

*A credible witness is one who can be herself, who can get the story out in a way that comes across as genuine.*

*Credibility is anything that makes her story more likely than that of the defendant.*

*Juries want to believe the victim, but they’re more satisfied if there is any form of corroborating evidence. They look for physical or forensic evidence, or an eyewitness who supports some aspect of the story. Juries want something outside of word against word, but these are external to the victim.*

*The jury, not the prosecution, is the arbiter of the facts. It’s their job to decide if she’s telling the truth.*

*Internal consistency is important, but little inconsistencies can add to veracity rather than detract from it. Everyone uses somewhat different words from one time to the next of telling a story, but if the victim’s story doesn’t budge from a rote form, it could give rise to the suggestion of fabrication.*

One prosecutor summed up credibility in the following way:

*She appears to be making a genuine attempt to tell the truth; she appears to be concerned about her predicament, but does not appear to have an axe to grind with the defendant. In terms of having an axe to grind, the prosecution is more likely to be successful if the victim did not know the defendant prior to the assault. The defence case will involve mud slinging and will try to show that the victim has an agenda. This is difficult when there is no prior relationship. Victims often have a different demeanour when the case involves someone they know versus a stranger. When it’s someone they know, they show anger and bitterness, compared to pain when it’s a stranger. It can help if she’s attractive and well presented; her story might be more likely to be accepted. But appearance has little impact overall. I remember a case where the victim was a heroin addict and prostitute, who was off her face during the trial and she was accepted by the jury.*

Because criminal trials are predominantly oral procedures, in which the victim is tested on explicit details of the offence by telling her story in front of the judge and jury, credibility can be helped or undermined by her age, intelligence, socio-economic status and cultural background. For example:

- A jury might accept that a young woman left a party with a stranger because she is naïve and takes men at face value, whereas an older woman would be expected to be more aware and less trusting.
- Inconsistencies in truthful accounts can be the result of a victim's difficulty in understanding lawyers' language, the fact that they ask questions in a non-chronological order, or because particular types of evidence are inadmissible, even though they are crucial to explaining why she acted as she did (see Breckenridge 1999 on the latter point). Mature, intelligent victims with good English skills are better able to understand what they are being asked, to respond to questions clearly and effectively and to cope with cross-examination.
- Victims who are educationally or intellectually disadvantaged, have emotional problems, or come from culturally and linguistically diverse backgrounds, might be unable to explain why they acted in certain ways. They might make up answers, rather than saying they cannot explain why they did certain things.
- Women from culturally and linguistically diverse backgrounds may be unable to make eye contact with strangers, males and authority figures.

Victims who are inarticulate or intellectually disabled are disadvantaged in the trial process, but one interviewee noted that "if they don't pass the prosecutor's test, they won't convince a jury". This does not mean that prosecutors themselves view credibility as a characteristic of older, white, educated women, but they do call on experience to assess a victim's ability to express herself and how a jury will view her.

### **Moral and gender stereotypes**

Prosecutors stated that they do not assess victim credibility on the grounds of moral or gender stereotypes, such as sexual history, moral character, or "risk-taking" behaviour. One prosecutor illustrated this point by reference to a trial involving a victim who worked as an exotic dancer. The prosecutor made it clear to the defence that the victim's work was not relevant to the case. He was prepared to counter any mention of her work that might lead the jury to think of her as a "slut", but was aware of the need to make attributions about the way juries think. The prevailing view among interviewees was that:

*It's tactically dangerous for the defence to run a trial around [factors such as] she was at a bar and was provocative in her behaviour and clothing. These factors don't necessarily equate with the offence.*

However, there was some difference of opinion as to jurors' attitudes and defence lawyers' use of stereotypes. Only two interviewees believed that jury decisions are not affected by stereotypes. While prosecutors tended to be aware that jury perceptions could influence the trial outcome, they viewed their task as determining the prospects of conviction on the strength of the evidence – not pre-empting jury perceptions.

*Juries represent society; they have no axe to grind. Victim stereotypes don't make a difference. Juries just want to know what happened in relation to the crucial issues.*

*Stereotypical factors such as dress or sexual history are not important to the prosecutor, but more so to the jury.*

*Stereotypes don't play an overt role in the proceedings, but a prosecutor can't know what goes on in jurors' minds.*

*In general, the defence and the Crown do not attempt to use stereotypes to sway the jury; we would get short shift from the judge. However, this can be done covertly by the defence and some do it if the case comes down to word against word.*

*Juries still see that if a woman is silly enough to get drunk that's enough cause to doubt her evidence and doubt lack of consent. If a woman's drunk at party and coming on to one man, or expressing interest in one man, juries seem to think this sends out messages to any other guy that she's consenting. I've seen it succeed for the defence and it's unfair, especially for younger victims. Yet alcohol is a mitigating circumstance for males where they both were drunk. Juries are still harsh on women who drink too much.*

*There is a need to consider stereotypes, because they will be used by the defence and they do influence juries.*

*However, sobriety is a factual issue which could give rise to a defence of mistaken belief in consent. I emphasise in court that what's important is what happened, not her character.*

The final two comments are representative of all interviewees who addressed the issue of drug or alcohol intoxication.

Prosecutors perceived that juries take a moralistic view of victim behaviour that could be perceived as "rough", which includes drinking, acting provocatively, willingly going with a stranger, going with a man after others have warned her about him, or doing anything that showed that she was interested in him. Even where there is corroborating evidence, juries are likely to believe that "she asked for it".

From the prosecutor's perspective, the problem with intoxication is its impact on the reliability of the victim's memory of the events and therefore on the ability to prove the elements of the offence beyond reasonable doubt. In a case that comes down to word against word, a victim who was extremely intoxicated cannot be in a fit state to recall the events and it becomes difficult to convince a jury beyond reasonable doubt.

*It's difficult where alcohol was involved, unless the victim was dead drunk, incapacitated and clearly unable to consent. Alcohol use often involves blackouts where victims' actions can give, or be interpreted as giving, the impression of consent. There's rarely forensic evidence of drugs or alcohol to support incapacitation.*

*There was a case where the victim tried ecstasy and could not get the words out to say "no", or bring her body to show refusal. The defendant had also been using cocaine at the time. I had to prove that the defendant knew she wasn't consenting or was reckless as to her lack of consent. The defence suggested that the case would not succeed because both were drug affected and it wouldn't be possible to disprove his honest belief in consent or his recklessness. The case didn't proceed, because the Director and I agreed with the defence counsel's assessment of the prospects of conviction.*

### **Police filtering**

One prosecutor noted that most cases forwarded to the DPP are inherently believable, because police filter out weaker cases and/or may encourage victims to withdraw. Having said that, two prosecutors noted that police seem to be increasingly unwilling to lay themselves open to allegations that they have taken the jury's place in determining the truth of the matter. As a result, they may be referring an increasing number of cases to the DPP for review. One prosecutor believes that it is better for an independent office to make these decisions, especially as most police are not lawyers and are not looking at cases from a prosecutor's perspective.

### **Difficulty of prosecuting sexual assault**

Twenty-one interviewees were asked whether it is more difficult to prosecute sexual assault than other types of offences. Fourteen prosecutors believed it is more difficult to gain a conviction for sexual assaults. It was common for these prosecutors to say that sexual assault cases are "among the most difficult to prosecute", or that they are "extremely difficult; I would rather do other types of cases". Seven prosecutors believed that sexual assault cases are "not necessarily easier or harder to prosecute than other types of offences, just different".

### **What is difficult about sexual assault cases?**

Prosecutors who believed that sexual assault cases are more difficult to prosecute than other types of cases said that relationship cases pose more problems than stranger cases and that few stranger cases go to trial. This group of prosecutors said that the inherent difficulties associated with sexual assault are:

- (a) most cases come down to word against word;
- (b) there is rarely eyewitness, medical or forensic corroboration; and
- (c) the emotions connected with sexual assault.

The most difficult cases can be subdivided into four categories: those involving prior relationships, where the defence is consent and there is no corroborating evidence; historical cases; cases involving multiple victims; and "date rapes", where there are suspicions that drugs were involved. Comments about cases involving prior relationships often centred on jury perceptions and understandings:

*It's amazing what juries believe women consent to (i.e. "rough play").*

*A prior sexual relationship isn't necessarily fatal. It depends on what type of relationship it was and when did it end. Sexual assault cases often involve objectively vulnerable women who have been deprived in adulthood, have poor self-esteem and relationships that don't end clearly. The jury may genuinely believe her, but they can think that he thought she was consenting, due to the on again/off again nature of some of these relationships.*

Responses related to the difficulty of prosecuting sexual assault were classified into two underlying categories: the knowledge that it is difficult to obtain convictions for sexual assault; and the social and emotional factors around sexual assault. As the following quotes demonstrate, there is some overlap in the two types of answers. Responses in the first category often relate to evidentiary or procedural difficulties, or to juries. In regard to juries, prosecutors in four jurisdictions noted that it is rare for juries in some districts to return a guilty finding. This was usually seen as a facet of attitudes associated with socio-economic status, particularly in areas where many sexual assault cases involve victim/witnesses who are barely literate and have had prior contact with the criminal justice system as offenders. People in these areas may be less shocked by domestic and sexual violence or not convinced that it is a problem and occurs at high levels.

1. The knowledge that it is difficult to secure convictions for sexual assault

*The low level of guilty verdicts has a personal impact on prosecutors who have a strong personal desire to succeed and bring justice.*

*Sexual assault cases usually involve word against word, with no corroboration and less injury than common assault. The defence is often consent, which complicates prosecution. It's more difficult to prosecute relationship cases, because the defence will say the allegation is made up.*

*Juries still like to see genital injury, despite the judge's direction that injury is not necessary to prove the offence. I had one case where there were extensive physical injuries but no genital trauma and the jury acquitted. Juries have this lingering idea of injury. With a stab victim, the prosecutor will have a photo of the wound, a medical report and the knife. It's clear that no one consents to being stabbed.*

*There's a huge double standard between what's expected of the defence and the prosecution. The defence can be quite conniving, while the prosecution must be scrupulously fair. There's an underlying disbelief in sexual assault cases that allows the defence tactics, because the defendant is presumed innocent.*

*There are three levels of difficulty with sexual assault. The first is to do with the witness and the degree of skill required to get information from them, especially with child witnesses. There's a lot of imprecision in dealing with children. Then there are the judicial directions. This is the worst part of sexual assault trials: the directions are so numerous that judges often get them wrong and they reduce the prospects of conviction. The law is so complex and there are so many directions that it's hard for judges to get them right. Finally there's the rate at which convictions are quashed in the court of criminal appeals. There's a high proportion of appeals for sexual assault, often based on incorrect judicial directions. All of this leads to the feeling that the system is ineffective and goes wrong too often.*

## 2. Social and emotional factors around sexual assault

*It's harder to stay uninvolved, especially with children. It's difficult to remain unaffected by the victim's emotional distress.*

*Sexual assault cases are the most difficult to prosecute due to the emotion of the victims and their families. There's also the emotion of police and prosecutors, who acknowledge the low rate of convictions, which leads to frustration.*

*Sexual assault victims are less well placed to give evidence than assault victims. They're more traumatised, there's usually less physical evidence, and it's more emotionally and socially difficult to recount the events in front of strangers.*

*These cases require more tact and understanding. These are real victims, when you compare sex offences to drug offences, which essentially involve a supply and demand business transaction. There are no **real** victims there.*

*But in sexual assault, the victim's life is torn apart and there are multiple victims, including the victim, her family and the family of the defendant.*

*The nature of sexual offences is that everyone has their own views and their own baggage about them – you know, they think “she got herself in that situation”, or “I wouldn't have done that”. Juries don't want to convict and punish people, or be responsible for sending them to jail, so they'll find reasons not to convict.*

*It's more difficult to prosecute sexual assault than other types of cases because the weight placed on the victim's evidence is so different. The case stands or falls on her evidence. She faces more pressure and social stigma. Issues around belief mean that victim integrity is on a different level. The defendant is cocky if he's acquitted in any type of case, but it's different for the victim, who's stigmatised in a rape case but not in an assault case. She'll only feel better if there's a guilty verdict.*

*Adult sexual assault cases most often involve people of low socio-economic status and within the context of domestic violence or drinking. So with juries, there's a difficulty in the societal response to the law and sexual assault; for example, attitudes that she was asking for it, or she should have expected it, especially if she was drunk or had gone back to a violent partner. This varies: there's a good jury response in [two cities], but a poor response in [a regional area]. There are different reasons for this. Firstly, it's a bible belt, so they deny it happens. These are also fractured communities, where people have been brought in from other areas, they're living on pensions and everybody's renting. There are high levels of sexual assault, but victims are judged by their peers and defence counsel play on the victim's personality and the community's bigotry. It's really difficult to get a conviction for adult sexual assault. Juries are more likely to convict for child sexual assault, but I get the feeling that that conviction is often based on a dislike of paedophiles, rather than a reasoned verdict based on the evidence.*

*The issues are different according to race. In Indigenous-on-Indigenous sexual assault there are two main impediments. The first is the attitudes of white juries. They're either not interested, lazy, racist, or distanced – they think “it's got nothing to do with me”. This attitude is a problem because of the particular context of the town. Drinking and violence are normalised in Indigenous communities, so people don't worry about violence. There was an instance when an Aboriginal woman was lying on the road and no one stopped to see what was wrong. A friend of mine eventually stopped her car and found the woman was not drunk, but unconscious from injuries. The second issue is that Indigenous victims have*

*difficulty in giving evidence. They're shy, unconfident, and face pressure not to say anything bad about the defendant. They may have been intoxicated at the time of offence and sometimes when they're giving evidence. When it's a Caucasian-on-Caucasian sexual assault, juries are more interested, but it's still difficult to get a conviction.*

### **What is different about sexual assault cases?**

Seven prosecutors believed that sexual assault cases are not necessarily more difficult to prosecute, but that they are different from other cases. One interviewee noted that prosecuting sexual assault becomes easier for experienced prosecutors who have greater familiarity with the issues. They need a good grounding in forensics and medical evidence and they must be able to explain the issue of consent clearly to the jury.

*Sexual assault and murder produce some of the most perverse jury decisions that are difficult to comprehend. I've seen an acquittal where the defendant admitted to the offence.*

*Some are easy, some are difficult. The most difficult cases involve multiple victims, historical offences, or where there's no corroborating evidence. Cases are easy when there is a strong witness and corroborating evidence. Different types of cases require different approaches and techniques. There are different potential difficulties.*

*The biggest difficulty is in the lack of witnesses. Juries have no particular pre-conceptions about victims lying and these days it may even be the opposite. Over the last 20 years, publicity about the trauma of reporting and testifying, following the trauma of the sexual assault, may have swung jury pre-conceptions in favour of the victim.*

*It's not more legally difficult to prosecute sexual assault, but witnesses in these cases are more emotional and fragile. Firstly, there's the embarrassment; and then the outcome is so important to victims. There are tragic personal consequences associated with an acquittal. These cases are more emotionally difficult for all concerned, including juries and prosecutors. You have to be a bit aloof to do well in court, but at same time you must establish rapport with the victim.*

*It's not necessarily easier or harder to prosecute sexual assault than other types of offences, just different – it depends on the case, the quality of evidence and the investigation.*

*The most difficulty is in cases involving word against word. You have to ask why the jury would be satisfied beyond reasonable doubt with what you say, when the defendant is saying that it didn't happen or that it was consensual.*

*Sexual assault has its own unique difficulties. I have a sense that juries get bored with some of the less serious cases and wonder "why are we here?" With some indecent assaults, if you go to a pub and someone touches your breasts, people think "so what?". Prosecutors also get jaded when they're doing sexual assault cases day in and day out.*

### **Organisational factors**

Thirteen interviewees were asked about the impact on their discretionary decisions of organisational factors such as lack of resources and high workloads. Their responses indicated that these factors do not influence their decisions to proceed with or discontinue cases. While material, temporal and human resources may be stretched, it is not a problem to the extent that prosecutors are looking for reasons to discontinue cases. At the same time, ten interviewees conceded that under-resourcing has the potential to affect how a trial is run. The main problem concerns high workloads and lack of time to prepare for the trial.

Prosecutors may be briefed in several trials in a week, sometimes only a few days before a trial. As a result, they may have insufficient time to requisition additional evidence, check facts, prepare witnesses, or come to grips with the central issues of the case.

One interviewee noted that sexual assault cases tend to be allocated to more experienced prosecutors and that the wellbeing of prosecutors who are running a lot of sexual assault cases needs to be considered. Their perspective can be affected, so that "they either think everyone is guilty or everyone is lying".

In the geographically large states and territories with bigger Indigenous populations, the underlying problems of prosecuting sexual assault are compounded by distance, language barriers and lack of victim support services in remote areas. One prosecutor expressed concern that although prosecutors do their best, they are often unable to spend time, gain the trust and meet the needs of Indigenous women in remote communities, "who often live in a different world".

## Discussion

This study addresses a gap in local information about prosecutorial decision-making in adult sexual assault cases. Data from 141 case files were used to describe and analyse prosecutorial decisions to proceed with, discontinue, or negotiate charges in cases referred to the DPP in five jurisdictions. Interpretation of the statistical data was supplemented by a qualitative analysis of interviews with Crown Prosecutors and by field notes recorded during data collection.

The results showed that, for this sample of cases, prosecutors were more likely to proceed with than discontinue cases. This may reflect the seriousness of the offences, as well as a social and organisational context in which there is an increasing expectation that these crimes will be prosecuted. Their decisions to proceed with or discontinue prosecution, or to negotiate charges, were primarily related to evidentiary considerations. In particular, decisions to go forward or withdraw cases were based on a combination of case and defendant characteristics that are largely related to the strength of the evidence and the severity of the assault. Bivariate analysis indicated that cases were significantly more likely to proceed to trial or sentencing when:

- the victim physically or verbally expressed non-consent to sex;
- the victim was injured during the attack;
- the assault was severe;
- the defendant used force during the assault;
- there was evidence linking him to the attack;
- the defendant was a stranger; and
- the defendant was non-Caucasian.

The majority of these variables go to the heart of proving the offence beyond reasonable doubt: non-consent is the basic substantive element of sexual assault, while force, injury and additional evidence corroborate the victim's claim that she did not consent to sex. The finding that case continuation was predicted by an interaction between non-consent and force reflects the fact that the level of force is commensurate with the level of resistance. The presence of both factors also helps in establishing the mental element of the offence.

The finding that prosecutors were significantly more likely to discontinue cases when the defendant and victim were known to each other raises the question of whether prosecutors continue to regard "acquaintance rapes" as less serious crimes than "real rapes" (i.e. stranger rapes). The results could be interpreted as providing partial support for the argument advanced by Estrich (1986) and Bryden and

Lengnick (1997) that the relationship between defendants and victims mediates whether victims are likely to be believed. These theories also suggest that victim characteristics should assume more importance where there was a prior relationship, but this was not the case in this study.

The victims knew the defendants in 87 per cent of the discontinued cases, but this statistic should be interpreted within the context of the sample characteristics. Three-quarters of all cases in the sample involved defendants and victims who knew each other, but most cases cannot be classified as "simple" rapes given the severity of the assaults and the fact that the majority of victims actively expressed non-consent. Just over half of the discontinued cases were withdrawn as a result of the prosecutor's or magistrate's view that the evidence did not justify prosecution or that there were not reasonable prospects of conviction.

At this point it is pertinent to highlight an important difference between the lawyer's view and the "outsider's" view of whether prior relationship is relevant or extraneous to the legal assessment of a case. This is a crucial consideration for the way prosecuting agencies deal with victims, most of whom, together with many of their formal and informal support systems, are likely to be "outsiders" to the legal system.

A critical view of prosecutorial decision-making suggests that discontinuance of cases involving prior relationships is underpinned by stereotypical assumptions about how women and men interact and about the nature of violence in relationships. For example, Stanko (1982) argues that when the defendant and victim know each other, and particularly when they have had an intimate relationship, prosecutors may assume that they were interacting as they normally would and that the ongoing nature of the relationship is a likely indicator that the victim will not carry through with the prosecution. Assumptions about the history of the two parties and about "family disputes" may override the issues relating to the particular case, leading prosecutors to decline to proceed with cases involving intimate partners. Prosecutors interviewed during the study acknowledged that there are legal and non-legal ways of "seeing" sexual assault cases:

*Stereotypes impact on juries' perceptions of credibility. Jurors have a different view from lawyers as to what are the important facts in a trial. Lawyers are too legalistic and juries may brush over matters that lawyers think are important. Jurors use their own life experience to orient themselves towards evidence. Lawyers need to try to orient themselves toward the way that juries see the case. They need to think more like the community.*

While assessments about the defendant/victim relationship or the victim's credibility are, in themselves, extraneous to the facts of the matter, they have considerable relevance for the prosecutor's decisions:

*Legally irrelevant does not equate to evidentially [ir]relevant. The difficulty of prosecuting successfully intimate "relationship rape" is that issues of consent arise. It is more difficult to prove this element beyond reasonable doubt when the prosecution must prove a lack of consent and a lack of belief in such consent... Decisions on credibility will also be based on what the prosecutor might think of the way **juries** might react to different cases. It may well be re-enforcing of stereotypes but juries acquit in simple rape cases in a high percentage of cases. If a purely mathematical approach was taken to reasonable prospects in some sexual assault categories, then a much higher percentage of cases would be discontinued.* (K. Archer, personal communication, 23 March 2004)

It is suggested here that both the lawyer's and the "outsider's" views have validity. There is ample empirical evidence, including the results of this study, that attrition of sexual assault cases at the prosecution stage is usually related to evidentiary matters, which are most complex in cases where the victim and the defendant are acquainted. These cases usually come down to word against word, with little or no corroborating evidence. The defence usually centres on consent or the defendant's mistaken belief in consent, which is more likely to succeed if there has been prior consensual sex. Cases involving current or former partners are often discontinued due to victim withdrawals and insufficient prospects of conviction. It is understandable then that experienced prosecutors, who are mindful of the limits imposed by the substantive, evidence and procedure laws of sexual assault, would assess the prospects of conviction by considering prior relationship in combination with other factors, such as the strength of the evidence. At the same time, it is also clear that cultural assumptions about consensual sex impact on legal definitions of consent and the conduct of trials.

Objectively, there are clear differences between sexual assault and lawful sexual intercourse, but not all people recognise women's right to refuse sex. Even among those who do, consensual sexual relations often involve, at best, ambiguous communications of consent or non-consent. Moreover, a certain level of aggression, pressure or coercion is often an expected part of male sexual behaviour. This can range from various forms of "persuasion" and seduction, such as compliments and gifts, to an "acceptable" degree of force (Lees 1996; Naffine 1994; Schulhofer 1998; Temkin 2002). Men who hold "a Casanova understanding of the woman's resistance" (Ekström 2003: 212) do not always perceive

forced sex as sexual assault, which highlights their recklessness to ascertaining consent. When consent is an issue at trial, there is a difficulty in determining whether lack of consent means that the victim denied consent in her own mind or whether she communicated lack of consent verbally or by her actions (Schulhofer 1998). Many authors note that widespread acceptance of rape myths, by women as well as men, means that victims' confidence about testifying is undermined and their access to justice restricted (see Appendix F; Lees 1996; Naffine 1994; Schulhofer 1998; Temkin 2002).

In this study, slightly fewer than half of the discontinued cases were withdrawn when the victims indicated that they were reluctant to proceed to trial. As only seven of the discontinued cases involved strangers, many victims were likely return to social, familial or domestic contexts where there was a possibility of future contact with or vulnerability to the defendant. This study could not elucidate whether, or to what extent, victims' reluctance to proceed was influenced by contact with the defendant or his supporters, by delays in going to court, by interactions with prosecutors, who may intentionally or unintentionally discourage victims from going forward, or by changes in victims' needs and goals over time.

Prosecutors are not precluded from pursuing cases where the victim is reluctant to proceed, but Spohn and colleagues (2002) argue that the goal of avoiding uncertainty makes it unlikely that they will do so. In their study, prosecutors' comments indicated that victim reluctance to proceed with the case could be attributed to a number of factors, including:

*a belief that prosecution of the suspect is not worth either the time and effort required or the humiliation of testifying about her victimization; and a belief, either arrived at independently or communicated by police and prosecutors, that her character and behavior at the time of the incident make conviction unlikely. The victims in these cases, in other words, may have made a rational decision that pursuing the case would be too traumatic and/or would be a waste of time given the low odds of conviction.* (Spohn et al. 2002: 232)

In the interviews with Crown Prosecutors, concern for victims' welfare was cited as a fundamental consideration in many decisions to withdraw cases where victims were reluctant to proceed. Decisions not to subpoena victims were based on prosecutors' awareness of the potential for revictimisation and on the pragmatic view that a reluctant, if not hostile, witness is likely to undermine the prospects of conviction. However, agreeing to the victim's wish to discontinue a case may place her in real danger of repeat victimisation.

There is an underlying tension here, which is difficult for prosecutors to resolve, between the victim's interests and the prosecutor's role as an independent officer who represents the community and not the victim (K. Archer, personal communication, 23 March 2004). Prosecutors are required to be independent and impartial arbiters of what is in the best interests of the community. Strictly speaking, their paramount role is to ensure that the criminal law fulfills its objectives; from this perspective, victims should have little say concerning prosecutorial decisions. However, one of the most common complaints voiced by victims stems from their feeling that they are not adequately informed about committal and trial processes and that there is a lack of communication with prosecutors (VLRC 2003).

In recognition of the subsidiary, albeit crucial role that victims play in the criminal justice process, governments in most Australian jurisdictions have given legislative effect to the UN Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power (1985). Victims' needs are afforded a measure of acknowledgment through these charters and, while the guiding principles for the treatment of victims are not legally enforceable, they are often adopted as policy (Johns 2002). Directors have acted in different ways to give concrete effect to victim of crime charters and to meet the obligations of prosecution authorities, which include ensuring that victims are informed about prosecution processes and their rights and responsibilities as witnesses. Every Australian jurisdiction has legislated for crime victims to be able to tender a Victim Impact Statement at sentencing. The Directors have ensured that victims are able to access support services and government-funded compensation and that help is available in preparing and tendering Victim Impact Statements. Many Directors have been able to do this through support and liaison provided by prosecution-based witness assistants and/or through referral arrangements with external sexual assault services. Directors have also implemented measures such as arranging for the prosecutor and the victim to meet prior to proceedings (other than for the more formal "proofing"). Given the general pressures of case management processes in courts and the prosecutor's obligation to disclose all evidence to the defence,<sup>12</sup> it is sometimes preferable for the prosecutor to limit contact with the victim. Witness assistance services enable the DPP to structure resources in such a way that it can provide "client service" without compromising the prosecutor's role (R. Holder, personal communication, 14 April 2004).

The VLRC (2003) reports that, in Victoria at least, some victims find these measures effective. Others continue to report communication problems, including not being informed about or being given short notice of hearing dates, not understanding what was expected of them in court, and

meeting the prosecutor for the first time on the day of the trial. They often do not understand charge negotiation and sentencing decisions, and may be distressed by an abrupt end to a matter, denial of the opportunity to tell their stories, or by a seemingly light sentence. These problems are compounded for women from non-English speaking backgrounds, due to a lack of culturally and linguistically appropriate information about legal rights and legal processes.

It is not suggested that there is an easy solution to these problems, or that prosecution agencies should be solely responsible for addressing them. The issues are systemic and the prosecutors who participated in this study made it clear that sexual assault laws and the attitudes of the judiciary and juries are major contributors to the difficulties of prosecuting sexual assault. Nevertheless, prosecutors are in a position to challenge practices that support cultural stereotypes around sexual assault and to contribute to changing the culture of the courtroom and wider rape-tolerant attitudes. Admittedly this is no easy task, but there is a danger that even prosecutors who do not ascribe to biased beliefs may reinforce them by the way they run trials. Ekström (2003) found that the way prosecutors chose to run trials had a substantial effect on court outcomes:

*In a formal sense, the bench had an independent position vis-à-vis the representatives of the parties, but the stance they took was nevertheless largely dependent upon what the prosecutor and the defence chose to emphasize during the trial. This is a situation in which both parties are well aware of the kind of conclusions and statements the court finds important in rape cases.* (Ekström 2003: 207)

The prosecution and the defence are not playing on a level field. Some researchers have found that patriarchal narratives of masculinity, femininity and "real" rape, which intersect with other cultural stereotypes about race, sexuality and so on, work in favour of the defence and make it difficult for the victim's story to be heard (e.g. Frohmann 1997; Tang 2000; Taslitz 1999; Young 1998). They argue that prosecutors are aware that the likelihood of conviction is enhanced the more closely the case resembles stereotypical rape scenarios and the more the victim and her behaviour resemble cultural discourses of femininity. On the one hand, ignoring cultural themes works against the prosecution; on the other hand, a prosecutor who emphasises the way an individual case reflects these themes reinforces cultural narratives and tells the jury that stereotypical behaviours and circumstances are indeed necessary for a guilty finding. They face the choice of using dominant cultural themes to secure a guilty verdict, or

<sup>12</sup> Prosecutors have a duty to disclose to the defence all relevant material relating to the case it intends to establish. Failure to do so can result in convictions being set aside because of a miscarriage of justice if the defendant shows that he was prevented from presenting relevant evidence at trial (Refshaug 2002).



having them used against the victim by the defence counsel. Because victim narratives often deviate from the ideal, cases that are risky in terms of convictability may be too easily dismissed during the pre-trial process or seen as candidates for charge negotiations. The challenge facing prosecutors is to strategically use the available evidence to rebut patriarchal tales and to convince jurors to modify existing themes (Frohmann 1991, 1997; Taslitz 1999).

This study was not able to address the question of how prosecutors run trials, but it should be acknowledged that particular factors must be present to secure a conviction. Prosecutors must consider the impact of substantive, evidence and procedure laws on the likelihood of conviction. Their discretionary decisions must still take into account the strength of the evidence, the credibility of the victim and other factors that are likely to impact on their ability to establish guilt beyond reasonable doubt – even if some of these factors are not strictly legally required.

The results of this study showed that in decisions to proceed, discontinue or negotiate charges, the prosecutors interviewed differed somewhat from United States studies on one notable dimension. Australian prosecutors voiced some concern over the uncertainty of trial outcomes and the statistical results support the contention that they are motivated to reject or discontinue cases where conviction is less certain (Albonetti 1987). However, the current findings indicate that Australian prosecutors may be more conservative about discontinuance and less likely to look for reasons to reject cases than the literature suggests. At the same time, the majority of cases in the sample had relatively strong evidentiary bases and involved serious offences. In line with previous findings, prosecutors may have had less opportunity to exercise discretion or to consider extralegal variables (see Spohn & Holleran 2001).

Aside from prior relationship, which is evidentially relevant even if it is extraneous to the substantive elements of the offence, the defendant's race/ethnicity was the only extralegal characteristic that was significantly associated with case withdrawal. Cases were significantly less likely to proceed to trial where the defendant was identified as Caucasian. This finding does not necessarily mean that prosecutors' decisions were necessarily based on discriminatory judgments or that they were more certain of convictions where the defendants were not Caucasian. The results are likely to be skewed by the large proportions of Indigenous offenders in the Northern Territory and Western Australian samples and there are other plausible explanations for the finding.

Cases involving non-Caucasian defendants – most of whom were Indigenous – may have involved offences that were objectively more serious due to the levels of violence involved.

Research on sex offenders shows that racial and ethnic minorities are over-represented among visible (i.e. convicted) sex offenders and some studies have found that Aboriginality is a predictor of the risk of sexual recidivism (e.g. Allan et al. 2002; Broadhurst & Maller 1991). Indigenous women are subjected to repeated and multiple types of violence that are more severe than violence against women in non-Indigenous communities (see Lievore 2003) and they are over-represented as victims of femicide (Mouzos 2001). Decisions to prosecute Indigenous defendants may therefore have taken into account the risk posed to the victim and the community by defendants with prior histories of violent offending. Further research is required to verify the reliability of this finding. There would be particular value in qualitative research that compares differences in the elements of the offences, the case for the prosecution and the defence and the way the trial was run, for defendants of various racial or ethnic backgrounds.

The finding that victim characteristics did not influence decision outcomes is at odds with most previous studies. This could be attributable to the fact that only a small number of victim-related variables were collected and that victim characteristics were not consistently recorded in the case files. After data collection had begun, it was noted that the case files often contained a considerable degree of contextual information about the assaults. Future studies could collect more information on victims' risk-taking behaviour and about the contexts of the attacks, which would have both descriptive and analytical utility. However, it is worthwhile commenting on the prevalence of substance use, particularly alcohol, among victims and defendants.

The association between sexual assault and victims' and defendants' alcohol use is well documented and is supported by the results of the current study. There was also evidence in the case files of a considerable degree of "problem drinking" among victims and defendants. For victims, "drinking in the event" and chronic drinking patterns are both risk factors for and consequences of sexual victimisation (see Finney 2004 for a summary of published research). There is limited evidence that prosecutors are less likely to file charges if the victim had been drinking before the attack (Chandler & Torney 1981; Kerstetter 1990), although this variable may be obscured in some research. In many studies the victim's alcohol or drug use is subsumed under a variable called "risk-taking", together with activities such as walking alone at night, hitchhiking, being in a bar alone, voluntarily accompanying the defendant to his house or inviting him to her residence. Some of these studies have found that prosecutors are more likely to reject cases if the victim engaged in any type of risk taking behaviour at the time of the attack (e.g. Spohn et al. 2001). Such findings may

be interpreted as indicative of biased decision-making based on victims' deviations from normative moral or gender codes.

The current study did not find a statistically significant association between substance use and case withdrawal. This supports the results of other researchers, who have found no difference in charging or conviction rates where the victim was drinking or using drugs prior to the incident (DuMont & Myhr 2000; Frazier & Haney 1996). At the same time, the qualitative results point to the salience of this variable for prosecutors' decision processes. Most Australian laws presume that some level of intoxication negates consent<sup>13</sup> but research has shown that:

- alcohol use is sometimes related to women's intention to engage in voluntary sex;
- men and women who have consumed alcohol are perceived as being more interested in, willing to consent to sex or easier to seduce than when sober;
- intoxication can affect a woman's judgment, for example, by impairing her ability to recognise risk and resist sexual assault; and
- intoxicated victims are viewed as less credible (Davis & Loftus 2004).

Importantly, intoxication or chronic drug or alcohol use often impair the victim's recall of factual events. From the prosecution's viewpoint, questions about the reliability of her evidence represent a major legal obstacle to credibility. In cases where it is one person's word against another, assessments of the relative credibility of the victim and defendant are integral to jury decisions. It is not simply a case of preferring one person's version over the other. The jury will be instructed that it is not enough to accept the complainant's version, "but that her account must be capable of satisfying them beyond reasonable doubt, notwithstanding the sworn testimony of the accused. They do not have to believe the accused is telling the truth for him to be acquitted" (K. Archer, personal communication, 5 May 2004). Therefore, it is reasonable for prosecutors to evaluate victim credibility in light of intoxication or chronic substance use. This does not necessarily indicate inappropriate bias, but neither does it preclude it. In no circumstance is the view warranted that a woman who was drunk was "asking for it" (Davis & Loftus 2004).

## Summary

In many respects, the results of this study are consistent with overseas studies, although victim characteristics are less influential predictors of prosecutorial decisions than in other studies. It is difficult to know whether these findings are strictly

comparable to United States research. As noted, prosecutors in some United States jurisdictions are involved with the investigation of crimes and decisions to charge suspects, whereas Australian prosecutors are largely independent of investigative functions (Krone 2003). The decision processes examined in previous studies may therefore be qualitatively different from those analysed in this research. Organisational requirements are also likely to differ. For example, United States prosecutors may experience greater pressure to screen out cases or use charge negotiation as a way of maintaining system efficiency due to higher caseloads. In addition, political independence is the hallmark of Australian prosecutors, while United States prosecutors who are politically appointed may face greater pressure to maintain high conviction rates. This could result in a greater propensity to reject cases with poorer prospects of conviction or to utilise charge negotiations as a way of case disposition.

The international literature indicates that rape law reforms may have led to higher reporting of "simple" rapes and greater police willingness to pursue "borderline" cases (Spohn et al. 2002). In turn, it is possible that prosecutors are being forwarded more cases that are less likely to result in conviction. They may then either choose to prosecute or to exercise their discretion to reject, discontinue or negotiate charges in cases that appear to be less likely to succeed. This has raised concerns that prosecutors have become preoccupied with convictability and that, in attempting to avoid uncertain outcomes, they look for weaknesses and reasons to reject cases, rather than trying to proactively build stronger cases (Albonetti 1987; Temkin 2002).

The results of this study suggest that the prosecution policies and guidelines of the DPPs that participated in this research provide a reasonable safeguard against biased decision-making. This conclusion is accompanied by the caution that the findings should be considered in light of the study's limitations and, ideally the research should be replicated. Prosecutors are afforded a considerable degree of discretion, but case decisions are not made on the opinion of a single person; they are overseen by other DPP lawyers and decisions to terminate cases ultimately require the Director's approval. At the same time, prosecutors noted that they are experiencing increased pressure to go forward with sexual assault cases, even when it is their opinion that the case has poor prospects of conviction. At present this does not appear to be affecting prosecutors' decisions, but the longer-term effects are uncertain.

<sup>13</sup> See: Crimes Act 1900 (ACT) s 67; Crimes Act 1900 (NSW) s 61R; *Criminal Code* (NT), s 192; *Criminal Code Act 1899* (Qld) s 348; *Criminal Code Act 1924* (Tas), s 2A; *Crimes Act 1958* (Vic), s 36; *Criminal Code* (WA) s 319

## Conclusions and Recommendations

This study has found that prosecutorial decisions in adult sexual assault cases are primarily based on legal and evidentiary considerations. The prosecutors who took part in the interviews were aware of and concerned about victim welfare and there was little to suggest that their discretionary decisions were overly influenced by gender and moral stereotypes. This may indicate that reforms to government policy and pressures from victim groups have changed the organisational culture in relation to sexual assault prosecutions. However, the qualitative results could reflect a self-selection bias, as it is possible that only prosecutors who are concerned about sexual assault outcomes volunteered to be interviewed. There are also some contextual factors that the study did not address, including:

- legislative differences across the jurisdictions;
- the impact of varying policies, guidelines and practices across the DPPs;
- formal and informal changes that may have taken place in prosecution policies and practices during the study reference period; and
- the impact of social and cultural changes in public awareness of sexual assault on victims and prosecutors.

### Policy recommendations

The findings of the study suggest that there is much to gain through greater inter-sectoral dialogue and understanding. It is acknowledged that some of the recommendations put forward in this section have been implemented to a greater or lesser extent in most states and territories. Even so, the interviews revealed that not all prosecutors are benefiting from these measures, particularly because heavy case-loads make it difficult for them to take advantage of training opportunities. This is an organisational issue that is not necessarily easy to overcome, given the amount of time Crown Prosecutors spend in court. The problem could be alleviated by adequate human and economic resources, which would reduce individual caseloads.

The report highlights a disparity between the lawyer's and the "outsider's" perspective on factors such as victim credibility and the defendant/victim relationship. One of the interviewees observed that lawyers need to think more like the community; it would also be beneficial for the community to understand more about the way that sexual assault laws shape prosecutors' views and actions.

It was not possible to determine in this study whether, or to what extent, differences between the legal view and the "outsider's" understanding about various evidentiary matters were implicated in victims' attitudes towards prosecution. Some victims feel that the meaning of "truth" differs in legal and everyday settings (Breckenridge 1999), while others

withdraw consent to prosecution due to lack of information about case progress, lack of contact with criminal justice officials and lack of support (Temkin 1997; VLRC 2003). At the same time, prosecutors are experiencing increased pressure to proceed with sexual assault cases and are more aware of victims' autonomy and of the danger of secondary victimisation.

Together, these findings suggest that various measures could be implemented to benefit prosecutors, victims and their support networks. These could include:

- inter-sectoral training between prosecution agencies, victim support services, and forensic services. Some prosecutors noted that high caseloads leave little opportunity for training, but that inter-sectoral training would help workers in different agencies to appreciate each other's difficulties and build a team approach to prosecutions. They requested training about the psychological effects of sexual assault, increased contact with doctors from sexual assault clinics, and contact with child psychologists, with a view to learning about developmental issues. Some overseas studies have found that specialised training of criminal justice officials by rape crisis staff may be linked with increased reporting rates and greater victim willingness to cooperate with the investigation and prosecution of sex crime (see Lord & Rassel 2000);
- helping victims to "see" their cases through a legal lens (Frohmann 1998), so that they understand why cases are discontinued, as well as helping prosecutors to remember that most people are not positioned within legal discourses. Some prosecutors noted that "what the law sees as improper reasoning, the jury sees as common sense. A very clinical picture of the defendant's character is presented during the trial, compared to the picture of the victim and the jury does not get a real picture of pre-existing relationships." This disparity between what the law sees as relevant and admissible and what the jury is looking for underlies victims' feelings that they are on trial;
- greater education of the community about not delaying reporting, not showering, and having a medical examination immediately after the attack. Prosecutors understand that women want to clean themselves thoroughly after a sexual assault and that they find it difficult to report the offence, but this makes the prosecutor's job very difficult due to the lack of evidence;
- it may be desirable for witness assistance services and sexual assault centres to take on greater advocacy, training and educational roles. However, resources are often stretched in these services and workers in different areas face different problems. It is crucial that they are provided with adequate and ongoing human, material and financial resources.

Prosecutors stressed that there is a need to acknowledge that not all victims are seeking retribution or conviction; many simply want to say what happened to them, to be heard and believed, to have the defendant acknowledge what he did and to explain why he did it. It may not be possible for the criminal justice system to fill these needs, but inter-sectoral collaboration could highlight the role of criminal justice and other agencies in promoting victim recovery.

Prosecutors in states and territories that do not have witness assistants stated that, while sexual assault services provide a good level of support, a witness assistance service would be useful. They need the help that the service provides in preparing victims for court, explaining the anticipated outcomes of a trial, or why a case is being discontinued. In existing witness assistance services, prosecutors see a need for one person to work with a victim through the entire process, providing access to information, arranging and sitting in on appointments and explaining criminal justice processes.

Documents in the case files showed that prosecutors generally took some type of action to explore the reasons behind victim retractions, but in some cases these determinations appeared to be rather cursory. By and large, decisions about charge negotiations were not well documented. This finding reflects concerns raised in previous reports about the lack of transparency and inadequate documentation of processes leading to these decisions (CMC 2003a). It is imperative that DPP lawyers systematically record and detail the basis for case decisions. Some prosecutors also recommended that prosecutors and the Director should be accountable to someone other than parliament. This could take the form of an independent body that periodically audits case files and reviews DPP processes.

Successful prosecution of sexual assault requires prosecutors to be familiar with the type of evidence to look for and the issues to be considered. Some overseas literature indicates that specialist prosecution teams decrease attrition by developing evidence that supports the complaint and bolsters the victim's credibility. However, criticisms of specialisation include the view that a generalist's perspective is crucial to sound decision-making (HMCPSI 2002). The interviews suggested that prosecutors' personal wellbeing could be negatively impacted by running too many sexual assault trials (also see Gomme & Hall 1995). There have been few empirical evaluations to support the views of either advocates or critics. Australian DPPs would do well to evaluate the advantages and disadvantages of specialisation.

### Considerations for legal and procedural reform

This report is written from an "outsider's" perspective, which allows comments to be made upon the way that Australian prosecutors handle sexual assault charges. Recommendations about changes to procedural or other legal rules are a matter for the legal profession and legislators. As a number of prosecutors put forward ideas for legal reforms during the interviews, issues that were raised by two or more interviewees are mentioned here.

In this study, as in previous research, defendants who did not plead guilty were more likely to be acquitted than found guilty, even when the case for the prosecution appeared to be relatively strong. This is largely attributable to the unique difficulties of prosecuting sexual assault and to issues concerning procedure, evidence and substantive laws. There was some feeling among prosecutors that legal reforms have probably gone as far as they can go without being too "helpful"; that is, without giving too much support to the belief that sexual assault is extremely difficult to prove. Suggested reforms include:

- abolish committals – they are unfair and simply a device that allows the defence to generate inconsistencies that undermine witness credibility;
- introduce alternative offences or outcomes where appropriate, with the objective of encouraging guilty pleas. Suggestions included the Scottish verdict of not proven; a non-criminal record in some circumstances; and a different offence level, especially for intimate relationships, that has a reduced penalty, but identifies the offender as the type of person who commits sex crimes;
- fast-track prosecutions – have a maximum three months from reporting to committal and from committal to trial. This is beneficial for the victim and also for the defendant if he is not guilty;
- the very strict jurisprudential view taken by the High Court hinders prosecutors. Some prosecutors believe that the gains of legal reforms have been lost because statutory directions are often negated by cross directions or balancing directions that the High Court says are necessary. The attitude that juries need to be treated with kid gloves for sexual assault trials is outdated. Juries understand that sexual assault does happen and they can act on the victim's word, but they are also hardened to the possibility of fabrication. There was a strong feeling among Crown Prosecutors that judicial directions are not helpful, but are simply confusing to juries and that incorrect judicial directions too often constitute grounds for appeal;

- sentences do not reflect the seriousness of the offence, do not show society's condemnation of sexual offences, or reflect the victim's pain. Low sentences are demeaning to victims;<sup>14</sup>
- a number of prosecutors commented that we are no longer a verbal society. Information is increasingly delivered through visual media such as television and jurors' perceptions of criminal trials are increasingly shaped by television shows. Among some prosecutors this leads to the view that the prospects of conviction are reduced by closed-circuit television (CCTV), as it detracts from the immediacy of the evidence and takes on the dimensions of a television courtroom drama. For others, it suggests that CCTV and videotaped evidence should be extended to all victims, as juries are not good at listening to evidence for hours on end. A third group believes that CCTV does not necessarily make a difference to trial outcomes, but that it is better for the victim to be in a comfortable environment as this leads to better recall. This debate would be helped by evaluating the impact of CCTV on trial outcomes;
- prosecutors who are in favour of CCTV and other provisions for giving evidence noted that the usefulness of these measures is often undermined by poor quality equipment such as small television monitors, poorly constructed and positioned screens, or waiting facilities where the victim has to walk past the defendant.

### Recommendations for future research

The validity of the interpretations and the generalisability of the results was maximised by the use of qualitative and quantitative methods in multiple jurisdictions. However, the study should be replicated, as the statistical results could reflect sampling bias or other unknown confounds.

Given the small numbers of cases for some jurisdictions, statistical analyses were conducted for the pooled sample only. A comparative analysis of possible differences between the jurisdictions could be followed up in a study with a longer reference period, which would yield sufficient numbers of cases per Office to allow reliable statistical analyses. This would also allow further analysis of the importance of defendant race/ethnicity in case screening decisions, which would be strengthened by incorporating qualitative analyses (see previous chapter).

The current study was unable to examine each Office's policies, reforms and practices in relation to sexual assault matters. Research of the type suggested in the previous recommendation would be complemented by an examination of these matters. Potential objectives of such research would be to provide an overview of the range of strategies implemented in recent years, to evaluate the effectiveness of these responses and to elucidate "what works" in various contexts.

The relatively high proportion of *nolles* that were prompted by victim withdrawals is a cause for concern. There is a need for further information about victims' help-seeking behaviours and whether existing responses are appropriate or adequate for their needs. There are clear implications for policy and funding decisions if, for example, it was found that these victims are more interested in outcomes other than substantive justice. Future research could focus on issues such as:

- what victims wanted to achieve when they reported the offence;
- whether those objectives or needs were met for women whose cases proceeded to trial and those whose cases were discontinued;
- whether and how victims' objectives and needs change during their involvement with the criminal justice system;
- whether victims are discouraged from proceeding because of long delays or because of perceptions that legal officials do not believe them or are encouraging them to withdraw.

This study was unable to address the issue of how prosecutors choose to run trials. This is an important discretionary decision that requires further study, as there are indications that at least some cases are lost due to mistaken analyses of the central issue of the case (HMCPSI 2002), or that prosecutors are reinforcing discriminatory gender stereotypes through the type of evidence on which they focus (Ekström 2003).

### Concluding comments

At the time this report was being prepared, prosecutorial decisions in adult sexual assault cases were under intense public scrutiny as a result of allegations of sexual assault against several groups of football players and due to a review of the Queensland DPP's decision in the Volkens case. In the cases relating to the footballers, the DPPs advised police not to lay charges and in the review of the Volkens case, the New South Wales DPP endorsed the original decision not to proceed. These decisions were attributed to insufficient evidence, which was unlikely to result in successful prosecutions. In one instance, this decision led to public comments about the difficulty of distinguishing between consensual and non-consensual sex, even though police believed that a sexual assault had occurred. The fact that

<sup>14</sup>Discussions on sentencing in New South Wales have taken the converse direction, following very long sentences handed down to offenders convicted of sexual assault in company.

these decisions led to statements about suspects being “vindicated” (e.g. Brennan 2004; Wilson, Smith & Meade 2004) and accusations that the complainants were lying, points to a lack of community understanding about what the decisions actually mean (the presumption of innocence notwithstanding) and about the difficulty of successfully prosecuting sexual assault. The implications for the future reporting of sex crimes are not clear.

Historically, the criminal courts have viewed women and victims of sexual offences as categories of “suspect witnesses”, whose evidence was potentially unreliable. Widely accepted rape myths suggested that women commonly accuse innocent men of sexual assault and that these allegations are easy to make but difficult to disprove. Contrary to traditional beliefs, it is now known that sexual assault is the most difficult crime to report and one of the easiest to get away with. Moreover, women’s reluctance to report sexual assault is at least partially attributable to the rigours of the criminal justice system (Spohn & Horney 1992). While it is undeniable that false allegations are made, it is likely that the majority of complaints are well founded. Pre-trial filtering processes are more likely to deter legitimate victims from pursuing legal redress than to encourage false complaints and they make it unlikely that victims’ evidence at trial will be unreliable (Department for Women 1996). It seems that the views of many “outsiders” continue to be based on rape myths or, at the very least, on misinformation. Given that juries consist of “outsiders” this may be an ideal time to educate the public about the issue. By the same token, one of the interviewees said that “prosecutors try to address the practical issues we *think* the jury grapples with, but we don’t really know what those issues are”. There may be no better time to learn.

## References

- Albonetti CA 1987. Prosecutorial discretion: The effects of uncertainty. *Law & society review* vol. 21, no. 2: 291-313
- Allan A, Allan MM Marshall P & Kraszlan K 2002. Juvenile sexual offenders in Western Australia: Demographic characteristics and offence histories. *Psychiatry, Psychology and Law* vol. 9, no. 2: 200-13
- Australian Bureau of Statistics 2003a. *Criminal courts Australia (cat. no. 4513.0)*. Canberra: Commonwealth of Australia
- Australian Bureau of Statistics 2003b. Information paper: *Sexual assault information development framework (cat. no. 4518.0)*. Canberra: Commonwealth of Australia
- Australian Bureau of Statistics 1997. *Australian standard offence classification 199 (cat. no. 1234.0)*. Canberra: Commonwealth of Australia
- Australian Capital Territory Director of Public Prosecutions 2003. *Annual report 2002-2003*. Canberra: Director of Public Prosecutions
- Australian Capital Territory Director of Public Prosecutions 2001. *Annual report 2000-2001*. Canberra: Director of Public Prosecutions
- Australian Capital Territory Director of Public Prosecutions 2000. *Annual report 1999-2000*. Canberra: Director of Public Prosecutions
- Australian Capital Territory Victims of Crime Coordinator 2002. *Sexual offences: The response of ACT policing*. Unpublished paper
- Boniface DJ 1994. Ruining a good boy for the sake of a bad girl: False accusation theory in sexual offences, and New South Wales limitations periods – gone but not forgotten. *Current issues in criminal justice* vol. 6, no. 1: 54-75
- Breckenridge J 1999. Subjugation and silences: The role of the professions in silencing victims of sexual and domestic violence. In J Breckenridge & L Laing (eds). *Challenging silence: Innovative responses to sexual and domestic violence*: 6-30. St Leonards NSW: Allen & Unwin
- Brennan P 5 May 2004. Ideology, evolution hurdles to rape prosecutions. *The Sydney morning herald* <http://smh.com.au/articles/2004/05/04/1083635130106.html> (viewed 05/05/04)
- Briody M 2002. The effects of DNA evidence on sexual offence cases in court. *Current issues in criminal justice* vol. 14, no. 2: 159-181
- Broadhurst RG & Maller RA 1991. *Sex offending and recidivism*. Perth: Crime Research Centre, The University of Western Australia
- Brown B, Burman M & Jamieson L 1992. *Sexual history and sexual character evidence in Scottish sexual offence trials*. Edinburgh: Scottish Office
- Bryden DB & Lengnick S 1997. Rape in the criminal justice system. *The journal of criminal law & criminology* vol. 87, no. 4: 1194-1384
- Chambers G & Millar A 1986. *Prosecuting sexual assault*. Edinburgh: Scottish Office Central Research Unit
- Chandler SM & Torney M 1981. The decisions and processing of rape victims through the criminal justice system. *California sociologist*, vol 4: 155-169
- Crime and Misconduct Commission 2003a. *Seeking justice: An inquiry into how sexual offences are handled by the Queensland criminal justice system*. Brisbane: Crime and Misconduct Commission
- Crime and Misconduct Commission 2003b. *The Volkens case*. Brisbane: Crime and Misconduct Commission
- Criminal Justice Commission 1999. *Reported sexual offences in Queensland*. Brisbane: Criminal Justice Commission
- Davis K & Loftus EF 2004. What's good for the goose cooks the gander: Inconsistencies between the law and psychology of voluntary intoxication and sexual assault. In WT O'Donohue, PR Laws & C Hollin (eds) *Handbook of forensic psychology* (997-1032). New York: Academic Press <http://www.sierratrialandopinion.com/papers/alcoholandconsent.rtf> (viewed 07/05/04)
- Department for Women 1996. *Heroines of fortitude. The experiences of women in court as victims of sexual assault*. Woolloomooloo, NSW: Department for Women
- Director of Public Prosecutions Queensland 2000. *Annual report 1 July 1999 – 30 June 2000*. Queensland Government, Department of Justice and Attorney-General
- Doyle S & Barbato C 1999. Justice delayed is justice denied: The experiences of women in court as victims of sexual assault. In J Breckenridge & L Laing (eds.). *Challenging silence: innovative responses to sexual and domestic violence*: 47-58. St Leonards NSW: Allen & Unwin
- DuMont J & Myhr TL 2000. So few convictions: The role of client-related characteristics in the legal processing of sexual assaults. *Violence against women* vol. 6, no. 10: 1109-1136
- Edwards J 2003. Medical examinations of sexual assault victims: Forensic use and relevance. *Judicial officers' bulletin* vol. 15, no. 8: 65-66 & 72

- Edwards SSM 1996. *Sex and gender in the legal process*. London: Blackstone Press Limited
- Ekström S 2003 Qualification and disqualification in rape cases. *Journal of Scandinavian studies in criminology and crime prevention* vol. 4, 204-222
- Estrich S 1987. *Real rape*. Cambridge, Massachusetts: Harvard University Press
- Finney A 2004. Alcohol and sexual violence: Key findings from the research. *Findings* No. 215. London: Home Office
- Fitzgerald K 1997. Problems of prosecution and adjudication of rape and other sexual assaults under international law. *European journal of international law* vol. 8, no. 4: 638-663 <http://www.ejil.org/journal/Vol8/no4/art6.html> (viewed 16/07/03)
- Flatman G & Bagaric M 2001. The victims and the prosecutor: The relevance of victims in prosecution decision making. *Deakin law review* vol. 6, no. 2: 238-255 <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/DLR/2001/2.html> (viewed 11/07/03)
- Frazier PA & Haney B 1996. Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives. *Law and human behavior* vol. 20, no. 6: 607-628
- Frohmann L 1998. Constituting power in sexual assault cases: Prosecutorial strategies for victim management. *Social problems* vol. 45, no. 3: 393-407
- Frohmann L 1997. Convictability and discordant locales: Reproducing race, class, and gender ideologies in prosecutorial decisionmaking. *Law and society review* vol. 31, no. 3: 531-555
- Frohmann L 1991. Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections. *Social problems* vol. 38, no. 2: 213-226
- Galvin J & Polk K 1983. Attrition in case processing: Is rape unique? *Journal of research in crime and delinquency* vol. 20, no. 1: 126-154
- Gomme IM & Hall MP 1995. Prosecutors at work: Role overload and strain. *Journal of criminal justice* vol. 23, no. 2: 191-200
- Grace S, Lloyd C. & Smith LJF 1992. *Rape: From recording to conviction* Research and Planning Unit Paper 71. London: Home Office
- Harris J & Grace S 1999. *A question of evidence? Investigating and prosecuting rape in the 1990s*. London: Home Office
- Heenan M & McKelvie H 1997. *The crimes (rape) act 1991: An evaluation report*, Victoria: Rape Law Reform Evaluation Project, Department of Justice
- Henning T 2000. *Consent and mistaken belief in consent in Tasmanian sexual offences trials*. Hobart: University of Tasmania Law School
- HM Crown Prosecution Service Inspectorate 2002. *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape*. London: HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary
- Horney J & Spohn C 1996. The influence of blame and believability factors on the processing of simple versus aggravated rape cases. *Criminology* vol. 34, no. 2: 135-162
- Jeffords CR 1984. Prosecutorial discretion in cases of marital rape. *Victimology: An international journal* vol. 9, no. 3-4: 415-425
- Johns R 2002. *Victims of crime: Plea bargains, compensation, victim impact statements and support services*. Sydney: NSW Parliamentary Library Research Service <http://www.parliament.nsw.gov.au/prod/web/PHWebContent.nsf/PHPages/ResearchBf10> (viewed 05/09/03)
- Justice Tasmania 2003. *Director of public prosecutions annual report 2002-2003*. [http://www.justice.tas.gov.au/cl/dpp\\_ann\\_report\\_0203.doc](http://www.justice.tas.gov.au/cl/dpp_ann_report_0203.doc) (viewed 18/12/03)
- Kelly L & Regan L 2001. *Rape: The forgotten issue?* London: Child and Woman Abuse Studies Unit, University of North London
- Kerstetter WA 1990. Gateway to justice: Police and prosecutorial response to sexual assaults against women. *Criminology*, vol. 81, no. 2: 267-313
- Kerstetter W. & van Winkle B 1990. Who decides? A study of the victim's decision to prosecute in rape cases. *Criminal justice and behavior* vol. 17, no. 3: 268-283
- Kingsnorth R, Lopez J, Wentworth J & Cummings D 1998. Adult sexual assault: The role of racial/ethnic composition in prosecution and sentencing. *Journal of criminal justice* vol. 26, no. 5: 359-371
- Kingsnorth RF, MacIntosh RC & Wentworth J 1999. Sexual assault: The role of prior relationship and victim characteristics in case processing. *Justice quarterly* vol. 16, no. 2: 275-302



- Konradi A 1996. Understanding rape survivors' preparations for court: Accounting for the influence of legal knowledge, cultural stereotypes, personal efficacy, and prosecutor contact. *Violence against women*, vol. 2, no. 1: 25-62
- Krone T 2003. *The limits of prosecution authority*. Seminar paper presented at Regulatory Institutions Network (RegNet): Australian National University 18 November 2003 [http://www.aic.gov.au/conferences/other/krone\\_tony/2003-11-regnet.pdf](http://www.aic.gov.au/conferences/other/krone_tony/2003-11-regnet.pdf) (viewed 12/12/03)
- LaFree GD 1980. The effect of sexual stratification by race on official reactions to rape. *American sociological review* vol. 45: 842-854
- Law Reform Commission of Victoria 1991. *Rape: Reform of law and procedure. Appendixes to interim report no. 42*. Melbourne: Law Reform Commission of Victoria
- Lee AJ 1983. *Rape study, volume 2: Research report 3: 1980 and 1981 court files*. Wellington: New Zealand Department of Justice
- Lees S 1996. *Carnal knowledge: Rape on trial*. London: Hamish Hamilton
- Lievore D 2004. *Recidivism of sexual assault offenders: rates, Risk Factors and Treatment Efficacy*. Canberra: Australian Government Office of the Status of Women
- Lievore D 2003. *Non-reporting and hidden recording of sexual assault: An international literature review*. Canberra: Commonwealth Office of the Status of Women
- Lincoln C 1996. A descriptive study of recent sexual assault cases in Perth, 1<sup>st</sup> November 1994 – 31<sup>st</sup> October 1995. *Balancing the Scales, National Conference on Sexual Assault, Perth, 20-21 June 1996* Perth: Sexual Assault Referral Centre
- Loh WD 1980. The impact of common law and reform rape statutes on prosecution: An empirical study. *Washington law review* vol. 55: 543-625
- Lord VB & Rassel G 2000. Law enforcement's response to sexual assault: A comparative study of nine counties in North Carolina. *Women & criminal justice* vol. 11, no. 1: 67-88.
- Madigan L & Gamble NC 1989. *The second rape: Society's continued betrayal of the victim*. New York: Lexington Books
- Martin PY & Powell RM 1995. Accounting for the "second assault": Legal organizations' framing of rape victims. *Law and social inquiry* vol. 14: 853-890
- Mason J 1996 *Qualitative researching*. London: Sage Publications
- Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General 1996. *Sexual offences against the person: Discussion paper*. Canberra: Model Criminal Code Officers Committee
- Mouzos J 2001. Indigenous and non-Indigenous homicides in Australia: A comparative analysis. *Trends and issues in criminal justice*, no. 210. Canberra: Australian Institute of Criminology
- Myers MA & LaFree GD 1982. Sexual assault and its prosecution: A comparison with other crimes. *The journal of criminal law & criminology* vol. 73, no. 3: 1281-1305
- Naffine N 1994. Possession: Erotic love in the law of rape. *Modern law review* vol. 57, no. 1: 10-37.
- Nuttall SE 1989. *Toronto sexual assault research study*. Ottawa: Solicitor General Canada
- Palermo GB, White MA, Wasserman LA & Hanrahan W 1998. Plea bargaining: Injustice for all? *International journal of offender therapy and comparative criminology* vol. 42, no. 2: 111-123
- Potas IL 1984. Measuring prosecutorial discretion. In I Potas (ed.) *Prosecutorial discretion. Seminar proceedings* no. 6: 35-45. Canberra: Australian Institute of Criminology
- Rathus Z 1994. *Rougher than usual handling: Women and the criminal justice system* (2<sup>nd</sup> ed.). West End, Qld: Women's Legal Service
- Refshauge R 2002. Prosecutorial discretion – Australia. In G. Moens & R Biffot (eds.) *The convergence of legal systems in the 21<sup>st</sup> century*: 353-390. Brisbane: CopyRight Publishing
- Salmelainen P & Coumarelos C 1993. Adult sexual assault in NSW. *Crime and justice bulletin number 20* Sydney: NSW Bureau of Crime Statistics and Research
- Samuels G 2002. *Review of the New South Wales director of public prosecutions' policy and guidelines for charge bargaining and tendering of agreed facts*. [http://www.agd.nsw.gov.au/report/lpd\\_reports.nsf/pages/report\\_gsamuels](http://www.agd.nsw.gov.au/report/lpd_reports.nsf/pages/report_gsamuels) (viewed 29 October 2003)
- Schulhofer SJ 1998. *Unwanted sex: the culture of intimidation and the failure of law*. Cambridge, Massachusetts: Harvard University Press
- Seifman RD & Freiberg A 2001. Plea bargaining in Victoria: The role of counsel. *Criminal law journal* vol. 25, no. 2: 64-74
- Slovenko R 1998. Consulting editor's editorial: Plea bargaining. *International journal of offender therapy and comparative criminology* vol. 42, no. 2: 108-110

- Smith JA 1995. Semi-structured interviewing and qualitative analysis. In JA Smith, R Harré & L Van Langenhove (eds.). *Rethinking methods in psychology*: 9-26. London: Sage Publications
- Spears JW & Spohn CC 1996. The genuine victim and prosecutors' charging decisions in sexual assault cases. *American journal of criminal justice* vol. 20, no. 2: 183-205
- Spohn C, Beichner D & Davis-Frenzel E 2002. Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice". *Social problems* vol. 48, no. 2: 206-235
- Spohn C, Beichner D, Davis-Frenzel E & Holleran D 2001. *Prosecutor's charging decisions in sexual assault cases: A multi-site study, final report*. United States: National Institute of Justice  
<http://www.ncjrs.org/pdffiles1/nij/grants/197048.pdf> (viewed 11 June 2003)
- Spohn C & Holleran D 2001. Prosecuting sexual assault: A comparison of charging decisions in sexual assault cases involving strangers, acquaintances, and intimate partners. *Justice quarterly* vol. 18, no. 3: 651-688
- Spohn C & Horney J 1993. Rape law reform and the effect of victim characteristics on case processing. *Journal of quantitative criminology* vol. 9, no. 4: 383-409
- Spohn C & Horney J 1992. *Rape law reform: A grassroots revolution and its impact*. New York: Plenum Press
- Spohn C & Spears J 1996. The effect of offender and victim characteristics on sexual assault case processing decisions. *Justice quarterly* vol. 13, no. 4: 649-679
- Stanko EA 1982. Would you believe this woman? Prosecutorial screening for "credible" witnesses and a problem of justice. In NH Rafter & EA Stanko (eds.) *Judge, lawyer, victim, thief: Women, gender roles, and criminal justice*: 63-82. Boston: Northeastern University Press
- Stubbs J (forthcoming) Sexual assault, criminal justice and law and order. *Women against violence*
- Sweetman T 21 September 2003. No bonus for pleas, please. *Sunday Mail Sunday Extra*: 83
- Tang K 2000. Cultural stereotypes and the justice system: The Canadian case of R. v. Ewanchuk. *International journal of offender therapy and comparative criminology* vol. 44, no. 6: 681-691
- Taskforce on Women and the Criminal Code 2000. *Report of the taskforce on women and the criminal code*. Brisbane: Office of Women's Policy
- Taslitz AE 1999. *Rape and the culture of the courtroom*. New York: New York University Press.
- Temkin J 2002. *Rape and the legal process (2<sup>nd</sup> ed.)*. Oxford: Oxford University Press
- Victorian Law Reform Commission 2003. *Sexual offences interim report*. Melbourne: Victorian Law Reform Commission
- Victorian Law Reform Commission 2001. *Sexual offences: Law and procedure discussion paper*. Melbourne: Victorian Law Reform Commission
- Webb EJ, Campbell DT, Schwartz RD & Sechrest L 2000. *Unobtrusive measures (rev. ed.)*. Thousand Oaks, California: Sage Publications
- Whitney KL, Flynn MM & Moyle PD 2000. *The criminal codes: Commentary and materials (5<sup>th</sup> ed)*. Sydney: LBC Information Services
- Willis J 1984. Reflections on nolles. In I Potas (ed) *Prosecutorial discretion. Seminar proceedings No. 6*: 173-186. Canberra: Australian Institute of Criminology
- Wilson A, Smith W & Meade K 16 April 2004. Dropped charges 'vindicate' Volkens. *The Australian*  
<http://theaustralian.news.com.au/printpage/0,5942,9292994,00.html> (viewed 16/04/04)
- Wood J 2003. Sexual assault and the admission of evidence. Paper presented at *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference* 12-14 February 2003 Sydney  
<http://www.agd.nsw.gov.au/cpd.nsf/pages/wood> (viewed 22/08/03)
- Wright R & Miller M 2002. The screening/bargaining tradeoff. *Stanford law review* vol. 55, no 29: 29-118
- Young A 1998. The waste land of the law, the wordless song of the rape victim. *Melbourne university law review* vol. 22: 442-465

## Appendix A — Case Attrition

It is sometimes assumed that prosecution and conviction rates for sexual assaults are very low and that attrition is higher than for other offence categories. Some caution is warranted when interpreting and comparing different types of statistics. Criminal justice agencies often record sexual assault data at the local level and these are then collated as national figures, but there can be notable inconsistencies and gaps in data collection. Few jurisdictions have data systems capable of tracking cases from the initial police report through to final disposition and there is considerable variation in files, often resulting in poor data quality due to missing or inaccurately recorded information (CJC 1999; VLRC 2003).

Comparison of statistics from different agencies is further complicated by the time lag between the reporting and prosecution of sexual assaults and by the use of different recording systems, which may be victim-, incident-, or offence-based. To gain a clear understanding of the significance of patterns and rates of attrition for sexual assault, data should be considered in relation to other offence types, but recording deficits make it difficult to accurately assess attrition rates for other crime categories. Interpretation may be further confounded by contextual factors, such as increased reporting, changed recording practices, or legal reforms that can result in higher or lower conviction rates for various types of sex offences, due to changes in offence labelling (Loh 1980).

While statistics for sexual offences are most meaningful in relation to other statistics, rates of attrition, prosecution and conviction vary according to the baseline selected. For example, a baseline of offences recorded by police will produce different prosecution and conviction rates than a baseline of cases forwarded to the DPP. Rates will also differ if they are calculated in terms of whether the full charges or only partial charges were prosecuted or proved by plea or by trial (Chambers & Millar 1986; Loh 1980).

Finally, results from different sources are not directly comparable because they are derived using different methodologies, samples and analytical procedures. Case outcomes in different jurisdictions are also likely to reflect different substantive, evidence and procedure laws. Taken together however, the available data point to particular trends in the attrition and processing of reported sexual assault cases. This section examines selected Australian and international data sources to provide an overview of patterns in sexual assault prosecutions. The data should be viewed as broadly indicative only. Official statistics that report on outcomes at selected stages in the criminal justice system are complemented by studies that track the disposition of cases through key decision points.

### Australia

Statistics relating to prosecution processes are sometimes available at the jurisdictional level, but national figures are scarce.

Between 1998/99 and 2000/01, approximately two-thirds of all concluded indictable and summary matters prosecuted in the Australian Capital Territory Children's, Magistrates and Supreme Courts were proved. Table A.1 compares the proportion of proved sexual offences with three other offence categories and with all offences. The proportion of all sexual offences proved during the period ranged from 28 per cent to 58 per cent, but overall, convictions for sex offences fell below the rate for all offences (Australian Capital Territory Director of Public Prosecutions 2000, 2001).

An analysis of trends for sexual assault cases finalised in New South Wales Higher Courts between 1988 and 1992 found that the number of persons charged with sexual assault almost doubled over the period, from between 300 and 400 to 600. Overall, however, the percentage of persons convicted showed little variation, ranging from 47 per cent to 37 per cent (Salmelainen & Coumarelos 1993).

Stubbs (forthcoming) found that the proportion of defendants pleading guilty to sexual offences in the New South Wales Courts was low relative to other crimes. Between 1997 and 2001 guilty pleas for sex offences ranged from 23 per cent to 33 per cent, compared to 65 per cent of all cases before the District Court in 2001. The high proportion of cases that proceed to trial is reflected in high numbers of acquittals. In the New South Wales Higher Courts in 2001, approximately 39 per cent of sexual offence matters resulted in a guilty finding, either by plea or jury verdict, compared to 77 per cent of all cases.

Between 1994 and 1998 in Queensland, charges for sexual offences increased steadily, while conviction rates were relatively stable. The majority of defendants appearing in the Magistrates Courts for rape and other sexual offences were committed to stand trial in the Higher Courts (83 per cent and 57 per cent respectively). The DPP processed an average of 500 to 600 sexual offence cases annually. Half of all persons accused of any type of sex offence pleaded guilty, but only 28 per cent of rape defendants pleaded guilty. Overall, two-thirds of all sexual offence cases resulted in a conviction, but significantly fewer convictions were recorded for rape than for child sex offences and other sexual offences. The Higher Court data in Table A.2 show that a minority of rape charges resulted in convictions and this was substantially lower than for other offence types. The figures are slightly higher when considered in terms of the number of appearances resulting in convictions, but the general pattern remains the same (CJC 1999).

Table A.1. Prosecutions in the Australian Capital Territory

OFFENCE TYPE	1998/99		1999/00		2000/01	
	PROSECUTIONS (N)	CHARGES PROVED	PROSECUTIONS (N)	CHARGES PROVED	PROSECUTIONS (N)	CHARGES PROVED
Sex offences upon adults	29	19	26	19	54	12
		66%		73%		22%
Sex offences upon children	46	15	63	33	86	27
		33%		52%		31%
<b>TOTAL SEX OFFENCES</b>	75	34	89	52	140	39
		<b>45%</b>		<b>58%</b>		<b>28%</b>
Offences against the person	1,135	612	1,015	536	1,455	744
		<b>54%</b>		<b>53%</b>		<b>51%</b>
Property offences	3,903	2,765	4,117	2,569	4,879	3,027
		<b>71%</b>		<b>63%</b>		<b>62%</b>
Drug offences	812	435	626	408	811	464
		<b>54%</b>		<b>65%</b>		<b>57%</b>
<b>ALL OFFENCES</b>	11,574	7,931	11,154	7,632	13,036	8,394
		<b>69%</b>		<b>68%</b>		<b>64%</b>

Source: Australian Capital Territory Director of Public Prosecutions 2000, 2001

Note: Percentage totals may not equal 100 due to rounding

Table A.2. Conviction Rates for Rape and Other Offences, Queensland 1994-1998

OFFENCE	CHARGES RESULTING IN CONVICTIONS (%)	APPEARANCES RESULTING IN CONVICTIONS (%)
Rape	35	45
Other sexual offences	57	67
Offences against the person	59	73
Other offences	73	75

Source: CJC 1999

Table A.3. Outcomes for Sexual Assault Trials in Tasmania

TRIAL OUTCOME	N	%
Guilty all sexual offences	23	42
Guilty some sexual offences	8	15
Full acquittals	16	29
Hung verdicts	6	11
Guilty non-sexual offence but hung verdict/acquittal on sexual offences	5	9

Source: Henning 2000

Note: Columns total more than 100 due to overlap between categories

Sexual offences accounted for eight per cent of all cases prosecuted by the Tasmanian DPP in 2000/01, six per cent in 2001/02 and 12 per cent in 2002/03 (Justice Tasmania 2003). Henning's (2000) analysis of 55 sexual offence trials conducted in Tasmania between 1995 and 1999 found that over half (56 per cent) of all trials resulted in a conviction on at least some of the sexual offences charged (Table A.3).

In Victoria prosecution data for rape have been analysed in three successive studies conducted by the LRCV (1991), the Rape Law Reform Evaluation Project (RLREP) (Heenan & McKelvie 1997), and the VLRC (2001). The results show that relatively few cases are discontinued once police lay charges and that the majority of defendants either plead guilty or are convicted of an offence, but not necessarily rape (Table A.4).

In cases where rape was originally charged, convictions decreased between 1988/89 and 1998/99, but there was an increased proportion of cases with non-trial outcomes, such as charges withdrawn prior to committal, discharged in the Magistrates Court, *nolle prosequis* entered, or no evidence led (Table A.5). Conviction rates and guilty pleas may have decreased for a number of reasons, including changes in case profiles. Changed case profiles may encompass an increased number of cases where the Director decides that non-rape charges are more appropriate, or a greater number of cases proceeding to trial that would previously have been filtered out by police. The latter include acquaintance cases, or historical offences only recently reported, both of which are more difficult to prosecute (VLRC 2001).

Table A.4. Rape Prosecutions Outcomes, Victoria

OUTCOMES	LRVC 1988/99		RLREP 1992/93		VLRC 1997/98–1998/99	
	N	%	N	%	N	%
Pre-committal						
Charges withdrawn	20	8	8	3	33	9
<b>MAGISTRATES COURT</b>						
Discharged/acquitted	10	4	5	2	24	7
Committed non-rape			2	1	2	16
Pleaded guilty non-rape	18	7	20	8	16	5
<b>COUNTY COURT</b>						
Pleaded guilty rape	70	26	53	22	55	15
Pleaded guilty non-rape	19	7	43	18	64	18
Convicted rape	53	20	35	14	29	8
Convicted non-rape	34	13	15	6	34	10
Acquitted/found not guilty	37	14	46	19	66	19
Directed acquittal	1	0.4	3	1	1	0.3
Permanent stay	1	0.4			2	1
<i>Nolle prosequi</i>	5	2	13	5	29	8
No evidence led					2	1
<b>TOTAL MATTERS</b>	<b>268</b>	<b>100</b>	<b>243</b>	<b>100</b>	<b>357</b>	<b>100</b>

Source: VLRC 2001

Note: Percentage totals may not equal 100 due to rounding

Table A.5. Trial and Non-Trial Outcomes in Rape Cases in Victoria

	1988-89 %	1992-93 %	1997/98-1998-99 %
Convictions and guilty pleas	46	36	24
Guilty pleas	26	22	15
Non-trial outcomes	13	11	25

Source: VLRC 2001

The ABS has begun to publish national statistics on Higher Court criminal cases finalised by adjudication (i.e. proven guilty, pleaded guilty, or acquitted).<sup>15</sup> The data are extracted from state and territory administrative records and do not cover cases finalised by non-adjudicated methods, such as charges withdrawn by the prosecution. During 2001/02, the majority of defendants were finalised by adjudication (85 per cent) and most adjudicated defendants in the higher courts either pleaded guilty or were found guilty at trial (92 per cent). Table A.6 compares outcomes for sexual assault defendants with four other offence categories. Adjudicated defendants with a principal offence related to sexual assault were least likely to plead guilty and consequently had the highest proportion of acquittals, as well as the highest proportion of guilty verdicts (ABS 2003a).

### Comparative international data

Kelly and Regan (2001) note that between 1 in 8 and 1 in 10 reported rape cases in western European countries result in a conviction. Their study of justice departments in more than 20 European countries found wide variations in the completeness of datasets provided by justice departments. Many countries cannot track rape cases through the criminal justice system and are unable to evaluate the impact of legislative and procedural reforms. Available data showed an overall decline in the proportion of reported cases resulting in convictions from the 1970s to the 1990s. Data from England and Wales showed a clear pattern of significantly increased reporting and slight increases in prosecution and conviction rates between 1985 and 1997. Figure A.1 clearly shows the widening gap between numbers of cases reported, prosecuted and convicted (Kelly & Regan 2001).

Table A.6. Higher Courts Adjudicated Defendants, Australia 2001/02

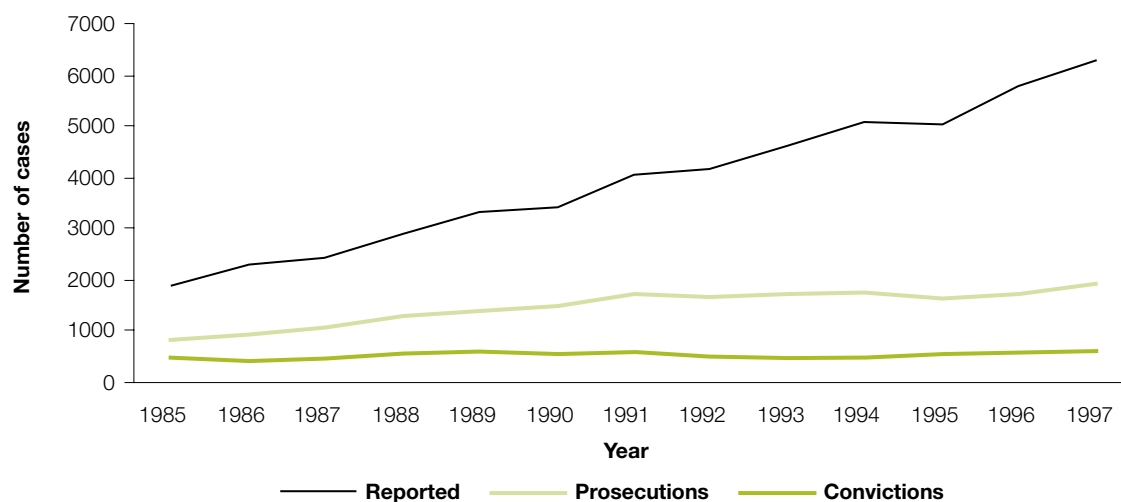
PRINCIPAL OFFENCE			ADJUDICATION TYPE (%)			PRINCIPAL SENTENCE TYPE (%)		
			ACQUITTED	GUILTY VERDICT	GUILTY PLEA	CORRECTIONS /COMMUNITY	CUSTODY IN SUSPENDED SENTENCES	FULLY CUSTODIAL NON-ORDERS
	N	%						
Total defendants	15,229	100	8	9	84	54	17	28
Homicide & related offences	463	3	19	34	47	86	8	5
Sexual assault & related offences	1,585	10	25	15	60	68	15	16
Robbery, extortion & related offences	2,022	13	5	6	89	77	11	12
Unlawful entry with intent/burglary, break & enter	2,206	15	3	3	94	49	13	38
Deception & related offences	1,106	7	2	6	92	41	23	33

Source ABS 2003a

Note: Percentage totals may not equal 100 due to rounding

<sup>15</sup> Data collected prior to 2001/02 were considered experimental and are not included here.

Figure A.1. Attrition in England and Wales 1985 – 1997



Source: Kelly & Regan 2001

Comparison of two Home Office studies that examined data recorded a decade apart (Grace, Lloyd & Smith 1992; Harris & Grace 1999) shows that increased numbers of acquaintance cases are accompanied by decreased proportions of cases proceeding to trial and conviction (Figure A.2).

Harris & Grace also found that charge negotiation was a significant feature of the criminal justice process: "Attrition occurred where three-quarters of defendants pleading guilty to lesser charges were convicted of those charges only, indicating a form of plea-bargaining between the prosecution and the defence" (1999: xii).

A Scottish study found that almost one-quarter of a sample of persons accused of serious sexual offences did not go trial as a result of charge negotiations. The majority of negotiations took the form of an agreed summary and were successful, with 21 of 23 leading to a guilty plea (Chambers & Millar 1986).

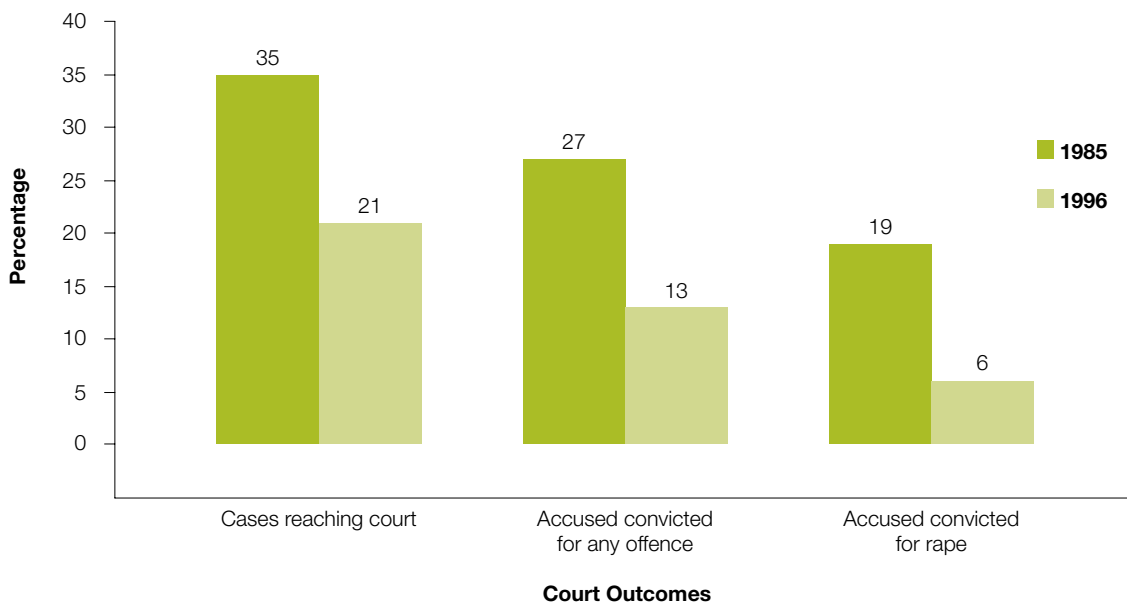
A recent review of police and CPS processing of rape cases in England found that the largest single category of cases that did not end in prosecution involved victim withdrawal (25 per cent). In many of these cases (42 per cent) the

suspect was the victim's current or former partner. There was little to indicate that prosecutors had attempted to explore the reasons behind victim retractions, to determine whether the withdrawals were genuine or whether victims required further support and protection. In a subset of 230 CPS files where there was evidence to support the allegation:

- 42 per cent proceeded to court;
- 49 per cent of the cases filtered out were not charged by police on CPS advice and the CPS dropped the remainder after charging;
- 24 per cent of cases that proceeded to trial resulted in a conviction for rape;
- two per cent of cases resulted in convictions for indecent assault; and
- conviction was more likely when the victim was male (38 per cent) than female (22 per cent) (HMCPSP 2002).

In the United States Frazier and Haney (1996) found substantial attrition in rape cases, with most cases dropping out at the police stage (Table A.7).

Figure A.2. Cases Reaching Court and Convictions, 1985 &amp; 1996



Source: Grace, Lloyd & Smith 1992; Harris & Grace 1999

Table A.7. Attrition in Rape Cases, Police to Sentencing

	ALL CASES		STRANGER CASES		ACQUAINTANCE CASES	
	N	%	N	%	N	%
<b>FROM POLICE TO PROSECUTOR</b>	569	100	196	100	328*	100
Suspect identified	273	48	59	30	213	65
Suspect questioned	187	33	48	24	139	42
Suspect referred	127	22	39	20	88	27
<b>FROM PROSECUTOR TO SENTENCE</b>	125*	22	39	20	86	26
Defendant charged	91	16	30	15	61	19
Defendant convicted	69	12	23	12	46	14
Offender sent to prison	39	7	20	10	19	6

\*Two cases involving juvenile defendants are excluded

Source: Frazier & Haney 1996



Spohn et al. (2002) found that prosecutors rejected a substantial proportion of 140 sexual battery cases at the initial screening (41 per cent; n = 58) and dismissed a smaller proportion (11 per cent; n = 16) after charges were filed. Of the remaining 66 cases, all but two resulted in convictions, either by plea or at trial.

Studies that focus on sexual assault cases only are unable to shed light on whether this filtering is unique to sexual crime. Galvin and Polk (1983) drew on a range of data sets to compare the processing of rape cases with homicide, robbery, assault and burglary. The data showed considerable attrition of cases between reporting to police and sentencing, but the processing of rape and other felony offences was comparable at various points in the system and over time. Over a seven-year period, rape cases were more likely than robbery, assault and burglary to be filed as felony offences and, if filed as felonies, were more likely to lead to a conviction and institutional sentences than assault and burglary, but somewhat less likely than robbery. A similar picture emerged from a comparison across seven jurisdictions, with homicide and rape ranking uniformly high and burglary and assault ranking uniformly low in terms of felony filings, convictions and institutional sentences.

By contrast, a Canadian report on violence against women found that, in 1998/99, only attempted murder had a noticeably lower conviction rate than sexual assault, but only assault had a lower proportion of convicted offenders receiving prison terms. One-third (35 per cent) of sexual assault cases appearing in the adult courts resulted in convictions, with 57 per cent of these resulting in incarceration (Federal Provincial-Territorial Ministers Responsible for the Status of Women 2002).

Table A.8 reports on a number of studies from Canada, New Zealand and Scotland. The table highlights that findings are often not directly comparable, because they are derived from samples with different characteristics or use different baselines and variables.

## Overview of attrition statistics

Statistics for sexual assault cases use a variety of baselines and outcome measures and direct comparison of different results is not always possible. However, an overview of various official data and empirical findings allows some broad conclusions to be drawn.

- Recorded sexual assaults have increased in recent years, but the relative proportion of cases proceeding to prosecution and conviction has decreased.
- Attrition of sexual assault cases occurs at each stage of the criminal justice system. Different types of cases drop out at different stages for different reasons (Kelly 2000). Most filtering occurs prior to referral to prosecuting agencies.
- Defendants are less likely to plead guilty to sexual assault than other offence types. The likelihood of conviction in the absence of a guilty plea is relatively low.
- Defendants are often convicted for some offence, but it is not unusual for the final charge to be downgraded to a lesser sexual or non-sexual offence.
- Prosecutors regularly exercise their discretion not to prosecute, often due to the absence of corroborating evidence.

Table A.8. Findings From Studies of Sexual Assault Outcomes in Canada, New Zealand and Scotland

	<b>NUTTALL 1989 CANADA</b>	<b>DU MONT &amp; MYHR 2000 CANADA</b>	<b>LEE 1983 NEW ZEALAND</b>	<b>CHAMBERS &amp; MILLAR 1986 SCOTLAND</b>	<b>BROWN, BURMAN &amp; JAMIESON 1992 SCOTLAND</b>
<b>SAMPLE CHARACTERISTICS</b>	37% of sexual assault offences reported to police between 1985 and 1987 proceeded to court	Of 284 women presenting to a sexual assault centre in 1994, 66% reported to police, 47% resulted in a charge	117 defendants in rape trials	Of 196 cases of serious sexual assault recorded by police in 1980/81 21% reached trial stage	High Court trials involving a single rape charge
<b>PLEA</b>	24% pleaded guilty	12% pleaded guilty	32% pleaded not guilty	16% pleaded guilty	
<b>FOUND GUILTY</b>	26%	5%	66%	9%	22% (includes guilty pleas)
<b>LESSER CHARGE</b>	9% found guilty of lesser charge		11% found guilty of a sexual offence other than rape		20% reduced to lesser charge
<b>ACQUITTALS</b>	6%	5%	22%		78%
<b>WITHDRAWAL BY PROSECUTION</b>	24%	16%		33%	
<b>OTHER</b>	10% dismissed 1% mistrials	5% dismissed or stayed by trial judge			

## Appendix B — Selected Australian Legal Definitions of Rape and Sexual Assault

### AUSTRALIAN CAPITAL TERRITORY CRIMES ACT 1900

#### SECT 54 Sexual assault in the first degree

A person who engages in sexual intercourse with another person without the consent of that other person and who knows that that other person does not consent, or who is reckless as to whether that other person consents, to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.

### NEW SOUTH WALES CRIMES ACT 1900

#### SECT 611 Sexual assault

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

#### SECT 61L Indecent assault

Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

### NORTHERN TERRITORY OF AUSTRALIA CRIMINAL CODE ACT

#### SECT 192 Sexual intercourse and gross indecency without consent

Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life.

### QUEENSLAND CRIMINAL CODE ACT 1899

#### SECT 349 Rape

A person rapes another person if--

- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

#### SECT 352 Sexual assaults

(1) Any person who--

- (a) unlawfully and indecently assaults another person; or
- (b) procures another person, without the person's consent-
  - (i) to commit an act of gross indecency; or
  - (ii) to witness an act of gross indecency by the person or any other person;

is guilty of a crime.

### SOUTH AUSTRALIA CRIMINAL LAW CONSOLIDATION ACT 1935

#### SECT 48 Rape

48. A person who has sexual intercourse with another person without the consent of that other person-

- (a) knowing that that other person does not consent to sexual intercourse with him; or
- (b) being recklessly indifferent as to whether that other person consents to sexual intercourse with him,

shall (whether or not physical resistance is offered by that other person) be guilty of rape and liable to be imprisoned for life.

### TASMANIAN CRIMINAL CODE ACT 1924

#### SECT 127A Aggravated sexual assault

- (1) A person who unlawfully and indecently assaults another person by the penetration to the least degree of the vagina, genitalia or anus of that other person by
  - (a) any part of the human body other than the penis; or
  - (b) an inanimate object –

is guilty of a crime.

#### SECT 185 Rape

Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.

### VICTORIAN CRIMES ACT 1958

#### SECT 38 Rape

A person commits rape if-

- (a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting; or
- (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

#### SECT 39 Indecent assault

- (2) A person commit indecent assault if he or she assault another person in indecent circumstances while being aware that the person is not consenting or might not be consenting.

### WESTERN AUSTRALIAN CRIMINAL CODE

#### SECT 325 Sexual penetration without consent

A person who sexually penetrates another person without the consent of that person is guilty of a crime.

## Appendix C — From Charging to Sentencing

As criminal justice processes vary considerably between the Australian states and territories, this appendix provides a broad and brief overview of the process for a typical indictable matter. Readers are advised to consult texts that describe procedures for specific jurisdictions.<sup>16</sup>

To begin proceedings, the police must lay charges, which means that at a minimum, the investigating police officer must be satisfied that:

- there is *prima facie* evidence that the offence has been committed;
- the suspect has committed the offence; and
- the statutory requirements of the offence are satisfied (CMC 2003a).

Police may charge the suspect without consulting the Director of Public Prosecutions, although in some cases they seek his or her advice on the nature of charges to be laid or whether to proceed with charging.

In most Australian states and territories indictable sexual matters are first heard at a committal hearing in the Lower Courts. At the committal hearing a magistrate examines the evidence to determine whether the case against the defendant is strong enough to go before the Higher Courts. In some states and territories special rules apply to committal proceedings for sexual offences. Matters may be resolved in various ways at the committal hearing:

- if the evidence is strong enough the defendant will be committed to stand trial in the Higher Courts;
- the defendant will be discharged if the evidence is not strong enough;
- the defendant may be discharged on some charges but committed on others.

Before the trial begins the defendant is asked to plead guilty or not guilty. If he pleads guilty the matter proceeds as a sentencing hearing. If he pleads not guilty, the case proceeds to trial, where the prosecution and defence counsel present their evidence and call witnesses, who are often cross-examined by the opposing counsel. The defendant may choose not to give evidence at trial, without adverse comment from the prosecution. At any time during the process a defendant may change his plea or the prosecution may discontinue proceedings or negotiate charges with the defence.

After the prosecution and defence counsel give a final address to the jury, the judge summarises the evidence and explains how various laws relate to the evidence. The jury retire to consider their verdict and the case may be finalised in a number of ways. For example, the jury may acquit the defendant because the charge was not proved; they may return a verdict of guilty on the charge or an alternative offence where available; or the judge may direct an acquittal on the primary charge but conviction on other charges. If the defendant is found guilty, he may be remanded for sentencing. The Director has no power to appeal against an acquittal, but may lodge an appeal against an order or ruling made by a judge at trial, such as an inadequate sentence.

<sup>16</sup>For example, VLRC 2001; New South Wales DPP 2002-03 Annual Report, <http://www.DPP.nsw.gov.au/reports/annual02-2003.pdf> (viewed 23 March 2004)

## Appendix D — Benefits and Criticisms of Charge Negotiation

BENEFITS
Substantial benefits to the community through decreased costs and time taken to dispense justice and increased efficiency of the criminal justice system
Reduces the burden on prosecutors' offices and uncertainty over outcomes
Leads to fairer charges and just outcomes that best fit the facts
Defendants are treated with the respect due to autonomous beings and have more control over their own fate
Provides incentives for defendants to admit guilt
Enforces the deterrent effect of the law through sentencing of offenders who might otherwise go free if the Crown case is not strong enough to secure a conviction
Recognises the flexibility inherent in the adversarial process
Provided sentencing is appropriate, provides a conclusive determination of guilt and satisfies victims
Victims who would be traumatised by the trial process or regarded as not credible are not required to give evidence
Obviates delays and postponements in the court process, which may advantage the defendant but wear down the victim
CRITICISMS
The goal of justice is secondary to that of processing
Serves self-interest: enhances the careers of prosecutors through high conviction rates; allows defence lawyers to collect fees from a large number of clients in a short time; and enables judges to clear court calendars
Encourages overcharging to induce a guilty plea. Australian guidelines note that prosecutors should not overcharge so as to leave room for charge negotiation
The courts are not adequately informed of the real facts and issues
Unjust because defendants give up their rights to the constitutional protections offered by adversarial trials. Those who exercise their right to contest the charges and are found guilty are penalised by harsher sentences, while offenders who are genuinely guilty are "rewarded" with lighter sentences
The perception that offenders who plead guilty are treated leniently detracts from the criminal justice system's objectives of retribution, incapacitation, rehabilitation and deterrence
Raises the spectre of wrongful conviction and sentencing. Negotiations take place under duress and some defendants may be pressured into pleading guilty to a lesser charge, even though they are unjustly accused. Some Australian guidelines note that negotiations will not be accepted where the defendant maintains innocence of the charge to which the guilty plea is being offered
Confidence in the system is undermined due to the perception that deals are done in private to save lawyers time and money and that the conviction offence does not match the crime
Prosecutors are given too much discretionary power, limited only by professional ethics and conscience. Their role in negotiating charges marginalises judges, who are better suited by training and experience to exercise these types of discretionary judgments
Fails to take into account the needs and concerns of victims, who are left with "the impression that a guilty plea somehow lessens the gravity of the offence" (Sweetman 2003, p. 83).
Inadequate consultation or involvement of victims, informants and the public. Can contribute to secondary victimisation, as victims feel that their experiences are trivialised

## Appendix E — Coding Categories for Case File Variables

### Victim and defendant characteristics

<b>Age</b>	Age in years at time of offence.
<b>Gender</b>	Male/Female.
<b>Relationship status</b>	Relationship status at time of offence. Coding relied on self-identification, or as recorded by police or in other documents in the file.

Single: never married;

Partner: a person in an intimate relationship, including a boyfriend/girlfriend, legal or de facto spouse. Intimate partners may be cohabiting but need not be and the relationship need not include sexual activities. This corresponds with the categories used in the recent International Violence Against Women Survey (Mouzos & Makkai forthcoming);

Divorced, separated, widowed: prior intimate relationship, which has since ended.

<b>Race/ethnicity</b>	Coding relied on self-identification or as recorded by police or in other documents in the file.
-----------------------	--

Caucasian/white;

Aboriginal/Torres Strait Islander;

Asian;

Other.

<b>Employment status</b>	Employment status at time of offence.
--------------------------	---------------------------------------

Employed;

Student;

Unemployed;

Not in labour force: pension (disability, carer, aged, sole parent), financially dependent on another person, such as breadwinner partner.

<b>Substance use</b>	Substance use at time of offence.
----------------------	-----------------------------------

No;

Yes, alcohol;

Yes, drugs;

Yes, both alcohol and drugs.

<b>Offence reported to</b>	Person to whom offence was first disclosed.
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Police/other official;

Rape crisis/medical;

Family/friend;

Other.

### Defendant criminal history

None;

Prior sex (includes other);

Prior violence (includes other);

Prior sex and violence (includes other);

Prior other only (e.g. property, drugs, traffic).

### Case characteristics

<b>Number of victims</b>	Number of victims per case.
--------------------------	-----------------------------

<b>Number of defendants</b>	Number of defendants per case
-----------------------------	-------------------------------

### Victim/defendant relationship

Stranger: a person not known to the victim, most commonly a person she met within hours of the attack, often at a nightclub, and less commonly a person she had never seen before and did not recognise;

Current partner: persons in an intimate relationship, including boyfriend/girlfriend, legal or de facto spouse, whether cohabiting or not;

Former partner: persons who were previously in an intimate relationship, which has since ended;

Family: any person identified as a family member, covering various types of kinship networks;

Other known: any other person known to the victim, including friends, work colleagues, acquaintances, neighbours, etcetera.

<b>Victim injury</b>	Physical and/or genital injury.
----------------------	---------------------------------

No/Yes.

**Additional evidence** Evidence beyond injury, threat, force, weapon use, or the victim's allegation.

No/Yes.

Type of additional evidence

None;

DNA (semen, hair);

Witness;

Multiple types;

Other.

**Weapon use** No/Yes.

**Force used** No/Yes.

**Threat used to force compliance** No/Yes.

**Physical resistance or verbal non-consent** Victim demonstrated non-consent verbally or by physically resisting the attacker.

No/Yes:

**Victim incapacitated** Victim was unable to give consent, e.g. because she was unconscious or asleep.

No/Yes.

**Time to report offence**

Within 3 hours;

4 – 24 hours;

25 hours – 7 days;

8 days and over.

**Charges withdrawn by**

Victim indicated reluctance to proceed;

Prosecution/magistrate: no reasonable prospects of conviction.

**Most serious final offence**

Rape/sexual assault;

Lesser sexual offence;

Non-sexual offence.

**Charge negotiation**

No charge negotiation;

Reduced number;

Lesser sexual offence;

Non-sexual offence.

**Court level** Court level for trial or sentencing

Lower court/Higher court

**Outcome for major charge**

Acquitted/not guilty;

Found guilty;

Pleaded guilty;

Dismissed.

## Case outcomes

**Case withdrawn** This variable encompasses whether the case proceeded to trial or was withdrawn and, if withdrawn, at what stage of the proceedings this occurred. Due to procedural differences across the jurisdictions, discontinuance was coded as either prior to or after an indictment was filed.

Proceed to trial (includes partial nolle);

Dropped prior to indictment;

Discontinued after indictment.

## Appendix F — Rape Myths and Reality

RAPE MYTHS	REALITY
Sexual assault is an expression of sexual desire	Sexual assault is an act of sexual power and violence
Sexual assault is attributable to the irresistible urge of male sexuality	“This depiction of male sexuality might be regarded as convenient and self-serving rather than accurate. It is suggested that where a woman registers unwillingness, a man does have the capacity and should be required to ascertain whether or not her consent is present” (Temkin 2002: 125)
Sexual assault is a result of men ‘misreading’ women’s signals	This claim points to the objectification of women, disregard for their autonomy, sexual and otherwise, and recklessness in assumptions of consent
Women are prone to make false allegations of sexual assault	The majority of sexual assault complaints are well founded. The pressures of testifying in a sexual assault trial and the potential repercussions of perjury are likely to deter false complaints
Women precipitate/ask for sexual assault	While women are held responsible for permitting or denying sexual access, they are not responsible for men’s violent actions. Placing the burden of communication on women fails to recognise that consent is often not mutually negotiated
Women secretly enjoy sexual assault	Research evidence shows that married women clearly differentiate between times when they had sex although they were disinclined, and times when they were coerced into sexual activity despite refusing consent. The latter experiences had detrimental effects on their marriages, but they were not prone to “cry rape” (Lees 1996)
Respectable girls play “hard to get”	It is difficult to establish objectively the stage at which cajoling becomes coercion, or “persuasion” becomes a psychological ploy to force acquiescence
“No” means “yes”	Most women intend “no” to mean just that, although some men do not regard “no” as a definitive answer because of a disregard for female sexual autonomy





