



## Victim Credibility in Adult Sexual Assault Cases

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*The exercise of prosecutorial discretion is one of the most important but least understood aspects in the administration of criminal justice. 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 rarely subject to external scrutiny. This paper provides a timely insight into some of the case-by-case considerations that inform prosecutorial decisions in adult sexual assault cases. It presents a thematic analysis of interviews with Crown Prosecutors from five Australian jurisdictions. The interviews shed light on the practical factors that are taken into account in decisions to proceed with or discontinue sexual assault cases, as well as prosecutors' views of what constitutes victim credibility.*

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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 crimes. Prosecutorial decision-making is therefore based on a policy of 'selective' prosecutions. Each Australian state and territory has a statutorily appointed Director of Public Prosecutions who is responsible for prosecuting indictable offences. Each Director has developed a prosecution policy that provides guidance for prosecutors in making decisions about the conduct and disposition of cases. While there are some differences among the various guidelines for proceeding with or discontinuing cases, they all specify that there must be sufficient evidence to justify prosecution and it must be in the public interest to proceed (Refshauge 2002). In assessing evidentiary sufficiency, prosecutors consider how strong the case will be when it is presented in court and whether the evidence provides reasonable prospects of conviction. The reasonable prospects test is applied in the knowledge that the jury's decision to convict is based on the stringent standard of *beyond reasonable doubt*. Assessments of the prospects of conviction take into account factors such as the competence and credibility of witnesses and the impression they are likely to make on the judge or jury, the admissibility of evidence, lines of defence open to the alleged offender, and any other factors that could affect the likelihood of a conviction.<sup>1</sup>

As 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 (HM Crown Prosecution Service Inspectorate (HMCPIS) 2002). Sexual assault cases involving adult victims often come down to the word of the victim against that of the defendant, with little or no corroborating evidence. As the probability of conviction relies on the victim's ability to articulate the events and convince a jury beyond reasonable doubt that a crime occurred, her credibility is integral to prosecutorial decisions. This is not inherently problematic, but overseas research has shown that prosecutors who become preoccupied with convictability may actively

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look for factors that discredit victims and provide a legal basis for rejecting or discontinuing cases. Factors that undermine credibility include personal characteristics relating to moral character or reputation; 'risk-taking' behaviour; discrepancies in the victim's accounts of the incident; and typifications about rape scenarios, rape reporting and post-assault behaviour (Frohmann 1991; HMCPSI 2002; Spohn, Beichner & Davis-Frenzel 2002). Some authors have expressed concern that prosecutors' appraisals of credibility may be filtered through prejudicial gender stereotypes and moral norms. They argue that discretionary decisions in sexual assault cases 'reflect a patriarchal foundation of reasoning and beliefs about gender roles in our present-day society' (Madigan & Gamble 1989: 130).

This paper presents selected findings from an Australian Institute of Criminology study of prosecutorial decision-making in adult sexual assault cases (Lievore 2004). The study involved statistical analysis of DPP case file data and qualitative analysis of data generated through semi-structured interviews with Crown Prosecutors. It is the first Australian study on this topic to be conducted in multiple jurisdictions and one of a few in which prosecutors have been invited to share their experience and views. The aim of this paper is to elucidate the case-by-case considerations that turn prosecutorial guidelines into action, specifically by presenting a thematic analysis of interview data pertaining to factors that prosecutors take into account when assessing victim credibility and deciding whether to prosecute.

## Methodology

Approval to interview Crown Prosecutors was obtained from the Director or the Chief Crown Prosecutor of the five DPPs that participated in the study. Each DPP was sent a brief background paper explaining the aims of the research and the purpose of the interviews, and was asked to provide a list of Crown Prosecutors who were experienced in prosecuting adult sexual assault cases and willing to participate in

semi-structured interviews. Twenty-four Crown Prosecutors were interviewed, including 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 male and eleven female interviewees. Given the complexity of the issues discussed, it is not always possible to quantify the responses, but a thematic analysis helps to capture the practical factors and nuances of human interaction that impact on official decision-making.

## Proceeding with and discontinuing prosecutions

The prosecutor's most important discretionary decision is whether to proceed to trial. Prosecutors noted that different issues impact at various stages of the process; their assessments are anything but formulaic:

*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.*

*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.*

*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.*

*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.*

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. Assuming that a *prima facie* case has been established, a number of factors enter into decisions to proceed or discontinue. The ultimate assessment rests on consideration of a range of victim-, defendant-, and case-related factors. Table 1 summarises factors that were mentioned by the majority of interviewees, although they were unanimous about the importance of victim credibility in adult sexual assault cases.

The most problematic and common cases are those that come down to word against word. The prosecutor's assessment of the victim's credibility and reliability as a witness, and her willingness to proceed, is crucial in these cases. Prosecutors were generally supportive of proceeding with most cases, but acknowledged that there are times when they would be more likely to recommend discontinuing. Their responses fell into two main categories, which generally result in cases going forward, with a third, smaller group that was more inclined to discontinue:

1. Most see no reason to discontinue most cases. The victim's word is sufficient grounds for prosecuting, as long as her evidence is inherently credible.
2. Some prosecutors advise the victim when the prospects of conviction are poor; because jury decisions in these cases are often unpredictable, they offer the victim the choice of proceeding or withdrawing.
3. A few prosecutors (n = 3) would not run a case unless they had to. They discuss options with the victim, but emphasise that ultimately this is not her decision. They would discontinue a case against the victim's wishes.

**Table 1: Factors influencing prosecutors’ decisions to proceed with or discontinue adult sexual assault cases**

	<b>Proceed</b>	<b>Discontinue</b>
<b>Victim</b>	Credible, reliable	Defence has access to material that will undermine victim’s credibility, for example, psychiatric history of delusions
	Willing to proceed; able 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, for example 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, for example, motive to offend, lies	Age, health, mental condition
	Inconsistencies, for example, admission followed by denial; denial followed by claim of consensual sex when DNA proves sex took place	
<b>Case</b>	Fresh complaint i.e. the victim reported the assault to a third party at the first reasonable opportunity, while the events were still ‘fresh’ in her memory	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)

**Pressure to proceed**

Some prosecutors (n=4) noted that they have more discretion in deciding *how* to run a trial, rather than *whether* to run it. There can be vast differences in the way that individual prosecutors approach trials and view matters such as which evidence to lead and witnesses to call. There was a general perception that ‘there is increasing public pressure to prosecute rape cases. You must have a clear, unarguable case not to proceed,’ although

prosecutors do not always feel that this is in victims’ best interests:

*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.*

*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.*

Prosecutors understood that some victims need their day in court, whatever the outcome, while others simply want acknowledgement of the harm suffered. There were concerns that, despite the efforts of prosecutors and witness assistance services, some victims fail to fully understand that a decision not to proceed, or a not guilty verdict, does not always indicate disbelief. Alternatives to the trial process may be more appropriate for some victims, but there is also a role for greater public education about legal and evidentiary issues.

**Reluctant victims**

All prosecutors said that they try to establish and overcome the source of reluctance for victims who are hesitant to proceed. They rarely force them to give evidence, partially because they are aware of the potential for revictimisation through the legal process, and because a reluctant victim is likely to undermine the case.

*The overwhelming factor is the wishes and well being of the complainant. I rarely proceed if the complainant doesn’t want to... I make sure they’re taking an informed position. If they’re frightened of the system, I try to explain it to them, encourage them by reminding them about how far they’ve come and the gains they’ve made. I acknowledge their progress and allay their fears through information and by demystifying the process. If they’re recalcitrant and I’m unable to confirm their position, I recommend discontinuance.*

The public interest sometimes overrides the individual’s wishes, usually where there is a possibility of repeat victimisation or offending. Decisions to subpoena reluctant

victims often involve violent relationships where the couple has reconciled, or where the victim is subject to improper influence by the defendant or his supporters. When a victim does not want to proceed, prosecutors must 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.

A decision to proceed with a case against the victim's wishes may be in the public interest where:

- the offences are more serious, for example, when the attack results in injury or there are other aggravating circumstances;
- there is a suspicion that the victim's reluctance is a result of intimidation; and
- the victim does not state that she fabricated the allegation.

## Credibility

The prosecutors were unanimous about the importance of victim credibility in adult sexual assault trials. They were more inclined to believe than disbelieve most allegations, but they also made it clear that 'the jury, not the prosecution, is the arbiter of the facts. It's their job to decide if she's telling the truth.' Their views on what comprises credibility were based on four non-discrete categories of personal characteristics. The most frequently cited factor was consistency.

### 1. Consistency:

- in her statements at various times;
- between her statements and those given by witnesses; and
- in her post-assault behaviour.

### 2. Genuine and trustworthy:

- she tells the story as it happened, without 'gilding the lily'. Embellishing the story to ensure she is believed is 'fatal' to the case, as is the tendency to 'understate the amount of alcohol they've consumed [because] they think it will look bad... They do

themselves a disservice because this leads to inconsistencies';

- the story rings true;
  - she makes eye contact with the prosecutor, defence and judge;
  - she is herself – she acts, speaks and dresses as she usually would; and
  - there are no other factors that 'set off alarm bells.'
3. Demeanour:
- she is not aggressive, 'smart', or argumentative towards the defence;
  - she is confident and relaxed;
  - 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;
  - she shows some distress, but is not withdrawn or numbed by having to recall and relate the offence; and
  - she is curious – she finds out about what will happen in the trial and why, and informs herself about how to withstand cross-examination.

### 4. Memory and communication skills:

- she can recall what happened;
- she is intelligent and articulate – she accurately and coherently describes the events; and
- 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.

There was considerable consistency in prosecutors' views about what determines credibility, but they emphasised that credibility is not a matter of the prosecutor's 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... Prejudice is the determinant of perceptions of credibility; the same witness could sway one jury but not another.*

*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.*

*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.*

*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... 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.*

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 a judge and jury, the interviewees reported that assessments of credibility may be affected by her age, intelligence, socio-economic status and cultural background. For example, in the experience of this sample of Crown Prosecutors:



- 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 might 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, questions asked in a non-chronological order, or because particular types of evidence are inadmissible. Mature, intelligent victims with good English skills might be 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 inarticulate, educationally or intellectually disadvantaged, have emotional problems, or come from Indigenous or non-English speaking backgrounds, can be disadvantaged in the trial process, if, for example, they are unable to explain why they acted in certain ways.

Prosecutors call on experience to assess a victim's ability to express herself and how a jury will view her: 'If they don't pass the prosecutor's test, they won't convince a jury.'

### Moral and gender stereotypes

Prosecutors stated that they do not assess credibility on the grounds of moral or gender stereotypes, but 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, but the general view was that the prosecution's task is to determine the prospects of conviction on the strength of the evidence, not to pre-empt jury perceptions.

*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.*

*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.*

*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 a 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... Juries are still harsh on women who drink too much.*

There was a view among some prosecutors that juries take a moralistic view of victim behaviour that could be perceived as 'rough,' such as drinking, willingly going with a stranger, or showing interest in a man. Some interviewees reported that, even where there is corroborating evidence, some juries are likely to believe that 'she asked for it.'

### The problem of intoxication

There is a well-established association between sexual assault and alcohol use by both victims and offenders (Finney 2004) and most Australian laws presume that some level of intoxication negates consent. Limited empirical evidence from the United States suggests that prosecutors are less likely to file charges if the victim had been drinking before the attack (for example, Kerstetter 1990). The interviews point to the salience of drug or alcohol use for prosecutors' decisions, but this is not necessarily indicative of biased decision-making, despite their awareness of potential jury bias. Intoxication or chronic substance use impairs the

victim's memory of factual events, which makes it difficult to prove the elements of the offence beyond reasonable doubt.

*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.*

*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.*

Questions about the reliability of the victim's evidence represent a major legal obstacle to credibility. 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 to the other. The jury will be instructed that the victim's '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.' It is therefore reasonable for prosecutors to evaluate victim credibility in light of intoxication or chronic substance use: this does not necessarily indicate an inappropriate bias, but neither does it preclude it.

### Conclusion

The Crown Prosecutors who participated in this study tended to be conservative about rejecting or discontinuing adult sexual assault proceedings. To some extent this may reflect the fact that while prosecutors are afforded a considerable degree of discretion, case decisions are not made on the opinion of a single person:

they are overseen by other DPP lawyers, and decisions to terminate cases that have been committed for trial require the Director's approval. This provides some consistency in the reasons for continuing or discontinuing prosecutions. This study cannot rule out the possibility that prosecutors' assessments of victim credibility may be influenced by gender stereotypes, as even prosecutors who do not consciously ascribe to stereotypes may operate on unexamined suppositions. For example, interviewees commonly noted that consistency in post-assault behaviour is an important criterion in assessing credibility. However, as there is no 'typical' response to sexual assault, it is possible that typifications of appropriate post-assault behaviour may be based on stereotypical assumptions. While the findings may indicate that reforms to government policy and pressures from victim groups have changed the organisational culture in relation to sexual assault prosecutions, it is not possible to generalise the findings, because the sample is small, taken at a single point in time, and the results could reflect a self-selection bias. Nevertheless, the study provides a timely insight into the way that prosecutors view credibility, as well as differences between legal and non-legal understandings of the issue.

A Senior Crown Prosecutor who regularly reviews recommendations of other prosecutors believes that prosecutorial 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.' The prosecutors were aware of the disparity between legal and everyday understandings of victim credibility and other factors that impact on their decision processes. One prosecutor observed that 'lawyers need to think more like the community, because what the law sees as improper reasoning, the jury sees as common sense.' It would also be beneficial for the community to understand more about the way that sexual assault laws and prosecutorial guidelines shape prosecutors' views and actions. Victims who are able to 'see' their cases through a legal lens might be helped by understanding that 'insufficient prospects of conviction' and 'credibility' take different meanings in law than they do in everyday discourse.

### Note

- 1 The parties to sexual assaults are referred to by different terms throughout the criminal justice process and by different sectors. For simplicity, this paper refers to victims and defendants. Feminine terms are used to refer to victims and masculine terms to defendants. While both women and men can be victims and perpetrators of sexual assault, 82 per cent of all sexual assault victims who came to the attention of Australian police in 2003 were females (ABS 2004). Responses to the Women's Safety Australia Survey indicated that 99 per cent of offenders were males (ABS 1996).

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