

**[Dis]Abled Justice:
Why reports of sexual assault made by adults with cognitive
impairment fail to proceed through the justice system.**

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Abstract

This study considers why, despite increased prevalence of sexual assault perpetrated against adults with cognitive impairment, reports of sexual assault made by adults in this cohort to the police seldom progress beyond the investigation stage.

The study is informed by a triangulation of theoretical perspectives consisting of radical feminist theory, symbolic interactionism and the social model of disability. A combined qualitative and quantitative methodological approach is underpinned by the social constructionist epistemology. Data was gathered through 13 focus group discussions conducted with Victoria Police members, including members of the Sex Offences and Child Abuse Unit, Criminal Investigation Unit and Sex Crimes Squad, as well as with staff from the Office of Public Prosecutions and advocates consisting of disability and victim support workers. The other main sources of data were 76 police case file narratives and a case study involving an adult victim whose report of sexual assault was successfully prosecuted.

Qualitative data from focus group interviews and file narratives were subjected to thematic analysis and critical discourse analysis. Basic frequencies and correlations of the case file data were analysed using SPSS and the case study was analysed utilising Yin's (2003) explanatory case study framework.

The research indicates that there are seven points in the course of police investigations at which decisions are made about sexual assault reports. Discretion is applied by police at all stages of decision making. Decisions are informed by an influence cycle consisting of social forces, the justice system, the police organisation, and the culture of the police unit. Police decisions are therefore subject to a range of influences, which perpetuate negative patriarchal and ableist stereotypes and disabling generalised assumptions about adults with cognitive impairment. The primary assumption is they are not credible. The result is that opportunities for people with cognitive impairment to access justice are extinguished prematurely.

Statement of Authorship

Except where explicit reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis by which I have qualified for or been awarded another degree or diploma. No other person's work has been relied upon or used without due acknowledgement in the main text and bibliography of the thesis.

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Dedication

This thesis is dedicated to my dear parents Carmen and Charles Camilleri who both passed away within six weeks of each other, during the last two months of writing this thesis.

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Acronyms

ABI	Acquired Brain Injury
ABS	Australian Bureau of Statistics
ARC	Australian Research Council
CASA	Centre Against Sexual Assault
CCTV	Closed Circuit Television
CIU	Criminal Investigations Unit
Code	Code of Practice for the Investigation of Sexual Assault
DA	Discourse Analysis
CDA	Critical Discourse Analysis
CRPD	Convention on the Rights of People with Disabilities
DHS	Department of Human Services
FMO	Forensic Medical Officer
ITP	Independent Third Person
LEAP	Law Enforcement Administration Program
OPA	Office of the Public Advocate (Victoria)
OPP	Office of Public Prosecutions (Victoria)
RCC	Research Coordinating Committee
SCS	Sex Crimes Squad
SOCAU	Sexual Offences and Child Abuse Unit
SOCIT	Sexual Assault and Child Investigation Team
TA	Thematic Analysis
UPIAS	Union of the Physically Impaired Against Segregation
VSA	Victim Support Agency (Victoria)

VATE	Video And Audio Taped Evidence
VLRC	Victorian Law Reform Commission
WAS	Witness Assistance Service
WHO	World Health Organisation
YRIPP	Youth Referral Independent Person Program

Chapter One: Introduction

Research Problem

The sentiments of the *Victorian Charter of Rights and Responsibilities* (here after the Charter) affirm the aspirations of a ‘just society’ in which all people are equal before the law and receive the protection of the law. However, despite what would appear to be the high rate of sexual assault victimisation perpetrated against adults with cognitive impairment,¹ comparatively few cases are prosecuted. This study seeks to shed light on the reasons why this phenomenon occurs.

There is sufficient research to date to demonstrate that adults (male and female) with cognitive impairment are more likely, compared to the rest of the adult population, to be victims of sexual assault (Brown, Stein, & Turk, 1995; Community Development and Justice Standing Committee, 2008; French, 2007; Sobsey & Doe, 1991; Turk & Brown, 1993). However, despite this increased vulnerability, and the prevalence of sexual assault perpetrated against adults with cognitive impairment, few reports are made to the police (Sobsey & Doe, 1991). Further, there is mounting evidence which suggests that reports of sexual assault made to police by adults with cognitive impairment face early attrition from the justice system. Indeed, such reports are unlikely to proceed beyond the investigation stage (Community Development and Justice Standing Committee, 2008; Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lea, Lanvers, & Shaw, 2003; Victorian Law Reform Commission, 2001).

This scenario juxtaposes, on the one hand, increased prevalence and vulnerability with, on the other hand, few successful prosecutions and, indeed, few reports that progress beyond the investigation stage. For several reasons this scenario invites examination. First, it describes a process that potentially perpetuates the level of violence inflicted against adults with cognitive impairment, thereby increasing their

¹ For the purposes of this study, the term ‘cognitive impairment’ refers to mental illness, acquired brain injury, intellectual disability, and dementia.

level of vulnerability. The *Inquiry into the Prosecution of Assaults and Sexual Offences*, conducted by the Western Australian Parliament in 2008 states:

Some members of the community are particularly vulnerable to sexual offences, and there is perhaps a correlation between the level of the abuse suffered in a particular demographic and their ease of access to the justice system. A particular group that suffers consequent attrition from the very outset are those with an intellectual or decision-making disability. (Community Development and Justice Standing Committee, 2008, p. 63)

Second, the scenario alludes to a systemic problem in how the criminal justice system responds to sexual assault reports made by adult victims with cognitive impairment. Third, it raises questions about how well the Charter may be reflected in policy and practice. Fourth, it questions the relevance of the Charter to all members of society.

There is a significant body of research that considers, police decision making and attrition in relation to sexual assault reports made by the broader population generally (Heenan & Murray, 2006; Jordan, 2004; Kerstetter, 1990; LaFree, 1981; LeDoux & Hazelwood, 1999; Rowe, 2007; Scerra, 2008; Schuller & Stewart, 2000; Soulliere, 2005; Stubbs, 2003; Teaster, Roberto, Duke, & Kim, 2000). While few studies have included the reports of adult sexual assault victims with cognitive impairment in their studies (Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003), there remains a paucity of literature which examines, in detail, police decision making in relation to sexual assault reports made by adults with cognitive impairment. The research problem addressed in this thesis is therefore the mismatch between the frequency of such sexual assaults and the successful prosecution of offenders.

Access to Justice

Access to justice and equality before the law is an ideal that many western countries seek to achieve. Yet, as numerous international and national studies spanning decades attest, the law, and in particular enforcement of the law, can be dispensed differently depending on your race (Chan, 1997), disability (Jones & Brassier Marks, 1999) and socio-economic status (Karras, McCarron, & Ardasinki, 2006). Much of the literature in relation to access to justice, however, is particularly concerned with the over-representation and unjust treatment of minority groups, including people with disability

and people from low socio-economic groups as offenders (French, 2007; Karras et al., 2006). During the 1990s and 2000s, much has been written about the impact of sexual assault and family violence on victims and the experience of victims within the criminal justice system (Carmody, 1991; Connelly & Keilty, 2000; Criminal Justice Sexual Offences Taskforce, 2005; Cunneen, 2004; Felson & Pare, 2007; Lievore, 2004a; Scerra, 2008). The last decade has seen an emergence of Victimology, a relatively new field of study and, with it, an interest in the needs of victims and their experience in the justice system. In particular, there has been a greater understanding of the impact of crime on victims and of the secondary victimisation of victims by the criminal justice system. There has also been a renewed understanding of the important role victims play in the processes of the criminal justice system (Spalek, 2006).

In Australia, the right to equality before the law ideally extends to victims as well as offenders. While not intended to be an exhaustive list nor a comprehensive critique of all legislation and policies relating to people with disabilities, the following section provides an overview of some of the most recent human rights and justice system developments of the last five years in the state of Victoria.

Convention to Practice

On the 18th July 2008, Australia became a party to the International Convention on the Rights of Persons with Disabilities (CRPD). Among the many provisions contained in the convention, one clause relates specifically to access to justice.

State parties shall ensure active access to justice for persons with disabilities on an equal access to others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. (United Nations, 2008, Article 13 (1))

As a member state and party to the convention, Australia agrees to uphold and promote the full human rights of all people with disabilities without discrimination. Member states carry the responsibility for promoting the rights espoused by the convention within the geographic boundaries of each member state. This is achieved by developing at national and state levels, legislation and policies, which are designed

to reflect the principles and spirit of the convention. While the process described above may appear systematic and straightforward, the reality can be quite the reverse. Disparities often appear between the aspiration and what occurs in practice.

Justice Statement

In 2005, the Victorian State government, through the Office of the Attorney General launched the Justice Statement. The aim of the statement is to reform the legal system by:

[R]eclaim[ing] the law as accessible and relevant to all Victorians ...and shape one that is co-operative, flexible and compassionate. [W]e must start from a recognition that the law is there not to be remote, but for the protection and benefit of the community. (Department of Justice, 2004, p. 3)

Section 4 of the statement 'Protecting Rights and Addressing Disadvantage' describes the government's commitment to Human Rights as it relates to equal treatment before the law. An initiative identified by the Justice Statement was the development of a Victorian Human Rights Charter.

KEY INITIATIVES

18. Establish a process of discussion and consultation with the Victorian community on how human rights and obligations can best be promoted and protected in Victoria, including the examination of options such as a charter of human rights and responsibilities, new approaches to citizenship and to modernising antidiscrimination law, reducing systemic discrimination, and strategies to promote attitudinal change. (Department of Justice, 2004, p. 52)

In addition, the Justice Statement recognises the role of victims in the criminal justice process and the impact of crime on victims. The statement also acknowledges the potential for the Criminal Justice process to compound the effects of crime on victims if their needs are not appropriately acknowledged or addressed by the response of criminal justice and service agencies. In an attempt to address the needs of victims of crime, the Victim Support Agency (VSA) was established in 2004. The role of the VSA is to "be responsible for overall strategic reform and policy for victims of reported crime. It will be the focal point for shaping how the criminal justice system

and other agencies respond to and deliver services to victims of reported crime” (Department of Justice, 2004, p. 65).

The *Victorian Human Rights and Responsibilities Charter 2006* (Vic) and the *Victims’ Charter Act 2006* (Vic), which are discussed below have both emerged from the Justice Statement.

Victorian Charter of Human Rights and Responsibilities

At a state level, in 2006, the Parliament of Victoria introduced the Charter, “the purpose of the Act is to protect the human rights of all Victorians without discrimination” (*Charter of Human Rights and Responsibilities, 2006* (Vic) p. 1). The section within the Act that has most relevance to this study is Part 2 section (8) ‘Recognition of equality before the law’, which states:

- (1) Every person has the right to recognition as a person before the law
- (2) Every person has the right to enjoy his or her human rights without discrimination
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. (*Charter of Human Rights and Responsibilities, 2006, (Vic) p. 10-11*)

While the legislation referred to above is a state initiative and actively seeks to promote human rights within Victoria, it does demonstrate congruence at a state level with Australia’s responsibilities as signatory of the international human rights conventions.

The Victims’ Charter

In 2006, the Victorian Parliament introduced the *Victims’ Charter Act 2006* (Vic) (here after the Victims’ Charter). The purpose of the Victims Charter is to articulate the principles by which criminal justice and service agencies, including police, respond to victims of crime (Victims’ Charter Act, 2006 (Vic)). The Victims’ Charter is directly aligned to the ‘Declaration of Basic Principles of Justice for Victims of Crime and

Abuse of Power adopted by the General Assembly of the United Nations resolution 40/34 of 29 November 1985'. Part 2, section 6 (1), of the Victims' Charter refers to the treatment of victims of crime by criminal justice and service agencies. It states that such services should take into account the impact of crime on victims, in order to avoid secondary victimisation. Part 2, section 6 (2), of the Victims' Charter also states that criminal justice and service agencies should take into account the particular needs of victims of crime relating to difference such as race, disability, gender sexual orientation. The remainder of the Victims' Charter refers to the right of victims of crime to be treated with respect and dignity and, further, that once victims enter the criminal justice system they have a right to receive, amongst other things, timely information about the progress of their case throughout the justice system pathway.

While the Victims' Charter acknowledges the rights of victims who choose not to report crimes committed against them, the Victims' Charter is primarily concerned with how victims are treated once a report is made to police. There appears to be an underlying assumption that all reports made by victims of crime will be investigated fairly and equally, irrespective of who the victim is.

Prosecutorial Discretion Policy

An equally significant policy is that developed by the Victorian Office of Public Prosecutions (Office of Public Prosecutions, 2008), which outlines the use of discretion in decisions made by prosecutors in relation to cases brought before the court. The policy on prosecutorial discretion is part of a larger policy framework.

2.1.1. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large, to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system. (Office of Public Prosecutions, 2008)

In deciding whether to prosecute, the prosecutor must consider a range of issues. In particular, these include whether the matter is of public interest; whether there is reasonable prospect of success in court; whether there is sufficient evidence; and whether the evidence is reliable and of good standard (Office of Public Prosecutions,

2008). The evidence in relation to prosecution of the matter in court includes the evidence provided by the victim. The policy provides a list, which prosecutors must consider in their deliberations. Of particular relevance in relation to victims with cognitive impairment are the following:

Section 2.1.5 (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?

(d) Has a witness a motive for telling less than the whole truth?

(e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?

(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?

(g) If there is conflict between eyewitnesses, does it go beyond what one would expect and hence materially weaken the case?

(h) If there is a lack of conflict between eyewitnesses, is there anything which causes suspicion that a false story may have been concocted? (Office of Public Prosecutions, 2008)

Although the considerations listed above are not specific to victims with cognitive impairment, the extract highlights the significance of victim credibility and believability in police and prosecutor decision making about the potential of the case to be successful at court.

The Police Code of Practice for the Investigation of Sexual Assault

In 2005, the Victoria Police developed the *Code of Practice for Investigation of Sexual Assault* (hereafter 'the Code') (Victoria Police, 2005). One of the aims of the Code, Clause 1 is to provide a coordinated response to the investigation of sexual assault by agencies including police, victim service agencies, and Centres Against Sexual Assault. Implicit in the Code is the importance of the holistic and integrated service crisis response to victims of sexual assault, which includes attending to the initial emotional and support needs of the victim in addition to the investigation of the crime. The following extract describes the functions of Victoria Police members in relation to sexual assault cases and emphasises that caring for the victim is the first priority.

Caring for the victim

3 The first priority in sexual assault cases is the care of the victim.

- The welfare of the victim is maximised when police officers conduct the investigation in a supportive and non-judgmental manner.

4 Police sensitivity to victims will:

- help the victim to recover from the assault trauma
- assist in gathering evidence in order to build a stronger prosecution case
- encourage victim cooperation with investigations and their willing involvement in court proceedings. (Victoria Police, 2005, p. 4)

In addition, the Code, Clause 27-39 contains a number of provisions in relation to victims with disabilities, mental illness, and cognitive impairment (Victoria Police, 2005).² Specifically, the provisions highlight the importance of providing an additional level of support for victims' in addition to providing support to assist police to respond more effectively to victims and to consider more closely the way in which police ask questions. Further, the provisions amplify the importance of victim health and safety by linking the victim with appropriate support services including Centres Against Sexual Assault (CASA). Lastly, the provisions state the requirement to use an Independent Third Person (ITP) during the interview and the requirement that, where the victim is suspected of having a cognitive impairment, their statement must be made using Video and Audio Taped Evidence (VATE) (Victoria Police, 2005, pp. 8-9).

Ready Reckoner

The Sexual Offences and Child Abuse Coordination Unit of Victoria Police and the Office of the Public Advocate jointly developed the Ready Reckoner in 2007. The intent of the 'Ready Reckoner' is to assist police to identify and respond more effectively to people with cognitive impairment. It provides police with a list of indicators that assist them to identify if a person has a cognitive impairment. Further, it provides suggestions to enhance communication between police and people with cognitive impairment, and contact details of other service agencies that police may call on for assistance.

For example:

² The provisions refer to mental illness and cognitive impairment separately and distinctly, with the use of the term cognitive impairment appearing to refer to intellectual disability.

Indicators of cognitive impairment

Is the person:

- Having difficulty expressing themselves
- Using repetitive language
- Having difficulty remembering facts or details

Tips to assist communication

- Keep the person calm by communicating with them as naturally as possible
- Make instructions clear and brief – short words and short sentences, speaking slowly and clearly (without being condescending)

Police procedure

Q. Who can be classified as an Independent Third Person?

A. An Independent Third Person will be either a relative, close friend or a Trained Independent Third Person.

Useful contact details

Victims of Crime Helpline - 1800 819 817

Forensic Medical Officer (FMO) - 9684 4480.

(Victoria Police & Office of the Public Advocate, 2007)

Sexual Offences Law and Procedure

Legislative and procedural reform in the area of sexual assault has long been a feature of the feminist reform agenda both internationally and in Australia (MacKinnon, 1987). The last decade in Victoria has seen significant legislative and procedural reform in the way justice and victim service agencies respond to victims of sexual assault. Victoria Police and the Office of Public Prosecutions have responded enthusiastically to the recommendations contained in the *Sexual Offences: Law and Procedure – Final Report* (Victorian Law Reform Commission, 2004), and have implemented many of the Commission's recommendations. While the focus of reform has been to improve legislative and procedural response to victims of sexual assault, the needs of victims who are considered particularly vulnerable, such as adults with

cognitive impairment and children, have also received greater attention amidst the broader reform agenda.

In 2001, the Victorian Law Reform Commission (here after VLRC) received a request from the State Attorney General, The Honourable Rob Hulls MP. The VLRC was asked:

- (1) To review current legislative provisions relating to sexual offences to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases; and
- (2) To develop and/or coordinate the delivery of educational programs which may be necessary to ensure the effectiveness of existing and proposed legislative, administrative and procedural reforms. (Victorian Law Reform Commission, 2001, p. vii; 2003)

The Final Report that was the outcome of this request was tabled in the Victorian Parliament in 2004. It contained 202 recommendations for legislative and procedural criminal justice system reform. Of these, 18 recommendations related directly to complainants with cognitive impairment (Victorian Law Reform Commission, 2004, p. 321-140 Recommendations 150-168). In the words of the VLRC, the recommendations:

are intended to make the criminal justice system more responsive to complainants in sexual offences cases, whilst at the same time ensuring a fair trial for those accused of the offences. (Victorian Law Reform Commission, 2004, p. vii)

This comment by the Commission highlights the tenuous balance in the criminal justice system, symbolised by the scales of justice, between on the one hand, responding appropriately and effectively to victims of crime, and, on the other hand, ensuring the accused receives a fair trial. The following extract from the Justice Statement identifies the need to consider the needs of victims.

The needs of victims of crime have been an increasing priority for the justice system over the past 15 years. There is widespread acknowledgement that while the criminal justice process is focused on identifying, convicting and punishing an offender, there must also be a commitment to assist the person most affected by the offence to recover from its effects. (Department of Justice, 2004, p. 65)

The VLRC final report contained 34 recommendations that were concerned primarily with the improvement of police responses to sexual assault through better investigative and management responses. These included the need for research to analyse and monitor police decision making and the progress of sexual offence complaints made to police (Victorian Law Reform Commission, 2004). The VLRC (2003, p. 99) noted that sexual offences are heavily underreported, a trend identified in national and international studies on sexual assault (Canadian Centre for Justice Statistics, 2006; Fitzgerald, 2006; Gregory & Lees, 1999; Lievore, 2003).

According to the VLRC report, one group of complainants to whom the justice system has not responded well, includes adults whose cognitive function as described by the *Crimes Act 1958 (Cth)* as impaired “due to acquired brain injury, intellectual disability, dementia and mental illness” (*Crimes Act, 1958 (Cth)* section (8) 50 (1) p. 46). To identify the complexity of the criminal justice system process it is necessary to understand the pathway along which the report of such a crime must follow.

Report Pathways

The pathway of an initial report of sexual assault through to trial of the defendant is one which is characterized by long delays through the justice system (Victorian Law Reform Commission, 2004). It is not unusual for this process, from report to trial in the Victorian County Court, to take over 12 months before a case is adjudicated and finalised (Victorian Law Reform Commission, 2001).

To expect, that all reports of sexual assault result in conviction is unrealistic, as there are numerous stages at which a report may be ejected from the criminal justice system. The following diagram presents a view of the disclosure and then report pathway of a report of sexual assault through the criminal justice system, indicating points at which decisions are made in relation to progress or otherwise of each report.

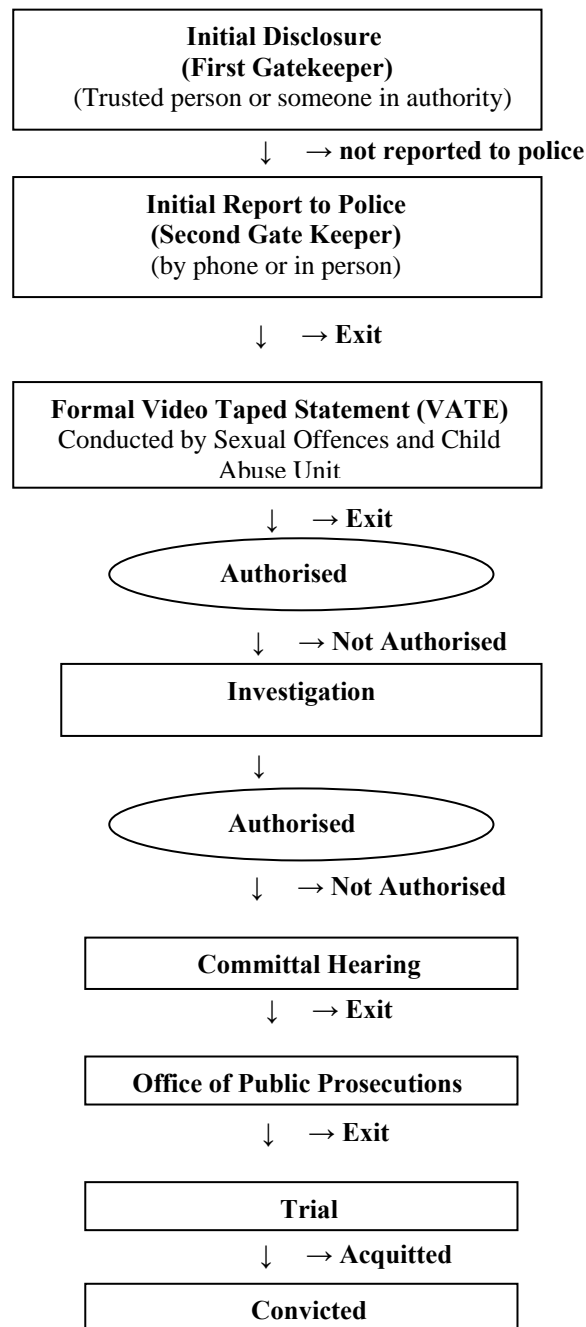


Figure 1:³ Usual Report Pathway for Victim with Cognitive Impairment

Previous research suggests that, despite an increased vulnerability to sexual abuse, victims with cognitive impairment make few reports of sexual assault to police. If

³ This diagram is adapted from the VLRC Interim Report (Victorian Law Reform Commission, 2001, p. 32). The pathway described above does not represent or discuss the option of hearing the offence (often a lesser charge) summarily in the Magistrate’s Court. In addition, it does not discuss the possibility of plea bargain options available to the OPP, or the range of other possible methods of finalisation other than conviction or acquittal of rape

reports are made, they are unlikely to proceed beyond the investigation stage. There is only a handful of studies (Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003; Triggs, Mossman, Jordan & Kingi, 2009), which consider the police response to adult victims with cognitive impairment. However, there are no studies, known to the researcher, which consider, in detail, the reasons why such reports do not progress through the criminal justice system.

Much of the literature to date indicates that many instances of sexual assault where the victim has cognitive impairment are not reported (Roehrer Institute, 1994; Sobsey & Doe, 1991). Even when a report to police is made, very few cases progress to trial and subsequent conviction (Victorian Law Reform Commission, 2001; Victorian State Ombudsman Office, 2005). There is a number of Australian and international studies, which have focused on either police and/or prosecutorial decision making in adult sexual assault cases (Fitzgerald, 2006; Heenan & Murray, 2006; Lievore, 2004a; Refshauge, 2002; Scerra, 2008). Researchers have discussed the specific victim, offender, and case characteristics, which appear to be influential in police and prosecutor decisions not to progress certain reports (Ekstrom, 2003; Frazier & Haney, 1996; Frohmann, 1991; Gregory & Lees, 1999; Kerstetter, 1990; Lievore, 2004a; Refshauge, 2002; Spears & Spohn, 1996).

While several earlier studies have focused solely on sexual assault perpetrated against adult victims with cognitive impairment, including the outcomes of sexual assault reports made to police (Brown et al., 1995; McCarthy & Thompson, 1997; Sobsey & Doe, 1991; Teaster et al., 2000). The main focus of these studies was on the prevalence of abuse perpetrated against adults with cognitive impairment, rather than police decision making and the pathway of reports through the justice system.

Several recent studies have included, in the cohort of cases analysed, reports of sexual assault made to police by victims with cognitive impairment. These include research conducted by Jordan (2004), Heenan and Murray (2006), Harris and Grace (1999), Triggs, Mossman, Jordan and Kingi (2009), Feist, Ashe, Lawrence, McPhee and Wilson⁴ (2007) and Lea, Lanvers and Shaw (2003). All these studies raise concerns

⁴ The definition of vulnerable victims includes young people as well as victims with disabilities.

about the propensity of police to view reports of sexual assault made by victims with cognitive impairment as false, and the implication is that few reports of sexual assault made by adults with cognitive impairment progress to trial. However, apart from the study conducted by Jordan (2004), the discussion in regards to why police believe these reports to be false is limited. Moreover, there are no known studies which attempt to identify the range of factors that inform police decision making and which shed light on the influence these factors have on the outcome of sexual assault reports made by adult victims with a cognitive impairment in the justice system.

Research Questions

In response to the stated aim of the current study, the research seeks to answer the following question.

Why do reports of sexual assault made to police by adult victims with cognitive impairment seldom progress beyond the investigation stage?

Several sub questions help to focus the research aim:

- a. What influences police decisions about sexual assault cases involving adult victims with cognitive impairment?
- b. When is discretion applied in police decision making involving reports of sexual assault made by adults with cognitive impairment?
- c. What specific victim/offender or case characteristics influence police decisions and therefore impede or enhance case progression of reports of sexual assault made by adults victims with cognitive impairment?

Terminology

The prime focus of this study concerns reports of sexual assault made to police by adult victims with cognitive impairment. Terms such as ‘sexual assault’ and ‘cognitive impairment’ have been used to describe a multiplicity of situations and disabilities. For the purposes of this study, the terms used carry a specific meaning:

Cognitive impairment: The researcher has chosen to use the definition provided by the *Crimes Act 1958* (Cth), which states, “cognitive impairment

includes impairment because of mental illness, intellectual disability, dementia or brain injury” (Crimes Act, 1958 (Cth), Section 50: Subdivision 1). Where terms such as intellectual disability, mental or psychiatric illness or indeed other descriptive terms have been used in this thesis, it is to reflect the terminology of the researchers being cited.

Sexual assault: “The term ‘sexual assault’ refers to physical assault of a sexual nature, directed towards another person, where that person does not give consent, gives consent as a result of intimidation or fraud, or is deemed legally incapable of giving consent” (Victorian Law Reform Commission, 2001, p. 17). The researcher acknowledges that other studies reviewed in this thesis have used a range of terms including sexual assault, sexual abuse and so on. Where terms other than sexual assault have been used in this thesis, it is to reflect the terminology of the researchers being cited.

Elder abuse: The term ‘elder abuse’ is a catch-all term used extensively in the literature to refer to a range of abuse perpetrated against vulnerable older people. The term is used reluctantly in this thesis to maintain a level of consistency with other literature in the field (Elder Abuse Prevention Project, 2005; Westcott, 2006). However, the researcher suggests that the use of generic terms such as ‘elder abuse’ and ‘family violence’ serve to minimise the seriousness of the crimes.

Impairment: The preference for the use of the terms ‘impairment’ and ‘disability’ varies in that there is no one shared view across people with impairments as to which term is most acceptable. As such, for the purposes of this thesis, the term impairment is used to refer to an impairment of the individual. The term **Disability** is generally used to refer to the disability created by the disabling society or justice system, but in some instances, reiterates an author’s use of the term where these works have used the term disability or disabled.

Independent Third Person: An Independent Third Person (ITP) refers to volunteers trained by the Office of the Public Advocate who are called by

police to attend and act as conduits in communication between police and an adult with cognitive impairment.

Victim: The researcher is aware of the preference by some feminist researchers and indeed victims of sexual assault to reject the term ‘victim’ in preference for the term ‘survivor’. The use of the term ‘victim’ in the context of this thesis was a deliberate choice. The motivation is to make visible the people who are victims of crime who because of their cognitive or verbal capacity, have limited access to the justice system.

Report Pathway: The term ‘report pathway’ is used in this thesis to refer to the pathway a sexual assault report travels through the justice system, from report to prosecution.

Third parties: In this study the term ‘third parties’ is used to refer to individuals, such as family members, support workers and friends who know the victim and who may offer information or be called on by police to provide information about the victim.

‘Authorised’ - ‘not authorised’: The terms ‘authorised’ and ‘not authorised’ describe the point at which a decision is made by the police that the report either progresses to the next stage in the criminal justice system (authorised) or is terminated (not authorised).

Thesis Structure and Overview

This thesis contains ten chapters, including the introduction. The first two substantive chapters examine the relevant literature, both to better understand the problem and to argue the appropriateness of the focus of the current study. Chapter two provides an overview of the literature in relation to adults with cognitive impairment as victims of sexual assault. In particular, chapter two provides a context through which the prevalence of sexual assault perpetrated against adults can be better understood. In addition, it sets out why people with cognitive impairment are particularly vulnerable to sexual assault and what factors impede victims with cognitive impairment from

reporting the offence. In chapter three, the literature about police and prosecutor decision making generally, and in relation to sexual assault in particular, is critically examined. Further, chapter three identifies where there are gaps in the knowledge about the problem under investigation.

Chapter four outlines the epistemological stance adopted in the current study and provides an overview of the three theoretical perspectives which collectively have informed this study. Lastly, this chapter describes the methodological approach utilised and justifies why this approach will provide depth of understanding of the cultural, structural, and situational factors that influence police decision making. Chapter five provides a detailed description of the data collection and analysis methods. This chapter also offers a justification for choosing the adopted methods.

Chapters six, seven and eight present the data collected from three data sources. Chapter six is divided into three sections and presents the themes that emerged from focus group discussions with members of the Office of Public Prosecutions, victim and disability advocates, and police members from the Sexual Offences and Child Abuse Units, and the Criminal Investigation Units. Chapter seven presents the qualitative and quantitative analysis of N =76 police case file narratives which relate specifically to adult victims with cognitive impairment. Chapter eight analyses a successfully prosecuted sexual assault report made by an adult with cognitive impairment. The case study utilises multiple data sources including interviews, case file and trial transcript to provide an in-depth analysis. The last two chapters contain discussion/conclusions and recommendations. Chapter nine discusses the overarching themes drawn from the three data chapters and discusses the relevant findings within the context of the three theoretical perspectives and the available literature. In addition, it discusses areas for future research, the strengths and limitations of this study, and the contributions this study makes to knowledge in this area. Chapter ten provides a list of recommendations, the purpose of which is to provide opportunities for the criminal justice system and broader welfare sector to respond more effectively to adult victims with cognitive impairment.

Chapter Two: Sexual Assault and Adults with Cognitive Impairment

This thesis explores what happens to reports of sexual assault made by adult victims with cognitive impairment to police once the report enters the Criminal Justice System. In order to better understand the significance of the research problem, it is helpful to provide an overview of the crime of sexual assault generally and specifically of adults with cognitive impairment as victims. This chapter provides background information about sexual assault, and outlines the existing research in this area. Specifically, it examines research regarding sexual assault and adult victims with cognitive impairment. It has three main aims: first to provide understanding of the broad social context in which sexual assault occurs; second, to shed light on why people with cognitive impairment are particularly vulnerable to sexual assault; and third, to identify factors that impede the reporting of sexual assault by victims with cognitive impairment.

The literature review was structured into two sections. The first section provides an overview of a number of issues surrounding sexual assault, such as gender and power, and how distinctions are drawn between sexual assault and other criminal offences. In particular, it tackles the common perception that there are ‘varying degrees’ of sexual assault. This section also discusses the limitations of current data sources. Under the second main heading, it provides an overview of the nature of sexual assault perpetrated on adults with cognitive impairment. Comparisons are drawn between characteristics of such offences against this group and similar offences against other victims. In addition, distinctions between adult victims with cognitive impairment and victims generally will also be highlighted, particularly in relation to the prevalence of sexual assault perpetrated against adults with cognitive impairment, their level of vulnerability, the incidence of repeat offences, and the particular difficulties faced by adults with cognitive impairment when disclosing or reporting sexual assault.

The literature reviewed in this and the following chapter was varied in terms of its purpose and focus. The following paragraphs define the parameters of the literature search that was conducted.

Search Parameters

A number of search strategies were employed to facilitate the identification of relevant literature pertaining to the area of sexual assault and adult victims with cognitive impairment. In order to be as inclusive as possible, and to broaden the pool of literature, a list of broad and then more specific search terms was developed. This list included terms used, currently and historically, to describe the range of cognitive impairments. In addition, given that the term 'cognitive impairment' is used as an umbrella term within this thesis, a search for literature, which focused on a specific type of cognitive impairment such as intellectual disability, mental illness, acquired brain injury and dementia, was also conducted. Further to searching specific terms, other strategies included using existing reference lists from journal articles, monographs, and government auspiced reports. In addition, internet and catalogue searches were conducted to search for specific authors known to have written and conducted research in this area.

The search sought Australian and international literature, with only literature written or translated into the English language being used in this review. A range of literature sources was used including 'gray literature'.⁵ These were particularly helpful in the first section of the literature review, which provided the social context of sexual assault against adult victims with cognitive impairment. An online 'subject' search of journals available electronically using terms was also conducted on a regular basis.

Studies of sexual assault generally, and of sexual assault perpetrated against people with cognitive impairments in particular, have been hampered by the lack of primary data sources that accurately record the prevalence of this crime.

⁵ The term 'gray literature' refers to government reports, conference proceedings, and theses, which have not been published by a commercial publisher.

Sexual Assault

Lack of Data

The lack of accurate data in relation to the prevalence of sexual assault was a recurring criticism in both Australian and international literature. Many researchers commented on the lack of official data sources generally, and the inaccuracy of data that was collected, particularly in relation to violence against women (Morgan Disney and Associates, Leigh Cupitt and Associates, & Council of the Ageing, 2000, p. 2) and sexual assault specifically (Bennett, Jenkins, & Asif, 2000; Heenan & Murray, 2006, p. 14; Lievore, 2003, p. 15-16; Victorian Law Reform Commission, 2001, p. 18-20; 2003, p. 57, 58; Victorian State Ombudsman, 2006). Notwithstanding the limitations of data sources, the Women's Safety Survey (Australian Bureau of Statistics, 1996) reported that one in five females aged 15 years and over, will experience at least one incident of sexual assault in their life-time. Further, the Crime and Safety Survey (Australian Bureau of Statistics, 2005) found that 44,000 persons aged 18 and over experienced at least one sexual assault in the 12 months prior to the survey (p. 3).

It was important, however, to be mindful that data collected by the Australian Bureau of Statistics reflected the incidence of sexual assault within the cohort surveyed, that being women and men living in the general community. People with moderate to severe or profound cognitive impairment living in hospitals, institutional or supported residential accommodation settings were not part of the cohort surveyed; hence, their experiences of violence were not included in the statistics.

In Victoria, the number of reported incidents of sexual assault had increased slightly from 3,395 in 1999, to 3,986 in 2008 (Australian Bureau of Statistics, 2008b). However, the reports of sexual assault had decreased in 2008 compared to 4,104 reported in 2006 and 4,259 reported in 2007 (Australian Bureau of Statistics, 2008b). The number of sexual assault cases that were finalised⁶ in the higher courts (County and Supreme) in Victoria during 2007-2008 totalled 471. Of these, 97 were acquitted,

⁶ "The process which leads to the completion of a criminal charge within a court so that it ceases to be an item of work in that court". (Australian Bureau of Statistics, 2007, cat. 4513.0)

349 were proven guilty, and 20 were finalised as ‘charges withdrawn’ by the prosecutor ⁷ (Australian Bureau of Statistics, 2008a, p. 130).

There were a number of characteristics associated with the outcome of sexual assault crimes in the higher courts across Australia, which distinguished sexual assault from other crimes. These included that sexual assault crimes at trial continued to result in the lowest proportion of matters proven guilty (59%), the highest proportion of charges withdrawn by prosecutor and the largest proportion of cases acquitted (Australian Bureau of Statistics, 2008b, pp. 11-15).

Clearly, the paucity of available data collected by government bodies in relation to sexual assault of victims with cognitive impairments was problematic. Arguably, the lack of data could be viewed as perpetuating the invisibility of crime, the implication of which was that incidence and impact of sexual assault on adults with cognitive impairment were hidden.

The difference in definitions of sexual assault or sexual violence used by researchers was also a contributing factor which made the process of comparing statistics difficult, if not impossible (Lievore, 2003, p. 13; Roeher Institute, 1994, p. 7). For example, the term ‘sexual assault’ can include rape and ‘non rape’ or non-penetrative sexual acts. The accuracy of data about the extent of sexual assault in the community was dependent upon the willingness of the victim to report the sexual assault and on the police to take and then accurately record the offence. The Victorian Law Reform Commission (2001) stated that, in relation to police statistics, the “...recorded sexual assault data reflects both the willingness of sexual assault victims to complain, and police reporting practices” (p. 25). This statement contained two important elements: the first was that, for a range of reasons, which will be discussed later in this literature review, victims would not always be willing to report. The second part of the statement referred to police reporting practices.

⁷ “The formal withdrawal of charges by the prosecution (e.g. police, Director of Public Prosecutions, Attorney-General). This includes nolle prosequi and no true bill. Withdrawal of charges allows the prosecution to charge the defendant on the same incident at a later time. This is a non-adjudicated method of finalisation”. (Australian Bureau of Statistics, 2007, cat. 4513.0)

There were two aspects to police reporting practices that were discussed in the literature, and thus impacted significantly on the reliability of available data on the level of sexual assault being perpetrated on victims generally (Lievore, 2003, p. 15), and in particular on victims with cognitive impairments. Depending on a victim's perceived level of cognitive function, police may not believe them and, consequently, their report may not be taken or recorded (Victorian Law Reform Commission, 2001, p. 33). In addition, victims with cognitive impairments may not be identified as having an impairment when they were making a report. Consequently, a victim's impairment may not be recorded (Goodfellow & Camilleri, 2003, p. 20-21; Johnson, Andrew, & Topp, 1988, p. 25; Roeher Institute, 1994, p. 11; Victorian Law Reform Commission, 2001). Alternatively, if impairment was identified, then a limited range of generic impairment types was typically used to indicate the type of impairment the victim was thought to have (Heenan & Murray, 2006, p. 34). Finally, adults whose cognitive ability was severely impaired were likely to rely on others to report the assault on their behalf. As will be discussed later, reports were often not made at all (Brown, 1991; Brown et al., 1995; Lievore, 2003; Sobsey & Doe, 1991; Victorian State Ombudsman, 2006).

Problems with police recording practices of sex offences, generally, and in particular sexual offences against people with cognitive impairments, were not limited to Victoria. A review of the literature from Australia, Canada and the United States which focused on violence against people with impairments, was conducted by the Roeher Institute (1994). The lack of data was raised as a problem by researchers. For example, referring to a Canadian study, the Roeher Institute notes:

National crime statistics provided by police departments to Statistics Canada concerning complaints, arrests and convictions have not been classified according to whether the victims have disabilities and so do not lend themselves to statistical analysis. (Roeher Institute, 1994, p.11)

There were a number of myths and stereotypes that surrounded the crime of sexual assault which also influenced police recording practices (Lea et al., 2003; Lievore, 2003, 2004b; Neame & Heenan, 2004, p. 12-13; Victorian Law Reform Commission,

2003, p. 22). The decision of victims to report sexual assault was also influenced by the same myths, as will be discussed in more detail below.

Unlike Other Crimes

The crime of sexual assault is immersed in enormous complexity. According to Lievore (2003), unlike other crimes sexual assault is linked to “gendered power relations, which influence laws and legal process and [is] reflected in cultural myths” (p. 29). These complexities can include crime specific characteristics. For example, it was often more difficult to secure a conviction for sexual assault offences than for other offence types. One of the reasons for this was that assaults were often committed in private, with only the victim and perpetrator involved, with no other witnesses (Victorian Law Reform Commission, 2004, p. 83). Further, according to Taylor (2007), jurors as members of the community were also influenced by myths and stereotypes about rape and rape victims. Indeed, Taylor (2007) concluded that jurors often had “strong stereotypical, expectations about how a ‘real’ victim would behave, before, during and after a sexual assault” (p. 5). For example, a jury’s perception of a victim is influenced by whether the victim screamed for help or reported to police soon after the assault. The connection Taylor (2007) makes between the crime of sexual assault (which was overwhelmingly committed by men against women) and societal factors which shaped and determined attitudes about women and rape victims, had also been made in a recent VicHealth (2006, p. 28) report examining community attitudes to violence against women.

Sexual assault is a crime steeped in cultural myths and misconceptions, which historically have described women and children who have disclosed sexual assault as ‘liars’ prone to making ‘false allegations’ (Jordan, 2004, p. 5; Lievore, 2004b, p. 56; Temkin, 2002). The notion that victims were prone to telling lies about sexual assault had so pervaded our society that victims (as members of the society) had come to expect that, should they disclose or report an assault, they would not be believed. The continued existence of this myth in the community had been described as one of the ‘challenges’ facing our society now and into the future (VicHealth, 2006, p. 22).

Other widespread myths and misconceptions included the perception that typically sexual assault was committed by strangers, whereas in the majority of cases the perpetrator was known to the victim (Victorian Law Reform Commission, 2004, p. 82-3). Indeed, a recent report produced by VicHealth (2006), which examined community attitudes to violence against women, including attitudes to sexual assault, found that one in four respondents either disagreed or were unsure whether they agreed or not with the statement “women are more likely to be raped by someone they know than a stranger” (p. 51). Further, the tendency to blame the victim for the assault was still quite high. For example, one piece of research found that 15% of respondents agreed with, and a further 8% were unsure about, the statement “women often say no when they mean yes” (VicHealth, 2006, p. 57). Two surveys in which respondents were asked to respond to the statement “women who are raped often ask for it ” elicited a 15 percent response rate in the survey conducted in 1995 and a five percent response rate in the survey conducted in 2006 (VicHealth, 2006, p. 58), demonstrating that some attitudes, while still present, were slowly changing.

Ageist assumptions that elderly people were unlikely to be victims of sexual assault were also beginning to be challenged within the literature. Increasingly, research indicated that elderly people, particularly women, were actually quite likely to be victims of sexual assault (Bennett et al., 2000; Holt, 1993; Jeary, 2004; Morgan Disney and Associates et al., 2000; Muram, Miller, & Cutler, 1992). While researchers had not provided estimates of victimisation rates, Jeary (2004) stated that "the sexual abuse of elderly people is a reality" (p. 28) and, further, that abuse might have occurred in any setting where elderly people required intimate examination or care.

There were certain, largely unspoken, expectations of victims of crime, held by the community generally, including police. Sexual assault victims were no exception. They were often expected to react in the same way as victims of other crimes of similar magnitude. That was, there is an expectation that the victim would be hysterical and distressed (Temkin, 2002, p. 2) and an expectation that the victim would report the assault immediately (Bronitt, 1998, p. 49; Du Mont & Myhr, 2000, p. 1110). According to Jordan (2004, p. 217), a victim whose demeanor did not

correspond with how the police feel a victim should look and behave can be viewed with skepticism.

The reality can be quite different to the expectations. Reporting (if it occurred at all) often occurred sometime after the assault – from hours, days or years later. There are numerous reasons why this occurred. One was that the victim might need to come to terms with what had happened, and might have needed to work through a number of issues associated with guilt, shame, threats of retribution by the perpetrator and fear of being disbelieved. Additionally, for children and some adults from indigenous or culturally diverse backgrounds, and for adults with cognitive impairment, there might have been fear of the police (Lievore, 2004b; Victorian Law Reform Commission, 2004). Further, Jordan (2004) discussed the typically contrasting reactions to sexual assault of the victim and the police. The police may have been in “action mode” – wanting to catch the offender - whereas the victim was likely to be responding to the assault itself. “[T]he potential for miscommunication and misunderstanding”, argues Jordan (2004), “is colossal” (p. 218).

The extent to which myths influenced how sexual assault was perceived by the community in general, and by individuals in their roles as law enforcers, legal professional, judiciary and jury, was evidenced in the work of several researchers including Jordan (2004) and Temkin (2002). They argued that myths and misconceptions specifically related to sexual assault were present in current laws and had become embedded in societal attitudes. These attitudes were reflected at various levels of the justice system and they contributed to determining whether an assault had actually taken place (Jordan, 2004, p. 136).

Researchers in New Zealand (Jordan, 2004), Australia (Lievore, 2004a), England (Temkin, 2002) and the United States (Spohn, Beichner, Davis-Frenzel, & Holleran, 2002) have concluded that certain case characteristics attributed to either the victim or offender in sexual assault cases appear to impact negatively on case outcome. For example, cases were generally less likely to proceed to conviction where the victim and offender were known to each other, and where the victim had no obvious physical injury. Jordan (2004) provided the following example:

In Lydia's case, for example, her husband had attempted to rape her and threatened to kill her one morning. She had no visible injuries and felt the police played the attack down, despite her husband having previously received diversion on an assault charge against her. She felt the officer minimised the seriousness of the incident and attributed blame to her, implying that if her husband was so terrible she should have left the relationship long ago. Finally, the police persuaded Lydia not to go ahead with the charges because of her apparent lack of injuries and because, they said, marital rape was very hard to prove. (Jordan, 2004, p. 84)

Gregory and Lees (1999), in a qualitative study of 26 victims of sexual assault in North London, found that victims themselves were influenced by myths and misconceptions. According to this study, victims were likely to acknowledge that they may not be believed and were therefore unlikely to report an assault perpetrated by someone known to them. This is as true for older victims of rape as it was for younger victims, although victims from different age groups might have been affected differently by myths and stereotypes relevant to their respective generations (Muram et al., 1992). Societal conceptions of what constitutes rape may have caused some victims to be unclear about whether what has occurred was indeed rape (Criminal Justice Sexual Offences Taskforce, 2005, p. 8). Sexual assault within a marital relationship was one such example.

Sexual assault is unlike other crimes in both social and legal terms. It is subject to gendered myths, which equate the seriousness of the crime with the level of injury of the victim, and with the level of victim hysteria and reporting timeliness. As will be discussed in detail later in this chapter, there was little doubt that the mythology associated with the crime of sexual assault was even more complex for victims with cognitive impairment. The impact of such myths, based on assumptions about either gender or impairment, on victim credibility permeates throughout society and was reinforced by systems and structures that created a distinction in the eyes of the community (and in some instances, of the victim) between what was termed 'rape' and 'real rape'.

Rape and Real Rape

Many researchers, including Estrich (1987), Jordan (2004), Taylor (2001) and Temkin (2002), have discussed the notion of ‘rape’ and ‘real rape’. The terms refer to how rape was viewed by the community, including by police. For example, rape by a stranger was generally seen as ‘real rape’, or ‘serious rape’, whereas rape by a person known to the victim, particularly if there had been or continued to be a sexual relationship (as with intimate partner violence), was often not seen as a ‘real rape’ and was seemingly demoted as a crime of less importance (Heenan, 2004; Morgan Disney and Associates et al., 2000; Parkinson, 2008; Whittaker, 1995). This kind of distinction was of real concern, particularly when (as discussed later) a feature of sexual assault perpetrated on victims with cognitive impairments was the number of repeat offences by individual perpetrators on either one victim or a number of victims. Other stereotypical factors, including the absence of visible injuries and/or a weapon, may also cause scepticism as to whether a ‘real rape’ had occurred (Lea et al., 2003).

The ‘stories’ referred to earlier, which included what members of the community, and particularly police, used as a reference point of the archetypal ‘real rape’ or ‘real rape victim’ (Lievore, 2004a), are among the determinants of whether a report was ejected from the justice system. Consent to sexual activity, or the perception of consent (in the minds of people other than the victim), appeared to be at the heart of the notion of ‘real rape’. Disturbingly, the view that when ‘a women says no she really means yes’ was still a view held by many members of the community (VicHealth, 2006, p. 24). The law, according to some feminists, implied that a woman was in a constant state of consent unless she demonstrated, by using physical resistance or strong insistent language, that she did not consent (Corbett, Larcombe, & Real Rape Law Coalition, 1991, p. 134 -136). This point was starkly highlighted by Corbett et al (1991) who quoted from the remarks of a Supreme Court Judge who overturned the decision in a sexual assault case in which multiple offenders had initially been found guilty by a jury and convicted of rape.⁸ They report the judge as having said:

⁸ In this case, a “woman was raped several times in the course of a night after two 'friends' arrived at her flat, drunk, at about 2 am. She let them into her flat because she was worried that their knocking and calling would wake residents in the other flats and her own sleeping children”. (Corbett, Larcombe, & Real Rape Law Coalition, 1991, p. 134).

It is a remarkable feature of the case that in spite of her evidence that she was forced to have intercourse there were no signs of force having been used on her body and no evidence of any struggle or resistance or of disarrangement of the furniture in the flat. (Corbett et al., 1991, p.135)

Clearly, in the view of this Supreme Court Justice, a ‘real rape’ had not been perpetrated and consequently the victim was not a ‘real rape victim’ due, for the most part, to the absence of evidence of physical resistance such as injuries and overturned furniture.

The notion of ‘real rape’ and the ‘real rape victim’ were ever present in our society (Heenan & Murray, 2006). These perceptions, which the community (as potential jurors) and the police take into account in their decision making, were used as a reference point by which to measure the credibility of the victim. In sexual assault cases involving victims with cognitive impairment, the victims were subject to additional scrutiny because of their impairment.

People with Cognitive Impairment as Victims of Sexual Assault

Adults with cognitive impairments were not a homogenous group. As discussed earlier in this thesis, ‘cognitive impairment’ included mental illness, dementia, intellectual disability, and acquired brain injury.

In contrast to research in the area of sexual assault generally, there was a paucity of literature which focused on the sexual assault of people with disabilities (Curry, Hassouneh-Phillips, & Johnston-Silverberg, 2001). The available literature on sexual assault perpetrated against adults with impairments was dominated by research about victims with intellectual impairments (Curry et al., 2001; Howe, 2000), followed by research on elderly people with dementia and victims with a mental illness. Curry, Hassouneh-Phillips, and Johnston-Silverberg (2001, p. 61) suggested that there were a number of factors that contributed to the lack of literature in this area. They included the “reluctance [of researchers as members of society] to come to terms with

the unpleasant realities of abuse of vulnerable groups in society” (Curry et al., 2001) and “the prevailing stereotype of women with disabilities as asexual” (p. 61).

Despite an initial lack of interest in the topic, there was now a small but growing body of Australian and international research that focused on abuse perpetrated against elderly people (Brogden & Nijhar, 2000; Clough, 1996; Elder Abuse Prevention Project, 2005; James, 1992, 1994; Kinnear & Graycar, 1999; The National Center on Elder Abuse, 1998; UQ Boilerhouse Community Services and Research Centre, 2004; Westcott, 2006; Wolf, 2000). However, there was a significant gap in the literature, which examined sexual abuse perpetrated against victims with dementia. Keeping in mind the predictions of an increasingly ageing population (Elder Abuse Prevention Project, 2005) and consequently, greater numbers of people with dementia, one would assume (and hope) that a corresponding increase in research in this area would occur. The current lack of research, particularly government auspiced research that specifically focuses on sexual assault of elderly people was reminiscent of the attitude to interfamilial sexual assault of children that existed in earlier decades.

People with cognitive impairment, including intellectual impairment (Department for Women, 1996; Johnson et al., 1988, p. 18; Wilson, Nettlebeck, Potter, & Perry, 1996; Wilson & Brewer, 1992), mental illness (Council of State Governments Justice Center, 2007; Davidson, 1994; Teplin, 1999) and dementia (Jeary, 2004), were, according to many researchers, more vulnerable to crimes of violence than non-disabled people, and to crime generally, with sexual assault appearing to be the most frequent crime perpetrated against this group (French, 2007).

Sexual assault of people with cognitive impairment was not a new phenomenon. Literature from Canada (Roehrer Institute, 1994, p. 11-12; Sobsey & Doe, 1991, p. 249), the United Kingdom (Brown et al., 1995; Cooke, 1990, p. 608; Jeary, 2004; Turk & Brown, 1993, p. 203), Ireland (Dunne & Power, 1990), the United States (Roberto & Teaster, 2005) and Australia (Carmody, 1990, p. 11-12; Davidson, 1994; Johnson et al., 1988, p. 31; Lievore, 2005, p. 95; Victorian Law Reform Commission, 2001, p. 114) suggested that people with cognitive impairments were more vulnerable to sexual assault than other members of the population.

There appeared to be agreement that people with cognitive impairments compared with members of the general population were more likely to be victims of sexual assault. However, accurately determining the prevalence of such crimes against adults with cognitive impairment was fraught with difficulty.

Prevalence

The absence of accurate statistics on sexual assault cases involving people with cognitive impairment was due to the absence of any reliable official data source. One reason for this was the limited comparability of existing data (due in part to definitional differences, and to the wide and varied range of methodological variables) from independent research which can reliably illustrate the prevalence of sexual assault among the disabled population (Brown et al., 1995, p. 4; Roeher Institute, 1994, p. 11; Teaster et al., 2000).

Notwithstanding these limitations, “there is an accumulation of independent findings strongly suggesting that there is a problem of considerable magnitude” (Roeher Institute, 1994, p. 11). While there are wide variations in researchers’ estimates of the level of abuse, there was general agreement on the following areas for all impairment types included in the definition of cognitive impairment used within this research. The perpetrators of sexual abuse against adult victims with cognitive impairment were overwhelming male (Bennett & Kingston, 1993; Buchanan & Wilkins, 1991; Cooke, 1990; Craft, 1996; Davidson, 1994; Jeary, 2004; McCarthy & Thompson, 1997; Muram et al., 1992; Sobsey & Doe, 1991; Teaster, 2003; Teaster et al., 2000; Turk & Brown, 1993). They were often known to the victim and were usually in a position of trust (Brown et al., 1995, p. 4; Cooke, 1990; Davidson, 1994; Jeary, 2004; McCarthy & Thompson, 1997; Teaster, 2003; Teaster et al., 2000; Turk & Brown, 1993). Further, there was agreement that there was a propensity for repeated abuse, contributed to in part by inept or negligent organisational policies and procedures (Burgess, Prentky, & Dowdell, 2000; Davidson, 1994; McCarthy & Thompson, 1997; Sobsey & Doe, 1991). It was also generally agreed that there was a reluctance of police to take action when sexual assault was reported by a person with cognitive impairment (Davidson, 1994; McCarthy & Thompson, 1997; Teaster et al., 2000).

Several researchers in the United Kingdom have attempted to extrapolate figures from their own research and apply them to the broader population. Turk and Brown (1993) and Brown, Stein and Turk's (1995) combined research was reputed to be the "largest UK study to date of the incidence of sexual abuse of adults with learning disabilities" (Brown et al., 1995, p. 3). The studies collected 138 (Turk & Brown, 1993) and 139 (Brown et al., 1995) retrospective (between 1989 to 1990 and 1991 to 1992 respectively) incidence surveys from disability service organisations located in one Health Authority. Extrapolations from the first study (conducted by Turk & Brown in 1993) concluded that 60 new cases of sexual assault perpetrated on people with intellectual impairments were reported on average each year in a population in excess of 3.6 million people. When extrapolated to a population of 50.7 million (the population of England and Wales) the incidence would be approximately 830 new cases a year (Turk & Brown, 1993, p. 203). Further, in validating the conclusions made in the first study, the second study estimated there would be approximately 1,400 new cases of sexual assault against people with an intellectual impairment living in the United Kingdom (including Scotland and Northern Ireland) each year (Brown et al., 1995, p. 22).

Abuse of elderly people had been recognised as an issue in western society at least since the mid 1900s (Wolf, 2000). Despite this, research into the area had been slow to develop, although there had been a recent resurgence in interest during the last decade under the umbrella of 'elder abuse' (Elder Abuse Prevention Project, 2005; Naughtin, 2006; UQ Boilerhouse Community Services and Research Centre, 2004; Westcott, 2006).

According to a number of researchers (Australian Society for Geriatric Medicine, 2003, p. 1; Elder Abuse Prevention Project, 2005; James, 1994, p. 2; Kinnear & Graycar, 1999; Naughtin, 2006; The National Center on Elder Abuse, 1998; UQ Boilerhouse Community Services and Research Centre, 2004, p. 12), abuse of older people included economic, physical, psychological, sexual and social abuse and neglect. Although there was agreement that abuse perpetrated against elderly people spanned the spectrum of abuse types, there appeared to be divergent views about the prevalence of sexual assault perpetrated against this group.

One perspective, supported predominantly in government auspiced research, was that sexual assault was the least prevalent form of abuse perpetrated against elderly people (Brogden & Nijhar, 2000; Elder Abuse Prevention Project, 2005; James, 1992, 1994; Sadler & Weeks, 1996; UQ Boilerhouse Community Services and Research Centre, 2004; Westcott, 2006). While there was no reason to doubt the accuracy of these studies, they relegated the sexual assault of elderly people to a seemingly insignificant status. The consequence of regarding sexual assault as the least prevalent form of abuse against the elderly was such that assault was regarded as undeserving of further discussion, which reduced the awareness of this issue. Arguably, this served to perpetuate the view that sexual assault against this group, living at home or in residential accommodation, was a rare occurrence.

One example of what one would expect to be a statistically significant study was the '*National elder abuse incidence study*' (National Center on Elder Abuse, 1998), a national study conducted in the United States, that focused on elder abuse in domestic settings. Data was gathered from over 20 counties in 15 States across the United States. Overall, the report concluded that women are by far the majority of victims; and most of victims were over 80 years of age. Overwhelmingly, the perpetrators were male, with the majority being the victim's son; and the greater proportions of victims were not physically able to care for themselves. The data was collected using a number of methods including collecting reports of abuse through what the study referred to as 'sentinels' (agencies). These sentinels included banks, hospitals, in home service providers, police or sheriff departments and other law enforcement agencies (The National Center on Elder Abuse, 1998, pp. 3-10).

According to the study, the types of substantiated abuse perpetrated most frequently were, in descending order, "Physical abuse 61%; abandonment 56%; emotional/psychological 54.1%; financial/material 44.5%; neglect 41%, and sexual abuse 7.4%" (The National Center on Elder Abuse, 1998, p. 10). There were several features of the study that were worthy of further discussion. Women represented the overwhelming majority of victims in all identified areas of abuse. Secondly, the variation between sexual abuse reports deemed unsubstantiated 84.8% and reports of other forms of abuse deemed unsubstantiated 31.6% and 44.6% was significant. Despite the number of unsubstantiated sexual reports being almost double that of the

other abuse areas, the researchers did not consider this was significant. Indeed, the low incidence of substantiated sexual assault (7.4%) was, it seemed, of such little consequence that it required no further discussion throughout the entire report.

One explanation for the low number of substantiated allegations of sexual assault may be due to the choice of 'sentinels' or agencies from where data was gathered. Surprisingly, the 'sentinels' did not include sexual assault centres or rape crisis centres. In considering the results of the study, it was interesting to note that Teitelman & Copolillo (2002, p. 254) have argued that sexual assault rarely occurs in isolation, inferring that, if there are other forms of abuse being perpetrated (particularly physical abuse), then it was not uncommon for the victim to also be experiencing sexual assault.

Other research, however, has shown that sexual assault perpetrated against the elderly does indeed occur (Burgess et al., 2000; Holt, 1993; Jeary, 2004; Muram et al., 1992; Ramsey-Klawnsnik, 1991; Ramsey-Klawnsnik, Teaster, Mendiondo, Abner, Cecil & Tooms, 2007; Roberto & Teaster, 2005; Teaster, 2003; Teaster et al., 2000; Teitelman & Copolillo, 2002). Elderly women, in particular, may have experienced sexual assault as a result of long term abuse within the context of family violence. Some researchers have found that when these women required nursing home or other care, sexual violence was recognised (Hightower, Smith, & Hightower, 2001). Others have found that elderly people began to experience sexual abuse for the first time when they required higher, more intimate levels of assistance (Jeary, 2004; Roberto & Teaster, 2005).

Given the low reporting rates of sexual assault, in addition to the inadequate policies and practices of some hospital and accommodation services discussed earlier, it was difficult to assess whether the accuracy of what was reported in the literature in terms of the prevalence of sexual assault perpetrated against elderly people with dementia. Certainly, much of the government auspiced literature did not include statistics for people living in supported forms of accommodation, other than those living in private accommodation either with their family or in their own homes.

A case of sexual assault in Victoria was discussed on the Australian Broadcasting Commission's Lateline program aired on 26th February 2006. The report seemed to corroborate certain research claims about victims with intellectual and mental impairment who resided in supported accommodation or spend time in psychiatric hospitals. The case in point concerned four elderly women in their nineties, who, whilst living in a nursing home, were allegedly sexually assaulted by a male staff member. The assault on one of the women was allegedly witnessed by another staff member, but not reported. Further, although one alleged victim's behaviour had, according to her granddaughters, changed dramatically, staff were unable to explain what had happened and attributed her downward cycle to old age (O'Neill, 2006). A Victorian study (Elder Abuse Prevention Project, 2005) suggested that the increase in the aged population, increasing longevity and increasing number of people with dementia, would result in a corresponding increase in the incidence of all forms of abuse over the next 15 years.

Whilst determining the prevalence of sexual assault at an official recording level was problematic, it was clear that many people with cognitive impairment, including dementia, were victims of sexual assault. Perhaps, given the low reporting rate and problems associated with recording this crime, the numbers might have been higher than currently estimated. Why victims with cognitive impairment were particularly vulnerable to sexual assault was an issue worthy of further exploration.

Vulnerability

Research to date indicated that people with cognitive impairment were more likely than members of the general population to be victims of sexual assault, but they were less likely to report to police (Muram et al., 1992; Roeher Institute, 1994, p. 11-12, 18-19; Teitelman & Copolillo, 2002; Victorian Law Reform Commission, 2001, p. 114). Why people with disabilities were so vulnerable to crime generally and to sexual assault specifically was a complex question. Reflecting on comments about this matter by a range of respondents, researchers Johnson, Andrew and Topp (1988) state:

[sexual assault] against people with intellectual disabilities throughout the research probably reflected the prevailing community attitudes to such people. They are seen as exploitable by some people in the community and in need of protective care by others. (Johnson et al., 1988, p. 31)

There were a number of factors that were considered to contribute to sexual assaults upon people with cognitive impairment. These factors can be categorised into three areas. The first can be described as social factors or, what Sobsey and Doe (1991) refer to as “indirect effects of disability” (p. 252).

Social factors include the socialization of people born with impairments to be compliant, to the point where they can be unquestioning of people (particularly those in authority) who choose to abuse them (Carmody, 1990, p. 12; New South Wales Law Reform Commission, 1992, p. 4; Roeher Institute, 1994, p. 16; Sobsey & Doe, 1991, p. 251-252).

A second social factor that applies (particularly to people with intellectual impairment) was a lack of sex education, resulting in victims being at times unaware that an assault has occurred (Carmody, 1990; Johnson et al., 1988, p. 20). Thirdly, restricted social lives, increasing dependence on carers (Jeary, 2004, p. 24; New South Wales Law Reform Commission, 1992, p. 5; Teitelman & Copolillo, 2002, p. 253) and little access to information services (Carmody, 1990; Johnson et al., 1988), all contributed to the social vulnerability of people with impairments.

Without wanting to make links between children and adults with cognitive impairment, and not wanting to be drawn into the often used metaphor that people with intellectual disabilities are ‘childlike’, adults with cognitive impairment and children shared the difficulty of bringing cases to court. Of the reports of sexual assault against people with cognitive impairment made to police, many did not go beyond the reporting stage (Victorian Law Reform Commission, 2003, p. 240). This propensity highlighted the potential structural contribution to vulnerability.

Shaped by cultural and societal expectations...because of the double reduction in external inhibition and the increased possibility of successful offences, offenders may see disabled

women and children as the most vulnerable victims and easy targets for sexual offences.
(Sobsey & Doe, 1991, p. 252)

Whilst in many cases the literature referred to some factors that contributed to vulnerability to sexual assault as social, given the entrenched and endemic nature of these factors, they could also be described as systemic. These systemic factors included the marginalization of people with disabilities in the community, both historically and in the present (Johnson et al., 1988; Roeher Institute, 1994), and the devaluing by society (who value high intellectual ability) of people whose intellectual functioning was low (Johnson et al., 1988, p. 18). Powerlessness brought on by unemployment associated with lack of education (Johnson et al., 1988, p. 21), and a society that supported some forms of violence as being culturally appropriate (Roeher Institute, 1994, p. 15). These factors can also be regarded as systemic factors that contributed to the maintenance of the low status of people with cognitive impairment in our society, thereby legitimising them as targets of abuse.

Considering the crime of sexual assault from a feminist perspective necessitates acknowledgement that sexual assault was predominantly (but not always) a gender based crime with males predominantly the perpetrators and women or children predominantly the victims. Moreover, sexual assault was a crime of power, the product, some feminists would argue, of a patriarchal society (MacKinnon, 1987; Scutt, 1997). Ownership, power, dominance and authority (Jordan, 2004) were continually reinforced by all facets of our society, including the legal system, which continued to see sexual assaults perpetrated by males known to the victim as somehow less serious than rape committed by strangers.

Other social factors that influenced society's perception of people with cognitive impairment could be described as myths and stereotypes about people with disabilities that are widely held in the general community. For example, people with cognitive impairment were sometimes described as being either asexual or promiscuous (Curry et al., 2001, p. 61; Goodfellow & Camilleri, 2003, p. 7) or they were said to be less traumatised by assault than victims from the non-disabled community (Carmody, 1990). One profoundly chilling comment highlighted in research by Holt (1993) was made by a general practitioner (respondent), "who

questioned what harm would be done to a victim being raped by her son, since the victim was confused and very old” (p. 69). This comment provided a clear indication of the level of embedded cultural ignorance and acceptance, which existed in society, about sexual assault and its impact on people with cognitive impairment.

The tenuous balance between, over-protection and protection, of people with disabilities (particularly women) by institutions and families, was raised by Chenoweth (1997). The over-protection that occurred manifests itself in families and institutions that did not recognise the relevance of sex education for adults and children with cognitive impairment because sex and sexual relationships were not regarded as being a legitimate part in the lives of women with disabilities. Alternatively, Chenoweth (1997) suggests that it was often believed that if women with disabilities were given information about sex, this lead them into uncontrollable sexual behaviour. The use of Depo-Provera as a means of sterilizing women with disabilities was commonplace in Australia as late as the 1980s (Chenoweth, 1997), as indeed was surgical sterilisation (Brady, 2001; Tomas, 2004; Women with Disabilities Australia, 2000). These facts suggested that institutions and families thought at that time that women with intellectual disabilities were likely to be vulnerable to assault or were promiscuous (Chenoweth, 1997).

Another factor that may contribute to the increased vulnerability of people with cognitive impairment to sexual assault has been referred to as ‘environmental’, referring to the specific institutional ‘care’ in which they are placed. Canadian based researchers Sobey and Doe (1991) analysed 162 reports (made by advocates) of sexual assault reported to them by victims with intellectual disabilities. They found that exposure to disability services markedly increased the risk of sexual assault.

Based on the percentage of offenders [within their research] that are associated with specialized services, it would be reasonable to expect risk [of sexual assault] to increase by an additional 78% due to exposure to the “disabilities service system” alone. (Sobsey & Doe, 1991, p. 249)

This disturbing claim suggested several things. One was that perpetrators may gravitate to disability services in order to prey on what they may consider to be easy

targets. Another implication was that policies and procedures in service organisations including employment practices were not effective in identifying and excluding sexual predators. Overall, the claim suggests that disability services represented the point at which societal attitudes, social environment, low status and systemic neglect and blindness, converged and contributed to an increased risk and prevalence of sexual assault in the disability service system.

Sobsey and Doe's claim regarding increased risk within 'protective' institutions was supported by Davidson's (1994) study of the experiences of women who had been sexually abused in psychiatric institutions in New South Wales, and by research conducted by Nibert, Cooper and Crossmaker (1989, p. 343). Davidson (1994) found that, while hospitals were not specifically targeted in the research, the nine victims and eleven current staff or previous staff (who had been out of the system for three months or less), who chose to participate, provided information about the practices and processes of eight hospitals across New South Wales. In relation to increased vulnerability, Davidson (1994) found that the hospital environment played a significant role in creating opportunities for sexual abuse and in allowing the abuse to continue. For example, according to staff respondents, information about staff who were known to be perpetrators of sexual assault was not well documented, allowing these individuals to continue the abuse either in the same hospital or in others.

Similarly, known patient perpetrators would be moved to other institutions. Policies or practices which allowed interviews in patients' bedrooms by male psychiatrists contributed to the abuse. Davidson (1994) also found that the majority of the abuse occurred in locked wards, leading her to conclude that there were a number of additional contributing factors that increased the vulnerability of patients to sexual assault. These included the design and gender mix of wards, low staffing levels, the use of medications that make patients less likely to physically reject sexual advances, and failure of hospitals to manage known perpetrators (Davidson, 1994, p. 36). The view that mixed gender wards was problematic and contributed to increased vulnerability of female patients was supported in a report by the Federation of Community Legal Centres (2006, p. 53). While the focus of the report was on the need for advocacy of sexual assault victims with cognitive impairment, it provided firsthand accounts from victims. One such account was that of Mary, a young woman

who had bipolar disorder. Mary was sexually assaulted by a male patient while undergoing treatment in a mixed gender high dependency (HD) ward. According to Mary, although staff had witnessed the assault, the perpetrator remained in the HD ward and she was moved to a general ward. Mary received no follow up or counseling. When Mary was brought back to the HD ward, the perpetrator was still there.

Many of the issues identified by Davidson (1994) as contributing to the vulnerability of patients to sexual assault had also been raised by other researchers in the area of abuse perpetrated against elderly people living in nursing homes (Burgess et al., 2000; Jeary, 2004). Indeed, living in institutional settings generally increased the vulnerability of patients to sexual assault (Nibert et al., 1989).

All impairment levels have been represented in research findings to date; however, victims with moderate to severe impairment seemed overly represented as victims of sexual abuse. It appeared that people with the greatest need for assistance in day-to-day activities were particularly vulnerable (Jeary, 2004). Moreover, impairments that impacted on a person's ability to verbally communicate made them even more vulnerable to abuse as their ability to communicate or disclose to a trusted person what was happening was diminished (Carmody, 1990, p. 12). Other researchers, including Turk and Brown (1993), found that 41 percent of 83 victims of sexual assaults (from 119 survey responses) had another impairment (other than intellectual disability) which affected their ability to communicate (p. 204). Similarly, Brown, Stein and Turk (1995) found that for 84 proven to highly suspected reports of abuse, the majority of victims (52) had moderate to severe disabilities (p. 11).

Similar findings were reported by Teaster, Roberto, Duke and Kim (2000) whose research focused on sexual abuse of older people. The findings indicated quite strongly, that of the 42 substantiated sexual assault cases (over a three year period), all victims had some level of deteriorated cognitive function with the majority of victims being diagnosed with dementia. Other researchers, including Holt (1993), Ramsey-Klawnsnik (1991) and Teaster (2003), confirmed these findings.

There were a number of social, environmental and systemic factors that may have increased the vulnerability of people with cognitive impairment to sexual assault. The social, systemic and environmental factors, in addition to the level and type of impairment, particularly if the impairment affected verbal communication, created greater vulnerability to sexual assault. While research had demonstrated that the factors discussed above contributed to increased vulnerability of adults with cognitive impairment to sexual assault, the extent to which these factors contributed to reduced access by victims with cognitive impairment to the justice system is unclear. In the following section, other shared victim specific characteristics also increased the level of vulnerability of adults with cognitive impairment to sexual assault.

Who were the Victims?

The majority of researchers in the area of sexual assault have found that women were overwhelmingly the victims of sexual assault. A statistical overview of sexual assault in Australia compiled by the Australian Bureau of Statistics (2004) stated that, in 2003, across all age groups (of people living in the community), 14,892 females and 3,255 males were victims of sexual assault (p. 19).

The Crime and Safety Survey, also conducted by the Australian Bureau of Statistics in 2002, found that out of 33,000 victims of sexual assault, 28,300 were women (Australian Bureau of Statistics, 2001-2002). This predominance of women as victims of sexual assault was mirrored in research concerning adults with cognitive impairment. Thus far, the overwhelming majority of researchers were in agreement that women with cognitive impairment represented the vast majority of victims of sexual crimes. For example, McCarthy and Thompson (1997) found that, of the total sample of 185, 40 out of 65 women were abused, compared to 30 out of the 120 men (p. 109). Similarly, Sobsey and Doe (1991) found that of 102 incidents of sexual abuse, 81.7 percent of the victims were women (p. 246). Likewise, Turk and Brown (1993) found that, of the 84 proven/highly suspected incidents of sexual abuse in their study, 73 percent of the victims were women and 27 percent were men (p. 203-4).

However, one study (Brown et al., 1995) identified the increased incidence of sexual victimisation of males with cognitive impairment. Moreover, the second of a two part

survey conducted in the United Kingdom by Brown, Stein and Turk (1995) found a distinct shift in the predominance of female victims (44 women and 51 men) when these figures were compared to an earlier survey (61 women and 23 men) conducted by Turk and Brown (1993). In explaining the seemingly significant shift in statistics the researchers state:

In [our] view [the data] reflects an artefact of reporting practice rather than any shift in patterns of actual abuse [and] this may be due to an increased willingness to acknowledge male victimisation with the general adult population. (Brown et al., 1995, p. 10)

Given that most researchers have found that women are the overwhelming the victims in sexual assault cases, the jury was still out in relation to the prevalence of sexual assaults perpetrated against men. There was no doubt however, that under reporting of sexual assault was common for male and female victims.

These researchers discussed a number of additional characteristics pertaining to adult victims, including level of impairment, which was discussed earlier, and age. In relation to age, the majority of stand alone studies have found that adults with intellectual impairment were the most likely to be the victims of sexual assault between the ages of 20 to 30 years (Brown et al., 1995, p. 11; Buchanan & Wilkins, 1991, p. 62; Sobsey & Doe, 1991, p. 246; Turk & Brown, 1993, p. 204). In contrast, various researchers found in their studies that elderly victims were most likely to be victims of sexual assault from the age of 75 years and over (Holt, 1993, p. 64), between 55 to 87 years (Muram et al., 1992, p. 72) and the majority of victims between the ages of 70 and 90 years (Teaster, 2003, p. 113).

As gender and, to some extent, the age of adult victims with cognitive impairment were significant in relation to identifying vulnerability to sexual assault, there were specific offender characteristics that continue to inform our understanding of the crime of sexual assault.

Who were the Perpetrators?

When considering the research findings in relation to the crime of sexual assault generally, it was apparent that the majority of sexual assaults, including those

perpetrated against non-disabled members of the population, shared similar characteristics. One such characteristic was that, whilst there had been and continue to be instances of abuse perpetrated by women, the overwhelming majority of abuse was perpetrated by males known to the victim. Typically, the male perpetrators were either paid carers, family members or other people receiving similar services to their female victims (Baladerian, 1991, p. 327-328; Brown et al., 1995, p. 16-17; Burgess et al., 2000; Cooke, 1990, p. 608; Dunne & Power, 1990, p. 119; Jeary, 2004; McCarthy & Thompson, 1997, p. 111; Roeher Institute, 1994, p. 11-13; Sobsey & Doe, 1991, p. 248; Teaster, 2003; Turk & Brown, 1993, p. 208; Whittaker, 1995). However, research conducted by Muram, Miller and Cutler (1992), which compared 53 assaults perpetrated against women aged between 18 and 45 and 53 assaults perpetrated against women aged 55 and over, living in the community, discovered that a different pattern of relationship existed between assailant and victim, depending on the age of the victim. The majority (79 percent) of sexual assaults perpetrated against older women were perpetrated by strangers who had targeted the victims and made their way into the victims' homes "either in a process of breaking and entering or after gaining entry under false pretences" (1992, p. 72). Whereas, assaults against the cohort of younger women, were perpetrated by a person known to the victim.

Another point worthy of mention was that women involved in the Muram, Miller and Cutler (1992) study were all living in the community. This research provided additional evidence as to the vulnerability of women to sexual assault throughout their lives, whether they were living in care situations or in the community. It also provided evidence of the level of victimisation of older women by perpetrators who saw them as vulnerable and who actively sought them out as potential targets. While there was a shared view among researchers, based on empirical data, as to who the offenders were, there was no single view as to which category of offender perpetrated the greatest number of offences. McCarthy and Thompson (1997) suggested that:

Men with intellectual disabilities feature so highly [as perpetrators] in abuse statistics of this kind [because] these men [with cognitive impairment] are considered more likely to be identified than others who may be more skilled at covering their tracks. (McCarthy & Thompson, 1997, p. 112)

Davidson (1994) found that perpetrators included male psychiatrists, psychiatric nurses and patients, and also female psychiatric nurses. Further, Davidson (1994) found that perpetrators used the system they were in, either as patients or staff, as a place that would afford them easy access to women who would put up little or no resistance to sexual assault because of their vulnerable condition.

The issue of a culture of abuse created by perpetrators was also raised by Davidson (1994). She pointed out that the lack of action taken against known perpetrators, staff or patients can create a culture of acceptance and further abuse. Such a culture can (according to staff and patient respondents in Davidson's study) create a situation in which men who had not perpetrated sexual assault previously, and for whom (according to staff respondents) it would be 'out of character' to do so, become more likely to abuse a female patient who had been previously abused by another perpetrator. This situation created a sense that a female patient was accessible to them and that such behaviour was acceptable (Davidson, 1994, p. 47).

The point had been made a number of times that perpetrators are overwhelmingly male. Except in the case of elderly women, they were generally known to the victim and exert power over their victims. With regard to the minority of assaults perpetrated by strangers, victims were usually chosen because they were seen as easy targets. It was also apparent that if the perpetrators were not dealt with appropriately then this sent a message of acceptance of sexual assault to other males within the specific environment. The issue of power as the central theme in crimes of sexual assault is further explored below.

Repeat Offenders

Abuse perpetrated by repeat offenders against people with cognitive impairment was a particularly serious issue mentioned by a number of researchers (Cooke, 1990; Sobsey & Doe, 1991, p. 247; Turk & Brown, 1993). McCarthy and Thompson (1997) found that typically the abuse continued over long periods where perpetrators have long term access to victims. Most perpetrators in McCarthy and Thompson's (1997,

p. 110) study were fathers of the victims or men with intellectual disabilities who shared the same service as their female or male victims.

Davidson (1994) found that some male patients would either get themselves readmitted to a particular psychiatric hospital or would move from hospital to hospital in an effort to get themselves admitted, with the sole purpose of “picking up” female patients. Interestingly, staff respondents mentioned that these male patients generally had only ‘mild’ disorders, implying that they did not need to be admitted. This finding was similar to that of McCarthy and Thompson (1997), who maintained that, increasingly, sexual offenders without intellectual disabilities were being admitted into intellectual disability services (1997, p. 111).

Some researchers, such as McPherson (1991), suggested that offenders (in this case among care givers) went on to commit as many as 200 offences before they are caught. Sobsey and Doe (1991) found that the majority of victims reported repeated offences against them, with “the largest group (49.6%) disclosing separate incidents of abuse on many (greater than 10) occasions” (p. 247).

According to Davidson (1994), sexual predators in the hospital environment, in this case male patients typically built a relationship with their victims over time and gained their trust. In the case of staff offenders, the sense of trust and care was often already there as one might expect in a hospital environment (Davidson, 1994, p. 111). These findings supported the conclusion of Brown (2000c) that “sexual abuse is compulsive rather than impulsive and often involves active targeting of potential victims” (p. 11).

McCarthy and Thompson (1997) made two particular points in their study in relation to the perpetrators’ history of abusing others. These points shed light on the high incidence of repeated abuse. They noted that:

It is likely that men with intellectual disabilities who sexually abuse people with intellectual disabilities will have a known history of sexually abusing, as is often the case with perpetrators generally[this reflects the] high levels of service incompetence in the

management of men with intellectual disabilities who sexually abuse. (McCarthy & Thompson, 1997, p. 114)

In relation to this latter point, much of the literature discussed the outcomes of reports of sexual assault. The literature indicated that a moderate to high proportion of perpetrators retained access to victims, even after the assault was reported. For example, Turk and Brown (1993) found that in 44 out of 84 cases perpetrators continued to have access to victims. These included 30 cases where access was supervised or reduced (p. 210).

Repeat offending was a significant issue in sexual assaults against some of the most vulnerable groups in the community. Unfortunately, it appeared that the systems and structures that were meant to care for vulnerable groups have embedded practices and processes which perpetuated the assaults.

Power Dynamics

Sexual assault was analysed and understood by feminists as a crime involving the abuse of power (MacKinnon, 1987). The power that perpetrators have over victims can take many forms, including physical threats of retribution should victims resist or disclose (McCarthy & Thompson, 1997). In discussing the issues of power and sexuality, Sobsey and Doe (1991) discussed the common perception of women and children as defenceless victims. They argued that “the perceived passivity of women and children may be exaggerated or increased by the social reaction to disability” (Sobsey & Doe 1991, p. 251-2), implying that generally society views women and children as weak. This view of being weak was further compounded when, in addition to being women or children, victims were also disabled.

There were a number of additional factors which researchers suggested increased or more acutely emphasized the power dynamics between perpetrator and victim. McCarthy and Thompson (1997) discussed the power imbalance that impacted on the respondents in their study. This was a particularly important issue for them as they stated that the majority (84%) of their respondents were compliant with perpetrators’ demands (p. 115). The researchers were careful to note that:

As some power difference exists in most sexual relationships, [we] have been careful to include only instances where the exploitation of the power differences rendered any consent on behalf of the person with intellectual disabilities invalid. Often the perpetrator relied on more than one power difference to ensure the compliance of the person with intellectual disabilities. (McCarthy & Thompson, 1997, p. 115)

With this in mind, the information provided by both female and male respondents was enlightening. In 33 cases involving female victims and 20 in which the victim was male, the major power imbalance was that the perpetrator was always of significantly higher intellectual ability. Higher social status within the client hierarchy, and then fear, were the next two major contributors to power imbalance for both male and female victims identified by the researchers (McCarthy & Thompson, 1997, p. 115).

According to Burgess and her research team (2000), control and power could be exerted over victims in nursing homes in four ways; the “mere presence” of the perpetrator, “verbal threats”, “display of weapons”, and “use of physical force” (p. 29). The author reported that the “mere presence” of the perpetrator was the “primary method of control exercised by this group of perpetrators” (Burgess et al., 2000, p. 29).

Sexual assaults, which were perpetrated by people in powerful professional roles, such as psychiatrists and other health professionals, took on another dimension. Davidson (1994) highlighted the absolute powerlessness which was likely to be felt by victims with a mental illness when assaults were perpetrated by people of high status whose role it was to care for them and assist them in the recovery process.

Where Do Assaults Occur?

Given that people known to the victims perpetrate the majority of sexual assaults, it was not surprising that the literature suggested that there were three main settings where violence, including sexual assault, occurred. These were: residential settings, such as homes, apartments, boarding homes; service settings, such as hospitals, group homes and institutions; and public spaces (Roehrer Institute, 1994, p. 13). Even in the case of older women who were most commonly assaulted by strangers, the victim’s home was the main setting in which assaults occurred (Muram et al., 1992).

Sobsey and Doe (1991) found that in the majority of the 102 survey responses they analysed, private homes were the locations where most abuse took place. Other places where abuse occurred, in descending order, included, institutions, specialized transport vehicles, public places, group homes, other environments associated with victims' disabilities, hospitals and other generic community environments. The researchers stated that 36% of cases of abuse took place in "environments that the victims encountered as a result of being disabled" (Sobsey & Doe, 1991, p. 249).

This point is emphasised by McCarthy and Thompson (1997) who concluded that assaults often occurred when people were placed in care or accommodation specifically established to 'care and protect' them, such as hospitals, institutions, and group homes (p. 111). Davidson (1994) provided a vivid and often distressing portrayal of sexual abuse committed in psychiatric institutions as reported by victims and staff respondents.

An analysis conducted in the United Kingdom by Bennett, Jenkins and Asif (2000) of 1,421 calls made to a helpline over a two-year period indicated that:

Details revealed by callers about abuse in residential homes, nursing homes and hospitals clearly indicate that there may be real cause for concern about what is happening to older people who live in a care setting. (Bennett et al., 2000, p. 10)

Once sexual assault had been perpetrated, the next step for many but by no means all victims was to disclose or report the crime. There were a number of factors that facilitated or impeded either disclosing or reporting sexual assault.

Disclosure and Reporting

As alluded to previously, despite the prevalence of sexual abuse perpetrated against people with cognitive impairments, those who have the added constraints of impairment were reluctant to report or disclose abuse for many of the same reasons as the broader population (Sobsey & Doe, 1991, p. 251). Reasons included feeling ashamed, fear of the perpetrator, fear of not being believed and feeling as though they are somehow to blame for the abuse. However, victims with cognitive impairment

faced additional barriers when they considered whether to disclose or report the crime (Roehrer Institute, 1994, p. 18).

Depending on the level of impairment, the victim would be reliant on another person to assist them or to make a report on their behalf. For many victims, even when they made the decision to disclose, their reliance on others to assist them often meant another hurdle they must overcome before their allegation received police attention. The person to whom the disclosure of assault was made played a vital role in ensuring the report reached the justice system (or not). Consequently, the ultimate decision to report or not often became subject to the view of the person to whom the disclosure was made (Lievore, 2003, p. 97; Victorian State Ombudsman, 2006, p. 5). He or she must decide whether they believed the allegation and whether the report should be made, regardless of whether they know or believe an offence had taken place. This point was highlighted by the results of a study conducted by McCarthy and Thompson (1997) who found that:

The decision to involve police was found to be directly related to whether the perpetrator has intellectual disabilities...[t]his is powerful evidence that both intellectual disability services and the criminal justice system do not think that abuse by men with intellectual disabilities is as serious as that committed by other perpetrators. (McCarthy & Thompson, 1997, p. 118).

People with impairments, depending on the type and level of their impairment and their place of residence, may be physically, emotionally or financially dependent on the perpetrator. For them, the consequence of reporting the assault might be that they would be forced to leave their home and be placed in care or in an institutional setting. If victims were already in supported residential settings or attending a specialized educational program, they would risk being moved from their current place of residence or program because the organisation may view moving the victim as the easiest response to a sexual assault having occurred (Sobsey & Doe, 1991, pp. 247-248).

Several researchers (Roehrer Institute, 1994, p. 16; Sobsey & Doe, 1991, pp. 251-2) had reported that compliance and obedience, instilled in people with disabilities from childhood, made it very difficult for them to challenge or disclose abuse to another

person. A number of factors influence whether or not a victim with cognitive impairment understood that what has happened to them was wrong. These factors included the communication level of the victim, their level of confidence, and the perception by the victim of the significance of the incident/s. The latter two factors were often characteristic in cases of interfamilial abuse where abuse occurred over a long period of time, often years. Repeated, ongoing abuse suffered by a victim over a long period of time may mean the victim did not remember or report the abuse. As Brown and colleagues explained:

[Abuse] is not likely to have been picked up [by service providers] because of changes in the person's behaviour, and it is more likely that distressed behaviour will have been misinterpreted as part of the person's handicap rather than an indicator of abuse. (Brown et al., 1995, p. 14)

Other factors that could influence disclosure and reporting include whether victims felt there is anyone to report to, whether they thought they would be believed, and their perception of the likelihood of receiving a "just and efficient response to the complaint" (Roehrer Institute, 1994, p. 19). Disclosure of sexual abuse was often made to another person before the assault was reported to police. For example, Davidson (1994) found that of 34 cases that she discussed, only 17 had been disclosed to another person. The person to whom the disclosure was made included "psychiatric nurses; psychiatric facility managers; psychiatrists; and social workers" (Davidson, 1994, p. 62). Decisions regarding who to disclose to were based predominantly on gender. Women were often chosen because they were known and trusted by the victim and because the victim felt they would take them seriously (Davidson, 1994).

People who witnessed a sexual assault or strongly suspected a sexual assault of a client or loved one had occurred also faced a number of complexities in deciding to report or not. For example, employees in residential or other care services faced losing their jobs should they make a complaint, or they may believe that no action is likely to occur in response to their complaint. Concerns about the number and frequency of claims raised by respondents about 'whitewashing' and 'collusion between home owner and regulatory staff' were discussed by Bennett and colleagues (2000, p. 10). Although there was no evidence to support these specific claims made

by respondents, the researchers felt that given the number of allegations they could not be discounted and ignored (p. 10).

In the case of family members who strongly suspected that sexual assault or other forms of abuse have occurred, Bennett and colleagues (2000) suggested that, in addition to the fear of retribution against their relative, family members are faced with a number of dilemmas when they consider whether to report their suspicions. These included trying to predict how the organisation will handle the allegation. For example, they may be unsure whether the allegation will be handled in a professional manner. Because a likely outcome was that the victim will have to leave the institution, the family might need to be prepared to care for their family member themselves or to be confident that another organisation can be found that will be prepared to accept their relative (p. 10). The family's financial status, the level of care required by the family member, and the availability of affordable services added another layer of complexity to this decision.

Disclosure and reporting of assault by a victim was obviously crucial in accessing justice. Consequently, the person to whom the disclosure was made played an important role. Victims with cognitive impairments shared the same concerns as other victims of sexual assault in relation to disclosing and reporting. However, victims with cognitive impairments faced additional barriers depending on their level of impairment. Once victims have disclosed an assault, and assuming their story was believed, the response by police to the allegation was pivotal in determining whether access to the justice system was possible. The police response will be discussed in the following chapter.

Summary/Conclusion

A review of the literature to date indicated that there was a multiplicity of issues that impacted on victims of sexual assault generally, and particularly upon adult victims with cognitive impairment. The lack of accurate and reliable data about sexual assault and in particular about adult victims with cognitive impairment was a perennial issue both in Australia and internationally. Victims of sexual assault, it seemed, must contend with lingering community attitudes to the crime of sexual

assault and the impact that these largely negative attitudes have on victims' willingness to report assault and on the community's willingness to believe the victims. The literature indicated that there were similarities between the experiences of disabled and non-disabled victims of sexual assault. These similarities include the nature of police and organisational responses to sexual assault incidents and common characteristics such as gender of perpetrator (usually male) and victim (usually female), the power dynamics associated with the crime of sexual assault, the relationship between victim and perpetrator, places where sexual assaults occur, and issues related to delayed reporting to police. It was also clear that victims with cognitive impairment faced additional risks of sexual assault such as increased vulnerability to further sexual assaults, which was exacerbated by the level or type of impairment, dependence on the perpetrator for care, the environment in which the victim resided and other social and systemic factors.

There were a number of problems comparing the results of different research studies in the area of sexual assault generally, and in the area of sexual assault perpetrated against adults with cognitive impairment in particular. As indicated earlier, there were particular issues that arose in relation to definitions of sexual assault and cognitive impairment. In relation to the former, this review has focused on research dealing specifically with rape, although some studies that have been discussed here have included rape as a category of sexual assault and did not focus only on rape per se.

An agreed definition of cognitive impairment was elusive. The majority of the studies included in this literature review did not use the term 'cognitive impairment'. For the most part, the research reported here focused on adults with intellectual disability. Hence, several terms related to cognitive impairment, such as 'learning difficulties', 'learning disabilities', 'retarded' and 'mental handicap' have been used in the literature. These definitions reflected the era in which the research was conducted and, hence, mirrored what were considered to be appropriate and acceptable definitions and language at the time.

Most of the research discussed in the literature review utilised qualitative research methods, with a minority using some level of quantitative methods for gathering and analysing data relating to demographics or prevalence of sexual assault. The majority

of studies used surveys or questionnaires, either administered in the form of individual interviews by researchers or posted through the mail to participants. Participants included medical, allied health professionals or victims of sexual assault. In several instances, researchers used data gathered from telephone surveys or other 'phone in' services. There was room for both more sustained and intensive qualitative research and for conceptual analysis of what quantity data was available.

The next chapter will focus broadly on the justice system response to victims of sexual assault and in particular to adult victims with cognitive impairment. More specifically, the review of literature will highlight and critique what other researchers have said about police and prosecutor decision making and in particular, discretionary decision making.

Chapter Three: Police Decision Making – A Review of the Literature

Introduction

The previous chapter provided a detailed overview of sexual assault perpetrated against adults with cognitive impairment. Further, it placed this issue within a broader context of sexual assault as it examined the similarities and differences between sexual assault perpetrated against adults within the broad community compared to sexual assault perpetrated against adults with cognitive impairment, including case characteristics, data collection and the myths and misconceptions that surround this crime.

The aim of this chapter is to highlight the response of the justice system to reports of sexual assault made by adults with cognitive impairment. The chapter also seeks to understand the determinants of police decision making in sexual assault cases and the consequential effect on case outcomes generally. In particular, this chapter will provide an insight into the impact of discretionary decisions upon the progress through the justice system of sexual assault cases involving adult victims with cognitive impairment. It will be argued that this area is under-researched and under-theorised.

This chapter provides a brief overview of the justice system response to adults with cognitive impairment and, more specifically, victims of sexual assault. The next section discusses the complexity of police and prosecutor decision making. It considers such discretionary decision making in sexual assault cases generally and, in particular, the impact of discretionary decision making on cases involving adult victims with cognitive impairment. Finally, there is a summary of this chapter and an argument for the importance of the kind of research constructed in the current study.

How the Justice System Responded

There was little argument that adults with impairments generally, but in particular adults with cognitive impairment, experienced disadvantage at a number of levels,

including within the educational, financial and legal systems. Whilst disadvantage does not discriminate between sexes, there was evidence to suggest that women with disabilities experienced an added layer of disadvantage due to their gender (Council of State Governments Justice Center, 2007; Frohmader, no date; Hague, Thiara, Mellender, & Magowen, 2008; Howe, 2007; Jennings, 2003). A review of the literature in relation to adults with cognitive impairment and the justice system suggested that adults (males in particular) with cognitive impairments were overly represented as defendants in the criminal justice system (Byrnes, 1999; Cockram, 2005; Cocks, 2002; French, 2007; Jackson, Cockram, & Underwood, 1994; Law Reform Commission of NSW, 1992; Lee, 2001; McSherry, 1999; New South Wales Law Reform Commission, 1994). Moreover, the legal system constructed disability as 'abnormal' or 'other' by accentuating disability against the presumption of normalcy (Jones & Brassier Marks, 1999, p. 6).

Research conducted to examine the attitudes of three groups from within the justice system in Western Australia towards people with cognitive impairment, and the likely impact of these attitudes, concluded that there existed "a very strong consensus [among respondents] that people with an intellectual disability do have characteristics that would significantly disadvantage them if they come into contact with the criminal justice system" (Jackson et al., 1994, p. 165). Moreover, Jackson et al., (1994) suggested that people with intellectual disabilities were more likely than people without disabilities to be disadvantaged as a result of their contact with the justice system. Disadvantage was due, in the main, either to a lack of training to enable police to work effectively with people with cognitive impairment or the inability of police to recognize intellectual disability.

Adults with cognitive impairment were also more vulnerable than members of the general population to becoming victims of crime (Brogden & Nijhar, 2000; Johnson et al., 1988; Kinnear & Graycar, 1999; Law Reform Commission of NSW, 1992; Williams, 1995). The range of crimes committed against adults with cognitive impairment, varied depending on the age and gender of the victim. The increased dependency on disability services increased the extent of vulnerability to which people with cognitive impairment became exposed (Hightower et al., 2001;

McCarron, Gray, & Karras, 2006, p. 86-91; McSherry, 1998; Mears, 1997; Roehrer Institute, 1994).

Outcomes of Sexual Assault Reports

There was considerable agreement in scholarly research about the outcomes of sexual assault reports made by adult complainants with cognitive impairments. Firstly, the credibility of victims was often questioned (Easteal, 2001, p. 188-191; Heenan & Murray, 2006; Jordan, 2004; Victorian Law Reform Commission, 2001). Indeed, the research of Brennan and Brennan (1994), Connelly and Keilty (2000, p. 15), and Easteal (2001, p. 188-191) indicated that decision makers in the criminal justice system, including police, were influenced in their thinking by myths about intellectual disability such as that adults with cognitive impairment are childlike, promiscuous and asexual (Brennan & Brennan, 1994; Goodfellow & Camilleri, 2003). Moreover, a number of researchers who have focused on the experience of women with impairments in the community and in the justice system suggested this group of complainants was likely to be marginalized by the community, and that this marginalization was mirrored by the justice system, the effect of which was that marginalization was further enhanced and perpetuated (Chenoweth, 1997; Easteal, 2001; Phillips, 1996; Wacker, Parish, & Macy, 2008).

There was a diverse range of reasons advanced by researchers that provided insight into why police may have decided not to progress a report of sexual assault through the justice system. These reasons included a tendency by police decision makers to focus on the limitations, rather than the strengths, of victims with cognitive impairment; the failure of police and other authorities to identify that a crime was committed or to respond appropriately (Brennan & Brennan, 1994; Lievore, 2005, p. 99); and feelings of helplessness of police and advocates in trying to respond effectively to sexual assault complainants (Connelly & Keilty, 2000). In the case of elderly people with dementia, reasons for not prosecuting might have included a belief such as that the level of disability made victims unable to participate in the justice process (Teaster et al., 2000, p. 11).

The majority of the literature concerning the outcomes of reports of sexual assault made to police by adult victims with cognitive impairment concentrated on adults between 18 and 50 years of age or, in some cases, up to 60 years of age. In the last two decades, however, there had been a growing body of literature that considered the victims of all forms of abuse, highlighting the increasing vulnerability which came with age, disability and dependence on others for care (Craft, 1996; Holt, 1993; Jeary, 2004; Muram et al., 1992; Ramsey-Klawnsnik, 1991; Ramsey-Klawnsnik et al., 2007; Roberto & Teaster, 2005; Teaster, 2003; Teaster et al., 2000; Teitelman & Copolillo, 2002). However, there was a dearth of literature which described the police or justice system responses to adults with dementia as victims of sexual assault. It appeared that researchers and the community at large were still coming to terms with the potential magnitude of sexual abuse perpetrated on this group (Jeary, 2004).

Several studies revealed that, in incidents of sexual assault in which both victim and perpetrator have cognitive impairment, reports were either not made to police in the first instance, or, if reports were made they did not progress through the justice system (Brown et al., 1995, p. 17; McCarthy & Thompson, 1997, p. 118; Turk & Brown, 1993). Possible explanations for the lack of progress of these reports may have included simply a reluctance of police to prosecute or a decision that the case has little chance of resulting in a successful prosecution at court.

As discussed in more detail in the previous chapter, there was agreement amongst the majority of contemporary scholars that the underreporting of sexual assault in western countries was a significant issue (Lievore, 2004a; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn et al., 2002; Spohn & Holleran, 2001; Temkin, 2002; Triggs et al., 2009). Of the reports of sexual assault that were made to police, very few resulted in conviction (Victorian Law Reform Commission, 2001, 2003, 2004; Victorian State Ombudsman, 2006). Given the level of underreporting and the low conviction rate, a positive interface between victim and police assumed added significance in encouraging future reports and in maintaining victim engagement with the justice system (Jordan, 2004; Kerstetter, 1990; LaFree, 1981; Spohn & Holleran, 2001).

The importance of the initial response from police to reports of sexual assault as 'gatekeepers' (Criminal Justice Sexual Offences Taskforce, 2005; Gregory & Lees,

1999; Jordan, 2001, 2002b; Kerstetter, 1990; LaFree, 1981; Lievore, 2003; Victorian Law Reform Commission, 2003, 2004; Victorian State Ombudsman, 2005) to the justice system, and hence their role in facilitating access to justice, was highlighted by a number of researchers (Davidson, 1994, p. 72; Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lievore, 2003; McCarthy & Thompson, 1997, p. 117; Sobsey & Doe, 1991, p. 249; Teaster, 2003).

Researchers have described the response of the justice system to adult victims of sexual assault with cognitive impairment as inadequate (Brown et al., 1995; Chenoweth, 1997; Cocks, 2002) as evidenced in the small number of reports made by this group of complainants that proceeded beyond the investigation stage. Research conducted in England by Sobsey and Doe (1991) for example, found that only 22 percent of offenders from 102 incidents of sexual assault were charged and of these only eight percent of those charged were convicted (p. 249). Similarly, another British study of the incidence of sexual assault of adults with intellectual disability in a large regional health authority in England conducted by Turk and Brown (1993), found that 33 of 119 incidents of sexual assault were reported to police and, of those, only 15 led either to conviction or disciplinary action (p. 202). Similar results were also found in an Australian study by Davidson (1994). This study of sexual assault perpetrated within psychiatric facilities in New South Wales suggested that, of the 34 incidents reported by either staff or patients, police proceeded in only one case, citing their belief that in all the other cases the 'Mental Health Act' would have precluded the perpetrator from being convicted because of their mental illness (p. 26 & 72).

Research conducted in three major cities in New Zealand by Jordan (2004) examined 164 police files involving allegations of rape and other sexual violation offences which were reported in 1997. Jordan found that complainants with an intellectual disability, or who were presumed to have a psychiatric illness, represented over one quarter of the cases examined. Jordan (2004) found that the vast majority of these cases 87 percent were regarded as 'false' by police and therefore not pursued.

A British study by Lea, Lanvers, and Shaw (2003) on attrition rates of sexual assault reports supported Jordan's finding regarding the exceptionally high attrition rate of reports involving victims with cognitive impairment. Lea, Lanvers and Shaw (2003)

state that a “group which is particularly disadvantaged ...[is] victims with learning disabilities or psychiatric problems [who] continue to be over-represented in terms of cases that drop out of the system” (p. 598). Further, the researchers found that, of the small number of sexual assault reports made by victims with learning disabilities and psychiatric illness, none progressed to court and conviction (Lea et al., 2003).

Similarly, the findings of the studies conducted by Jordan (2004) and Lea, Lanvers and Shaw (2003) were largely replicated by Heenan and Murray (2006, p. 23) and Triggs, Mossman, Jordan & Kingi (2009). Heenan and Murray (2006) found that of 850 reported rapes in Victoria over a three year period, charges were laid in only in five out of 130 cases of sexual assault involving victims with psychiatric disability.

A New Zealand study conducted by Triggs, Mossman, Jordan & Kingi (2009) found that of their sample of 2, 888 sexual violation offences consisting of 1,955 victims and 2,029, found that of the total number of victims 15 percent were recorded as having a psychiatric, intellectual or other disability. Of these, psychiatric impairment (47 percent) and intellectual impairment (44 percent) were most commonly represented and this was consistent with other studies who similarly found that intellectual and psychiatric impairments made up the majority of the sample of victims with identified impairments. Victims with physical disability made up eight percent of victims with disabilities (p. 20). Of the total overall sample in this study of victims, 65 percent were deemed by police to be valid complaints. Consistent with other research discussed in this chapter, the attrition of reports through the justice system resulted in only 13 percent of total sample cases resulted in the conviction of the offender. According to the researchers, of the 157 reports perceived by police to be false, victims with disabilities were overly represented (p. viii). Further, reports made by victims who had a psychiatric impairment were less likely to result in prosecution compared to reports made by victims who had intellectual disability (Triggs et al., 2009, p. 81). The researchers also found that cases involving victims with disabilities were less likely to be prosecuted, but conversely, if they were prosecuted, they were more likely to be convicted. Of the total sample 251 reports that did lead to conviction 13 involved victims with disabilities. This finding of a low prosecution rate was consistent in part with previous research; however, the researchers also concluded that a higher proportion of reports involving victims with disabilities, which were prosecuted resulted in conviction. One explanation for this result might have been that

the higher conviction rate was most commonly associated with sexual offences other than rape.

In summary, two main issues emerged from the literature to date. The first related to the treatment of adults with cognitive impairment by the justice system. There was evidence to suggest that people with cognitive impairment either due to mental illness, Acquired Brain Injury or Intellectual Disability, as victims of crime or as defendants, were disadvantaged by the justice system. Further, this phenomenon, which scholars have termed prejudicial (Brown, Hamilton, & O'Neill, 2007) was not unique to Australia. Rather, the response by justice systems that were steeped in historically based misconceptions of fear, mistrust and ignorance of adults with cognitive impairment, was shared by justice systems in other western countries such as Britain and the United States.

Secondly, it was also clear that sexual assault had the lowest conviction rate of any indictable offences in Victoria. The low conviction rate is also a feature of other Australian states⁹ and other western countries. Moreover, the literature clearly stated that in the case of adults with cognitive impairments who were victims of sexual assault, there appeared to be a convergence¹⁰ of differential treatment by the justice system. The effect of this convergence on adult victims of sexual assault who had cognitive impairment was compounding, resulting in fewer reports of sexual assault and fewer convictions of offenders.

The following discussion on police decision making within the justice system highlights several factors which influenced the trajectory of sexual assault reports made to police.

⁹ According to the Australian Bureau of Statistics “Defendants finalised for charges of sexual assault had the lowest proportion (63%) proven guilty of all principal offences. This offence also had the largest proportion of charges withdrawn (22%). The principal offence with largest proportion of acquittals was homicide (16%)”. (Australian Bureau of Statistics, 2009, p. 11)

¹⁰ Convergence in this context referred to the point at which the acknowledged differential response to sexual assault victims combined with the differential response to victims with cognitive impairment.

Decision making in a Complex Environment

There was little argument amongst researchers that decisions made by police were made within a complex environment, within which a multitude of factors was considered (Corsianos, 2003). Decisions within the justice system with regard to reports of sexual assault must pass through a series of decision making points, at each of which decisions were made either to progress the case or eject it from the system.

Prior to making a report of sexual assault to police, the victim must first make a decision about whether the crime will be brought to the attention of the criminal justice system. Whilst the reasons why victims may not decide to report a crime of sexual assault to police have been discussed in the previous chapter, it was nevertheless important to note that the initial trigger of reporting an assault rested with the victim (Gottfredson & Gottfredson, 1980). However, it goes without saying that the victim's decision to report had little bearing on police decision making. Indeed, there were indications that significant screening measures in sexual assault cases were made initially by police and subsequently by the Office of Public Prosecutions (Victorian Law Reform Commission, 2001). The first stage of the 'screening' process in the justice system process began with the police. The police, in effect, decided whether a report of an alleged crime was accepted into the criminal justice system (Gottfredson & Gottfredson, 1980, p. 582; Kerstetter, 1990; LaFree, 1981).

If the initial report that was made to police was accepted, the report (and victim) entered the criminal justice system and usually proceeded through to the investigation stage. If the file was then authorized by the Criminal Investigation Unit (CIU), it proceeded through to the prosecution stage. The main criterion, by which a report was filtered, was the estimation of the 'likelihood of success' of the case at trial, first by the investigator and then the prosecutor. Albonetti (1987, p. 624) referred to this process as one in which decision makers sought to 'reduce uncertainty'. The point at which many reports of sexual assault were ejected from the justice system was the investigation stage (Fitzgerald, 2006; Harris & Grace, 1999; Heenan & Murray, 2006). According to the Victorian Law Reform Commission (2001), "it would appear

that once a sexual offence is reported, the most significant filter in the criminal justice system is a decision by police to not lay charges” (p. 33).

A number of points in relation to police decision making should be emphasized. First, decision making by police occurred in a complex legal and procedural environment. There were a number of stages or screening points through which a report of sexual assault was subjected in order to determine its trajectory through the justice system. The second important point was that police play a crucial role in case attrition. Indeed, a decision to reject many reports of sexual assault was made at the police investigation stage, affirming the role of police as ‘gatekeepers’ to the justice system. As will be explained in the following discussion, the complex environment alluded to earlier arises when we begin to consider the range and types of decisions which must be considered by police in relation to reports of sexual assault.

Police and Prosecutor Decisions in Sexual Assault Cases – Factors that Hindered or Facilitated Case Progression

The ‘likelihood of success’ was a major benchmark used by police and prosecutors in first anticipating and then determining the trajectory of a report of sexual assault through the justice system. In essence, decision makers were asked to make predictions based on their estimation of whether a case has the hallmark components of what police perceive to be a ‘successful’¹¹ case. This process of ‘estimation’ was fraught with complexity for the decision makers and involved a great deal of uncertainty for victims who awaited the outcome of such decisions.

An example of the range of possible considerations that must be taken into account by decision makers in the estimation process was compiled by Kerstetter (1990, p. 272) after reviewing the available literature. The factors were described as ‘administrative’, which may have included the outcome of a lineup of possible offenders and the police district in which the assault occurred; ‘instrumental’ including the willingness of victims to prosecute; ‘offence elements’ including sexual penetration and resistance by victims; ‘evidentiary factors’ such as use of weapons, or availability of witnesses

¹¹ The terms ‘success’ or ‘successful’ case, in the context of the current study, refers to whether a case will, or has the likelihood of resulting in a successful prosecution.

to the incident; 'aggravating elements' including injury to victims, or theft of property; and 'extra legal factors' such as victim behaviour perceived as negative or as having contributed to the assault, or the status of the victims or race of the assailant (Kerstetter, 1990, p. 272).

There was a large and growing body of Australian and international literature which considered the extent to which police and prosecutors, as decision makers, were governed by the requirements of substantive law or were influenced by 'extra legal' or discretionary variables when considering sexual assault cases. Researchers made it clear that decisions were informed mainly by evidentiary considerations and were influenced, at varying levels, by discretion or extra-legal factors (Brown et al., 2007; Lievore, 2004a; Soulliere, 2005). However, Spohn and Holleran (2001, p. 667) argued there was little clarity or agreement amongst researchers about what constituted extra legal variables. A review of the literature confirmed the view expressed by Spohn and Holleran (2001) in terms of the diversity of variables that were labelled as extra legal and which seek to typify 'real rape' scenarios and 'real rape' victims. These variables, though numerous, were categorized into three distinct groups including race, socio economic class, and moral and gendered stereotypes.

There was also a substantial body of work that considered the 'screening' role of police in decision making processes more broadly (Corsianos, 2001, 2003; Goldstein, 1964), and in particular in relation to sexual assault cases (Du Mont & Myhr, 2000; Gregory & Lees, 1999; Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Kerstetter, 1990; LaFree, 1981; LeDoux & Hazelwood, 1999; Rowe, 2007; Scerra, 2008; Schuller & Stewart, 2000; Soulliere, 2005; Stubbs, 2003; Teaster et al., 2000). Researchers had also focused on the decisions of prosecutors in relation to sexual assault cases (Albonetti, 1986; Brown et al., 2007; Frohmann, 1991, 1998; Kerstetter, 1990; Refshauge, 2002; Spears & Spohn, 1996; Spohn et al., 2001; Spohn & Holleran, 2001; Stanko, 1982).

Whatever the level of decision making on which researchers have focused, the common aim was to seek insight into the reasons for the high attrition of sexual assault reports compared to other types of crimes, or to understand the process of

police decision making. Whilst these studies exhibited some similarities, there were also differences between them, including methodological variables. The following discussion provided an overview of the Australian and international research into police and prosecutor decision making in relation to reports of sexual assault. A minority of these studies included reports made by victims with cognitive impairment (Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003; Triggs et al., 2009). These studies are discussed in more detail later in this chapter.

Characteristics of research focusing on the relationship between the decision making of police and prosecutors and the attrition of sexual assault cases were divided into a number of categories, the first of which was methodology. The majority of research in this area was based on a combination of qualitative and quantitative approaches (Brown et al., 2007; Harris & Grace, 1999; Heenan & Murray, 2006; Kerstetter & van Winkle, 1990; Lea et al., 2003; Lievore, 2004a; Lord & Rassel, 2000; Spohn et al., 2001). However, the emphasis was on the use of quantitative data in conjunction with what, in some cases, could be described as a limited number of interviews with police, prosecutors, and members of the judiciary and victim advocates.

Whilst a body of knowledge existed about the use of discretion in police decision making, particularly in relation to sexual assault cases, much of the research, except that conducted by Gregory and Lees (1999) and Frohmann (1998), had utilised quantitative research methods as central to the research design. Methods such as focus group interviews or individual interviews were utilised mainly to support quantitative studies, notable exceptions being Jordan (2004) and Lievore (2004a), who used qualitative and quantitative methods concurrently. Alternatively, other researchers collected and analysed data using solely quantitative methods to explore the predictors of case progression and points of attrition (Du Mont & Myhr, 2000; Fitzgerald, 2006; Frazier & Haney, 1996; Kerstetter, 1990; Kingsnorth, MacIntosh, & Wentworth, 1999; LaFree, 1981; Spears & Spohn, 1997; Triggs et al., 2009).

There was significant variability in the quantity of files analysed by researchers. The size of the sample used in each study were categorised into groups containing less than 300 (Brown et al., 2007; Du Mont & Myhr, 2000; Lea et al., 2003; 2004a; Spohn et al., 2001); between 300 and 500 (Harris & Grace, 1999; Kingsnorth et al., 1999;

Spohn & Holleran, 2001); greater than 500 and less than 1,000 (Frazier & Haney, 1996; Heenan & Murray, 2006; Kerstetter & van Winkle, 1990; LaFree, 1981; Spohn et al., 2002) and greater than 1,000 (Fitzgerald, 2006; Kerstetter, 1990; Spears & Spohn, 1997; Triggs et al., 2009).

A number of studies have investigated the impact of certain case, offender, or victim characteristics as predictors of case outcome. For example, what was the impact of prior or existing offender and victim relationships on case outcome? Alternatively, did social class or race of offender and victim have any measurable effect on case outcome? On the other hand, what impact did victim characteristics have on case progression when compared to legal or case characteristics? Some studies have attempted to identify statistical correlations between case outcomes and offenders, such as the effects of prior relationship between victim and offender, including acquaintances, intimate partners and strangers (Harris & Grace, 1999; Kingsnorth et al., 1999; Spohn & Holleran, 2001; Triggs et al., 2009).

Other studies compared outcomes of cases involving acquaintances and strangers on outcomes (Kerstetter & van Winkle, 1990; Lea et al., 2003; Triggs et al., 2009), while other researchers identified correlations between victim, offender and case characteristics, including victim-offender relationships (Brown et al., 2007; Fitzgerald, 2006; Frazier & Haney, 1996; Frohmann, 1991; Heenan & Murray, 2006; Kerstetter, 1990; LaFree, 1981; Lea et al., 2003; Lord & Rassel, 2000; Spears & Spohn, 1997; Spohn et al., 2001; Spohn et al., 2002; Spohn & Holleran, 2001; Triggs et al., 2009). Further, correlations between the class and race of victims and offenders and police decision making were also identified (Kerstetter & van Winkle, 1990; Triggs et al., 2009). The majority of researchers considered victim characteristic variables as predictors of case progression or rejection.

The majority of, but not all, research into sexual assault involved testing, stated or not, of what Kerstetter (1990) referred to as the feminist hypotheses, which included whether decisions in sexual assault cases were based on moral and gendered stereotypes. For example, what bearing, if any, did the victim's behaviour prior to the assault have on case outcome? Of the studies which considered the effect of moral and gendered stereotypes on case outcome, a number concluded that the feminist

hypothesis was strongly supported (Frohmann, 1991; Harris & Grace, 1999; Heenan & Murray, 2006; Kerstetter, 1990; Lea et al., 2003; Spears & Spohn, 1997; Spohn et al., 2001; Spohn & Holleran, 2001). Other researchers have marginally affirmed the explanatory value of feminist theory (Frazier & Haney, 1996; Kerstetter, 1990; Kerstetter & van Winkle, 1990; Lord & Rassel, 2000; Spohn et al., 2002), whilst others did not confirm the influence of moral or gendered stereotypes on case outcomes (Fitzgerald, 2006; Kingsnorth et al., 1999; LaFree, 1981; Lievore, 2004a).¹²

A significant proportion of attrition of sexual assault reports was attributed to the withdrawal of complaints by victims themselves (Brown et al., 2007; Triggs et al., 2009; Victorian Law Reform Commission, 2003). There were a number of possible reasons for a victim to withdraw his/her report, including (but not limited to) fear of reprisal by the perpetrator and concern about the low likelihood of convictions. It has been suggested that, in cases where complainants decided not to prosecute, their decisions “appear frequently to be subject to official influences” by investigating police officers (Kerstetter & van Winkle, 1990, p. 281).

As was apparent from the following overview of research findings into decision making and case attrition in sexual assault cases, there was a multiplicity of case, victim or offender characteristics which impacted on case trajectory. Whilst the following compilation of factors is illustrative of where there was agreement amongst researchers, it should not be assumed that individual factors alone were the sole, positive, or negative determinants of case outcomes. Indeed, the most salient feature of all the research reviewed in the current study was that all factors are considered within a broader decision making context. If nothing else, the data presented below provided an insight into the complexity involved in researching police and prosecutor decision making in sexual assault cases. In particular, the data highlighted the difficulty experienced by many researchers in their attempts to shed light on this area and to secure greater access to justice and equity of outcomes for victims of sexual assault.

¹² Note that the categories of ‘strongly’ and ‘marginally’ are categorisations used by the researcher.

Victim characteristics, which to varying degrees, have been demonstrated through research to influence negatively on case outcomes, included the victim's age. Cases involving older women are less likely to proceed (Du Mont & Myhr, 2000; Heenan & Murray, 2006), as are cases which involve a victim under 13 years of age (Fitzgerald, 2006; Spears & Spohn, 1997). Other factors which might have impacted negatively on case progression included: if the victim had cognitive impairment (Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003; Triggs et al., 2009); or factors which are considered to affect victim credibility (Spohn & Holleran, 2001) and negative moral stereotypes (Heenan & Murray, 2006; Jordan, 2004; Lord & Rassel, 2000; Spears & Spohn, 1997; Spohn et al., 2001). Cases in which the victim resisted, (Spohn & Holleran, 2001) and where the victim did not resist (Du Mont & Myhr, 2000) in addition to cases in which the victim did not sustain injuries (Heenan & Murray, 2006) were also likely to affect case trajectory. Those cases where the victim had an existing or prior relationship with the offender (Lea et al., 2003) or specifically when the offender was a partner (Feist et al., 2007) were also less likely to proceed.

Victim, offender, or case characteristics which increased the likelihood of charges being laid included cases where the offender was known to the victim (Brown et al., 2007; Du Mont & Myhr, 2000; Lievore, 2004a). This contradicted feminist assertions that there was a level of non-acceptance amongst the community and police of the existence of rape in existing relationships as this scenario did not fit the typology of a 'real rape' (Spears & Spohn, 1997). Explanations offered by researchers for this factor being a predictor of case progression included the argument that, because the identity of the offender was known to the victim, therefore an arrest was less time consuming (Du Mont & Myhr, 2000), and case progression was likely to increase the perception of efficiency and successful outcomes for the station and police officers involved.

Other factors identified by researchers that were found to influence case progression included: evidence of physical/verbal resistance by the victim (Du Mont & Myhr, 2000; Lievore, 2004a); if the victim was over the age of 10 years (Fitzgerald, 2006); where the gap between offence and reporting was less than 10 years (Fitzgerald, 2006); the presence of physical injury sustained by the victim (Fitzgerald, 2006; Heenan & Murray, 2006; Lievore, 2004a; Spohn et al., 2002; Spohn & Holleran, 2001; Triggs et al., 2009); cases where the victim had not consumed alcohol or used

drugs prior to the assault (Heenan & Murray, 2006); and prompt reporting by the victim (Spears & Spohn, 1997). Heenan and Murray (2006) also found that cases involving male victims were more likely to proceed. This conclusion was contrary to the conclusion made by Fitzgerald (2006, p. 11), who found that cases involving females were more likely to proceed compared to cases involving male victims.

Contrary to the findings of the literature presented above, researchers such as Kingsnorth, MacIntosh and Wentworth (1999), Fitzgerald (2006), Lafree (1981) and Lievore (2004a) had found that 'extra legal' variables which reflect negative victim characteristics had greater significance in prosecutor and police decision making than do legal considerations. Further, there was also the suggestion made by Brown, Hamilton and O'Neill (2007, p. 367) that corroborating evidence was the most important determinant of case progression. However, the researchers do conclude that, where corroboration was absent, the focus of the investigation was on victim characteristics. If the investigation focus was drawn to consider victim characteristics, Brown, Hamilton and O'Neill (2007) assert that, "such decision making may be more susceptible to the introduction of extralegal thinking, as judgements on these grounds are less straightforward" (p. 367).

Police and prosecutors, in determining the likelihood of success of sexual assault cases, were asked to use their discretion in order to estimate the likelihood of success of such cases. Whilst there was substantial diversity, including methodological, sample size and breadth of issues considered amongst the research conducted, researchers were in agreement, and indeed have demonstrated, that many factors influenced police and prosecutor estimation of success, including both legal and extra legal factors. Moreover, there was consensus among researchers that extra legal variables, particularly those that focused on negative victim characteristics were influential in police decision making. However, there was disagreement about the point at which extra legal variables informed the decision making process.

The following provides a more detailed discussion of the literature and the impact of discretionary or extra legal elements on case trajectory.

Police Discretionary Decisions

The use of discretion by police and prosecutors, as evidenced by the volume of literature focusing on this issue, continued to be the focus of debate amongst researchers. Studies of the use of discretion indicated that the use of police discretion in deciding which laws to enforce and to what degree, tended to occur in areas of law considered as less serious, such as those involving traffic violations (Chan, 1997, p. 44; Goldstein, 1964; Reiner, 1992; Wilson, 1968a). However, as demonstrated previously, police discretion was not reserved for less serious offences, but was applied at all levels of police decision making, particularly when laws were open to interpretation (Albonetti, 1986).

Discretion within the criminal justice system, according to McLaughlin and Muncie (2001, p. 95-96), referred to “the power conferred on criminal justice professional to use their judgment to decide what action to take in a given situation. This includes the decision to take no action”. McLaughlin and Muncie (2001) suggested that the exercise of discretion was influenced by a number of factors, including “the nature of the criminal law they have to enforce, the context within which piecemeal takes place and limitations on resources” (p. 96). Some researchers referred to discretionary decisions as the extra-legal elements or variables which contributed to and informed police and prosecutor decision making (Brown et al., 2007; LaFree, 1981). Researchers such as Lievore (2004a) described as extra-legal these “variables [which] are thought to come into play as a result of ideological power struggles and serve to perpetuate existing social stratification systems” (Lievore, 2004a, p. 11). In contrast, Brown, Hamilton and O’Neill (2007, p. 357) described extra legal variables as the ‘personal attitudes’ of decision makers which were brought to bear on decisions in sexual assault cases.

In reviewing the available literature in this area, LaFree (1981) identified three possible models of police decision making. They included the ‘legal model’, which suggested that discrimination based on social class or moral and gendered stereotypes is not inherent in police decision making; the ‘extralegal model’, which “suggests that police do discriminate; and the ‘change’ model’ [which] suggests that reliance on

extralegal determination declines with growing awareness of rape as a social problem” (LaFree, 1981, p. 582).

A national study by Lievore (1991), through a combination of qualitative and quantitative methodologies, examined the prosecutorial decisions and case outcomes of 141 case files of sexual assault between 1999 and 2001. Files referred to Offices of the Director of Public Prosecutions were collected from across five state and territory jurisdictions (excluding Victoria and South Australia). The sample did not appear to include cases involving people with cognitive impairments, either as victims or offenders. Whilst it is not certain whether this was a deliberate decision to exclude such cases or another explanation could be reports, involving, adult victims with cognitive impairment did not progress to the stage where they were referred to the Office of Public Prosecutions. If this was indeed the case, this was consistent with other reports, including those by Sobsey and Doe (1993) and Turk and Brown (1993) who found that very few reports by victims with cognitive impairments went beyond the reporting stage. Discussing the research findings Lievore (2004a) concluded that:

Prosecutorial decisions in adult sexual assault cases are primarily based on legal and evidentiary considerations [and further] that there was little to suggest that their [prosecutors’] discretionary decisions were overly influenced by gender and moral stereotypes. (Lievore, 2004a, p. 53)

Further analysis, would suggest a degree of incongruence between Lievore’s concluding remarks and the outcomes of the qualitative component of her study, which included interviews with 24 Crown Prosecutors. The majority of Crown Prosecutors acknowledged their broad discretionary powers in relation to decision making (Lievore, 2004a, p. 42). On the issue of credibility, factors which the prosecutors said contributed to their decisions whether to proceed or not, included ‘consistency’ in the victim’s story, and the victim’s ‘post-assault behaviour’ (p. 43).

The victim’s perceived ‘genuineness and trustworthiness’, including whether the victim was someone who would make eye contact with the judge, prosecutor and defence and if the ‘story rings true’ (p. 43), are particularly subjective and infer that the prosecutor will have a ‘story’ in his or her mind, against which they will measure

the story offered by the victim. Indeed, this story may be constructed based on gendered stereotypes, against which he /she was comparing the story told by the complainant. Another factor was 'demeanour'. The prosecutors wanted the victim to demonstrate a specific level of 'distress', but not so much that she was 'withdrawn'. 'Memory and communication skills', including whether the victim could 'recall' what happened and could communicate this in a 'coherent', 'intelligent and articulate' way (2004a, p. 41), was another subjective factor contributing to the assessment of credibility.

Quantitative data collected during Lievore's (2004a) study indicated that sexual assault reports were less likely to continue through the justice system if the victim had a history of mental illness and if the defence had access to this information, or the complainant had delayed reporting. The extent to which the issues in relation to victim credibility reflected the prosecutor's own belief in the myths and stereotypes about sexual assault victims' behaviour and credibility, or rather the judgement made by the prosecutor in relation to how the victim's credibility may be viewed by the jury, was not entirely clear. However, regardless of the basis on which decisions about a victim's credibility were made (either personal or based on perception of the jury views), it appeared that stereotypes of how a victim was perceived were being perpetuated and acted upon in regard to decision making about the progress of a case.

The findings of Lievore (2006) that decisions in sexual cases were more likely to be based on evidentiary considerations have, however, been supported by Fitzgerald (2006) in a quantitative analysis of 7,500 reported incidents of "sexual assault and indecent assault/acts of indecency" (p. 2) made over a 12 month period in New South Wales. Fitzgerald (2006, p. 11) used a quantitative methodology to track sexual assault cases and to identify where cases had been ejected from the justice system as well as identifying the characteristics of the sexual offences which proceeded. The conclusions reached by that research were as follows:

The data ... indicate that criminal proceedings were more likely to be initiated if the victim was over the age of 10 years at the time of the offence, if the victim was female, if the gap between offence and reporting was less than 10 years, if the alleged offender was known to the victim or if the offence involved some aggravating factor. These findings are consistent

with the assumption that proceedings are more likely to be initiated in cases where evidence suggests a reasonable prospect of a successful prosecution. (Fitzgerald, 2006, p.11)

These findings could suggested that police were making decisions based on what they anticipated the jury will decide or believe. For example, juries were more likely to believe a rape victim if she/he had sustained injury. Whilst on one hand this may mean there was more evidence due to the presence of injuries, on the other hand, it also meant that the notion of what was seen as a 'real' rape was further reinforced and perpetuated through the system. Such cases that were not authorized through to prosecution and trial become entrenched in meaning systems as 'not real'.

A Canadian study conducted by DuMont and Myhr (2000, p. 1132) found that some cases which appeared strong from an evidentiary perspective did not reach the trial stage, while others did. According to Du Mont and Myhr (2000), this discrepancy was due mainly to discretion by the police and prosecutors, as they often reflected negative stereotypes that were unfavourable to victims. The exercise of such discretion would therefore seem to have a significant negative impact on case progression and outcomes. This finding was supported by Spears and Spohn (1997, p. 521) who concluded that rather than decisions being influenced by the available evidence and the serious nature of the offence, decisions appeared to be predicated on a range of victim characteristics based on 'rape relevant behaviour'.

Other research conducted by Jordan (2004) examined data gathered from 146 police sexual assault files (including some relating to victims with intellectual disabilities and mental illness) from three major cities in New Zealand. In addition, drawing upon data collected from interviews conducted with victims without cognitive impairments and with detectives, Jordan (2004) revealed that the use of discretion by police was quite subjective. Jordan (2004) notes that each police officer was different in how he/she interpreted information. Belief and credibility were central to police perceptions of rape victims. Police officers drew on stereotypes when making an assessment about a complainant's credibility, or, in other words when deciding whether his/her version of events was perceived as true or false. This was particularly true in rape cases where, as discussed, rape was intertwined with cultural myths and stereotypes (Jordan, 2004).

In a summary of the case files analysis, Jordan (2004) asserted that “[there is] a dominant mind set of suspicion underlying police responses to reports” (Jordan, 2004, p.135). Her analysis revealed that police consider, and were influenced by, a range of factors in relation to a victim’s credibility, she stated:

Police may become in effect the adjudicators, applying their own judgments and interpretations to individual cases. Within this context, factors identified as determinants of complainants’ credibility assume enhanced significance and can result in the premature closure of investigations. (Jordan, 2004, p. 97)

In her concluding comments, Jordan (2004) stated that she was convinced that the historical attitude which has prevailed in relation to the mistrust of women “continues to be evident in police processing of rape complainants” (2004, p. 215). Jordan (2004) also identified that clusters of variables were apparent where police had made a negative assessment about the complainant’s credibility. Factors including whether the complainant was drunk or had had a previous sexual relationship with the perpetrator can be interpreted by police as negative in terms of the victim’s credibility, while factors such as obvious physical injuries and prompt reporting may have caused the police to view the complainant as credible. The claim that physical injuries were a trigger for police to view the victim as credible has been supported by other researchers such as DuMont and Myhr (2000, p. 1129). As Jordan (2004) stated, “the scales of justice apparently sit waiting, into which are placed factors which will either enhance or diminish a victim’s credibility” (p. 135).

A study conducted by Scerra (2008) in which she considered the influence of the cultural constructions of police in their investigations of serial sexual assaults involving young male victims, found that police used “culturally defined labels to form the response to victims of serial sexual assault [and this] was evident from interviews with police” (p. 15). Further, Scerra (2008) found that the same group of victims was characterized differently by police. Characterizations varied and appeared to be influenced by positive stereotypes such as ‘decent kids’, ‘not drug users’ which constructed a view of vulnerability and believability of the victim. Whereas, Scerra (2008) noted that another detective, apparently drawing on broadly held societal perceptions that males cannot be victims of sexual assault, did not believe one victim

to the extent that the victim risked being charged with public mischief. In both examples detectives drew on different cultural stereotypes to inform their view of the believability of the same group of victims, with positive or potentially negative results.

Of particular interest to the current study was research conducted by Spohn, Beichner, Davis-Frenzel and Holleran (2002, p. 12) into the charging decisions of prosecutors from three major cities in the United States. This study was one of a small number of studies that gathered data from multiple geographic sites, thereby enabling the researchers to highlight any variance in prosecutor decision making across sites. The sample consisted of 666 sexual assault files where the victims were aged 12 years and over and where the offenders were 'cleared for arrest' in 1997 and were constituted from three cities: Kansas City 259; Philadelphia 267 and Miami 140. Analysis of data was conducted in a number of ways, including pooling together the data set from all three cities, separately for each jurisdiction, and analysing complainant outcomes of cases involving different types of victim and offender relationships. In addition, the study tested the results of another study conducted by Frohmann (1991) entitled *Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections*.

The findings of the Spohn, Beichner, Davis-Frenzel and Holleran (2002, p. 86) study were numerous. In summary, these researchers found that over half the cases did not reach prosecution and that questions about the credibility of victims were present in a 'substantial number' of rejected cases. In particular, these researchers found that securing convictions was the primary concern of prosecutors and judges, and as such, decisions were based on reducing uncertainty of victim credibility in order to improve case outcome. Further, questions regarding uncertainty focused on victim credibility in particular the "victim's moral character and behaviour at the time of the incident [and these cases] are more likely to be rejected" (Spohn et al., 2002, p. 86). This finding caused these researchers to conclude that the 'focal concerns' of charging decisions are different in sexual assault cases compared with other crimes. Of particular interest to the current study was that Spohn Beichner, Davis-Frenzel and Holleran (2002) found few differences between prosecutor decisions across the geographic locations, indicating that, although prosecutors were bound by similar

prosecutorial guidelines, the similarities in charging decisions suggest that broad cultural understandings of what constituted ‘genuine rape victim behaviour’ may also have been influential.

Discretion Applied in Sexual Assault Reports made by Adult Victims with Cognitive Impairment

The main focus of discretionary decision making in the current study related to decisions at police level about whether a report of sexual assault was ejected from or progressed through the legal system. As mentioned earlier, one of the main criteria which prosecutors or police investigators must satisfy was the ‘likelihood of success’ (Albonetti, 1986; Bryden & Lengnick, 1997; Criminal Justice Sexual Offences Taskforce, 2005). In assessing the likelihood of success, in effect police, then prosecutors, are required to draw conclusions about the outcome of the case at trial, which, in the case of the justice system in Victoria, may not occur until a year after the initial report. According to Albonetti (1986), who conducted research into police investigations of a range of felony cases including, but not limited to, sexual assault, decisions made at this point were based mainly on the likelihood of success at trial, which equated to ‘reducing uncertainty’.

The role of prosecutorial discretion in criminal matters required decisions being made about the ‘assignment of criminality’ to defendants. Conversely, one could argue, in sexual assault cases, the police and prosecutors were in effect required to assign ‘credibility’ to the victim and his or her story. Police and prosecutors assessed whether he or she was a genuine victim.

There were several researchers, the most notable of whom are McCarthy and Thompson (1997; 1991), Sobsey and Doe (1993), Turk and Brown (2000), Jeary (2004) and Teaster, Roberto, Duke and Kim (2000), who, in their studies of sexual assault perpetrated against adult victims with cognitive impairment, had discussed the outcomes of reports made to police by this group. There was an absence of research which examined the progress of reports of sexual assault made to police by adult victims with cognitive impairment through the justice system. Indeed, this gap in the literature has been identified by Lea, Lanvers and Shaw (2003) who suggested that

research into attrition of cases involving vulnerable witnesses should be conducted, as it was an area which is under researched. Notwithstanding this gap in the available literature there were, however, a handful of studies which included cases involving victims with cognitive impairment in general studies of attrition of sexual assault cases (Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003; Triggs et al., 2009).

Of those researchers who have included cases involving adult complainants with cognitive impairment in their sample, all were in agreement that attrition of reports made by adults with cognitive impairment may be overly influenced by negative police perceptions about this group of complainants, particularly in relation to reliability and credibility. This view of adult complainants with cognitive impairments appeared to be shared by law enforcement agencies in other Australian states (New South Wales Law Reform Commission, 1994) and indeed other parts of the world, as it has been raised as an issue of concern by researchers in New Zealand (Jordan, 2004, p. 100), United Kingdom (Harris & Grace, 1999, pp. 23 & 49; Lea et al., 2003, p. 594) and South Africa (Dickman & Roux, 2005) and in many other jurisdictions. These researchers had asserted that, in the majority of cases involving victims with cognitive impairment, either intellectual or psychiatric disability, disbelief by investigators was a major issue (Harris & Grace, 1999; Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003).

The following quote from Heenan and Murray (2006) while specifically relating to the outcome for victims with psychiatric disability, was illustrative of the effect that police views of the credibility of adult victims with cognitive impairment can have on case outcomes for this group of victims.

The most significant difference in cases involving victims with a psychiatric disability compared to the overall sample appears to be amongst Police members' views of the allegations. CIU members expressed some degree of disbelief in over 40 percent of the cases (compared to 20.6 percent in the wider sample) and were confident that the allegations were false in 15.4 percent of cases (compared to 9 percent in the wider sample). (Heenan & Murray, 2006, p. 34)

Research conducted by Jordan (2004) included cases in which, victims were intellectually impaired (16) and/or 'psychiatrically disturbed' (30). Jordan's analysis revealed that, of the complainants who were intellectually impaired, three were considered genuine, five possibly true – possibly false, seven were viewed as false, and one in which the complainant said the allegations were false. Of the complainants who were believed to be psychiatrically disturbed, the majority (18) were seen as false (Jordan, 2004, p. 100). Jordan concluded:

These findings have serious and far reaching implications for organisations such as the police, and draw attention to the need for greater understanding of the power, control and dependency dimensions associated with disability. A tendency in the police to view intellectual or psychiatric impairment as factors which reduce the 'truth' value of the complainant's testimony can unwittingly benefit sexual predators. (Jordan, 2004, p. 100)

Jordan's (2004) findings in relation to victims with cognitive impairment were consistent with those of Lea, Lanvers and Shaw (2003) who, in the 3% of cases (approximately 13) in their sample which involved victims with cognitive or physical impairments, found that:

The attrition rate appeared very high [with a] number of these cases [being] no-crimes as police felt that the allegation was false or that consensual sex had probably taken place. Problems in communicating with the victim and the possibility that the victim would not be a credible witness led to the remainder being [ejected]. (Lea et al., 2003, p. 594.)

Similarly, findings from a study conducted by Harris and Grace (1999) in the United Kingdom found that, of the 40 cases involving victims with cognitive impairment, "22 were thought to be false allegations and the other 18 [resulted in] no further action" (Harris & Grace, 1999, p. 23). Some of the reasons for ejecting these cases that were provided by police and prosecutor participants included the claims that reports made by complainants were often seen as a "cry for help or attention seeking" (Harris & Grace, 1999, p. 23). The view expressed by participants, that these complainants were repeat reporters, no doubt added to this perception. This view was also detected in Jordan's (2004) analysis of police files involving adult victims with cognitive impairment. Participants in this study stated that, whilst in some cases they did consider that a rape had occurred, some of the cases did not proceed because

participants believed that the consequences of undergoing the ordeal of a trial would be detrimental to the complainant's health.

Conversely, a recent study conducted by Feist, Ashe, Lawrence, McPhee and Wilson (2007), which included people with cognitive impairment as part of the overall sample of 676 cases from eight police areas across England and Wales, concluded that victims with cognitive impairment did not appear to be overly represented in the number of cases which were viewed as false by police.

Clearly, the findings of the studies discussed above provided strong evidence that there was good reason for concern that victims with cognitive impairment appeared not to be treated equitably within the justice system. While the main assertion by researchers appeared to be that reports made by this group of victims were, in the majority, seen as false, investigation of the influences on police decision making with regard to this group of complainants was captured in the work by Harris and Grace (1999) and Lea, Lanvers and Shaw (2003). It was important to note that only the summary report of Heenan and Murray's research (2006) is available at this time because the main report continued to be embargoed by Victoria Police. This situation was regrettable, as the currency of the report, together with the inclusion of reports made by adults with cognitive impairment in the total sample of cases, would have undoubtedly shed light on the issues faced by this cohort of victims in the criminal justice system and would add significant value to research currently being conducted.

Other Factors Influencing Police Discretion

Research that considered the use of police and prosecutor decision making suggested that the decision making process and use of discretion was an attempt to reduce uncertainty and thereby increase the likelihood of a successful prosecution (Albonetti, 1987). Current literature suggested that police opinions were influenced at three levels including broad social forces, which included widely accepted norms and assumptions, their own personal experience, and immersion in police or organisational culture (Corsianos, 2001, 2003). In a well known study Reiner (1992) suggested police culture continued to be reproduced as "successive generations are socialised in to it" (p. 87). Interestingly, Reiner (1992) suggested that while police

were socialised into police culture they were not passive agents; rather, they were willing learners and participants. Another perspective was offered by Eastal (2001, p. 8) as an explanation of how women and women with impairments were viewed by the law including police. Eastal (2001) argued that, 'reality constructions', shaped by our language, experience and knowledge, were informed by our experience within a patriarchal society. In relation to the influential nature of broad social forces on police attitudes, Jordan (2001) also argues that police decision making regarding sexual assault cases was informed by societal views based in patriarchy and, further, that these patriarchal views were manifest in all areas of government. Other literature reviewed in the current study would concur, at least in part, with Jordan's (2004; 2004b) concluding remarks, that negative victim characteristics informed by 'real rape' and 'real rape victim' typification were mediating factors in police discretionary decision making.

Most of the available literature focused on police and prosecutor decisions in sexual assault cases in relation to supporting or not supporting the hypothesis. With the exception of Jordan (2004), Gregory and Lees (1999), Eastal (2001), Scerra (2008) and Heenan and Ross (1995), there was little discussion of the direct effect of broader social forces, which had also influenced police and prosecutor discretionary decisions. In the main, researchers who have considered the role of discretion on police or prosecutor decision making have focused on decisions other than those involving sexual assault cases and discretion applied by 'regular' members of the police force.

Police Organisation and Culture

Some researchers viewed the influence of police organisational structure on police discretion differently. For example, in examining the 'uncertainty avoidance hypothesis' in 4, 248 felony (not solely sexual assault) cases considered by prosecutors in the United States, Alboneti (1987, p. 640) concluded that prosecutors were similar to decision makers in other organisations, in that career enhancement and advancement were significant motivating factors.

Other researchers such as Corsianos (2003) and Chan (1997, p. 44) described the police organisation as para-militaristic, embracing a hierarchical structure, which used

power as the means of enforcing and reinforcing uniformity inherent in police culture, even in decision making. Hence, Corsianos (2003) argued that officers have two options when making a decision, either follow the direction from their superior or challenge the position of power. Other researchers including Jordan (2001) and Gregory and Lees (1999) identified however, that perceptions of women based on patriarchy, as evidenced in women's roles within the police force, indirectly informed police decision making.

In addition to the patriarchal perceptions informing police decision making, Goldsmith (1990) suggested that police had two sets of rules. These included the 'external' rules, meaning the legislation that police are meant to enforce and the 'internal' rules, which police do work to, resulting for example in the lack of implementation, of either legislation or internal policies. Goldsmith (1990) suggested that police had an internal social order, which was much more powerful in terms of influencing work practice than the rule of law. Indeed, Goldsmith (1990, p. 94) observed that "[t]he action perspective of police 'crime fighter' is readily frustrated by imposed rules and procedures seen as unwarranted impediments to effective law enforcement". This was further supported by Rowe (2007), who suggested police felt a level of frustration imposed on them by regulation, which limited their ability to use their judgment, further supported this. Therefore, this suggested a considerable level of police discretion and an acknowledgment that police culture was a particularly powerful influence on police decisions about their practice.

Other authors (Council of State Governments Justice Center, 2007) suggested that other influences, including for example, stereotypes of people with mental illness, determined the law enforcement response to victims. Chan (1997), who suggested that although police culture was a reflection of society, it provided a unique environment in which discriminatory views were fostered and that stereotypes, and indeed prejudices influenced police decision making.

Another factor that may also influence how police use discretion was the availability of resources. Early research into police discretionary decisions conducted by Goldstein (1964), suggested that two variables which influenced police discretion, are the resources available for police at any given time and legislative ambiguity.

Goldstein argued that there were inadequate police resources at all levels of the police force to investigate all crimes. Hence, decisions at police level were made in relation to which cases resources were allocated. Legislative ambiguity suggested Goldstein (1964), gives police, particularly street level police, greater flexibility and discretion in determining how, when and to what extent the police officer should enforce the law.

It was clear that much of the literature sought to better understand police decision making in sexual assault cases from the perspective of the influence of moral and gender stereotypes. There was much discussion in the literature that considered, the law from a feminist perspective, and as such considered the role of patriarchal law and police culture in the area of sexual assault. There is also a small but growing voice in the area of police decision making in sexual assault cases, which identified or considers the effect of broader cultural, organisational culture and other situational factors, which may have influenced police decision making and consequently case outcomes directly or indirectly in sexual offence cases. There were no known studies which considered the influence of broader social forces on police decision making in relation to adult sexual assault victims with cognitive impairment.

Summary/Conclusion

Researchers agreed that the law marginalised adults with cognitive impairment. Adults with cognitive impairment as victims were subsumed by the justice system: they sat on the edge of the justice system with limited access. Further, there was agreement that decisions made at either police or prosecutor level were based on a combination of substantive law and discretionary elements. There was no consensus among researchers about the extent to which discretionary elements impacted on case outcomes. It was clear, according to the majority of researchers, that discretion was applied in sexual assault cases with often negative consequences to the victim and case progression. There is also agreement amongst researchers of police culture who concluded that the police organisation was a microcosm of society. Further, researchers suggested that whilst police members held prejudicial views of various groups, these views may have gone unchallenged, but furthermore, the police organisation may have provided opportunities for the negative perceptions to foster.

Although there were a growing number of studies that considered police responses to sexual assault complainants and subsequent decision making, there was no study known to the researcher that solely examined the process of police decision making and outcomes of sexual assault reports in relation to adult complainants with cognitive impairment. Further, there was no known research which considered the social, structural and organisational influences on discretionary decision making in sexual assault cases involving adult victims with cognitive impairment.

The aim of this current study was to contribute to knowledge in the area of research concerning sexual assault and adult complainants with cognitive impairment by building on existing knowledge in this area. In particular, the current study builds on the research conducted by Jordan (2001; 2004), Lea et al., (2003) and Harris and Grace (1999) who all found that complainants with cognitive impairment were most likely to have their reports viewed as false by police, resulting in the ejection of the report from the justice system. In addition to the study by Heenan and Murray (2006) who found that reports made by complainants with psychiatric disabilities were less likely to proceed to charge. In addition, the current study sought to build on the work conducted Eastaill (2001) by increasing the evidence base in relation to understanding of the range of broader cultural influences on police perceptions of victims of sexual assault who have cognitive impairment.

Other important features of the current study that distinguished it from other studies were the combination of data gathering methods, including identifying case files relating to sexual assault reports made over a two-year period to five police stations across Victoria by victims of sexual assault with cognitive impairment. In addition, data gathered from focus group interviews with five distinct groups including advocates, Victoria Police members (Sexual Offences and Child Abuse Unit, Criminal Investigation Unit and Sex Crimes Squad) and Office of Public Prosecutions and a case study of a successfully prosecuted case. Moreover, the current study builds on existing research by using a triangulation of theoretical perspectives including radical feminist theory, social model of disability, and symbolic interactionism to add depth of understanding to the questions posed.

To reiterate, the question this study sought to respond to were as follows:

Research Questions

Why do reports of sexual assault made to police by adult victims with cognitive impairment seldom progress beyond the investigation stage?

Several sub questions helped to focus the research aim:

- a. What influences police decisions about sexual assault cases involving adult victims with cognitive impairment?
- b. When is discretion applied in police decision making involving reports of sexual assault made by adults with cognitive impairment?
- c. What specific victim/offender or case characteristics influence police decisions and therefore impede or enhance case progression of reports of sexual assault made by adult victims with cognitive impairment?

The following chapter considers the Methodological and Theoretical Intersections adopted in this study. The chapter provides an outline of the epistemological grounding, methodological approach and the three theoretical perspectives, which collectively have informed this study.

Chapter Four: Methodological and Theoretical Intersections

Previous chapters established the boundaries of the research question in addition to providing a context to facilitate a better understanding of the multiplicity of issues that must be considered in relation to the sexual assault of adults with cognitive impairment. This chapter discusses the theoretical and methodological perspectives, which provide the framework for how this research is understood.

The aim of this chapter is threefold. First, to provide an outline of the epistemological grounding for the current study. Second, to provide an overview of the three theoretical perspectives, which collectively have informed this study. Third, to justify and describe the methodological approach used in this research, which in turn has informed the range of methods employed.

The main aim of this study is to better understand why reports of sexual assault made by adult victims with cognitive impairment do not progress through the justice system and to highlight the influences on police decision making and police discretionary decision making. In particular, this study aims to enhance comprehension of the impact of discretion on the trajectory of sexual assault reports made to police by adult victims with cognitive impairment as well as other factors, which may impede or progress reports through the justice system.

What follows is a discussion of the epistemological stance, in this case social constructionism, which underpins this project. This is followed by a discussion of the three theoretical perspectives employed, namely feminist theory, the social model of disability and symbolic interactionism which have informed the analysis of the influences that inform police discretion in decision making.

Epistemology

Epistemology or the theory of how knowledge is developed, and what knowledge is possible, is the foundation on which research designs are built (Crotty, 1998).

Constructionists contend that meaning is constructed and not created and that constructionism brings together objective and subjective reality. Contrary to the objectivist stance, which contends that “things exist as meaningful entities independently of consciousness and experience that they have truth and meaning residing in them as objects” (Crotty, 1998, p. 5), constructionists such as Berger and Luckmann (1984), Blumer (1969) and Mead (1934) contend that reality is constructed through human interaction. In other words, meaning does not exist in objects waiting to be discovered, but rather, an object is given meaning through our interaction with that object (Crotty, 1998, p. 42-52). For example, the site of a recently logged forest carries a very different meaning for a logger or logging company than to an environmentalist. As individuals we construct knowledge and meaning rather than being passive agents (Schwandt, 2000, p. 197).

In addition to the individualistic nature of our interaction, social constructivists argue that not only is meaning derived through our individual interaction with an object, but also we are born into a culture and “therefore inherit a world of significant symbols” (Crotty, 1998, p. 54), which include language, practices, values and beliefs (Schwandt, 2000, p. 197). For example, how our society constructs the notion of what is ‘rape’ and who can be a victim of rape has changed significantly over the last century. These symbols are part of our culture and as such we learn to assign significant meaning to some things and totally ignore other things (Crotty, 1998).

Social constructionism is adopted in this research as a way of understanding discretionary decision making at two levels. The first is to gain greater insight into the multiple factors that inform police discretionary decision making. The second is to illuminate, in particular, the broader cultural forces, which influence police discretionary decisions in their work involving crimes of sexual assault perpetrated against adult victims with cognitive impairment.

Implicit in our understanding of the meaning of the word 'discretion', in relation to police decision making, is that it implies the use of one's own judgement to form an opinion in relation to a problem or issue about which a decision is required. The use of judgement is individualistic and is informed by a vast array of factors. These include societal and organisational enculturation, specific experience, and information to which we are all exposed. Once judgements about certain situations or individuals or groups are made, this experience and that of others, to which we may refer, informs the subsequent situation. As such our realities are simultaneously reinforced, sustained and constantly evolving (Crotty, 1998, p. 55).

For example, we might consider the position of a police officer making a decision about whether to authorise a case involving an adult victim with cognitive impairment. It is feasible to expect that their decision to authorise the case or not will be influenced by the interrelationship of a number of factors. These may include situational factors specific to the case considered, for example, the available evidence and the victim's ability and willingness to proceed. They may include experiential factors that relate to the previous experience of the police officer or his/her colleagues. Finally, they may include systemic factors, which include the outcome of numerous cases that were not successfully prosecuted, or ejected early in the report pathway. The role of broader social forces and police organisation in the enculturation of the individual police officer will also be influential.

As no two individuals are the same, it may be reasonable to contend that the interplay of the range of influences may result in any two people contemplating the same question arriving at different conclusions. However, this may not necessarily be the case, as implicit in the proposition posed above is the notion that the factors which influence police decision making are not necessarily equal in terms of the level of influence on the individual decision maker. Meaning, regardless of how it is constructed, can be applied to objects and groups in society. One such group central to this research is adults with cognitive impairment; hence the notion of disability must be theoretically incorporated.

Social Construction of Disability

The way people with impairments have been viewed by society has changed over time. In a discussion of ‘constructing normalcy’, Davis (1997) argues that as a society we appear obsessed with making constant comparisons in all aspects of our lives to what we consider ‘normal’. Further, Davis (1997) asserts that, in effect, the construction of ‘normalcy’ creates the ‘problem’ of the ‘abnormal’. In other words, ‘normalcy’ is used by our society, through our systems and institutions, as a benchmark against which we are all measured and by which we measure others and ourselves. For example, if someone is missing a limb, the medical profession may consider and label their body as abnormal. Similarly, psychologists or psychiatrists may consider a person’s behaviour abnormal if the behaviour does not conform to what may be considered ‘normal’ standards of behaviour.

Our obsession with normalcy is evident in the history of the eugenics movement in the United States around the early 20th century. Ferri and Connor (2006) suggest that people with disabilities and people of certain races were seen by supporters of white supremacists as inferior and defective and as such should be bred out of society. The past practice of forced sterilization of people of ‘feble-mindedness’ was and some would argue continues (Chenoweth, 1997; Frohmader, 2007; Women With Disabilities Australia, 2000) to be one such strategy (Ferri & Connor, 2006). Indeed, although eugenics as a social movement is largely discussed within a historical context, current debate suggests that the medical profession is still focused on curing or fixing what it considers ‘abnormal’. An example of the contrasting constructions of what constitutes disability is highlighted in the case of members of the deaf community. Whilst the medical profession has and continues to work towards curing deafness, many individuals who use sign as their method of communication, do not see hearing loss, profound or otherwise, as a disability (Levy, 2002).

The construction of disability continues to evolve, yet what might be presumed as historical constructions of disability, remain, and continue to impact negatively on those members of society with disabilities. Critical theorists such as Oliver (1990) assert that society judges an individual’s worth on the basis of their contribution through work (Johnson et al., 1988). Further, the advent of industrialisation has

reduced the opportunity for individuals with impairments to contribute in this way, hence their value or worth to society has deteriorated.

A social constructionist perspective espoused by Rapley (2004) is particularly relevant to this study in understanding how social construction, informed by the medical model of disability, continues to influence how society relates to and views people with cognitive impairment. According to Rapley (2004) broad terms like 'intellectual disability', which have been used as diagnostic terms, can and have been used to identify and justify assumptions of low level intelligence, incompetence, deviance and distorted morality. Indeed, Rapley (2004) suggests that these views have and continue to be perpetuated by psychologists and are based on flawed or inappropriate diagnostic tools (Ferri & Connor, 2006, p. 29).

The language which has emanated from the medical profession through diagnostic assessments continues to linger (Rapley, 2004). Of particular interest in the data analysis phase of this research is the highlighting of language used by participants, in articulating their experiences of working directly with, or on cases which involve people with cognitive impairment. The aim is to discern what the language of participants can tell us about how disability is constructed, and whether there is any evidence of shared meaning and understanding amongst participants.

Theoretical Intersections

A range of theoretical perspectives or models provides a range of different understandings of the research question/s. Not all research fits neatly into, or can be understood through, the application of one theoretical perspective. The interrelationship of the multiple foci of this study, namely the legal system, disability and gender, combine to invoke an inherent complexity, which benefit from a theoretical triangulation approach. Theoretical triangulation adds depth to the analysis of data by using multiple theoretical perspectives to interpret the same data sets (Begley, 1996; Janesick, 1994). Essentially, theoretical triangulation provides the opportunity to consider the data from three quite distinct perspectives. Each perspective contributes to a broader and more in depth understanding of the research question.

Understanding police decision making is inherently complex: there are a variety of theoretical perspectives which could inform our understanding of the factors which inform decision making. In this research, three theoretical approaches or models have particularly informed the analysis. They are symbolic interactionism, the social model of disability and Radical Feminism. The following discussion will provide an overview of each theoretical position as well as describing how each perspective complements each other and brings a unique flavour in informing the socially critical, interpretivist perspective adopted in the research.

Symbolic Interactionism

Symbolic interactionism is a term first coined by Herbert Blumer (1969). Through his work as a Social Psychologist, Blumer built on the work of George Mead from whose thoughts symbolic interactionism developed. Blumer, as a student of Mead's, sought to further develop a 'methodological position' (Blumer, 1969, p.1) that he identified as lacking in Mead's original approach. The focus of symbolic interactionism is "the study of human group life and human conduct" (Blumer, 1969, p.1). Symbolic interactionism is a theoretical position that presupposes society is an ongoing process of interactions in which people continually learn to act and respond to situations, mindful of the meanings they and others give to those situations. How meaning is constructed in our interaction with other people on a daily basis relies on how we, as individuals, interpret those interactions.

According to Blumer (1969), symbolic interactionism is based on three premises. Each premise relates to three levels of meaning from the macro to the micro or the individual interpretation level. Central to the first premise and pivotal to symbolic interactionism is the idea that meaning is not only the product of various influential or causative factors, but rather, all of us act toward objects (including physical, social, institutional and humans) based on the inherited meaning each object has for us and our society or group.

Secondly, the meanings we ascribe to 'objects' are a result of our social interaction. Hence, meaning is constructed through the interactions between and among people. How we react to objects is informed and confirmed by our interaction with others. For

example, someone who holds the door open for another person to walk through begins a sequence of expectations and corresponding behaviours. The person holding the door open is signalling their intention to the person to whom the gesture is directed. The person to whom the gesture is directed interprets the intention and responds. The interaction is based on shared understanding of what the gesture signifies in terms of the intention and response. It is at the point of shared understanding that interaction takes place.

The third premise refers to the interpretive process by the actor (individual), which occurs when objects are encountered. Blumer (1969) described the interpretive process as the “formative process in which meanings are used and revised as instruments for the guidance and formation of action” (p. 5). There are two distinct steps, which occur when the interpretive process begins. The first referred to by Blumer (1969), is self-interaction, whereby the individual who encounters the object begins a process of communication with themselves. The second step is referred to by Blumer (1969) as “handling the meaning” (p. 5). It is at this point that the interpretive part of the process begins, including the assessment and revision of meaning which then leads to action.

According to social constructionists Berger and Luckmann (1984), the use of language in our day to day interactions, “is the most important sign system of human society” (p. 51). Further, while the use of language reflects or ‘typifies’ our personal experience, the language we use becomes ‘anonymized’ (Berger & Luckmann, 1984, p. 53) in that the use of certain words, for example ‘disability’, are understood by most members of a particular society to have certain shared meanings.

This thesis is interested in how police interact and interpret their interactions with people with cognitive impairment who are also victims of sexual assault. Of specific interest is how these interpretations are expressed as constructions through both written and spoken language. Certainly, the use of research methods (described in more depth in the following chapter) such as focus groups, interviews and analysis of extant files, provide the vehicles through which language can be analysed in order to highlight factors which influence police discretionary decision making.

How police ‘construct’ people with cognitive impairment and how these constructions influence police discretionary decision making is of particular relevance to this study. The literature supports that how the police response to victims, particularly in the initial meeting, can determine the relationship for the entire investigation (Jordan, 2004). The initial interaction can also strongly influence whether the allegation is acted on. Indeed, some cases of sexual assault proceed no further than the initial interaction because the police officer decides, for various reasons, that it is not worthwhile taking a statement from the victim (Kerstetter, 1990).

In situations where a statement is recorded, the nature of the interaction between police and victim can still have significant consequences for the progress of the report. In assisting the victim to tell their story fully, the police officer will structure questions in a certain way. This can be based on procedural guidelines with which police are expected to comply, or the officer’s own perceptions of the ability of the victim (Jordan, 2004). How the victim is encouraged to tell their story, and how clearly the story is told, will have a significant impact on the progress or otherwise of the case through the justice system. The success or otherwise of this stage will be determined in part by the perception of the police officer who is taking the statement.

Further, the justice system is such that each preceding stage informs the next, from first report to trial. Information entered into the Law Enforcement Administration Program (LEAP) data base, to the extent that Symbolic Interactionists are correct about the importance of social interactions in creating shared meanings, is likely to reflect the cultural reality and understanding of the individual recording the information. Crotty (1998) refers to ‘inherited understandings’ or ‘sedimentation’ as when the “[l]ayers of interpretation get placed one upon another like levels of mineral deposits in the formation of a rock” (p. 59). In this statement, Crotty (1998) was referring to and indeed warning researchers, to engage with the world realities, rather than “building on theoretical deposits already in place” (p. 59). Equally, the visual image of ‘sediment layers’ could also be used in this research to describe the layers and stages of decision making, inherent within the usual report pathway, each decision influencing subsequent decision makers.

Another concept that is extremely important to this study centres on the concept of disability. The following discussion highlights the complexities represented by the divergent views which continue to be debated in the disability field.

Constructs of Disability

For at least two centuries, the dominant paradigm through which western societies constructed and thereby understood disability is through the lens of the medical model of disability (Llewellyn & Hogan, 2000, p. 158).

The medical model views disability as a feature of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals. Disability, on this model, calls for medical or other treatment or intervention, to “correct” the problem with the individual. (World Health Organisation, 2002, p. 8)

Also referred to as the individual model, the medical model pathologises disability and in so doing individualises disability as the ‘problem’ or ‘tragedy’ of the individual upon whose experience society has no bearing other than to find ways of curing or to bring people closer to what is considered a state of normalcy.

Criticisms of the medical model have developed since the late seventies (Donoghue, 2003) in the United States and the United Kingdom and more recently in Australia. Central to the criticisms of the medical model is its focus on the individual impairment as a deficit and as the main cause of disability. The medical model of disability is firmly based in the functionalist paradigm espoused by Parsons (1951). The position of health and illness advanced by functionalists is that society is in balance when we fulfil our respective roles. The role of the medical profession is to cure or fix and the role of the person who is not in good health, is to get well.

There are a number of assumptions associated with this approach. First of these is that a person with impairment is not well nor do they reflect the “able-bodied ideal” (Barnes, 1996, p. 43) and as such has a responsibility to work towards curing or minimising the physical or biological effects of their impairment. A further assumption is that society’s systems and structures are established based on the ‘able

body' or normalcy ideal. As such, the 'problem' of disability rests with the disabled individual, requiring the person with the impairment to make the adjustment in order to participate in society. The consequence for individuals, who cannot make the necessary adjustments, is greatly restricted lives leading to enforced isolation. Restricting people's participation in society in itself is a form of oppression (Morris, 1996) and reflects a systemic prejudice reminiscent of how other people of difference, for example indigenous communities, were and continue to be excluded, albeit in different ways and for different reasons. The medical model of disability has so dominated our cultural perceptions of disability in western society that a shared, largely negative, construct has developed. The results, as Blumer (1969) suggests, are shared symbols of disability.

In contrast, the social model of disability considers that people with impairments are oppressed and disabled by society. As such, the focus of the social model of disability is on the structures, which restrict, deny, and perpetuate [dis]ability. Effectively, the social model of disability provides a new lens through which we can reorientate our view of disability, from individual deficit to shared responsibility.

The social model of disability draws a distinction between impairment and disability. Disability, from the social model perspective is defined below. By contrast the impairment is defined as "the functional limitations within the individual caused by physical, mental or sensory impairment (Thomas, 1999, p. 15).

The disadvantage or restrictions of activity caused by contemporary social organisation which takes little or not account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. (Thomas, 1999, p. 15)

As the distinction between impairment and disability and more specifically, the definition of disability used by social modelists indicates, the social model of disability focuses on the intersection between the person's impairment and what is seen as the disabling effects of society (Chappell, Goodley, & Lawthom, 2001; Oliver, 1990; Thomas, 2004). Thomas and Corker (2002) describe the underpinning concept of the social model as:

The formulation that disability is the active purposive social exclusion and disadvantaging of people with impairment, resides in its redefinition of disability as a social rationale as opposed to a biologically determined phenomenon. (Thomas & Corker, 2002, p.18)

In other words, the position of social modelists is that disability is not the result of individual pathology, but rather the result of social and structural barriers, which exclude people with impairments from participating fully in society.

According to Oliver (1990) the meaning of the term disability, like meanings given to other objects, is a social construct. Once a definition is socially constructed and widely accepted within society, people will tend to orientate their behaviour to a person with an impairment, so as to be congruent with the definition (Oliver, 1990, p. 2). What Oliver refers to is the existence of a socially constructed shared symbol, which constructs people with impairments in a particular way, usually negatively. Hence, this shared view informs our interaction with and perception of people with impairments.

Further, Oliver (1990) argues that the way someone experiences disability will greatly depend on the kind of society in which they live, a view also supported by Davis (1997). How society's structures and systems relate to people with impairments, is central to the social model of disability, particularly in terms of providing opportunity for insight into the enabling or disabling affect of society's systems and structures. The social model of disability is not without its critics however.

There are at least four criticisms of the social model of disability identified by various activists and academics. One criticism relates to the focus of the Social model of disability being primarily on people with physical disabilities (Thomas & Corker, 2002, p. 20), thereby under representing or effectively excluding the position of people with other impairment forms (Thomas, 1999, p. 25). This may be due to the origins of the social model, as it was developed by activists with physical impairments who collectively formed the Union of the Physically Impaired Against Segregation (UPIAS) (Shakespeare & Watson, 2001). However, Oliver (1990) refutes the claim that the social model of disability ignores the experience of people with cognitive

impairments, suggesting that the social model of disability is based on “the collective experience of disablement” (p. 2), and is not about individuals per se.

Further, other critics suggest that the social model neglects the impact of the impairment on the lives of individuals, that is that there are limitations associated with the specific impairment, which can make participation in certain activities extremely difficult, if not impossible (Shakespeare & Watson, 2001, p. 15). In addition, the social model of disability is challenged for emphasising the commonalities experienced by people with impairments rather than also considering the impact of areas of difference such as gender, race, and sexual orientation (Garland-Thomson, 2005). The final criticism identified is that the social model of disability has ignored the role of culture in the oppression of people with impairments (Barnes, 1996). According to Barnes (1996, p. 57), “cultural oppression of people with impairments can be traced back to the very foundations of western society”, and as such the role of culture in disabling individuals should not be ignored. Morris (1991) expands on the impact of western culture on how disability is represented and perceived. Morris (1991) suggests that western culture invalidates the experience of disability through the conspicuous absence of people with disabilities in the mainstream media and the portrayal of disability as the focus of charity or an indication of someone being struck by tragedy. Further, the concepts of disability commonly used such as ‘intellectual disability’ are used as broad categories to refer to people with disabilities as groups rather than as individuals (Harris, 1995).

By way of counteracting criticisms of the social model of disability, Thomas (1999) argues that the individual experiences of disability have not been ignored by the social model, but rather, are not explicitly stated. Hence, Thomas puts forward a revised or more clearly stated definition of disability, which she refers to as the social relational definition of disability: “Disability is a form of social oppression involving the social imposition of restrictions of activity on people with impairments and the socially engendered undermining of their psycho-emotional well-being” (Thomas, 1999, p. 156)

This definition acknowledges and distinguishes two pivotal aspects, which when combined compound the experience of individuals with impairments and the effects

of a disabling social environment. Foremost, the social relational definition of disability acknowledges that there are tangible physical, mental, or emotional effects of impairment on the individual, but also notes that these experiences are further defined and amplified by a society which does not provide opportunity for full and equal participation to people with impairments as full participating members.

Despite these criticisms of the social model of disability, for the purpose of this study the model provides a unique vehicle from which to gain further insight into how the structures of our justice system respond to adults with cognitive impairment who are victims of sexual assault. Other theoretical perspectives employed in this study provide opportunities for the cultural and gender perspectives to be explored and considered as well as to add depth to the analysis. Notwithstanding the application of other theoretical perspectives, which enhance the analysis, this study considers the criticisms of the social model of disability as demonstrative of rigorous debate (Shakespeare & Watson, 1997), which in itself makes the social model dynamic and demonstrative of the evolving process from “interpretation” (Finkelstein, 2001) to “model” (Oliver, 1990) to ‘theory’.

The social model of disability has significance for the current study in ways which are not evident in other theories. For example, critical theory does not recognise disability as a category of difference, and as such does not acknowledge that whilst, for example, people with disabilities experience high levels of unemployment, the reasons why this is the case are different to those of other minority groups. There are specific issues and experiences with which people with disabilities are confronted, which are different to race, class, or gender and which deserve attention from researchers. A specific aspect of the current study to which the social model of disability will be applied, is to gain insight into the extent to which the cultural constructs of disability have influenced police discretionary decision making in relation to reports made by adults victims of sexual assault. The study also seeks to question how the social model of disability may provide further insight into the possible structural impediments which play a role in restricting, or indeed excluding, this group of victims from accessing the justice system and consequently justice.

In addition to the insights provided by the social model of disability, feminist theory also provides an additional lens through which the problem of what informs police discretionary decision making can be understood and analysed.

Feminist Analysis

The meanings constructed as relevant to individual sexual assault cases and their progress or otherwise through the justice system, can be determined to some degree, by which lens decision makers look through when applying discretion.

Gender is particularly influential in how society is viewed, and how individuals are viewed by society. As Weedon (1999) asserts, “in contemporary capitalist societies power is central to the production of difference as both oppressive and hierarchical” (vii). The foci central to this study, namely sexual assault, adults with cognitive impairment and police decision making, encompass the sentiments of Weedon’s statement. Sexual assault is demonstrative of the expression of one person’s power over another. In addition, sexual assault is an example of the powerlessness experienced by women generally and by males with disabilities within society and as victims of crime seeking justice within a hierarchical and male dominated organisation and patriarchal legal system.

What follows is a description and defence of the reason underpinning the choice of a gendered analysis as one of the three theoretical perspectives applied to this research. This study also seeks to clarify that whilst a gendered analysis is being applied, it does so on the basis that sexual assault is predominantly a crime perpetrated on women by men. This study acknowledges that males, in particular males with cognitive impairment, are also victims of sexual assault. Like women, men with cognitive impairment, are rendered more vulnerable because of their impairment, by a society which also views them as subordinate and, as such, renders them powerless. Whilst feminism, broadly speaking, is concerned with highlighting and addressing deeply embedded gender inequalities and oppression, this does not mean that its focus is solely on the experiences of women. Cummerton (1986) in discussing the focus of feminist research suggests that:

[a]ny analysis of the oppression of women must involve research on the part played by men and by the interactions of women and men in it. Similarly, analysis of oppression based on race, sexual preference, age, or any other basis of discrimination must look at the oppressors and the oppressed and the interaction between them. (Cummerton, 1986, p. 88)

Within the context of this research, adult men with cognitive impairment are seen as being oppressed and, as such, the discussion concerning the gender analysis includes the experience of male victims of sexual assault. However, the researcher reiterates that women continue to be overly represented as victims of these crimes and, like males, women are rendered more vulnerable to sexual assault because of their impairment. As women with disabilities, their vulnerability and experience of oppression is compounded because of their gender (Chenoweth, 1997; Hague et al., 2008; Jennings, 2003).

In finding my own place within the range of Feminist perspectives, this study draws on the work of many feminists including, but not limited to Jocelyn Scutt (1997), Catherine MacKinnon (1987), Chris Weedon (1999), Lois McNay (2000), Patricia Easteal (1994;1998), Jan Jordan (2001;2002a;2004), Carol Smart (1995)and Sylvia Walby (1990). In addition, I have also drawn on the writing of feminists who have focused on the intersections of disability within the feminist movement and the experience of disabled women. These include Carol Thomas (1999), Jenny Morris (1991; 1993; 1996), Lesley Chenoweth (1993; 1997; 1999), Barbara Waxman Fiduccia (1991) and Rosemarie Garland-Thomson (2001; 2005). Feminism as a theoretical perspective provides a lens through which to gain greater insight and an alternative perspective into how police respond to difference, and how that response is manifested in their decision making.

Feminism can be described as a social and political movement, which aims to highlight and make visible what have previously been the invisible structural and social determinants that result in women and girls being treated differently because of their gender. Feminism and feminist theories provide ways of highlighting, explaining, and understanding the difference that gender creates in the lives of women. However, whilst commonality amongst diverse feminist approaches is

apparent within the broad umbrella of feminism, there are significant differences in how the source or reasons for the inequities experienced by women are understood.

There is a diverse range of feminist theoretical perspectives which have emerged in western society through three major waves of feminist activism (Weedon, 1999). Radical feminist analysis is one perspective, which began during what is referred to as the second wave feminism (MacKinnon, 1987; Weedon, 1999, p. 19). Radical feminism stemmed from the civil rights and anti Vietnam War movements. Radical feminism understands male dominated systems, known as patriarchy, as the basis of women's oppression in society. Rather than being an analysis based on class or race, radical feminism sees the subordination of women as being evident throughout history and across different civilisations (Weedon, 1999, p. 20, 26-35).

Feminists, in particular Radical Feminists, have argued that society is constructed and organised into gender hierarchy and often understood through a patriarchal lens. Radical feminism, states Walby (1990), can be distinguished from other feminist streams by "its analysis of gender inequality in which men as a group dominate women as a group and are the main beneficiaries of the subordination of women" (p. 3). The gender inequality to which Walby (1990) refers, is not one which has emerged from any specific political system, but rather one which forms the basis of how males have historically viewed their position in society and by which they view all others, namely women, children and, in the case of this research, people with disabilities as subordinate. This ideology of assumed dominance is evidenced in male dominated domains including the justice system and medicine (Scutt, 1997).

The construction of laws reflects the attitudes and societal structure of the time in which they are developed. In western society, laws were and continue to be constructed by those in dominant positions in society, namely by white middle and upper class men. The cultural, political and economic context within which many of our laws was developed, viewed women and people with disabilities as different, as subordinate and as dependent on males for their existence. Hence, the way the law sees women, mirrors society's view of women and people with disabilities at the time during which the laws were developed (Easteal, 2001; MacKinnon, 1987). Easteal (2001) uses the metaphor of a kaleidoscope to describe the 'reality constructs' of

knowledge, language and experience, which are informed by patriarchy and collectively inform how the law views women generally and women with cognitive impairments. In describing the place of women in the law Eastal (2001, p. 135) suggests that the “constructed kaleidoscope (of reality) [come] crashing into the [sexual assault] victim”. By this Eastal (2001) is referring to how women are viewed by society and despite reform the scales of justice have not been tilted in favour of the victim.

Whilst there have been a number of attempts to reform sexual assault laws and procedures in Victoria (Victorian Law Reform Commission, 2001), feminist research suggests many of the gendered stereotypes associated with sexual assault and sexual assault victims still permeate through society more broadly. Further, gendered stereotypes are reflected in the justice system’s response to this crime and its victims. Radical feminist theory can help inform our understanding of the stereotypes applied to sexual assault and sexual assault victims and the influence of these stereotypes on decisions made by police.

Radical feminism affords the most congruency with this research and represents the final analytical point of the theoretical triangle, to be brought together through the triangulation process. The researcher is aware that the perspective offered by radical feminists is not one currently favoured by all feminists. This is based predominantly on the notion that radical feminism fails to acknowledge areas of difference such as race and class, and that radical feminism continues to view patriarchal structures as the main cause for women’s inequality and continued subordination. There are suggestions, however, that radical feminism has served its purpose, and as such is discussed in terms of its place in feminist history (Caine, 1995).

A preferred feminist perspective, which is said to more accurately reflect the current position of women in society, is that of post structural feminism. The focus of post structural feminism is often how women have used their own negotiated agency and strategies to achieve greater power and equity. Another significant contribution of the post structuralist approach is to refrain from treating all women as one homogenous category, and to recognise therefore that sexuality, race and class make a difference to the lived experience of women. The insight offered by the post structural perspective

is valuable. However, in the area of sexual assault and the law there are strong grounds for the continuing heuristic value of thinking theoretically about women as a category suffering inequality, albeit recognising the particular vulnerability of women with cognitive impairment.

The stance adopted in the current study is that which is espoused by Walby (1990) who suggests that the notion of women and the progress of women's position in society should be separated, and that concurrent with the changes in the position of women are new forms of inequality. Whilst some forms of patriarchy have diminished, others have increased. Walby (1990, p. 1) provides a strong and persuasive argument that the "concept of patriarchy' is indispensable for an analysis of gender inequality". Walby (1990, p. 20) has reconceptualised patriarchy into six distinct structures all of which affect each other by "reinforcing and blocking".

According to Walby (1990), the six patriarchal structures that operate in the public or the private domain include firstly, production relations, which focus on work done in the home by women. Second is refers to paid work, noting the lower pay and segregation of women in the labour market to jobs traditionally seen as women's roles. The third structure concerns the patriarchal state, where we see the systemic bias towards patriarchal interests in state policies and priorities. The fourth structure refers to male violence and includes individual acts of violence against women, but also includes the condoning of male violence at a broader level. The fifth structure considers the patriarchal relations in sexuality, which enforces heterosexual stereotypes and encompasses the different standards or rules of sexuality that apply to males and women. The sixth structure refers to the patriarchal cultural institutions and includes the often negative and stereotypical representation of women in our institutions, such as education and the media (Walby, 1990).

Walby's (1990) conceptualisation of the six patriarchal structures has resonance for the current study, particularly structures two to six. As Walby states, each structure whether in the public domain, such as cultural institutions or in the private domain, such as work performed in the home, is separate, but linked through the construction and conceptualisation of women and women's roles. In relation to sexual assault, it is clear that despite years of reforms to sexual offences laws in Victoria, decisions in the

justice system continue to be made based on myths and stereotypes of rape and rape victims (Heenan & Murray, 2006). These myths and stereotypes continue to be reflected in broader society (Easteal, 2001; VicHealth, 2006). Inherent in our construction of what constitutes 'real' rape and 'real' rape victims, is our construction of gender roles. As Smart (1995) argues, our laws are based on male constructions of gender to the exclusion or disqualifications of alternative constructions. This is particularly magnified in the area of sexual assault law, which until recently has struggled or even failed to acknowledge the notion of rape in marriage, perhaps because the very notion that rape could in fact take place within marriage challenged long held assumptions of the role of women within that institution.

Radical feminism has currency in understanding how we, as a society, view the fundamental role and position of women. In stating this position, this study does not discount the other areas of difference including, but not limited to, race, disability, and social class, and their impacts on women's lives. However, I see the male dominated social construction of femaleness and femininity as the basis against which all women are measured and judged. The areas of difference such as race, disability, and social class remain as elements which further compound the oppression experienced by women in contemporary Australian society.

Certainly, the current study is interested in oppression at two levels. At one level, the study considers the oppression of the sexual assault victim by the perpetrator, which for many victims does not end after the assault. As discussed elsewhere in this thesis, sexual assault is a crime based on power of the perpetrator (oppressor) over the victim (oppressed). In the majority of sexual assault cases, men wield the power over their victims who are most usually women. However, as discussed in chapter two of this thesis, in a considerable number of cases, boys and men with cognitive impairment are also victims. Whilst the literature suggests that the power of perpetrators over their victims can take many forms, in sexual assault cases involving victims with disability, the power of the perpetrator over the victim can take other dimensions influenced greatly by how our society values people with disabilities. Secondly, the systemic oppression of sexual assault victims with cognitive impairment, which, as described by radical feminism and the social model of disability, occurs at a broader societal and institutional level, is also of real relevance to this research. Whilst there are clear

strengths in utilising a triangulation approach in this study, there are also tensions in the use of diametrically opposed theoretical perspectives.

Tensions in Theoretical Triangulation

The theoretical perspectives chosen in this study are at some levels fundamentally opposed in that radical feminism and social model of disability stress the conflict view of social order, where order is maintained by oppression and domination. Symbolic interactionism, in contrast, considers that social order is based on consensus, which is maintained by agreement. Rather than viewing these theoretical perspectives as incompatible with the social construction epistemological stance, the three theoretical approaches of radical feminism, social model of disability, and symbolic interactionism may be seen as complementing each other, with the structural theoretical perspectives seen as a system of constraints in which social construction operates. For the purpose of this study, the social model of disability and radical feminist theory add insight to our knowledge of the structural environment within which reports of sexual assault made to police by adult victims with cognitive impairment are dealt. Symbolic interactionism provides a mechanism through which the cultural influences are identified and understood, particularly as a means of highlighting the role played by the constructed structural environment on facilitating, limiting or indeed, denying access to justice.

Methodology

Primarily, despite the use of a quantitative method to assist in analyses of the case file data, this research is based firmly within a qualitative methodological paradigm. Denzin and Lincoln (2000) describe researchers choosing to work within a qualitative framework as “committed to ... the interpretive understanding of human experience” (2000, p. 7). Further, a qualitative framework is consistent with the epistemological stance (Social Construction) taken in this research in that “[q]ualitative researchers’ stress socially constructed nature of reality... [t]hey seek answers to questions that stress *how* social experience is created and given meaning” (Denzin & Lincoln, 2000, p. 8). In identifying the features of research designed within a qualitative paradigm, Auerbach and Silverman (2003, p. 22-28) suggest the features which differentiate

qualitative research from quantitative. These are that qualitative research investigates the subjective experience of participants by asking participants as experts about their experience. Lastly, qualitative research involves reflexivity by the researcher identifying and acknowledging his or her own subjectivity and values.

A fundamental influence, which determines the direction of any research, is the question the researcher seeks to answer. In the current study the central research question of ascertaining the reasons behind failure of cases to progress leads us to more focused enquiries about the role of discretion and influences on police decision making.

At first glance, the questions may appear to be straightforward, and driven by substantive law largely determined by evidentiary factors pertaining to individual cases of sexual assault. In actuality, the research is more interested in the role of ‘extra legal’ or discretionary considerations, described by Lievore (2004b, p. 11) as “variables [which] are thought to come into play as a result of ideological power struggles and serve to perpetuate existing social stratification systems” (Lievore, 2004b, p. 11). In particular, the current study is concerned with how these factors may influence the pathways of sexual assault cases through the justice system.

It is clear from the literature that the discretionary powers of decision makers throughout the justice system are broad (Jordan, 2004; Lievore, 2004a), and that the concept ‘discretion’, when applied to decision making by police in sexual assault cases, contains subjective elements and therefore will be greatly influenced by the decision makers’ own experiences and values. Certainly, this is a view shared by other researchers including Gregory and Lees (1999), and Jordan (2004), who have argued that the subjective views of decision makers (including police) who are using their discretion in sexual assault cases, are influenced by their own individual experiences, organisational factors, and broader society.

Conclusion

This chapter has demonstrated that the social constructionist understanding of how knowledge is formed is pivotal in developing our understanding of the research

question. Further, it is argued that, as the area of research is complex, a theoretical triangulation is necessary in order to add more depth to our understanding of the one problem. The three theoretical approaches of the social model of disability, radical feminism, and symbolic interactionism provide an opportunity to understand the factors that influence police knowledge and, in particular, whether the factors are systemic, structural and organisational or social in nature.

Further, the study argues that a qualitative methodological approach is best suited to the endeavour of better understanding how individual police officers as decision-makers construct meaning. In particular, it aids the interrogation of how their constructed meanings of disability, sexual assault and sexual assault victims, inform their decision making in sexual assault cases involving adult victims with cognitive impairment.

The following chapter describes in detail the data gathering methods employed in the current study, which collectively bring to the fore aspects of the police decision making process, which to date have been an under researched area of study.

Chapter Five: Methods

Introduction

By providing conceptualisation of the research problem, context, and the theoretical framework, the previous chapters have laid the foundations for an understanding of both the research question and why the research was needed. Specifically, the issue of sexual assault has been discussed using the literature to illustrate the current thinking in this area, particularly in relation to police discretionary decision making. In addition, a detailed discussion was conducted of the prevalence of sexual assault perpetrated against adults with cognitive impairment, and the similarities and differences between such assaults when compared to sexual assaults against adults in the broader community. The previous chapter discussed the multiple theoretical perspectives that have typically been employed in the analysis of sexual assault, through which meaning and understanding are brought to this study. The perspectives discussed so far have guided the choice of methodology and subsequent data collection methods and the analysis tools used in this research.

The aims of this chapter are to describe the broad methodological approach and the methods chosen for this study, and to argue why the specific data collection tools were utilised in preference to other methods. Finally, this chapter will also describe in detail the processes by which data was collected and analysed.

This chapter is divided into four sections. The first considers issues of testing the data validity and reliability. The second focuses on the methods chosen, namely focus groups, case study and documentary analysis of case file data. The third section discusses in detail the tools and process of data analysis. Finally, relevant ethical considerations are discussed in relation to the chosen methods.

Seeking an In-Depth Understanding

In pursuit of an in-depth understanding of the research problem in question, a multi method approach to data collection and analysis was selected (Denzin & Lincoln,

2000, p. 5). According to Rose (2001), there is no one method that can stand out as being better than another method or which more accurately reflects the complete understanding of any research question. The range of methods incorporated within the research design of this study, which included focus groups, multi-source case study, and analysis of case file narratives, facilitated a broad and comprehensive understanding of the main and subsidiary research questions as listed in chapter 1. In addition, the chosen multi-methods presented a unique approach to data collection, in that the combination of all three methods had not, to date, been used concurrently in a single study within this field of research. Table 1 (on the following page) provides an overview of the study design in addition to highlighting generic and study-specific strengths and weaknesses inherent in each method.

The aim of employing a multiple methods approach to data collection was twofold. Primarily, the combination of methods has enhanced and adds depth to the understanding of the research question by bringing a range of perspectives to the shared issue: namely to better understand why reports of sexual assault made by adults with cognitive impairment to police were unlikely to progress beyond the investigation stage. Secondly, the multiple methods enhance data rigour and, consequently, the outcomes.

The following table was developed to provide an overview of the research design, including methods employed to enquire into the main research question and subsidiary questions and the timing of data collection. In addition, the overview provides information about the tools for analysis and also the strengths and weaknesses of each method in relation to and within the parameters of this research project.

Table 1: Design Overview

Research questions	Data Type	Method	Sample/Evidence source	Strengths - research specific	Weaknesses - research specific	Method of Analysis
Phase one						
<p>Questions</p> <p>Why do reports of sexual assault made to police by adult victims with cognitive impairment seldom progress beyond the investigation stage?</p> <ul style="list-style-type: none"> • What influences police decisions about sexual assault cases involving adult victims with cognitive impairment? • What is the role of discretion and when is discretion applied in police decision making involving reports of sexual assault made by adults with cognitive impairment? 	Qualitative	Focus groups	<ul style="list-style-type: none"> • Sexual Offences & Child Abuse Unit (SOCAU x 3: one regional, one outer metro, one metro) • Criminal Investigation Unit (CIU x 3 one regional, one outer metro, one metro) • Combined SOCAU & CIU x 1 (rural) • Sex Crimes Squad (SCS x 1) • Office of Public Prosecutions (OPP x 1) • Advocates (4 groups) 	<ul style="list-style-type: none"> • Provides insight into group decision making • Provides opportunity to identify shared meanings • Provides understanding of participants perspectives on key issues. 	<ul style="list-style-type: none"> • Focus group organised by conduit – subject to variation in recruitment practice • Focus groups with police (SOCAU & CIU) occurred within a short time frame, not allowing time for transcription and analysis before commencement of next focus group discussion 	<ul style="list-style-type: none"> • Thematic analysis • Critical Discourse Analysis
Phase two						
<p>Question</p> <p>What specific victim/offender or case characteristics impede or enhance case progression of reports of sexual assault made by adults victims with cognitive impairment?</p>	Quantitative and Qualitative	Police files	Reports made from January 2005 – December 2006. One rural, two regional, one outer metro and one metro, total 76 files.	<ul style="list-style-type: none"> • Stable – can be retrieved repeatedly • Information not written with possibility of research in mind 	<ul style="list-style-type: none"> • Sample may not represent total number of reports made during that time to those specific SOCAU • May not include reports from victims with dementia 	<ul style="list-style-type: none"> • Thematic Analysis • Critical Discourse Analysis • Statistical and Comparative analysis
Phase three						
<p>Question</p> <p>What influences police decisions about sexual assault cases involving adult victims with cognitive impairment?</p>	Qualitative	Case Study: Individual interviews with victim, advocate & police officer; document analysis	Three individual interviews; case file document; trial transcript	<ul style="list-style-type: none"> • Stable – can be retrieved repeatedly • Information not written with possibility of research in mind 	<ul style="list-style-type: none"> • Interviews: Recall may not be entirely accurate 	<ul style="list-style-type: none"> • Explanation building • Chronology of events • Thematic Analysis

Note: Table 1 has been adapted from Yin (2003, p. 86)

This section provides details of the three data collection methods employed in this study: focus groups, a case study and analysis of case file data. In each subsection the rationale for choosing the particular method and the process of sampling, recruiting and carrying out the research is discussed in detail.

Phase One: Focus Groups

At their most basic, focus groups are usually small groups of individuals brought together to discuss their views and experiences about a specific topic (Litoselliti, 2003, p.1). For the purposes of this research, the definition offered by Madriz (2000) was congruent with the epistemological framing of this enquiry. According to Madriz (2000) “[t]he focus group [is] a collectivistic rather than an individualistic research method that focuses on the multivocality of participants’ attitudes, experiences, and beliefs” (p. 836). By using such an approach, the researcher had opportunities to observe the spontaneous interaction of group members in response to the focus of the discussion and also their interactions, including their body language and verbal responses to comments made by fellow participants (Madriz, 2000).

Why Focus Groups?

There was considerable debate in the qualitative research literature about the benefits or otherwise of using focus groups as a research method. In this research, focus groups were chosen as the most appropriate form of collecting data for a number of reasons. First and foremost, focus groups were appropriate for this study because they provided an opportunity to observe and listen to interactions between members of an existing group (Liamputting & Ezzy, 2005, p. 96). Of particular importance to this study was the opportunity to identify shared meanings, experiences and attitudes of participants to victims of sexual assault, the justice system and the crime sexual assault, in ways which according to Litoselliti (2003) “would not be feasible using other methods such as individual interviews, observation or questionnaires” (p.16).

Secondly, use of focus groups allowed the researcher to immediately identify areas where there was agreement or disagreement. This was particularly the case when group dynamics facilitated an open, cooperative discussion (Cresswell, 1998, p. 124). Thirdly, focus groups, particularly if they were unstructured or semi structured, “provide an

opportunity to obtain large and rich amounts of data in the respondents' own words" (Robson, 2002, pp. 284-285). Fourthly, focus groups provided an opportunity for the researcher to interact with participants and, further, to seek clarification of, and probe more deeply into, specific issues (Stewart & Shandasani, 1990). Conversely, as Madraz (2000, p. 836) argued, the interaction between participants often minimises the involvement of the researcher, adding weight to the information gathered, as it became more representative of the participant views. Finally, focus groups as a research method were often used in conjunction with other methods (Stewart et al., 1990) adding another layer of depth to the research.

The order in which the focus groups were held was particularly important. Each discussion informed the next, creating a 'snowball effect' as it allowed the researcher to follow up issues raised in the first group with subsequent groups. Similarly, each 'cluster' of focus groups, for example those held with advocates, informed the next cluster of interviews with Sexual Offences and Child Abuse Unit (SOCAU) members, which in turn informed discussion with the Criminal Investigation Unit (CIU) and so on.

The number of participants required was another issue that was important when organising focus groups. The size of a focus group can vary, with as few as three (Bloor, Frankland, Thomas, & Robson, 2001, p. 26), four (mini focus groups) (Litoselliti, 2003), and up to a maximum of 12 (Krueger et al., 1994, p. 5). With respect to this study, a decision was made to keep participant numbers between the minimum and maximum levels identified in the literature. Information about the actual numbers of participants who attended each focus group discussion is discussed later in more detail.

Creating an atmosphere conducive to open discussion was a high priority in this research. Whilst the original structure of questions developed for focus groups was adhered to, the structure of asking a list of prepared questions proved to be cumbersome and restricted rather than promoted discussion. Consequently, to encourage a more narrative open style of communication, the second and subsequent focus groups with advocates and police began simply with the first question, 'What factors are taken into consideration when making a decision about whether to proceed or not with an investigation where the victim has cognitive impairment?' The researcher then encouraged continued discussion in an attempt to encourage participants to draw on experiences which had meaning and context

for them (Stewart et al., 1990). When required, the remaining list of questions was used to further understand the research question. However, often the issues of interest covered in the subsidiary questions arose within open dialogue. Questions put to the members of the Office of Public Prosecutions were, in comparison, more directed, and consequently more structured, as discussion could draw on knowledge acquired from previous focus groups with Victoria Police members (see Appendix 1).

All focus groups were audio recorded and verbatim transcripts made for the purpose of analysis using Thematic Analysis and Critical Discourse Analysis. There were several benefits of audio taping focus group discussions or interviews. First, recorded conversations allowed the researcher to re-listen to the recordings, thus improving the quality of the transcriptions. While transcripts are never really, complete or perfect, transcripts represented the closest representation of the dialogue captured during the interview or focus group. The opportunity to re-listen to recordings also offered the researcher the opportunity to listen for features in the conversation, which were previously not noted (Silverman, 2000).

Conducting focus groups in an organisational setting presented a number of challenges of which researchers needed to be mindful Krueger and Casey (1994, p. 172). Issues that may distract from optimal research included the familiarity between members of the team, which may prevent rather than promote open discussion. In particular, focus group discussions among existing groups may stifle opportunities for participants to be open about their views and practices, particularly when one member's views may differ from their colleagues. Power differentials among participants in groups also present a problem when a group composed of varying levels of authority may also have a negative effect on group discussion, as police officers of lower rank may be reluctant to disagree with their superiors (Krueger et al., 1994).

While the dangers of conducting focus groups with existing groups were clearly highlighted by Krueger and Casey (1994), other researchers, such as Kitzinger (1994) discussed, the advantages of conducting focus groups with pre-existing groups. Kitzinger (1994) states that, "above all it is useful to work with pre-existing groups because they provide one of the social contexts within which ideas are formed and decisions are made" (p. 105). In addition, feminist researchers such as Wilkinson (2004) suggested that focus

groups provide a contextualisation of the discussion with the social interactions, “offering the opportunity to observe the co-construction of meaning and the elaboration of identities through interaction” (p. 279).

Further, one could also argue that how an existing team interacts during a focus group interview conducted in their place of work can also reflect how these groups would interact with respect to team synergy and culture, including their use of shared meanings. Research into police culture around the phenomenon of domestic violence conducted in Tasmania by Knowles (1996) strongly suggested that there were shared views amongst police which develop in response to the local environment. For example, who are the ‘crooks’, ‘the real people’ and who are the ‘scumbags’ (a term used by police in the Knowles study when discussing people living in public housing). In addition, there appeared to be views that transgressed local boundaries and were shared amongst police more broadly. For example, what constituted ‘real crimes’ and what constituted ‘real police work’ as opposed to the ‘social work’ roles (Knowles, 1996). The understanding of police culture and shared meanings Knowles (1996) developed in her research was possible due to her observations of the police in partner/team situations.

The use of existing groups was conducive to identifying shared views and meanings. The focus group, which was composed of an existing team/unit, varied, as do the individuals within it interact, including their preparedness to discuss issues. Further, interviewing each distinct group also allowed any group differences influenced by either geographic or cultural differences to be identified.

Sample

To gather data, which would inform this study, it was essential that only focus group participants who had direct experience of working with and/or supporting an adult with cognitive impairment who had been a victim of sexual assault, be invited to participate. With these criteria in mind, purposive or judgemental sampling defined by Kumar (1996) as “a decision or judgement made by the researcher as to who can provide the best information to achieve the objectives of the study” (1996, p. 179) was selected as being the most meaningful way of recruiting participants and adding most value to this study. While purposive sampling was applied to participant selection for each focus group, as

will be discussed in detail below, the method of invitation was necessarily different for each participant category.

Three categories of focus groups were conducted between 2005 and 2007. As mentioned earlier, as each focus group interview informed the next, focus groups commenced with advocates.

Group A: Advocates

Table 2: Advocate Focus Groups

Location	Date	Duration	Number of participants
Region 1	6 /10/05	2 hours	Four
Region 2	18/10/05	2 hours	Three
Region 3	11/4/06	2 hours	Three
Region 4	23/11/05	2 hours	Four

Advocates' experience of supporting adult victims of sexual assault who have cognitive impairment, can provide information on the factors (separate to that of the victim) which have contributed to the progress or exit of a report from the justice system. In this research, the term 'advocate' was used as a generic term referring to those who, in the course of their work, provided support to or advocated on behalf of adults with cognitive impairments, either in the areas of disability or sexual assault.

As the geographic focus of the research was the State of Victoria, five locations, including rural, regional and metropolitan, were initially chosen. However, despite a comprehensive recruitment strategy as outlined below, focus groups were necessarily limited to four geographic locations across regional Victoria due to limited availability of advocates in the areas canvassed.

Five was considered as being the optimal minimum number of participants for each focus group, as it was anticipated that this size would promote discussion, whilst still providing a range of views and experiences. A decision to set a maximum of ten participants was made because it was thought that numbers beyond ten could prove to be unworkable. This was particularly so as the discussion was being recorded for the purpose of verbatim

transcription, where in order to transcribe accurately, it was optimal perhaps, but not always possible to have only one person talking at any one time. It was also thought that groups larger than ten would not facilitate equal opportunity for all participants to contribute, in addition to resulting in a somewhat superficial discussion of the issues rather than encouraging more in-depth discussion (Bloor et al., 2001, p. 27). Participants were recruited in a number of ways.

A combination of methods was used to both advertise the research and seek expressions of interest from those working in the disability field who might wish to participate. In order to maximise opportunities for wide dissemination of the research project and garner interest from potential participants, the initial strategy involved identifying peak body disability and advocacy organisations (both state and regional) and relevant State government organisations. These were identified through a variety of means, including existing contacts that were known to the researcher, web searches, existing lists of disability specific agencies from the Department of Human Services (DHS) web site, and word of mouth. An initial telephone conversation explaining the research was made to all identified peak body organisations and relevant State government departments. This was followed by an electronic communication containing four attachments. These included a definition of cognitive impairment, a letter to Managers/Coordinators outlining the research and requesting that they disseminate the information to staff, a plain language statement providing an overview of the research and what participation in the research would entail, and a flyer calling for expressions of interest (see Appendix 2). Individuals who indicated an interest in participating in the research by contacting the researcher, were then contacted to ensure they had relevant experience to contribute. Once relevant experience had been determined, an informed consent form was sent electronically to potential participants.

Once a decision about number of participants was reached, a choice of dates and venue for conducting a focus group was negotiated with one of the agencies who could provide meeting space in which the session could be conducted. The date and time chosen was that which the majority of participants from that region or area could attend.

Despite having five or more interested potential participants prior to the focus group interview being conducted, there was no way of ensuring that all would attend on the day

(Bloor et al., 2001, pp. 33-35). It transpired that a number of participants could not attend on the day, due to circumstances outside their control (either work or family).

Consequently, availability of staff with the specific experience necessary to contribute to the discussion was problematic. It was found that regional services were characterized by low staffing levels, with workers dispersed across large geographic regions. Some rural services had only one to four part time staff. For example, a disability advocacy group had one worker for an entire region. Many such groups had high staff turn-over. All of these factors contributed to less than optimal participation levels in focus groups with advocates.

Group B: Victoria Police

Table 3: Police Focus Groups

Location	Date	Duration	Number of participants	
			CIU	SOCAU
Regional	9/2/06	1.5 hours	Six	four
Outer Metro	13/2/06	1.5 hours	Four	four
Metro	14/2/06	1.5 hours	Five	four
Rural	18/1/06	1.5 hours	Five combined CIU/SOCAU	
Metro	17/12/08	1.5 hours	Sex Crimes Squad Five	

Anticipated participant numbers were larger than the number who ultimately attended on the days. Due to the nature of police work, officers and detectives who indicated their willingness to participate and intention to be available were, at times, unexpectedly called out, and hence unable to participate on the day.

Prior to and after the process of gaining ethics approval from Victoria Police, the research was supported by the Sexual Offences and Child Abuse (SOCAU) Co-ordination Unit, which was based in Melbourne. There was no doubt that the support offered by this unit was instrumental in gaining ethics approval to conduct this phase of the research. One way in which the Co-ordination Unit supported the study was to devote personnel to organise the focus group sessions. As the staff member assigned to this task was in effect

taking the role of recruiter of participants, it was necessary for the researcher to both clearly describe the research using the plain language statement as an aid in this process, and most importantly, to ensure that participation was voluntary. The fact that participation was voluntary and would in no way affect their employment was also clearly stated in the plain language statement provided to members of Victoria Police (see Appendix 3).

Sample: Initially, two discreet units from Victoria Police were identified as being the most heavily involved in sexual offences cases and subsequent decision in relation to progress or exit of such cases, and therefore best placed to inform the research. The units identified included the Sexual Offences and Child Abuse Unit (SOCAU), which is called in initially to work with sexual assault victims, both adults and children. The second unit was the Criminal Investigation Unit (CIU), whose role is to investigate any allegations of sexual assault made and to decide whether to authorise, or not, a brief-of-evidence to be handed over to the Office of Public Prosecutions (OPP). A third group to be identified later in the research process was the Sex Crimes Squad (SCS), whose role is to investigate the sexual assault cases which are viewed as most 'serious'. These may include incidents which threaten life or cases involving offenders who are considered to be of 'high risk of recidivism' (Victoria Police, no date). The decision, at a later stage in the research, to include this group was based on information that cases investigated by this group had involved victims with cognitive impairment; hence, members of this group were deemed able to make a valuable contribution to the research.

Once a decision regarding which units to invite had been made, the subsequent decision was that of locations for conducting the focus groups. It was decided that focus groups (one each with SOCAU and CIU) would be conducted in one regional, and one outer metro and one inner metropolitan station. Having a diversity of geographic locations for the focus groups was important as it may have highlighted any differences in operational or attitudinal styles, which may have existed amongst members, as well as highlighted any issues specific to geographic location. After nominating three locations, the SOCAU Co-ordinations Unit suggested that a rural location be considered for inclusion, as it would provide a rural perspective. This addition was accepted.

Information, including plain language statement, informed consent and definition of cognitive impairment was disseminated to identified locations from within Victoria

Police. An intermediary - a staff member from the SOCA Co-ordination Unit necessarily disseminated the information pertaining to the research in order to seek expressions of interest. Prior to recruitment of potential participants, the researcher briefed the staff member of the ethical requirements as required by the Victoria Police Research Coordinating Committee and University of Ballarat Human Research Ethics Committee (HREC). Information sent to members of the Sexual Offences and Child Abuse Units (SOCAU) and the Criminal Investigation Units (CIU) at the nominated locations included dates and times of focus groups and a reminder that participation was voluntary. In addition, a plain language statement containing information about the research, the duration, what participants could expect their involvement would entail and informed consent form in the format determined by Victoria Police Research Coordinating Committee (RCC), was distributed (see Appendix 4). Police members interested in participating contacted the relevant staff member at the SOCA Co-ordination Unit. The focus group session with members of the Sex Crimes Squad (SCS) was organised by the researcher (after having received permission from RCC) directly with a senior officer of the SCS. An electronic copy of plain language statement and informed consent form was sent to a contact nominated by the senior officer from the SCS located in Melbourne. The contact person was asked by his superior officer to organise the focus group session.

Focus groups sessions for Criminal Investigation Unit CIU and SOCAU members were held separately except for the discussion held in the rural location. In this instance, the SOCA Co-ordination Unit argued that the number would be too small to warrant separate group interviews and further, that both SOCAU and CIU in this rural location worked very closely as one team. Therefore, a single focus group interview was conducted which included participants from the SOCAU and CIU. It is worth mentioning at this point that the gender of all CIU members who participated in the focus groups were male, whereas the SOCAUs who participated consisted predominantly of female members with one male in each of the units. Of the six members from the SCS who participated, one was female and the remainder male.

The final focus group session was conducted with the Office of Public Prosecutions.

Group C: Office of Public Prosecutions

The focus group discussion was conducted with the Office of Public Prosecutions (OPP) on 5 December 2007. To ensure greater availability of potential participants the focus group was scheduled to take place on a date and time usually set for staff meetings. Hence, participants included staff from various positions within the OPP, including solicitors and prosecutor. Given the varied nature of the role participants performed within the OPP, not all participants had firsthand experience in cases involving adult sexual assault victims with cognitive impairment. In all, ten staff members participated. The duration of the focus group was one hour.

One focus group session was conducted with staff prosecutors from the Office of Public Prosecutions (OPP). Despite commencing the process of seeking permission in June 2006, organising the focus group session with members of the OPP proved to be very difficult. A range of reasons, which were, for the most part, all outside the control of both researcher and OPP, resulted in the focus group interview being unexpectedly delayed for some 18 months. The delay required a further application for an extension to data collection time to be made to University of Ballarat Human Research Ethics Committee. Most of the delays centred on the availability of key staff and also major changes to the structure of the Sex Offences Unit at the OPP, as recommended in the VLRC's final report *Sexual Offences: Law and Procedure* (2004). Despite the delays in convening the focus group, the researcher and representatives from the OPP were in regular contact. The OPP maintained their interest in the research and willingness to see the process through to fruition.

As with previous focus groups, participation was voluntary and those solicitors, advocates and prosecutors who considered they had specific experience in sexual assault cases involving adult victims with cognitive impairment and who had decision making authority in relation to case progression were invited to participate. Despite the planning and the goodwill from OPP representatives to ensure key figures were available to participate, the nature of the work performed by certain members of the OPP did mean that their participation was not possible on the day. Nonetheless, the focus group was conducted as other members of the OPP were available and the researcher was reluctant to reschedule the focus group at such a late stage into the doctoral candidature.

Phase Two: File Identification

The reports analysed were made by adult victims with cognitive impairment to police during the period from January 2005 to December 2006 and were gathered from five regional and metro locations across Victoria. Congruent with Richardson's (1994) concept of 'crystallisation' of data, police case file narratives provided another perspective from which to consider the one problem. Charmaz (2006, p. 37) refers to sources such as police reports as 'extant texts', meaning texts which remain in their original form, and are not affected or interfered with by the researcher. While Charmaz (2006) discussed the usefulness of such files, she also warned of their 'serious limitations' as, increasingly, extant files can be subpoenaed as evidence in court proceedings, a reality of which report authors have become increasingly aware. The implications were that, information contained in the files was likely to be sanitized and perhaps unlikely to reflect the author's own personal views, therefore making the researcher's task of finding rich data more difficult. Despite these limitations, the fact remained that the 'extant' files were a primary source of information and provided valuable insight, particularly when the sample size was sufficiently large to provide a reasonable diversity of report writing styles. In addition, the files also contained demographic data, which was analysed and discussed in comparison to other research, conducted in other jurisdictions, where similar data had been collected.

Initially, reports from across Victoria made between January 2002 and December 2004 were to be identified and analysed. According to Victoria Police, this task would necessitate Victoria Police engaging in a lengthy and time consuming process. This process included first identifying sexual assault cases reported over a two year period from across Victoria, identifying the cases involving adult victims with cognitive impairments, and then 'blacking out' all information contained in the file that identified any person involved in the case (not including police personnel) to maintain confidentiality and facilitate access by the researcher.

It is worth noting at this point that, the allocation of police resources to the time-intensive task of de-identifying files may have also been avoided had it been possible for Victoria Police to develop protocols within the current legislative framework of the *Information Privacy Act, 2000* (Vic). According to the legislation (see below) and as discussed in conversation with an officer from the Privacy Commission, access is allowed to

identifiable data if research is deemed to be in the public interest. The following quote from the *Information Privacy Act, 2000* (Vic) would concur with the officer's interpretation.

Principle 2 Use and Disclosure

2.1 An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless

- (a) both of the following apply ... (c) if the use or disclosure is necessary for research, or the compilation or analysis of statistics, in the public interest, other than for publication in a form that identifies any particular individual –
 - (i) it is impracticable for the organisation to seek the individual's consent before the use or disclosure; and
 - (ii) in the case of disclosure – the organisation reasonably believes that the recipient of the information will not disclose the information. (*Information Privacy Act, 2000* (Vic))

Despite the myriad of challenges and frustrations faced by police in providing access, and researcher in gaining access to confidential police data, it was important to acknowledge that without the commitment from Victoria Police to ensure access was provided, the chapter regarding case files could not have been written. Overwhelmingly, police were supportive of the research, and contributed their time and resources over a long period to ensure limited and conditional access to de-identified files was eventually provided.

Sample

In order to overcome the problem of lack of available police resources to dedicate to the task of identifying and then de-identifying files, it was decided to reduce the sample size, of sexual assault reports involving adult victims with cognitive impairment from across Victoria to those in specific geographic locations. It was important however, that a range of geographic locations was represented in the sample of reports. As such, it was decided that reports made between January 2005 and December 2006 were selected. The choice of areas of Sexual Offences and Child Abuse Units (SOCAUs) from which data would be gathered was based on two criteria; first, that the sample was geographically representative; second, that the locations, where possible, mirrored those chosen for focus groups. To this end, five geographic locations were selected - two regional, one rural, one inner and one outer metropolitan.

Although a reduced sample was necessary, it was anticipated that the diverse mix of geographic area, report density and investigation focus would mirror the diverse range of personnel, resources, service and practice variables, had access to the original larger sample been possible. Overall, the number of reports of all adult sexual assaults made to these five SOCAUs during the two-year period was approximately 1,500. Of these, the number of reports made by adult victims with cognitive impairment was 76 or five percent. The information available to the researcher was limited to the case narrative and minimal unidentifiable information, such as gender, pertaining to the victim and or offender. Each file contained a minimum of two and maximum of six pages. The reports made by adult victims with cognitive impairment were identifiable using Video and Audio Taped Evidence (VATE) to record the victim statement.¹³ While being resource efficient, the process of using VATE as the identifying marker for inclusion of reports in the sample, presented limitations. For example, a widely publicised case involving multiple victims with dementia (which will be discussed in chapter 9) was not included in the sample of case narratives supplied by Victoria Police. This apparent omission was either because a VATE was not conducted with the victims due to the severity of their cognitive impairment, or that the file selection process did not identify all files in this geographic area.

Given the confidential nature of the data, Victoria Police required a number of conditions pertaining to the use and publication of data. One such condition was the excision of the case file chapter from the final public copy of the thesis.

The third and final phase of data collection related to a case study of a successfully prosecuted case involving an adult victim with cognitive impairment.

¹³ Police are required by legislation to use VATE to record a victim's statement when the victim is a 'vulnerable victim' - a child or is an adult with cognitive impairment. It should be noted that not all vulnerable victims would make a VATE. Sometimes the extent of the victim's impairment is such that a police member will make a decision not to record a VATE because the victim will be deemed not capable of presenting verbal evidence.

Phase Three: Case study

Study Focus

A case study, according to Yin (2003), “is the method of choice when the phenomenon under study is not readily distinguishable from its context” (p. 4). Yin (1989) mentioned that:

The distinctive need for a case study arises out of a desire to understand complex social phenomena. In brief, the case study allows an investigation to retain a holistic and meaningful characteristics of real life events. (Yin, 1989, p. 14)

In this phase the phenomenon under study was a sexual assault case in which, unlike the majority of sexual assault cases involving victims with cognitive impairment, the result of this trial was the conviction of the perpetrator. The fact that the case being analysed was an outlier¹⁴ and negative instance, added to the validity of the whole research approach.

The aim of the case study was to ascertain ‘why’ this case was an exception to what appeared to be the rule. The analysis traced the operational links over time and by identification of the facilitators to case progression, contributed to a greater understanding of the processes and practices, which have led to a successful prosecutorial outcome. Yin (2003) described this particular type of case study as an “explanatory case study [which] presents data bearing on cause-effect relationships explaining how [an] event happened” (p. 5).

Case Study Identification

The case study was not part of the original research design, but rather included at a later stage of the research. The inclusion of the single case study was a fortunate and serendipitous event that arose when a report, which had been successfully prosecuted, was made known to the Chief Investigator. Because such cases are very rarely successful, the decision to pursue the single case study was made without hesitation.

¹⁴ An outlier refers to a data which is different or disconfirming to what the majority of data is indicating. Outliers are identified through the researcher actively looking for negative evidence. See Miles, M. B., & Huberman, A. M. (1994). *Qualitative data analysis: an expanded sourcebook* (second edition ed.). p. 271

Case Study Design

The case study designed within the framework of this research was a single multi source case study. According to Yin (2003) analysis of multiple sources to further understand a particular phenomenon strengthened the case study:

[w]hen findings, interpretations, and conclusions are based on such multiple sources, the case study data will be less prone to the quirks deriving from any single source, such as an inaccurate interviewee or a biased document. (Yin, 2003, p. 83)

Case Study Validity

Yin (1989, p. 95 - 103) described three principles of data collection which, he argued, enhanced the reliability and construct validity of a case study. These included using multiple data sources, case study data base and maintaining a chain of evidence. All three principles were utilised within this case study and will be described in the following paragraphs.

Multiple Data Source or Triangulation

Utilising multiple sources of data provided opportunities for the researcher and readers of the research to corroborate or provide multiple sources of evidence and measures for the same phenomenon, therefore providing a better understanding of that phenomenon. The sources of data used in the case study for the current study, included three semi-structured interviews. The interviews were conducted with three central characters including the victim who was described as having a low-level intellectual disability, the victim's mother who acted as support and advocate for her daughter, and the police officer who was involved in the case from beginning to conclusion. All three participants described their lived experiences of the case from their unique perspectives.

A second source of data was the documentation related to the case that was established in the form of police case file, which provided an insight into the decisions made by the investigator over the life of the case, which lead to the successful prosecutorial outcome. Permission to access the case file was provided by both the victim and her mother, and required specific application to the Victoria Police RCC. Consequently, Victoria Police supplied the de-identified narratives on June 6th 2008.

The third data source employed in this case study was the trial transcript. This document (a verbatim trial transcript) provided insights into the trial processes and how they may have contributed to a positive outcome for the victim. Upon trial completion and once transcribed, specific parts of the trial transcript were available to the public. There were two avenues for gaining access to transcripts: either through the Victorian government Reporting Service or through the Office of Public Prosecutions. In this instance, the transcript was accessed through the Office of Public Prosecutions.

Case Study Data Base and Chain of Evidence

Both the development of the database and the maintenance of the chain of evidence were contained within the one database. All information pertaining to the study, including notes, transcripts, and case study data were loaded onto Nvivo7 qualitative data management program and coded thematically.

Case Study Analysis

Data analysis was conducted using two methods, ‘explanation building’ and ‘chronology’ (Yin, 1989, p. 109 - 119). Both methods were used concurrently. The latter focused on the timing and sequence of events in chronological order to ascertain whether specific events documented chronologically contributed, either individually or collectively, to a successful case outcome. Further, the analysis considered how the range of events or factors, not necessarily in chronological order, may have contributed to the progression of the police investigation and subsequent trial. These events and factors were cross-referenced across two types of data sources, the three individual interviews, and the case file. Finally, all the elements found to have been influential on case progression within the case study, were compared against what was understood to be the ‘usual’ report pathway as described by the Victorian Law Reform Commission (2001, p. 29 - 49). Analysis of other forms of data generated from the remaining phases of the research was conducted using other analysis methods.

Data Analysis

Analysis of data was conducted using several approaches depending on data type. The quantitative component of the case file data was analysed using SPSS. The qualitative component of the data collected in phases one and two, namely the focus group sessions

and narratives from police case files were subjected to two levels of analysis; thematic analysis and critical discourse analysis.

Data was analysed in two stages. The first stage included the use of thematic analysis, which allowed the theory to emerge from the data rather than being imposed by the researcher (Auerbach & Silverman, 2003). In addition, Critical Discourse Analysis as described by Bloor and Bloor (2007), Fairclough (2003) and Locke (2004) was applied.

According to Charmaz (2000) researchers do not go into the research process as 'passive receptacles'. In other words, claiming total neutrality is not possible, as the researcher brings their own experiences and knowledge to the research process, and in turn, the experience and knowledge of the researcher will inform how the researcher interprets the data.

Thematic Analysis

The first stage of the analysis process involved using Thematic Analysis (TA). The process of analysis followed the four steps described by Auerbach and Silverman (2003). Throughout the thematic analysis process, the data was analysed with the theoretical framework and research questions at the forefront of the researcher's mind.

Initially, all transcripts were loaded onto the qualitative software NVIVO 7. There were a number of reasons for the switch to using electronic data storage software. These included the ease and speed of handling large amounts of data, the capability of comparison across data sources and finally to maintain a chain of evidence.¹⁵

Transcripts were analysed one at a time, identifying passages of text, which the researcher identified as informing the research questions. This stage influenced subjective perceptions of the researcher in determining which passages of text were most relevant.

The second stage of the analysis process was referred to by Auerbach and Silverman (2003) as coding. At this stage, it was important to remember that this was not a process of making the data fit the research but, rather, listening to what the data was saying. Each

¹⁵ In this context, the chain of evidence refers to the capacity to retrace steps from data collection to analysis and insertion of quotes into the thesis so that every quote can be traced back to its original source.

data source and type was analysed independently of other data types and source. For example, all transcripts from focus groups were analysed in order of collection. Advocates were the first group to be interviewed, then Sexual Offences and Child Abuse Units (SOCAU), Criminal Investigation Units (CIU), Sex Crimes Squad (SCS) and Office of Public Prosecutions (OPP). Analysis was conducted in a number of ways including on a line-by-line basis, paragraphs and then issues raised by participants.

As data with potential to inform the research question was identified, it was highlighted, copied and grouped together into the database, the remainder of the transcript was then searched for repeating ideas. The ideas were continued to be grouped together to form themes. Analysis of each subsequent transcript was approached in the same way. Once all transcripts were searched, each of the highlighted data was categorised into themes. In the process of categorising into themes there were occasions when what participants were saying was considered important by the researcher but could not necessarily be categorised into an existing theme, Auerbach and Silverman (2003, p. 58-59) referred to these ideas as 'orphans'.

As the case file narratives were not in electronic form, analysis was carried out manually and then typed in a matrix on an Excel spreadsheet. In all cases, extracts included entire paragraphs so as not to lose or misinterpret the context. Additional columns were also added to the matrix which would assist in answering specific research questions. Headings of each column were informed by the data. For example the heading, 'Raising questions about ability/competency' was chosen because it represented the decisions and assessments made by police and articulated in the narratives.

Once all the themes were developed, the next stage was to develop the theory or theoretical constructs. This was achieved by organising the themes into more abstract groupings. In the current study, the themes developed related to the factors which inform police decision making. The theoretical constructs were then developed by considering the levels of influence of each factor. Levels of influence emerged as process or guideline based, while other factors reflected a broader structural influence of the police organisation. Other influences on police decision making were not necessarily related to police organisation but rather to the broader social forces, which for the most part they referred to, but were unaware they were doing so.

The second stage of data analysis utilised Critical Discourse Analysis (CDA). The process included the reanalysis of the original transcripts in their entirety.

Analysing Discourse

The landscape of discourse analysis was quite a complex field of research containing many forms or ways of analysing both text and spoken word (Wetherell, Taylor, & Yates, 2001). Critical discourse analysis (CDA) was favoured within this research. The main purpose for using CDA as a method of analysis was to shed light on and better understand the range of influences, including cultural, societal and organisational, on police discretionary decision making. More specifically, the aim was to identify shared hegemonic or culturally dominant understandings that police have about people with cognitive impairment. Further, it was to see if it was possible to identify whether these understandings were specific to the police unit or applied to the wider police force culture or, indeed, whether these understandings mirrored those of the broader community. Finally, the aim was to consider how these cultural influences informed police decision making in relation to case progression or ejection.

Critical Discourse Analysis

Critical Discourse Analysis (CDA) goes beyond the traditional focus of Discourse Analysis (DA) used in the 20th Century, in that it describes language, builds theories about communication and develops methods of analysis (Bloor & Bloor, 2007, p. 12). The distinction between DA and CDA is the focus on social issues, either at international or individual levels. Bloor and Bloor (2007) have identified six objectives of CDA in the current context. These include:

- To analyse discourse practices that reflect or construct social problems;
- To investigate how ideologies can become frozen in language and find ways to break the ice;
- To increase awareness of how to apply these objectives to specific cases of injustice, prejudice, and misuse of power;
- To demonstrate the significance of language in the social relations of power;
- To investigate how meaning is created in context;
- To investigate the role of speaker/writer purpose and authorial stance in the construction of discourse. (Bloor & Bloor, 2007, p. 12-13)

The use of language, either oral or written, is a controlling force in society used to manipulate, to exert power and to present situations, individuals or groups in ways the writer or speaker would choose to present them (Bloor & Bloor, 2007, p.1). Further CDA constructs, reflects and maintains ideologies, usually of those who are in socially sanctioned positions of power including judges, police, lawyers, doctors and politicians (Locke, 2004, p. 1-2).

Police are one group who are given and uphold a position of power within the community. One way in which police assert their power is in relation to decision making, particularly in reference to reports of sexual assault. This power has been referred to by other researchers (Kerstetter, 1990; Lievore, 2004a) as being a result of police being the 'gatekeepers' to the justice system. In simple terms, the police decide whether reports of sexual assault are indeed recorded and if they are, active decisions are then made to determine the trajectory of the report: will it proceed or will it be ejected from the system? As previously discussed, the focus of the current study is to better understand why reports of sexual assault made by adults with cognitive impairment to police are unlikely to progress beyond the investigation stage, as well as to better understand the influences of police decision making and discretionary decision making.

To this end both written and oral communication (police case file narratives and focus group transcripts) were analysed a second time in their entirety with respect to identifying any language which may reflect or provide insight into police decision making. To assist in this process, the following list was informed by the literature and compiled by the researcher as a guide to inform the CDA process.

1. The use of metaphors;
2. Ability/disability;
3. Enabling/disabling;
4. Belief/disbelief;
5. Suspicion/credibility;
6. Language which either minimized or promoted the assault as serious;
7. Language which indicated congruence or disconfirmed broader societal attitudes about people with cognitive impairment;

8. Language which identified people with cognitive impairment as ‘other’ or which identified people with cognitive impairment as members of the community;
9. Language which demonstrated shared meanings with group or police force;

An additional level of analysis was used in respect to case file data. This included developing a demographic data collection sheet (see Appendix 5) to record the characteristics of each case, including gender of victim and offender, date of report, who made the report and impairment type. Once the data collection sheet was developed, the next stage involved developing a matrix using Excel. Initially, for easy reference all demographic information was collected manually using the data collection sheet. Data was later transferred onto the matrix. Quantitative data was then coded and imported into SPSS and subjected to further analysis (see chapter 6).

Testing for Validity

Testing for validity may at first appear to be opposed to the general epistemological paradigm, particularly as the previous discussion strongly suggested that there is no single truth and that multiple realities are socially constructed. Nonetheless, the research and subsequent thesis is a product built on the entrusted realities of participants. Hence, there was an obligation on the researcher’s part to ensure that the information presented as extracts of interviews and case file narratives were accurate, in respect to using the language used by participants. Further, it was essential that the analysis accurately reflected the sentiments and perceptions expressed by participants that made sense of their life worlds, and should be inherent components of the research design. To this end, there are a number of measures described by Miles and Huberman (1994), Rose (2001, p. 33 - 35) and Cresswell (1998, p. 119 - 218), which can increase validity of a research project. These measures will be discussed in further detail in the following paragraphs.

Clarifying Researcher Bias

The need to clarify researcher bias was highlighted by Cresswell (1998, p. 202) as an important ‘verification procedure’ in qualitative research. Put simply, clarifying researcher bias places the onus on the researcher to declare past experiences, assumptions, perspectives, and prejudices they may have and that are likely to exert some influence on his/her interpretation of data and situations.

The researcher has worked extensively in the legal sector for many years prior to commencing this study. Much of the researcher's experience has been from the standpoint of an advocate working with individuals or groups in the community who because of their income, disability, ethnic origin, age or gender were disadvantaged and marginalised. During these years, an interest in the area of sexual assault and family violence was cultivated and maintained. To this end the researcher also spent some time working on stage one of the Disability Discrimination Legal Service 'Sexual Offences' project, which was funded by the Reichstein Foundation and the Victorian Women's Trust.

In order to mitigate the potential for researcher bias, the researcher employed several strategies. These included first, to deliberately pursue evidence that disconfirmed any researcher bias. In addition, the researcher relied on a small group of colleagues to read and scrutinise the draft data chapters (except the excised chapter) with the intention of highlighting any examples of where comments made by the researcher in relation to data, were unjustifiable or biased. This proved to be a rigorous process as there were occasional instances where the researcher was required to further justify or modify the conclusions drawn.

Ensuring Accuracy of Interview Data

Creating verbatim transcripts of interviews and focus groups made from recordings of the individual interviews and focus groups, was one strategy used in this research study to ensure accuracy of reporting. Verbatim transcripts ensured that the voices of participants were represented honestly and in context, therefore reducing the potential for bias on the part of the researcher (Rose, 2001, p. 37). One additional strategy used in the current study in order to strengthen the validity of transcription was to re-read the transcription whilst listening to the recordings. Whilst this was time consuming, it did highlight some errors in the researcher's understanding, and these errors were corrected.

Participants in interviews conducted for the case study were offered the option of reading their interview transcript and making changes if necessary. Whilst Rose (2001, p.49) has concerns about confidentiality when verbatim transcripts are returned to participants, after discussion with the participants the researcher transcripts were returned only where there was participant agreement about the means by which transcripts were sent and returned. In addition, names or other identifying information were either substituted or omitted from the

copy sent to the participant, in order to minimise potential for breaching confidentiality should the transcripts be read by a third party. The aim was to ensure that transcripts were not identifiable; however, a small risk remained that participants may have been identifiable by the content, if the person reading it was familiar with the case.

Offering participants the option of reading and confirming the interview transcripts did not prove to be as straight forward as the researcher or the participants had expected. In the case of one participant who was both the mother and advocate of a victim of sexual assault, reading the transcripts was confronting in that she came to realise (perhaps for the first time) the repercussions on her of her daughter's assault and her dealing with the emotional and legal aftermath. Whilst reading the transcript was very difficult, the advocate also reported in a subsequent telephone conversation that the process was cathartic and useful.

In the case of another participant, a police officer, finding the time to read the transcript and listen to the tape, in what proved to be a very difficult year for her personally, was not possible. In our last telephone conversation, the police officer noted that she trusted the researcher to report the interview accurately. This being said, there were one or two possibly controversial points in the recording and the researcher wanted to ensure the police officer was comfortable that they remained in the transcript. These specific points were discussed in a telephone conversation between the researcher and the police officer. This ensured that the police officer was alerted to those points and subsequently was able to give verbal confirmation that those quotes could remain in the transcript.

Representativeness

Essentially, the current study was interested in the factors informing police discretionary decision making and how discretion was used in the decision making process. The participants were purposefully selected for their capacity to shed light on the question of police decision making from a number of perspectives. As mentioned previously, these perspectives included the views of members of Sexual Offences and Child Abuse Unit (SOCAU), Criminal Investigation Unit (CIU), Sex Crimes Squad (SCS) and the Office of Public Prosecutions (OPP). Collectively, these groups represented the points at which decisions about case progression or otherwise were made, and importantly, these groups also provided different views of a sexual assault case (as will be described in more detail later in this chapter). The views of disability and sexual assault advocates were also sought.

Although they did not represent the views of victims, advocates were chosen because of their multiple experiences in advocating for or assisting victims with cognitive impairment. Their views provided a valuable perspective in that they provided the view of ‘outsiders’ (Lievore, 2004a) on police decision making.

Possible influences of geographic location in terms of access to support services were also anticipated in the research design in order to improve validity (Bloor et al., 2001, p. 28). Ultimately, a mixture of rural, regional, and metropolitan groups was selected, as each could contribute different perspectives to the question and add depth to the dimension of representation.

Rich, Thick Description

Providing what Cresswell (1998, p. 203) refers to as a ‘rich, thick description’ of the research, how it was conducted including sampling, recruitment and setting allowed readers to make decisions about the transferability of some aspects of the study, based on shared characteristics of the research, to other applications and studies. Knowledge of the makeup of focus groups, the questions asked, and the types of files concerned, allows other researchers to replicate and test research findings in other contexts.

Data Triangulation or Crystallisation?

Janesick (1994) describes data triangulation as a process of using a range of data sources to gather information and add depth to our understanding of a particular question (p. 391). However, other qualitative researchers such as Richardson (1994) suggest that the term ‘triangulation’, which has been adopted from the quantitative paradigm, implies that the question can be, and indeed is, viewed from a fixed point or triangulated; implying questions can only be viewed from three sides (p. 934). Rather than using the term ‘triangulation’ Richardson (1994) suggests:

The central imaginary is the crystal, which combines symmetry and substance with an infinite variety of shapes, substances, transmutations, multidimensionality’s (sic), and angles of approach. Crystals grow, change, alter, but are not amorphous. Crystals are prisms that reflect externalities and refract within themselves, creating different colors, patterns, and arrays, casting off in different directions. What we see depends upon our angle of repose. (Richardson, 1994, p. 934)

This imagery, and to some extent the elusiveness of the socially constructed 'reality', denoted by the 'crystal' metaphor, is congruent with the constructivist paradigm employed in this research study, in particular the view that there is no one objective reality. Reality, at one level, is an individual construct, and indeed, there can be many individual perspectives or realities. Certainly, the crystallization of data as described below provides representations of individual and group realities from very different perspectives and sources. Moreover, when these sources converge or are mutually confirming, validity is enhanced or reaffirmed (Thurmond, 2001).

Although researchers have highlighted that using opposing theoretical perspectives can be problematic (Blaikie, 1991), other researchers argue the multiple perspectives or crystallization of perspectives enables the validity and credibility of findings to be enhanced. At best, each independent method of data collection reinforces the evidence gathered by the other, or at the very least does not contradict other collected data (Miles & Huberman, 1994, p. 266).

The multiple perspectives were gathered through a range of sources; namely extant data in the form of police case narratives, focus groups with participants representing a range of decision makers throughout the report pathway, and finally the individual 'explanatory' multi-source case study of a report which resulted in the successful prosecution of the offender. The sources of evidence for the case study included three individual interviews, the police case file, and the trial transcript.

An Extreme Case - An 'Exception' to the Rule

According to Yin (1989) choosing a single as opposed to a multiple case study is appropriate in certain instances. In the current research study instance the single case study was chosen as it represented what Yin (1989, p. 47) refers to as an 'extreme or unique' case. Unlike the majority of sexual assault cases involving victims with cognitive impairment, this report was successful at multiple levels of the justice system from report to prosecution, and ultimately to the conviction of the offender. The use of the case study, as part of the triangulation of data strengthened and reinforced the findings of the other two data chapters.

Ethical Considerations

Ethics Applications

Ethics approval for the initial project and the amendment to the research, the case study, was granted by University of Ballarat Human Ethics Research Committee in July 2005 and March 2006 respectively. Ethics approval was granted by Victoria Police to conduct focus groups with police members on 15 November 2005 (Appendix 6). Approval to conduct a single interview with a police member was granted on July 2006 (see Appendix 7). Negotiated limited access to case files data was granted on 3 October 2008.

Conducting Research in Sensitive Areas

There were a number of ethical issues which are of particular relevance to the current study. Conducting research that enquired into what was seen as a sensitive area, was often confronting, and elicited a variety of emotions from participants and researcher alike. These issues included confidentiality from participation to publication. In addition, there was the importance of being aware of and reducing the potential for participants to become distressed or stressed because of their participation in the research, during the interviews or focus groups as well as the impact of their participation, post involvement. Each of the identified issues, not necessarily in order of importance, is discussed.

Support for Participants

Participants involved in individual interviews and focus groups were, for the purposes of ethics in relation to stress and distresses resulting from participation, divided into two categories. One group can be referred to as the professional group, consisting of professionals, police members and advocates, whose job required them to work with and respond to victims of sexual assault. The second group included primary and secondary victims, in that the assault was perpetrated on them or that they were a family member of the victim. To clarify, the researcher is not suggesting that professionals working with victims are not affected by their work, as work of this nature has a considerable short and long-term impact (Morrison, 2007). Certainly, the effect on workers in recalling and retelling specific cases in which they have been involved is not necessarily achieved without discomfort and stress. However, there would be little, if any, argument in suggesting that the experience for the person violated by such a crime is different to those

whose role it is to work in the sexual assault area, either as police, advocates or other support workers.

Although the research focus and interview questions were not intended to inquire into the nature of the assault, obviously asking a victim and the support person (her mother) about the decision to report and the long and arduous process through the justice system, raised many potentially distressing issues for both participants. However, the difficulties associated with including vulnerable groups, including women exposed to violence, did not mean that they be excluded from research (National Health and Medical Research Council, 2001, p. E168). Certainly, the victim, her mother and the police officer who participated in this study were all keen participants, who hoped that their participation might make some positive contribution to how the justice system responds to sexual assault victims with cognitive impairment.

All participants were offered counselling support. Victoria Police members were able to access assistance from services provided by Victoria Police. Other participants were provided with the contact details of two other services from which they could seek assistance if required.

Confidentiality

Confidentiality during the entire research process and beyond was another issue which, if not dealt with appropriately, would have compromised the integrity of the research. A number of measures were employed to ensure confidentiality was established and maintained.

All data was stored at the University of Ballarat in a locked cupboard accessible only to the researcher. Data in the form of transcripts was kept separately from other information such as informed consent forms. All transcripts were coded, and in addition the name of organisations and of participants were omitted. Tapes used for recording individual interviews and focus groups were destroyed after the researcher was satisfied that all interviews were transcribed accurately. This occurred after all transcripts were re-read while listening to tapes.

All identifying information contained in the transcripts (both hard and electronic copies) has been removed, coded or pseudonyms used. The informed consent forms remained the only document containing participant names; these were stored separately from hard copy transcripts. Where quotes have been used in this thesis, or in other publications generated from the current study, no specific statements, or information which may make the statement attributable to any specific group or individual, has been used.

Potential for Coercion

All participants were made aware prior to opting to participate and again prior to interviews or focus group discussions that their participation in the research was voluntary. Despite the assurance that participants were, from the researcher's perspective free to exercise their choice to participate or not, clearly, there was no guarantee that participants for whom a power imbalance existed, did not experience any coercion to participate in the study.

This chapter has identified, described and justified the broad methodological approach and the methods chosen for the current study. It argued why the specific data collection tools were utilised in preference to other methods and describes in detail the processes by which data was collected and analysed. Additionally, this chapter has highlighted and discussed the various issues associated with research in this area, including the impact on participants and the importance of confidentiality.

The next chapter is the first of three data chapters. The chapter will present the analysed qualitative and quantitative components of the police case file narratives in relation to 76 reports of sexual assault.

Chapter Six: Excised

Subject to an agreement with Victoria Police, Chapter six: Case File Data has been excised.

The chapter contained qualitative and quantitative data, which included 76 case file narratives from five police stations across Victoria. All cases related to adult victims with cognitive impairment.

Chapter Seven: In Their Own Words

The results of case file analysis presented in the previous chapter comprised the first of three data chapters. Through the use of both qualitative and quantitative data, the previous chapter highlighted that very few reports of sexual assault made by adults with cognitive impairment progressed beyond the investigation stage. Further, police decisions appeared to be influenced by negative perceptions of disability, in particular, perceptions which viewed victims with cognitive impairment as not credible.

The primary aim of the current study was to better understand why reports of sexual assault made by adults with cognitive impairment to police were unlikely to progress beyond the investigation stage. To better understand why reports did not proceed, the current study has attempted to shed light on the barriers to and facilitators of progression of sexual assault cases involving adult victims with cognitive impairment. Further, it aimed to enable better understanding of the factors that influenced police decision making and discretionary decisions as they applied to sexual assault cases involving adult victims with cognitive impairment. To this end, the central analytical aspect of this chapter has been identified as, 'Disablers and Enablers to Justice'.

The concept of 'Disablers and Enablers to Justice' refers to the constructed structural and attitudinal environment that either inhibits or facilitates access to justice. The term combined theoretical concepts from radical feminist theory, the social model of disability and symbolic interactionism in the development of a framework through which the social and structural systems and the associated facilitators and inhibitors can be better understood. The underlying assumptions of both radical feminist theory and the social model of disability perspectives include the oppression by systems and structures based on either gender or disability. These frameworks provides an opportunity to refocus our view of the justice system from the expectation that individuals must fit within the established structures, to one that seeks to identify opportunities for the justice system to reorientate its approach in order to facilitate greater access to justice for those who are currently either alienated or excluded from the justice system.

The aim of this chapter is to present the results derived from the analysis of 13 focus groups. Focus groups were conducted with five distinct participant groups namely: advocates, staff members from the Office of Public Prosecutions (OPP) and members of Victoria Police from the Sexual Offences and Child Abuse Units (SOCAU), Criminal Investigation Unit (CIU), combined Sexual Offences and Child Abuse Unit and Criminal Investigation Unit and the Sex Crimes Squad (SCS). The dominant voices used in sections one, two and three of this chapter are those of police members from SOCAU and CIU. It is important to note that the extracts presented in the remainder of this chapter do not represent the views of all police members or of Victoria Police. Rather, the extracts serve to illustrate the diversity of views within the police force, and to some extent to illuminate the strength of subcultures within discrete police units. Opinions from advocates, Sex Crimes Squad members and OPP employees are used to support, highlight, or contradict various police statements.

Emerging from the central analytical concept of Disablers and Enablers to Justice, this chapter is divided into three separately structured areas of analysis or 'domains'. Each domain is presented as a separate section. Each section presented contains the results of the thematic analysis of all focus group sessions. Each domain represents one of three major influences on police decision making. The domains are 'Organisational Culture', 'The System', and 'The Victim'. Each domain is further analysed according to identified themes and sub themes.

Disablers and Enablers to Justice

The data presented includes discussion about the influences which police themselves have identified as being influential in their decision making about sexual assault cases involving adult victims with cognitive impairment. The analysis also revealed a number of cultural or attitudinal factors that influenced police decisions. Although not necessarily regarded by police as influential, these factors emerged in sometimes-subtle ways from the data and provided useful, if partial, insights into the reasoning of police officers. These additional factors provided an insight into the broad cultural and social forces which influenced police perceptions of adult victims, either as victims of sexual assault or as people with cognitive impairment.

Case progression appeared to be influenced by a myriad of factors that. Specifically, the data presented sheds light on the factors which police took into account when making decisions about sexual assault cases and, in particular, cases involving adult victims with cognitive impairment. Where possible, direct quotations made by focus group participants have been reproduced verbatim. Insertions made by the researcher to provide clarity are contained within square brackets.

The three domains ‘Organisational Culture’, ‘The System’, and ‘The Victim’ presented below emerged during the data analysis process. The term ‘domain’ is used as a purposefully broad descriptive term, which serves as a metaphoric umbrella under which the minor themes and categories that have emerged from the data are gathered.

Domain 1: Organisational Culture

The domain of ‘organisational culture’ emerged as a descriptive category - that is the topic of many of the comments of participants. Data was identified through the analysis as reflective of sub-cultures and police organisational culture at the broadest level. Included in this category are the three minor themes of ‘Unit culture and subcultures’, ‘Relationships’ and ‘Views of sexual assault’. Collectively, these three themes relate to police cultures at a number of levels, including organisational, unit (SOCAU or CIU) or station (location).

In understanding the organisational and unit cultures of Victoria Police it is important to note that, if the units who participated in the focus group sessions were at all representative, the majority of SOCAU members were female and almost all CIU members were male. Indeed, CIU participants in the focus groups were all male. The role of gender in police culture, particularly in relation to how roles are delineated along gender lines and the implications of such delineations in terms of how units viewed themselves and how they are viewed by the police organisation as a whole, cannot be underestimated. Such gender role delineation may reinforce gender stereotypes which minimise the importance of the role performed by women in the police organisation (Gregory & Lees, 1999).

Unit Culture and/or Sub Cultures

This theme highlights the attitudinal distinctions between SOCAU members and members of CIU. The way in which individual units perceived their work and the work of their colleagues within Victoria Police emerged as an important issue, which in some cases elicited strong feeling. It became clear as the focus groups progressed that there were a number of perceptions that could have been attributed to somewhat different views generally held within SOCAUs and CIUs. Whilst not all members of every unit voiced these distinctions, the comments when provided, were strongly expressed and provided insight into the thoughts, feelings, and perceptions of some Victoria Police members about their roles, other units within their station, and about the existing relationships between different groups.

A general observation that can be made was that CIU members tended to view their role as instinctive. The following comments were made during a discussion about whether a victim had a cognitive impairment and whether they (CIU members) had received the necessary training to identify and respond to victims with cognitive impairment. By using terms such as, 'we are detectives, we know' or 'as investigators you know', to describe themselves, CIU members indicated that they had a high level of confidence in their ability to perform their roles. They generally stated that there was either no need for training in relation to people with cognitive impairment, as they already knew how to recognise if someone has a cognitive impairment, and said that that such identification was a straight forward process. This perception may be informed by their own stereotypes of how people with a cognitive impairment may be expected to look or behave. Moreover, the CIU participants typically expressed the view that there was no need to respond differently to victims with cognitive impairment because, in their view, every victim was treated the same. The focus group extracts below are illustrative of many comments made by participants at one CIU when discussing how they identify whether a victim had a cognitive impairment and how they, as detectives, responded to victims of sexual assault who had cognitive impairment.

I just think as investigators, you know what's needed. (C1)

We're detectives. We know when someone's got a disability and treat them differently, and we treat them how they should be. (C1)

Realistically, it is often not easy to recognise if someone has a cognitive impairment. Accurate recognition of impairment of either victims or alleged offenders has been recognised as important. As stated previously the Victoria Police in conjunction with the Office of the Public Advocate in late 2007 developed a ‘ready reckoner’,¹⁶ a tool to assist police to identify if a victim or alleged offender has a cognitive impairment. Comments that emerged during the Office of Public Prosecutions (OPP) focus group indicated that errors of judgement regarding a person’s impairment could have significant effects on case outcomes and on the experience of the victim throughout the police investigative process. One focus group participant stated:

I’m having difficulty now with two cases where I believe the police should have probably picked up where there was, I believe, a cognitively impaired complainant and for a number of reasons chose to go the traditional way of just taking a statement, instead of doing a VATE tape. [As a result] in one case now, we’ve had to adjourn it several times, because we’ve had to organise an independent assessment to see whether she is cognitively impaired, and that way have the protection under the Act. Whereas, in another case. It’s a case where I think again, clearly there were issues [of non recognition of cognitive impairment] there, where it wasn’t looked at and now it’s ready to shortly proceed, where she’ll [victim] be in a position of being cross examined. Where there was no consultation [between] police and this office, and charges were issued [by police] and the evidence is, you know, pretty insufficient, and we’ve got all of these problems. (OPP)

Vulnerable witnesses are defined in the *Evidence Act 2008* (section 41(2)) as children or adults with cognitive impairment. Rather than making a written statement, under the legislation, police are required to take the requisite statement through Video and Audio Taped Evidence (VATE). The VATE allows victims to give their statement verbally.

The statement above raised several issues in relation to conducting or giving a statement using VATE. These included the possibly inaccurate recognition by police of cognitive impairment, and the (un)willingness of a victim to use VATE, either because they were not comfortable about being videotaped or were not adequately informed about the

¹⁶ In recognition of the difficulty associated in identifying cognitive impairment, Victoria Police and the Office of the Public Advocate have developed the ‘Ready Reckoner’, a tool to assist police to: identify if a victim or offender has a cognitive impairment; provide information on support agencies; outline police procedure and tips on how to communicate effectively. This tool was introduced during the period in which focus group discussions were taking place; subsequently data regarding the impact of this tool in practical terms was not collected in the current study.

potential implications on case outcome should the victim not have proceeded with VATE. The victim may simply not identify as someone with cognitive impairment.

The transition of a sexual assault report from SOCAU to CIU emphasised the distinct roles of the respective units, as well as emphasising the next decision making stage in the pathway of the sexual assault report through the justice system. The next series of statements highlights the importance detectives placed on their role in the process, the perceived variability in the quality of the VATE, which was directly influenced by the variability of the SOCAU member's skills in taking the VATE statement. According to one CIU detective:

Because it's one thing that the personnel from SOCAU would have their own ideas. We'd [detectives] have to rely on our own experience. [The] person [victim] may not be vivid [clear] as what they're [SOCAU] thinking, or the other way around. (C3)

As the extract indicates, CIU saw their role separate to that of SOCAU, serving as a screening process of the evidence, in the form of the VATE statement, but also the work of the SOCAU member. While they (detectives) had to rely on the opinions of the SOCAU members, they may have also lacked confidence in the abilities or judgement of some SOCAU members.

The next focus group extract highlights several points. First, some CIU members had not fully accepted the use of the VATE. Additionally, the detective who was quoted expresses concern about the variable standards of SOCAU members conducting VATE, particularly in relation to what CIU perceive was an acceptable standard of VATE.

Participant: I think the processes that SOCAU have got at the moment, like I've been there for a little while and it's a hell of an improvement on what it used to be now. Because it's all taped and they're [SOCAU members] trained, even though there might be temporary duties there, but they're still overseeing in a interview stage, and if that training person is still overseen, like someone with a bit more experience. I've got a fair bit of faith in the abilities of the majority of members of SOCAU. They take things on with a bit of spirit, and they do it to the best of their ability. And I can see that we would know generally who they are, and you know. "Oh yeah, so and so is a bit of a space cadet, so I'll really watch this one closely". You might get another member and you know the abilities of that member and trust them less.

Researcher: The ability varies from member to member?

- Participant: Oh absolutely.
- Researcher: So that's going to determine the quality of the VATE?
- Participant: The quality of the VATE and how much you, how closely you do oversee it, like how much leeway you give them. (C2)

Another SOCAU member described the initial reluctance of CIU to accept the use of VATE as a tool for taking statements from vulnerable witnesses.

- Participant: When VATE first came in here the CI (CIU detectives) was just, they hated it because they actually had to sit and watch it. Wasn't the same as the written statements, highlighting this etc. I think now upstairs is quite happy with VATE
- All participants: They're [CIU] getting use to it. (S1)

Interestingly, rather than agree with the final statement, 'I think upstairs is quite happy with VATE', the other SOCAU participants implied that CIU members at that station were still in the process of coming to terms with the alternative method of taking a victim statement. The apparent reluctance of some CIU members to accept the VATE as an alternative to the written statement provided some insight into the strength of sub-cultures within the unit. It suggested there was resistance to adapting to a process change.

The issue of training of police members to raise their awareness of the needs of victims with cognitive impairment was raised during the focus group discussions.

- Researcher: Do you get any training in working with people with a cognitive impairment?
- All participants: [laugh]
- Participant 2: Friday afternoons. (C1)

The views expressed by participants in the extract above can be interpreted in one of two ways. First, they could mean that the demands of the job were such that finding time to attend training was not possible, or that such training was not offered. Alternatively, the laughter from participants may have indicated that they viewed the training program or the need for training as a bit of a joke.

Another view expressed was that some training might not have necessarily met the needs of participants.

[We CIU] play it by ear. But we get statements and reports, obviously if they [Victoria Police] did something, call it training. I think that's to differentiate between different types of impairments; what to look for and so on. It's [the training] pretty light on, very light on.. (C3)

In this statement, the detective was implying that their role was instinctual and that the reports and statements they received about the case and victim informed their judgements. Further, the detective was clearly stating that the training detectives received to assist in identification of various impairment types was not adequate.

In discussing the relationships detectives had with other organisations, one detective stated:

Mind you, we come in looking open minded. Most of these people [CASA and perhaps SOCAU] that speak to victims, "oh yes, yes it happened, oh you poor thing". We've got to come in and think, well, maybe this didn't happen. Maybe it's all bullshit. Then we start talking nasty to them [victim] and all of a sudden, we're the big black [bad] men, aren't we. Oh nasty man. (C1)

The comment provided a deep insight into how this particular CIU member perceived his role to be sceptical about the allegations as being distinct from that of other units and organisations. In this statement, the detective implied that it is a detective's role to identify what really happened, rather than simply believe the victim's version. It also highlighted the perception by this CIU member and presumably by other members who indicated acceptance that their role was not understood by outside organisations such as CASA, which created an apparent clash in objectives between CASA (to support the victim) and CIU (to first determine if the victim was telling the truth and second, to investigate the crime).

The expression 'all of a sudden, we're the big black men aren't we. Oh nasty man', highlighted how language, in the form of metaphoric descriptors, continues to be drawn upon to provide added emphasis or meaning to a statement. The role and use of metaphors by police is discussed later in this chapter.

In the next statement, a CIU member claimed that CIU were the experts in sex offence matters and court processes. The opinion expressed here left little to the imagination about the existing relationship between CASA and CIU and, in particular, how this detective perceived the role of CASA.

I'm of the opinion that there's a lot of people that really don't know a lot about sex offences, and a lot of people who don't know much about the court process, sticking their noses in. Like, as it is now, we don't get to speak to a victim until everyone's had a chop at them. I just think CASAs [participant shakes his head]. (C1)

Other detectives expressed a loss of control or a feeling of exclusion from the process and the case once the brief has been handed over to OPP. This may mean that, for some CIU participants, there was a sense of connection with the case and the victim and perhaps reluctance to hand the case over. The following statements were made in discussion with CIU members about the transition of the case from CIU to OPP.

Because they [victim] give their evidence first [in court], we [CIU] aren't allowed to go to court until after they have given their evidence. We go in last, so the person they have got used to isn't there. (C3)

Well, they [victim] become witnesses, and believe it or not, at that jurisdiction, we [detectives] are just witnesses. We lose control of it [the case] after committal. That's the end of our [participation], we may have some influence, but that's about it really. (C2)

I've got to look at the big picture and they [OPP] go, he's a crook and we know he's done it no matter what the case is, and obviously I know he's done it too, but it's not enough. So it's [the investigation] very emotive [at] our [detectives] end. One of the main reasons for that is because at this coal face we have direct contact with the victim and associates, that people from the OPP won't have. (C3)

These statements highlighted the connections that some detectives made with the victim and how the roles of both the victim and the investigator changed, from victim to witness and from investigator to witness.

How members of the SOCAU saw their role, and how they thought their colleagues from CIU and Victoria Police generally viewed the role of the SOCAU, was particularly illuminating. The following two statements were made by a participant who equated the constant search for more staff with the difficulty of numerically measuring the work of the SOCAU, and this was viewed as an indication that their work was not valued within the police organisation.

Well [we can tell we're not valued] in respect of how seriously the police department value what we do and that we're constantly scratching for staff. (C2)

We can't measure how many penalty notices we give out for sexual assault or how many patrol hours we [have take looking] for sexual predators, because it's just not measurable. (C2)

Implied in this statement was the view that the role of SOCAU members was not valued by their colleagues and, more broadly, by the police organisation. This statement can be interpreted as a reflection of the feminisation of some roles within the police force and the subsequent subordination of these roles within a male dominated and hierarchical organisation.

The next extract highlighted the frustration of some SOCAU members with the apparent lack of understanding of other members of the police force about the extent of the role they perform.

You walk down stairs now and ask some of the members what we [SOCAU] do ... and it's, "Oh, you've been quiet today". "No, I just sit there for seven hours taking a rape statement". They've [other police members] got no idea. (C2)

The implication here was that police members outside the SOCAUs did not understand that taking a statement from a sexual assault victim could take several hours. This created the perception to other police members that SOCAU members were not busy. The comments made by police members outside the SOCAU confirmed and reinforced the view that SOCAU work was not measurable in the same way as the work of police in other roles and, as such, was not considered as important.

Or [if we SOCAU] go out the door [past their colleagues] and they [their colleagues] go. "Oh, going shopping again". (C2)

They've [colleagues] got no concept [about what SOCAU work involves] and unless you've actually worked in the area and actually know what a SOCAU member does, then general policing really has [no idea]. (C2)

But it is also that sort of culture as well, if there's a culture, and you've still got that element in the police force. They'll [police officers who reflect that culture] always see it as a police woman's duty. My husband's been in the job for 20 odd years and his attitude still is, why do men go to SOCAU? (C2)

Whilst these views were not outwardly expressed in focus groups with other SOCAUs, there was a sense of delineation of roles of SOCAU and CIU. Moreover, it is clear that CIU, as overseers of the case, were in control and SOCAU were trying hard to earn recognition for their role. Not surprisingly, women make up the majority of SOCAU members who participated in this study. Advocates also raised the notion of gendered work during a focus group session.

Well it's [the work of CIU] real work [compared] to the fuzzy wuzzy [not real police work] work isn't it?. (A3)

Interestingly, this comment, made by an advocate, demonstrated to some extent that the perceptions of what constituted real work compared to the 'fuzzy wuzzy' work or what was seen as women's work or not real police work, was observable to people who worked outside the police organisation. Other participants at the same focus group nodded their heads in agreement with this statement and this signified that the sentiment had some resonance with them.

The theme 'Unit culture and /or sub-cultures' reflects three main attitudinal issues raised by participants, including advocates and SOCAU and CIU members. In summary, CIU members predominantly raised issues described as 'territorial'. These issues include the transition of a case from CIU to OPP and how members interpret their role. This is particularly evident in comments which viewed the investigation stage as distinct and, to some extent, the 'real' police work compared to other stages in the report pathway. The comments reveal that detectives believe they 'know what to do', so much so that training is viewed as having little value. Despite this view, the OPP focus group participants argued that the perceptions of CIU members were not always accurate, and may potentially had a detrimental impact on trial outcomes.

Participants at separate focus groups of SOCAU members and advocates raised the issue of gendered work. Specifically, a claim was made that work performed largely by women, was not given high status or importance within the police organisation. Significantly, the perceptions of the low value of SOCAU members' work was also reinforced by advocates from a different region thus highlighting the pervasiveness of the devaluing of the work of SOCAU members.

As the above section demonstrates, the different cultures evident in respective CIUs and SOCAUs and the role played by the police organisation in perpetuating gendered work attitudes had significant consequences for SOCAU members. The gendered roles and the undervaluing and subordination of the work performed by SOCAU were keenly felt by SOCAU members and were apparent to workers from organisations outside Victoria Police. The extent to which the subordination and devaluing of SOCAU also reflected how the crime of sexual assault is perceived within the police organisation or unit level or at an individual level was unclear. The distinct cultural differences evident between SOCAU and CIU may have had consequences not only for relationships between units, but also for relationships with external agencies.

Relationships

This theme deals with the relationships between Victoria Police participants and external agencies such as the Office of Public Prosecutions (OPP) and Centres Against Sexual Assault (CASA), both of which play an integral part in the success of cases of sexual assault.

Centres Against Sexual Assault

The following focus group extracts indicate that relationships between units and external agencies can be influenced positively or negatively for a range of reasons including, but not limited to, individual personalities. Relationships may be influenced by the perceptions police had of their own work and their perceptions of the role and value of other organisations as well as how they thought other organisations viewed the role of police. However, relationships per se do not determine the outcome of a sexual assault case. The importance of good relationships, particularly between police and CASA, whose role has been identified by Victoria Police as important for sexual assault victims, can potentially have significant implications for case outcomes.

The pathway the victim must travel through the justice system is extremely difficult. The victim not only deals with the emotional and physical effects of the assault but must also have the strength and stamina to withstand an often drawn out and arduous process of coping with the demands of the justice system, from first report to trial. A negative or non-existent relationship between CASA and the police can create unnecessary tension or potentially leave the victim without support throughout the justice system process,

particularly once SOCAU has handed over a case to CIU. Consequently, the victim may decide to withdraw the report. In discussing their relationship with the respective CASA, police provided a range of perspectives. The varied views indicate that, despite the importance of the relationship between CIU and CASA, as acknowledged in Police Code of Practice for the Investigation of Sexual Assault (Victoria Police, 2005), in some regions there was still work to be done to build and maintain relationships.

When a victim reports a sexual assault, SOCAU members are usually in a position to make initial contact with a worker from CASA who will offer support to the victim. Once a CASA worker becomes involved with a case, their involvement will continue depending on the wishes of the victim. While this process appears straightforward, the relationship between the police (initially SOCAU and then CIU) and the particular CASA worker may influence the ability of the CASA worker to offer their support to the victim in a timely way.

A SOCAU member described the variable relationships between police and CASA workers as follows.

[Relationships vary] from CASA worker to CASA worker...you can get someone with an impairment to have a support person. Obviously they've [the victim] already got a rapport and it just makes it that bit more smoother to introduce them [the victim] to a CASA worker or other policeman or whatever. Where you're doing it alone with someone with an impairment it's [rapport] very hard to develop and they've got all these new people in their life all wanting one thing, to look after them. (S3)

The extract implied that the absence of a pre-existing good relationship might hinder the process of support for the victim. The last line of the extract indicates that this SOCAU member believed that both SOCAU and CASA have the same aim, which was to help the victim. Indeed, one SOCAU member seemed to believe the relationship between CASA and SOCAU is good.

Researcher: It sounds like you've got a good relationship with those organisations
Participant 1: Yeah, it's pretty good here (S1).

The relationship between Victoria Police participants and the Office of Public Prosecutions also appeared variable.

Office of Public Prosecutions

As with the relationship with CASAs, the relationship between Victoria Police members, particularly CIU, and the Office of Public Prosecutions was also important in terms of promoting victim confidence in continuing the process and promoting open dialogue and consultation between them. As the following statements demonstrated, there was a sense of frustration experienced by some police officers in how the OPP worked, particularly in relation to the time taken by prosecutors to acquaint themselves with the case and the victim and the perceived value of police judgements. In the following extract, a police member describes their frustrations when their opinion was not listened to by the OPP in relation to one case.

OPP got the victims' [Witness Assistance Service] person to come up and talk to her. We sat around and I said I think she's trying to say that she doesn't want to do it [appear in court]. And they tried to ask her why and she couldn't even talk to them. In the end, they [witness support] agreed that it would be more harmful to her, even though we had absolute plethora of evidence to prove that she would [be successful]. They [OPP] didn't play the VATE and the VATEs were beautiful. The OPP decided to put her up [on the witness stand rather than play the VATE]. I said "don't" but they did, and she just got ripped to shreds and denied that it [the assault] happened in court and said [later to police] "I'm never doing that again". (SSC)

The statement raised a number of issues. The police officer obviously believed that they know the victim well enough to know that placing the victim on the witness stand would be counterproductive and damaging to the victim. The Witness Assistance Service (WAS) worker based at the OPP shared this view. Yet, for reasons not clear to the police officer, the OPP did not play the VATE tapes to the jury. Instead, they chose to have the victim provide verbal evidence. In this instance, the OPP (solicitor or prosecutor) chose to disregard the advice from the police officer and the WAS worker, yet clearly did not explain why it was preferable to have the witness provide verbal evidence in court (perhaps for greater impact on the jury) rather than rely on the VATE statement. In this instance, the decision appeared to backfire in that the victim was, in the words of the police officer, 'ripped to shreds'. In addition, the experience resulted in reluctance by police to put victims through the court process again.

The time taken or available to prosecutors to become acquainted with a case and/or the victim was a cause of some frustration to both police and advocates.

They'll [OPP] pick it up [the brief of evidence] the night before. (SC)

To be honest, you're lucky if they [OPP] read the brief on the day. (C1)

[OPP will read the file on the] morning [of the trial] and it's half an hour [before the trial] and it's not on. (A4)

[The lack of time the OPP has available for reading the file and meeting the victim has a] huge [impact on victim]. They're [victim] stressed anyway. And here's this person who's supposedly on my side. 'Cause we keep it simple, they [OPP] don't even know me [the victim]. Not only that, they don't want to know me [the victim] and they don't really care about it. They're just here and they'll be going to lunch and then they'll be going home. End of story (A3).

I think that varies, sometimes you have no time on other occasions you have plenty of time. (OPP)

The discussion of the transition of a case from CIU to OPP raised some interesting responses from CIU relating in particular to the loss of control and agency, in addition to the expressed frustrations as to why certain decisions were made.

This first extract below was taken from a discussion with police about consultation with the OPP about a case, and whether police or prosecutors had the final say about whether the case proceeded to trial. Participant 2 accepted that the OPP had the final say. Although participant 4 indicated agreement with the first statement made by participant 2, there was no agreement about the OPP having the last say and that the case was out of police hands. Participant 4 stated, 'they're just getting advice'.

Participant 2: We've got one [case involving adult victim with cognitive impairment] at the moment. But we're about to go and see the OPP. I think we'll go to them and say, "Well, what do you guys think"? We'll offer our opinion of what we think should happen, but if they think no, then they'll refer us to some case law or their ideas about this and that, then so be it.

Participant 4: Yeah I'd agree with that,

Participant 2: That's right. They [OPP] have the last decision and our hands are tied I suppose.

Participant 4: Not always, if it's clear cut then we'll charge em [the alleged offender]. We put it to the OPP, to put it before the court.

Participant 2: Yeah.

Participant 4: If there's factors [related to case or victim] we're unsure about, we'll consult with them [OPP], it's just gaining advice. (SP1)

SOCAU and CIU participants at another focus group shed light on their relationship with OPP.

The OPP will knock a lot out because they believe they'll never get a conviction. Even if we put them up there, they'll say, "No, we'll never get a conviction". (S2)

It should have been in the top court [County Court not Children's Court] but that was a decision made at that top level and I was astounded by it. I can cite other experiences where the decision making process also amazed me, but then at a solicitor level when you get in a court scenario and you say to them, "I'm here to follow this matter through. This is my brief, and I'm not going to cop it on the chin and be told what to do", I've found it to be extremely good. (C2)

Some changes to victim support at the OPP had been particularly successful, according to the advocate in the following extract, who described the care and support provided to a victim by a Witness Assistance Service (WAS) worker.

But I'll tell you what I have noticed and I think there should be more of it [the] Victim Support Worker, and if there were ten of her, what a wonderful world this would be. (A3)

Clearly, the extract above provides insight into the variability of relationships between Victoria Police members, Centres Against Sexual Assault and the Office of Public Prosecutions. In relation to the relationship between police and CASA, there appeared to be two points of disconnection. The first of these was at an individual or personality level and the second was at a Police Unit level where it was quite apparent that what was in contention is the perceived conflict of roles of CASA and Victoria Police.

The role of the OPP and the relationships between the OPP, Police and advocates highlighted three main issues. The first related to the transition of cases from police to OPP and the feeling of exclusion by police in the process once a case had been handed over. The second related to communication between OPP and police. Whilst the OPP would clearly have welcome more communication and consultation with police during the decision making process, disagreement was evident amongst various police units about when or if to consult with OPP about a case.

The third issue that police and advocates expressed was their frustration about the limited time taken or available for OPP to speak to the victim and/or to read the brief of evidence

prior to trial. CIU and advocate focus group participants indicated that the OPP prosecutor often read the file and met the victim for the first time on the morning of the trial. Advocates, in particular, stated that it was vital for victims to meet the person/s involved in prosecuting the case, if for no other reason than to assist in alleviating some of the stress involved in the trial process.

Views of Sexual Assault

Data grouped in this category were selected because they provided an insight into how the views of sexual assault held by some police officers mirrored misconceptions of sexual assault held by the wider community. The misconceptions were expressed in comments from both members of the Criminal Investigation Units and members of the Sexual Offences and Child Abuse Units. The comments also served to highlight the distinct different attitudes towards and understanding of sexual assault of members of CIU and SOCAU. The following statements provided a glimpse into the thought processes and attitudes of police when they were considering whether a case will progress, particularly in relation to what was considered to be a ‘real rape’ and who was a ‘real rape victim’ (chapter 2 discusses these concepts in more detail). The extracts are discussed using sub headings to highlight the connection between police views of sexual assault and those of the broader community.

Victim Behaviour Prior to Assault

Victim behaviour prior to a sexual assault was an issue that juries and, indeed, the detective in this instance were likely to consider when making a decision. The implication of the following extract was that police consider the prior assault behaviour described as likely to cause doubt in the minds of the jury members.

[Detective describing a scenario] I [the victim] was already in this room playing play station and he just wanted to play with my breast, so I let him do that. I lay on the bed, but I didn’t want him to do it. So all of a sudden you’ve got [a situation], when you think about a jury sitting there saying, ‘Well, who the hell do I believe here?’ (C2)

Blaming the Victim

The next focus group extract was from a discussion about the impact and importance of sexuality education for people with cognitive impairment in reducing the incidence of

sexual assault. Clearly, the detective was stating that the onus was on the female service user to refuse, or to know that having an affair with the manager of the service, was not appropriate.

We recently had a case where the person had [Downs Syndrome]. [A victim] person in their [between the ages of 30 and 40 years]. The person comes from a very well off family. She's in a centre [disability service] here at [name of area] and she'd been having an affair with an, alleged [affair] with the manager of that centre over the last 12 months. And she doesn't, she's not, actually for someone with Downs Syndrome, she's a little bit hard to pick at times. She comes over very well, very well spoken. But with education, wouldn't she know that that's not acceptable behaviour? (C2)

Sometimes these things [police perceived sexual encounters] that get reported did happen, but it was with consent and it's not really our role [to determine if there was consent or not]. One day it's with consent and tomorrow morning, it's not with consent. (C1)

The extract below reflected a police officer's view of the apparent lack of importance Victoria Police in general assigned to crimes of sexual assault.

If you want to catch burglars, I'll tell you what, they'll throw the resources at you. But if I want to put a crew [SOCAU] on the road, I'm scraping [to find the resources] and thinking and saying well [can't comprehend]. (S2)

The perceived lack of importance may also be reflective of organisations such as Victoria Police responding to political and community pressure to reduce 'real crime', the response being to increase police presence.

A Hidden Agenda¹⁷

For the participants whose opinions are presented below, victims with cognitive impairment were perceived as less likely to have hidden agendas, which implied that the view of these members might be that other victims of sexual assault do have hidden agendas.

Participant 5: I actually think they're [victim with cognitive impairment] viewed with more credibility than everybody else.

Researcher: Yeah okay....why do you think that is?

¹⁷ The meaning of 'hidden agenda' in this context refers to victims who make up false allegations of sexual assault may have an ulterior motive.

Participant 6: They mightn't have an agenda.

Researcher: One of the things some participants have said, is that they think people with intellectual disabilities are more honest.

[All participants agree]

Researcher: Is that your experience?

Participant 3: A lot of them [victims with cognitive impairment] that I've had dealings with don't have the capacity to make up a story for their own agenda. (SP1)

Males cannot be Victims of Sexual Assault

The statement below was a telling comment about whom some police considered victims of sexual assault. Clearly, the male police officers had two views of what constitutes sexual assault, one during work hours and another outside of work. The 'boys' referred to, in this comment were police officers from outside the Sexual Offences and Child Abuse Unit.

I actually took offence on Saturday. That article in the paper, of the female teacher that sexually abused a 15 year-old [male] student. I was at a place with a number of police officers and the boys were commenting on how lucky the 15 year-old boy was. I turned to them and said, "would you be saying the same thing if it was your 15 year-old daughter" and they said "No, we'd be killing him" and I said, "What difference does it make?"

It's almost an insult, this scum bag [offender] had been doing this to your 15 year-old daughter, you'd want to lynch him. Why wouldn't you want to lynch him for your 15 year-old son?

And they looked at me like I had two heads and said "outside men are not victims, they're lucky, and we shouldn't speak about it [as it is not the view we are supposed to represent within Victoria Police]. (S2)

Further exploration of the extent to which this comment can be said to be reflective of police attitudes towards the sexual assault of males by females was not the focus of this study. However, these extracts highlight the point that, despite training and the experience of working with victims of sexual assault, police attitudes to sexual assault and sexual assault victims continue to reflect the myths and misconceptions about sexual assault that are apparent in society at large.

Summary/Conclusion

The data described and analysed in the domain 'Organisational Culture' demonstrated the dynamics of organisational, inter-organisational and cross-organisational relationships. Specifically, the data provides an insight into the positive or negative influence that internal and external relationships can have on police decision making directly and/or indirectly, such as the impact that consistent ongoing support may have on a victim's willingness to remain engaged with the justice system process.

Also clear was what could be described as disturbing attitudes of some Victoria Police member participants towards sexual assault. Whilst these attitudes may mirror those expressed by a proportion of the public, the comments are nonetheless worrying, particularly if members who are investigating cases of sexual assault hold these views. While the data does not allow for generalisations in relation to attitudes of Victoria Police members across the state, there can be little doubt that Police member participants as members of society, are influenced by social forces that inform their decision making in relation to sexual assault cases involving adults with cognitive impairment. Further, where Police members hold the views espoused above, about the crime and victims of sexual assault, the impact of their views on case progression of sexual assault cases will more than likely be negative.

The two remaining domains will now be interpreted and analysed in order to provide insight into the influences of other aspects of police decision making.

Domain 2: 'The System'

This domain was used to group data that was illustrative of the processes of the justice system that police worked through and satisfy when making decisions about sexual assault cases. The comments that follow describe, in the words of participants, the considerations that they said were taken into account when police make decisions in sexual assault cases. The participants described what they saw as the difficulties with the system they work within, and the challenges it presented for them as police and for victims.

The perception that the justice system provided more support and protection of the rights of the accused than of victims was a view expressed by a number of focus group participants.

The system doesn't work for them [victims] (SOCAU 2).

There are a lot more things in place obviously for the defendant than there is for the witness. There are things legislated that you got to have somebody there [at the interview]. You've gotta deal with them in a particular way and if you don't, you lose your interview. So there's plenty of things there for them [defendants] (CIU 1).

The statements above suggest that the justice system was difficult and certainly not kind to victims, particularly sexual assault victims. Further, it suggests that the perception of some police was that the justice system was not balanced in its approach to victims and the accused.

Decision making within the Prosecutorial Guidelines

Framework

For police, including SOCAU and CIU, at each stage of the decision making process there were a number of system requirements that a case must have met before it could be authorised. One such requirement referred to by police was the prosecutorial guidelines. In addition to other information, the prosecutorial guidelines outline a list of questions that were intended to aid the discretionary decision making process of the investigator or prosecutor in relation to assessing, amongst other things, the evidence, and the credibility and capability of the victim.

The points raised and considered salient by research participants, which fell within the framework of the prosecutorial guidelines, are provided below. The analysis highlights how these decisions, and indeed the prosecutorial guidelines, were applied when police are considering cases of sexual assault where the victim was an adult with cognitive impairment.

Guidelines

The use of guidelines to inform and provide a framework for decision making was mentioned at two focus group sessions with CIU. However, terms such as 'public

interest' and 'reasonable prospect of success' were used by participants at other focus group sessions, suggesting that CIU were aware of and use the guidelines, even though the term 'guidelines' was not specifically mentioned by them in their discussion.

We certainly have guidelines. There's very strong guidelines which come from head quarters. (CS)

There are various guidelines you have to follow. (C1)

Somewhat surprisingly, one participant mentioned that they did not have guidelines.

We don't have guidelines. We package up our investigation in what is called a brief. (SP1)

This police member was new to the role of investigator, which raises the issue of the importance of induction and training.

Evidence

The collection of evidence that could corroborate any allegations made was of prime importance to police investigators. Evidence gathering and the making of decisions based on evidentiary considerations was one part of the process of building a 'good' case, or rather, a case that will have a good chance of 'success' at trial. Success, in this context, refers to a guilty verdict and the conviction of an offender.

For some participants the evidentiary requirements are the same regardless of who the victim was.

Our job is to gather the evidence, and then it goes to our boss or the OPP. But we just gather the evidence and put it obviously in a brief form. I don't care who they are, whether they're mentally impaired or what, the situation is, it makes no difference really. We've got to gather the evidence and present it and see whether it's going to be authorised or not. (SP1)

Although the process of evidence gathering, be it in the form of witness statements or physical evidence, may seem quite straight forward and objective, it was quite clear from the following statements that subjective decisions were also made about the evidence in terms of its 'quality' and usefulness in the trial process. Evidence was not simply evidence.

Generally, you'll make an assessment of what [evidence] you have and whether there's any likelihood of it proceeding to court. Because obviously it's all limited space. The only time you're going to get prosecution, is if you've got enough evidence to actually have a successful prosecution. But if it's one word against the other, you've normally got [no option, but not to proceed] unless there's DNA evidence or other form of biological evidence. (S3)

I think with any sex offence really, depending whether the person has a disability or not, we would rely heavily on corroborative evidence in the form of physical evidence and eyewitness evidence. (C1)

You'd be still looking for the same sorts of things like corroboration via a witness, via medical, via forensic, via first complaints. All those sorts of things. (SC)

I think you still run [the investigation] along the line that even if the victim is able bodied. Because if there is no other evidence and it's subject to the consent thing, that's the only issue. And the offender is saying, yeah, yeah she consented, even if there is medical evidence that's of no use cause he's admitting to having sex with the victim. If there's only consent there that's just as hard as an able bodied victim as it is with an impaired victim. But I think, yeah if you're at that wall, if there is no other evidence, you know you're not going to get it past first base. So it wouldn't go any further even if you know, I don't want to be judge and jury, but you know that where there is no other evidence and they haven't encountered all of the other issues as other victims, you know it just isn't going to go any further. (S1)

There appeared to be levels or categories of evidence which constituted acceptable evidence to individual investigators and prosecutors. In effect, both investigators and prosecutors constructed their own views of what they deemed to be sufficient evidence. Ultimately, the better the evidence was, the stronger the case would be. This in turn leads to an increased chance that the case would be authorised and ultimately an increased chance of a successful prosecution.

Interestingly, while the previous comments indicated the importance of forensic or corroborating evidence, a member of the Office of Public Prosecutions stated that forensic or other forms of corroborating evidence was not a determining factor in the success of a trial.

Participant 3: I just wanted make one point, when you talk about forensic evidence. I think there's, to me there seems to be, a bit of a misconception in the wider community, as if it's the be all and end all. In probably in the vast majority of cases we have absolutely no forensic or scientific evidence. We have what the victim says and if

the jury accepts that victim's evidence, then they can find the accused guilty beyond reasonable doubt. So generally the lack of forensic evidence is not something that is an overriding consideration. We'll look for, is there evidence that's capable of corroboration, but it's not a determining factor. (OPP)

Participant 2: If there is forensic evidence though, in all likelihood it [the trial] will go ahead, because in all likelihood there will be sufficient evidence. (OPP)

This comment by the OPP member highlighted the need for more communication between police and OPP, particularly in relation to the authorisation or non-authorisation of reports based on assumptions police may have had about the 'absolute' need for corroborative evidence. However, the comment made by participant 2 slightly tempered the previous statement made by their colleague and indicated that corroboration in the form of forensic evidence increased the likelihood of a case progressing to trial. In addition to the identification of increased communication between OPP and CIU, these extracts illustrate the different levels of interpretation that can be applied to determining the 'likelihood of success' a case may have at trial.

More Evidence

Although SOCAU and CIU participants stated that the process was the same for any victim, their statements implied that more evidence was needed in cases where the victim had a cognitive impairment. Further, they implied that the evidence would need to be stronger in such cases, depending on the severity of the impairment.

I think with any sex offence really, depending whether the person has a disability or not we would rely heavily on corroborative evidence in the form of physical evidence and eyewitness evidence. If someone had a severe disability you would rely on more of that [more evidence], so more emphasis on that [evidence] again. (C1)

In a nutshell, I think that people with mental impairment or any sort of disability are treated just as any other rape victim or sexual assault victim. The only difference is you've got to find some corroboration or independent person to help get that person before the court. (SP1)

It depends on how much other evidence you have definitely. If we've got forensic evidence, then obviously the strength of the case doesn't purely rely on the evidence the person can give, but what other corroborating evidence you have. But a person may not be [a good witness] and may make mistakes during cross examination, if you've got strong evidence this person nominated and we've got all this other evidence, witnesses, forensics, obviously you'd go ahead with it. (S3)

The statements directly above indicated that, if a case involved a victim with cognitive impairment, there was a view that ‘more evidence’ was needed for the case to have a reasonable prospect of success. The implication was that disabled victims lacked credibility, hence collecting ‘more evidence’ may have restored credibility to the case.

In discussion about the types of cases the Office of Public Prosecutions dealt with in regard to victims with cognitive impairment, the following observation was made.

Participant 2: There’s really not that many historical cases with what we call impaired people. Most of the historical cases are people without cognitive impairment. Most of the cases involving impaired victims are.

Participant 3: There’re recent reports. Often, they’ve come about as a pretty recent disclosure.

All participants agree. (OPP)

Given the previous discussion about the extent of evidence needed for cases involving victims with cognitive impairment, it was possible that a relationship existed between the few historical reports involving victims with cognitive impairment and the low number of cases that reached the OPP. The link was that evidence, in particular forensic evidence, was not available for historical reports; hence, an early decision made by police ‘not to proceed’ may have been made on the basis that there was a lack of what police may have judged as ‘good’ evidence.

Reasonable Prospect of Success

‘A reasonable prospect of success’ was one of several criteria against which police (SOCAU & CIU) assessed the evidence relevant to a sexual assault case in order to determine the potential of the case to be successful at trial. The factors considered to contribute to a ‘reasonable prospect of conviction’ were listed in the prosecutorial guidelines in sections 2.14 and 2.15. In making an assessment, police and then prosecutors must apply their judgement or discretion to every aspect of the case, including the strength of all forms of evidence.

But we still have to assess it [case] as having a reasonable likelihood of successful [prosecution].

(C2)

You work on a reasonable prospect of success. (SC)

Our bottom line is reasonable prospect of conviction and we have to assess our briefs on reasonableness of the prospect of convicting the defendant. (S2)

Police also made judgements about the victim. These were made on the basis of whether the victim would make a good witness, was a credible witness, and would stand up to the rigours of cross examination. Police considered whether the victim had the verbal and mental capacity to speak clearly and remember vital aspects of the evidence, such as dates and times.

Public Interest

Assessing the merits of a case from a public interest perspective was an additional criterion contained in the prosecutorial guidelines, against which the merit of case progression is considered. One CIU participant described the process he used for case assessment in relation to public interest.¹⁸

I go through and there are various guidelines you have to follow. You look at whether it's in the public interest, whether there is a likelihood of a finding of guilt. But you also look at, one of the main things is the public interest. You're mindful of costs, although in these sorts of offences that is secondary. But you're really seeing whether or not it can be corroborated, knowing that you're going to go through committal and a trial. Sometimes it's quite difficult. (C1)

The statement above highlights the complexity and subjectivity of police decision making in relation to the decision to recommend authorisation or non-authorisation of a sexual assault case.

Influence of Third Parties

In forming an opinion, or making a decision about the progress or otherwise of a case, or indeed the decision whether to take a report of the alleged assault, police gathered or received information from a number of sources. 'Third parties', in this context, included family members, friends, acquaintances, or workers associated with the victim. The information provided appeared to have an influential effect on police decision making,

¹⁸ Section 2.1.9: The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence, the less likely it will be that the public interest will not require that a prosecution be pursued (Office of Public Prosecutions, 2008).

particularly in determining whether a crime had been committed and, more importantly, on decisions about the character of the victim should the victim make a report of sexual assault in the future.

The following statement made by an advocate, highlights the influence that workers from the supported accommodation service may have had on police decision making. Claims made by workers, such as those which implied the victim cannot be believed, may be recorded on the police case file. Should the victim make further reports of sexual assault in the future, this information will be referred to and may subsequently influence police decision making.

She [the victim] was living in a supported accommodation situation, which was under the department, and staff they claimed that they didn't believe what was going on in her flat. The client was clearly of a different view point. I don't know that she would have got much support if the police had gone over to investigate. (A1)

The following extract refers to the mother of a victim. The accused was the mother's boyfriend. The victim's mother was defending the alleged offender in this situation.

The person [mother of the victim] who told them [the police], rang and told them [the police], was not on her [victim's] side and everything, her privacy her everything even the trust, her personal space was completely manipulated to suit the offender. (A3)

In this instance, the police officer described how the police may have relied on a support person for assistance to determine the victim's verbal capacity and whether or not the victim's level of communication was sufficient to provide evidence in court.

We don't always take a statement from the victim if they're not able to give a statement. So they [victim] more than likely will have a support person at that stage while we're talking to them to speak to them about what disclosures they can make and how verbal they are or how understanding they are as to what they need to tell us. Like, if they're non verbal and if they're not going to be able to give us anything verbal to the standard, for court that is, we won't even do a statement, we'll make that assessment and say they're not even [verbal]. (S2)

The next statement illustrates how people with cognitive impairment and their workers became known to police officers.

Now I've got a couple now where their worker at the accommodation places will ring me and say such and such has been in big trouble so she's bound to ring you and say she's a victim of something. And quite often she [victim] has encountered with somebody, like it's consensual sex and maybe that's why she wasn't home on time or what ever the case may be. So [consequently] she's [the victim] going to report that and it's not really done maliciously, it may be a survival thing for them [people with cognitive impairment]. Or they've [person with cognitive impairment] got to be the victim, so they won't get into so much trouble at home. (S1)

The following extract highlights the potential risk associated with the power of third parties to effectively determine the outcome of a report. This power increased when, or if, the perpetrator was a staff member making the call to police. The fact that staff at accommodation services may be perpetrators did not appear to influence the perceived credibility of the staff member.

We'd go up there, we'd have to listen to her [victim] telling us how she'd been sexually assaulted that night. But this nursing staff would say, "There's no way, we haven't allowed any male nursing staff to look after her". And you think, oh I hope this isn't true and that you'd hate to think that in a place like that someone is getting at them. (S1)

Conversely, as the next extract demonstrates, third parties can also be the instigators of reports.

You're right, both mine [cases] it was the third party that was the instigator the complainant. (SC)

In cases involving adult victims with cognitive impairment, police relied on information from third parties. Positive or negative information provided by third parties could have a significant influence on future reports made by the victim.

Third Parties as 'Gatekeepers'

The role of third parties or organisations in raising awareness of a sexual assault that has occurred while the victim is using the service can be critical to the outcome of the case. What service organisations decided to do with information they have about an alleged assault will influence police decision making. If the report to police was delayed, forensic evidence may have been affected or not available, which would in turn influence the police perception of 'likelihood of success'. The extracts below demonstrate how critical the role of service organisations is to case outcome and ultimately to the victim.

Certainly patient-to-patient assaults are reported fairly quickly, but carer-to-patient, slow in coming to light. (C3)

We class 72 hours as historical. But so often, it's the case that they [victim] might report to a worker and the worker talks to a supervisor and it goes on and goes on. Eventually, the police are called and they may even be notified through [government department] and then there's some discussion on what to do. So often by the time we get those cases, they are advanced in time anywhere from 48 hours to, I would say a week or two weeks, probably a week would be the statistic in time. (C.2)

By the time I got there, she had been taken off the bed, changed, washed, so that was it, [not able to get forensic evidence]. (S3)

We get a few reported from the psych unit where women make complaints about staff and it will, the staff, they'll record it, but they'll consider that it's part of their condition. (S1)

In addition to the impact on case progression, the way in which service organisations handled allegations of sexual assault appeared varied. The following extracts provide examples of incidents as recalled by advocates.

He had an intellectual disability and some other disabilities. The thing that we most noticed was the reluctance of the service provider to take it [sexual assault] seriously in the first instance. To think that they could handle it through the normal incidence reporting or whatever. It wasn't an immediate response, so we had to actually push them to start their reporting and then assist. (A2)

It's the day placement; they are the people that have buggered this whole process up [case] by not reporting, infighting about and then debating what's happened and what hasn't happened. For me it looks awfully suspicious that they've [day service] terminated his [alleged offender] employment, thereby putting themselves at risk of unfair dismissal because nothing was ever proven. (A2)

There's another issue, which is probably indirectly relevant. That person [alleged offender] is free to go and work anywhere else. They just move on, move on. (A2)

The statements presented above provide some insight into the influential gatekeeping role organisations can have in determining if a report of sexual assault is made to police. The comments also highlight the implications of not reporting the incident and simply asking the alleged offender to leave the organisation rather than having the report investigated.

Video and Audio Taped Evidence (VATE)

The role of the VATE is to provide an alternative to a written statement for vulnerable witnesses, including adults with cognitive impairment and children. The recording forms part of the ‘evidence in chief’ gathered by police and its purpose is to be replayed in court for jury, judge and defense counsel. The quality of the statement recorded and a number of other factors, including the ability of the victim to tell their story and the ability of the SOCAU member to conduct the interview effectively, will determine its usefulness for court. During focus group sessions, CIU members stated that VATE quality could be variable and depended on the skill of the interviewer (SOCAU member). The interviewer must ask the ‘right’ questions in the ‘right’ way in order to, in the view of CIU, be useful for trial. Ultimately, how effective the VATE was, and indeed whether it was used during the trial, was subject to the discretion of police and Office of Public Prosecutions and members of the judiciary.

The following statement made by a CIU member indicates that the quality of the VATE influences the decision to authorise the brief or not.

I’ve seen [how] they [SOCAU] can leave out some fairly important points of proof. If that’s not there and when I come to authorize the brief, well, if that’s not there, it’s not. You can’t authorize it and it’s sometimes because that question just hasn’t been asked. (C1)

The following quotes provide some insight into the differences in culture within units.

I think it works well with people with intellectual disabilities because often they can’t verbalise what happened. So it’s that visual. (SC)

When VATE first came in here the CI was just. They hated it because they actually had to sit and watch it. Wasn’t the same as the written statements, highlighting this etc. I think now upstairs is quite happy with VATE. (S1)

All participants: they’re getting used to it. (S1)

Yes adults, well both [children and adults]. I think that VATE itself has put a lot more cases before court, a lot more.

Researcher: Would you say that you have had a lot more cases of cases involving victims with a cognitive impairment going to court?

Participant 1: No, I couldn't say a lot. It's probably kids ones that we've seen a lot more going to court.

Participant 2: But probably since VATE we've had some that have gone to court. And again, it's the descriptions. If they were to use words that had to be put into a written form, well you can't [find the words]. Whereas, if they can sit there and say he did this (makes hand gesture)

All participants agree. (S1)

Some police clearly embraced VATE and saw its benefits, whilst others were still coming to terms with its use. The extent to which the views of police about using a new process of taking a statement impacted on decision making regarding case progression, was not clear. The data suggests, however, that changing the culture within some units in Victoria Police can take quite a while.

The next extract illustrates that, as far as the participant is concerned, some judges were also yet to come terms with allowing the VATE to be used in the court room.

There are a lot of judges that are resistant to VATE, so it doesn't matter how good the quality is. The OPP says yeah, but if you get a judge who just doesn't like it or if you get a defense lawyer arguing cleverly. It's not just the police, it's the judges as well. (S1)

While VATE as a tool for taking statements have been in existence for a number of years, there were still some pervading issues in terms of the use and acceptance of VATE throughout the Justice System.

The threat of costs being awarded against police in sexual assault cases was also an issue which may have impacted on decisions made by police regarding progress or exit of cases.

Costs

During focus group sessions, police members raised the prospect of having costs awarded against the police if a case failed at trial. The following extract may indicate that despite guaranteed anonymity, participants still may have been a reluctant to acknowledge that costs associated with unsuccessful prosecutions may have influenced their decision making. Conversely, the discussions may be an indication a gradual change in culture was occurring within the police force in relation to the influence of cost considerations on case authorisation.

The reasons are, it's probably based on a cost factor I suppose in a lot of areas they talk about cost and our highest court costs [are] where we lose court cases and the majority of cases that we lose [and] probably the highest percentage would be sexual assault cases. So then, I suppose the force takes the view of, should these be authorised in the first place? (SC)

The perception persisted, however, that 'the force' may still consider costs, particularly in sexual assault cases, and such considerations may still influence police decision making in relation to case progression. In considering what factors may influence case progression or exit, one focus group mentioned costs as being influential.

In contrast, when other focus groups were asked for their views about the influence of cost on their decisions, their views differed.

I would say no to that [whether costs is an issue they would consider]. It would be more the OPP's area about costs. We base our decision solely on the evidence. (C3)

Not in sexual assault cases...

Oh, I don't know that costs are an issue. If they are, it's something you wear...definitely it was in the past but that was a pressure applied...by the police department...line managers when they looked at authorising...for court...but I don't see it as a real issue now. Generally costs are awarded and the police department doesn't like it. It's usually been when there is a fairly glaring error [error meaning where a case should not have been authorised]. (C2)

The OPP participants were clear in their response to a comment made by police regarding the influence of costs on decision making in relation to sexual assault matters. As the discussion continued, however, acknowledgement of costs being a consideration, at least in the early stages prior to committal, was made. The committal, or just prior to, is the transition point for a case to be handed over by the CIU to the OPP.

Participant 2: And it's more like other reasons such as putting the complainant through enormous stress unnecessarily, would be more of an influence.

Participant 1: I think it's the complainant [which influences the decision] and is there sufficient other evidence. What do they [complainant] want and what's overall in the public interest and that's not money, that's just more public interest.

Participant 2: If there were the cost implications that we had in the forefront then it would be completely inappropriate, as it would mean our decisions were being driven by money and how can we best secure a conviction and that sort of thing. There are

many cases where it's in the public interest to run them even though the chances of conviction are equivocal at best.

Participant 4: My own personal experience. I've never seen anyone seek costs where there has been a cognitively impaired complainant, has anyone else [question asked of other participants]?

Participant 1: At the magistrate's court level if it's discharged.

Participant 4: The cases I've had where charges have been withdrawn.

Participant 2: Discharged.

Participant 4: Yeah, discharged is a different thing. But, what we try to do in matters where we don't think, we get them from the police and we look at them and we think there's not much chance of success, it's not really in the complainant's best interest, we try and make a decision early on in the piece to try and avoid costs at committal. Costs don't generally come into it in the very early stages. (OPP)

The extracts discussed above demonstrate some lack of clarity about the influence on decision making of costs being awarded against police. Conversely, several police respondents were adamant that, while costs were an issue considered in the past, costs no longer influenced decision making, particularly in sexual assault cases. Some claimed that, even if costs were a consideration, then this would only be an issue once a case was handed over to the OPP. On the other hand, the OPP participants indicated that decisions they made regarding whether a case should proceed to trial were made in the best interests of the victim.

It was evident that a lack of communication existed between OPP and Police about the reasons cases did not proceed to trial. This appeared to result in frustration by the police, as cases thought to have a reasonable prospect of success were not prosecuted by the OPP.

The availability of resources can also have an impact on the direction of a case through the justice system.

Resources

Police rely on the timely availability of resources to support their work in sexual assault cases generally, but particularly in cases that involve victims with cognitive impairment. The consequences of a lack of, or timely access to, resources can be significant, both for the police officer and for the victim, as the lack of adequate resources can have a significant impact on the trajectory of the case. The resources mentioned during focus

group sessions included diagnostic services to assist identification of impairment and level, access to the Independent Third Person (ITP) program, and access to forensic services.

The way in which police officers make decisions about impairment type and the accuracy of their decisions can influence what other resources are called on to support the victim or the statement process. As the following comment indicates, if the police officer did not recognise that the victim has a cognitive impairment, they were unlikely to seek assistance from a trained Independent Third Person. Other comments highlight that a distinction was made between the need to assess cognitive impairment of victims and that of the accused. Police either used their own experience in identifying cognitive impairment, or relied on the recommendations of others who knew the victim, such as case workers or family members. In the case of the accused, police may call on a medical officer or psychologist to make the assessment. The Office of the Public Advocate and Victoria Police developed the 'Ready Reckoner', the purpose of which is to assist police in recognising if a victim or offender has a cognitive impairment. The Ready Reckoner also provides procedural information, referral options and informal techniques of communication.

The following comment made by a SOCAU member highlights the potential for cognitive impairment not to be identified by police officers.

Yeah, it's a hard one. Sometimes I find with intellectual disability, I've had times when I haven't realised that they had an intellectual disability, I've been told by somebody else. (S 2)

Discussion that occurred in the OPP focus group sessions highlights the fact that errors in identifying whether a victim has a cognitive impairment can have significant effects on case outcomes and the experience of victims throughout the process.

I'm having difficulty now with two cases where...um...I believe the police should have probably picked up where there was, I believe a cognitively impaired complainant and for a number of reasons chose to go the traditional way of just taking a statement, instead of doing a VATE tape. [As a result] in one case now, we've had to adjourn it several times, because we've had to organise an independent assessment to see whether she is cognitively impaired, and that way have the protection under the Act. Whereas, in another case. It's a case where I think again, clearly there were issues [non recognition of cognitive impairment] there, where it wasn't looked at and

now it's ready to shortly proceed, where she'll [victim] be in a position of being cross examined. Where there was no consultation [between] police and this office, and charges were issued [by police] and the evidence is, you know... pretty ...um...insufficient, and we've got all of these problems. (OPP)

A number of issues came to light when participants were asked about using ITPs in their work with victims with cognitive impairment. Discussion of the ITP program was characterised by confusion about the role of an ITP, the reduced availability of ITPs, particularly out of the metropolitan area, and the variability of ITP expertise.

The following extracts highlight the issue of police and advocates being uncertain and confused about the role of an ITP. In the first extract, an advocate asked whether she would qualify as an ITP.

Well, I think I made the initial contact with police, so they were sort of anticipating I would come down. Do I qualify as an ITP? (A1)

The next extract suggests that the police in this situation feel that there is an overlap of roles with ITPs and detectives.

An ITP is usually there to look after a person's rights, make sure they are treated fairly. This is a victim you're talking about, that's our role too. (C1)

There was some evidence that some police lack understanding of the Independent Third Person program, not just at individual level, but also at a unit or station level. As the following discussion highlights, police in one station had a list of volunteers from two distinct programs – the Independent Third Person program and the Youth Referral Independent Person Program (YRIPP). The YRIPP program trains volunteers to act as Independent Person during police interviews with young people, when their legal guardians cannot be contacted. The YRIPP volunteers are not trained in working with people with cognitive impairment.

Participant 4: I think we use them more for suspects rather than any witness.
If you get an ITP it doesn't necessarily mean that they're going to be trained in the particular problem that your victim has got. You just get a person off your list when you know it's a regular person that doesn't mind coming in at odd hours.

You'll get that person that you've had previous dealings with that aren't necessarily trained in the problem that your witness has.

Researcher: What do you mean?

Participant 4: If it's an ITP you get a particular ITP, the person on the list. The person you're interviewing might have a particular problem you need an ITP for. That ITP may not be trained in the problem that the particular suspects experiencing, they're just there as an ITP.

Researcher: Yes, so what sorts of problems does that bring up with communication?

Participant 4: Well they're not trained to interpret what that particular person is trying to say.

Participant 5: You've got a list of people there for suspects under 18 and you have some that are trained to work with people with a disability, not all of them are cross-trained.

Researcher: So you draw on both lists?

Participant 5: No, there's one list, some are cross-trained, some aren't. (C1)

The extract above indicates that police develop rapport with specific ITPs, who hence may be chosen in preference to others. This practice raises concerns about why one ITP would be favoured ahead of others. For example, the ITP may be favoured because they work in a way that police find useful for their purposes, which may not always be in the best interests of the victim, or the accused for that matter. Advocates' perceptions of police use of ITPs indicated a reluctance of some police particularly the Criminal Investigation Unit to use this program.

I ensure that an ITP is there; certainly the police at some stations do it automatically. Other areas they need a little bit of persuasion. (A3)

I don't know. Well [it is] the police stations I often have the most problem with generally, because I also work with perpetrators. And the ones most resistant to using ITPs know what they're doing.

Researcher: Is that the SOCAU people

Participant 3: No, the CIU. (A3)

I was in [SOCAU] for a few years and I had a few that I remember calling. I always tried to use someone that they [victims] trusted. (C3)

Availability and reliability of ITPs were particular problems for stations outside of the metropolitan area. The views expressed by police members at these stations further suggested that relationships develop between certain ITPs and police. In this case, it appeared that one ITP's availability and experience had made him a particular favourite with this police unit.

Participant 3: Availability is a problem

Participant 2: It's a huge problem

Participant 3: We've got really probably two people that we can rely on, that would come in and be available. (SC)

Participant 1: I don't know how many exactly...five...we have one that we particularly use...[name of ITP] because he's accessible, and he's happy to come down at any time...

Participant 2: Yeah for sure, and he's really easy to deal with and he gets along well with the people we're dealing with as well so he's just convenient to us...

Participant 3: And he's worked extensively with people with cognitive impairment too.

The ITP is our main support. I think we could definitely do with a few more people on the list to call, 'cause we're very restricted. But there is really only one that is available these days and she's an elderly lady. (SC)

Every now and then you'll get stuck. I remember one time we had, we just couldn't get anybody at all and we were ringing around asking people who did it years ago. I don't even know the legality of that, whether we should have done it or not. We ended up putting off the interview because there just wasn't anyone available. But it's very rarely does that happen. (S1)

The discussions regarding ITPs highlighted the selectivity of ITP use across the stations involved in the research. For example, the extract below indicates that it was the practice of one particular police officer to use an ITP to inform the victim's understanding of the process generally, not simply to outline what would occur during the VATE. Ensuring the victim was fully informed was also a way for this police officer to ensure that there were no repercussions from a procedural perspective.

Yes, you'd have an ITP come in and sit with them when you're going through the initial, what has happened, because they [victim] need to know and understand everything that's going to happen from there on. They need to know the process of what we take them through, making statements, going through a medical, going to CASA. They've got to make an informed decision and be able to give consent for those things, so they need to know what's going on. By having someone independent there, who will be able to say, well, that was fully explained to them. Otherwise they can turn around later on and say, well, there was no one with me, and the police didn't tell me that so I didn't know what was going to happen. So by having an independent...say, "No, I was present when the police member explained all that". So you cover yourself basically to make sure that no allegation will be made that you've not done your job properly. (S3)

The previous extract highlights the variability and confusion that surrounded the role of an ITP. The issues raised related to availability of ITPs in rural and regional areas, the role of an ITP and the relationships that developed between ITPs and police. On one level these relationships can be positive. On another level, a close relationship between police and ITP may have emphasised notions of convenience, working in the best interests of the offender or the victim. The lack of clarity about the role of ITPs was not specific to one group; rather, police and advocates alike shared the uncertainty.

Access to other services, such as forensic services, on which police rely, can also have implications on case progression.

The DNA took over 14 months to get back and then to get the brief in. Then it was adjourned. In three and a half year she went to a contested committal. (SC)

Forensic evidence can play an important role in building a case for successful prosecution. Whilst time delays when in waiting for evidence to be forensically examined were not discussed in all focus groups, the impact of delays is obviously significant for victims. Delays may also have a flow-on effect on the decision to progress a report through to the next stage.

To recapitulate the points raised in this section, the research data indicated that, despite the framework of the Prosecutorial Guidelines that guide police assessment of available evidence in determining whether a case should proceed on the basis of having a ‘reasonable prospect of success’, the process was neither straightforward nor entirely clear. Ultimately, decisions based on evidentiary considerations were also quite clearly subject to varying levels of police discretion. The most salient influence on these decisions was the notion of what is perceived to be ‘good evidence’ or ‘enough evidence’, particularly when the evidence was considered against the level of cognitive impairment of the victim.

The role of third parties as either ‘gatekeepers’ or as influences about the victim’s character also appeared to have some influence on the overall assessment of a case. Other influences included the availability of resources such as an Independent Third Person, particularly in rural and regional areas. The attendance of a well trained ITP when a victim was giving their statement by VATE was crucial, as the data had shown that

detectives assessed the quality of the VATE when determining whether a case was authorised.

Finally, this section also highlighted the uncertainty felt by police about the role that costs awarded against the police may play in the decision making of the OPP, and indeed in their own decision making. The next section considers issues that fall outside the prosecutorial guidelines framework, but still within the confines of the 'system' in which police are located as determinants or, at the very least, influences on police decision making when considering a sexual assault case involving an adult victim with cognitive impairment.

Need to be Protected

The question of whether the victim will be further traumatised by the system is an important consideration for several police officers, when deciding whether or not to authorise a case.

The other thing is, I consider, is it worth putting the victim through what she's already been through again and again? You know, she's got the committal hearing and the trial. (C1)

The question always at the back of my mind, is whether I authorise or pass it on with fragmented authorisation is, if it's likely to do more damage to this person like exposing, to legal situation. (S2)

You get afforded nothing by the defence. Totally for the crook. (C2)

It's hard enough for your standard victim in court as you know, let alone some one [with cognitive impairment] the solicitors would just thrive on it. (C1)

The extracts above underline the expressed concerns of participants in relation to the various steps that the victim must traverse through the justice system, should the case progress. The likely impact of this experience on the victim caused several police members to suggest that victims needed to be protected. One way of protecting victims was to make the decision not to progress the case.

Committals

Criticism of committal hearings from a procedural perspective has been consistent over time. Much of the concern about Committal hearings was related to the impact on the victim.

The committal hearing is considered by many who work within the legal system, as potentially traumatic for the victim. Police and advocates describe it as a difficult and sometimes traumatic process in which there was little protection of the victim.

Participant 1: The whole purpose of it [committal] is to test the waters and make sure there's enough evidence there. [It's] no less traumatic for the victim. It's a rehearsal of what they can expect at the trial. For some, you know, it's too much to bear. There's no jury there too...defence counsel gets stuck into [victim].

Researcher: And what about the judge or magistrate?

Participant 1: Useless would be a word. They allow the defense to go their hardest because they're ...not making an impression, in front of a jury. (C3)

Participant 2: Woe! Absolute waste of time, absolute disgrace, what is going on, the idea of a committal is all the evidence. So it's tailored down for the trial (I've probably got all this wrong, but this is me after all these years). Why put them [victims] through it twice? If you're good at your job, (you're paid well enough to do it) do it right the first time. Because if it's about making sure that people are treated with dignity and respect and that we are creating environments – all fair go for all the victims, those that are innocent. I know everybody's innocent until proven guilty, are entitled to the same respect. It is a horrific experience. (A)

It appeared that the committal was but one experience that had a negative impact on victims. Perhaps adding weight to the view expressed by police participants in the following section that cases involving victims with cognitive impairment were too difficult for a number of reasons to warrant proceeding to trial.

Too Difficult

A general view of the majority of participants was that cases involving victims with cognitive impairment were just too difficult. Investigating sexual assault, according to some participants, was difficult enough, but the level of difficulty was further compounded when the victim had a cognitive impairment.

I think it's because they're impaired, it's a complicated enough procedure for anybody that's got normal faculties, they [non-impaired] may not even understand. (C2)

They're [cases involving victims with cognitive impairment] harder to investigate, they're harder to prove and they're harder to prosecute. It's just the fact of it. (C1)

It's too hard for a normal person, let alone a person with impairment. (C1)

And if we speak to these people and they can't even verbalise, there's never going to be a reasonable prospect of conviction. (S2)

Because some of them are crap to do, they're really tedious.

Other participants: Hard to get to the bottom of.

Participant 2: Yeah, rather than going get it done, they put it off, put it off. (S1)

The following extracts provide examples of the subjective views of advocates, who pondered the question of why relatively few cases involving victims with cognitive impairment reach trial. The first statement indicated that police may be influenced by a desire to protect the victim, while the second statement implied that reluctance to proceed may have emanated from the view of police officers that trying to prove the case 'beyond reasonable doubt' would be too difficult given the victim's level of impairment.

I just wonder if the police think they take on this role of trying to protect the victim from the physical abuse of going through the legal system. They think, "Oh, it's going to be really hard for this person; it's too hard so we won't proceed". Sometimes I've had a feeling that that might go on, probably not so much with working with people with disabilities, but with kids in particular. (A4)

Although, and I'm expanding this, thinking dementia, mental illness, it's like "Oh yeah, you can't believe what they're saying, they're all over the shop, it's too difficult. (A3)

Advocates confirmed the level of difficulty experienced by police. The process appeared too difficult, not just for police but also for victims.

Layers and Stages of Decision Making

There is an established process within Victoria Police for dealing with allegations of sexual assault. Although there are exceptions, the following description is indicative of the process. Once an allegation is made the SOCAU is contacted, and this unit works closely with the victim to establish rapport and to conduct the video taped recording

(VATE) of his/her statement. A decision is made at this point about whether to authorise (progress) the case. The next stage in the process is that of investigation. Investigations are, in the main, conducted by the Criminal Investigation Unit. Similarly, a decision to authorise or not is made at the end of the investigation stage. If the case is authorised it then progresses to the Office of Public Prosecutions, where the brief of evidence, the character and competence of the victim, and other factors will be considered to determine whether the case will progress to trial. The reference to 'layers of decision making' therefore refers to the decisions made at each stage from when report is made through to the decision of the OPP to bring the case to trial.

A number of variations in the decision making chain do occur. The factors which precipitate such variation in the process appear to be individualistic or team specific. As the following extract indicates, SOCAU members have their own ideas.

Because it's one thing that, the personnel from SOCAU would have their own ideas, we'd have to rely on our own experience. [The] person [victim] may not be vivid [clear] as what they're [SOCAU] thinking or the other way around. (C3)

This participant from CIU needed to satisfy himself that the VATE was of sufficient standard for trial. Hence, the decision made at this stage may be informed by SOCAU recommendations, but, equally, the next person in the decision making chain, in this case CIU, may have a different opinion based on their own experience. The point is that there is not always agreement between decision making stages.

The following statement suggests that the participant, in this case a CIU member, will, for the most part, agree with the recommendation of those who have looked at the case before him. The implication here was that the participant trusts the judgement of colleagues and was unlikely to contradict their judgement.

It could, I mean, you got to look at every one [case] as it is. You take a lot of it from the informant or the investigator. They've got a good feel for the job, the sergeant who's checked the brief. You might have spoken to them [Sergeant] and they've said, "Well, it's not too bad". But quite often, either the investigator or the sergeant, before it gets to me, will recommend non-authorisation for a number of reasons. I mean there's not too often you'll get a brief recommended for prosecution where I say, "Well, I don't agree, I'm going to knock that back". Usually by that stage everybody knows that we are not going to be able to get up on this [case]. Sometimes it's different (C1).

In contrast, the next extract indicates that, while at the end of the each stage the police member needed to justify their recommendation, the perception that all cases go through was one shared by all participants of this particular focus group. During this focus group session, participants had indicated the appointment of a new senior sergeant of the (CIU) has had a considerable impact on the number of cases being authorised. This suggests that previously, cases were being knocked back because the former senior sergeant had a different view to his successor.

If there's a report made to police of a sexual assault, if we decide if there's no further police action to be taken, that has to be authorized by the senior sergeant from the CIB. We would have to justify why no further action needs to be taken.

All participants say: they all go through. (S1)

We've been pretty lucky here with one of the Sergeants upstairs and he's upgraded to Senior Sergeant. He believes that cases should go to court. They are guided by us. (S1)

Alternatively, implied in the following statements was the view that opinions were formed at the early stages of a case, prior to investigation.

Oh, look, we generally form an opinion ourselves anyway when we come across a job. (S3)

I think if their impairment was a lot more severe, so if you think their evidence giving even, even if you utilize the VATE, they have still got to be cross examined and stuff. If you think that they're just not going to be able to sit and do that, you would put that in a report saying "I don't feel the victim is going to be able to deal with that situation". Or, if it was a brain injury person for instance where one day they have recollection and then for the next month they don't, you put that in a report, saying that they have some recollection of other incidents and there is going to be a real problem with recalling. You just put that on the report and I would say that it would just not go any further. If evidence giving for them is going to be a major issue, especially if that's all the evidence they have. (S1)

The participants in this case indicated that a decision was made when they come across a job. Similarly, the SOCAU member who made the second statement above said that a decision in regards to case outcome can be made at an early stage. Despite not wanting to be judge and jury, the member indicated that, acting as judge and jury was exactly what a decision at this level required.

This next extract was from an advocate. It provides some insight, from an advocate's perspective, into the police decision making process.

The police officer that I dealt with at the time, he was great, he was fantastic and he was quite satisfied in his own mind that her ability to be able to remember what had happened, to be able to relay the incident thinking longer term. He saw her as someone who would be quite capable of standing up in court and being able to be cross examined. So he put in a brief and of course it didn't go any further than that. (A4)

The statement highlights the level of frustration in the decision making process that can be experienced by police officers. Of concern, was the fact that this participant did not expect the case would 'go any further', implying that this outcome may be commonplace.

Clearly, police considered a myriad of issues that when making decisions about whether a case should be authorised or not. As one would expect, the prosecutorial guidelines appeared to play a significant role in decision making, particularly when police consider evidence and assess whether a case had a reasonable prospect of success.

In assessing the evidence, however, police often stated that additional evidence was needed when the victim had a cognitive impairment. The level of evidence required appeared to increase with the severity of the impairment. Perhaps for this reason, police have expressed the view that cases involving victims with cognitive impairment were too difficult to deal with and prosecute. The extent to which this view prevailed has an influence on decisions made early in the report pathway, as such the point of initial report. The fact that decisions in regards to the potential success of a case were being made so early in the process was highlighted by a number of police officers.

The use, understanding, and availability of the ITP program varied quite substantially across police units and geographic areas. The VATE was one piece of evidence that was used by police to ascertain the likelihood of success of a particular case. Hence, knowledge of the ITP program, the availability of, and understanding of the role of an ITP was crucial for case outcomes. So, while the ITP program in itself may not have influence case progression, the purpose of the program was being undermined to some extent by the lack of knowledge and limited availability of trained ITPs.

The influence of other factors such as information from third parties who knew the victims in some way was also quite influential. Third parties can and do become ‘gatekeepers’ to the justice system for victims with cognitive impairment, as they may be either reluctant to assist in reporting an assault or they may destroy evidence that could be vital to the outcome of a case.

Decisions made as the case is passed from SOCAU to CIU and finally OPP also appeared, in some cases, to be determined by individual views about victims with cognitive impairment or about sexual assault. While police repeatedly stated that their decisions were based on evidence, their discussions revealed that, on the ground, a variety of influences existed. While this domain has explored the issues and decisions concerning the processes with the legal system that must be adhered to, the following domain ‘The Victim’ sheds light on victim-specific characteristics that police consider when making decisions.

Domain 3: The Victim

The third domain, ‘the victim’, explores the factors which influence police perceptions of the ability of the victims and ways in which these perceptions play an important role in police deliberations about whether or not to proceed with a case. An incorrect judgement based on misconceptions and stereotypes can have a detrimental effect on case progression, effectively excluding an individual or group from accessing the justice system.

A Good Witness

At each stage of the decision making chain, police try to assess whether a victim is a ‘good witness’. The term ‘good witness’, was mentioned repeatedly by police participants, which indicated that police make subjective judgements about the ability and credibility of the victim. Victims were continuously measured against a benchmark or ‘test’ in the ‘*Prosecutorial Guidelines*’ of what constituted a ‘good witness’.

You’d take that into account, their capacity to give evidence in court. We’d be looking at their [the victim’s] ability to withstand cross examination. (C3)

There's no doubt that with a good witness, it's a strong case. If you've got a good witness that is credible and delivers in the [witness] box, there's no doubt whatsoever that it helps. At the same time if you get a mentally impaired person in the box in front of the jury [not going to be strong]. (C3)

A judgement call [based on the experience of detectives] is often made when they [detectives] deal with the victim, as to whether they [detectives] think; One, they'll [victim] be able to go to court and give their evidence, credibly and competently and two, will they [victim] withstand cross examination? Now, most people with 100% of their faculties will stumble at some stage in the cross-examination process. It's torturous for the [victim] to go through, if all you've got is a one-on-one situation [victim's word against that of the accused]. (C2)

We're judging that all the time, to what we think their suitability would be and that's certainly, I think, listened to at the stage when (participant 4) is making his decision. (SC)

I think if their impairment was a lot more severe. So if you think their evidence giving even, even if you utilize the VATE they have still got to be cross examined and stuff. If you think that they're just not going to be able to sit and do that, you would put that in a report saying "I don't feel the victim is going to be able to deal with that situation". Or if it was a brain injury person for instance where one day they have recollection and then for the next month they don't, you put that in a report, saying that they have some recollection of other incidents and there is going to be a real problem with recalling. You just put that on the report and I would say that it would just not go any further. If evidence giving for them is going to be a major issue, especially if that's all the evidence they have. (S1)

As the following comment from an advocate attests, police judgement of what constituted good witness was observable to those outside the justice system. In this instance, the advocate alluded to an experience where a judgement about the ability of a victim to be a good witness was made at the reporting stage. A similar experience of another advocate from a different region is described below under 'stereotypes and misconceptions'.

They will not make good witnesses; it's as simple as that. They will not make good witnesses and so this will be too difficult for them, and look, I'm like a cracked record. This person's here because they want to make a statement, listen to them. (A3)

Assessing a victim's ability to be a good witness included assessing whether the victim could tell the difference between telling the truth and telling lies.

Truth and Lies

One measure which police use to assess a victim's suitability as a witness is whether the victim can distinguish between telling the truth and telling lies. The accuracy of the assessment is crucial to the progress of the case. The following extracts represent some of the ways in which police went about this process.

[You would ask questions] pretty much the same way you would with the kids.

Researcher: so can you give me an example of the sort of questions you might ask?

Participant 3: Probably ask them about how they got there today. Then you turn it around and say "Well if I said to you, you got here by bus or what ever, would I be telling the truth or lie", and then see if they can differentiate. You'll expect them to say, "Well, that's a lie" and you say to them "Why is it a lie?" and you expect them to say, "Well no, you're an idiot, I walked here or came by car" or whatever. (SSC)

The next statement provides the perspective of two advocates on the process of determining whether the victim was able to determine the difference between telling the truth and telling a lie. According to participants at one focus group, the problem was that questions asked by police were posed in a complicated negative form. The problem with this was that victims might not want to contradict the police officer or the question being posed as a negative would cause confusion and even cause the victim to question their own judgement.

Participant 1: In terms of questioning, people with Intellectual Disability get really confused [by structure of questions]. They'll [police] say "You're not really telling the truth are you", they'll [victim] go "No", it's [the question] a negative. If they [police] say to them "Are you telling me the truth"?, they'll [victim] go "Yes".

[All participants agree].

They'll also, where they determine the truth and lies at the beginning of the interview, because it's a police officer actually doing it [asking the questions] with them. I've found the first time, that the client clearly knows the difference between truth and lies, however the police officer said "I put it to you that your top's green" and the client sort of, well, he's a police officer, what he's saying must be true "yes". So really they become confused as to why, why is the police officer saying this. Because they trust them and they believe that they do tell the truth.

Participant 2: They shouldn't have done it with colours. They should have said...

Participant 1: Okay, in the cases that I've been involved with it hasn't been the ITP; it's been the police officer.

Participant 2: Yeah the police do it in the interview but the ITP should have asked them to rephrase the question.

Participant 1: Yeah, it's been at the interview stage where the police have done it. Questions like "I haven't got a pen in my hand" or something. They [victim] just become really confused because they're thinking "What am I supposed to say?" It becomes very confusing for them [victim] despite the fact that they've had it explained, "that we just want to understand whether you can tell difference between truth and lies" and they [victim] says "Yeah we can". And then he (the police) picks up a pen or something and says "I'm not holding a pen, am I?" They just lose what it is that they're supposed to say. So often that can be quite a lengthy period within the interview, actually determining that. (A3)

The discussion presented above indicates there was a disconnection between what police were required to determine and the most appropriate way to achieve an outcome that accurately reflected the ability of adult victims with cognitive impairment to understand the difference between truth and lies.

Not Able - Competency/Credibility

At first glance, the following extract could be viewed as being relevant to the domain of 'good witness', as police officers were indeed assessing whether particular witnesses, in their view, could be 'good witnesses'. Although the ultimate goal was to determine the victim's capacity to be a good witness, the extracts below appear to be saying more than that. The extracts demonstrate the generalised views that police hold about what victims with cognitive impairment are going to be 'able' to do.

Sometimes the ability of these witnesses to give that evidence to the SOCAU, sometimes it's fairly ordinary, so the information that comes to us would be fairly fragmented and all over the place. So it can make it difficult for us in the initial stages. (C3)

The focus here was on the generalised deficits of victims rather than on the capabilities of the individual victim. For example, the use of the demonstrative 'these' signified that this participant made a generalised assumption about the quality of VATE provided by all victims with cognitive impairment. This participant believed that evidence from victims with cognitive impairment was 'fairly ordinary', meaning it was not strong and 'fairly fragmented and all over the place'.

The next statement is also interesting. The detective was suggesting that at least half of the cases that involve victims with cognitive impairment would not be authorised if no corroborating evidence was available.

If all you've got is a one on one situation which, I would say more than 50% are, and you've got someone with an intellectual disability then they're going to, generally they're [victim] going to have trouble presenting their evidence logically. I'm not saying they won't present it credibly, but present it logically so that the jury understands. So they cover all the elements that they need to cover, so that person can be convicted of that offence...and then will they be able to withstand cross examination? (C2)

This assessment appeared to be based on the generalised view that victims with cognitive impairment were 'going to have trouble presenting evidence' and also, on doubts about their ability to withstand cross examination.

Later the same participant stated:

Look, like it would depend [colleague] and I went to [a victim's home]. [A] lady who was suffering depression and she reckoned she was raped and I ended up doing it [the case]. I recommended the brief didn't get authorised when it hit my tray. It would depend, like this woman who, she didn't have any cognitive problems or anything like that, but she was obviously suffering depression and anxiety and had medication for it, so in those circumstances, I wanted to have a feel for the witness about what she was able to say and what she [wasn't]. (C2)

The way police determined which attributes constitute a 'good witness' can, as the discussion above indicates, be based on the subjective views of individual officers, which are influenced by a range of social influences and based to some degree on myths and stereotypes. The general acceptance of the metaphor 'child like' for instance, is illustrative of the power of symbols and language, and of how a shared understanding, can perpetuate and reinforce a specific view of groups in society.

Child Like

The metaphor 'child like' was expressed by many participants across a number of police units, advocate groups and the OPP. As such, the use of the metaphor can be described as being a shared language or symbol.

The [victim] was quite, I suppose child like and endearing. (A1)

Participant 1: An impaired person, as much as a child, they're very easy to confuse, 'Oh who did you say that to?'

Participant 2: Yeah, just like a child. Children, I find are usually pretty good witnesses, but are so easily suggestible. This is the problem you know, like they can recall things in their own way, but I reckon people with an impairment are a little bit the same, but they have a habit of wanting to please you as well, so you have to be a little careful of it. (S2)

Researcher: So if you were trying to determine if someone was telling the truth how do you go about that?

Participant 3 Pretty much the same way you would with the kids, little kids.

Participant 4: [participant 3] got it right before. We probably treat [victims with cognitive impairment] more like child cases, I suppose, as a comparison. (SC)

With SOCAU, because we deal with children, at a lower level anyway, when we're dealing with them [children], we don't use a lot of difficult language with them anyway. So when we're dealing with people who have cognitive deficiencies, then we deal with them like we deal with children and speak to them on the same level. I don't find SOCAU members have an issue with that because we've been trained. (S2)

I initially ask the normal way of asking, you know "can you explain to me what a lie is" and if they have absolutely no idea of how to explain that, then [I] go to the simpler terms and more child like questions. (S1)

The metaphor of 'child like' appeared to define a category that was recognisable to participants and was used to explain how victims with a cognitive impairment might be approached and treated and how the victim could be expected to react and respond.

Outlier

One police participant expressed a contrasting view that it was important to avoid treating adult victims with cognitive impairment like children. This SOCAU member said that questions might require rephrasing depending on the victim's individual abilities.

And you also have to be careful that you don't bring it down to too low a level, so they [victims with cognitive impairment] don't feel treated as a child. (S2)

At one level we, as human beings, strive to understand and make sense of our world, and the use of metaphors was but one strategy to assist in this process. Metaphors may be based on a common understanding of a situation, phenomenon, or group. However, in

some instances, such as the one just discussed, metaphors can simply be a result of lingering misconceptions, which continue to be perpetuated.

Stereotypes and Misconceptions

Categorising and Generalising

The use of the term ‘these people’ when referring to people with cognitive impairment was evident in at least three focus group discussions. The implication was that ‘these people’ are homogenous.

And if we speak to these people and they can’t even verbalise, there’s never going to be a reasonable prospect of conviction. (S2)

We’ve got to be careful in not making some of these people victims either ... if they don’t believe it’s wrong, and they’re not suffering, why tell them they’re victims? Why make them suffer? Why tell them that they’ve been [sexually assaulted]. It’s only the parents that have an issue with the relationship, why make them victims? (S2)

With some of these people if they’ve done something wrong and you speak to them about what they’ve done wrong and you go and speak to them in a couple of days time, they’ve forgotten. You think you’ve gotten through to them that they can’t do that sort of thing. She had that sort of mentality. “I forgot what the question was. What did you ask me again?” (S1)

I think you’ve got to work a bit harder when you’ve got these people to find some sort of corroboration. (C1)

Although the second last line of the third extract above indicates that the police officer was talking about an individual case, the categorisation of ‘these people’ provided a reference point from which to understand and describe all members of a group of people. Therefore, when a police officer assesses a victim’s capabilities, the use of the broad categorisation of ‘these people’, and the associated positive or negative attributes of this category, may also have influenced decisions about whether the case had a ‘reasonable prospect of success’.

Outlier

Conversely, there was an understanding at some level by one participant that there was a need to be cautious about making generalisations.

They're [victims with cognitive impairment] all very different in how their disability affects them. (S2)

This next extract highlights an example of categorisation expressed by a police member.

We are expected to deal with that sort of a victim (victim with cognitive impairment), as well as any other victim that comes along. If the Prime Minister of Australia ever got sexually assaulted we would have to deal with him. Right down to the lowest of the low, you just gotta deal with them. People with a cognitive impairment, makes no difference to our regime. (C1)

Categorising and generalising is part of the daily decision making. The next lengthy description provided by an advocate relating his experience of supporting an adult victim with cognitive impairment to make a report of sexual assault at the local police station.

[Police officer says to the advocate] you can come [into the office] but they [victim and parent] stay here (in waiting area). So we went in to the bowels of the police station and the bloke [the police officer] pulled out the 'mates and buddies act' and said, [to the advocate] "Listen mate, we all know how it is. The bloke's [the victim] got an intellectual disability. His never going to be able to give evidence. There are evidentiary problems. You're a lawyer, I don't need to tell you about that, so what are you even doing here?"

[Advocate] said "I understand where you're coming from, but he's a citizen of Victoria and I tend to think that he should be protected under the laws of Victoria, the same as you and I". He [police officer] said, "Well, I'm telling you, there's evidentiary problems, we won't be taking the complaint". I said, "But you should take the complaint, throw it in the bin, file it, do what you want, but take the complaint, don't just say, well we're not even taking the complaint." So he said, "Well, it's not happening".

So we [advocate, victim and parent] went back out. [Advocate] said to the people [victim and parent] "Let's jump into the car and whip up to the other police station". He (next police officer) said "Well they're [victim] not in our area". That's how the buck stopped for him. Out we go to the other police [first] station. Roll up to the counter, said to the fellow, "How you going? This is what we're here for. We want to make a complaint against ... for sexual assault". He said and I quote "I used to work [with people with cognitive impairment] when I was a young fellow. I used to work with people with intellectual disability and this means a lot to me and I'm going to take this matter on". Behind the glass, I could see the people with ties [other police officers] peering out and talking. I said [to the police officer at the front desk], "Well, I think you won't be, those people there [behind the glass] are talking about us" and they [police behind the glass] called him

[police officer at front desk] in. We could see them talking behind the glass. My client said, “What do you think this is about?” and I said, “I don’t think it’s all good”.

He (police officer) came back out and said, “I’ve been told I’m not allowed to take this complaint. I’m not allowed to handle this matter. There are evidentiary problems. There will never be a conviction, so I’m not taking a complaint”. My argument was still. Maybe I’m wrong here, let’s not worry about the end result, take the complaint then make the decision, you can’t make a decision without it”.

Then another disturbing thing at the first police station. I said, “Well, what happens when you get these types of complaints, what do you do?” He [police officer] said, “Look, what we do mate, I’ve got this book here, we write them down here, this complaint was made and blah, blah, blah”. I said, “Is this an official report book? What happens with it, where does it go?” He said, “It’s not official. It’s just so we know what’s happened.” Like it’s a complete waste of time and energy.
(A2)

The narrative in the first paragraph indicates that the police officer made an ‘over the counter’ assessment about the ability of the victim to give evidence. It appeared that the ‘assessment’ was based purely on the fact that the victim had a cognitive impairment. Further, the narrative in the second paragraph indicates that the justification for not taking the statement was that there were ‘evidentiary problems’.

This particular narrative provides insight into the experience of an advocate who was supporting a victim to make a statement about an alleged sexual assault. The narrative also provides insight into police response, in this case where the decision was made to not take a statement, without speaking to the victim, nor to discover what was alleged to have taken place. Further, it appeared that the view of the first police officer who made the initial decision not to take the statement was validated and upheld by other police members at that police station, or perhaps he was a senior police officer whose influence was dominant within that particular police station. The final paragraph implies that the response to this victim with cognitive impairment was not a unique occurrence in that police station. It is important to note that the advocate, in conjunction with the victim and family, had subsequently made a complaint about this incident and an investigation was conducted by Victoria Police.

As the extract illustrates, the police officer used a generalised view of people with cognitive impairment to determine the victim’s ability to be a ‘good witness’. The police

officer appeared to use his own perception of what the legal system would accept. The seemingly dominant view of this police officer was then reinforced, to the exclusion of the view of another more junior police officer, who may have taken the report and set the process in train. This victim's access to justice was for a time held in the balance. Eventually it was the individual view of the more dominant, perhaps a senior officer that appeared to deny this victim access to the justice system, seemingly for no other reason than that the victim's cognitive impairment was equated with insurmountable evidentiary problems.

Promiscuity

The stereotype that people with cognitive impairments were promiscuous and, as such, invite sex, was a view expressed at one focus group. In the following statement, the participant recalled a report of sexual assault made by a victim and her boyfriend.

There are people with these disabilities too, that are fairly promiscuous and I've found that. We had one [victim] a couple of weeks ago, that had a party at their place. Told the two blokes that she would have a threesome, and at some stage [she said] said stop. They did. The next morning her boyfriend came around he brought her in and said it was rape, but when we talked to her, she said "Well I really thought it was a good idea at the time". You really can't do much with that.
(C1)

Clearly, the participant states that he believed at least some people with disabilities were promiscuous. Whether this view informed his judgement in relation to this matter was not clear, but it seemed likely to inform future decisions.

Acquiescence

Another commonly held misconception about people with cognitive impairment is that there is a tendency to acquiesce to police questioning. This view has a number of implications for victims and the outcomes of their report to police. For example, in the extract below a police officer states why he and his colleagues at his station would prefer to have an ITP rather than a member of the family present during the interview. The police officer described good process in terms of ensuring that information was communicated effectively and understood by the victim.

ITP [present at the interview] preferable, 'cause if they [people with cognitive impairment] know someone, they'll look to them for the answers, "Am I telling the right thing to the police?" You don't have mum or aunty or someone there. They won't look to them as much for, "Am I saying the right thing". Cause all they [people with cognitive impairment] want to do is please. If they think, even if it's not what happened, if they think that's the right answer and that's helping you, or making you happy, they'll sometimes give you that answer. If they see someone else, react to it. (SC)

In the following extract, a police officer expressed the perception, based on the victim's body language, that there was a tendency for victims with cognitive impairment to acquiesce.

I don't like it [advocate or support person [being] present during the interview] because they [pause] very much. I try and establish a rapport with the victim myself, because I don't like the ability of the witness, to use that person [advocate or support person] as a crutch, to turn around and look to their support person for affirmative, an affirmative gesture. Just like, they'll say something and they'll say, you can see the body language, "Am I saying the right thing?" (C2)

Clearly when someone is sexually assaulted, they are a victim of a horrendous crime of power and control, which violates trust and accepted boundaries. The presence of a trusted person, in an environment that for many is unfamiliar and uncertain, may assist the victim to feel safe and supported to tell a stranger, albeit a police officer, about the intimate details of the crime which had been perpetrated against them.

Scared of Police

Another perception expressed by police officers was that people with cognitive impairment were scared of police.

It depends on the victim. If the victim is really nervous and wants someone there to give them reassurance. A lot of these mentally impaired people are scared of police. (C3)

You can try to form a rapport with another type [of victim with cognitive impairment] and we're seen as the police, the bad man [that's what victims with cognitive impairment have] always been told...and so they'll [victim will] clam up. (C2)

The extracts above illustrate that some police members believe that people with cognitive impairment were frightened of police and, further, that this fear was learned.

Multiple Victimization/Reporter and Credibility

Making multiple complaints to police can have the effect of reducing the credibility of the person making the allegations, particularly if previous allegations have been unfounded. For victims with cognitive impairment, the multiple reporting can be seen as symptomatic of their impairment, or as a way of avoiding getting into trouble.

- Researcher: Do you get victims who come in on a regular or semi regular basis?
- Participant 1: Multiple victimisations
- Researcher: You do?
- Participant 1: We do. I was trying to think about whether they were. Oh, we had that one last week.
- Researcher: What happened there?
- Participant 2: Psych issues, she had psych issues.
- Researcher: What happened?
- Participant 2: She's [victim] a sexual allegator [sic] as in alleging she's had sexual assault against her and when it comes to us, [the victim] actually being able or available to ask her questions, she always retreats. Now whether it's [retreating] part of her condition or whether it's [sexual assault] in fact happened, we still can't establish.
- Participant 1: Oh, yes [it does affect the credibility] it has to. Because you know, that if you were the prosecutor, a single allegation that every other previous allegation ever made will be subpoenaed, and the [information of previous allegations] just gets smacked around [in court], and it's not worth it. You'd want some more evidence than just her word, and that makes it very hard. (S2)

This statement, made by a police officer, illustrates the point that a victim's apparent elusiveness in being unavailable to answer questions about the alleged assault was sometimes considered as symptomatic of the victim's disability. Implicit in the term 'a sexual allegator [sic]', was that, the credibility of a victim who repeatedly reported sexual assaults, was reduced.

Similarly, the following extract is another example of a case in which a person's impairment raises suspicion about their credibility. However, the extract describes situations where women with disabilities were being targeted by males who sought to exploit them, both sexually and financially.

- Participant 2: If it is someone we know, someone we've dealt with before and we know that they're registered through [disability service], you contact their worker and find

out a little bit more about them or even their disability. But most times I haven't had a new person with a disability for years. It's the same one that comes in over and over and over again. (S1)

Participant 1: In my experience, I would say, a lot, probably up to 80% percent of them [reports made by adults with cognitive impairment]. These are adults, that it is initially they might have consented and they, because of their impairment, afterwards, it's that "I'm not feeling so great about it so it must have been sexual assault". Or, it's more important to them [adult with cognitive impairment] that they are going to be in trouble. They weren't supposed to be out. Or, they were supposed to be at someone's house and they weren't. So what takes over is, that it must have been sexual assault because they feel so bad about it and the most times in my experience they're not founded [presumed false allegations]. And we usually have good evidence that they're not and usually the offender is another [disability service] registered client as well. (S1)

Participant 1: Yeah, yeah so you know they're supposed to be home in bed at a set time, but they're not really sure where they are during the day. And even though we sort of bag [criticise] a lot of places in [this area] there are a few places where they all go for a cuppa or they all go to meet and things like that. It's good that we know they're there, but, a lot of the time that is where they're [victim] meeting their offenders as well. Cause the offenders go there knowing that they're [women with cognitive impairment] quite easy victims, even for just the theft of their [victim's] money or taking their [victim's] cigarettes and then [sex].

Researcher: And in these cases the offenders are able bodied people?

Participant 1: Yes. Well, I'll say that a lot of the blokes have no disability.

Researcher: Okay, so they go into these places knowing that they will find women with disabilities?

Participant 2: Some of the repeat ones [victims who report] you could almost set your clock, and if they haven't been in for a while, you know something will pop up. (S1)

In the next extract, a police officer provided insight into the influences of police decision making in relation to adult women with cognitive impairment that had made previous reports of sexual assault.

Participant 1: Or when they're in trouble, and quite often...now... I've got a couple now where their [women with cognitive impairment] worker at the accommodation places will ring me and say, "such and such has been in big trouble so she's bound to ring you and say she's a victim of something". Quite often she [woman with cognitive impairment] has [had an] encounter with somebody. Like, it's

consensual sex and maybe that's why she [woman with cognitive impairment] wasn't home on time, or what ever the case may be. So she's going to report that. And it's not really done really maliciously. It may be a survival thing for them. Or they've got to be made to be the victim so they [woman with cognitive impairment] won't get into so much trouble at home. And they're usually easy to pick. [There] would be a time when we have meetings with her [woman with cognitive impairment] and say, "tell us the truth" and that sort of stuff. But it's never going to stop, you know, it's never going to stop.

The terrible thing is and I'm even game to say it, every report of rape now, you're just going to presume it's not true. It's really hard to say that because we're not talking two or three times. We're talking 25 to 30 times. It's always the same. It's always this place where they all go for free coffee and went out for a couple of drinks and had a bit of drugs and you know. The next thing you know they're back in the motel room and it's happened. So the consent thing, like any able bodied victim is there and that's the hard thing to prove, but the offender is able bodied and you're fully aware that they've taken advantage of the impairment. So consent is going to be impossible to prove at court.

Participant 2: I think that makes it harder because if consent's the only issue and he's saying, "Well, yeah we went up, and drank some grog and smoke and she was happy to do this" and that's the only issue. Like an able bodied victim, that's very impossible to prove, but particularly, it makes it hard when she's even been charged in the past for making false reports. You look at the file and it says false reports. It's virtually near impossible to help her in the future.

Researcher: So are you talking about a person with a cognitive impairment who has been charged with making a false reports.

Participant 1: The past continues to come forward. [Women with cognitive impairment] making allegations which in some respects is going to be seen as the 'Boy who cried Wolf'.

I have no doubt that a lot of the situations she has been put into a position she doesn't know how to get out of. It's not a malicious thing. I'll do this and then get him into trouble afterwards. It's not that at all. She is a victim because she's a bit vulnerable. You know a free cigarette and free can of beer is more exciting than even worrying about anything else and it's almost quite well known that she's an easy target. And there is a lot of low life that hover around the area where they [adults with cognitive impairment] go for craft and free cuppas and stuff.

Researcher: So do you think it's possible that she's someone who is not even able to give consent anyway.

Participant 1: You would think that, but she is [able to give consent] when she really doesn't like that person and she hasn't had any alcohol and there's no other factor that draws her to that person

Participant 3: She [victim] probably doesn't know what informed consent is.

Participant 1: It's not malicious. They're not intentionally false reporting but that's the only way of dealing with it.

Participant 2: There is one in particular that [participant 1] has had a lot to do with, is a repeat reporter and you end up having a meeting with all the agencies involved with that person, every now and then, so that everyone's aware of what's going on.
(S1)

The statement demonstrates how individual workers at service agencies can also influence police perceptions about a woman's credibility, and how all the information was added to the police files and consequently influences the decision should the woman report an assault in the future. Interestingly, the police officer acknowledges that women with cognitive impairment were 'easy targets' who find themselves in situations 'which they can't get out of'.

Similar to the previous domains, the data discussed above demonstrates that victim related characteristics played an important part in police decision making. More specifically, police, like the rest of the community, appeared to rely largely on negative stereotypes and generalisations about adults with cognitive impairment rather than focus on their abilities as individuals. These views influenced police perceptions about the ability of the victim to conform to the image of what was perceived to be a 'good witness'. This was a bench mark which, if informed by negative stereotypes and generalisations, many victims with cognitive impairment would fall below.

The issue of questioning and determining whether a victim could differentiate between telling the truth and telling lies was also an issue raised as a concern initially by advocates. Constant use of the metaphor of 'child like' influences how and what questions were asked and has significant effects on how victims were able to present themselves and their allegations, and hence could have been a determining factor in case trajectory.

Conclusion

The analysis of data collected during focus group sessions suggested that there was an enormous variety of factors ranging from individual experience to organisational and unit culture and broader social forces, such as entrenched stereotypes and generalisations about people with cognitive impairment, that played a role in police decision making. This is not to say that all police take all factors identified into account when making decisions. Indeed, the suggestion being made in this study is that individual police officers are subject to a range of influences, and the extent to which certain factors influence an individual police officer is, in itself, subject to the influence of, for example, geographic location, the culture of the particular police unit and their own experience.

Indeed, some factors appeared to be location specific and others were the result of relationships either between police units or between police and outside organisations. What appeared to be cultural influences within a particular unit or police station may have also reflected more broadly held societal perceptions of people with cognitive impairment and of rape victims. Police members who expressed certain views and referred to stereotypes may have held these views prior to entering the police organisation. However, the data also suggested that the experience within the police organisational or unit cultures did not dispel such myths and stereotypes; rather, they continued to exist and influence decisions.

The data presented in this chapter suggested that, at one level, the nature of decision making is individualised in that individual police officers interpreted the factors he or she considers pertinent to the case. However, it was also clear that, overall, the most significant influences on police decision making were the assumed connection between perceptions of disability as a deficit, and rendering the person as less credible and a justice system that appeared to those who enforce the law as a system in which victims with cognitive impairment do not belong.

In response to the main research questions, this study indicates that the reasons reports of sexual assault made by adults with cognitive impairment are unlikely to progress are numerous.

Chapter Eight: The Pathway of a Successfully Prosecuted Sexual Assault Report

The previous data chapter presented the analysis of data from Victoria Police sexual assault files and focus group interviews with Victoria Police members, advocates and members of the Office of Public Prosecutions. The previous chapter provided an insight into a range of influences on police decision making about reports of sexual assault made by adults with cognitive impairment.

The aim of this chapter is to present a case study of a sexual assault report involving a victim with cognitive impairment. This case is notable as it represents an ‘extreme or unique’ example (Yin, 1989, p. 47) in that the case, involving a victim of sexual assault with cognitive impairment, was successful at prosecution. As such, the case presents a relatively rare opportunity to consider what factors may have led to the successful prosecution. Moreover, it is an opportunity to consider whether there are any lessons to be learnt from this case that may provide insight into ways in which the conduct of police investigations of sexual assault may be improved in order to secure a greater proportion of convictions and, most importantly, more just outcomes for sexual assault victims.

The paragraphs that follow present a detailed account and analysis of the pathway through the justice system of this particular sexual assault report. The analysis presented was based on multiple data sources, including individual interviews with each of the victim, mother/advocate and police officer, in addition to the trial transcript and the brief of evidence relating to this case. According to Yin (2003) this particular type of case study is described as ‘explanatory’, in that the data focused on the cause and effect relationships which might explain how an event happened (p. 5).

To maintain confidentiality, all people mentioned in this case study have been given pseudonyms and, where possible, only information important to the discussion was included. The three people central to this case are Vicki (victim), Jan (mother/advocate) and Paula (Police officer).

Case Background

Vicki is a young female who, at the time of the assaults, was aged over 18 years. She has a diagnosed cognitive impairment and, according to Jan, her adoptive mother, has a 'mild disability'. Jan and Vicki live in a rural area. The offender was a young male, a fellow student known to Vicki. According to both Jan and Paula, unlike other fellow students, the perpetrator had a learning disability and not an intellectual disability.

According to all data sources, Vicki was subjected to two assaults. The assaults occurred over a six-month period, and took place at camps organised by the educational institution attended by both Vicki and the offender. Both assaults were penetrative, and the offender became more aggressive during the second assault (Police Officer-Interview transcript).¹⁹ Characteristically, as is the case with the majority of sexual assaults, there were no witnesses to either assault; however, there was corroborating evidence in the form of nine witnesses (including the victim's VATE statement) whose statements were used to corroborate elements of Vicki's story, such as time, place, and emotional state.²⁰ One witness stated that they saw Vicki distressed immediately after one assault. Vicki also disclosed the attacks to a teacher and a friend. Other documentary evidence such as course information, photographs of the site where the assaults took place, and diary entries were also used to corroborate Vicki's story. Unfortunately, the teacher did not, according to Paula, discuss with Vicki the option of reporting the crime to the police. Although Vicki's statement does reveal that she was informed that she could report to police, she appeared not to have been given any information about what would be involved. In addition, Vicki's statement to police and her interview transcript reveals that she was not encouraged to tell her mother about the assaults (Victim statement – police file).

Consequently, the assaults were not reported to police until shortly after the second assault, six months after the first assault. As the report was not made within a 72 hour period after the assault, the report was considered by police to be historical. The first assault became known to police during an interview with one witness about the second assault. The second assault might have been prevented, had Vicki's initial disclosure not

¹⁹ Views expressed by the police officer in this interview are personal views only, and does not necessarily represent Victoria Police policy or a position in relation to the issues presented.

²⁰ Given the delay before reporting and the absence of physical injuries sustained by the victim, no forensic evidence was gathered.

met with distrust and ultimately rejection by the school. Moreover, she was left to continue sharing the same classroom with the perpetrator. In addition, the perpetrator stalked Vicki. In Jan's words,

The whole time the young man, who was raping her, was stalking her. Whenever she went down the street, school, she was being stalked constantly. (mother - interview transcript)

According to Vicki's VATE statement and research interview transcript, she was confused, and she wanted to tell her mother about the assaults, but the teacher suggested that she did not have to because she was over 18 years old. This appeared to have been interpreted by Vicki to mean that she should not tell her parents. In the research interview transcript, Vicki stated that the teacher said, "The school would take care of it". The report to the police was eventually made by Jan, who became aware of the assaults through a conversation with a welfare worker. Jan's report instigated the police investigation, which, after 12 months, led to the offender being charged and given a custodial sentence.²¹

Characteristically, the offender pleaded not guilty. According to Paula, a plea of not guilty by the accused was a strong indicator, based on her experience of previous jury decisions that the trial would result in an acquittal. There had been no other sexual assault case heard in the particular regional area in Paula's memory in which a defendant (with or without impairment) who pleaded 'not guilty' had been convicted (Police Officer-interview transcript).

While it was not possible to access data which specifically related to trial outcome for this regional area, data issued by the Australian Bureau of Statistics for 2006-07 states that "[d]efendants finalised for charges of sexual assault had the lowest proportion (59%) proven guilty of all principal offences. This offence also had the largest proportion of acquittals (19%) and charges withdrawn (22%)" (Australian Bureau of Statistics, 2007-08, p. 11).

²¹ The offender was charged with separate counts of rape and indecent assault. He was found guilty and convicted of five charges.

Factors Contributing to a Successful Prosecution

There are a number of factors that appeared to have contributed to the successful prosecution in this particular case. In keeping with the explanatory analysis described by Yin (2003), this section provides the analysis of all data sources, including interview transcripts, brief of evidence and trial transcript. In addition, the data sources were viewed through the three main theoretical perspectives that inform this research study: namely, the social model of disability, radical feminist theory and symbolic interactionism.

As a starting point, the actions of the three main characters are discussed separately so that critical aspects of their respective roles can be described and significant aspects that in the view of the researcher were identified as facilitators to justice can be highlighted.

Mother and Advocate

Jan's adopted daughter, Vicki, was a survivor of physical abuse and neglect perpetrated against her in a succession of foster homes. According to Jan, Vicki was placed in '28 [foster homes] before the age of five' (mother/advocate – interview transcript). This heightened Jan's determination that, despite Vicki's past, her future could be different. Jan recalled, "she (Vicki) was powerless at four but she was not powerless at 18" (mother/advocate- interview transcript). Jan recalled that, once she learnt about the assaults on Vicki, she hesitated for a short time before making the report to police.

It would be so easy for me to say to her, don't do anything just let it go, we'll just go on with life. But it just kept on playing over in my mind; I thought I can't do that [just let it go], not for her. (mother/advocate –interview transcript)

While Jan did make the report to police, she did appear to experience some level of doubt about how to proceed. It is not uncommon for family members, or other adults to whom the disclosure is made, to act as 'gatekeepers' in deciding whether to report sexual assault allegations to police. A range of factors can motivate a decision not to report. These can include an attempt to try to protect the victim, disbelief, or wanting to keep the family together, particularly when the perpetrator is a family member. If the assault occurs in a disability service environment, a decision not to report may be influenced by concerns about litigation and loss of funding.

The role of an advocate is to ensure that the police take an allegation of sexual assault seriously. Such advocacy is pivotal in cases involving victims with a cognitive impairment (Connelly & Keilty, 2000). The advocate's ongoing involvement in the case is also crucial in improving the possibility of a successful outcome. This point was reinforced during focus group discussions with advocates, who explained that the role of the advocate might include ensuring police maintain focus on the case, which in some instances, involves waiting up to 12 months before the case is brought to trial (Victorian Law Reform Commission, 2003, pp. 151-152). This role can also include encouraging or, in Jan's case insisting on, an ongoing dialogue with the investigating police officer and receiving regular updates about how the case is proceeding. The *Victims' Charter Act 2006* (Vic), part 2, section 8 of the now requires police to keep victims up to date with the progress of their case.

Another factor that was crucial to the success of the case was that Jan knew her daughter very well, including her past and her present. Jan says:

We got these girls [Vicki and her sister], we got them when they were in a thousand pieces and we got them to 100 pieces. (mother - interview transcript)

Jan's intimate knowledge of her daughter ensured that some aspects of the process involved in providing a statement to police were handled in a way that would best suit Vicki. To this end, the initial statement made to police about the assault was made at her home, where Vicki felt safe and supported, and not at the police station as police had requested. Jan's insight and knowledge about Vicki's personality and the manifestations of her impairment were also helpful in preparing her daughter for the rigors of the trial. For example, Jan spent hours with her daughter 'walking through the bush' asking her to repeat statements like 'could you repeat the question' in preparation for cross-examination.

The trial transcript revealed that Vicki was subjected to an in level of questioning by the defence. For example, Vicki was asked on numerous occasions, some 12 to 18 months after the first assault, to provide a detailed description of what occurred before, during and after the assault. On several occasions, the tactics used by the defence could be described as an attempt to confuse Vicki. The following trial transcript extract provides some insight into the type of questioning.

Defence: When you say you told them [two friends of the Victim] do you think you told both [names of friends].

Vicki: Yes

Defence: So if somebody later said that [friend] wasn't in the tent would you agree with that or disagree with that?

Vicki: Disagree

Defence: So you would say that [friend] was definitely in the tent?

Vicki: Yes. (trial transcript)

Questioning about this point continued for six pages of transcript, with each question framed in a way that would elicit a yes or no response. While the current study does not analyse the tactics used by the defence counsel during the trial, it is possible that the questions were structured in such a way as to confuse the victim.²²

Jan provided invaluable emotional support to Vicki from the initial report to the conclusion of the trial and beyond. Jan mentioned that she waited outside the courtroom while Vicki was giving evidence. At each break, Vicki would sit on Jan's lap, curled up and wanting to be hugged and rocked gently. While Jan embraced Vicki, she whispered encouraging words, such as "not too much longer to go", "you are strong, you can do this" (mother -interview transcript).

In summary, Jan played at least three main roles, that of reporter, supporter and strong and persistent advocate.

Police Officer

In 2004, Jordan argued that, in relation to rape victims:

The most significant aspect to emerge from interviews with [rape victims] concerns the paramount importance of the police in establishing a positive relationship with the complainant {Jordan, 2004, p. 212}.

In this case, the relationship between the police officer, Paula and Vicki was vital in securing the prosecution of the offender. Paula had many years experience in the area of

²² There are numerous studies, which describe and add insight into the treatment of sexual assault victims by the defence, and the tactics used by the defence to confuse victims. For example, see Young (1998). The impact of cross-examination and indeed the trial process on victims is acknowledged and often referred to as a source of secondary victimisation. For example see (Winkel, Vrij, Koppelear, & Steen, 1991) and Taylor (2004a).

sexual assault. As a member of the Sexual Offences and Child Abuse Unit (SOCAU), Paula worked exclusively with adult and child victims of sexual assault, as well as with children subjected to other forms of abuse. One of the main tasks of a SOCAU member is to make a Video Audio Taped Evidence (VATE) to record a statement of the offence/s from the victim. The *Evidence Act 1958* section 37B stipulates that a statement can be recorded on VATE if victim has “a cognitive impairment or [is] under the age of 18”. This recording can be wholly or partly used as evidence-in-chief during a trial. Members of SOCAU see themselves as victim-focused and, as such, they endeavour to build a rapport with victims in order to establish an atmosphere where victims can feel sufficiently comfortable and safe to tell their story (SOCAU members - focus group interviews).

As a victim-focused police officer, Paula took the time to develop a strong rapport with both Vicki and Jan from the point of report until the end of the trial. This relationship was a sustaining factor for both Jan and Vicki. The positive relationship appeared to strengthen their ability to endure the rigors of the justice system and the rollercoaster-like emotional journey imposed upon them by the crime, the investigation and the trial. Comments from Vicki such as ‘I trusted Paula’, ‘Paula was good to me’, ‘Paula told me what was happening’ (Victim - Interview transcript), provided a glimpse into not only the importance of this relationship to Vicki, but also of Paula’s ability to recognise Vicki’s needs and to respond accordingly.

Paula also took an active interest in the case from beginning to end. As discovered during the interview, the brief of evidence had not been sent to the Criminal Investigation Unit (CIU) for investigation as normal procedure dictated.

Broadly speaking, the role of the Criminal Investigation Unit is to investigate a diverse range of crimes, including sexual assault. In particular, their role is to establish if in fact a crime has been committed and, if so, what if any charges can be laid against the accused. In this investigative role there is, compared with the role of SOCAU, less emphasis on building rapport with victims. In the view of CIU participants in focus group sessions (discussed in chapter seven), the victim is but one source of evidence that is used to establish a occurrence of a crime. In addition, CIU members must also decide whether the case has a ‘reasonable prospect of success’ in convicting the alleged perpetrator. This

assessment is informed by evidentiary and discretionary considerations: one factor police must consider is the presumed ability of the victim to contribute positively to a successful prosecution. This is a crucial area of police decision making, the outcome of which can determine whether a case is authorised.

Changing the System from Within

In the case under discussion here, Paula, for a number of reasons, decided to seek permission to investigate this particular case herself rather than pass the file on to the CIU. Although a SOCAU member with a distinctive role as explained in chapter 5, Paula was very interested in conducting investigations. Her decision to seek permission to undertake the investigation in this case was influenced by who was available in CIU. Paula explained, “It depends on who’s on in our CIU as to whether they’re interested or not in this particular case. It might have been that the interested people were away or something” (Police officer-interview transcript). Paula indicated that the response of CIU members to the investigation of sexual offences involving adults with cognitive impairment was variable. The implication was that there were no CIU members available to whom Paula would have necessarily entrusted the investigation.

Paula did not receive encouragement to investigate the case from her superior officer at the time. She states:

To be perfectly blunt, I think probably the attitude was, ‘Well, she’s intellectually disabled, so it’s not going to get anywhere’. So it’ll all be a storm in a tea cup, get it over and done with and that’s it (Police Officer - interview transcript).

The response Paula received from her superior was that there was no point pursuing the case because there was little likelihood of a successful prosecution. Paula perceived that her superior’s decision was made because the victim had a cognitive impairment. The decision made by Paula at this point was crucial to the progress of the case. Paula decided to seek authorisation and to seek approval to investigate this case despite advice from her superior officer, and despite her knowledge and experience of the high numbers of acquittals at trial of sexual assault cases in that region. In essence, Paula made a conscious decision not to allow the precedence of numerous acquittals to inform her judgement of whether to proceed with this case.

Paula did not expect the case would be successful at trial. She said, “We actually didn’t expect to win” because, according to Paula, “If you plead not guilty in (regional town), you are 99.9% assured of being acquitted” (Police officer-interview transcript). Paula was determined. She said, “I just thought no. This kid is, she’s a gem, you [her superior officer] haven’t met her” (Police officer-interview transcript). Paula indicated that the decision by her superior was based on what he had read on the file. At no stage had he met the victim. Paula’s use of the term ‘she’s a gem’ may also indicate that Paula thought Vicki would make a good witness.

If, at this point, Paula had decided to take the advice of her superior, or indeed hand the case over to CIU members, who may not have been interested in taking this case on, the outcome may well have been different. In considering this point in the decision making process from a Social Model perspective, Paula’s actions would be considered as ‘enabling’ Vicki’s access to justice. The decision of her superior that it was not worth proceeding could be considered as ‘disabling’ access to justice because his perception of the ‘likelihood of success’ appeared to be informed by a generalised assumption about people with cognitive impairment.

Not only did Paula conduct the entire investigation, including identifying and interviewing all potential witnesses, but she also took the proactive step of introducing the case to the prosecutor on circuit in the region, something that (according to interviews with CIU members) did not normally happen. Discussions during focus group sessions with CIU members and advocates indicated that there was usually limited time for the prosecutor to meet the victim before the trial; this is particularly the case in regional areas, where the prosecutor’s time in the region coincides with the County Court circuit.

Arranging to meet the prosecutor on circuit was a deliberate attempt on Paula’s part to ensure the prosecutor would become familiar with the case earlier than would ordinarily be possible. Indeed, Paula ensured that the prosecutor met with both Vicki and Jan some two weeks prior to the trial, knowing that this would go some way in assisting Vicki to feel more at ease with the trial. In this next statement, Paula refers to the likelihood of improving case outcomes if time were taken by prosecutors to get to know the victim. This was helpful in making decisions about how to direct questioning of the accused.

To me it's just so important that if you spend hours with the victim and then hours with the witnesses, you have a far better understanding of approaching the interview with the offender than someone who is just doing it cold (Police Officer -interview transcript).

Paula's decision to seek permission to investigate the assault was informed by a number of influences. These included her eagerness to move beyond her usual role, her belief that Vicki was a 'gem' whose case was worth pursuing, the personnel in CIU at the time of the investigation and, finally, Paula's wish to change the system.

I also have a belief that we should be taking more cases to court, be they intellectual disabled or not and lose more at court, because we would, we'd lose more in court. Just to start changing the attitudes of those in the court system, the jury the judge, the whatever. To start them changing the system. (Police Officer -interview transcript)

The role played by the victim in the progress of the report is by no means straightforward. Indeed, the role of the victim in the justice system process could be described as paradoxical. The victim might have some control over the decision to report the assault and participate in the criminal justice system process. In reality, a substantial proportion of the decisions made during the pathway of a report, from report to trial, are, in effect, out of the control of the victim. Notwithstanding the lack of control over much of the process, the victim, or witness (as they are referred to later in the process), is central to the prospects of a successful trial outcome.

Victim

As with all cases of sexual assault that are reported and, certainly, those that reach the trial stage, the victims themselves require and indeed demonstrate, a great deal of courage and determination. This case was no exception. The softly spoken Vicki showed extraordinary strength throughout the case, which took over 12 months before reaching trial. Once the trial commenced, she endured a stressful and distressing two and a half days of cross-examination, which was prolonged due to difficulties with Closed Circuit Television (CCTV) technology.

During her interview with the researcher, Vicki was able to look back and identify people who assisted her through a difficult process, as well as those who may have made the process more difficult. When describing how her disclosure was handled by the education facility, Vicki said, "Well, they wanted me to go to a counsellor, but I told them I didn't

want to” (victim - interview transcript). Vicki added, “Well, I felt sad, ‘cause I really wanted to tell mum’ (interview transcript – victim). Another aspect of importance to Vicki was the consistency and support she received from report to trial. The two people central to Vicki’s support were her mother Jan, and the police officer, Paula.

Vicki’s mother accompanied her to every interview and meeting with various players in the case leading up to trial. There were, however, other people brought in to assist Vicki at various stages, such as the Independent Third Person (ITP) and the worker from the Witness Assistance Service (WAS) from the OPP, in addition to other court staff. Vicki’s comment, ‘The people at the court were good. They supported me and I had [Paula] and my mum there too’ (victim- interview transcript), indicated that, while her experience with the other support people involved in this case was positive, the presence at court of her mother and Paula was particularly important.

It was clear that the presence of these support people that Vicki knew and trusted was of pivotal importance. In describing her relationship with Paula, Vicki said, “She understood, she was good to speak to” (victim-interview transcript).

[En]Ablers To Justice: What Made The Difference?

To understand what factors contributed to this successful prosecution, it is important to draw out the salient elements associated with the case. One way of analysing the pathway of the report is to look at it in relation to Figure 1 (see page 12) discussed earlier in chapter one, the ‘usual pathway of reports’.

Prior to discussing the initial report made by the victim, it is important to stress that without the assistance and advocacy from her mother, Jan, a report would not have been made to police. Indeed, at a focus group discussion held with advocates (in the same region in which Vicki lives), the case involving Vicki was highlighted as a successful case because of the strength of the advocate. Although it was unknown to the researcher at the time, it became clear after reviewing the transcripts of focus group discussions that it was Vicki’s case being discussed, although, for ethical reasons, names were not disclosed.

For a variety of reasons, including but not limited to a lack of understanding that what occurred is a crime, a lack of information about legal rights, fear, shame and learned helplessness, some adults with cognitive impairments tend to disclose assaults to a trusted adult before or instead of going to the police (Lievore, 2003, p. 97; Victorian State Ombudsman, 2006, p.5). The person to whom the disclosure is made plays a crucial role in deciding whether an allegation of sexual assault is reported to police. In effect, adults with impairments are often confronted by an additional level of ‘gatekeeping’ compared to the broader community. In Vicki’s case, the person to whom the disclosure was first made (her teacher) chose not to report the crime. Vicki endured two separate sexual assaults before a report was made to police. Indeed, Jan only became aware of the first assault by chance. Information concerning the first assault did not come to light until the investigation into the second assault had commenced.

Initial Police Report

The importance of the crisis response to victims in the initial stages of disclosure and reporting is highlighted in the literature (DuMont, 2007). Further, the importance of supporting the victim is identified in the police code of practice, which states that the first priority is the care of the victim (Victoria Police, 2005, p. 4). The *Code* serves as a basis for the State government coordinated crisis response policy to victims of sexual assault.

The importance of the first response by police is clearly highlighted in this case. Paula’s empathic response, and the information she provided about what the implications for Vicki would be if she decided to make a report, were instrumental in Jan’s and Vicki’s decision to make a formal statement.

Formal Police Statement by Victim

The VATE statement is a videotaped recording of the victim’s statement in which the victim provides a firsthand account of the assault which took place. The importance of this statement in facilitating case progression cannot be underestimated. As such, it is vital that the VATE is conducted by an officer experienced in using VATE, and preferably experienced in interviewing people with cognitive impairment. Certainly, it requires a person who is willing to listen, who provides sufficient opportunity for the victim to describe the assault, and someone who is prepared to ascertain the abilities of the victim and not rely on generalised assumptions of deficit due to impairment. A

separate incident involving another victim (older woman), described in a focus group session with SOCAU members, illustrates this point.

Her allegations were clear, very clear. How it happened, where it happened and she was wanting to get the VATE done [victim wanted the opportunity to tell her story]. And I thought well, we'd give it a go and she was saying (making groaning noises) you could just make out what she was saying. It was like a muted deaf person's speech, [the victim described] where he [offender] put it [penis] and how he held her. Because she couldn't write, so in the end she drew, really quite good drawing skills, of person leaning over against a wall and someone having sex with her from behind. The whole thing she explained. The CI [Criminal Investigation Unit members] just laughed at her. They said "How can you even tell that that's the word penis" and I said 'just listen to it'. I only had two meetings with her and I could understand her. You had to really listen. (1S, p. 26)

In broad terms, there were two main factors which appear to have made the difference in the successful outcome of this trial, they were:

Determination to Seek Justice

Both Jan (mother) and Paula (police officer) expressed a strong desire that Vicki (victim) deserved justice. They believed Vicki's version of events and believed Vicki should have the opportunity to seek justice by being assisted to bring the case to trial.

Strong Advocate

In this case, the role of a strong and consistent advocate appeared pivotal in ensuring the crime was reported to police. In addition, the advocate ensured that the police remained focused on the case and, finally, the advocate ensured that the victim was supported throughout the justice system process.

Continuity

The usual pathway of a report through the justice system, from point of report to Office of Public Prosecutions, is characterized by the division or compartmentalising of tasks, or what is often referred to as demarcation or the division of labor. This can mean as many as five people being involved in a case (not including changes in staff due to illness, transfer and annual leave). As discussed during focus group discussions with members of Victoria Police (See chapter 7), each level in the decision making chain has a specifically defined role, indicating the point at which each person becomes involved and the point at which the case is handed over to the person at the next level in the decision making chain.

Consistency in the police personnel deciding with Vicki proved an important aspect of this case. Paula's decision to remain involved in the case from inception to end ensured continuity for Vicki and Jan. It also ensured information did not get lost, which can be the case when there is a change in personnel. Although a number of people were involved for short periods of time throughout Vicki's case, the two main supports for Vicki during the entire case were her mother/advocate and the police officer. Contrary to what occurred in this instance, it is all too common for victims, especially those with cognitive impairment (if they are connected with a service at all), to be referred to a number of services throughout the process. This can be due to a number of factors, including lack of understanding of the legal process by disability workers, or a lack of understanding of how to respond to people with cognitive impairment by sexual assault advocates (Goodfellow & Camilleri, 2003).

Relationship Building: Lack of resources, time constraints, and role boundaries were some of the reasons provided by police during focus group interviews for not being able to spend a greater length time with a victim. As the quote on page 166 illustrated, the amount of time invested in listening to a victim made the difference in understanding what the victim was saying, and how questions might have been posed. Paula did take the time; she listened, and she wanted to know. As Jordan (2004a) pointed out, the time invested in establishing the relationship between victim and police is of pivotal importance. When a victim decides to report a crime, they risk being blamed, not being believed, being blamed, potentially re-traumatisation from retelling the story, and of having judgements made about their character. It is logical to assume, then, that the process of reporting, and then of maintaining engagement with the justice system until trial, will be greatly assisted if time is taken to build trust and confidence.

Commitment and Investment in seeing it Through: This case provided an example of a movement against the tide of the last century, during which we have seen increasing specialization, and division of labor and the associated separation of conception from the execution of tasks. Here we see the value of a mother and police officer who conceptualised the notion of a just outcome. Characteristic of those who were focused on an outcome, respectively, they invested emotion, energy and time. They were able to conceptualise and execute many of the tasks associated with the progress of the case.

Essentially, some members of both SOCAU and CIU see separating the tasks involved in a 'usual pathway' as specialized work domains. SOCAU members are trained in (amongst other things) building rapport with victims, interviewing and recording VATE statements, whilst CIU members typically view their area of specialization as 'the investigation'. Once their respective task has been completed, the job is moved into the next phase where a new group of specialists become involved. The effect of this approach is that no unit is involved from beginning to end.

Victoria Police has established two pilot Sexual Assault and Child Investigation Teams (SOCITs) (one located in a rural station and one metropolitan station). Whilst an evaluation of the pilot Sexual Assault and Child Investigation Teams was conducted in 2009, the evaluation report has not yet been released publicly. It remains to be seen whether the specialization in the area of sexual offences brings the desired improved outcomes in terms of increased convictions and improved police response for victims. If what has transpired in this case study is any indication, improved outcomes may be better achieved by empowering continuity of personnel and the associated greater 'investment' in the case outcome.

The table below provides an overview comparison between the 'usual pathway' of a report of sexual assault and the pathway of the successfully prosecuted case described in this case study.

Table 4: Different Pathways

Usual Disclosure and Report Pathway	Pathway of Successful Case
Disclosure to trusted person or someone in authority	<ul style="list-style-type: none"> • Despite initial disclosure to a teacher, the assault was not reported. • The victim made a second disclosure to the mother, who did report.
Initial Police report <i>(by phone or in person)</i>	<ul style="list-style-type: none"> • Initial enquiry was made by phone, call was referred directly to SOCAU. • Police officer began to develop rapport with victim and mother.
Formal Video Taped Statement <i>Proceed to investigation or exit</i>	<ul style="list-style-type: none"> • Time was taken by police officer to build rapport with victim and mother assisted victim to feel more secure and comfortable. • Presence of a trusted advocate
Investigation outcome <i>Proceed to investigation or exit</i>	<ul style="list-style-type: none"> • Decision and permission sought to conduct investigation. • Persistence and determination needed on behalf of investigating officer, due to some pressure being applied to let the case go, particularly as there had been many sexual assault trials, which have not been successful in this regional area. • SOCAU member advocated for case to progress. • SOCAU member prepared brief and submitted for authorisation.
Committal Hearing	<ul style="list-style-type: none"> • 'Paper committal' - defendant's legal representation waived their client's right to a committal hearing.
OPP seek to prosecute	<ul style="list-style-type: none"> • Police officer briefed prosecutor and arranged for the prosecutor to meet the victim two weeks prior to the trial. • Mother/advocate knew difficulties her daughter would have, begins rehearsing with her daughter how to respond if she does not understand a question.
County Court Trial <i>Convicted, acquitted or alternative plea bargain with OPP</i>	<ul style="list-style-type: none"> • SOCAU member still involved, interested in outcome and supportive of victim and mother. • Problems with CCTV creates delays
Time from first report to trial outcome	<ul style="list-style-type: none"> • First reported to police in late 2003 • Offender sentenced in late 2005

Conclusion

The aim of this chapter was to analyse and make salient the factors which contributed to the successful prosecution of a particular case. In particular, it was to better understand what, if any, lessons could be learnt from this case that may provide insight into ways in which the broader police response to sexual assault victims would be improved in order to increase greater access to justice by improving the conviction outcome of such cases.

In this case, the police officer, 'Paula', in effect adjusted (within the confines of her power) how the system responded to Vicki. What could be described as a disabling justice system environment for many victims, was rendered more enabling by the steps Paula took to maintain involvement with the case and for 'Vicki' to be seen as a real person and not merely as an 'intellectually disabled' witness. Rather than labelling this a 'special case', perhaps it should be seen as an example of how the justice system could improve its response to all victims. In providing the opportunity for the victim, mother/advocate and the police officer to work closely together, this case facilitated the building of rapport, trust, and understanding of both the system and of the victim. Such an approach reduces the level of fear and uncertainty often experienced by victims.

The social model of disability offers a great deal of saliency in explaining or giving meaning to what has transpired in this case. The focus of the social model of disability is on the socially constructed systems that create barriers that exclude and effectively disable access and participation in society of people with impairments. According to Jones and Brassier Marks (1999), the constructed legal system in Australia has a history of rendering a number of groups 'disabled' or 'lacking legal competency or legal capacity'. These include children, women, and what the medical and the legal professions once referred to as 'lunatics and idiots' (Jones & Brassier Marks, 1999, p. 5). Whilst there is continuing debate regarding the extent of inclusiveness of the social model of disability in regards to people with cognitive impairment, there is little doubt that access and inclusion have not been at the forefront of society's systems and structures in Australia. Certainly, one would only need look into the recent past in Victoria to find that people with 'impairments' have not been fully included into general society.

The evidence of this chapter clearly suggests that a number of elements such as consistency, strong advocacy, and persistence were present in this case which led to the achievement of a successful prosecution. Crucially, however, the evidence in this chapter also suggests that a decision based on a deficit view of people with cognitive impairment was made at the first authorisation stage, from SOCAU to CIU. The question, which must be asked then, is this: if such a decision was made in this case then to what extent are other cases of sexual assault that involve adult victims with cognitive impairment being subjected to similar subjective views. Such views in effect, prevent cases involving

people with cognitive impairment from accessing justice when there is a good chance that they could potentially be successfully prosecuted.

Chapter Nine: Conclusion

Introduction

The previous three chapters have presented the analysis of three distinct data sets: the case file narratives, the focus group interviews, and a case study. Contained in each of these chapters are the main emergent themes. Individually, each data chapter has provided the evidence upon which the argument presented in this final chapter is based.

The aims of this chapter are multiple. First, to identify and discuss the overarching themes that have emerged from each of the independent data sets and to consider how these themes respond to the research questions. Second, to link the emergent themes with the three theoretical frameworks utilised to inform this research. Third, to explain how this research relates to the findings of previous studies in the field of sexual assault, both in terms of areas of agreement or disagreement and where this study adds to the existing knowledge in this field. Fourth, this chapter aims to identify areas for further research. Fifth, it aims to highlight the strengths and weaknesses of the current study.

While the rationale for the current study has been articulated in chapter one, it is worth restating at this juncture the questions the current study sought to answer.

Research Questions

Why did reports of sexual assault made to police by adult victims with cognitive impairment seldom progress beyond the investigation stage?

Several sub questions helped to focus the research aim:

- a. What influenced police decisions about sexual assault cases involving adult victims with cognitive impairment?
- b. When was discretion applied in police decision making involving reports of sexual assault made by adults with cognitive impairment?
- c. What specific victim/offender or case characteristics influenced police decisions and therefore impeded or enhanced case progression of reports of sexual assault made by adult victims with cognitive impairment?

To begin, it is useful to provide a brief recapitulation of the data collection methods and tools of analysis and to restate the theoretical approaches that have informed this study. The research combined qualitative and quantitative methodologies, with the main emphasis being on the application of qualitative methods.

Data Sets and Methods of Analysis

The current study comprised mutually reinforcing triangulation of multiple data sources, methods, and theoretical perspectives. Data sources included 76 police case file narratives, which related to the reports of adult victims with cognitive impairment, that were made over a two-year period to five police stations across Victoria. Second, 13 semi-structured focus group interviews were conducted with police, Office of Public Prosecutions staff, and advocates from sexual assault and disability services. The third data source was a case study of a successfully prosecuted report of sexual assault, which was analysed using Yin's (2003) 'explanatory' case study analysis discussed in detail in chapter 5.

While a more detailed explanation and justification for the research approach can be found in chapter 5, in brief, thematic analysis and critical discourse analysis were used to analyse all qualitative data. The quantitative data relating to case, victim, and offender characteristics from police case file data was analysed using SPSS in order to conduct basic correlation and descriptive statistics.

In addition, the analysis was informed by a theoretical triangulation incorporating feminist theory, the social model of disability and symbolic interactionism, which, as discussed in chapter 4, had inherent tensions between, on the one hand, the conflict theory, represented by feminist and social model perspectives and, on the other, the consensus perspective espoused by symbolic interactionism. Despite these inherent tensions, the three theoretical assumptions brought a depth and richness to the study that would otherwise not have been possible. The main justification for the theoretical triangulation was the focus of the study; namely, disability and gender as concepts. These concepts assisted in understanding police decision making from a macro perspective, while the desire to better understand decision making from a micro perspective, can be achieved through language and shared meaning and assumptions.

Multilevel Influences on Police Decision Making

Police decision making in relation to sexual assault cases involving adult victims with cognitive impairment is inherently complex. The current study suggested that there were multiple factors which informed police decision making. The influences have been categorised into four levels, each representing a level of influence. These are 1) social forces, 2) the justice system, 3) police organisation, and 4) police unit culture. While some levels of influence, such as those indicative of broad social forces or the justice system, were apparent across all data sources, other levels of influence appeared to be specific to geographic location, availability of resources or the influence of unit culture. The majority of influences on police discretionary decision making, appeared to reside outside the structural framework of the justice system.

A model is proposed in this chapter, which provides a typology (Figure 2 on page 256) of the influences on police discretionary decision making in sexual assault cases involving adult victims of sexual assault. The typology was informed at two levels by the two opposing theoretical perspectives discussed in chapter four.

The position proposed in this study through combining the differing theoretical perspectives was one which suggests that the majority of individuals understand, assign meaning to and interpret meaning within a consensus model. That is, society functions because we as individuals function within it according to predominantly broad, shared understandings of how our society operates. The dominance of some shared understandings (such as negative stereotypes about people with impairments and 'real' rape typification) are perpetuated through a shared understanding, for example, that people with cognitive impairment are childlike and that some women 'invite' sexual assault by the way they dress. Both the social model of disability and radical feminist theory, which state that our understanding of rape and disability are based on the dominance of one group over others, and which assume norms of patriarchy and so called 'normalcy', inform the paradigm that underpins our societal understandings. Figure 2 presents a diagrammatic representation of such influences on decision making.

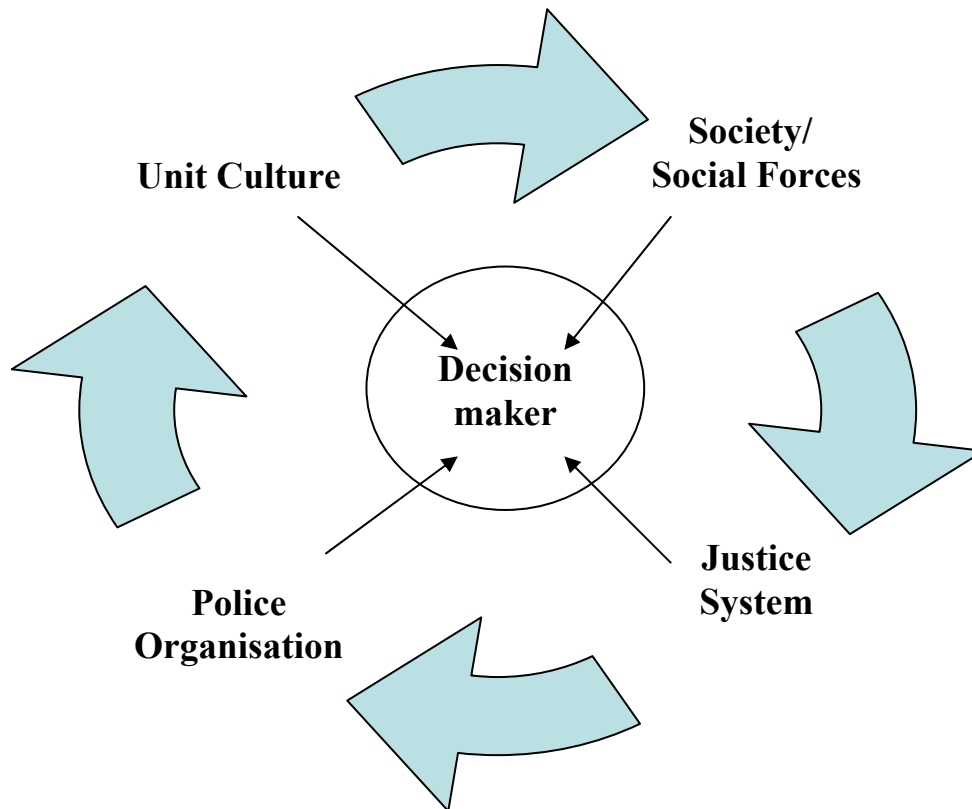


Figure 2: Typology of Influences on Discretionary Decisions: ‘The Influence Cycle’

Model Overview - Levels of Influence

The model presented in Figure 3 builds on work in the area of sexual assault conducted by Jordan (2002a; 2004), Gregory and Lees (1999), Eastal (1998) and Scerra (2008), who have considered broad cultural and organisational influences on police decision making in sexual assault cases. The current study also builds on research conducted by Corsianos (2001; 2003) regarding the levels of influence of cultural and social factors on police decision making generally. The findings of the current study support the conclusions of these researchers in acknowledging the influence of police organisational factors and of broader social forces on police decision making. This study, however, adds further insight into police discretionary decision making by considering the specific role of social forces, police organisational norms and culture, and unit culture, in addition to the role of the justice system, in facilitating or hindering access by adult victims with cognitive impairment. The analysis suggests that, in many instances, police decision making tends to create barriers to the achievement of justice rather than removing them and facilitating access to justice.

In brief, the diagram indicates that four levels, including society, the justice system, police organisation influence, and unit culture, influence police discretionary decisions in regard to sexual assault cases involving adult victims with cognitive impairment. A distinction was drawn between the police organisation and unit culture, as there are strong indicators presented in chapter seven, which suggested that unit culture can be particularly influential.

Lastly, the circle within the arrows represents the individual police member who interprets these influences and constructs his or her own meaning, which is then the basis of the decision. The term 'interpret' in this study refers to more than simply the conscious filtering and interpretation of information. The basis of symbolic interactionism and the premise of shared understanding is that much of the interpretation occurs at a sub-conscious level, without thought about its origin. For example in relation to the use of the metaphor 'childlike' discussed in chapter seven, many of the focus group participants were clear about the meaning of the term and how the use of the term directed their practice.

The victim was, in this sense, external to the decision making process, and hence was rendered invisible by the process. The victim became a witness and onlooker, alienated by the justice system process as decisions regarding their credibility, ability and anticipated case outcome were made around them and about them.

Each level presented in Figure 2 influences the next, and attitudes continue to perpetuate unless change is introduced. The following paragraphs discuss in more detail each area of the typology presented.

Level One: Social Forces

Police, as members of society, do not operate in a vacuum but are informed by the values and norms of the broader society in which they live (Jordan, 2001). Their use of discretionary decisions reflects these values and norms. The following discussion provides further evidence of how police constructions of disability and sexual assault are likely to be informed and reinforced by dominant social understandings.

Negative Constructs: Stereotypes, Myths, and Generalised Assumptions

The generalised constructions of disability and sexual assault identified in the data appeared to significantly influence on police decision making and, consequently, the trajectory of sexual assault reports made by victims with cognitive impairments. Negative constructions of disability, in addition to narrow constructions of ‘real rape’ and ‘real rape victim’ typification, were apparent at all points of the ‘influence cycle’ and are discussed within each theme.

Broadly, the analysis of data identified a range of stereotypes, myths, and misconceptions, particularly in relation to cognitive impairment, that were frequently applied by police. Whilst these were described in more detail in chapter 7, the following paragraphs focus on the dominant constructs of disability identified across data sets.

Moral and Gender Constructs: ‘Real Rape’ and ‘Real Rape Victims’: Although it was not possible, within the parameters of this study, to determine how influential negative gendered and moral victim characteristics are on individual case outcome, it was clear that such characteristics informed the decision making of some police officers. It appeared that police have preconceived notions of what constituted a ‘real rape’ and a ‘real rape’ victim. While police did not expressly articulate such a scenario, words such as ‘does their story ring true’ and the use of question marks or exclamation marks when describing the allegation, indicated a level of police suspicion and cynicism about the victim’s story.

Factors such as previous “false” reports made by the victim, the consumption of drugs and alcohol by the victim prior to the assault, and victim behaviour immediately after the assault, played some part in influencing the outcome of sexual assault cases. Previous allegations made by the victims, particularly if these allegations were deemed false, also appeared to impact negatively on case outcome by heightening the level of disbelief toward the victim and their current allegations.

This study supported findings of previous research conducted by Heenan and Murray (2006), Jordan (2004), Lea et al., (2003), Spohn and Holleran (2001) and others who also found that decisions in sexual assault cases are informed by gendered and moral stereotypes which manifest as negative victim characteristics. In addition to the moral and

gendered stereotypes, which were drawn on by police to inform their decisions, this study demonstrated that stereotypes and generalised assumptions about disability also informed decisions. As such, victims and their reports were subjected to two levels of typification, one on the basis of ‘real rape’ and ‘real rape victim’ scenarios and the second on the basis of stereotypes of disability.

A significant influence on police decision making was the shared use of the metaphor ‘child like’ which was also identified by Brennan and Brennan (1994, pp. 51-58). The metaphor appeared to have the same meaning across the various focus groups and the range of individual participants. In this way, it transcended “spheres of reality” (Berger & Luckmann, 1984, p. 54) such as gender, geographic location, organisation, work role, unit, and rank. The extensive use of the metaphor within the data highlighted not only its widespread application, but also a shared understanding of the meaning ascribed by the metaphor and applied to people with cognitive impairment.

While participants used the metaphor ‘child like’ as a means of explaining how they communicated with adult victims with cognitive impairment, it was also clear that participants had assigned to them other ‘child like’ attributes including certain types of behaviour and levels of understanding. In essence, adults with cognitive impairment ceased to be adults and became children in adult bodies.

Indeed, we may apply Goffman’s (1963) concept of ‘stigma’ to further understand the notion of using stereotypes to describe groups of people, in particular people with a disability. The metaphor ‘child like’ was used by participants as a way of describing their respective experiences as police officers and advocates in working and communicating with adults with cognitive impairment. In effect, what participants were articulating was a way of categorising and making sense of social life, and by so doing they inferred homogeneity of individuals unlike themselves.

Further, the use of ‘child like’ by professionals within the justice system imputes certain characteristics on the person or group to whom it was being assigned. Although the term in the context of the focus group interviews was not intended as derogatory, its effect was to reduce those who were defined as such to something less than what they were – adults. The metaphor discredits adults with a cognitive impairment from adults, who are

credible, to being children who are seen as less credible, or to have no credibility. Indeed, the administrative pairing of children and adults with cognitive impairment in relation to VATE and other policy and legislative frameworks²³ provide a type of scaffold for the perpetuation of the metaphor and consequently of the practice of treating adults like children.

The use of the metaphor as a frame of reference by police to ‘aid’ communication and better understanding of the victim’s abilities and potential to be a good witness, may potentially have significant implications for the victim and the trajectory of their sexual assault report. Adults with cognitive impairment are not children. They are adults who have impairments, which affect their cognitive capacity in different ways.

Generalising Lack of Credibility: The perception that victims with cognitive impairment were not credible or were seen as less credible than other victims was a strong and constant theme through the data. Indeed, it would appear that central to many of the decisions about reports of sexual assault made by adult victims with cognitive impairment was the perception of the victims’ lack of credibility. While the notion of lack of credibility will be discussed at greater length later in this chapter, it is worth noting that rather than being a view that was specific to the police organisational culture, unit culture, or to individual decision maker, the perception of lack of credibility appeared to be informed by broad societal forces and reinforced by the justice system.

One example taken from the data reported in this thesis, which highlighted the dramatic effect that perceptions of generalised lack of credibility have on case outcomes and on the victim, provided a glimpse of how people with cognitive impairment were constructed as not credible. The case study (chapter eight) revealed that a report, which did lead to conviction of the perpetrator, might have resulted in a decision of ‘No Further Action’ (NFA) had the SOCAU member taken the advice offered by her superior. The advice was that the police officer should not spend too much time on the case because the victim had a cognitive impairment and, as such, was unlikely to contribute to a ‘successful’ prosecution. The assessment by the superior that the case had no likelihood of success appeared to be based on a judgement about the victim’s cognitive impairment.

²³ Adults with cognitive impairment and children are often paired together in policy and legislation see for example *Crimes Act 1958 (Cth)* where such legislation or policy refers to ‘vulnerable’ victims.

The conclusions reached by Harris and Grace (1999), Jordan (2004) and Lea, Lanvers and Shaw (2003) indicated a level of support for this conclusion, as the majority of cases involving victims with cognitive impairment in their respective data samples were viewed as false or less credible by police. While the findings of the Heenan and Murray (2006) study were congruent with the findings of the studies mentioned immediately above in relation to psychiatric disabilities, Heenan and Murray (2006) found that reports made by victims with intellectual disabilities were more likely to result in charges.²⁴ According to the typology or influence cycle being proposed here, the next level of influence was the justice system.

Level Two: The Justice System: Enter if you're 'Able'

Not surprisingly, the justice system was another significant influence on police decision making. The most salient level of influence on police decision making identified from within the justice system theme was the prosecutorial guidelines. The following paragraphs highlight what appeared to be the three most influential aspects of the guidelines on police decision making; namely, the link between 'credibility and disability', the 'reasonable prospect of conviction' and the 'good witness'. All three themes were indicative of a justice system that equated credibility and the ability to be a 'good witness' with normalcy and which measured all victims who sought to gain access to justice, against an 'ableism bench mark'.

The Link between Credibility and Disability

The main guiding instrument police used to make decisions about whether reports were to be authorised or ejected from the system was the prosecutorial guidelines. Since the commencement of this study, the Office of Public Prosecutions updated the guidelines, in December 2008. Yet, it appeared that, despite the review of the guidelines, the section that guides discretion, the *Prosecutorial Discretion Policy* section 2.1.5 (Office of Public Prosecutions, 2008), still reflects the previous guidelines to the extent that they appear to be unchanged.

Using the social model as a framework as a lens through which to view the Prosecutorial Discretion Policy, it seems clear that the guidelines encourage police to use discretion.

²⁴ There were 221 sample of victims with disabilities in the Heenan and Murray (2006) including 130 who had a psychiatric disability or a mental health issue and 49 victims were identified as having an intellectual disability (6 percent of the overall sample).

The guidelines ask a series of questions in relation to the evidence, victim, and witnesses. One such question is “Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?” (Office of Public Prosecutions, 2008). It appears implicit in this statement that a differentiation between ‘normal’ victims and victims with cognitive impairment is encouraged. If the victim had either a physical or a cognitive impairment, then it is anticipated that the jury, judge, or defence counsel would make an assumption, that the impairment equated to, or suggested, a lack of credibility.

‘Reasonable Prospect of Conviction’

In determining whether to authorise a report or not, police undertake a process of assessing various elements of an allegation to determine whether a case has a ‘reasonable prospect of success’ at court. The data revealed that, in determining the ‘likelihood of success’ police made a range of subjective judgements about the case. These judgements take into account the evidence (level and quality), the victim (competence and credibility), and whether consent was a factor (Office of Public Prosecutions, nd, np). Albonetti (1987) referred to this process as a process of decreasing or removing possibilities for uncertainty. The data also revealed that the link presumed between credibility and disability was one of the most significant influences on police decision making. Examples provided in chapters 6 and 7 reinforced this suggestion. Evidence appeared to be available in some cases yet they did not proceed to trial. In other cases, despite reports being made within the 72-hour period, forensic evidence was not gathered.

Assessing the victim’s overall capacity to be a ‘good witness’ was also a pivotal component of the assessment of the prospect of the ‘likelihood of success’ of a case at trial.

A ‘Good Witness’

The evaluation of the victim’s capacity to be a ‘good witness’ appeared to commence as soon as the report was made to police. The usual pathway of a report would suggest that, ‘usually’, evaluation of the victim’s capacity began with the SOCAU member who conducted the interview: however, as the example on pages 225 -226 illustrated, evaluation may begin with the police officer at the watch house prior to the interview.

In evaluating whether a victim will make a 'good witness', the data suggests that police relied on a construct of what they perceived constitutes a 'good witness' (Ekstrom, 2003, p. 207; LaFree, 1989). This construct was informed, in part, by the prosecutorial guidelines, the outcome of previous cases, and the experience of the individual police members and their colleagues. Given that so few sexual assault reports progress through to trial and are successfully prosecuted, the experience upon which police officers draw, may be limited.

This study suggests that what occurs when a police officer is assessing whether the victim will be a good witness, is a similar process of construction to that of deciding about 'real rape' and 'real victim' typification identified in this study and by other researchers (Easteal, 1992; Heenan & Murray, 2006; Jordan, 2002a; Krahe, 1991; Spears & Spohn, 1997). Police appeared to have a construct of the attributes of a 'good witness', including a number of assigned attributes, such as the ability of the victim to verbalise clearly the nature of the offence that has taken place. The victim must be able to be consistent in the way he/she told and retold their story. Police, and the jury, must perceive the victim as credible.

In actuality, a victim's verbal skills have no bearing on whether a crime has been committed. Rather, the lack of progress of a report through the justice system is likely to be due to the justice system's limited capacity to accept alternative ways of giving evidence. In effect, this study indicates that victims of crime with cognitive impairment, or, who use alternative methods of communication, may be prevented from accessing justice because the justice system does not have the capacity to enable access.

The culture of the police organisation also influenced and informed police decision making.

Level Three: Organisational Culture

The culture of the police organisation informed police discretionary decision making in sexual assault cases involving adult victims with cognitive impairment. While police culture was discussed by several researchers in the context of police response to sexual assault victims (Gregory & Lees, 1999; Jordan, 2004; LaFree, 1989), and by other researchers in the area of police decision making generally (Corsianos, 2001, 2003;

Knowles, 1996; Goldstein, 1964). There was no apparent discussion on the influence of the police organisational culture on discretionary decision making in sexual assault cases involving adult victims with cognitive impairment. While the following discussion will draw on the work of researchers named above, the discussion on police culture will also draw on work by Chan (1997) and Reiner (1992) to support the argument presented.

If the structures and mechanisms of the state mirror and uphold the values and beliefs of the broader society, then similarly the police organisation, which is a mechanism of the state, also reflects the values and beliefs of broader society (Jordan, 2001). There were a number of factors that have emerged from the data (see chapter seven) which can be characterized as reflective of, and informed by, the ‘traditional patriarchal values’ (Jordan, 2001, p. 704) evident in society. These factors provided insight into how the crime of sexual assault was viewed and investigated by police.

Gendered Roles

A striking feature of the police organisation was the lack of gender balance, a characteristic identified by other researchers (Jordan, 2004; Temkin, 1997). Indeed, in Victoria Police, like other police organisations across Australia, women represent between 10% and 30% (Wilkinson & Froyland, 1996) of the total police numbers, a similarity shared with other military and para-military organisations such as the fire brigade and the armed forces (Gregory & Lees, 1999). Women have been a relatively late inclusion into the ranks of the police force. Indeed, the low number of women represented in the police organisation, mirrors the gender inequality found within the broader legal sector (Easteal, 1998, p. 3), in which few women occupy positions of authority (Jordan, 2004, p. 220). Work within an organisation in which ‘masculocentrism’ (Easteal, 1998, p. 4) is the dominant cultural paradigm is reflected in the delineation of work along gendered lines, with SOCAU, for instance, almost exclusively staffed by women while the CIU was exclusively staffed by males. Although the ‘bosses’ (as they were referred to) of the SOCAUs who participated in the focus group interviews were male, which was also noted by Jordan (2004, p. 221), it would appear that SOCAUs were predominantly staffed by women because of what was considered to be their ‘natural’ propensity for ‘caring and listening’ (Gregory & Lees, 1999, p. 26).

It is clear there is a belief that victims of sexual assault, who are predominantly women, would prefer to be interviewed by an officer of the same sex (Victoria Police, 2005, p. 20), although Jordan (2004) found that the gender of the police officer was not a significant issue for most victims in her study. However, the delineation of work along gendered lines appeared to be linked to the perceived value of the work performed by the SOCAUs. The data in this study suggested that, in addition to the perception by some SOCAU members that their work was not equally valued by the police organisation and their colleagues, there was, in some cases, a strongly held view that the work of SOCAU was 'women's' work or not 'real police work'. This perception appeared to have been overtly expressed, as it was discernable by advocates who participated in this study.

By implication, 'real police work' was work that can be quantified, such as the arrest of an offender, while the role of SOCAU was to make initial contact with the victim, build the relationship and conduct a VATE interview. If the offender was arrested, this is usually performed by the CIU once the investigation has concluded. It was not surprising, then, that as an organisation that works within the bounds of the values inherent in a patriarchal society, police, as members of that society, will reflect similar patriarchal values (Easteal, 2001; Jordan, 2001).

Level Four: Unit Culture/Subcultures

The attitudinal or cultural differences between SOCAU and CIU were clearly expressed and identified in all data sets. The impact of unit subcultures appeared to be manifest in a number of ways, including on relationships within and outside the police organisation as well as how sexual assault victims were perceived and treated. The potential impact of unit subcultures on outcomes for victims is significant in that a variable relationship between police and outside organisations, such as CASA, would determine the support available for victims, thereby establishing a situation of differential treatment for victims across police regions. A lack of support for victims through the justice system process may affect the ability of the victim to remain engaged with the justice system process and, ultimately, may affect their long-term recovery.

Subculture is defined as "[a] system of values, attitudes, modes of behaviour and lifestyles of a social group within a whole, whether this is a whole society or an organization" (Abercrombie, Hill, & Turner, 2006, p. 382). The existence of subcultures

within the police organisation is an acknowledged feature of what is often referred to as the 'police culture' (Chan, 1997; Knowles, 1996; Reiner, 1992). While subcultures are formed as a result of amalgamations of individual perspectives and experiences, they are also the result of a process of enculturation into the police organisation (Chan, 1997; Corsianos, 2003; Harrison, 1998; Reiner, 1992).

The subcultures identified in this study were evident in the 'attitudinal' differences exhibited by SOCAU and CIU, which were similar to those identified in other studies (Heenan & Murray, 2006; Heenan & Ross, 1995; Victorian Law Reform Commission, 2004). A number of cultural characteristics were identified within this study, some of which appear to be specific to CIU. While each of the CIU teams was comprised of different individuals, the expressions of cultural identity of each CIU members appeared similar. The main variation was the extent to which some attitudes were expressed.

The culture of the CIU appeared similar across units and could be characterized as members having a strong sense of the importance of their role in relation to case outcome, as well as a strong sense that they performed this role effectively. Detectives stated "we're Detectives – we know" (transcript). The implication was that 'they know' as detectives because of the instinctive and intuitive experience gained from years in the police force.

There appeared to be a wide variation among CIU members in terms of their relationship with victims. Detectives at one end of the spectrum expressed a sense of commitment to and relationship with victims. One CIU member could be described as the other end of the continuum, explained that at times he felt he should 'get nasty' with a victim to ascertain whether the allegations made by the victim were genuine. A noticeable distinction in the cultures of CIU and SOCAU was the cynicism and suspicion (Chan, 1997, p. 43; Reiner, 1992, pp. 85-110) expressed by CIU members compared with SOCAU members, who, in the main, appeared neutral (Heenan & Murray, 2006, p. 34) in their written and verbal comments.

Cynicism or suspicion was expressed by CIU members in response to numerous aspects of their work and was reflected in their attitudes toward victims, particularly in relation to motive and behaviour. This may be explained as Heenan & Ross (1995) suggested

because investigators were focused on “testing the strength of evidence and the validity of the complaint” (p. 99). Members of CIU also expressed a significant level of cynicism toward ‘the system’ and its inequitable treatment of victims compared with defendants, particularly by defence barristers and the committal process. In addition, some members were also cynical about the role of other organisations such as CASA and OPP.

As found elsewhere (Heenan & Ross, 1995, pp. 102-104), the CIU perspective of the relationship between CIU and CASA varied from apparent distrust to positive working relationships. Relationship between police and CASA appeared in some cases to be personality driven, and in other cases to be driven by reluctance to work together. A high proportion of victims were not referred to CASA: this may be indicative of a poor relationship between CASA and CIU or SOCAU in that area.

Another explanation of the evidently problematic relationships between the CIU and CASA was that there was a general view in CIU that they were skilled to deal with every aspect of a report of sexual assault, from victim interview to investigation. Indeed, some CIU members believed they had built a good level of rapport with the victim, and may not have seen the value of CASA being involved at all. It was not clear what drives this view. It may be associated with the way in which CIU members generally believed that they were the ones best equipped to deal with sexual assault report. The dismissive attitude of CIU to ‘outsiders’ (Lievore, 2004a) results in lack of trust of anyone not involved directly in the investigation and, consequently, an apparent reluctance of some CIU units to work cooperatively with other agencies or units. This was in addition to an apparent inability of some CIU members to accept that other agencies may make a positive contribution, if not to the case directly, then certainly in assisting the victim through the long and difficult process. Despite several reviews of the police role and response to sexual assault cases that have identified the relationship between police and CASA as an issue of importance (Heenan & Ross, 1995; Victorian Law Reform Commission, 2003), the latest being the changes to the *Code of Practice for Investigation of Sexual Assault* (2005) which identified the value of such relationships, the problem appeared to persist.

The Decision Maker as Interpreter and Constructor

This study has demonstrated that, although individual police officers interpreted and constructed their own meanings, these meanings were informed by a myriad of factors, each of which had varying level of influence on individual police decision making. Although decisions were made individually it appeared that individual police officers made decisions which conformed within the existing cultural values of social, police organisation and police unit cultures.

To use discretion in decision making is to use one's own judgement. Our judgement is informed by the interplay with the socially constructed environment, which includes our cultural environment, the legal system, and our own experiences (Berger & Luckmann, 1984). A socially constructed environment, which includes structures such as our cultural and legal institutions, is not static. As participants in our environment, we must relate to situations and people. As such, we are constantly interpreting and reconstructing our environment, with each new experience informing the next interaction, interpretation and construction (Blumer, 1969, p. 5). However, as theorists such Giddens (2006) make clear, such constructions and reconstructions occurs within structures and relationships of unequal power.

Other researchers have argued (Corsianos, 2003; Jordan, 2001, p. 96; 2002a; McLaughlin & Muncie, 2001) that police decision making does not occur in isolation. This study confirmed the findings of previous research by suggesting that police as decision makers, in applying discretion in sexual assault cases involving adult victims with cognitive impairment, were continually interpreting and reconstructing the influences. This study has identified four levels of influence, as shown in Figure 2, namely, society, the justice system, the police organisation and unit culture. The last of these, the culture of the unit to which police officers belong, appeared to be particularly influential on police practice and decision making, as was previously noted by Corsianos (2003), Jordan, (2004) and McLaughlin and Muncie (2001). Consequently, decisions made by individual police officers in relation to each case were made as a part of an ongoing process through which these influences were interpreted and reconstructed in ways that informed the situation at any particular moment. The level and degree to which each decision maker drew on these influences occurred both consciously, in terms of assessing the evidence, and subconsciously, with respect to the broader social forces and power structures.

It was not clear which of the influences presented in Figure 2 was more influential on individual police decision making. Examples described in the data chapters suggest that there were a myriad of potential influences on police decision making. While all factors can be influential to a point, it was clear that despite having codes of practice that provide a framework for the crisis response and investigation of reports of sexual assault, some police officers decided not to follow these codes. This was highlighted in focus group data reported in chapter seven. This conclusion supports the findings of the evaluation of an earlier Police Code of Practice conducted by Heenan and Ross (1995).

Conclusions made by Jordan (2004), Feben (1988), Corsianos (2003, p. 303) and Connelly and Keilty (2000) suggest that instances of individual police officers not following the code of practice are indicative of individualistic police decision making, with some police choosing to 'make it up' as they go (Feben, 1988; Jordan, 2004). The current study contends that, while police decision making may have appeared individualistic, the decision not to follow the Code, as illustrated in chapters six and seven, may have reflected the unit culture to which the police officer belongs, rather than being an example of individual officer opting to make a decision, which conflicted with the dominant police unit view.

The level of influence of any one or combination of influences on police decision making can vary depending on the level of power and relevance the individual attributes to a particular influence. The focus group extract on pages 225-226 provided an example of a police officer initially drawing on his first hand experience of people with cognitive impairment to inform his decision to take action and record the report of sexual assault. However, in that example the influence of his unit/station culture was ultimately more powerful in that environment than his own personal experience.

Thus far, the current study, in attempting to find the reasons reports often do not progress beyond the investigation stage, has identified a range of influences on police decision making. It has identified that decision making was informed at four levels including social forces, the justice system, police organisation, and police unit culture. Each level built the knowledge and experience of the police officer or decision maker, beginning with the broader social forces that underpinned how society perceived and valued people with cognitive impairment. The next level was the justice system. As an institutional

structure, the justice system reflected society's view of adults with cognitive impairment: namely, that they were like children and are not credible or will not be viewed as credible. Adult victims of sexual assault with cognitive impairment were subjected to 'real rape' and 'real rape victim' typification. In addition, adult victims of sexual assault with cognitive impairment were also subjected to the 'good witness' typification, which was based on what this study referred to as the 'ableism typification'. The 'ableism typification' referred to the image of what a 'good witness' being an 'able' witness. The more 'able' the witness was perceived to be, the closer the witness was to fulfilling the 'ableism' requirement. Consequently, the less able or less 'normal' a victim was perceived to be, the more difficult it was for them to access justice.

The next level of influence was the police organisation. As a major institution, the police organisation reflected the prevalent values of a male, patriarchal society, in which perceptions of the role of women, real police work, and sexual assault were inextricably linked.

The fourth level of influence identified by this study was that of the police unit, which appeared to exert a significant level of influence on how SOCAU and CIU members perceived their work in relation to that of other units within the police organisation and external organisations.

Hence, a partial answer to the research question is that patriarchal and ableist prejudices filter through social forces, the justice system, police organisation and the police unit culture to negate the potential of a victim with cognitive impairment to be believed or to be perceived as a good witness. The second subsidiary question was centred on explaining the failure of cases to progress and concerned the role of police discretion.

Discretion: 'We're Judging All the Time' – The Role of Discretion in Police Decision Making

The title of this section was drawn from the words of a SOCAU unit member involved in the focus group discussions. The word 'judging' suggested that the police were constantly assessing or making judgements about how and whether to proceed once a sexual assault is reported. As the data analysis progressed, the phrase 'we're judging all the time'

became more illustrative of the decision making process and reflected the whole gamut of decisions a report, and indeed the victim of sexual assault, must traverse before arriving at their destination, either to trial or to be ejected from the justice system.

Too Difficult – The Self-Fulfilling Prophecy?

A view expressed quite strongly in the data (chapter 6) was that cases involving adult victims with cognitive impairment presented a range of difficulties to police. The police expressed the ‘difficulty’ was in a way that described a chain of events or a chain reaction, central to which was the victim’s impairment. In the words of one detective, if the victim had a cognitive impairment “they’re harder to investigate, they’re harder to prove, and they’re harder to prosecute. It’s just the fact of it” (Focus group transcript). Police participants in focus group interviews conducted by the VLRC (Victorian Law Reform Commission, 2004, p.118) also shared this view.

The notion that cases involving adult victims with cognitive impairment will present specific difficulties appears to have informed part of the police repertoire of assessing such cases. This suggests an element of ‘self fulfilling prophecy’ in that such cases do not proceed and hence will affect police decisions, particularly in relation to deciding the level of resources and time to be devoted to investigating the case. The case study in chapter 8 highlighted how a decision not to progress or not to spend too much time on a case can be influential in decision making about sexual assault cases involving sexual assault victims with cognitive impairment.

The ‘self fulfilling prophecy’, may be reinforced by the experiences of individual police officers and their colleagues within the unit. The ultimate result was a justice system that constructed a benchmark that was not inclusive of people with impairments. For example, not admitting alternative forms of communication as acceptable in interview and trial rendered cases involving victims with cognitive impairment to a reduced likelihood of success and hence more difficult to progress through the justice system.

The data suggested that the prophetic approach to decision making might have occurred on a regular basis. If this was the case, this approach may have reached what Berger and Luckman (1984, pp. 70-84) refer to as habitualized behaviour, particularly as police appear to predetermine that cases involving adult victims with cognitive impairment will

not progress through the justice system. In other words, even though there may be other options in terms of how the investigation may proceed, if, due to the influence of previous experience, the officer considered a case will not proceed beyond investigation, the process of investigation may be circumvented.

Extra Legal and Evidentiary Decisions

Much research to date discusses evidentiary and discretionary or extra-legal decisions as separate aspects of police and prosecutor decision making, implying a clear distinction (Kerstetter, 1990). The distinction is made by other researchers that in the main police decisions are not affected by extra-legal factors, but rather decisions are made on the basis of the evidence available (Fitzgerald, 2006; Lievore, 2004a). Indeed, rather than evidentiary decisions being immune from or sitting outside the influence of discretion, this study suggests that all variables, including evidentiary decisions about sexual assault cases involving adult victims with cognitive impairment, were subject to the influence of the subjective nature of discretion.

In regard to the distinction between decisions concerning evidence and extra legal decisions, this research concludes firstly, that the ‘Criteria Governing the Decision to Prosecute’ (Office of Public Prosecutions, no date), which police use to inform their decision making, is purposefully broad in order to encourage the use of discretion. Second, when the victim was an adult with cognitive impairment, the use of discretion increased and, hence, the distinction between evidentiary and discretionary decisions was minimised or non-existent. For example, in such cases, police in assessing the level of evidence applied their own judgement. Indeed, the prosecutorial guidelines require that an assessment of the sufficiency of the evidence be made in order to determine the likelihood of a successful prosecution. The use of judgement or discretion appeared to increase and was deemed necessary because of the perceptions that police officers might have of the reduced ability and credibility of the victim.

Possible reasons for the increased application of discretion by police put forward by this study include the police perception that cases involving adult victims with cognitive impairment will be subject to greater levels of uncertainty about the victim’s credibility. Heightened doubts about a victim’s credibility created a ripple effect such that other

aspects of the case were also subjected to greater level of scrutiny in order to compensate for the perception of reduced victim credibility.

The Credibility Barrier: Where Cognitive Impairment and the Justice System Collide

It is an expectation of our legal system that an accused person will be convicted of a crime where it can be demonstrated, beyond reasonable doubt; a crime has been committed (Bronitt & McSherry, 2005). Before a case can progress to trial, police (SOCAU and then CIU) must assess whether a sexual assault case involving an adult victim with cognitive impairment can be proven beyond reasonable doubt. In sexual assault cases, where forensic evidence or witness accounts may not be available, the focus on victim credibility is enhanced (Jordan, 2002a; Lievore, 2004c; Spohn et al., 2001). The current study has identified, that in relation to adult victims with cognitive impairment, it appeared that victim credibility assumed heightened significance. Indeed, this study submits that there is a point at which people with cognitive impairment and the justice system collide – the impasse between cultural perceptions of reduced credibility and the legal requirement of proving the case beyond reasonable doubt. This impasse represents a significant hurdle for adults with cognitive impairment, not because they were not credible, but because as a group they were perceived by society, including societal systems and structures, to lack credibility (Easteal, 2001; Jones & Brassier Marks, 1999).

The presence of an identifiable cognitive impairment, particularly mental illness, appeared to mean that the investigation commenced at a point at which low or no credibility was assumed. This conclusion is supported in a number of ways by the data. Perhaps most salient is the fact that defendants were only charged in cases where a person other than the victim made the report of sexual assault against an adult with cognitive impairment (see chapter 6). In light of the presence of negative stereotypes identified in the data and discussed earlier in this chapter, the assumption that people with cognitive impairment were not credible may already have been formed. Alternatively, or perhaps simultaneously, the police officers might have perceived that the report had little chance of success at trial. Police officers with experience of the defense counsel practice of focusing on the victim's impairment during cross-examination, using the impairment as a

means to accentuate the victim's lack of credibility and create doubt, may have formed this perception. On the other hand, police officers may have considered that members of the jury may have viewed a victim with cognitive impairment as less credible.

Confirming the Victim's Lack of Credibility

Corroboration takes a number of forms, including forensic evidence. However, cases involving adult victims with cognitive impairment appeared to be unduly informed by the views of third parties, who were usually known to the victim. Rather than supporting or corroborating the victim's story, information provided by third parties appeared typically to be largely negative and often subjective, and it appeared to be accepted by police as more credible than that of the victim. It appeared that negative or discrediting information from third parties often confirmed the existing police perception that the victim lacks credibility. Third parties often provided confirmation to police that proving the case beyond reasonable doubt was not possible, and thereby contributing to the 'self fulfilling prophecy'.

What was also clear was that police invariably assessed a case involving a victim with cognitive impairment as requiring a greater amount of evidence from a range of sources. It appears that police perceived that additional evidence was necessary to 'balance' the scales and increase victim credibility within a justice system that, from the start, perceived such cases as being more difficult than other cases to prove in court.

Evidence...And More Evidence

Despite corroboration not being a legal requirement for a case to proceed to trial (Mack, 1998), and the Office of Public Prosecutions also suggesting that corroboration was not essential to case progression, police were reluctant to accept that a case, for which little or no corroborative evidence exists, should proceed to trial. In some cases, trial court judges choose to issue a corroboration warning, which effectively calls into question the reliability of the victim's evidence.

There appeared to be an expectation by police that additional, corroborating evidence was required in cases involving adult victims with cognitive impairment. Although the notion that cases involving adult victims with cognitive impairment were 'too difficult' has been discussed earlier, it was important to note that the expectation that such cases will be

more difficult to get through the system to prosecution has been firmly embedded in the experiences of police officers. Consequently, the perception that an adult victim with cognitive impairment will be viewed by jury or the police officer as less credible, and therefore will require additional evidence from sources perceived as 'more reliable' in order to increase the likelihood of success, has become endemic in police decision making.

Generalised 'Diagnostic' Assessment

Another influential factor, which appeared from the data to inform police decision making, was the use by police of disability categories to assist them in determining the capability and credibility of a victim. A number of salient points emerged which confirmed the use of categorisations and assessment of cognitive impairment and the subsequent assessment by the police about the impact of the impairment on the victim's capacity to be a 'good witness'.

As with the use of the 'child like' metaphor, police, like other members of society, drew on existing descriptors of impairments in order to determine how they related to a person whom they believed was impaired in some way (Oliver, 1990). Terms used by police included 'intellectual disability', 'mental disorder', 'schizophrenic', 'mental illness', 'cognitive deficiency' and many others (see chapters 6 and 7). Often, terms such as 'mental disorder' and 'intellectual disability' were used interchangeably. Assessments of equivalent age capacity exhibited by the victim during the interview or during the investigation were also made. The language used by police to describe and assess victims' disability, including their 'capacity', 'IQ' and 'cognitive function', are diagnostic terms associated with the medical model of disability (Rapley, 2004). Although the meaning of the term as a medical diagnosis may have altered, they have nevertheless been adopted in common usage (Rapley, 2004). The widespread use of such terms, has according to Blyth (2003), has "led to widespread misconceptions and inappropriate response to and treatment of people with intellectual disabilities" (2003, p. 1).

Of particular relevance to this study was the fact that the use of such terms carried with it certain assumptions that the person had certain attributes, usually of a deficit nature. These deficit attributes were sufficiently generalised to apply to other victims so

categorised, in a way that suggested homogeneity. The result was that negative characteristics believed to be associated with the diagnosis were attributed to the victim (Oliver, 1990). It appeared that police did not consider that adults with cognitive impairment were individuals whose impairments affected them in different ways. To make assessments and then generalise the effects of an impairment to all who are thus labelled, would, in some cases, severely impede a victim's access to justice. The expectation that police made a diagnosis of a victim's cognitive impairment was unfair, unrealistic and, for the victim, unjust.

Discretion is Applied at Every Level of the Decision Making Chain

Once a report of sexual assault is made, the report travels along what has been referred to in this research as the 'usual report pathway'.

Figure 3 below provides a diagrammatical representation of the decision making points for reports involving adult victims with cognitive impairment. The diagram identifies a total of seven decision making points from first report to the end of the investigation stage. The first decision making point was outside of the justice system process. If the victim did not go directly to the police, they may disclose their assault to a trusted person, a family friend or staff member from a service organisation. The person to whom the victim discloses becomes the gatekeeper, choosing whether to report to police.

The initial report to police may be made at a police station. At this point, the response from police will depend on where the report has been made and who made the report. The data indicated that a report made by a victim who was cognitively impaired might be treated differently to a report made by someone who the police perceived as more credible. The next decision making stage was the initial interview with the victim, conducted by SOCAU member. At this point, the SOCAU member assesses the victim's credibility and capacity and may decide not to progress the case any further.

A decision can also be made at the point of initial contact between the victim and the SOCAU member. For example, a SOCAU member may decide when they first meet the victim that the victim is not competent to provide a VATE interview; or the SOCAU member may choose to accept information from a disability/accommodation support

worker stating the victim may not be telling the truth, and then decide not to take the case any further.

The VATE interview conducted by the SOCAU unit, and the investigation stage that is conducted by the CIU, are the next two decision making stages. Each of these stages requires a decision from at least two people before a report is authorised and progressed to the next level. For example, in the case of the SOCAU, first the SOCAU member conducting the VATE interview must decide whether to recommend authorisation and then the head of the SOCAU must decide whether to accept recommendation to authorise or not before the report can proceed through to CIU and the next stage.

Another point at which a decision may be made is during or immediately after the VATE interview. While conducting the VATE interview, the SOCAU member may decide that the victim is not able to tell their story effectively and to the standard required by the court. In the latter case, the report will progress to CIU who will affirm the decision made by the SOCAU not to authorise, and consequently the report will be screened out.

Research in the area of sexual assault identifies the investigation stage as the point where many reports of sexual assault are screened out of the criminal justice system (Fitzgerald, 2006). A high proportion of reports that are screened out are reports made by adults with intellectual disability or mental illness (Heenan & Murray, 2006; Jordan, 2004; Lea et al., 2003). The evidence presented in the current study suggests that, in relation to reports of sexual assault involving adult victims with a cognitive impairment, decisions by police to screen out reports may be made much earlier in the report pathway. Decisions that appear to have been made at the investigation stage may in fact have been made by SOCAU, and the decision to screen out may have been subsequently supported by CIU through the decision making chain.

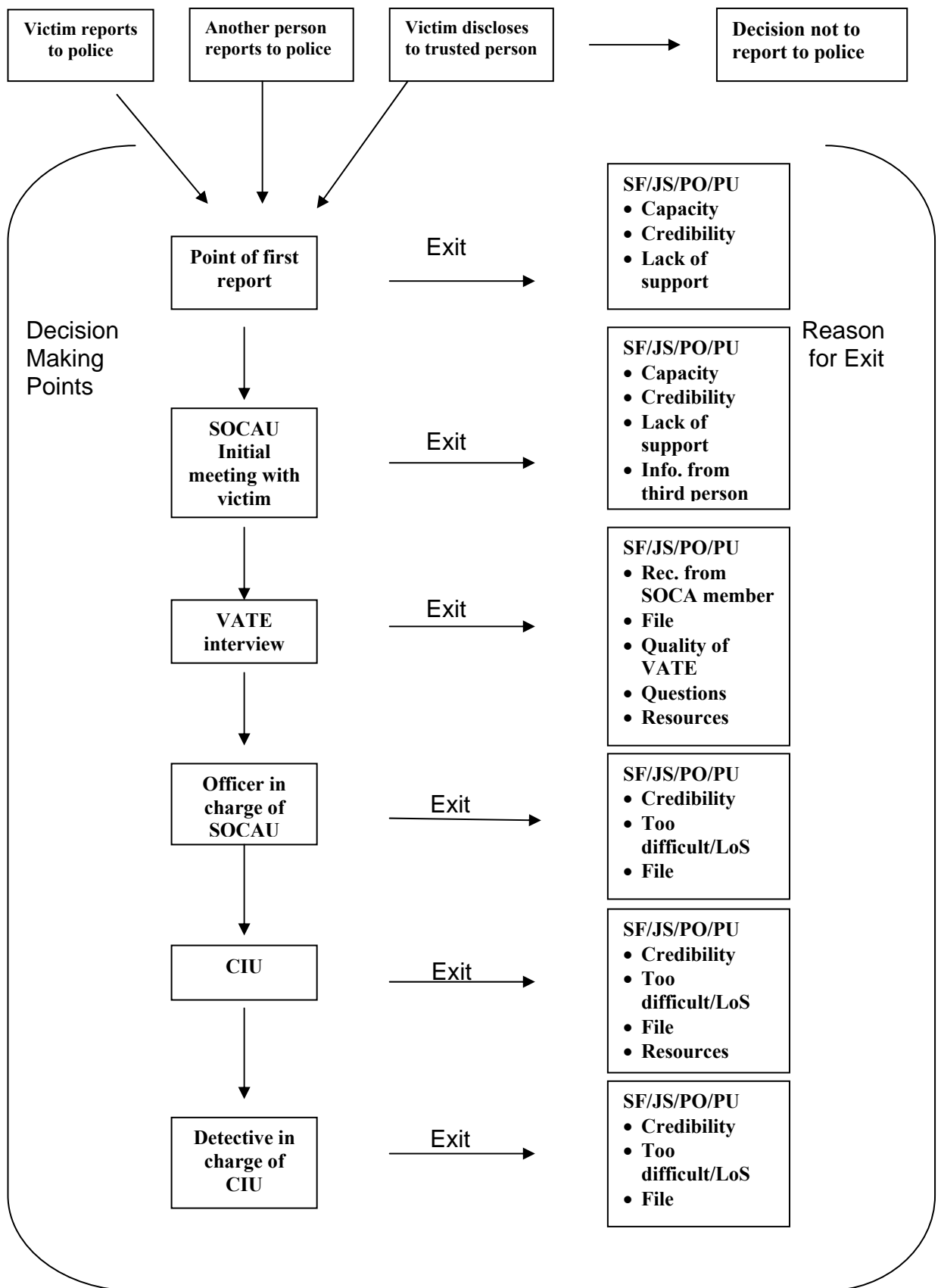


Figure 3: Influences on Decisions and Points of Exit

Legend: SF- Social Forces; JS- Justice System; PO – Police Organisation; PU – police unit
LoS – Likelihood of Success; File – police files

What was also apparent in the current study was that negative characterisations or constructs of disability were made early in the report pathway and were likely to result in the report being screened out of the justice system as it was likely that the negative construct will be reinforced at the next decision making stage. In cases where no negative construct was apparent in the initial interview, there still might be a negative characterisation at the investigation stage, and the final negative assessment appeared to determine the trajectory of the case.

The way in which individual police officers constructed disability can have a strong influence on case outcomes, particularly when the construct was informed by negative stereotypes. Hence, if at the time a report was made by the victim, a negative construct of disability was formed, this will have determined the relationship between the police officer and victim and will have also determined how the case will proceed (Berger & Luckmann, 1984; Jordan, 2004; Kerstetter, 1990).

Downstream Decisions

A Canadian study conducted by DuMont and Myhr (2000, p. 1132) found that some cases, which appeared strong from an evidentiary perspective, did not reach the trial stage while other reports did. According to the researchers, this discrepancy was due mainly to discretion used by police and prosecutors, as they often reflected negative stereotypes that are unfavourable to victims and hence have a significant negative impact on case progression and outcomes. This finding was supported by Spears and Spohn (1997, p. 521) who concluded that, rather than decisions being influenced by level of evidence and the serious nature of the offence, decisions appeared to be predicated on a range of victim characteristics based on 'rape relevant behaviour'.

In evaluating the 'likelihood of success' of reports of sexual assault involving adult victims with cognitive impairment, police also considered how the victim may be viewed by the jury and how the victim may be treated by the defense counsel during the trial. Anticipating or assessing how the jury will receive a case including the victim was referred to by current literature as making 'downstream' decisions (Heenan & Murray, 2006; LaFree, 1989; Spohn & Holleran, 2001; Wacker et al., 2008). While several police stated during focus group interviews that, their role was not to be judge and jury, making downstream decisions does place police in a position of anticipating the trial outcome.

Indeed, the requirement of the prosecutorial guidelines that police determine the ‘likelihood of success’ of any case, asks police to anticipate what chance the case has of success at trial. The analysis of data thus far demonstrated that decisions about case progression were made at six points along the decision making chain and that discretion was applied early with decisions at every level being informed by the four levels of influence cycle.

During the process of the research, it became obvious that timely access to resources was a source of some frustration for police.

Resource Availability – Influence on Decision Making and Case Progression

The availability of resources includes availability of Forensic Medical Officer, results from forensic evidence and the availability of an appropriate Independent Third Person. While the availability of a Forensic Medical Officer and the timely return of forensic tests were not discussed extensively in the data, both of these services were important in collecting and returning forensic tests results in a timely way. The absence of these services or the difficulty of accessing these services by police would have potentially impact on police decision making and contributed to the perception that reports involving adult victims with cognitive impairment were ‘too difficult’. Another service that police utilised, and which potentially had an impact on police decision making, was the Independent Third Person Program (ITP).

The Independent Third Person Program (ITP)

The role of an Independent Third Person (ITP) is as conduit to and facilitator of communication between the police and the person with cognitive impairment, be they offender or victim. The role of an ITP is also to provide support and to assist the person with cognitive impairment to understand their rights (Office of the Public Advocate, 2009).

The VATE interview is the primary tool by which a victim’s capacity to be ‘a good witness’ and to ensure ‘reasonable prospect of success’ at trial is assessed by police. The presence of the ITP during a victim’s interview with police can be of pivotal importance in ensuring a victim with cognitive impairment has the opportunity to provide a detailed

account of the crime perpetrated against them (Office of the Public Advocate, 2009; Victorian Law Reform Commission, 2004, p. 326).

An evaluation of the ITP program was not the aim of this study. However, as a service utilised by police, and one that potentially plays a vital role in facilitating the access to justice of people with cognitive impairment, discussion about the use of ITPs by police was of importance to this research. Of particular relevance were how the police gained access to, and how much they knew about the ITP program, and how this might have influenced police decisions regarding case progression.

As the data demonstrated, there were a number of problems identified concerning the knowledge of police and advocates about the ITP program, the role of ITPs, and the availability of ITPs, which required further discussion. The problems identified in the data were described in detail in chapter 6. However, what the data highlighted was that there was a level of ambiguity amongst police, and to a lesser extent advocates, in their understanding of the role of an ITP (Byrnes, 1999, p. 320). Most notably, the data highlighted significant limitations in relation to the availability of ITPs across Victoria.

Issues in relation to the timely access to ITPs might have been due to a number of factors including the availability of ITPs at times and locations which meet the needs of victims and police. Some ITPs are reluctant to participate in interviews involving sexual assault cases and their availability may be restricted to limited times during the day, week, or month. This presents particular difficulties for victims and police across the state, particularly in rural and regional areas, where the number and availability of ITPs are seriously limited.

The significance of this was that the ITP program may have what may be perceived as a sufficient number of volunteers for a particular location, but the nature of volunteerism is such that volunteers may have other jobs and other commitments that take precedence in their lives. Effectively, this creates a situation where a greater number of volunteers may be required for one area in order to provide adequate coverage of personnel over specific periods.

Although police in some geographic areas may have several ITPs to call on to attend interviews, police may favour certain individuals because they work well together. Whilst this can be positive, it can also have negative consequences in that police may favour certain ITPs because interviews may proceed at a better pace, which may not necessarily be in the best interests of the victim. Essentially, the data in relation to access to ITPs indicated that access was not equitable across the state and that police and victims in regional and rural areas are the most significantly disadvantaged.

Access to resources to support the interview with the victim or the investigation stage also had the potential to influence decisions or contribute to the perception by police that cases involving adults with cognitive impairment were too difficult.

In relation to the third subsidiary question, ‘what specific victim/offender or case characteristics impede or enhance case progression of reports of sexual assault made by adults victims with cognitive impairment?’, the structured analysis that was carried out was not able to accurately predict specific victim, offender or case characteristics.

Contribution to Knowledge

This study appeared to be unique in that no other studies had focused specifically on the reasons why reports of sexual assault made by adult victims with cognitive impairment do not progress through the justice system. Nor do there appear to be any studies that consider the use, role, and influence of police discretionary decision making in reports of sexual assault involving adult victims with cognitive impairment. As such, the findings which have emerged from the analysis of data, provided an opportunity to expand our understanding of why reports of sexual assault made to police by adults with cognitive impairment were unlikely to progress beyond the investigation stage.

This study has identified the parallels that exist between how society constructs disability, usually informed by the medical model of disability, and how this construct is reflected in policy frameworks and how these frameworks were interpreted and played out in the decisions of law enforcement agencies when assessing sexual assault reports. Further, the implications of police reliance on the medical model to inform practice and decisions, served to extinguish prematurely the opportunities for victims of sexual assault with cognitive impairment to access justice. Police applied discretion at every level of the

decision making chain. The majority of influences appeared to sit outside the existing police organisation and procedural frameworks. Unit culture potentially exerted the most influence on police decision making, particularly on how SOCAU and CIU perceived their work in relation to other units within the police organisation and external organisations.

Decisions about which victims were 'able' and which were 'not able' were informed and in turn reinforced at four levels of influence, including the influence of social forces, the justice system, police organisation and unit culture. The combination of influences contributes to police decisions about whether reports were progressed or screened out of the justice system. These decisions might have been made early based on the perception that cases of sexual assault by adult victims with cognitive impairment were 'too difficult' including the notion that reports often will not be successful at court. Further, the perception that such reports were 'too difficult' may contribute to a 'self fulfilling prophecy' resulting in such reports being seen as inevitably unsuccessful at court. Hence, the need to contribute time and resources to such cases was also regularly assessed. Indeed, there was evidence to suggest that if police did decide that the report was 'too difficult', they were likely to seek information that may confirm this view by appearing to accept the opinions of third parties as being more credible.

The research has found that reports of sexual assault made to police by adults with cognitive impairment were unlikely to progress through the 'usual pathway' because, like other victims of sexual assault, they were subjected to gender and moral typification. However, unlike other victims of sexual assault, adults with cognitive impairment were subjected to an 'ableism' typification for which capacity and credibility were the primary foci.

The impact of the 'ableism' typification on the trajectory of sexual assault reports made by adult victims with cognitive impairment manifested in a number of ways, including in decisions to screen out reports that may be made very early in the report pathway. Generalised assumptions based on negative stereotypes of capability and credibility were made on the basis that adults with cognitive impairment were a homogenous group and that the limitations created by their impairment will impact similarly on all 'members'.

Limitations and Strengths

Limitations inherent in the design and conduct of the current study have been identified during the course of this thesis. These include issues related to scale, representativeness and recruitment.

The geographic distribution of focus groups prevents the generalisation of the findings across other SOCAU and CIU and does not allow the comparison of, for example, two or more rural, regional, outer metropolitan and metropolitan locations. However, the research findings do provide information that highlights the range of influences on police decision making. Further, the data indicates that geographic location may have some influence on decision making.

The process of recruiting Victoria Police members for this research also presented limitations. Although information regarding voluntary participation was sent to members, and was reiterated to the person within Victoria Police assisting with recruitment, it was unclear what impact the internal organisational recruitment process may have had on the decisions of individual police officers to participate.

The geographic diversity and number of participants in focus group discussions with advocates was also a limitation. For a range of reasons discussed in chapter 5, the number of advocates who were able to participate was limited. However, the contribution of these workers broadened the depth of our understanding of the questions the current study sought to answer.

Ironically, while conducting focus group discussions with police proved insightful in providing a better understanding of unit culture, given the findings of the current study, in particular by findings about the significant influence of police unit culture on individual decision making, an additional method of gathering data may have proved useful. For example, individual interviews with police officers would have provided an opportunity to more clearly distinguish between individual views and the views of the unit. Certainly, data that generated an alternative perspective would have provided a more in-depth understanding of the influences on police decision making.

For a variety of reasons, but particularly because of the boundaries of the current study, it was not possible to include the voices of adult victims with cognitive impairment regarding their experience of the police response to their reports of sexual assault.

There are particular limitations in contextualising the legal response to adult victims with cognitive impairment compared to adult victims of sexual assault who are not cognitively impaired, but to pursue such a comparison was too large an undertaking for a focused research project. It was also not possible within the boundaries of this study to explore and compare how other systems of justice, for example the inquisitorial system of justice, respond to victims with cognitive impairment generally, and in particular, to sexual assault complainants.

The data generated about the Independent Third Person program, although useful for this study, identified the need for a broader based evaluation of the program.

Recommendations for Future Research

In the process of conducting this research, it became clear that there were a number of avenues for future research. These include:

1. Research into the experience of adult victims of sexual assault with cognitive impairment from initial report to trial.
2. Research into the potential implications of a restorative justice approach for adult victims of sexual assault who are cognitively impaired.
3. Research into alternative justice models, for example, the inquisitorial system approach.
4. Research into providing victim support service, similar to that which has been in operation in South Africa (Dickman & Roux, 2005), specifically for adult victims of sexual assault with cognitive impairment.
5. Research to explore the influences on police decision making and more broadly to compare decisions in relation to different types of crimes, offenders and victims.
6. A larger quantitative study of case files may also be useful for tracking statistically significant correlations between case related variables and outcomes.
7. Research that combines gender, social model, and interactionist approach would be fruitful in this area of research.

Conclusion

Inherent in our adversarial system of justice is the ‘presumption of innocence’ and the requirement of proof ‘beyond reasonable doubt’. While few if any would disagree with the need to ensure that innocent people are not convicted of crimes they did not commit, it does appear that the scales of justice are not balanced in its response to adults with cognitive impairment who are victims of sexual assault.

In answer to the central research question of this thesis, reports of sexual assault made by adult victims with cognitive impairment did not usually proceed beyond the investigation stage because, currently, adults with cognitive impairment who were victims of sexual assault were often seen as not capable and not credible. In effect, victims with cognitive impairment collide with, and become casualties of, the justice system. As such, the current justice system response as described in the ‘influence cycle’ on page 257, perpetuated the cycle of violence against adults with cognitive impairment who were victims of sexual assault by rendering victims disabled, more powerless, and more vulnerable to possible repeat offences.

Informed by a theoretical triangulation of gender, social model of disability and symbolic interactionism, this study demonstrates that police decisions in relation to reports of sexual assault made by adults with cognitive impairment, were informed by four levels of influence: namely, social forces, the justice system, police organisation and unit culture. Each level reinforced and informed the next, thereby perpetuating decisions which prematurely eject reports made by adults with cognitive impairment from the justice system.

The dominant assumptions regarding adults with cognitive impairment were largely negative, and were based on ableist views of normalcy informed by the medical model of disability. Ableist and patriarchal stereotypes and assumption of adult victims with cognitive impairment ensured that the victims were given little if any credibility. The consequences of these assumptions were such that increased discretion was applied at every level of the decision making chain, and the decision that cases involving adult victims with cognitive impairment were too difficult assumes habitualised status, resulting in a self-fulfilling prophecy.

The final chapter provides a series of recommendations informed by the salient themes that have emerged from the data. The recommendations provide an opportunity to consider how access to justice, might be enabled for adult victims of sexual assault with cognitive impairment.

Chapter Ten: Recommendations

The following recommendations are informed by the themes that emerge from the data. It is evident that issues in relation to the progress of sexual assault reports made by adult victims do not rest solely with Victoria Police. Rather, if reports are to progress through the justice system, change is required at all levels of the 'influence cycle'.

Recommendations address, in particular, police attitudes and values and the role of the ITP, and processes that might minimize the use of discretion and facilitate continuity in police decision making.

Recommendation 1: That the Department of Justice adopt the Social Model of Disability as a framework to review and further develop inclusive legislation, policies and procedures which facilitate access to justice by all members of society irrespective of any impairment.

Recommendation 2: That Victoria Police develops strategies, focusing at a local level that enhance police relationships with external organisations such as CASA and the Office of Public Prosecutions.

Recommendation 3: That the Office of Public Prosecutions reviews the prosecutorial guidelines with the view of removing the reference contained in section 2.1.5 (f) that creates and perpetuates the assumption that people with impairments are not credible.

Recommendation 4: Victoria Police members, in particular CIU, undertake training in working with people with cognitive impairment. Such training should be constructed in such a way as to challenge the many myths and negative stereotypes held by many police members.

Recommendation 5: That Victoria Police consider adopting change management strategies which seek to promote the value of all aspects of police work and focus on the way in which units such as SOCAU are perceived and valued within the organisation.

Recommendation 6: That police recruitment of officers working in the area of sexual assault is purposive, and seeks to attract officers who demonstrate congruence with the values espoused in the Police Code of Practice for Investigating Sexual Assault.

Recommendation 7: That the Department of Justice consider amending the Crimes Act 1958 to ensure that the use of appropriately trained ITPs during interviews with victims with cognitive impairment is mandatory, with the exception of cases in which the victim chooses not to have an ITP present.

Recommendation 8: That strategies be developed that minimise the use of police discretion in decision making relating to sexual assault cases involving adult victims with cognitive impairment. This should be done in conjunction with the Office of Public Prosecutions with particular reference to the Prosecutorial guidelines.

Recommendation 9: That Victoria Police, in conjunction with the Office of Public Prosecutions and Department of Justice, further develop the brief authorisation process to minimise the use of discretion and to ensure that myths and stereotypes do not dominate police decisions.

Recommendation 10: That Victoria Police provides opportunities for police to invest in the outcome of reports through to their conclusion. One way this can be achieved is by assigning a case to one police officer from report through to transition to OPP.

Recommendation 11: That Victoria Police and the Office of Public Prosecutions develop strategies to enhance closer collaboration between CIU and OPP in relation to the authorisation of briefs, with particular reference to the extent of evidence that is considered necessary for a case to have a reasonable prospect of success.

Recommendation 12: That the Office of Public Prosecutions considers strategies that will facilitate the opportunity for sexual assault victims with cognitive impairment to meet the Prosecutor and other personnel prior to the day of the trial.

Recommendation 13: That the Office of the Public Advocate deliver recurrent training to police and service organisations detailing the role of the Independent Third Person Program.

Recommendation 14: That Victoria Police consider using ITPs during the investigation stage, when the victim may be required to provide further information about the assault.

Recommendation 15: That the independent Third Person Program be funded at a level which ensures that services are equitably available across Victoria.

Recommendation 16: That the role and effectiveness of the Independent Third Person program be evaluated, with particular reference to the following:

- effectiveness and limitations of the voluntary nature of the program,
- level of understanding by police and other agencies of the role of the ITP,
- the accessibility of the ITP program across Victoria,
- expanding the role of the ITP to include from report to court

relationship between ITP and other support services such as CASA, police and Office of Public Prosecutions.

Recommendation 17: That the ITP program be viewed as a service that is intended to promote access to justice. As such, funding of the ITP program should be increased to ensure that access is equitable across the State.

Recommendation 18: That the Department of Justice should establish a coordinated approach to advocacy and victim support that includes either:

- Early referral to victim support
- Advocacy and support be available for victims from report to finalisation

Recommendation 19: Recommendation 20: That Victoria Police considers reviewing the need, purpose, and process by which they determine whether an adult victim with cognitive impairment can tell the difference between the truth and a lie.

Recommendation 20: That all reports of sexual assault should be investigated on their merits; as such, the outcome of previous reports made by the victim should not be

included on police files and should not be taken into account when making decisions on successive reports.

Recommendation 21: That urgent consideration be given to the acceptance of and legitimisation of alternative methods of communication in justice system processes and that the *Evidence Act 1958* be amended to incorporate such changes.

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Appendix 1

Focus Group Questions - OPP

Not all the following questions may be asked as it will depend on the flow and direction of conversation. Additional questions may be asked as a follow up to issues or comments raised by the participants.

Decision making:

- In addition to the existing prosecutorial guidelines, what other factors are taken into consideration when making a decision about whether to proceed where the victim (witness) has a cognitive impairment?
- From your experience what level of discretion are you able to apply when making decisions about whether or not a case involving a victim (witness) with a cognitive impairment is able to proceed to prosecution?
- What information provided by police in the brief-of-evidence most informs your decision-making as to whether a case is able or not able to proceed to prosecution?
- Are there any specific victim/offender characteristics which may determine a brief would be more likely to be authorised?
- In your view which factors are most influential in either impeding or enhancing case/trial progression?

Witness credibility and/or ability:

- How might the cognitive and communication capacity of a victim (witness) influence your decision in relation to which way and how you proceed with a case?
- Are issues such as:
 - Credibility of victim (witness)
 - How the victim would be viewed by court/jury i.e whether they would be a credible witness
 - Ability to withstand cross examination
 - Perceptions around consent or sexual activity of particular concern or more relevant when the victim (witness) has a cognitive disability?

Other considerations:

- In your experience is there less time for you to become acquainted with a case when it is being heard in a regional area?

- In this study, some police have expressed a view that the OPP is reluctant to authorise a brief where the victim (witness) has a cognitive impairment. In your opinion, and from your experience, is this point valid?
- Police have mentioned that cost can be a determining factor in deciding whether to proceed, particularly in cases where the victim has a cognitive impairment – How significant is cost when making your decision?

Appendix 2

Information to Community Agencies

Dear Coordinator/Manager,

Researchers at the University of Ballarat in conjunction with industry partners the Disability Discrimination Legal Service have received an Australian Research Council Linkage grant to research *the uptake, progress and outcomes of reports made to police by adults with a cognitive impairment who have been sexually assaulted*.

This group is more vulnerable to sexual assault yet is less likely to report. When reports are made, they are less likely to proceed to hearing. The research will examine:

- Identify issues which arise in the reporting process from the victim advocates perspective and that of Victoria police members as well as employees of the Office of Public Prosecutions.
- What happens to reports once they are made;
- At what point do they exit the legal system; and
- The reasons why they exit.

One means of collecting data will be through the facilitation of focus group sessions in regional and metropolitan locations in Victoria. The sessions will target workers in organisations such as yours who have experience in advocating or assisting an adult with a cognitive impairment who is a victim/survivor of sexual assault, to report the assault to police.

We are currently seeking expressions of interest from workers within your organisation who have experience in this area and who are willing to participate in the forthcoming focus group session. To promote these sessions to potential participants, we would greatly appreciate your assistance in circulating the attached *call for expressions of interest invitation* to staff within your organisation.

Should you require any further information regarding this research please contact either:

Supervisor
Dr. Caroline Taylor
Phone: 5327 9732
Email: c.taylor@ballarat.edu.au

Research student
Margaret Camilleri
Phone: 5327 9721
Email: m.camilleri@ballarat.edu.au

Yours Sincerely,

Margaret Camilleri

Reports to Police
by people with a cognitive impairment (Intellectual Disability)
who have been victims of sexual assault.

**Calling for expressions of interest to participate
in a focus group session**

**Have you assisted or been an advocate for some one with
a cognitive impairment who is a victim/survivor of sexual
assault, to make a report to police?**

If your answer to this question is YES
Please consider participating in the forthcoming focus
group session.

Researchers are investigating the outcomes of reports made to police by people with a cognitive impairment (Intellectual Disability) who have been sexually assaulted. This group is more vulnerable to sexual assault yet is less likely to report. When reports are made, they are less likely to proceed to hearing. The research will examine:

- What happens to reports once they are made;
- At what point do they exit the legal system; and
- The reasons why they exit.

Focus group sessions will be held in the following areas:

Contact Margaret Camilleri

Email: m.camilleri@ballarat.edu.au phone: 5327 9721

to lodge interest to participate in a focus group or for further information.

UNIVERSITY OF BALLARAT

PLAIN LANGUAGE STATEMENT

1. **PROJECT TITLE:** (Dis)abling Reports: Mapping uptake, progress and outcomes of police reports of sexual assault made by those with cognitive impairment.
2. **RESEARCHERS:**
 - 2.1 Professor Lawrie Angus
 - 2.2 Ms Margaret Camilleri: Doctoral Candidate

2. PLAIN LANGUAGE STATEMENT:

The Research: The researchers invite you to participate in this research project which seeks to examine the outcomes of reports made to police by adults with a cognitive impairment who have been sexually assaulted. This group is more vulnerable to sexual assault yet is less likely to report; when reports are made they are less likely to proceed to hearing. The research will examine:

- Issues which arise in the reporting process from the victim advocates perspective and that of Victoria police members as well as employees of the Office of Public Prosecutions;
- What happens to reports once they are made;
- At what point do they exit the legal system; and
- The reasons why they exit.

Potential benefits of research: It is anticipated that there will be a range of potential benefits from this research, which will ultimately lead to greater access and equity to the justice system by victims with a cognitive impairment. These include:

- Inform police policy and procedures;
- Inform legislation which relates directly to crimes of sexual assault against people with a cognitive impairment;
- Inform police training

Focus Groups: Information which will assist in answering some of these questions will be gathered through focus group meetings. Participants will be asked a series of questions which relate to processes involved in the course of their work either assisting a client to report a sexual assault to police, or in taking a report or in prosecuting alleged offenders. Questions are designed to promote discussion. In order to assist in analysing information gathered at the meetings a tape recorder will be used to tape discussions and transcripts of the recordings will be made.

Confidentiality: All information which can potentially attribute any statement made to an individual participant will be de-identified, this means no names or positions will be attributed to any statement. As there is only one Office of Public Prosecutions in the state of Victoria, it will not be possible to keep the name of the organisation confidential, as writing up the final thesis or other reports using the data collected may necessitate identifying the organisation.

During the research all transcripts and recordings of focus group discussions will be kept in a locked cupboard located at the University of Ballarat. Recordings will be ‘scrambled’ after transcription. All transcripts will be shredded after five years and in accordance to University policy and procedures.

Freedom to withdraw from study: You are free to withdraw your consent at any time during the study in which event your participation in the research study will immediately cease and any information obtained from it will not be used.

Duration: approximately two hours with lunch or light refreshments provided

Any questions regarding this project can be directed to the Principal Researcher

Professor Lawrie Angus: Head of the School of Education

on telephone number 5327

Should you (i.e. the participant) have any concerns about the conduct of this research project, please contact the Executive Officer, Human Research Ethics Committee, Research & Graduates Studies Office, University of Ballarat, PO Box 663, Mt Helen VIC 3353. Telephone: (03) 5327 9765.

Appendix 3

Police - Plain Language Statement

INSTITUTION: University of Ballarat

RESEARCHERS: Supervisor/ Principal Researcher: Dr. Caroline Taylor:
Phone: 5327 9732 Email: c.taylor@ballarat.edu.au

Doctoral Candidate - Researcher: Ms Margaret Camilleri:
Phone: 5327 9721 Email: m.camilleri@ballarat.edu.au

PROJECT TITLE: (Dis)abling Reports: Mapping uptake, progress and outcomes of police reports of sexual assault made by those with cognitive impairment.

PLAIN LANGUAGE STATEMENT:

The Research: The researchers invite you to participate in this research project which seeks to examine the outcomes of reports made to police by adults with a cognitive impairment who have been sexually assaulted. This group is more vulnerable to sexual assault yet is less likely to report; when reports are made they are less likely to proceed to hearing. The research will examine:

- Issues which arise in the reporting process from the victim advocates perspective and that of Victoria police members as well as employees of the Office of Public Prosecutions;
- What happens to reports once they are made;
- At what point do they exit the legal system; and
- The reasons why they exit.

Potential benefits of research: It is anticipated that there will be a range of potential benefits from this research, which will ultimately lead to greater access and equity to the justice system by victims with a cognitive impairment. These include:

- Inform police policy and procedures;
- Inform legislation which relates directly to crimes of sexual assault against people with a cognitive impairment;
- Inform police training

Interview: Information which will assist in answering some of these questions will be gathered during an interview. You will be asked a series of questions which relate to processes involved in the course of your work on a specific sexual assault case. Questions are designed to promote discussion. In order to assist in analysing information gathered during the interview a tape recorder will be used to record discussions. The tape will be used to ensure accuracy of transcripts made of the discussions. A copy of the transcript will be supplied to you to ensure accuracy.

Duration: approximately two hours

Confidentiality: All information which can potentially be attributed to any participant will be de-identified, this means no names, positions, unit or police stations will be mentioned.

During the research all transcripts and recordings of interview will be kept in a locked cupboard in the Principal Researchers' office, located at the University of Ballarat. Recordings will be 'scrambled' after transcription. All transcripts will be shredded after five years and in accordance to University policy and procedures.

Freedom to withdraw from study: You are free to withdraw your consent at any time during the study in which event your participation in the research study will immediately cease and any information obtained from you will not be used. Neither refusal nor withdrawal will affect your circumstances currently or in the future.

Questions:

Any questions regarding this project can be directed to either:

Dr Caroline Taylor - 5327 9732 Email: c.taylor@ballarat.edu.au

Margaret Camilleri – 5327 9751 Email: m.camilleri@ballarat.edu.au

Additional Information of relevance to members of Victoria Police:

Participants should be aware that Section 127A Police Regulation Act 1958, 'Unauthorised disclosure of information and documents' states:

(1) Any member of the police force who publishes or communicates, except to some person to whom he is authorised to publish or communicate it, any fact or document which comes to his knowledge or into his possession by virtue of this office and which it is his duty not to disclose shall be guilty of an offence against this Act.

Section 95 of the Constitution Act 1975 provides that officers in the public service must not:

- (a) publicly comment upon the administration of any department of the State of Victoria.*
- (b) use exception in or for the discharge of this official duties, any information gained by or conveyed to him through connection with the public service; or*
- (c) directly or indirectly use or attempt to use any influence with respect to the remuneration or position of himself or of any person in the public service.*

Complaints:

Should you have any complaints or concerns regarding the manner in which this research has been conducted, please do not hesitate to contact the Research Coordinating Committee:

The Secretary to the Research Coordinating Committee
Policing Research Unit
Victoria Police Centre
637 Flinders Street
Melbourne 3005
Tel: (03) 9247 6732 Fax: (03) 9347 6712

Appendix 4

Informed Consent Form for Research Participants

I _____ agree to participate in the research project entitled:
(Name of participant)

(Dis)abling Reports: Mapping uptake, progress and outcomes of police reports of sexual assault made by those with cognitive impairment, conducted by University of Ballarat _____

(The researcher) Margaret Camilleri has discussed this research with me. I have had the opportunity to ask questions about this research and I have received answers that are satisfactory to me. I have read and kept a copy of the attached Information sheet and understand the general purpose, risks and methods of this research.

My agreement is based on the understanding that:

1. I am aware of what I am expected to do.
2. I have read the attached participant information sheet and understand that general purpose, methods and demands of the study. All my questions have been answered.
3. I understand that the project may not be of direct benefit to me.
4. I can withdraw from the study at any time without prejudicing me.
5. I am satisfied with the explanation given in relation to the project so far as it affects me and my consent is freely given.
6. I can obtain overall results of the study.
7. I consent to the publication of results from this study provided details that might identify me are removed.

Signatures

Signed by the participant: _____ date _____

Signed by the researcher: _____ date _____

You may contact the researcher, Margaret Camilleri on 5327 9721 with regard to any queries or concerns you may have with regard to your participation in their project. Should you have any queries concerning the way this research is conducted please contact the Secretary to the Research Coordinating Committee, 637 Flinders Street, Melbourne 3005 Tel: 9247 6732.

Appendix 5

Police Files Data Sheet

Code:

Reported by _____

Other organisations involved: _____

Time frame:

Report date: _____

CIU: _____

Charged: _____

OPP: _____

Final outcome date: _____

Victim: F M

Disability type:

Age:

Offender: F M

Disability type:

Known: Y N

Relationship:

Age:

Adult

Weapon used: Y N

Where offence occurred: _____

When offence occurred: _____

Appendix 6

Victoria Police – Ethics Approval to Conduct Focus Groups

Reference RCC: 439

15 November 2005

Ms Margaret Camilleri
University of Ballarat
Mt Helen
PO Box 663
Ballarat 3351

Dear Margaret

(Dis)abling Reports: Assault victims with cognitive impairment – Focus Groups component

It is my pleasure to advise you that the Victoria Police Research Coordinating Committee has approved your request to undertake the above research involving Victoria Police.

Please complete and return the accompanying Conditions of Access form at your earliest convenience. To speed up the process, you might like to send the signed document by fax (9247 6712).

Please do not hesitate to contact me by phone (9247 6728) or facsimile (9247 6712) if you have any questions you wish to raise.

Yours sincerely,

Joseph Poznanski, PhD
Secretary, Victoria Police Research Coordinating Committee

Appendix 7

Victoria Police Ethics Approval – Interview with police officer

Corporate Strategy & Performance
Level 6, Building C, 637 Flinders Street
Melbourne 3005
Victoria, Australia
Telephone: 92476732
Facsimile: 92476712

Reference RCC: 439

18 July 2006

Ms Margaret Camilleri
University of Ballarat
Mt Helen
PO Box 663
Ballarat 3351

Dear Margaret

(Dis)abling Reports: Assault victims with cognitive impairment

I write to advise you that the Victoria Police Research Coordinating Committee has granted the extension of the initial RCC approval, to cover the conduct of a single interview with a member of Victoria Police.

Please ensure that when referring to the interview content the reader will be notified that the *“view expressed by the police officer in this interview is a personal view only, and does not necessarily represent Victoria Police policy or a position in relation to the issues presented”*.

Please do not hesitate to contact me by phone (9247 6732) or facsimile (9247 6712) if you have any questions you wish to raise.

Yours sincerely,

Joseph Poznanski, PhD
Secretary, Victoria Police Research Coordinating Committee