
Prosecutors' perceptions of the utility of video-evidence for adult complainants of sexual assault

Nina J Westera and Martine B Powell*

Playing an adult sexual complainant's video-recorded police interview as the basis for his or her evidence-in-chief is a reform Australia could adopt to help improve criminal justice responses to these cases. This article presents a qualitative evaluation of prosecutor's support for this reform and their views about what conditions would determine its utility. Focus groups were held with 13 prosecutors from across New Zealand (which already has this reform) and Australia. Collectively, prosecutors supported the availability of video-evidence for adult complainants. They perceived the utility of this reform depends on the following conditions: (1) the quality of the police interview; (2) how credibly the complainant presents on video; (3) contextual factors that influence the complainant's ability to give live evidence; and (4) the degree of stakeholder support. These findings suggest that Australia should extend video-evidence to adult complainants of sexual assault guided by careful planning around these four areas.

Determining how to achieve just outcomes in sexual assault cases where the complainant is an adult is one of the most serious and complex problems facing the criminal justice system today. Only around 15% of all victims choose to enter into the criminal justice process by reporting to police.¹ For those who do report, attrition is high and outcomes are discouraging, with only 12.5% of reported cases resulting in conviction.² These poor prospects, prolonged prosecutions and the stress of giving testimony lead to low victim satisfaction; some victims even report being "re-victimised" by the process itself.³ Adding to these problems, the complainant's account is often the only evidence available, which makes it difficult to reach the evidential requirements for proof.⁴

This article examines one legal reform that has the potential to improve both an adult sexual assault complainant's experience of the court process, and the quality of his or her evidence: using the video-recorded interview of the complainant as the basis for his or her evidence-in-chief (referred to in this article as video-evidence). In this alternative way giving of evidence, the video-recorded police interview of the complainant is played to the court, followed by any supplementary questions from the prosecutor and cross-examination by defence counsel. The ability to use video-evidence with adults has already been introduced in many English-speaking countries (for example, England, Wales and New Zealand).⁵ The Northern Territory recently adopted this reform in its *Evidence Act*, s 21B and Tasmania in its *Evidence (Children and Special Witness) Act 2001* (Tas), s 7A and other Australian

* Nina J Westera: Griffith Criminology Institute, Griffith University, Queensland. Martine B Powell: Centre for Investigative Interviewing, Deakin University, Melbourne. The authors wish to acknowledge the prosecuting agencies that enabled this research to happen and the prosecutors from those agencies who gave their valuable time to participate in this study.

¹ Australian Bureau of Statistics, *International Violence against Women Survey: The Australian Component* (Canberra, 2004).

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

³ S Estrich, *Real Rape* (Harvard University Press, 1987); A Konradi, "I Don't Have to be Afraid of You': Rape Survivors' Emotion Management in Court" (1999) 22 *Symbolic Interaction* 45; CS Taylor et al, *Policing Just Outcomes: Improving Police Response to Adults Reporting Sexual Assault* (Edith Cowan University, 2012).

⁴ S Lees, *Carnal Knowledge: Rape on Trial* (2nd ed, The Women's Press, 2002); CA Visher, "Juror Decision Making: The Importance of Evidence" (1987) 11 *Law and Human Behavior* 11.

⁵ R Mahoney et al, *The Evidence Act 2006: Act and Analysis* (Brookers, 2007); Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (London, 2011).

jurisdictions are likely to follow. The purpose of the current study is therefore to guide jurisdictions that choose to adopt this reform by qualitatively exploring prosecutors' views about how to make video-evidence most effective if it is introduced.

There are many potential benefits to using video-evidence with adult complainants of sexual assault.⁶ Complainants report they want the option of using this method, which can reduce the potentially stressful experience of having to recall events while on the stand months or years after the alleged incident during evidence-in-chief.⁷ In addition, psychological theory and research findings indicate that the police interview is likely to provide the court with more complete and reliable evidence from the complainant than live courtroom evidence-in-chief for three reasons. First, the video captures a fresher account, which is likely to be more complete and more accurate due to the negative effects of delay on memory recall.⁸ Second, the interview methods used by police are designed to encourage the reporting of events in narrative format, which is likely to result in more complete and elaborate detail than the short-answer questions used by prosecutors.⁹ Third, the more relaxed and less stressful environment of the interview room is likely to improve the quality of information reported by the complainant.¹⁰ These effects are supported by a study in which the content of transcripts from rape complainants' video-recorded police interviews was compared with the same complainants' live evidence-in-chief.¹¹ The researchers found that more than half of the information provided by the complainants in their police interviews, about consent and the sexual acts, was never reported in the live evidence.

Despite the potential benefits, legal professionals from countries where video-evidence has been adopted have mixed views about its success. Lawyers and judges have identified potential benefits of video-evidence to the completeness and accuracy of the account, the ability to capture a more credible demeanour of the complainant nearer the time of the offence, and the reduced opportunity to cross-examine the complainant on prior inconsistent statements.¹² Yet many legal professionals are reluctant to use video-evidence with adult complainants of sexual assault for various reasons.¹³ In a review into how rape complainants are handled by public authorities in England and Wales, Stern reported concerns from legal professionals that the video medium reduced the impact of the complainant's evidence, and poor police interviewing practices meant that using these interviews as

⁶ MR Kebbell and NJ Westera, "Promoting Pre-Recorded Complainant Evidence in Rape Trials: Psychological and Practice Perspectives" (2011) 35 Crim LJ 376.

⁷ M Burton, R Evans and A Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office, London, 2006); B Hamlyn et al, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office, London, 2004); MR Kebbell, CME O'Kelly and EL Gilchrist, "Rape Victims' Experiences of Giving Evidence in English Courts: A Survey" (2007) 14 *Psychiatry, Psychology and Law* 111.

⁸ JD Read and A Connolly, "The Effects of Delay on Long-Term Memory for Witnessed Events" in MP Toglia, JD Read, DR Ross and RCL Lindsay (eds), *Handbook of Eyewitness Psychology: Volume 1 Memory for Events* (Lawrence Erlbaum Associates, 2007) pp 117-155; EF Loftus and JC Palmer, "Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory" (1974) 13 *Journal of Verbal Learning and Verbal Behavior* 585; H Ebbinghaus, *Memory: A Contribution to Experimental Psychology* (US Teachers College Press, 1913).

⁹ MB Powell, RP Fisher and R Wright, "Investigative Interviewing" in N Brewer and K Williams (eds), *Psychology and Law: An Empirical Perspective* (Guilford, 2005) pp 11-42; JP Lipton, "On the Psychology of Eyewitness Testimony" (1977) 62 *Journal of Applied Psychology* 90; DA Poole and LT White, "Effects of Question Repetition on the Eyewitness Testimony of Children and Adults" (1991) 27 *Developmental Psychology* 975.

¹⁰ Konradi, n 3; KA Deffenbacher et al, "A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory" (2004) 28 *Law and Human Behavior* 687; RM Yerkes and JD Dodson, "The Relation of Strength of Stimulus to Rapidity of Habit-Formation" (1908) 18 *Journal of Comparative Neurology & Psychology* 459.

¹¹ N Westera, M Kebbell and B Milne, "Losing Two Thirds of the Story: A Comparison of the Video Recorded Police Interview and Live Evidence of Rape Complainants" (2013) 4 *Criminal Law Review* 290.

¹² V Stern, *The Stern Review* (Home Office, London, 2010); N Westera, M Kebbell and B Milne, "It Is Better, but Does it Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence" (2013) 19 *Psychology, Crime & Law* 595.

¹³ Stern, n 12; Westera et al, n 12; Criminal Justice Joint Inspection, *Report of a Joint Thematic Review of Victim and Witness Experiences in the Criminal Justice System* (Home Office, London, 2009).

evidence-in-chief was counter-productive to successful prosecutions.¹⁴ In New Zealand, a survey of 30 prosecutors about the advantages and disadvantages of video-evidence found similar concerns.¹⁵

While research has identified prosecutors' cursory perceptions about the pros and cons of video-evidence, no research has conducted an in-depth analysis of their views about what factors contribute to the utility of video-evidence with adult complainants. Prosecutors, who are likely to be the main criminal justice professionals who use this reform, may find video-evidence useful under some conditions, but not others. A better understanding of these conditions can help inform how, if at all, video-evidence should be introduced to other Australian jurisdictions.

The purpose of this study was to conduct an in-depth and constructive analysis of prosecutors' perceptions about the utility of video-evidence with adult complainants of sexual assault to help provide guidance for reform. The authors wanted to explore: (1) whether prosecutors support the introduction of video-evidence; and (2) under what conditions video-evidence is likely to be most useful. They purposefully sampled prosecutors who were experienced with sexual assault cases to find what they thought were the key factors contributing to the utility of video-evidence.¹⁶ They sought the views of New Zealand prosecutors who are experienced with video-evidence¹⁷ and have a similar legislative context to Australia, and thus could offer insight on how well video-evidence works in practice. They also sought the views of Australian prosecutors who understand the local criminal justice context.

Focus groups were used to elicit prosecutors' views on the utility of video-evidence with adult sexual assault complainants. This method encourages discussion, to gain an in-depth understanding about their views. Due to the exploratory nature of the research, a grounded theory approach was used that involves the inductive collection and analysis of data driven by the views of the participants rather than from pre-existing theories or frameworks.¹⁸

METHOD

After obtaining approval for the study from the Griffith University Human Research Ethics Committee, the authors invited Crown Prosecuting agencies from different regions in New Zealand and Australia to participate. All agencies agreed. A senior manager in each agency was asked to nominate a prosecutor who they considered an expert in cases involving vulnerable witnesses. Four focus groups were held – two in New Zealand (two groups of three prosecutors) and two in Australia (one group of three and one group of four prosecutors). The focus groups represented six different regions in New Zealand and every Australian State or Territory, except for one small jurisdiction. The prosecutors, eight female and five male, were experienced and had spent a mean time of 14.23 years as a prosecutor (experience ranged from six to 18 years).

Due to the exploratory nature of the research, a non-directive approach was used to gain an in-depth understanding of prosecutors' views. Prior to each focus group, the attending prosecutors were provided with the broad research topics for preparation as follows:

- (1) How frequently is your region using video-recorded evidence with adult sexual assault complainants? Explain why.
- (2) Please reflect on the usefulness of police video-recording adult sexual assault complainant interviews from a prosecution perspective.
- (3) Please reflect on the usefulness of using video-recorded adult sexual assault complainant evidence-in-chief from a prosecution perspective.

One of the authors administered each focus group face-to-face. Each focus group lasted approximately

¹⁴ Stern, n 12.

¹⁵ Westera et al, n 12.

¹⁶ MQ Patton, "Qualitative Research" in BS Everitt and DC Howell (eds), *Encyclopedia of Statistics in Behavioral Science* (John Wiley and Sons, 2005) pp 1633-1636.

¹⁷ Video-evidence has been available in New Zealand since 2007: *Evidence Act 2006* (NZ) ss 103, 105.

¹⁸ A Strauss and JM Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Sage Publications, 1990).

60 minutes. During the focus groups, an unstructured interviewing method was used, using broad open questions to encourage the prosecutors to drive the discussion based on their views as to what topics were most important.¹⁹

Each focus group was audio recorded and transcribed. Both authors independently analysed the transcripts and made notes about the common themes of prosecutors' responses. They discussed the themes and found strong consensus in their interpretation of the responses. The common themes of the responses are reported below, with quotes to illustrate prosecutors' views. These quotes have been edited to de-identify all participants, correct grammatical errors, and improve readability.

RESULTS

Most prosecutors strongly supported having video-evidence available for adult complainants of sexual assault, but only under certain conditions. All prosecutors agreed that complainants having the option of using video-evidence could make the process of giving evidence less stressful, by giving complainants the opportunity to avoid remembering evidence live on the stand some time after reporting events to police. Another benefit cited by prosecutors was the improved completeness and accuracy of the video-recorded interview due to the freshness of the account when compared to live testimony. Using the complainant's police interview as the basis for his or her evidence also meant that there were less opportunities for defence counsel to cross-examine the complainant on prior inconsistent statements. Prosecutors' primary concern in deciding whether video-evidence was useful as evidence was whether it would present the most compelling evidence to the court:

Sole criteria: what is best going to facilitate a conviction? It's not good for a complainant to have an acquittal. And while it might be in her best interests to have the process though the court made easier by virtue of having a video played, if the video's inadequate it impacts upon the chances of a conviction, then why? So we start at the end, with what is going to present to the jury in a way that is most persuasive.

The degree to which video-evidence was perceived as more or less compelling than live evidence varied between prosecutors. For this reason, prosecutors wanted the ability to choose when video-evidence was used.

The seven prosecutors who had legislation that allowed video-evidence were more positive about how well it presented as evidence than those who did not have the legislation. A major concern was that not having the complainant present in person would reduce the impact of the evidence. For prosecutors who had access to video-evidence, the frequency with which they reported using it reflected their views on how well it presented (with the exception of those who had restrictive judges, as discussed later). Prosecutors who perceived that the video presented poorly as evidence reported using it less than prosecutors who perceived that the video presented well as evidence.

Despite the varied views about the how well the video would present as evidence, the analysis suggests that most prosecutors wanted police to video record the interview in the first place. Having this recording gave them the option of using it later as evidence:

I suppose the thing that comes out of all of this is that it's nice to have the option of video-evidence. We have led our evidence for hundreds of years. We still do, but it's nice to have the option. If there's a really outstanding video then you're ahead of where you would have been without it. If you're not happy with the video you are back to where we started.

Prosecutors from regions where police routinely video-recorded interviews expressed strong views that video was a more helpful record of the interview than the traditional process of taking a written statement. They reported the transparency, completeness and accuracy of the video enabled better case preparation because it showed how well the complainant might present and the exact words spoken, not just a police officer's (often overly positive) interpretation of what was said at interview. Having the video could also reduce the potential for cross-examination based on inaccuracies resulting from the statement-taking process.

¹⁹ Patton, n 16.

Prosecutors who were not exposed to video-evidence had more disparate views about the usefulness of police video-recording interviews. While some favoured it, others were concerned that the process may inhibit the complainant's reporting of events. This concern was not identified by prosecutors who routinely viewed these interviews. Others had discouraged police from video-recording interviews after police had self-initiated this practice without consultation and produced interviews that were considered by prosecutors to be poorly conducted, lengthy, difficult to review, and which contained additional avenues for cross-examination.

Once police had video-recorded the interview, the analysis found there were four main conditions that prosecutors used to determine the utility of the interview as video-evidence: (1) the quality of the police interview; (2) how credibly the complainant presents on video; (3) contextual factors that influence the complainant's ability to give live evidence; and (4) the degree of stakeholder support. Prosecutors discussed these factors regardless of whether they were from a region that had access to video-evidence with adults.

QUALITY OF THE POLICE INTERVIEW

The overriding theme to all prosecutors' discussions was that the quality of the police interview was a central factor to determining the effectiveness of that interview as evidence. Prosecutors perceived that poor police interview practice could undermine the utility of video-evidence and often led to prosecutors deciding not to use the interview as evidence. Specifically, they reported that police interviews were often overly long, incoherent, lacking in structure, and they did not follow a logical order:

One main consideration is what's the interview like? Is it going to be effective? Is it structured, sequential, coherent, and is it going to be good evidence?

Prosecutors expressed concern that these problems could cause jurors to become confused and fatigued:

Her interview was incoherent. It was really, really hard to work out her narrative because it was just all over the place. She gave her evidence live, and the jury were in no doubt whatsoever about her story, whereas the video didn't give a story – it gave a collection of facts. Like taking a book, ripping up all the pages, throwing it on the ground and saying to the jury, go work it out. Having said that, I've had some excellent examples where it has worked when the women went straight to the police station soon after the sexual assault – that's gold, of course. So my view it's just horses for courses: what best facilitates a conviction and is best for the woman in the long term, rather than what's best for the woman in the short term but means having an acquittal and not being believed in the long term.

Adding to this problem, prosecutors suggested these features of the interview could make it onerous to identify indictments when reviewing the interview prior to trial, especially when the complaint involved allegations of repeated abuse (for example, historical allegations of child abuse or inter-partner sexual violence).

Prosecutors generally preferred interviews where the interviewer used open questions to generate a narrative account but there was also a clear structure to the account and it was in a logical order. The use of leading questions or condescending language (such as using child interviewing language) was considered disadvantageous to effective evidence presentation:

The most useful combination from my point of view would be an interviewer who understands elements of an offence and gets that in a coherent way that can be used in court, but then drills into detail that they will be using in their investigation.

DEGREE TO WHICH IT CAPTURES PRESENTATION THAT IS FAVOURABLE TO THE COMPLAINANT

The next most common theme to prosecutors' responses was whether the video captured the complainant in way that was likely to present more favourably than during live evidence. Prosecutors reported that the complainant was often highly emotional in the police interview, especially if the alleged offending was contemporaneous to the interview. This emotion, other aspects of the complainant's demeanour, or the spontaneity with which he or she reported events, could make

compelling evidence that may be not replicable in live testimony:

On this video she relived it as she told it, and you could see her thinking carefully what was the next thing that happened, and then she'd do it, so the breaks were there, they just weren't in the transcript. So as soon as I saw that I said we'll play it because you're not going to get that live in the courtroom. When she's playing to the jury and you're asking the question, and you're asking the next question, you're not going to get that; you're not going to get those pauses again.

Other times, however, prosecutors reported how the complainant presented in the video could diminish complainant credibility, such as displaying no emotion. Some prosecutors expressed a strong preference for having the complainant giving evidence in person, in the courtroom:

But, on other occasions the complainant may appear very matter-of-fact on video and this would not present well as evidence. So we start at the end: what is going to present to the jury in a way that is most persuasive? And I meet with the complainant, and if I think that she is someone that I can gauge and get to be real in front of the jury in a way that may not be presented well in a video then of course we'll go live. Our experience is overwhelmingly better live than with a video.

Prosecutors were aware that the credibility of the complainant is central to successful prosecutions; how credible the complainant was in the video was therefore an important factor in determining whether they would elect to play the video as evidence:

When deciding whether to use video-evidence, prosecutors would weigh up how well the complainant presented in the video against how well they anticipated the complainant would present in front of a jury. They perceived some complainants may struggle at interview, but with the time that has passed between the interview and trial they could be better able to articulate what happened. Other complainants might find giving evidence in the courtroom especially stressful and could benefit from having the video played.

The quality of the video recording, such as the clarity of the picture and sound, was also considered an important factor:

One of the reasons why it's bizarre is technology in our courtrooms and television, if you can believe it, something as simple as that are not good; they're miles away from the jury, the audio is appalling, and so the jury gets this little slice of a person in the corner of the room.

Prosecutors wanted jurors to be able to see the complainant's facial expressions, which sometimes were not captured on the video due to the distance between the complainant and the camera.

CONTEXTUAL FACTORS RELATING TO THE COMPLAINANT'S EVIDENCE

The analysis of prosecutors' responses found that some contextual factors relating to the complainant's ability to give evidence were perceived to make video-evidence more beneficial. One important factor was the characteristics of the complainant. One group of complainants perceived to benefit most from video-evidence were those suffering vulnerability that would impair their ability to give live evidence (such as complainants suffering from psychological distress or anxiety). In these cases, prosecutors suggested that complainants needed to have the extra assistance that video-evidence could offer. Complainants from a cultural background which made giving evidence particularly difficult (for example, Indigenous complainants) were also considered likely to benefit more from video-evidence:

We're starting to use video-evidence for adult victims, particularly because it captures it fresh. Quite often the sexual violence perpetrated on Indigenous females is accompanied by physical violence. So we're having complainants still carrying signs of injury shortly after release from hospital being interviewed by police officers in a soft interview room, showing the signs of recent violence, giving quite a fresh, raw evidence of the assault, and that can be quite compelling. There is always the language difficulty, but you're not going to get the contrast between the statement, which is written in police speak, and their evidence-in-chief. Yes, it may not be the greatest articulation there of what happened to them, but in their own words they're not going to get as tripped up as easily when they come to explain it again in cross-examination, and it just sounds more compelling.

Another important factor was the context of the offending. Prosecutors considered it was especially important to have video-evidence available for complainants who are intimidated or likely to retract their evidence for other reasons (such as in domestic violence cases). This was especially the

case if the video captured other corroborating evidence that supported this earlier account (a favourable demeanour, or injuries). Capturing a fresh account of the alleged offending in cases where the offence had only just occurred when police conducted the interview was another high priority category. In contrast, prosecutors perceived video-evidence for historic allegations of sexual abuse was less useful due to the time delay between the offence and the interview, which meant there was no advantage in obtaining an earlier account. These types of interviews were also considered more difficult to conduct in a way that would produce an account that was useful as evidence in terms of coherence and telling a story due to the number of offences:

I've had some excellent examples of when we play them: intruder rape, 18-year-old girl, beaten up, raped, kidnapped, straight to the police station, straight in front of a video, not a little pre-interview, just an interview, a good interview by a senior detective – brilliant. Played it, she still had bruises on her face; she gave a narrative from beginning to end, why wouldn't you play it? Another example, similar sort of situation but involving domestic partners, straight in, full-blown you know she'll go dive and you'll have to get her declared hostile so of course you're going to play that.

DEGREE OF STAKEHOLDER SUPPORT

The final factor in determining the usefulness of video-evidence with adult complainants of sexual assault found by the analysis of prosecutors' discussions was the degree of stakeholder support. The presiding judge's willingness to grant the prosecutor's application to use video-evidence was central to this theme. Prosecutors reported that it was typical for defence counsel to object to any applications to use video-evidence and it depended on the views of the judge as to whether the application was granted. Many judges were reluctant to use video-evidence with adults, and would only grant applications if there was evidence (such as a psychological report) to suggest the witness was particularly vulnerable.

We've have massive resistance to our applications to play adult interviews as evidence-in-chief, particularly if it's a good interview. Defence lawyers will resist like mad and their default position, which is also adopted by certain judiciary in our parts, is that the ordinary way of giving evidence is live testimony which means that you will need evidence of some sort of a disability on the part of your victim to be able to use the interview as part of your evidence-in-chief. And so we've had real resistance to be allowed to play them even if we want to.

Prosecutors themselves expressed that they and their colleagues were in a culture where it was difficult to depart from traditional views that live evidence was most favourable:

I don't know, I'm such a control freak, and I think I would have trouble giving away what I see as a really large part of my job.

Using video-evidence also meant the prosecutor loses the ability to present the complainant's evidence in a strategic way. Police conduct interviews early in the investigation when the primary purpose is gathering information, not presenting evidence. Prosecutors expressed concerns that not only did police not know what was important at that time, but they were not skilled in presenting evidence. Using the video therefore removed the ability of the prosecutor to use their skills in presenting the case to the jury.

After being exposed to video-evidence, some prosecutors had changed their mind from thinking it was ineffective, to seeing many benefits to having the option of using it:

I was against adult [video-recorded evidence]. I suppose in my own mind it was children who should have access to video-evidence, but adults can just tough it out. Defence have to be quite careful with children in front of a jury, with an adult it's completely different, the gloves are off. Defence counsel can do virtually anything with an adult complainant, so it's pretty tough for an adult complainant. I've been completely won over to playing evidential interviews. I think they are fantastic.

DISCUSSION

The overriding theme of prosecutors' focus group discussions was that video-evidence for adult complainants of sexual assault has many potential benefits, but it is more useful under certain conditions. The findings of the current research suggest prosecutors are more positive about police video-recording the interview and using this interview as video-evidence than found in previous

studies.²⁰ This may be due to the New Zealand prosecutors in the sample now being more familiar with the method and recognising its potential value. This possibility is supported by the finding that those Australian prosecutors who are not exposed to video-recorded police interviews with adult complainants were less positive about their potential utility. The perceived benefits to case preparation of video compared to written statement found in this and other studies²¹ are well supported by the literature which suggests the written statement is an unreliable and edited version of a witness's account.²² The benefits of video-evidence to the completeness and reliability of an adult witness's account are also supported by literature about the negative effects of delay on memory recall.²³

The current study extends prior research by identifying the conditions that prosecutors consider are important in determining the usefulness of video interviews as evidence. The major factor in determining prosecutors' decisions to apply use video-evidence was whether it would present the complainant as having more credibility than during live courtroom testimony. Similar to previous studies, prosecutors expressed concerns that police interviewing methods may not present well as evidence, and using the video could decrease the impact of a complainant's testimony when compared to live testimony.²⁴ But the prosecutors also identified factors that sometimes make the interview more useful than live courtroom testimony. Hence, they wanted the ability to choose whether or not to use video-evidence. Sometimes the police interview captured a spontaneous, emotional and fresh account from the complainant that prosecutors considered would make compelling evidence. Other times the complainant's presentation was considered less favourable in the video. Prosecutors considered the quality of the police interviewing an important factor in contributing to how well the interview presented as evidence. Having the option to use video-evidence was considered especially important with certain types of complainants and cases that were considered most likely to benefit from video-evidence – vulnerable complainants, complainants from a different cultural background, complainants of domestic violence, and complainants of recent offending providing a fresh account of events. Another important factor was ensuring the legislation did not make it onerous to apply to use video-evidence.

IMPLICATIONS FOR POLICY AND PRACTICE

Based on the findings of this study, the authors recommend Australian jurisdictions introduce the option of using video-evidence for adult complainants of sexual assault. However, it is important to note that, despite the many potential benefits of this reform, it is not a panacea for improving outcomes in sexual assault cases. Australian jurisdictions that choose to introduce video-evidence for adult complainants would need to address a number of areas for this reform to be successful.

First, it is essential that policing organisations develop an effective, reliable recording capability. This involves police having the facilities to video-record interviews with high quality sound and picture. Another cost to police (or other criminal justice stakeholders) is the transcription of these interviews.²⁵ Police developing policy that gives priority to those cases that can benefit the most from video-evidence would help ensure consistent service delivery and reduce the costs of implementing

²⁰ Stern, n 12; Westera et al, n 12; Criminal Justice Joint Inspection, n 13.

²¹ Westera et al, n 12; A Heaton-Armstrong and D Wolchover, "Recording Witness Statements" (1992) *Criminal Law Review* 160.

²² RT Cauchi, MB Powell and CH Hughes-Scholes, "A Controlled Analysis of Professionals' Contemporaneous Notes of Interviews about Alleged Child Abuse" (2010) 34 *Child Abuse & Neglect* 318; ME Lamb et al, "Accuracy of Investigators' Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims" (2000) 24 *Law and Human Behavior* 699; G Köhnken, C Thurer and D Zoberbier, "The Cognitive Interview: Are Interviewers' Memories Enhanced, Too?" (1994) 8 *Applied Cognitive Psychology* 13.

²³ Read and Connolly, n 8.

²⁴ Stern, n 12; Westera et al, n 12; Criminal Justice Joint Inspection, n 13.

²⁵ N Westera, MR Keibell and R Milne, "Interviewing Rape Complainants: Police Officers' Perceptions of Interview Format and Quality of Evidence" (2011) 25 *Applied Cognitive Psychology* 917.

this reform. The current study suggests these may include sexual assault complainants who are vulnerable witnesses, those from a different cultural background, cases of inter-partner sexual violence, and recent sexual assaults.

Most importantly, police need to have the ability to produce a skilled interviewing capability. This involves having training regimes that have the key features for evidence-based practice in developing skills: clear instruction, ongoing practice opportunities, expert feedback and continuous evaluation of performance.²⁶ There is a need to find a balance in the interview methods used by police to meet the multiple, and sometimes competing, objectives of an investigation compared to evidence. This is a difficult task, but scholars have begun to address this topic by collaborating closely with police and prosecutors to devise and refine evidence-based interview methods with these multiple purposes in mind.²⁷ It is clear that if police do not follow these steps, it likely to severely restrict prosecutors' perceived utility of video-evidence with adult sexual assault complainants, and thus negatively impact the likelihood that complainants will have the opportunity to use this method of evidence.

Second, if video-evidence is to be effective with adult complainants of sexual assault, changes are also required to the criminal justice system more broadly. Some jurisdictions will need legislative reform to make this mode of evidence an option and to streamline court processes so that the courts can accept the complainant's video interview as a pre-trial statement. There are other issues to be addressed to aid the implementation of video-evidence. Robust discussion between lawyers, judges and victim advocates on what is the best process for applying for video-evidence is required.

As highlighted by the current study, a strong tradition of live evidence may result in a reluctance of prosecutors to apply to use video-evidence, especially when it is first introduced. Further, if it is the judge's discretion as to whether video-evidence is used, this may lead to prosecutors having to spend additional time and resources on preparing an application to use this alternative measure and gather supporting evidence. McDonald and Tinsley have suggested addressing these issues by having a presumption in favour of video-evidence.²⁸ Indeed, in 2002 when England and Wales enacted the option of video-evidence for adult sexual assault, complainant prosecutors were required to apply to use video-evidence and other special measures.²⁹ Criticism by victims' advocates and in government reports about the infrequent use of these reforms by lawyers and judges³⁰ led these countries to give complainants automatic eligibility to use video-recorded evidence.³¹

Another possibility is to allow the complainant to choose how he or she would like to give evidence. However, prosecutors in the current study reported that they want to have the option of choosing the method of giving evidence. As experts in evidence presentation, prosecutors' views are an important consideration, but scholars need to examine the validity of their concerns through empirical research. For example, in a review of the research examining lawyers concerns that video-evidence reduced the credibility of child witnesses, Davies³² found empirical research did not substantiate these concerns. It is important to note, however, that this type of research does not always

²⁶ Powell et al, n 9; MB Powell, "Designing Effective Training Programs for Investigative Interviews of Children" (2008) 20 *Current Issues in Criminal Justice* 189; KA Ericsson, RT Krampe and C Tesch-Römer, "The Role of Deliberate Practice in the Acquisition of Expert Performance" (1993) 100 *Psychological Review* 363.

²⁷ K Burrows, M Powell and MS Benson, "A Guide to Clarifying Evidence in Australia" (Submitted to *Journal of Forensic Practice*); E Darwinkel, M Powell and P Tidmarsh, "Prosecutors' Perceptions of the Utility of 'Relationship' Evidence in Sexual Abuse Trials" (2013) 47 *Australian & New Zealand Journal of Criminology* 44.

²⁸ E McDonald and Y Tinsley, "Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges" (2011) 1 *Victoria University of Wellington Legal Research Papers* 1.

²⁹ *Youth Justice and Criminal Evidence Act 1999* (UK), s 17.

³⁰ S Payne, *Redefining Justice: Addressing the Individual Needs of Victims and Witnesses* (Crown, London, 2009); Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Constabulary, *Without Consent: A Report on the joint review of the Investigation and Prosecution of Rape Cases* (2007).

³¹ In the Crown Court; *Youth Justice and Criminal Evidence Act 1999* (UK), s 22A enacted on the coming into force of the *Coroners and Justice Act 2009* (Commencement No 7) Order 2011 (SI 2011/1452).

³² G Davies, "The Impact of Television on the Presentation and Reception of Children's Testimony" (1999) 22 *International Journal of Law and Psychiatry* 241.

capture the realities of the courtroom. For example, contrary to some lawyers' criticisms, researchers have found little affect of long, detailed narratives on mock juror credibility judgments when compared to short answer responses from the complainant.³³ Nevertheless, these studies do not capture the potentially damaging effects of cross-examination that uses this additional detail to generate inconsistencies in the complainant's testimony. Another limitation of these studies is it that they only test typical police interviews, which may not represent the lengthy and rambling narratives found in some interviews.³⁴

Finally, an evaluation of the impact of video-evidence should be implemented with the adoption of this method, allowing the criminal justice system to determine its effectiveness, and how this could be improved as it is implemented. As evidenced by the introduction of video-evidence for child witnesses, all too often expensive schemes fail to achieve their full potential and the absence of an evaluation process means the criminal justice system cannot effectively identify and address weaknesses in the process in a timely way.³⁵

CONCLUSION

The video-recording of witness interviews is likely to become more common with improved technology. The use of video-evidence offers many potential benefits to the quality of information obtained, and to the witness. Adult sexual assault complainants have been identified as one type of witness who can benefit the most. How well the criminal justice system responds by implementing and evaluating the effectiveness of these methods in this case will likely determine how responsive it can be to using video-evidence with other types of witnesses to improve justice outcomes more generally.

³³ EA Lind et al, "Social Attributions and Conversation Style in Trial Testimony" (1978) 36 *Journal of Personality and Social Psychology* 1558; RP Fisher, EW Mello and MR McCauley, "Are Jurors' Perceptions of Eyewitness Credibility affected by the Cognitive Interview?" (1999) 5 *Psychology, Crime & Law* 167; N Westera et al, "Does the Narrative Style of Video-Evidence Influence Judgments about Rape-Complainant Testimony?", *Applied Cognitive Psychology* (in press).

³⁴ Westera et al, n 33.

³⁵ Harvard University, *Workplace Learning that Works: The Adding, Embedding, Extracting Model (White Paper)* (Cambridge, 2014); MJ Hill and PL Hupe, *Implementing Public Policy: Governance in Theory and Practice* (Wiley Online Library, 2002); Victoria Law Reform Commission, *Sexual Offences: Final Report* (2004).