



Changed evidentiary requirements?

Interim report pursuant to the Government instruction regarding Performance in respect of investigation and prosecution

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English summary of Brå report 2016:19

**The Swedish National Council for Crime Prevention (Brå) –
centre for knowledge about crime and crime prevention measures**

The Swedish National Council for Crime Prevention (Brå) works to reduce crime and improve levels of safety in society by producing data and disseminating knowledge on crime and crime prevention work.

This report is a summary of the Swedish report
Förändrade krav på bevisning?, report no 2016:19.
The Swedish report can be ordered from Brottsförebyggande rådet, info@bra.se

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URN:NBN:SE: BRA-683

Summary

Between 2006 and 2010, the police force expanded by 2,500 new employees. One of the hopes behind this investment by the Government was that the police's investigative work would improve and the person-based clearance rate of reported offences would increase. This effect was not, however, realised, and instead the person-based clearance rate has declined during recent years. Brå has previously sought explanations as to why an increase in the number of police did not lead to an increased person-based clearance rate (Brå 2014:17) and found several possible reasons which were not, however, investigated within the scope of that project. The Government has since given Brå a new instruction to investigate three of these possible reasons for the downward trend of the person-based clearance rate: the use of limitations of investigation (result presented in Brå 2015:7), changes in the character of the offences (result presented in Brå 2016:8), and changed evidentiary requirements (which is addressed in this report).

Increased evidentiary requirements from judges?

One point of departure for this study is the unanimous impression advanced by the police officers in the evaluation of the investment in 20,000 police, namely that public prosecutors have increased their evidentiary requirements. For their part, public prosecutors interviewed by Brå believe that the courts have increased their evidentiary requirements. They believed that the courts' increased evidentiary requirements had also had affected the public prosecutors, in that they now impose higher requirements for the evidence which comes to light in the police investigations in order to attain a person-based clearance for the matter.

Brå has therefore been instructed to: (a) study whether judicial evidentiary requirements in criminal cases have changed and, if so, why; and (b) the significance of any such changes in judicial requirements in respect of trends in person-based clearances of offences. In consultation with the Ministry of Justice, Brå has chosen to focus primarily on the second question presented in the instruction – namely the significance of any such changes for the person-based clearance rate.

Since the decisions regarding person-based clearances are taken by public prosecutors – not courts – on the basis of the police investigation, this report focuses on these parts of the criminal justice process. Brå has thus chosen to focus on police officers' and prosecutors' *impression* of the requirements which are imposed for evidence in police investigations. The main question in the report is: In those cases in which a decision regarding a person-based clearance was taken, have the working methods of the police and public prosecutors changed such that more evidence is collected or more stringent evidentiary requirements are imposed?

Precedential decisions?

Judges often increase their evidentiary requirements as a result of previous, precedential decisions. Brå has looked for precedential decisions from 2006-2013 which address evidentiary requirements in respect of the three selected offences. No such decisions have, however, been found for decisions regarding assault involving strangers or unlawful threats. On the other hand, there are a number of Supreme Court decisions regarding evidence in rape cases. On this basis, both legal researchers and the Prosecution Centre (*Åklagarcentrum*) have concluded that requirements have been made more stringent, but that this occurred prior to 2006. However, this does not rule out the possibility that judicial outcomes at lower levels may have given public prosecutors the impression that requirements for technical evidence – or other evidence – have been made more stringent.

Three types of offences, three years, 1,500 coded police investigations

Brå has studied material from police investigations in order to investigate changes, if any, in the working methods of the police and the public prosecutor.

In consultation with the Prosecution Authority, Brå has selected three types of offences: assault involving strangers, unlawful threat, and rape. The Prosecution Authority's perception is that the evidentiary requirements might have increased specifically in respect of these three types of offences. In addition, these are types of offences for which the person-based clearance rate has declined in recent years.

In addition, Brå has only looked at matters where there is a reasonably suspected perpetrator. Since the purpose of the study is to analyse changes over time, Brå has compared the evidentiary situation in police investigations from 2013 and 2006. We have also included matters from 2010 as a comparison year.

Brå has conducted a random selection of police investigations from the relevant types of offences and years. In total, approximately 1,500 police investigations have been coded, based on the presence of various forms of evidentiary material and evidentiary facts which can connect a perpetrator to the offence. The evidence has been broken down into four categories, of which two refer to statements from the injured party and a suspect, and two refer to supporting evidence, namely witnesses and technical evidence. Reading and analysing this quantity of police investigations is demanding in terms of both resources and time. The material offers a unique possibility for a quantitative answer to the question of whether the police and public prosecutor have increased their evidentiary requirements.

No general support for the proposition that the police have changed their work

The analysis does not provide support for the proposition that the police have begun to collect more evidence in police investigations. Interviews with injured parties, suspects, or witnesses have not become more common, nor has police collection of technical evidence.

Unlawful threats deviate, in part, from this pattern. There, the review of the material shows an increase in the percentage of matters where technical evidence was collected. The police we spoke with believed that this might be because an increasing number of unlawful threats are made digitally. This is more likely to indicate that this increase results from the fact that the unlawful threats may have changed character rather than that the police changed their working methods in order to meet increased evidentiary requirements.

No general support for the proposition that public prosecutors have changed their work

Brå sees no improvement in the evidentiary situation in the offences with person-based clearances in 2013 when compared with 2006. The analysis thereby does not indicate that prosecutors required more evidence in 2013 than they did in 2006 in order for a case to have a person-based clearance.

The picture is different in respect of rape. Certain aspects of the evidentiary situation have improved while other aspects are worse. In cases with person-based clearances, it has become more common that there are witnesses who can, in whole or in part, describe what happened. Technical evidence which can prove that the offence occurred has also become more common.¹ At the same time, it has become less common for the injured party to be able to provide a clear account of the incident.

Signs that the reported rapes have changed character

As previously stated, there have been certain changes in rape cases with person-based clearances. We see the same pattern in respect of reported rapes as a whole. It has become more common that there are witnesses who can, in whole or in part, describe what happened; at the same time, it has become less common that the injured party is able to clearly recount the incident.

The fact that there are now more reported and cleared cases without an injured party who can provide a clear account is probably, in part, a consequence of the fact that the law was changed in July of 2013. In the change, the offence of rape was expanded to clarify that an assault where the victim in a helpless condition due to sleep or intoxication would be regarded as rape. On the other hand, these cases occur more often in contexts where there are witnesses who can describe what happened before and after the reported incident.

Another tangible change which is clear from our study is that a smaller percentage of the reports that a rape has occurred are made directly after the incident occurred. This has, of course, clear consequences for the possibility of collecting technical evidence, since it diminishes the possibility to conduct DNA tests and document the victim's injuries, if any. Brå thus sees the aforementioned changes as a sign that the reports have, to a certain extent, changed character.

¹ This difference is not, however, statistically significant.

Why aren't police and prosecutor impressions of changed working methods consistent with our result?

One point of departure for Brå's study was the impression of an increased evidentiary requirement which came from the police and the public prosecutor in connection with the agency's evaluation of the investment in 20,000 police (Brå 2013:20). Notwithstanding that the police and public prosecutors convey a picture that they have changed their work as a consequence of the courts' increased evidentiary requirements, we have not been able to find signs of that in our analysis. It could be the case that they actually changed their work methods in a way which we could not discern within the parameters of this investigation.

One possible explanation is that there have actually been changes, but that these were made before 2006. In respect of rape, this premise could be borne out by the fact, among others, that the Supreme Court's evidentiary requirements in rape matters were made more stringent in the 1990s, but that later Supreme Court decisions primarily entail confirmation of earlier case law. An additional argument for the proposition that the changes in the view of which evidence is necessary in criminal cases is the development of the annual number of DNA tests conducted by SKL (now the Swedish National Forensic Centre (NFC)). The number of such tests increased during the first five years of the 21st century, but has thereafter been at a somewhat consistent level (NFC's 2015 Annual Report).

The other explanation is that the police have changed their working methods in a way that we have not been able to measure in our study. Some of the police officers with whom Brå discussed the result of the study say, for example, that they increased the number of interviews with witnesses and injured parties or changed their working methods in connection with the collection of technical evidence. This type of detail was not, however, earmarked in Brå's coding schedule.

Brå's assessment

How should the results be interpreted in relation to the declining person-based clearance rate?

The instruction includes shedding light on the significance that any changes may have had on the development of the person-based clearance rate for offences. The review does not provide any support for the proposition that there have been any major changes in respect of either the police's work when collecting evidence or the prosecutors' requirements for the evidence necessary for prosecution. Accordingly, the study supports the proposition that changes in respect of evidentiary requirements have had any direct significance in terms of the declining person-based clearance rate. One must, however, add the caveat that (as stated above) there may have been changes in the way in which the police collect evidence which were not discerned by Brå's study. It is possible that more a finely honed collection of data would show that the police interview injured parties more times than previously, interview more witnesses, and visit the crime scene more often. In such case, this could lead to an improvement in the evidentiary situation both in the investigations and in the matters the public prosecutors choose to prosecute. If this were to be the case, it would have had a negative impact on the person-based clearance rate, since each

investigation takes longer if the investigative efforts are expanded. With unchanged investigatory resources, this leads to having time to “produce” fewer matters which are passed on to the public prosecutors. Brå’s aggregate assessment is, however, that any tangible change in the police’s working methods should have had impact also in respect of that which is illustrated in the review. The conclusion is thus that it is not likely that changed evidentiary requirements have had any direct significance in terms of the development of the person-based clearance rate.

Changes in the character of rape may have affected the person-based clearance rate

The focus of this report is the question of any increased evidentiary requirement, not whether the matters have changed character. The question is illuminated in another report which is presented concurrently with this one. Since rape is not, however, included among the offences which are addressed in that study,² there may nevertheless be cause to highlight that the character of these matters changed in a way which makes them more difficult to clear. This may have contributed to a slight decline in the person-based clearance rate. It is, however, difficult to comment on the precise magnitude of the effect.

² Fraud and assault were studied.