

Office for Criminal Justice Reform

# Convicting Rapists and Protecting Victims – Justice for Victims of Rape

## A Consultation Paper

Spring 2006

CRIMINAL JUSTICE SYSTEM





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A consultation paper produced by the Office for Criminal Justice Reform.  
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and the Criminal Justice System website ([www.cjsonline.gov.uk](http://www.cjsonline.gov.uk))

CRIMINAL JUSTICE SYSTEM





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# Preface

Rape is an appalling crime that devastates the lives of victims and their families and inspires fear in our communities. Rape is sexualised violence, representing a psychological as well as physical violation. However, rape will always be a difficult offence to prosecute. The majority of rapes are perpetrated by someone known to the victim. Often there are no independent witnesses present and no forensic evidence available.

The Government has already made a number of changes both to the law on rape but also to how the police and Crown Prosecution Service work on these cases. These changes include strengthening the law on rape through the Sexual Offences Act 2003 and developing a network of sexual assault referral centres that provide specialised, dedicated help and support to victims.

However, the conviction rates in rape cases remain unacceptably low and we are determined to do more to tackle the barriers to the successful prosecution of rape, whilst not interfering with the burden of proof. Increasing conviction rates is vital in terms of reducing the incidences of rape, both by preventing rapists from committing further offences and also by sending a powerful deterrent message to potential offenders.

This paper sets out a range of proposals, which aim to improve the outcome of rape cases through further strengthening the existing legal framework and improving our care for victims and witnesses. We want to ensure that stronger cases are presented to the courts, witnesses are given greater assistance in providing their evidence and courts hear evidence from experts that will better inform juries about the realities of rape and the psychological impact of sexual offences upon victims and address certain myths and stereotypes concerning how a victim might be expected to behave.

We believe these proposals have the potential to make a positive difference and welcome views on them.



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# Chapter 1: Introduction

## Scope and Purpose of this Consultation Paper

Fewer than 6% of rape cases reported to the police ultimately result in a conviction. Increasing conviction rates is vital in terms of crime reduction, both in preventing rapists from committing further offences, and sending a deterrent message to potential offenders.

We are currently developing a cross-government national Action Plan on sexual violence to address the low conviction rate. Earlier this month we launched a communications campaign targeted at potential perpetrators of rape and with a secondary audience of the general public, about the need to seek active consent. This will also seek to dispel common myths about rape.

This consultation paper deals only with part of the wider strategy and addresses those measures which would require changes to the law concerning rape, although some of them may go wider than just rape. This paper sets out four proposals which we believe will improve the conviction rate through:

- strengthening the existing legal framework
- helping to reduce the barriers to effective prosecution
- improving further our care for victims and witnesses.

## What is the Government consulting on?

In this paper, the Government is consulting on four proposals:

### 1. 'Capacity' in relation to consent

Consent is at the heart of most cases of rape. This is not simply saying 'yes' or 'no' but doing so through choice, and with the freedom and capacity to make that choice. We are seeking views on whether we need to define that capacity in law to assist the courts and juries in cases where drink or drugs may have impacted upon the complainant's ability to choose.

### 2. Expert evidence

In order to place juries in a more informed position from which to assess the credibility of a complainant, it is proposed that prosecutors should be able to present general expert evidence concerning the psychological impact of sexual offences upon victims.

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<sup>1</sup> Coxell, A., King, M., Mezey, G., Gordon, D. (1999). *Lifetime prevalence, characteristics, and associated problems of non-consensual sex in men: cross sectional survey*. *British Medical Journal*, 318, 846-850

<sup>2</sup> Kelly, L., Lovett, J. and Regan, L. (2005) *A Gap or a Chasm? Attrition in reported rape cases* *Home Office Research Study 293*

### 3. First complaint

We would welcome views on whether Section 120(7)(d) of the Criminal Justice Act 2003 should be repealed in order to ensure that all relevant evidence of complaints made by victims in rape cases are admissible as evidence in a trial, irrespective of how much time has passed since the alleged conduct.

### 4. Special measures: use of pre-recorded video evidence

Views are sought on whether the framework should be altered so that video recorded statements of complainants involving serious sexual offences taken by the police will automatically be admissible as evidence in chief at a trial. This will be subject to the witness agreeing that they wish to give evidence in this manner, and the court agreeing to admit the evidence having considered the interests of justice do not demand otherwise. Views are also sought on proposals to relax the current restrictions on the prosecution asking the witness questions in addition to the showing of the video-recorded statement.

## Responses to this Consultation Paper

Responses should be sent to:

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The final date for receipt of responses is **31 July 2006**.

## Responses: Confidentiality & Disclaimer

The information you send us may be passed to colleagues within the Office for Criminal Justice Reform, the Government or related agencies. Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. Please ensure that your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed. The Department will process your personal data in accordance with the Data Protection Act – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## **Alternative formats**

Please contact the Better Trials Unit if you require a copy of this consultation paper in any other format, e.g. Braille, large font or audio.

## **Post-consultation information**

A summary of the responses received will be published within 3 months of the closing date for this consultation, and will be made available on our website.

# Chapter 2: Background

This chapter outlines the nature and prevalence of sexual violence in England and Wales and highlights the key issues that contribute to the low rate of conviction for rape and serious sexual crimes. It also summarises the wide range of work the government has already undertaken to improve the conviction rate, and identifies further initiatives currently under consideration.

## Sexual Violence in England and Wales

The 2001 British Crime Survey (BCS) Interpersonal Violence Module (IPV) found that 7% of the women sampled had suffered rape or serious sexual assault at least once in their lifetime. It estimated that there were 190,000 incidents of serious sexual assault against women aged between 16 and 59 in England and Wales in the year leading up to the research, and among these an estimated 80,000 incidents of rape or attempted rape. 54% of rapists were current or former partners or boyfriends of the victim and only 17% were strangers.

Whilst the majority of victims of serious sexual violence are women assaulted by adolescent and adult males, the survey also estimated that a small proportion of men – 0.2% – had been subject to sexual assault in the previous year. Other research suggests that almost 3% of men experience non-consensual sexual experiences as adults and over 5% as children (Coxell et al., 1999)<sup>3</sup>.

Sexual violence is massively under-reported by both female and male victims. The 2001 BCS IPV found that only about 15% of rapes came to the attention of the police. 40% of those who had suffered rape in the 2001 BCS IPV had told no-one about it.

## Conviction rates in rape cases

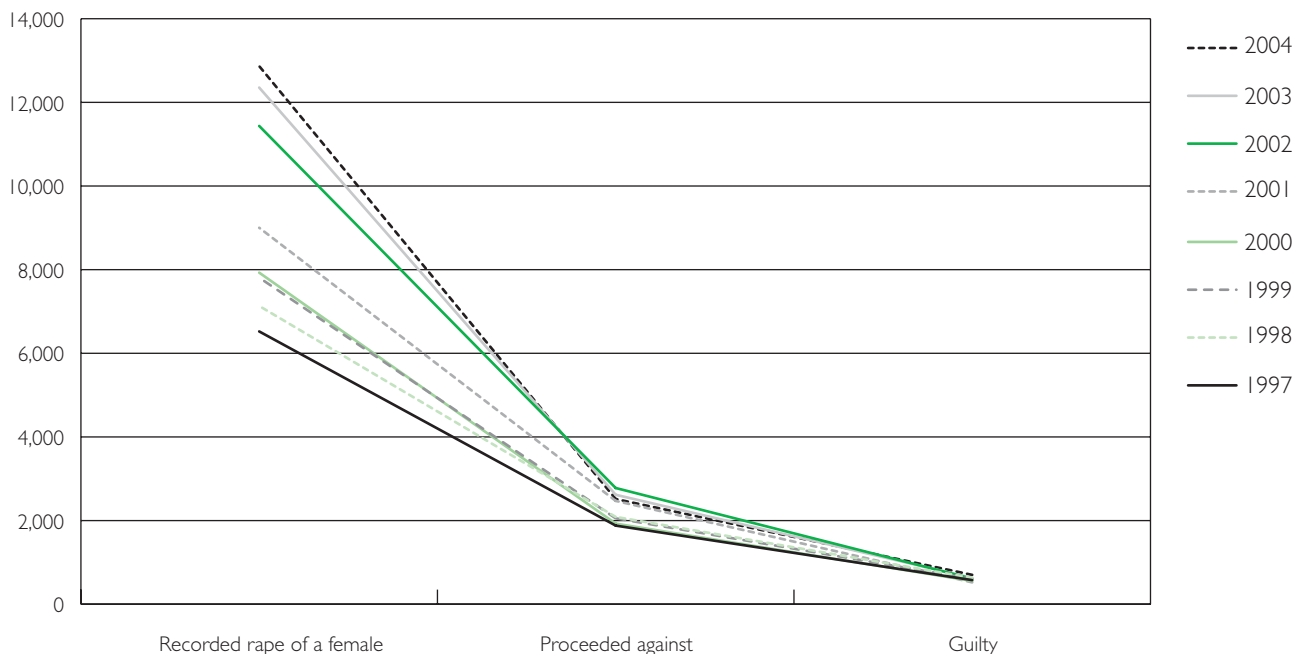
Whilst the number of rape convictions has remained relatively stable, the number of rapes reported to the police is increasing year on year, meaning that the proportion of rapes resulting in a conviction has steadily declined. The rate of conviction for rape has, therefore, decreased from 33%, one in three, of cases reported to the police in 1977 to 7.5%, one in thirteen cases, in 1999, to 5.29%, one in twenty cases in 2004.

Although the fall in the proportion of cases that end in conviction is disappointing – and something that we are determined to tackle – we welcome the increase in reporting. Rape is a hugely traumatic, even humiliating experience for the victim, and reporting crimes and reliving events can add significantly to that trauma. Through the introduction of Sexual Assault Referral Centres and through better, more

<sup>3</sup> Coxell, A., King, M., Mezey, G., Gordon, D. (1999). *Lifetime prevalence, characteristics, and associated problems of non-consensual sex in men: cross sectional survey*. British Medical Journal, 318, 846-850

sensitive policing we have sought to create an environment in which victims can have confidence and which encourages reporting. We recognise that some of the cases that are now reported are very difficult to prove but we remain determined to offer access to justice for all.

**Graph to show numbers of rapes of a female recorded by the police, the number of cases proceeded against, and the number of cases resulting in a conviction, for each year between 1997-2004.**



**Notes:**

Crimes are recorded on a financial year basis (whereas court proceedings data is collected on a calendar year basis), so the figures in the 'Recorded rape of a female' column actually relate to 1997-98, 1998-99, etc.

Crimes data is recorded by offence; court proceedings data is recorded by offender

Where a crime is recorded as a rape, but the case proceeds as a lesser sexual offence and results in a conviction, this will not appear in rape conviction data.

Research indicates that many reported cases that do not proceed to conviction fall out of the process at the earliest stages, with between half and two thirds dropping out before referral to prosecutors<sup>4</sup>. When cases do get to court, a relatively low percentage result in a conviction. For example in 2004, 702 people tried at the Crown Court for rape of a female, were convicted, representing 28% of total rape prosecutions. This was an increase of 4% from 2003.

## Why is the rate of conviction so low?

### Evidential difficulties and burden of proof

The majority of rapes are perpetrated by someone known to the victim, where it is normally one person's word against another. Often there are no bruises or forensic evidence available. Proving what happened, beyond reasonable doubt, in such cases is extremely difficult. It is vital that these cases are prepared and delivered by police and lawyers who are trained on sexual offences, to ensure the best evidence is collected and presented.

<sup>4</sup> Kelly, L., Lovett, J. and Regan, L., (2005) A Gap or a Chasm? Attrition in reported rape cases *Home Office Research Study 293*

## Victim withdrawal from investigation and legal process

Research has found that victims who declined to complete the initial investigative process and victim withdrawals accounted for over one-third of cases lost at the police stage. Key contributory factors were not being believed and fear of going through the criminal justice process.

Those victims whose cases do make it to court are faced with the intimidating prospect of having to recount traumatic and often intimate details, endure cross-examination and in some cases have information about their past sexual behaviour presented to the court as evidence against them.

## Public attitudes towards sexual violence

Research published by Amnesty International in November reported that a third of people in the UK believe that a woman is partially or totally responsible for being raped if she has behaved in a flirtatious manner. The research also showed that similar attitudes exist in relation to clothing, drinking, perceived promiscuity, personal safety and whether a woman has clearly said “no” to the man. The fact that these rape myths are so widely believed has considerable implications for the willingness of juries to convict in cases of rape.

## Defendant’s previous behaviour

Relevant evidence about a defendant’s previous behaviour, and that based on hearsay, has been kept from the jury meaning that they have often had to make a decision about guilt or innocence based on an incomplete picture.

## What has the government done recently to improve the conviction rate?

- The CPS have trained 520 specialist rape prosecutors to ensure that all rape cases are prepared by experts.
- Guidance has been produced for police on investigating serious sexual offences and national police training on sexual offences is now under development.
- The CPS is liaising with the Bar Council to introduce comprehensive training on rape issues and quality assurance of barristers presenting rape cases in court.
- The Sexual Offences Act 2003 overhauled the legal framework for dealing with sexual offences. It provides a coherent and comprehensive set of offences appropriate for the modern day with penalties that reflect the seriousness of the offences. Importantly, the Act also strengthened the law on consent, by creating for the first time a definition of consent and by removing the defence that a person could avoid conviction for rape if he had an honest but mistaken belief in consent.
- The Domestic Violence, Crime and Victims Act 2004 put victims at the heart of the criminal justice system. It provides for a statutory Victims’ Code of Practice, which places obligations on the police to keep victims informed about case progress.

- Over 2004-06, the Government dedicated £4m to supporting victims of rape and sexual assault through further developing the network of Sexual Assault Referral Centres and expanding capacity in voluntary and community sector sexual violence organisations. An additional £1.25m will be used to further increase capacity in support services provided by the sexual violence voluntary sector in 2006-07. The Government has also funded the production of a handbook for victims of rape explaining the criminal justice process which will be available to victims through the police and voluntary sector.
- Witness Care Units will assess the needs of victims going through the criminal justice process, providing an 'initial needs assessment' to identify specific support requirements, witness care officers to steer individuals through the criminal justice process and to co-ordinate support and services; greater communication and contact with witnesses about cases including the case outcome or trial.
- The Youth Justice and Criminal Evidence Act 1999 introduced specific provisions for vulnerable and intimidated witness, including special measures such as video links and screens, which shield the witness from the defendant in court. The aim has been to assist such witnesses give their best evidence in court.
- Through the Criminal Justice Act 2003, we have clarified and expanded the circumstances where evidence of a defendant's bad character is admissible in court, and introduced new measures on hearsay evidence, to ensure that the jury is presented with all relevant evidence.

## **What other initiatives is the government considering?**

### **Protecting against late applications for admitting victim's previous sexual history**

As well as introducing provisions for vulnerable and intimidated witnesses, the Youth Justice and Criminal Evidence Act 1999 limited the circumstances in which a victim's previous sexual history is admissible in court to ensure that only relevant evidence is presented to the jury. We are, however, aware that in some cases, very late applications are being made by the defence for previous sexual history evidence to be admitted. Such late applications frustrate the effectiveness of the legislation as victims are unprepared for such cross-examination and fail to give their best evidence. To ensure that the issue is dealt with early in proceedings, it is proposed to invite the Criminal Procedure Rule Committee to consider ways of strengthening the relevant rule and indicating that when an application is granted, the court should consider allowing the prosecution an adjournment in order to explain the situation to the victim and to review the position with regard to special measures.

### **Pre-trial interviews with witnesses by prosecutors**

In December 2004 the Attorney General published his report on pre-trial interviews with witnesses by prosecutors. These interviews are currently being piloted in 4 CPS Areas. These interviews will strengthen the prosecution process by allowing the prosecutor to assess the reliability of the witness's evidence; assist the prosecutor in understanding complex evidence and afford an opportunity to explain the criminal process and procedures to the witness. Whilst these interviews may be held in any case, it is hoped that these interviews may in due course be found to be of particular use in rape cases given the evidential difficulties described above.

# Chapter 3: ‘Capacity’ in Rape Cases

## Background

The Sexual Offences Act 2003 came into force on 1 May 2004. It followed over 3 years of consultation with many of those involved in tackling sexual offending, from law enforcement through to the provision of help and support to victims and survivors.

In July 2000 the government published “Setting the boundaries: reforming the law on sex offences”. It was a detailed account of the consultation exercise and made a number of recommendations. The subsequent Command Paper “Protecting the public: strengthening protection against sex offenders and reforming the law on sexual offences” put forward proposals to strengthen the law on sex offenders and to modernise penalties and the law on sex offending to increase public confidence and better protect the public. Those proposals were articulated in the Sexual Offences Act 2003.

Recommendation 6 of “Setting the boundaries” was that the law should include a non-exhaustive list of examples of where consent was not present including where a person was “too affected by alcohol... to give free agreement”<sup>5</sup>. However, in the 2002 White Paper, “Protecting the Public”, the Home Secretary, when stating the Government’s intention to create a set of evidential presumptions, indicated that these would not cover voluntary intoxication leading to incapacity falling short of sleep or a lack of consciousness:

*“I have rejected the suggestion that someone who is inebriated could claim they were unable to give consent – as opposed to someone who is unconscious for whatever reason, including because of alcohol – on the ground that we do not want mischievous accusations.”*

## The current law

The Sexual Offences Act 2003 sought to create greater legal protection for victims by clarifying the law on consent. For example, section 1 of the Act states that a person commits the offence of rape if they intentionally penetrate the vagina, anus or mouth of another when that person does not consent to penetration and the perpetrator has no reasonable belief that consent was given. Section 1 also provides that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the defendant took to ascertain whether the person consented.

Section 74 of the Act defines consent by stating that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. It also provides, at section 75, a list of circumstances in which it is presumed a complainant did not consent. These include:

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<sup>5</sup> “Setting the boundaries” 2.10.9

- Where the victim was asleep or unconscious, or could not communicate consent because of a physical disability; and
- Where the victim had been given a substance without their consent that was capable of causing them to be overpowered at the time the alleged rape took place. This includes the scenario when a victim's drink is spiked.

These circumstances do not include, however, where the victim was voluntarily intoxicated. Nor does the Act define what is meant by 'capacity'.

## Consent and capacity

So, taken in conjunction with the evidential presumptions about consent provided for by section 75, in a case where a complainant was rendered unconscious by drink, then it could be presumed that she had not consented. However, where the complainant was severely intoxicated but remained conscious, the presumption would not arise and it would be for the jury to consider whether or not the complainant had consented to sexual activity or not and central to that argument would be whether or not the complainant had the capacity to give her consent.

Capacity however is not defined in the Sexual Offences Act 2003. In "Sexual Offences: Law and Practice"<sup>6</sup> the authors Rook and Ward suggest that, in the absence of such a definition, the courts may look for assistance to the common law, although they acknowledge that there were at common law no clear principles governing whether a person had capacity to consent to sexual acts. They conclude: "Adapting the common law on capacity to the definition of consent in s.74, a complainant will not have had the capacity to agree by choice where their understanding and knowledge were so limited that they were not in a position to decide whether or not to agree"<sup>7</sup>.

## R v Dougal [2005] Swansea Crown Court

The case of *R v Dougal* concerned an allegation of rape by a female student at Aberystwyth University. In that case, the judge directed the jury to enter a 'not guilty' verdict when the prosecution informed the judge that it did not propose to proceed further because it was unable to prove that the complainant had not given consent because of her level of intoxication.

What was not addressed at the trial was whether or not the victim had the capacity to consent to sexual activity given her level of intoxication. It could be argued that these were matters that could quite properly have been put before a jury and the matter left for them to decide whether or not the complainant's level of drunkenness had meant that she was not capable of consenting to sexual activity. However, the case has also raised questions about the possible need for 'capacity' to be defined in statute.

The case of *R v Dougal* has undoubtedly raised concerns amongst some about the effectiveness of the Sexual Offences Act 2003 and caused them to question whether or not the Act offers adequate protection to persons at times of particular vulnerability. The absence of a clear definition has, they argue, led to a lack of clarity the result of which has been that not all cases that should have gone to the jury have done so.

<sup>6</sup> 3rd Edition, 2004, Thomson Sweet and Maxwell

<sup>7</sup> Rook and Ward: "Sexual Offences: Law and Practice" 1.81-1.94

Others have argued to the contrary, saying that *R v Dougal* has not brought into question the effectiveness of the legislation but merely raised questions about the prosecution of such cases. They contend that in such a case the question about whether or not the level of alcohol consumed by the complainant had left her incapable of consenting could quite rightly be put to the jury. Moreover, seeking to change the law in this area would do little to address underlying weaknesses in the criminal justice system relating to the manner in which such cases are handled.

## Does the law need to be changed?

Where the victim is so drunk that she becomes unconscious or where the accused 'spikes' the victim's drinks the law on consent is clear. But where the victim has voluntarily taken drink or drugs, the issues become more difficult. Inevitably, if a person continues to drink heavily throughout an evening, they will reach a point at which they become so intoxicated that they will lose the capacity to give meaningful consent to sexual activity. What is difficult to establish is when is that point reached? There are many levels to intoxication and different people will be able to consume varying amounts of alcohol and suffer different effects.

It is also the case that alcohol is a disinhibitor and can make individuals do things that they would not choose to do when they are sober. There is a distinction to be drawn therefore between intoxication that results in a lack of capacity to consent; and intoxication that alters a person's choices but does not deprive him or her of the capacity to consent. Regretting an act the following day does not mean that you did not engage in it willingly, if foolishly, at the time.

Given the evident complexities in this area, the question that needs to be asked is: does the existing legislation need to be changed or is sufficiently robust as it stands to prosecute these particularly challenging rape cases?

The offence of rape at section 1 of the Sexual Offences Act 2003 has 3 central elements which the prosecution must prove beyond reasonable doubt: the intentional penetration of the vagina, anus or mouth of a person by the penis of another; that the victim did not consent to the penetration; and that the perpetrator did not reasonably believe the victim had consented. In many cases, it is not doubted or disputed that penetration occurred and therefore the key to the case is the issue of consent. And this is where the difficulties lie because consent is not simply about demonstrating that the complainant said 'yes' or 'no'. Rather, it is about the complainant having the capacity to make that decision and that choice, a capacity for which alcohol (or drugs or other things) may have deprived her. Moreover where the complainant is publicly intoxicated it may well be the case that there are witnesses to that incapacity as well as to the fact that the perpetrator could not have reasonably believed that she was able to consent by choice, freely and ably.

## A statutory definition of capacity?

As mentioned previously, Rook and Ward in their book "Sexual Offences: Law and Practice" have suggested a definition of the central elements of capacity based on understanding and knowledge, with further reference to the limits placed upon them by, amongst other things, alcohol. While the issues about whether and to what degree an individual's understanding and knowledge, and therefore capacity, were limited through drink undoubtedly raise some difficult questions for courts and juries to contemplate, the question on which views are sought, is whether the inclusion of such a definition would serve to reinforce the importance of capacity as a key consideration and provide a clearer reference point to aid juries in determining this issue.

## Evidential presumptions

As also discussed previously, section 75 of the Act provides a list of circumstances where, if it is proved that they existed, it is presumed that the complainant did not consent. These include unconsciousness and the complainant being asleep. There is clearly a link here with alcohol, as many intoxicated persons will reach a point when the effect of the drink is such that they will pass into unconsciousness. But this is often a drawn out process, involving a gradual passage through mild drunkenness to intoxication to passing out. In many cases, a person's ability to function properly and to have the capacity to consent to certain acts will be severely impaired at the point that an individual drifts into unconsciousness or sleep.

Given this complex picture, would the creation of a further evidential presumption based upon extreme drunkenness be helpful in ensuring that, in general, it is the jury that decides whether or not the complainant had the capacity to give consent?

We have given careful consideration to this question. Creating an evidential presumption would raise many difficult questions, especially as alcohol affects people differently. This is also a matter about which other concerns have already been expressed such as those of the Home Secretary quoted at the beginning of this chapter. The existing presumptions all relate to circumstances where the complainant is not able to freely consent due to factors outside of his or her control. That would not apply to self-induced intoxication.

Moreover, there is little evidence that the existing evidential presumptions have enjoyed great usage. The presumptions apply unless the defendant raises "sufficient evidence" to raise an issue as to whether the victim consented. Where the defendant does raise such evidence, the judge will direct the jury that the presumption does not apply and the jury should consider the issue of consent in the normal way. In practice, it is not particularly onerous for defendants to enter the witness box and give "sufficient evidence" to disengage the presumption. Therefore, we believe that the arguments for creating an additional evidential presumption are not strong and the better course would be to proceed by legislating to provide for a clearer definition of capacity.

In summary, the questions on which your views are sought are:

**Question 1**  
Does the law on capacity need to be changed?

**Question 2**  
Should there be a statutory definition of capacity?

# Chapter 4: Adducing General Expert Evidence in Rape Cases

## Introduction

This chapter discusses amending the law in order to allow prosecutors to present expert evidence concerning certain characteristics of behaviour and psychological reactions that victims may experience and demonstrate after a violent, sexual crime. The aim of 'general expert evidence' is to dispel myths and stereotypes concerning how a victim should behave, and help a judge and jury understand the normal and varied reactions of such victims. It will not limit the ability of the defence to cross-examine victims and witnesses. Effectively, it 'levels the playing field between the prosecution and defence' by providing an alternative explanation to the defence's assertions.

## Background

Currently in a criminal trial, any omission, discrepancy, error, delay in reporting, unbecoming or puzzling behaviour that a victim may exhibit before, during or after the alleged rape, will be used by the defence as a basis to question that person in order to make him or her appear unreliable or untruthful. It is the job of the defence to probe and test the evidence of the prosecution, and it is in the interests of justice that this should continue.

However, there can be another explanation as to why a victim omits detail, reports the offence late or exhibits other puzzling behaviour. This explanation is grounded in the common psychological reactions that occur if a person has suffered a traumatic event or the realities of being in an abusive relationship. Currently such information is not being placed before a jury or magistrates for consideration, and therefore the decisions on the credibility of a victim or witness are made in absence of this relevant knowledge.

## The role that general expert evidence would play

General expert evidence goes to the heart of this problem as it will explain to jurors and judges that such apparently problematic features of a person's evidence are common and should not necessarily lead to the conclusion that the victim/witness is lying or unreliable. The court will be informed of the acknowledged psychological reactions that occur after a prolonged relationship of abuse and/or after a deeply traumatic event. Such reactions can affect a victim's ability to give a coherent, consistent account of their experiences and cause behaviour which, to an onlooker, is puzzling as it does not match the expectation as to how 'genuine' victims act or react. For example, a court could be told that it is not unusual for a rape victim to delay reporting and an expert would provide alternative explanations that the jury could consider. Alternatively, general expert evidence could be used to counter the commonly

held view that if a person has been raped by their partner, then the victim would leave. However, there are many practical reasons why people feel compelled to stay with violent partners – fear of poverty, social ostracism and child care.

The inclusion of such evidence will also assist in challenging the erroneous assumptions and preconceptions that surround victims. These misperceptions and myths have been the subject of much research and academic debate. (**Annex C** contains a list of references on this area.) For example, in the recent Amnesty poll<sup>8</sup>, a blame culture was identified against the victims of rape. This February<sup>9</sup>, the British Psychological Society published research following a hypothetical study, which did not involve actual rape trials. This found that if a judge summarised a rape case to a jury and in so doing invited them to consider the evidence from a perspective of accepting stereotypes and myths, then a juror would be more likely to find the defendant not guilty of the rape<sup>10</sup>. It is hard not to conclude that certain societal attitudes do amount to a substantial contributing factor to the low conviction rates in rape cases.

We propose that such general expert evidence should only be called in rape cases. This is because rape is a unique offence. The majority of rapes occur between acquaintances. Often, there is little outside evidence that supports the victim's account given that such offences usually occur in private. In the majority of non-stranger rape cases the identity of the attacker is not disputed and there will be no conclusive forensic or medical evidence. At the moment, the only evidence as to what allegedly occurred is being considered against a background of misperceptions and myths as to how 'proper' victims should behave which is going unchallenged.

It would appear that general expert evidence would be likely to be beneficial in cases of domestic violence too. Whilst that is outside the scope of current considerations, we do not rule this out in due course.

This need has also been recognised by other countries, and in particular, the USA. **Annex D** provides background to the use of such evidence in the US.

## General principles regarding the admissibility of expert evidence

In a trial, expert evidence can be called by either the prosecution or defence subject to the magistrates or judge agreeing that the following conditions are met:

- It provides information to the court which is outside the experience and knowledge of the finders of fact<sup>11</sup>;
- The expert has the necessary qualifications or level of competency. An 'expert' does not need to have formal academic qualifications but instead, possess extensive experience of the matters upon which he or she has been called to give evidence.

The function of the expert is to give an opinion upon an issue in the case. For example, the injury suffered by the victim was consistent with being hit over the head by an iron bar. The expert is also permitted to give evidence of facts, which his or her training has equipped the expert to perceive and draw conclusions from, but which a member of the public would not understand or appreciate. For example, a fingerprint found at the scene of the crime matches the fingerprint of the defendant.

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<sup>8</sup> Published 21 November 2005

<sup>9</sup> Published 1st February 2006

<sup>10</sup> *Rape myth beliefs and prejudiced instructions: Effects on decisions of guilt in a case of date rape* by Jacqueline M. Gray, *Legal and Criminological Psychology*

<sup>11</sup> *R v Turner* [1975] 1 QB 834

If either the prosecution or defence wish to call expert evidence, then they must inform the other side and serve a copy of the expert's statement. It is then a matter for the opposing legal team to decide whether they should obtain a separate expert's report. Both experts may be called to give evidence at the trial. The conclusions and findings of each expert may contradict in whole or part the evidence of the other expert. A judge, jury or magistrate does not have to accept the evidence of the expert<sup>12</sup>. It may reject it or prefer one expert to another. If there is no evidence to contradict an expert's opinion, the finder of fact should accept it<sup>13</sup>.

## The current limits to expert evidence

Experts are not permitted to express an opinion as to whether a witness is truthful or not. That is a matter for the jury. If an expert is called to bolster a witness's credibility, this is known as 'oath helping' and is currently forbidden under the law. The case of *Robinson*<sup>14</sup> (decided in 1994) illustrates this point. The facts were that Mr. Robinson was charged with indecently assaulting a 15-year-old girl, who had severe learning disabilities. The judge allowed the prosecution to call an educational psychologist, who gave evidence on the question of whether the complainant was suggestible, and whether she would pick up suggestions made to her and then repeat them, and whether she was likely to fantasise. Mr. Robinson appealed and the Court of Appeal allowed his appeal because the expert evidence effectively amounted to 'oath helping'. In the judgment, the Court said:

*"In our view, the Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable."*

In addition, an expert cannot give evidence on an issue which a member of the public would be expected to know about. The case of *Turner* is a good example of this point. Mr. Turner was facing an allegation of murdering his girlfriend. His defence was that he had been provoked when his girlfriend confessed that she had been unfaithful to him. The defence had wanted to call an expert who would say that although Mr. Turner was not mentally ill, he had a deep emotional attachment to the victim which caused him to explode into a blind rage. The Court of Appeal held that the judge was correct in not allowing the expert to give this evidence before the jury because the issue was not outside their common knowledge and experience. As it was put in the judgement:

*"Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."*

## Arguments for calling General Expert Evidence

The arguments in favour of allowing general expert evidence in rape cases can be summarised as:

- The common reactions of victims of rape are not within the understanding of the average juror. This is attested to by academic research;
- It is unfair to victims that their reliability is assessed against an incomplete factual background, which can only benefit the defendant;
- If the evidence of a victim is to be assessed detrimentally because of the powerful myths and misconceptions that many people hold, then there would be no benefit in a victim explaining why they reacted or acted in a certain way. It would provide further ground for cross-examination;

<sup>12</sup> R v Stockwell 97 Cr.App. R. 260

<sup>13</sup> R v Matheson [1958] 1 WLR 474; R v Bailey [1977] 66 Cr.App. R. 31

<sup>14</sup> 98 Cr.App.R 370

- To give juries a balanced picture it will be necessary for expert evidence to be called rather than for prosecution advocates to attempt to address rape myths in speeches to the jury;
- General expert evidence will not be specific to any particular victim or witness. It merely provides another explanation for fact finders to consider when assessing a person's evidence.

## Arguments against General Expert Evidence

Those arguing against a move to permit general expert evidence in rape cases might say:

- How a person would react after a rape is a matter of common sense and does not call for expert evidence. It is a matter of assessing the victim during their evidence, which the judge or jury can do without the help of 'experts';
- The prosecuting advocate could effectively address any bias by seeking an explanation from the person as to the reasons behind their behaviour;
- The prosecution advocate could remind the judge or jury of the dangers of unconsciously being influenced by myths and misconceptions when they make a speech at the opening and closing of the case;
- General expert evidence is merely an attempt by the prosecution to 'bolster the credibility' of their witnesses.

### Question 3

Would the introduction of general expert evidence be justified in principle?

## The proposal

If it is agreed to call general expert evidence, then it is proposed that the expert would give evidence that is limited to alerting the court to certain information that they may not have been previously aware. This evidence would be based on empirically validated behaviours or reactions of victims and witnesses. The expert would not comment on the behaviour or evidence of the victim or witness in the particular case, and would not have examined the person.

As this evidence is general, it would be difficult for another expert to dispute any findings. More importantly, the expert would clearly not encroach on the fact finding task of the jury.

In order to achieve the above, the legislative clause could contain the following information:

- The defendant must be facing either a trial or hearing after a guilty plea before a judge or magistrate in order to determine a factual dispute between the prosecution and defence (known as a 'Newton' hearing); and
- The expert will provide evidence as the effects of physical and/or mental and/or emotional abuse upon a notional victim; and/or
- The expert will provide evidence of the varied reactions of such a notional victim and behaviours that might be expected.

The ability to call general expert evidence will apply equally to the prosecution and defence. To limit this evidence only to the prosecution and allow the defence to only call an expert in rebuttal would be contrary to the right to a fair trial and create an 'inequality of arms' in the preparation and presentation of cases.

## The Procedure for calling General Expert Evidence

The expert would still have to be suitably qualified as currently required, and any expert would have to comply with the requirements of disclosure of material as set out in the Guidance Booklet for Experts, which was published on 14 February 2006 following the Attorney General's Review of Infant Death Cases. Similarly, prosecutors would comply with their duties as set out in the Director of Public Prosecution's guidance on issues arising from the use of experts (also published on 14 February 2006).

The procedure for calling a general expert would be the same as for any other expert. The prosecution would obtain a statement, which would then be served upon the defence along with notification that it is intended to rely upon this witness's evidence. This reliance could be by reading out the statement in court if the defence do not object to any matter in the statement, or by calling the expert to give live evidence. The service of the statement would have to be ahead of any trial date, and it would then be a matter for the defence as to whether they wish to cross-examine that witness at trial or even obtain another expert's opinion.

If the expert is called at trial, he or she will give evidence and could be cross-examined by the defence. If the defence wish to call an expert who has reached different conclusions to the prosecution expert, then they may do so and similarly, the prosecution can cross-examine. As stated earlier, a jury or magistrates do not have to accept the evidence of the expert. It may reject it or prefer one expert to another. If there is no evidence to contradict an expert's opinion, the finder of fact should accept it.

The anticipated issues that the expert may give general evidence upon include:

- The common misconception that if the rape occurred against a domestic abusive background, then the victim would leave;
- The common misconception that a victim would willingly come to court to give evidence against his/her abuser;
- Why victims delay reporting;
- Why victims blame themselves;
- Why victims minimize the events and their injuries;
- Why victims have incomplete, discrepant or inconsistent memories of the incident;
- Why victims do not always physically resist or escape;

This list is not intended to be exhaustive, and it may be that as the expert evidence develops, so new issues will appear:

**Question 4**

Do you agree with the proposal outlined in this chapter?

**Question 5**

Are there alternative ways to present juries with a balanced picture concerning the behaviour of victims after incidents of rape?

# Chapter 5: Evidence of First Complaint

## The rule against hearsay evidence

Until the Criminal Justice Act 2003 it was not normally possible for a witness giving evidence in a criminal case to be able to refer to a previous statement that he or she has made. Equally it was not normally possible for anybody else to give evidence about what somebody else has said to him or her. This is because the courts have treated such evidence as “hearsay” evidence, which is generally not allowed.

The law in relation to hearsay evidence was recently reviewed and codified in the Criminal Justice Act 2003. In order to understand the present law in relation to complaints made by victims it is necessary to look at the state of the law prior to the commencement of the Criminal Justice Act 2003.

## The development of the recent complaint exception

In relation to sexual offences a limited exception to the hearsay rule had developed. This is often referred to as the “recent complaint” exception. Where a victim gave evidence to a court, it was possible for the court to hear evidence from the victim and from other witnesses as to the original complaint made by the victim. The court could only hear this evidence if the complaint was made spontaneously and at the first reasonable opportunity. Furthermore, the magistrates or jury could only consider the evidence in their assessment of whether the witness was telling the truth. It was not possible to rely on the complaint as evidence that the alleged victim was subjected to a sexual assault.

This was a difficult concept for the jury to consider. Judges used to explain the position in this way: “You have heard evidence that shortly after this alleged incident X made a complaint to Y. This is not evidence as to what actually happened between X and the defendant. Y was not present, and did not see what happened between them. It is evidence which you are entitled to consider, because it may help you to decide whether or not X has told you the truth. The prosecution say that her complaint is consistent with her account, and therefore she is more likely to be truthful. On the other hand the defence say... It is for you to decide whether the evidence of this complaint helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between X and the defendant, and it therefore cannot of itself prove that the complaint is true.”

The exception about recent complaint had developed over a number of years. Historically it was a requirement in a prosecution for rape that a woman claiming rape could prove that she raised “hue and cry” in the neighbourhood whilst the offence was still recent. Appreciation and greater understanding of the reaction to rape has seen the removal of this requirement. Nevertheless, it could be said that admitting evidence of recent complaint only as to whether the victim was telling the truth or not tends to preserve the suggestion that a recent complaint should be made.

## More recent considerations of the law on hearsay and first complaints

The law on the admissibility of hearsay and out of court statements was comprehensively reviewed by the Law Commission in a report presented to parliament in 1997.<sup>15</sup> The law of evidence was also considered by Sir Robin Auld in his Review of the Criminal Courts of England and Wales published in September 2001. Both the Law Commission and Sir Robin Auld recommended that the rules in relation to the use of hearsay evidence be simplified and that as much relevant evidence as was available should be heard and considered by the magistrates or jury. The suggestions from both reports were taken forward in the White Paper Justice for All, which was published in July 2002.

In relation to the recent complaint exception the Law Commission recommended that it was right for evidence of a recent complaint to be heard. The Law Commission assessed that there were four problems with the recent complaint exception. First, it related only to sexual offences. Second, it could only be used to assess whether the witness was telling the truth. Third, it was necessary to show that the complaint was made at the first available opportunity. Fourthly, the complaint could not be heard if it was prompted or assisted.

The Law Commission recommended that evidence of recent complaint should not be limited to sexual offences; should not be limited to assessing whether the witness was telling the truth; and that the fact that the complainant may have been prompted about the complaint should be a factor for the magistrates or jury to take account of when deciding what reliance to place on the evidence.

In relation to the issue of requiring the complaint to be made at the first reasonable opportunity the Law Commission had reservations. They accepted that there was clear research to show that most victims of sexual offences are too embarrassed to tell anyone and would not necessarily do so spontaneously or early.<sup>17</sup> They had a concern that many victims will therefore find their evidence cannot be supported by telling the court the terms of their original complaints. However, at the time of the publication of their report the law had recently been developed in a decision of the Court of Appeal in *R v Valentine*<sup>18</sup>. Roch LJ giving judgement in *Valentine* said:

*“What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, a complaint will not be inadmissible merely because there has been an earlier complaint, provided that the complaint can fairly be said to have been made as speedily as could reasonably be expected.”*

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<sup>15</sup> Law Commission report 245

<sup>16</sup> Law Commission report 245

<sup>17</sup> J. Temkin, Rape and the Legal Process 145-146

<sup>18</sup> [1996] 2 Cr App R 213

The Law Commission took the view that the definition of first reasonable opportunity given by the court had relaxed the law sufficiently. Therefore, the Law Commission recommended that evidence of complaint be allowed only if it was made as soon as could reasonably be expected after the alleged conduct.

Although the Law Commission believed that the law had been relaxed by the decision in *Valentine*, other judicial interpretation of the rule suggests that complaint must still be recent. In *R v Birks*,<sup>19</sup> Rix LJ said:

*“...we do not think that we are permitted, as a matter of authority, to understand that the test that the complaint has to be made ‘within a reasonable time of the alleged offence’...can be understood to mean ‘has to be made within a reasonable time of the alleged offence whether the complaint is recent or not’ ”.*

The decision in *Birks* effectively means that the common law position prior to the commencement of the Criminal Justice Act 2003 was that a complaint had to be both recent and made within a reasonable time.

## The position in the Criminal Justice Act 2003

The recommendations of the Law Commission on recent complaint and on other circumstances where previous consistent statements of witnesses are allowed were followed in Section 120 Criminal Justice Act 2003, which provides:

### “120 Other previous statements of witnesses

- (1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.
- (2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.
- (3) A statement made by the witness in a document—
  - (a) which is used by him to refresh his memory while giving evidence,
  - (b) on which he is cross-examined, and
  - (c) which as a consequence is received in evidence in the proceedings,is admissible as evidence of any matter stated of which oral evidence by him would be admissible.
- (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—
  - (a) any of the following three conditions is satisfied, and
  - (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.
- (5) The first condition is that the statement identifies or describes a person, object or place.

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<sup>19</sup> [2003] Cr App R 7

- (6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.
- (7) The third condition is that–
  - (a) the witness claims to be a person against whom an offence has been committed,
  - (b) the offence is one to which the proceedings relate,
  - (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
  - (d) the complaint was made as soon as could reasonably be expected after the alleged conduct,
  - (e) the complaint was not made as a result of a threat or a promise, and
  - (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.
- (8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.”

The Criminal Justice Act uses the term “as soon as could reasonably be expected after the alleged conduct”. In the case of *Birks* the Court of Appeal commented on the then draft clause 120(7)(d) and remarked that it could visualise arguments, on the one hand, that the words “as soon as” pointed to a necessarily early complaint, but, on the other hand, it could also visualise arguments, in the context of “an entirely new legislative beginning” where the overall language of (7)(d) could permit a broader test, and allow the sort of complaint in question in that case, or even more delayed complaint, depending on the circumstances. A narrow interpretation of this term, reflecting the previous common law, might mean that evidence of complaints made only a week or so after the alleged conduct will not be available to the magistrates or the jury. In *Birks* the Court of Appeal suggested that the jury should not have heard evidence of a complaint made two months after the alleged conduct.

In the event that evidence of a complaint is not admissible in the terms of Section 120 Criminal Justice Act 2003 it may nevertheless be possible for the court to admit evidence if it is in the interests of justice to do so using the discretion contained in Section 114(1)(d) Criminal Justice Act 2003. This latter section has been referred to as a “safety valve” so as to enable a court to admit hearsay evidence, which is not admissible by any of the specific statutory grounds. Since evidence of complaint is specifically referred to in the Act, it could be suggested that it would be inappropriate to use the discretion in this way. However, in the case of *R v Xhabri*<sup>20</sup> the Court of Appeal accepted that if they were wrong in their assessment that certain evidence was admissible in the terms set out in Section 120, then the evidence might be admitted under Section 114(1)(d), subject to the exercise of judicial discretion and the interests of justice.

The Court of Appeal in *R v Xhabri* ruled that the hearsay provisions contained in the Criminal Justice Act 2003 are compatible with the European Convention on Human Rights. The court also ruled that there was equality of arms because the hearsay provisions apply to all parties to the proceedings.

One of the main principles in the Justice for All White Paper (2000) was to ensure that the widest possible range of material is available to the court and that it is for the fact finders, i.e the magistrates or the jury who are to be entrusted to decide on what weight is to be attached to any part of the evidence. The admission of relevant previous consistent statements is consistent with this principle.

<sup>20</sup> [2005] EWCA Crim 3135

There is academic and judicial opinion to suggest that there will be occasions where evidence of complaint which would be relevant to the magistrates or a jury's consideration of a complaint of rape will fall outside the scope of the present definition. For example, a complainant who is the subject of a sexual assault whilst she is a teenager may not make any disclosure at all until she subsequently begins a close relationship with a trusted companion. This may be months or even years after the alleged assault.

However, safeguards do exist to enable the court to exclude evidence that it considers to be superfluous or unfair. Section 126 Criminal Justice Act 2003 presently gives a court the discretion to exclude hearsay evidence, which either party to the case seeks to call, if "the court is satisfied that the case for excluding the statement, taking into account the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence." In addition, the court also has power to exclude any evidence the prosecution proposes to call if the court considers that its admission would have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it" (Section 78 Police and Criminal Evidence Act 1984).

## Should evidence of complaint that is not recent be admitted?

The academic research<sup>21</sup> suggests that it is normal for a traumatised victim to delay reporting an allegation of sexual assault, but there are numerous cases that proceed through the courts where a first complaint of sexual assault is made months or years after the alleged conduct. Is there a case for the magistrates and jury hearing about the first complaint whatever the delay after the alleged conduct?

This consultation paper concentrates on issues relating to sexual offences. Prior to the commencement of the Criminal Justice Act 2003 sexual offences were the only category of case where recent complaint evidence was permitted. However, the Criminal Justice Act extends the exception to all offences.

If the arguably existing requirement for a complaint to be recent is removed expressly, this could be achieved in a number of ways, some of which are set out below.

In relation to sexual offences, there are strong arguments, given what the research<sup>22</sup> tells us about victims 'bottling-up' and not making early complaints, for saying that evidence of first complaint will be important background evidence whenever it is made. Even if any delay could not be said to be reasonable, the making of the complaint and what is said at that time will clearly assist the magistrates or jury in understanding the case before them. The circumstances leading to the making of the complaint may well assist the fact finders in assessing all the evidence and remove any speculation about the reason for dealing with a case where the incident took place a long time ago.

However, if such evidence is admitted it is now evidence of the truth of its content. There is concern, particularly in cases of historic child abuse, that the statement of complaint will add unfair support for the complainant's evidence.

One option would be to make admissible all complaints made by a victim. Some might be concerned that this may result in the admission of numerous statements to the same effect. A victim might want to bolster their complaint by complaining to numerous people in the hope that all those statements will be given to the court. It could be said that there is a risk that malicious complaints could be given credence merely because of the number of complaints made. Some would say that that generally it is the statement of first complaint that will be of greatest benefit to the magistrates and jury in understanding the case.

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<sup>21</sup> J. Temkin, *Rape and the Legal Process*

<sup>22</sup> *Ibid*

On the other hand it could well be argued that a number of complaints combine to form a picture that the jury should be able to consider. If the extension is limited to the first complaint, there may still be statements that would be of benefit to the court that are still not admissible. For example, the first complaint may be very brief, for instance an initial report to a friend, family member or even the police, with the complainant then providing full details of the complaint very shortly afterwards, either to the same person or to another. The prosecution would not be obliged to call all complaints received and would focus on those of highest evidential value.

## Options

### Option 1

No change. This will allow for judicial interpretation of the phrase “as soon as could reasonably be expected after the alleged conduct”. This might mean that a complaint needs to be recent in order to be admissible under the terms of the Criminal Justice Act 2003.

### Option 2

Clarify the law by requiring the phrase “as soon as could reasonably be expected after the alleged conduct” to be considered subjectively by the judge. This would apply to all offences. Legislation could clarify that a complaint need not be recent if it is made at the first reasonable opportunity depending on the circumstances including the character of the complainant, the relationship between the complainant and the person to whom he complained and the person to whom he might have complained.

### Option 3

As option 2 in relation to offences generally and additionally, in relation to sexual offences only, remove the requirement that a complaint needs to be made “as soon as could reasonably be expected after the alleged conduct” but limiting admissibility to the **first complaint** whenever it is made.

### Option 4

As option 3 – but for **all** complaints to be admissible in relation to sexual offences only.

Option 1 would result in continuing uncertainty as to whether a complaint needs to be recent in order to be admissible.

Option 2 appears to reflect the intention of the Law Commission in 1997. Complaints that are not recent will be admissible when made at the first reasonable opportunity after taking account of the personal characteristics of the complainant but the courts will not have to consider multitudes of statements of complaint. Taking account of the personal characteristics of the complainant not only widens the opportunity for reasonably made complaints to be admitted but also provides safeguards against unreasonably delayed or malicious complaints.

However, there is a compelling argument for dealing with sexual offences differently.

The first complaint, whenever it is made will be important background evidence. This is reflected in option 3. Option 4 would permit all relevant evidence of complaints in sexual offences to be heard by the jury. It is argued that the finders of fact will always be assisted by hearing of all relevant complaints.

Question 6  
Which is your preferred option?

Question 7  
What are the reasons for your preference?

To assist, some examples of how each of the options might operate in practice appear below:

## Examples of the application of the different options

A 14 year old girl (A) is babysitting for neighbours. She is sexually assaulted by her neighbour when he returns home. A goes home. A had not told her parents that she was babysitting for her neighbour. She is frightened to tell her parents what has happened to her and she does not report the incident at all. She does not return to baby-sit at the neighbour's address. A develops a relationship with her boyfriend when she is 17 years old. She speaks to him about the incident that took place 3 years earlier with her neighbour. The boyfriend persuades her to report the incident to the police.

Application of the options to the admissibility of the complaint made to the boyfriend.

### Option 1

Prosecution seek to admit the statement on basis that it was made as soon as could reasonably be expected after the alleged conduct. The defence argue that the wording in Section 120(7) reflects the previous common law and, relying on *Birks*, say that as the complaint was not recent it should not be admitted. Court must make a decision on admissibility.

If the court decides that complaint needs to be recent the statement to the boyfriend will not be admitted. Prosecution may then argue that the statement ought to be admitted in the interests of justice pursuant to Section 114(1)(d).

If the court decides that the complaint does not need to be recent it will decide whether the complaint was made as soon as could reasonably be expected taking account of A's personal circumstances.

If the court decides that A acted reasonably then the statement is admitted. A and the boyfriend will give evidence about the conversation that took place between them. Defence may argue that the admission of this evidence is unfair under Section 78 PACE and ought to be excluded.

If the court decides that A did not act reasonably then the statement is not admitted. It is unlikely in these circumstances that an application under Section 114(1)(d) would be made or would be successful.

### Option 2

Prosecution seek to admit the statement on the basis that the complainant made the complaint at the first reasonable opportunity taking account of her personal circumstances.

If the court decides that A acted reasonably then the statement is admitted. A and boyfriend give evidence about the conversation that took place between them. Defence may argue that the admission of this evidence is unfair using Section 78 PACE.

If the court decides that A did not act reasonably then the statement is not admitted.

### **Options 3 and 4**

Statement is automatically admissible. A and boyfriend give evidence about the conversation that took place between them. Defence may still argue that the admission of this evidence is unfair and should be excluded under Section 78 PACE.

# Chapter 6: Special Measures for Rape Victims

## Background

Giving evidence in court can be a daunting experience for anyone. This can be particularly traumatic for victims of rape and other sex offences as the evidence they must give will be of a very personal nature. This can deter victims from wanting their cases to be taken forward. Because of the nature of these offences, the Government has already recognised that such complainants should have the opportunity to receive help to give their best evidence in court.

Under the provisions of the Youth Justice and Criminal Evidence Act 1999 adult victims of sex offences, subject to their own wishes, are eligible for special measures to assist them give their best evidence in court (s17(4)). Children under 17 years of age are automatically eligible. The prosecution may apply to the court for one or more special measures to be available during the trial. The measures currently available to such witnesses are: live TV links, which enable the witness to be able to give evidence from outside the courtroom; screens round the witness box; giving evidence in private and removal of wigs and gowns in the Crown Court.

Before granting the application the court must be satisfied that special measures will improve the quality of evidence and that the particular measures applied for will be likely to maximise the quality of the witness' evidence. It must take into account the witness' views and also whether the measure(s) might inhibit the evidence being effectively tested by the defendant. These limitations do not apply in full to children under 17 years (s21(3)) and not at all to children "in need of special protection" i.e. in cases involving sex, violence or cruelty.

The Youth Justice and Criminal Evidence Act 1999 also banned cross-examination of complainants in sex offences by defendants in person (i.e. defendants who are not legally represented) and further restricted cross-examination on a complainant's sexual history.

Another special measure, video-recorded evidence-in-chief, is being phased in. At present it is available for vulnerable witnesses, that is vulnerable adults and all child witnesses under 17 years in the Crown Court. It is also available in magistrates' courts for child witnesses in cases of violence, sexual offences, kidnapping, abduction and cruelty.

## Views of victims on special measures

Home Office research<sup>23</sup> has found that one third of witnesses using special measures said that they would not have been willing or able to give evidence without them. Witnesses using special measures were less likely to experience anxiety than those not using them and there was also some evidence that the measures also made cross-examination less distressing. In particular for victims of sexual offences their level of anxiety fell between two surveys from 22% (before introduction of special measures) to 12% following the introduction of special measures. The research also found that among the most important predictors of satisfaction among vulnerable or intimidated witnesses (including rape victims) was the feeling that they had been able to give their evidence accurately and had lower levels of anxiety or distress.

## Research on the effectiveness of video-recorded evidence-in-chief

Further Home Office research<sup>24</sup> has found that one of the key benefits of a video interview is enabling evidence to be recorded shortly after a complaint is made. This may produce a more detailed and accurate account than would otherwise be given in court.

While some have doubts about the effectiveness of video-recorded interviews and regard it as having less impact on a jury than live evidence, most agencies who were consulted by the researchers rated this measure as either 'very effective' or 'effective'. Significantly, although prosecutors were aware of the doubts about the impact of video-recorded evidence, none believed that it led to a lower conviction rate. Some Judicial respondents did, however, feel that a conviction was less likely. Earlier research by Davies (1999)<sup>25</sup> reviewing the evidence on the impact of televised testimony on jury decision making process concludes that, whilst jurors show a preference for live testimony, they do not appear to allow that preference to influence their decision making. Studies cited by Davies show that the medium of presentation of evidence had no overall impact on the proportion of guilty verdicts.

This is supported by recent research both in this country<sup>26</sup> and in Australia<sup>27</sup>. The research from Liverpool showed that where large plasma screens are used to present remote testimony, the impact of the evidence on the jury is stronger and it is less likely that there will be an acquittal compared with evidence displayed on small video units.

Some positive feedback has already been received following an ongoing pilot in South Yorkshire where video recorded evidence in chief is being used for sexual offences witnesses. There appears to be a general consensus that these videos have been very effective and have led to prosecutions where there otherwise would not have been any. There is also the view that they can be compelling especially if recorded straight after the event. However, some judges have considered that the interviews are often too long and are not wholly in favour of their use in such cases becoming routine. In one case the video was not used as it required substantial editing to remove inadmissible evidence. However, prosecution counsel later commented that they wished in hindsight that the video had been used, as the victim was not as good live as on the recording.

<sup>23</sup> Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar (2004) *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* Home Office Research Study No 283 and Home Office Research Findings 240

<sup>24</sup> Burton, M, Evans, R., and Sanders, A., (2006) *Are Special Measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* Home Office On-Line Report No. 01/06 and Home Office Research Findings No 270

<sup>25</sup> Davies, G., (1999) *The Impact of Television on the Presentation and Reception of Children's Testimony*, *International Journal of Law and Psychiatry*, 22, 241-256.

<sup>26</sup> Reported in the Law Society Gazette ([www.lawgazette.co.uk](http://www.lawgazette.co.uk)) on 8 December 2005.

<sup>27</sup> Taylor and Joudo (2005), *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology).

The Government considers that it is important to offer complainants in rape and sexual offence cases the full range of special measures. Therefore, we have announced that it is hoped to extend video-recorded evidence in chief to adult complainants in rape and serious sexual offence cases within the next 12 months.

## The proposals

### Admissibility of video-recorded statements

While we have made progress in the treatment of victims of sex offences in court, we consider that there is more that can be done. Prosecutors need to be able to use the best evidence available in prosecuting rape cases. Enabling the jury to see and hear a rape victim being interviewed at the time of the complaint by means of a video-recorded statement used as evidence in chief will usually provide more compelling and coherent evidence than evidence given in court several months later. This is a matter which the prosecutor is best placed to determine in any particular case- in the same way that he or she decides what other evidence to use as part of the prosecution case. Therefore, as is already the case for child witnesses in sex offence cases, we seek views on proposals to amend the Youth Justice and Criminal Evidence Act 1999 to provide that video-recorded statements for adult victims of serious sexual offences should be automatically admissible as evidence in chief, if the prosecutor wishes to use it, subject to the interests of justice (s27 (2) 1999 Act). However, whilst we believe that most of these complainants would benefit from these measures, the Government regards it as important that all witnesses retain the right to opt out of them if they wish to give evidence live in court. Therefore we seek views on the following proposals for serious sexual offence cases:

- the video-recorded statement of the complainant should be automatically admissible as evidence-in-chief;
- this will be subject to the victim agreeing that they wish to give their evidence in this manner and the court being satisfied that it would not otherwise be contrary to the interests of justice.

#### Question 8

Do you agree that the legislation on special measures should be amended to make video recorded statements by adult complainants in serious sex offences cases automatically admissible as evidence in chief, subject to the interests of justice test?

#### Question 9

Do you agree that victims of sex offences generally should continue to have the choice NOT to receive assistance from special measures?

## Supplementary questions

Secondly, we consider that prosecutors should have more discretion to use the video recorded evidence in the most effective way possible in court. The present legislation only permits additional questioning on any matter which, in the opinion of the court, has not been dealt with adequately in the video recording or requires the permission of the court for questions on a matter that has been covered in the recording. Consequently where a video is admitted as evidence-in-chief, usually, the first experience the witness will have of being questioned in court is during cross examination. Thus the witness is thrown into a cross examination “cold” rather than being “warmed up” by friendly questioning by prosecution counsel.

The origin of this provision is that in a general climate of resistance to the use of video-recorded evidence for child witnesses the aim was to prevent prosecution counsel from abandoning the use of the video-recorded evidence altogether in favour of live examination of the witness. However, while the intention of the legislation was to restrict rather than prohibit any live questioning by the prosecutor, in practice, such questioning rarely occurs.

Therefore, in order to assist the witness to ‘settle down’ the Government proposes that where a video-recorded statement is to be admitted as the witness’ evidence in chief, in serious sexual offence cases it should be normal practice before cross examination for the prosecutor to follow up the showing of the video in court, with a few short questions by the prosecutor to the witness such as asking if they can see and hear everyone in court clearly, whether they have anything to add to the video statement and whether they need a break.

This can be achieved within the terms of the existing legislation but it may be necessary to seek judicial agreement to issue a Practice Direction to establish this proposed practice as the norm and to prevent the development of ‘local’ arrangements in courts. This approach would also need to be included in revised CPS instructions to prosecution counsel.

We believe that such an approach will be beneficial to child witnesses in serious sexual offence cases as well as to adults but would welcome views on this proposal.

In addition to the need to assist the witness in the way described above, the Government believes that more can be done to improve the effectiveness of the complainant’s evidence. While the video-recording of an interview made at the time of the complaint will provide an immediate account of the incident as it will often have been conducted in the early stages of an investigation additional matters may arise later on in the course of police enquiries and on which the prosecutor ideally would wish to question the witness or perhaps seek clarification in order to maximise the effective presentation of the prosecution case. The prosecutor may wish to stop the video recording at a particular point and ask the complainant to elucidate a particular matter or perhaps ask further questions at the conclusion of the recording. We consider that decisions on such matters should be left to the prosecutor who has the responsibility for determining the best way to present his case. Therefore we would welcome views on whether the current legislative requirement to obtain the courts permission before such questioning can take place should be relaxed while introducing safeguards or criteria before such permission can be given. Alternatively the current legislative restriction could be repealed in respect of serious sexual offence cases leaving it entirely at the discretion of the prosecutor to decide whether to put questions to the witness in addition to the video recording. Views are sought on these options.

Again, as video-recorded evidence in chief is also available as a special measure for vulnerable witnesses, including children and potentially to other witnesses in fear or distress in all types of offence,

consideration needs to be given as to whether it would be appropriate to extend these proposed changes to the use of video recorded evidence in respect of all vulnerable or intimidated witnesses eligible for video recorded evidence in chief under the 1999 Act and to all other offences. On the one hand, such a flexible approach may produce a more coherent account from such witnesses, including children. But we also recognise that in order to ensure that child witnesses in particular are not subject to additional questioning, it may not be appropriate to relax the current restrictions for such witnesses. Your views on these proposals in respect of child witnesses and other vulnerable or intimidated witnesses are sought.

#### Question 10

Do you agree that guidance should be issued to promote the use of the existing provisions for limited additional questions for the purpose of “warming up” the witness, particularly in serious sexual offence cases?

#### Question 11

Should the prosecutor be given a broader discretion to ask supplementary questions of the complainant in serious sexual offence cases?

#### Question 12

If so, should this be achieved by:

- (a) relaxation of the present restrictions but with some safeguards or criteria; or
- (b) by a repeal of the present restrictions?

#### Question 13

Do you consider that either Option (a) or Option (b) in Question 12 should also apply to vulnerable witnesses, including children and other witnesses in fear or distress and to all offences?

#### Question 14

If so, do you consider that there should be any particular safeguards for other categories of witness, such as children if these proposals applied to them and if so, what would you suggest?

# Annex A: Partial public sector Regulatory Impact Assessment

## **1 Title**

The title of the proposal is, Convicting Rapists and Protecting Victims – Justice for Victims of Rape.

## **2 Purpose and Intended Effect**

Rape is a serious crime. The Government is determined to do everything within its power to reduce the number of rapes and, where it does take place, to bring offenders to justice.

Fewer than 6 per cent of all rapes reported to the police result in a conviction. The public consultation document “Convicting Rapists and Protecting Victims – Justice for Victims of Rape” proposes a number of changes to criminal procedure, designed to secure a greater number of convictions in rape trials, without prejudicing the rights of defendants to a fair trial.

The proposals, if translated into legislation, will have a favourable effect on the conduct of rape trials and so help to safeguard the interests of rape victims and the victims of other sexual assaults. This is an issue of major public and political interest. If nothing were done to address the situation, the confidence of victims in the criminal justice system would be severely undermined.

## **3 Options**

The options identified are as follows:

### **Option 1**

Do nothing.

### **Option 2**

Pursue the proposals in the consultation paper for reform of the law.

Under Option 1, public sector staff would not be expected to do anything differently.

The present consultation paper complements a wide ranging package of measures which the Government is taking to address the problem of rape. The most recent example is the launch, on 14 March 2006, of the National Advertising Campaign on consent. It is unlikely that any groups other than victims would be specifically affected by the proposals, and in their case the impact would be beneficial.

## 4a Benefits

Option 1 by leaving the present unsatisfactory situation unaddressed would have no benefits. Option 2 would primarily benefit witnesses, by making them more confident that their abusers' trials would be resolved satisfactorily. It would also ensure that convictions were secured in more cases where they were appropriate, and so have a positive effect on public confidence in the criminal justice system generally.

## 4b Costs

Option 1 would be cost neutral.

Option 2 will cost a total of about £800,000 per annum, as set out in more detail in the following tables. The proposals on capacity and hearsay evidence are assessed as cost neutral. The cost of the proposals will lie in the proposals on special measures and general expert evidence. These costs will fall on the Crown Prosecution Service in prosecution experts' time, and on HM Courts Service in court time.

Costs for the first three years are set out in the tables below to illustrate the ongoing/recurring costs of the proposal. It will be noted that, after the proposals had bedded in, a significant reduction in the prosecution experts' costs is anticipated. Resource issues have been covered by agreement between Departments.

## 4c Other Assessments

The proposals have no known race equality, rural proofing, environmental or health impact.

	Public Sector Staff	
	Prosecution experts	HM Courts Service
Time impact per person (hours per year [Y])	Y1 1 Y2 1 Y3 1	
Total time impact (hours per year)	Y1 126 Y2 50 Y3 10	
Total staff cost (£ per year)	Y1 £5,567 Y2 £2,268 Y3 £454	
Non-staff costs (per year) Prosecution Costs/Legal Aid	Y1 £502,214 Y2 £456,297 Y3 £436,832	Y1 £308,000 Y2 £308,000 Y3 £308,000
Total cost for all staff groups (per year)	Y1 £810,214 Y2 £764,297 Y3 £744,832	

The information is summarised in the following table:

Costs (£m) – figure	Year 1	Year 2	Year 3
Option 1	£nil	£nil	£nil
Option 2	£810,214	£764,297	£744,832

## 5 Monitoring and evaluation

The Government has not yet decided to legislate as set out in the consultation paper and will give further consideration to the issues when the public consultation period is complete. Should it decide to legislate, the effect of the proposals would be monitored primarily for evidence of improved conviction rates in rape cases and other cases of sexual abuse.

## 6 Contact Point

The following officials can answer enquiries about the proposals or partial Regulatory Impact Assessment:

Capacity proposal: Matthew Laxton, 2 Marsham Street, London SW1 020 7035 0495

General expert and hearsay evidence proposals: Stephen Jones, 2 Marsham Street, London SW1, 020 7035 8456

Special measures proposals: Stephen Underwood, 2 Marsham Street, London SW1, 020 7035 8474.

# Annex B: Consultation Information

## List of Persons and Bodies Consulted

Association of Chief Police Officers  
British Medical Association  
Council of Her Majesty's Circuit Judges  
Criminal Bar Association  
Crown Prosecution Service  
General Council of the Bar  
General Medical Council  
Institute of Legal Executives  
Justice  
Law Society of England and Wales  
Liberty  
Lord Chief Justice of England & Wales  
Neil Kibble  
Police Superintendents' Association of England and Wales  
Police Federation of England and Wales  
Professor Andrew Ashworth  
Professor Di Birch  
Professor Richard Card  
Professor Liz Kelly  
Professor David Ormerod  
Professor John Spencer  
Professor Jennifer Temkin  
Rape Crisis Co-ordination Group  
Rights of Women  
The Survivors Trust  
Victim Support  
Whitehall Prosecutors Group  
Womens' National Commission

## The Consultation Criteria

The Code of Practice on Written Consultation issued by the Cabinet Office recommends the following criteria:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full code of practice is available at:

<http://www.cabinet-office.gov.uk/regulation/Consultation/introduction.htm>

## Consultation Coordinator

If you have any complaints or comments about the consultation process only, you should contact the consultation coordinator Bruce Bebbington by email at:

[bruce.bebbington@homeoffice.gsi.gov.uk](mailto:bruce.bebbington@homeoffice.gsi.gov.uk)

Alternatively, you may wish to write to:

Bruce Bebbington,  
Consultation Coordinator  
Performance and Delivery Unit  
Home Office  
2 Marsham Street  
London SW1P 4DF

# Annex C: Research on Myths and Misconceptions about Sexual Assault

Below is a list of research on the question of myths and misconceptions in sexual assault cases. Please note, most of these resources are American.

Bayliff, C. (2000). Using expert witnesses in sexual assault cases to help you prove your case and support the victim. In *Understanding sexual violence: Prosecuting adult rape and sexual assault cases*

Benitez, J. (2001, June). Why expert witnesses are needed in sexual assault cases. Paper presented at the National Training Center on Domestic and Sexual Violence conference entitled "Expert Witnesses for Domestic Violence and Sexual Assault Cases: Why? Who? When? How?" Austin, Texas

Burt, M. R. (1994). Rape myths and acquaintance rape. In A. Parrot & L. Bechhofer (Eds.). *Acquaintance rape: The hidden crime* (pp. 26-40). New York: John Wiley & Sons

Ellison, L. Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases (2005) 9 E&P 239 – 268

Ferraro, K. J. (2003). The words change, but the melody lingers: The persistence of the battered woman syndrome in criminal case involving battered women. *Violence Against Women*, 9, 110-129

Fischer, K. (1989). Defining the boundaries of admissible expert psychological testimony on rape trauma syndrome. *University of Illinois Law Review*, 3, 691-734

Frazier, P. & Borgida, E. (1988). Juror common understanding and the admissibility of rape trauma syndrome evidence in court. *Law & Human Behavior*, 12, 101-122

Frazier, P., & Borgida, E. (1992). Rape trauma syndrome: A review of case law and psychological research. *Law & Human Behavior*, 16, 293-311

Gaines, K.W. (1997). Rape trauma syndrome: Toward proper use in the criminal trial context. *American Journal of Trial Advocacy*, 20, 227-245

Garrison A.: 'Rape Trauma Syndrome: A Review of the Behavioral Science Theory and its Admissibility in Criminal Trials' (2000) 23 *American Journal of Trial Advocacy* 591

Kelly, L, Lovett J. and Regan L.: *A Gap or a Chasm? Attrition in Reported Rape Cases* HORS 293 (Home Office: London, 2005)

Lonsway, K. A., & Fitzgerald, L. F. (1994). Rape myths: In review. *Psychology of Women Quarterly*, 18, 133-164

Massaro T.: 'Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony' (1985) 69 *Minnesota Law Review* 395

Rumney P. and Morgan Taylor, M: 'The Use of Syndrome Evidence in Rape Trials' (2002) 13 CrimL Forum 471

Spanos, N. P., Dubreuil, S. C., & Gwynn, M. I. (1991-92). The effects of expert testimony concerning rape on the verdicts and beliefs of mock jurors. *Imagination, Cognition and Personality*, 11 (1), 37-51

Stewart M., Dobbin S. and Gatowski S., "Real Rapes" and "Real Victims": The Shared Reliance on Common Cultural Definitions of Rape (1996) 4 Fem LS 159

Temkin, J: 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 JLS 219,235

Tetreault, PA: Rape Myth Acceptance: A case for providing Educational Expert Testimony in Rape Jury Trials' *Behavioral Sciences & the Law* Vol. 7, No. 2, pp. 243 – 257 (1989)

# Annex D: The Use of General Expert Evidence in the USA

## Introduction

This annex provides a short overview of the prosecution use of general expert evidence in the USA, where this evidence is called to deal with the psychological reactions of rape and domestic violence victims, as well as dispelling the myths and assumptions which surround these offences. This evidence is most commonly used when complainants refuse to give evidence or withdraw their support for a prosecution in domestic violence cases<sup>29</sup>. General expert evidence is used in rape and sexual assault cases, but not to the extent that it appears in domestic violence cases.

## The Legal System in the USA

The US legal system is based on our system, and is known as a 'common law jurisdiction.' This means that the law is a mixture of statute and precedent that is based on the judgments given by the appeal courts (known as 'common law'). Each state is responsible for making its own laws, either within the state legislature or via the rulings of the 'state courts'. In other words, each US state is a separate 'jurisdiction'.

## Legislation

Certain states have enacted specific statutes that explicitly permit the admission of domestic violence expert testimony. The relevant provisions in the state law of California and Oklahoma sections are printed below:

### California – Section 1107 Evidence Code

*1107. (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.*

*(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on intimate partner battering and its effects shall not be considered a new scientific technique whose reliability is unproven.*

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<sup>29</sup> Such jurisdictions include the state of California, as well as specific counties, cities or districts within Connecticut, Colorado, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oklahoma, Tennessee, and Washington State. Other jurisdictions within Florida, Illinois, Iowa, New York, and Texas also admit expert witness testimony in the prosecution of domestic violence. However the practice has not yet become routine in all states. Please see page 3, fn 5 in M Dempsey – The use of Expert Witness Testimony in the prosecution of domestic violence, CPS website, published 2004

## Oklahoma – Code of Criminal Procedure

### Rule 22-40.7 Expert Testimony – admissibility

*In an action in a court of this state, if a party offers evidence of domestic abuse, testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behaviour and perception of the person being abused shall be admissible as evidence.*

## Case Law

Below are examples of rape cases in which the use of general expert evidence was upheld by the appellate courts in the U.S.A..

*State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986) – the defendant was convicted of raping a woman, whom he met at a bar. At trial, he claimed that they engaged in consensual sexual acts. The prosecution called a psychologist who had examined the complainant to determine her psychological condition and to recommend treatment. The psychologist concluded that the complainant's "condition was consistent with all of the symptoms of the Posttraumatic Stress Disorder known as rape trauma syndrome." The Court held that rape trauma syndrome was a proper subject for expert testimony in a rape case, when the only issue between the parties was whether the complainant consented. A qualified expert may explain RTS to the jury and express an opinion that the victim suffers from the syndrome, but may not testify otherwise as to the witness' credibility or believability.

*State v. Kinney*, No. 99-122 (Vt. Oct. 13, 2000) – the defendant was convicted of kidnapping and rape. At trial, an expert had testified about rape trauma syndrome and the typical behaviours of adult rape victims. It was held that the trial court had properly admitted the expert's testimony. Expert evidence of rape trauma syndrome and the associated typical behaviour of adult rape victims were admissible to assist the jury in evaluating the evidence and, frequently, to respond to the defendant's claim that the victim's behaviour after the alleged rape was inconsistent with the victim's claim that she was raped. Rape trauma syndrome is professionally recognized as a type of Posttraumatic Stress Disorder, and the behavioural characteristics of rape victims had been the subject of numerous professional studies. The expert had never interviewed the victim and offered no opinion as to whether the victim suffered from rape trauma syndrome or exhibited any of the behaviour of a rape victim.

# Annex E: Summary of Questions

## Questions in Chapter 3

### Question 1

Does the law on capacity need to be changed?

### Question 2

Should there be a statutory definition of capacity?

## Questions in Chapter 4

### Question 4

Do you agree with the proposal outlined in this chapter?

### Question 5

Are there alternative ways to present juries with a balanced picture concerning the behaviour of victims after incidents of rape?

## Questions in Chapter 5

### Question 6

Which is your preferred option?

### Question 7

What are the reasons for your preference?

## Questions in Chapter 6

### Question 8

Do you agree that the legislation on special measures should be amended to make video recorded statements by adult complainants in serious sex offences cases automatically admissible as evidence in chief, subject to the interests of justice test?

### Question 9

Do you agree that victims of sex offences generally should continue to have the choice NOT to receive assistance from special measures?

Question 10

Do you agree that guidance should be issued to promote the use of the existing provisions for limited additional questions for the purpose of “warming up” the witness, particularly in serious sexual offence cases?

Question 11

Should the prosecutor be given a broader discretion to ask supplementary questions of the complainant in serious sexual offence cases?

Question 12

If so, should this be achieved by:

- (a) relaxation of the present restrictions but with some safeguards or criteria; or
- (b) by a repeal of the present restrictions?

Question 13

Do you consider that either Option (a) or Option (b) in Question 12 should also apply to vulnerable witnesses, including children and other witnesses in fear or distress and to all offences?

Question 14

If so, do you consider that there should be any particular safeguards for other categories of witness, such as children if these proposals applied to them and if so, what would you suggest?



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