



Rights of Women response: A Consultation on the CPS Policy for Prosecuting Cases of Rape

About Rights of Women

Rights of Women aims to achieve equality, justice and respect for all women. Rights of Women advises, educates and empowers women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers¹.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

Rights of Women provides specialist legal advice to women who have experienced sexual violence as well as to those who support them. The issues we raise in this consultation come directly from the experiences of the women we support. Rights of Women's has recently revised and reprinted **From Report to Court: A handbook for adult survivors of sexual violence**, 10, 000 copies of which will be distributed to survivors of sexual violence and support organisations as part of the Government's **Cross-Government Sexual Violence and Abuse Action Plan**².

Overview of Rights of Women's Position on a Consultation on the CPS Policy for Prosecuting Cases of Rape

Before engaging in the substantive questions asked by this consultation we think it is important to highlight the issues surrounding the prosecution of serious sexual offences in England and Wales.

Evidence from the British Crime Survey indicates that 24% of women have experienced sexual violence since the age of 16³. In the vast majority of

¹ For advice on family law, domestic violence and relationship breakdown telephone 020 7251 6577 (lines open Tuesday to Thursday 2-4pm and 7-9pm, Friday 12-2pm). For advice about sexual violence, immigration or asylum law telephone 020 7251 8887 (lines open Monday 11am -1pm and Tuesday 10am -12noon).

² Dave Gee MBE, Rape Advisor to ACPO and Home Office has said that "From Report to Court is an essential guide for victims of rape or sexual assault. It provides clear and accessible information which will assist survivors who are going through the criminal justice system and represents a major step forward towards gaining victim confidence in this difficult area." For further information about From Report to Court visit our website at www.rightsofwomen.org.uk.

³ Prevalence of intimate violence by category among adults aged 16 to 59, *Homicides, Firearm Offences and Intimate Violence 2005/2006* (Supplementary Volume 1 to Crime in England and Wales 2005/2006), British Crime Survey.

cases women do not report incidents of sexual violence to the police⁴. Of the crimes that are reported two-thirds are dropped at the investigative stage and only 23% are prosecuted.⁵ Conviction occurs in less than 6% of cases. 54% of female victims of serious sexual assault reported that a partner / spouse or ex-partner / spouse had been the offender. 40% of female victims reported that a serious sexual assault had been committed by someone else known to them. However, cases where the victim and suspect were in a relationship were most likely to have no further action taken by the police or discontinued by the CPS⁶. Consequently, the current mechanisms for investigating and prosecuting sexual violence are failing victims and specifically failing the majority of victims who know their perpetrator.

It is important to consider the context in which the CPS policy for prosecuting rape cases operates, because while improvements have been made in the prosecution of sexual violence, it is clear that the current situation is far from adequate. Rights of Women believes that this consultation process presents an opportunity to revise the rape prosecution policy in a way that goes beyond simply updating it, but to make further progress in prosecuting perpetrators and protecting victims.

Before moving on to answer the specific questions raised by the consultation we will first consider the ambit of the policy and whether it is consistent with either the law on sexual offences or current investigative practice.

Rights of Women believes that it is unhelpful and counterproductive to separate the prosecution of rape cases from that of other, serious, sexual offences. The **Sexual Offences Act 2003** (the SOA 2003) introduced a new definition of rape as well as the new offences of assault by penetration and causing someone to engage in sexual activity without consent. Parliament imposed the same maximum sentences on these offences (where there is non-consensual penetration of the vagina or anus or of the mouth with a penis) making it clear that they were equally serious. The Sentencing Guidelines Council has also adopted this position stating:

“It is impossible to say that any one form of non-consensual penetration is inherently a more serious violation of the victim’s sexual autonomy than another. The Council therefore has determined that the sentencing starting points established in *Millberry* should apply to all non-consensual offences involving penetration of the anus or vagina or penile penetration of the mouth”⁷.

⁴ 91% of women who have been sexually assaulted did not inform anyone of the violence that they had experienced, Painter, 1991. Similar responses were given to researchers in British Crime Survey (see above).

⁵ Home Office Study available on the Child and Woman Abuse Studies Unit’s website www.cwasu.org

⁶ Home Office figures available on the Child and Woman Abuse Studies Unit’s website www.cwasu.org.

⁷ Sexual Offences Act 2003, Definite Guideline (April 2007), page 23.

The **Guidance on Investigating Serious Sexual Offences (2005)** and **(2008, forthcoming)**⁸ does not isolate rape from other offences preferring instead to set a standard for the investigation of “serious sexual offences” which are defined as:

“...any of the following offences committed against a person, either male or female:

- Rape;
- Sexual assault by penetration;
- Sexual assault where the assault is particularly serious or features of the offence are aggravated;
- Causing a person to engage in sexual activity without consent;
- Any other offence of a sexual nature deemed especially serious by the investigating officer (IO);
- An attempt to commit any of the above offences.”⁹

The policy goes on to state that sexual offences may be considered to be serious offences where the victim is particularly vulnerable or where there is a pattern of offending.

The current CPS policy creates a situation where a victim of rape and a victim of assault by penetration receive a different service from the CPS despite the fact that Parliament, the courts and the police consider those offences to be equally serious. Such differentiation cannot be maintained. Rights of Women therefore believes that the CPS should replace the existing policy on prosecuting rape cases with a policy that covers all serious sexual violence. Rights of Women believes that adopting the same definition of serious sexual violence as is currently used by the police would result in greater consistency in the investigation and prosecution of such offences and result in a considerable improvement in the service that the CPS offers victims of sexual violence.

1. Is there any part of the Rape Policy Statement you strongly disagree with?

Following the implementation of the Victims’ Code the CPS is now obliged to tell a victim if the Prosecutor decides that:

- there is insufficient evidence to charge (where there has been a full evidential report from the police);
- a case is dropped; or
- it is necessary to substantially alter charges.

The CPS also has the obligation to inform a victim if it is not in the public interest to charge a suspect (but there is sufficient evidence) although this is not clear from paragraph 4 of section 10 of the policy. In addition to writing to the victim to explain the decision, the CPS is also obliged to offer a meeting. The policy states that the purpose of the meeting is “to explain personally the reasons for the decision.”

⁸ Produced on behalf of the Association of Chief Police Officers by the National Centre for Policing Excellence.

⁹ Guidance on Investigating Serious Sexual Offences (2005) page 10.

Rights of Women believes that the meeting should offer the victim an opportunity to discuss the decision with the Prosecutor rather than simply having it explained to her (or him). One of the greatest causes for concern that women who contact our advice line have is the decision to charge. The Prosecutor's Pledge states that the Prosecutor will "Take into account the impact on the victim or their family when making a Charging decision". However, unless this issue is specifically addressed in the Victim Impact Statement (where one is available) there is no mechanism through which a victim can make their views known.

Rights of Women agrees with Louise Ellison that:

"The inability of prosecutors to address potential evidential weaknesses first hand will inevitably impact on the effectiveness of case preparation. With no opportunity to explore inconsistencies or possible omissions prosecutors must construct cases based on incomplete information and are disadvantaged when it comes to anticipating the discrediting strategies of the defence. *Alternatively, prosecutors may simply determine that there is no realistic prospect of a conviction having assessed the complainant's initial account unreliable and the case drops out of the criminal justice system*"¹⁰.

The then Attorney-General, Lord Goldsmith Q.C., recommended that prosecutors should be able speak to witnesses about matters of evidence and proposed the introduction of pre-trial witness interviews for this purpose. Lord Goldsmith stated the function of such interviews would be:

"to establish whether or not the evidence of the witness already provided in the police statement is reliable, accurate or complete, so that a properly informed decision can be made about the future of the case, including whether a charge should be maintained or dropped."¹¹

Rights of Women believes that the nature of sexual offences means that their prosecution presents unique (but not insurmountable) challenges particularly where there has been either a previous relationship or previous contact with the suspect (as occurs in the majority of cases). Consequently, we think that there is value, for the CPS and for victims, in offering meetings in cases where the Prosecutor is *minded* not to charge because of concerns that the evidence obtained does not meet the evidential test. Such meetings would give the victim the opportunity to express her (or his) views and would enable the Prosecutor to address any evidential weakness and assess credibility first hand. Such meetings would be in line with recent developments, specifically the meetings that may now be offered post-charge. Rights of Women believes that giving victims input into the decision would make them more likely to accept a negative decision as well as resulting in decisions to charge in cases that may previously be considered to have failed the evidential test.

¹⁰ *Promoting effective case-building in rape cases: a comparative perspective*, Louise Ellison, Crim. L.R. 2007, Sep, 691-708 (emphasis added).

¹¹ The Rt Hon. Lord Goldsmith Q.C., *Pre-Trial Witness Interviews by Prosecutors Report* (Office of the Attorney-General, 2004).

2. Do you think the law has been explained adequately?

Rights of Women believes the explanation of rape and, in particular, the presumptions, intoxication and consent (following **Bree**) have been clearly and appropriately explained. However, Rights of Women believes that it might be useful to present a brief explanation of the rules governing the admissibility of evidence in criminal proceedings. Many victims do not understand that not all of the evidence the police obtain in an investigation can be presented to the court at any subsequent trial. Consequently, it might be useful to refer to the fact that there are strict rules about the admissibility of certain types of evidence (such as hearsay or bad character evidence) that prevents it from being part of the Crown's case. We believe that a reference to admissibility, however brief, would assist in managing victim expectations.

3. Do you agree with the way in which we have tackled myths and stereotypes?

Research carried out by Child and Women Abuse Unit concluded that part of the reason for falling conviction rates is that police and prosecutors overestimate the scale of false allegations made by victims. This creates and feeds into a 'culture of scepticism', which results in poor communication and a loss of confidence between victims and the police¹². While useful reference is made to some of the myths surrounding sexual violence, Rights of Women believes that this area of the policy could be strengthened by dealing explicitly with the 'culture of disbelief'.

In terms of the 'culture of disbelief' Rights of Women believes that some reference should be made to the fact that only between 3-8% of rapes reported to the police are false allegations¹³ and that there is no evidence that there are higher rates of false reporting for rape in comparison to other crimes. It is as important to address 'rape myths' that persist in criminal justice agencies as it is to address those that persist in the general public. Indeed, it is hoped that a reference made to the overestimation of false allegations that challenges this assumption would serve as an important reminder to prosecutors of the importance of questioning their own attitudes to victims and credibility.

Finally, Rights of Women also believes that paragraph 3 of section 1 (one of the sections that deals with myths) could be strengthened by reference to relevant statistics, for example, the percentage of cases where the perpetrator is a victim's current or former partner or otherwise known to him / her. Many of the women we support do not identify their experiences as being criminal offences (including rape) because they have occurred within the context of a relationship. This view is often reinforced by the response that these women receive from the police and other agencies in the criminal justice system. It is hoped that by directly referring to relevant statistics, rather than simply to "the majority of cases..." those who read the policy will have a clearer

¹² *A Gap or a Chasm? Attrition in reported rape cases* L Kelly, J Lovett and L Regan, Child and Woman Abuse Studies Unit available at www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf

¹³ Ibid

understanding of sexual violence and how rare the paradigmatic offence of 'stranger rape' is.

4. Do you think the Rape Policy Statement adequately addressed the issues of victim support?

The provision of adequate support to victims has been shown to be a significant factor in successful rape prosecutions¹⁴. Consequently, Rights of Women welcomes the increased reference to measures that support victims in the revised policy (for example, in relation to the discussion of special measures or the role of Independent Sexual Violence advocates).

However, Rights of Women believes that there is room for further improvement in relation to the references to pre-trial meetings between prosecutors and victims. Rights of Women welcomes the introduction of meetings between prosecutors and victims for the reasons outlined above. However, we want to ensure that such meetings are not a cause for concern for victims. Consequently, Rights of Women believes that further details should be given about these meetings, who will be present and what their purpose is in the policy. For example, at meeting with SVAAN on 16th September 2008¹⁵ Jonathan Bushell from the CPS Policy Directorate stated that the meetings would be attended by two Specialist Prosecutors, that they would be recorded and that victims could have a supporter present if they wished. Rights of Women is of the view that explicit reference to these and any other safeguards should be made in the policy so that victims (and support organisations) are aware of the purpose of the meeting and how they can prepare for it.

5. Is there any further support we can offer victims for them to achieve their best evidence and prevent retractions?

In Rights of Women's experience, one of the most significant factors that results in victim retractions post-charge is intimidation by the perpetrator and / or his family or friends. Rights of Women is therefore of the view that explicit reference in the policy should be made to:

- situations in which the CPS will consider appealing a decision to grant a defendant bail; and
- that a robust approach will be taken to breaches of bail conditions.

6. Have you any other comments about the Rape Policy statement?

Specialist Rape Prosecutors / Area Rape Co-ordinators

Rights of Women welcomes the training and use of Specialist Rape Prosecutors and believe that their role should be expanded to cover serious sexual violence for the same reasons that we would like there to be a policy for the prosecution of serious sexual violence (rather than just for rape).

¹⁴ *Investigating and detecting rape*, A Feist, J Ashe, J Lawrence, D McPhee and R Wilson (2007) Home Office Online Report 18/07, page 87.

¹⁵ SVAAN is the Sexual Violence Action and Awareness Network run by the Lilith Project. It is a network of organisations, including Rights of Women, that provide support services to women who have been raped or sexually assaulted.

Rights of Women believes that the current policy could be further strengthened with reference to the role of Area Rape Co-ordinators and their responsibilities. Rights of Women is also of the view that Area Rape Co-ordinators should be given the ability (and the resources) to check and continuously review the quality of decisions made in relation to rape and other serious sexual violence cases.

Inclusion

Rights of Women believes that that discussion of particular groups of victims who may face additional barriers in reporting offences and supporting prosecutions, at paragraphs 3-11 of section 1 of the policy, is a useful way of reassuring those groups that the CPS understands diversity issues and is prepared to take steps to meet the need of all victims.

Missing from the groups discussed, however, are those with an insecure immigration status or limited leave to remain in the UK. Those who have leave¹⁶ as a spouse or refugee and those who have an insecure immigration status, including women who have been trafficked into the UK for the purposes of sexual exploitation (and the organisations that support them), may have particular concerns about the way that their case may be handled and the support they are entitled too. It would, therefore, be useful to add a paragraph or sentence at this point in the policy to reassure these groups that the criminal law of England and Wales and the rape prosecution policy should protect all victims within the jurisdiction, regardless of their current immigration status.

Language

The policy refers throughout to “victims” of rape, however, we know from our work in providing advice to women who have experienced rape or other sexual violence that many “victims” prefer to be referred to as “survivors”. The CPS may, therefore, want to consider using alternative terminology in the policy, such as ‘survivor’ or ‘complainant’. Whatever term is used we would advocate the inclusion of a paragraph at the beginning of the policy to explain the terms used and to acknowledge the different views that exist in this area.

Conclusion

Rights of Women welcomes the opportunity to comment on these issues and urges the Crown Prosecution Service to consider the issues outlined above.

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October 2008**

¹⁶ Permission to remain in the UK under the Immigration Rules.