

Rights of Women Response to Convicting Rapists and Protecting Victims – Justice for Victims of Rape

Background

Rights of Women is an Industrial and Provident Society, which was founded in 1975 to promote the interests of women in relation to the law. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work. We run two national confidential legal advice lines for women provided by women, one general advice line specialising in family law issues, including domestic violence, and another on criminal law and procedures in relation to sexual violence.¹

General Overview

As an organisation which provides legal advice to women who have been subjected to sexual violence, we welcome the opportunity to be part of this consultation exercise on the law and legal processes dealing with rape. Throughout this consultation response we use the term “victim” because this is the word used by the Sexual Offences Act 2003 and that used in legal proceedings. However, we acknowledge that many women prefer the term “survivor”.

As a feminist organisation dedicated to providing services and resources for women by women, we view the issue of sexual violence through a gendered lens. When we refer to the term “sexual violence” we do so in the recognition that all available evidence indicates that the majority of victims are female. We therefore define such violence as a form of gender-based violence, to be understood within the framework of violence against women. In this regard we endorse the definition of violence against women contained in the United Nations Declaration on the Elimination of Violence against Women which is taken to mean ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’ (Article 1).

Consent and Capacity

The issue of consent is pivotal in many cases of contested rape. Whilst the Sexual Offences Act 2003 (SOA) brought much needed clarity to the law on rape and other sexual violence, since its enactment the issues of consent and capacity have become blurred. This is particularly so in the case of voluntary intoxication.

¹ Sexual Violence and Criminal Law Legal Advice Line: 020 7251 8887 (open Mondays 11am-1pm and Tuesdays 10am-12pm). Legal Advice Line: 020 7251 6577 (open Tuesdays, Wednesdays and Thursday 2–4pm and 7–9pm and Friday 12–2pm).

In all contested rape cases the key issue will be whether the victim consents and not her capacity. However, when voluntary intoxication is an issue there is a tendency to view the issue of consent as one of capacity.² A woman who has been drinking alcohol does not automatically lose the ability to consent to sexual intercourse. Therefore if a woman who is intoxicated is aware of what she is consenting to her consent is valid.

There may be other cases where a victim is so intoxicated that she cannot consent because she has no understanding of what is happening or does not understand to what she is consenting. As Prof. Temkin suggests in her response to this consultation, this issue should be clarified in the statute. In addition, it appears that there may need to be clarification and strengthening of the SOA presumption which assumes the absence of consent where the victim is unconscious or sleeping (section 75(2)(d) SOA). In such situations, as with the case of *R v. Dougal* (2005) at Swansea Crown Court, the victim cannot consent. Rights of Women believe that unconsciousness (for any reason) should be a conclusive presumption.³ We urge the Government to consider reclassifying this rebuttable presumption as a conclusive presumption. We reject arguments based on criminalising partners who mistakenly believe in consent due to the victim's movement or noise whilst unconscious or sleeping. Consent must not be viewed as a one-off. Irrespective of whether consent has been given previously it must still be given for subsequent acts.

Cases where voluntary intoxication prevents a victim from expressing her non-consent should not be dealt with as an issue of capacity. Here, a victim does not consent and as *Malone*⁴ made clear, "there is no requirement that the absence of consent be demonstrated or communicated" for the crime to have occurred. In line with Professor Jennifer Temkin's response to this consultation, Rights of Women urges the Government to incorporate this highly important principle into the Sexual Offences Act 2003.

The key factor will always be whether the victim consents, which in cases of voluntary intoxication may require an assessment of the victim's awareness and understanding of the situation. It is our opinion that there is no reason why the SOA cannot be interpreted in the above way. However, there is a considerable amount of confusion surrounding the issue of consent, particularly in relation to intoxication and to what end capacity should be examined.

Rights of Women believe that more can be done by not only the courts and lawyers but also by the police, to improve protection of and justice for rape victims. Our service users have reported an overwhelmingly negative experience of the criminal justice system. The attitudes of police officers are an important recurring issue, and frequent complaints include officers dismissing the prospects of a conviction when the perpetrator is a partner or

² Please see the break down of intoxication examples provided by Prof. Jennifer Temkin in her response to this consultation.

³ See Prof. Jennifer Temkin's response to this consultation.

⁴ [1998] 2 Cr. App. R. 447.

former partner or being told it is not worth proceeding when it is the victim's word against that of the perpetrator. These, however, are some of the most typical examples of rape cases, and contested rapes almost always revolve around the differences between the word of the victim and defendant.

The experience of our service users, backed up by recent Home Office research,⁵ is that the definition of consent is not properly understood by criminal justice practitioners and the presumptions (both conclusive and rebuttable) are rarely used.⁶

Rights of Women believe that rather than seeking to remedy the current problems with the implementation of the definition of consent, the Government should focus on ensuring that criminal justice agencies are fully aware of and understand the current SOA. There is a clear need for the police, lawyers and judges and other criminal justice officials to be trained on the issue of consent, both in general and in relation to voluntary intoxication. More needs to be done to ensure that the theoretical clarity of the SOA is a reality in practice.

Expert Evidence

Rights of Women has advocated the use of expert evidence in sexual violence cases. As we noted above, research has indicated that rape myths pervade the public perception of rape and rape victims. For example a recent Amnesty International poll found that a third of people believed that if a woman is flirtatious she is partially or totally responsible for being raped and more than a quarter (30%) believed that a woman was partially or totally responsible for being raped if she was drunk.

These attitudes are particularly disturbing in the context of prosecuting rapists given that potential jurors are drawn from the general public. These attitudes need to be countered. We believe that expert evidence in rape trials can have a vital role in dispelling rape myths. For example the reactions of rape victims are not a matter of common sense, and to reduce them to such fails to acknowledge the complexities of rape and its consequences. Rights of Women therefore supports the introduction of expert evidence in sexual violence trials. However, we are not convinced that the proposals contained in the consultation document go far enough.

Firstly, we are not convinced that expert evidence should be restricted to only to rape. We believe that it should be possible to adduce expert evidence in all cases of sexual violence, and not simply limited to cases of rape. In principle it is difficult to justify the use of such evidence in only one of a continuum of sexual violence offences. In practice this artificial division is out of line with the Government's policy of parity between rape and assault by penetration. In addition under the proposed limitation charging decisions will impact heavily on the admissibility of expert evidence. If the prosecution chooses to under-charge a defendant or reduce charges, this would effectively withdraw the use of expert evidence. We fail to see how this would meet the aims of convicting

⁵ *Sexual Offences Act 2003: A stocktake of the effectiveness of the Act since its implementation* (Home Office, 2006).

⁶ *Sexual Offences Act 2003: A stocktake of the effectiveness of the Act since its implementation*, para 46, where one judge stated that he was yet to discover a case where the presumptions had arisen.

rapists and ensuring justice for the victims of rape. Further, where the defendant is charged with rape and sexual assault in the alternative, the limitation of expert evidence to the rape charge only would be nonsensical and create significant difficulties.

Secondly, we are not convinced that expert evidence should only be admissible to provide general information without reference to the victim or case in hand. As the consultation notes, the function of an expert is to give an opinion upon an issue in the case and this is the basis for adducing other types of expert evidence. We believe that limiting expert evidence to a hypothetical victim and situation, without examining the actual victim or the actual circumstances, unnecessarily limits the impact and usefulness of expert evidence in rape trials.

Rights of Women, further believes that should the Government decide to allow expert evidence in cases of sexual violence, it must also do so in relation to domestic violence. We believe that the arguments for allowing expert evidence extend to all forms of violence against women. These issues, including victim's reactions to gendered violence, are not issues that members of the public can be expected to know about. Indeed, expert evidence provided by those who have the knowledge and experience of supporting women who are victims of violence, can play a vital role in challenging stereotypes and perceptions of violence against women.

In relation to 'alternatives' to present juries with a balanced picture of the behaviour of victims after incidents of rape, Rights of Women suggests that consideration could be given to developing a limitation on defence questioning. Clearly this requires careful consideration and must comply with human rights standards as set out in the Human Rights Act 1998, in particular those on fair trial. We suggest that the provisions on asking questions in relation to the victim's previous sexual history under section 41 Youth Justice and Criminal Evidence Act 1999 could provide a useful starting point for thinking about such a restriction (please see below for our comments on section 41).

Evidence of First Complaint

Echoing much research in this area, many of our service users do not report sexual violence immediately. In many cases there can be a significant delay in disclosing sexual violence. Whilst delay may have consequences for evidence gathering, we do not believe that the delay should in itself provide the basis for negative inferences to be drawn.

Rights of Women believes it is necessary to remove the current requirement that a complaint needs to be made as soon as could be reasonably expected after the alleged conduct. We believe that Option 4 as outlined in the consultation document is the best suited to meeting this end. It is important the jury are not encouraged to draw negative inferences from a delay in reporting, an inference which can be bolstered by the focus on reasonableness of the time between the incident and reporting to the police. It

is equally important, in sexual violence cases that all complaints in relation to sexual offences are made admissible.

Further, Rights of Women is of the opinion that the issue of delayed reporting should be addressed by expert evidence irrespective of whether (and to what extent) the reasonableness requirement is removed or amended.

Special Measures

Rights of Women has consistently supported the need for special measures to be available to all victims of rape. However, our approach to the automatic admissibility of video-recorded statements is cautious, particularly in relation to police statements, given the high levels of inadequate or inappropriate police responses our service users report. For example we have concerns that the questions asked during a recorded police statement may not be appropriate to the trial and there is a risk that videos will require editing to such a degree that the quality of the victim's evidence is reduced. However, we are also aware that for many women the admissibility of video-recorded statement is appropriate and right for them. Therefore, if video-recorded statements are to be automatically admissible, this must be done on the strict basis that the victim consents to such videos being used, and has made this decision having been made aware of all the available options.

Rights of Women fully supports the continuation of victims of sexual violence to exercise the choice not to receive special measures. In order to make an informed choice women must be told about the special measures that are available. This requires criminal justice agents, in particular the police and the CPS, to be fully informed about special measures, including the procedure for applications and knowledge about local availability. Part of this include, ensuring these criminal justice agencies are aware of the Victims Code, and ensuring that victims are themselves informed of their rights under the Code (please see below for further recommendations).

In relation to supplementary questions and video evidence, Rights of Women believe that the current provisions on additional questioning are sufficient to meet the aim of assisting a witness to 'settle down' prior to cross examination. We fully support the consultation's recognition that there is a need for the witness to adjust to being in the court for cross examination. However, we believe that the current rules are sufficiently flexible to allow this. In addition, this can be identified as a best practice issue, in which prosecutors routinely ensure that they use the current provisions for this purpose.

Additional Issues of Concern and Recommendations

In addition to the issues highlighted in the consultation document, Rights of Women would like to take this opportunity to highlight additional areas of concern and recommendations.

Consent and the presumptions: As we highlighted above, Rights of Women is concerned by research indicating that the conclusive and rebuttable presumptions in the SOA are not often raised in rape cases. This may well indicate that the content of the presumptions need to be revisited.

However, we believe that it may be possible to ensure that the presumptions are used more effectively in prosecutions for sexual violence. For example, in cases where force has been used we would argue that as a matter of best practice, the CPS should seek to engage the rebuttable presumption on using or causing the victim to fear that violence was being used, or that immediate violence would be used (section 75(2)(a) and (b) SOA).

Previous sexual history: Rights of Women feel it would be remiss, in the context of a consultation on protecting and ensuring justice for the victims of rape, not to comment on previous sexual history. We strongly believe that evidence of a victim's previous sexual history should only be admissible in very limited circumstances. It is our understanding that this intention underpinned the enactment of section 41 of the Youth Justice and Criminal Evidence Act 1999. The presumption of exclusion under section 41 provides that such evidence or questions about sexual history are inadmissible unless a judge rules that one of four exceptions applies, as interpreted by the House of Lords in *R v. A* (2001).

Rights of Women is therefore very concerned at recent research which indicates that the procedure set out in section 41 is not being followed in the majority of cases.⁷ We are further concerned that during this research almost half of the judges interviewed were unaware of the Crown Court rules, which set out the procedure for making pre-trial applications and some only had a vague knowledge of section 41. Equally worrying is evidence that in some cases the CPS are raising previous sexual history of the victim in cases. In this regard we believe that there needs to be an explicit prohibition on the CPS raising the victim's previous sexual history. Rights of Women notes the Government's acknowledgement that the rules and procedure for section 41 applications, particularly in relation to late applications, needs to be examined. However, we suggest that the Government not only focus on late applications but also on the knowledge levels of the judiciary in particular, regarding the content and procedures for section 41 applications. There is a clear and urgent need for judges and lawyers to be to receive better and more effective training not only about the social context in which rape occurs, but also about the law itself (see below).

Charging standards: We understand there is a traditional reluctance to charge for more than one offence in most criminal cases. However, in cases of sexual violence, we would suggest that as a matter of best practice, the CPS charges the accused with both the sexual violence offence (e.g. rape) and any other criminal offence which might be relevant, for example actual bodily harm where the victim has been subjected to physical as well as sexual violence. This will indicate both the seriousness and the totality of the victim's experience.

Training, education and awareness-raising: As we have identified above, there is a clear need for training, education and awareness raising both in the

⁷ Kelly, L., Temkin, J. and Griffiths, S. *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office, 2006)

general public and within the criminal justice system. These are vital tools for ensuring justice for the victims of rape.

Rights of Women acknowledges the Government's acceptance for the need for a public awareness campaign, having launched the "Consent Campaign" earlier this year. We welcome the campaign's focus on men also taking responsibility by ensuring that a woman fully consents.

However, we are concerned at some of the images used in the campaign, which we believe undermines the campaign's purpose (as for example with the image of the lower part of a woman dressed only in underwear displaying a no entry sign). We are also concerned by campaigns which seek to direct responsibility onto women, as for example, with Suffolk Police's "Safe Magazine" which is aimed at offering women safety advice. However, both the format and content are inappropriate and irrelevant, trivialising an important issue and serving to reinforce blaming women for being victims of crime. We therefore urge the Government and its agencies that to ensure that public awareness campaigns are carefully considered, drawing on the expertise on knowledge of those organisations with experience of supporting victims of sexual violence.

Rights of Women would like to reiterate the need for the police, the CPS and judges to receive routine training on sexual violence. Such training, if it is to be effective, must draw on the experience and insight of those in the women's sector who have a history of dealing with sexual violence. Rights of Women suggests that training should not be a one-off, but should be continuous and methods of monitoring implementation should be looked at. For example if targets were introduced (please see below), these could feed into a monitoring process and flag areas for further training.

Targets: Rights of Women believe that consideration should be given to improving the responses of the criminal justice system by developing targets dealing with sexual offences. In our experience of the criminal justice system, those areas that have targets are often taken more seriously. Targets, although not a remedy to the current inadequacies of the criminal justice system, may provide a useful starting point for a strategy to improve the current approach to sexual violence.

Victims Code: As noted above, Rights of Women believes that more can be done to promote the Victims Code, which contains many positive developments in responses to crime, and in particular to sexual offences. However, for it to be effective, all criminal justice agencies which have responsibilities under the Code need to be aware of its provisions. Importantly, if victims are to ensure that they are being treated in line with the Code, they must be made aware of its existence and the rights it provides. It is vital that the Government provide organisations which support and advise victims of sexual violence with copies of the Code for their service users.

Advocates for rape victims: Rights of Women strongly urges the Government to reconsider its previous pre-election pledge to provide victims

of serious crimes, including victims of rape, with their own legal advocates. There are similar legal representation schemes in Denmark, Norway and Sweden.⁸ We have consistently called for legal advocates to be a key part of any strategy aimed at ensuring that victims of rape are protected. An independent legal advocate for victims of rape can provide assistance when attending the police station, providing legal advice about the processes and procedures involved in a criminal trial, and can assist with any applications for compensation from the Criminal Injuries Compensation Scheme. Given the issues highlighted above, there may also be a case for such representatives challenging the admissibility of previous sexual history.

We accept that the introduction of such a scheme may require serious consideration, especially in relation to determining the scope of a legal advocate's right to represent the victims views during the trial (for example by opposing applications for previous sexual history). However, this is a mechanism we urge the Government to seriously reconsider, particularly in light of its recent announcements to move forward with similar proposals to give a voice to the families of victims of murder and manslaughter.

Conclusion

We urge the Government to seriously consider the issues we have raised in any reforms aimed at protecting and ensuring justice for the victims of rape.

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⁸ For an in-depth analysis Temkin, J. *Rape and the Legal Process* (OUP, 2002) pp. 281-305.