CRIMINAL JUSTICE SYSTEM

CONVICTING RAPISTS AND PROTECTING VICTIMS - JUSTICE FOR VICTIMS OF RAPE

Response to Consultation
November 2007

Contents

Introduction

This document is the post-consultation report for the consultation paper, *Convicting Rapists and Protecting Victims - Justice for Victims of Rape*.

It covers:

- The background to the consultation paper;
- A general summary of the responses to the paper
- A detailed account of the responses to the 14 questions in the paper and other comments made
- Conclusions

The consultation document is available on the websites of the Home Office and Office for Criminal Justice Reform at:

http://www.homeoffice.gov.uk/documents/cons-290306-justice-rape-victims?view=Binary

or:

http://www.cjsonline.gov.uk/downloads/application/pdf/Rape_consultation.pdf

Background

The Government has already made a number of changes to the law on rape and the way 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.

Nevertheless, the conviction rate in rape cases remains unacceptably low. The consultation paper *Convicting Rapists and Protecting Victims - Justice for Victims of Rape* sets out a range of options for change. It aims to improve the outcome of rape cases by tackling unnecessary barriers to the successful prosecution of rape and improving the service given to victims and witnesses.

Four main issues are discussed in the paper:

- whether there is need to define in law a complainant's capacity to give consent where drink or drugs were involved, to assist judges and juries;

- enabling general expert evidence on the psychological impact of rape on victims to be put before a jury;

- whether all relevant evidence of complaints made by victims in rape cases should be admissible as evidence in a trial, irrespective of time passed since the alleged conduct;

- and allowing adult victims of rape to give video-recorded evidence at trials.

The consultation paper was published on 29 March 2006 and the consultation period ended on 31 July 2006.

A list of respondents is at Annex A

Summary of responses

A total of 94 written responses to the consultation paper were received from a wide range of organisations and individuals. Most took the form of detailed submissions. Generally speaking, respondents addressed all the 4 main subject areas, and all 14 questions, in the consultation document. Some only commented on areas of particular interest to them. In a few cases, identical responses were submitted that represented an agreed response from like-minded organisations.

A large number of comments were made by a variety of respondents which were not directly relevant to the four subjects of the consultation but touched on generally related issues. These have been referred to the relevant departments for consideration and are not discussed in the present summary.

Six respondents commented on issues relating to cross-examining of the complainant on their previous sexual history. The Government will be considering these comments, along with the empirical studies on this subject, as we take the work forward.

The Crown Prosecution Service has already taken action to address concerns raised about the need for further criminal justice practitioner training. They have agreed with the Bar that all counsel who prosecute rape cases will complete accredited training. Counsel must have completed the training by 1 October 2007. The training is based on case studies and role play.

We are grateful to all those who took the trouble to respond for their contribution to the exercise.

Individual responses have not been published with this document, although respondents are identified at some points of the summaries. If you wish to obtain copies of individual responses, application should be made to:

Mr Guy Wilson
Tel: 020 7035 8490
Email: guy.wilson@cjs.gsi.gov.uk

Please note that it may be necessary to make a charge for copies of large numbers of responses, or long ones. You should also contact Mr Wilson if you require a copy of this consultation response in any other format, e.g. Braille, Large Font, or Audio.

We will not release responses from individuals who asked for their response to be kept confidential.

Responses to Specific Questions

'Capacity' in rape cases

Question 1

- ***Does the law on capacity need to be changed?***

1.1 There was a clear two-to-one majority in the number of respondents who believed that the law on capacity needed to be changed. Many respondents felt that the current legislation was failing - as evidenced by the very low conviction rate in rape cases - and therefore required changing, but there were few suggestions as to how this might best be achieved.

1.2 The clearest support for a change came from non-government groups and victim and survivor support groups, whilst members of the judiciary and legal profession were less persuaded of the need for change. Moreover, around a third of the respondents who believed that the law should be changed favoured a further evidential presumption to cover intoxication by drink and drugs, often citing the recommendation that was made in the report to Home Office's review of the law on sexual offences, "Setting the Boundaries", which proposed an evidential presumption that read: "Where a person was asleep, unconscious or too affected by alcohol or drugs to give free agreement".

1.3 A number of respondents, particularly victim and survivor organisations, further argued that the law as it currently existed was inherently contradictory on the subject of intoxication. The respondents argued that where intoxication fell short of unconsciousness - and was therefore covered by section 75(d) of the Sexual Offences Act 2003 - it was both presumed and not presumed to invalidate consent depending on whether the intoxicating substance was administered surreptitiously or consumed voluntarily.

1.4 It was suggested that the distinction between those intoxicated having had their drink 'spiked' (or been drugged in some other way) and those intoxicated apparently of their own volition was not as clear cut as the legislation allowed for. There were cases in which offenders deliberately facilitated the intoxication of vulnerable victims in order to commit an offence. One example was where an uncle facilitated the intoxication of a younger niece in order to commit a sexual offence. Even in situations where the offender had not been responsible for inducing intoxication there was a risk that some men can seek to take advantage of the fact that women are drunk and therefore have less capacity to resist pressure or coercion. Consequently, it was argued that the law should be changed so that it made no distinction between voluntary and involuntary intoxication if the ultimate effect was a lack of capacity to consent.

1.5 The proceedings in the case of *R v Dougal* were widely cited as an example of the difficulties caused in applying the current law to cases involving voluntary intoxication and as an argument in favour of adopting a change in the legislation. This case collapsed when the prosecuting counsel took the view that the prosecution were unable to prove that the complainant, because of her level of intoxication, had not given consent and informed the judge that he did not propose to proceed further. The judge agreed and directed the jury to enter a 'not guilty' verdict. It was argued, that the case should have been proceeded with and the issue of the victim's capacity to consent put to the jury. It was argued that a change in the law would allow a similar case to proceed in the future and would provide assistance to the jury in considering the issue of consent.

1.6 While the relationship between capacity and intoxication was the most prominent issue, responses from police and prosecution representatives and children's organisations identified other factors that should be taken into account when considering an individual's capacity to consent. These included mental health, domestic violence and the exploitation of victims made vulnerable by their circumstances, for example sex workers. There were differing opinions on whether a change in the law would be necessary to allow the effects of such factors to be considered in relation to consent.

1.7 Organisations with a specific interest in children supported a change to the law which would take account of the particular vulnerability of children and the circumstances in which they can be exploited in order to commit sex offences. It was noted that alcohol can often be used by offenders to make it easier to commit an offence. However, it was also pointed out that alcohol is frequently consumed voluntarily by teenagers before engaging in consensual sex and that it was important that intoxication should not be the only factor taken into account when considering the capacity of those under 16 to consent as this could lead to inappropriate prosecutions.

1.8 The opinion that the law did not need to be changed was most commonly held by members of the legal profession, the judiciary and law enforcement agencies. Some argued that the law had only been in force for a relatively brief period and that any meaningful assessment of the Act's provisions was therefore premature. Continual change, others argued, rather than bringing clarity, would only serve to cause further confusion.

1.9 Opponents of change argued, it would be wrong to seek to change the legislation simply because of the outcome of the case of *R v Dougal*. They took the view that the Sexual Offences Act 2003 had "provided a welcome modification to the law on consent", which had improved the law because juries were now required to consider what steps the accused had taken to establish whether or not the complainant genuinely consented. Although there may now be a focus less on whether or not consent was given but rather on whether the complainant had the capacity to give consent, this did not challenge the adequacy of the law as it was currently framed.

1.10 Indeed the argument that the current law was adequate was commonly made. Those who did not consider that the law needed changing argued that it was already the case that a jury could ask themselves whether the complainant was in a fit state to give free and informed consent, especially if they had been drinking heavily. It was suggested by judicial respondents that *R v Dougal* had been an exceptional case and that in most similar cases juries have been properly directed that lack of capacity includes incapacity through excessive consumption of alcohol or drugs. However, some voluntary sector respondents believed that clear guidelines and the training of judges would be beneficial in helping to ensure that the law is properly applied and that juries are properly directed.

1.11 It was agued that 'capacity' was a term that was in regular common usage and one with which jurors would be familiar and readily understand. To seek to change the law to define what might be indefinable – the point at which drunkenness results in incapacity – may cause unnecessary confusion.

1.12 This view would seem to be supported by the variety of factors suggested, by those who favoured a change, as indicators of intoxication amounting to incapacity. Obvious staggering and/or vomiting and being over the legal limit to drive were among the suggestions.

1.13 Furthermore, as a number of respondents suggested, there would be difficulties in corroborating evidence of the victim's level of intoxication and even more so in determining whether this amounted to incapacity. These difficulties could result in lengthy cross-examinations on the woman's behaviour and the amount she drank that night.

1.14 There was concern for the broader implications of a change in the law. It was suggested that establishing a link between intoxication and a capacity to consent could result in, and according to some should entitle, a defendant to argue that he was too drunk to assess whether consent had been given. It was also argued that the effect of intoxication on a person's ability to make decisions could not be used as a defence to other offences, for example assault, and so should not be relevant to the capacity to consent in rape cases. However, it was also argued that these two situations were not analogous because victims were not on trial.

1.15 It was noted that section 74 of the Sexual Offences Act 2003 refers to 'freedom and capacity' and argued that there was a distinction between these two concepts. It was argued that capacity to consent was relevant to children and individuals with mental disorders impeding choice but not to adults who had become intoxicated. It was suggested that equating adults with children in this way was a step backwards and that it would be more appropriate to consider developing the concept of freedom, and adopting the alternative model of "free agreement" based on an Australian law. This would mean that an offence would be committed if the victims did not 'freely consent' to sexual activity. A similar suggestion was made by another response which noted that the Act currently placed the onus on the offender to establish a reasonable belief that consent had been given and argued that this could be

Question 2

- ***Should there be a statutory definition of capacity?***

2.1 Opinion was far more divided on whether or not there should be a statutory definition of capacity but the majority of respondents thought that there should not. Indeed, many of the respondents who had favoured a change in the law opposed a statutory definition of capacity.

2.2 Of those who did favour a statutory definition there was a general belief that its inclusion would bring clarity to proceedings and ensure that juries would consider the complainant's circumstances, including any effect that alcohol or other substances may have had on their ability and freedom to choose. However, even those that favoured a definition acknowledged the difficulties of developing one that was suitable.

2.3 Various responses relied upon the definition of capacity provided by the authors Rook and Ward in their book "Sexual Offences: Law and Practice" (quoted in the consultation paper) whilst others suggested that the text in section 30(2) of the Sexual Offences Act 2003 may serve the purpose more satisfactorily. Section 30(2) addresses an inability to refuse sexual activity if:-

> (a) he lacks the capacity to choose whether to agree to the [activity] (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or
>
> (b) he is unable to communicate such a choice.

Advocates of this definition consider that it is clear and easy to understand and would cover the circumstances where a complainant was so drunk – but not unconscious – as to not know what was happening or unable to say no.

2.4 A number of those who supported a further evidential presumption based on alcohol consumption suggested that this might be the statutory definition of capacity that was needed. Most commonly, the evidential presumption that was proposed was the one that appeared in "Setting the Boundaries" (quoted in 1.2 above). Such an evidential presumption, it was argued would allow the case to be put to the jury, even where the complainant could not remember whether she consented or not. It would, of course, remain open to the defendant to say that the complainant did indeed consent and for the jury to believe him or, at least, give him the benefit of the doubt.

2.5 Some responses suggested the following explanation of the concept of the inability to refuse given by Lord Falconer during the passage of Sexual Offences Bill would be a more suitable basis for a statutory definition:

'Whether at any time they were able to understand enough of what was proposed to refuse if they did not want to engage in sexual activity.' [1]

2.6 The most commonly given reasons for opposing a statutory definition were the difficulty in arriving at one and the limited use that it was considered such a definition might have. Indeed, a number of respondents tended to the view that defining capacity, rather than bringing clarity to proceedings may simply increase the burden on the prosecution and make it more difficult to pursue a case.

2.7 Opinion on the merits of a statutory definition of capacity was particularly divided amongst those organisations which provided support for the victims and survivors of sexual violence and abuse. Of those who were against such a move, many adopted a common line. They argued that the introduction of such a provision may have the undesired consequence where, unless the complainant is found to lack capacity – as newly defined – then they will have been deemed to have consented. This in turn, they asserted, may perpetuate the myth that women were vulnerable and in need of protection rather than autonomous agents with an equal right to make active choices about their sex lives. It was argued that campaigns to raise public awareness about the law and to challenge myths and stereotypes surrounding the issue of rape would be preferable.

The Government's Position

The Government sought views on whether the law on capacity needs to be changed and whether or not a statutory definition of capacity is required. One case in particular suggested that the current law has not always been operating as the Government had intended, although there is no substantial body of evidence to show that this case is typical.

The Government's intention was to invite responses on whether the law required modification in order to better ensure that cases where the capacity of the complainant to consent to sex as a result of the consumption of drink or drugs are determined by the jury. In March 2007, the Court of Appeal gave judgment in a case called R v Bree. In its judgment the Court of Appeal provided vital guidance on how the law in this area should operate:

> **"If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and**

[1] HL, col 397, 10 April 2003, Lord Falconer of Thoroton

subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape."

The Court of Appeal also highlighted that "as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious."

Given the guidance provided by the Court of Appeal, which reinforces that the law should operate as the Government intended when passing the 2003 Act, the Government has decided that the legislation does not need to be amended at this point. However, in order to ensure the law operates as intended by Parliament and the Court of Appeal, the Government will invite the Judicial Studies Board to consider whether judges who sit on rape cases would be assisted by appropriate specimen directions on the issue of capacity and consent. We will also consider updating guidance on the Sexual Offences Act 2003, to take account of the Court of Appeal judgment in R v Bree.

The Government does not rule out legislation in the future if the development of the case law raises further concerns. Other practical measures are taking place with a view to ensuring that rape cases are effectively presented in the courts. For instance, training for judges who sit in rape cases has recently been overhauled and the CPS specialist rape prosecutors and advocates from the independent Bar who prosecute rape cases are to receive further specialist training covering this area. The Government will continue to keep this issue under review within the context of its periodic review of the operation of the Sexual Offences Act 2003 being undertaken by the relevant Ministerial Group.

Responses to Specific Questions

General Expert Evidence

Question 3

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

3.1 The majority of police responses to the consultation agreed the introduction of general expert evidence was justified in principle. The Police Federation noted in its response that "if the victim is truly meant to be at the heart of the criminal justice system then a search and understanding of the truth is essential both to support the victim and give the criminal justice system credibility and instil public confidence."

3.2 The Superintendents of England & Wales also noted that in addition to being beneficial to prosecutions, general expert evidence "would raise public awareness and potentially increase confidence of victims to come forward and report offences."

3.3 However, Suffolk Constabulary did not agree and noted:
"Prosecution counsel would be far better placed to elicit evidence from the victims by getting them to explain their subsequent reaction to 'their' ordeal rather than a general explanation of delayed shock or any other psychological reaction to a very personal invasive crime."

3.4 The majority of responses from the judiciary were in favour of the introduction of general expert evidence in principle, although a number of responses indicated they were strongly against.

3.5 The Rose Committee agreed noting:
"that material could be put before the jury at the outset of cases of serious sexual assault, in effect without direct reference to the specific complainant. In this form, there would be no danger of the expert expressing his or her view whether the complainant is or is not telling the truth."

3.6 However, the Council of Circuit Judges disagreed noting:
"…the distinction between independent expert evidence assisting a jury to find facts and usurping the jury's function is likely to be blurred in a majority of cases of rape… where the facts of cases vary a great deal and a decision has to be case specific, general expert evidence that cannot focus on the credibility of the individual case would be of little real value."

3.7 The majority of responses from academics were in favour of the introduction of general expert evidence in principle. Phil Rumney of Sheffield Hallam University agreed commenting:

“It should be remembered that this type of expert evidence does appear to work in challenging rape myths, while in no way threatening defendant rights.”

3.8 In her response, Dr Louise Ellison doubted that the delivery of a bare statement was adequate and argued that the prosecution should be able to present an alternative narrative through expert witness testimony.

3.9 The Centre for Crime & Justice Studies, King’s College London also disagreed in their response, noting that general evidence would not help to level the playing field but “give the prosecution a distinct and unfair advantage which would serve to increase the number of miscarriages of justice.” It was noted that jurors would be considering evidence “the complainant is acting in the manner they have seen because that is what victims of rape do, without having yet reached a factual decision as to whether a rape occurred.”

3.10 Dr Kate Cook of Manchester Metropolitan University agreed in principle but identified two risks. Firstly, the defence could call general expert evidence of dubious validity to discredit genuine complainants. Secondly, the evidence could be used to suggest that a victim does not fit the medical model and therefore is not a true victim.

3.11 The majority of responses from professional bodies disagreed with the introduction of general expert evidence in principle.

3.12 The Law Society’s Criminal Law Committee disagreed noting:
“How people reacted to a traumatic experience is not an exact science, introducing evidence of research findings may go further than merely directing irrational beliefs and juries may give too much weight to such evidence.”
The Committee also questioned if general expert evidence would be the best method for raising the awareness of the jury.

3.13 The British Medical Association agreed with the introduction of general expert evidence in principle commenting:
“Belief in the myths and stereotypes of rape and sexual assault affect Counsel and Judges too. The introduction of general expert advice would mitigate some of the effects of variable quality of Prosecuting Counsel.”

3.14 The subject of false allegations of rape and the need for its inclusion in general expert evidence was also raised in the responses of the Law Society Criminal Law Committee and the Criminal Bar Association. The Criminal Bar Association also noted:
“The use of the word victim to describe all complainants of rape is in danger itself of creating a most dangerous myth and misconception, namely that all allegations of rape are true.”

3.15 The majority of respondents from the voluntary sector agreed that the introduction of general expert evidence was justified in principle. Rights of Women commented:
“We believe that expert evidence in rape trials can have a vital role in dispelling rape myths.”

3.16 The Centre for Law, Gender and Sexuality expressed a similar opinion:
"General expert evidence has the potential to counterbalance and challenge a number of pervasive but highly prejudicial rape myths that research persistently identifies within society (and thus within the jury room)."

3.17 Sheffield Rape & Sexual Abuse Counselling Service also agreed:
"The admissibility of such evidence would appear to address the imbalance which currently exists, and would help to secure more convictions whilst not discriminating against the defence in any way."

3.18 However, the UK Men's Movement strongly disagreed with introduction of general expert evidence in principle:
"[If the] expert states that … the complainant appears to be a rape victim via being a sufferer of rape trauma syndrome, then that expert is, in reality, stating to the court that the defendant is guilty".

3.19 One respondent disagreed noting "in practice it [general expert evidence] would be unlikely to have any impact. This is due to the already contradicting views in relation to trauma and PTSD [Post-Traumatic Stress Disorder]. As Defence would also be allowed to have experts Juries would remain as confused as they are now."

3.20 Liberty also disagreed, noting: "It is not clear how the presentation of generalised evidence about the behaviour of other complainants will help a jury to assess the reasons for the behaviour of the complainant in the case before them."

3.21 The majority of individuals who responded to the consultation indicated that they agreed with the introduction of general expert evidence being justified in principle. One respondent disagreed and noted:
"Perhaps society does need educating, but a court of law is not the place for it."

Question 4

- ***Do you agree with the proposal outlined in the consultation?***

4.1 The majority of police responses indicated that they agreed with the proposal outlined in the consultation.

4.2 The Police Federation noted that: "The provision on general expert evidence appears to be the most independent way to provide information that the jury should be aware of in order to dispel myths that are so widely believed in society in respect of the offence of rape."

4.3 In a similar vein ACPO responded:

“rape is a different type of crime, victims develop varying psychological symptoms because of the sexual nature of the offence. This leads on to Post-Traumatic Stress Disorder (PTSD) in the majority of cases. This is probably not widely known by the public and it is only right and fair for a jury to be given expert evidence on the effects of Rape Trauma and PTSD.”

4.4 Avon & Somerset Area Victim Liaison Team noted “the expert witness should be explaining to the jury how sex offenders operate in the same way as fraud cases have special investigators to explain complex financial procedures – this has been shown to be effective in getting convictions in fraud cases and juries have been able to understand.”

4.5 The Police Federation added a note of caution to the use of general expert evidence and questioned what would happen if the evidence was subsequently challenged publicly and if there would be a list of appeals based on this evidence:
“…there would need to be advice and suitable support mechanisms in place for the expert and investigating officers to encourage suitably qualified persons to come forward to act as experts in the court process. It is becoming apparent, as shown in child protection cases such as the Sally Clarke and Angela Canning cases, that experts are less willing to become involved due to the high risks to their own careers, stress associated with court proceedings and high profile media attention.”

4.6 There was an even balance between agreement and disagreement with the proposals outlined in the consultation in responses from the Judiciary. Several responses noted there may be additional costs for the CPS and Legal Aid and a lengthening of the trial process upon the defence production of their own expert. The Council of Circuit Judges commented:
“Attention may be drawn away from the fundamental issue of creditability of the complainant.”

4.7 There were also concerns on the identification of experts suitable to provide evidence. The Council of Circuit Judges noted:
“We are far from clear what sort of expert might be appropriate, how the qualification of such an expert might be established and how many such experts might be available.”

4.8 Pitchford J & HHJ Rook QC, for the Rose Committee, would be in favour of admission of general expert evidence in principle provided it was kept strictly within the limits of the proposal in the consultation paper. They noted that many judges already invite juries to consider the behaviour of complainants in the context of the trauma they have described.

4.9 There was an even balance between agreement and disagreement with the proposals outlined in the consultation in responses from Academics.

4.10 Professor Jennifer Temkin supported the proposal but had some doubt on the effect that general expert evidence which is not related to the individual complainant would actually have.

4.11 Respondents Dr Louise Ellison and Dr Kate Cook commented there may be a particular danger in cases where the evidence presented relates to “rape trauma syndrome”. It is, that jurors may infer that the complainant was raped or was abused because their behaviour fits, or does not fit, the syndrome profile, and Dr Ellison noted that jurors may be unduly swayed by the credentials of the expert.

4.12 Professor J R Spencer QC, disagreed with the proposal outlined in the paper noting:
“…if this sort of information [general expert evidence] is to be given to lay juries (as in principle it should be), some other vehicle should be devised for doing so.”

4.13 The Royal College of Obstetricians and Gynaecology (RCOG) commented on the experts who would provide evidence and the need for inclusion of false claims of rape:
“…expert instruction must be precise and balanced, and that balance must include the opportunity to instruct why people may make false or mistaken claims as well as the traumas of rape.”
RCOG also noted that doctors were more cautious about acting as experts following recent cases which have led to media attacks on experts. They felt that the same problems could arise for experts appearing in rape trials. Referring to experts more generally RCOG noted:
“There is a need for more careful definition of experts in criminal cases and greater emphasis on the need for advice to the court rather than for the defence or prosecution.”

4.14 Mike Redmayne of the London School of Economics noted that judges would have a difficult task in policing the evidence to ensure that it does not go beyond the general. Professor David Ormerod responded noting that there was a danger of distracting evidence from competing experts confusing the jury. Penny Lewis of King’s College London and others felt that rape was not unique in relation to the characteristics exhibited by victims and the proposals should be extended to all types of serious sexual assault.

4.15 The majority of respondents from professional bodies disagreed with the proposals outlined in the consultation paper.

4.16 The Criminal Bar Association disagreed with the proposals commenting:
“Although the aims of this recommendation are understandable, they are misguided and likely to lead to a category of evidence which is unlikely to help the jury in the way hoped and may well confuse them.”
The Criminal Bar Association also noted that the defence would be entitled to call upon an expert, leaving the jury to decide on the conflicting views of experts.

4.17 The Law Society Criminal Law Committee commented that trials could become ‘bogged down’ in arguments about the introduction of general expert evidence which could result in delays. The Committee also identified the

possibility of increased legal aid costs resulting from longer cases and expert fees incurred by the defence.

4.18 Chris Saltrese Solicitors noted that there would be a risk of "the jury convicting not on the actual evidence of the crime but on alleged effects and symptoms of rape trauma which could be said to lend weight to the allegation made."

4.19 The British Medical Association agreed with the proposals in the paper but enquired if there had been consultation with those who will attend court to see if there will be sufficient expertise throughout the country to meet the anticipated demand.

4.20 The majority of respondents in the voluntary sector agreed with the proposals outlined in the consultation. The Wearside Domestic Violence Forum noted:
"Experts are viewed in a different light by juries. They will be accustomed to being questioned, used to court procedures and parlance and able to present their views clearly and concisely."

4.21 The NSPCC was strongly in favour of general expert evidence for victims of any kind of abuse or exploitation "to counter the imbalance of power in the courtroom".

4.22 Liberty however, disagreed with the proposal commenting:
"We are not convinced that a sufficiently robust case has been made to support the proposed change in the law. … The result could well be satellite litigation about the quality of the expert evidence which will make the jury's task no easier when determining the main issues."

4.23 Some respondents qualified their agreement with concerns on conflicting general expert evidence, such as the Magdalene Project:
"There is a possibility that when there is conflicting or contradictory information given by prosecution and/or defence expert witnesses that the jury will default to prior knowledge.

4.24 Another respondent warned on the generality of the 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.

4.25 Issues surrounding the idea of a notional victim were also identified, such as in the Centre for Law, Gender and Sexuality response:
"Individual victims will display varieties of reaction and may not resemble the 'notional victim' envisaged."
And also by Victim Support:
"Concern if any inconsistency between the behaviour of the victim and the picture painted by the expert evidence of common or normal responses to rape were challenged by the defence in a way that attacks the credibility of a complainant."

4.26 It was noted by the British False Memory Society that:
"There is currently no reference to any consideration of the potential for false claims within the consultation paper."

4.27 The NSPCC questioned the identification of experts, noting:
"it must always be clear where experts come from and from what they draw their expertise."

4.28 The Rape Crisis and Co-ordinating Group for England and Wales suggested that the experts should be drawn "from those who work with rape survivors" and also that guidance on what expert evidence might cover should be drawn up with the help of "a panel of experts".

4.29 Welsh Women's Aid identified a risk associated with the experts and the weight attached to their evidence, noting the proposal could end up like the 'shaken baby' cases with the jury choosing between experts rather than listening to the evidence.

4.30 Some respondents felt that the proposals in the consultation for general expert evidence were not far reaching enough and should be extended to all sexual violence cases and identified strong links with domestic violence cases. For example, Rights of Women stated:
"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. …[the Government] must also do so in relation to domestic violence."

4.31 The voluntary group Object (A) went even further to suggest:
"The creation of separate courts for crimes involving all forms of sexual violence that would have trained rape prosecutors, specialist staff, appropriate technology and facilities for video links. Courts specifically designed to accommodate these cases could allow a more positive environment for the victim and ensure there are necessary resources and staff to educate all involved and ensure a fair trial."

4.33 The majority of individuals who responded to the consultation agreed with the proposal outlined. One respondent noted:
"The jury needs to hear the truth from someone who they see as impartial, objective and knowledgeable. For this reason it needs to be someone other than the prosecutor."

Question 5

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

5.1 Suffolk Constabulary suggested that a video recorded account of the allegation made by the victim could be used as evidence in chief. It was suggested that this would allow the victim to be interviewed by specialist-trained officers with whom they had already significant contact and would more likely result in truthful and spontaneous responses that would be recorded and available for interpretation by the jury.

5.2 The Superintendents of England & Wales suggested "up to date research papers (agreed by both the prosecution and defence) could assist the jury in understanding victim responses to rape (in general terms) and could in some cases avert the need for a general expert to attend court."

5.3 ACPO suggested, in addition to general expert evidence, mandatory pre-trial training for jurors and specialised mandatory training for prosecutors and judges on sexual and domestic violence.

5.4 The Council of Circuit Judges and other respondents identified a public awareness campaign in relation to the reaction to rape as an alternative, which "is a less complex and rather more secure method of achieving a balance."

5.5 HHJ David Wood suggested a set of guidelines could be produced for jurors which could be read to them by judge or presented as part of the jury guidance at court.

5.6 Penny Lewis of King's College London suggested a judicial warning as occurs in Australia and New Zealand, and also combining judicial direction with expert evidence. She noted "there was no reason of principle why expert evidence and formal judicial warning should be mutually exclusive."

5.7 Professor David Ormerod suggested jury research to discover what jurors think about the effectiveness of evidence, attitudes to complainants, myths etc. He commented that "rather than supposition, it would be possible to construct appropriate reforms with confidence that they would work."

5.8 Professor J R Spencer QC suggested a standard video with leading experts on the main principles for jurors in rape cases.

5.9 The Centre for Crime & Justice Studies, King's College London suggested the assessment of the complainant by a court appointed expert, noting that this would also "avoid the complainant being over-examined by competing prosecution and defence experts."

5.10 The Law Society Criminal Law Committee suggested an alternative of the prosecutor addressing the jury about common misconceptions in their closing remarks, with a further direction from the judge in course of summing up. The Committee also suggested a neutral public information film which could be shown to jurors in rape cases, the Committee commented that the film would also need to address the fact that sometimes false allegations of

rape are made but noted that “it would be very difficult to make such a film neutral.”

5.11 The Criminal Bar Association suggested a “sensible and balanced direction from the judge” which would cover the same matters as an expert but “in a less confrontational way”.

5.12 The British Medical Association suggested a joint expert to give the evidence proposed, who would be “under a duty to put forward their opinion and explain any dissenting views.”

5.13 A large number of responses from the voluntary sector identified judges being ticketed and undergoing training as an alternative, and also information and training for jurors on common reactions to rape. Suggestions included a booklet or a video recording. A number of responses identified a need for wider public education and publicity campaigns on the subject.

5.14 Sheffield Rape & Sexual Abuse Counselling Service suggested that juries could be given copies of reports regarding behaviour of victims but noted that “this would be a poor substitute for having an expert testify in the witness box.”

5.15 Rights of Women suggested that consideration be given to developing a limitation on defence questioning.

5.16 Two respondents noted that judges should be held accountable for their comments and decisions through a disciplinary process with an appeals mechanism.

5.17 One respondent suggested that victims might be questioned as to the reasoning behind their behaviour by a trained psychiatrist or therapist who could be ‘attached’ to the court system and trained to avoid leading witnesses in presenting their testimony. Another respondent noted that it may be more effective to offer expert evidence on how the behaviour of the sex offender fits the pattern of sex offending.

5.18 Other respondents suggested a standard recorded report, including major input from experts, on the myths and stereotypes surrounding sex offences, attackers and victims should be played to all jurors. A respondent also noted that this should not disregard false accusations.

The Government’s Position

The Government’s view is that whilst it would be desirable for juries in rape cases to receive expert evidence concerning the characteristics of behaviour and psychological reactions that victims of rape may demonstrate, so as to seek to break down what are well recognised to be stereotypical myths about the way rape victims react, there are

substantial risks to this proposal and it should be approached with caution.

Such evidence could expand from being general evidence into becoming evidence about the specific complainant in a particular case. That could in turn give rise to the risk of a "battle of experts" detracting from the core issues. There is a further concern that such evidence could build a profile of a typical rape complainant, which might become a standard by which rape victims are judged, thereby potentially harming the case of a complainant who did not fit that pattern.

Consequently we will continue to look for ways in which general expert material could be presented in a controlled and consistent way with a view to dispelling myths as to how victims behave after incidents of rape. We will ask the experts who came to help us in formulating the Government's response on this issue to continue to work to find an appropriate and fair way forward. If that can be achieved, we will be prepared to legislate, if necessary, to allow such material to be presented to juries.

Responses to Specific Questions

Evidence of First Complaint

Question 6

- ***Which is your preferred option?***

6.1 64 respondents commented on the questions in Chapter 5 of the paper. The consultation document set out 4 options for admitting first or subsequent complaints made by victims to friends and others in rape and sexual offence cases. Although it is hearsay evidence, a first or subsequent complaint may be admitted at present if it is made as soon as reasonably possible after the crime. The options identified in the paper were:

Option 1
No change.

Option 2
Clarify the law by requiring the phrase "as soon as could reasonably be expected after the alleged conduct" to be applied by the judge in the light of the victim's subjective circumstances. This would apply to all offences.

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.

6.2 4 respondents preferred Option 1, 5 preferred Option 2, 7 preferred Option 3 and 43 preferred Option 4.

6.3 A small number of respondents rejected all the options, of whom one suggested that hearsay complaint evidence should not be admissible whilst another suggested that hearsay complaint evidence should be admissible in all cases, included non-sexual offence cases.

Question 7

- ***What are the reasons for your preference?***

(i) Option 1

7.1 Of the 4 respondents who expressed a preference for **Option 1**, 3 respondents considered that the law was already sufficiently clear.

7.2 One respondent considered that this was the most acceptable option, but that it would be preferable to have no hearsay evidence.

7.3 Liberty considered that prosecutors would not present first complaint evidence where there had been a long delay in making the complaint on the grounds that it was likely to be of more use to the defence than the prosecution. They also considered that the court should retain control of the admission of complaint evidence.

7.4 The Council of Circuit Judges argued that there was no evidence that the new first complaint provisions in the Criminal Justice Act 2003 were not working, and in any case it was too early to make this judgement.

Comments made by supporters on the other options

7.5 Professor David Ormerod, in commenting on Option 1, considered that Option 4 was a particularly dangerous proposal because Option 4 would offer the opportunity for fabrication and evidence creation.

Option 2

7.6 Of the 5 respondents who expressed a preference for **Option 2**, the Crown Prosecution Service considered that this option would enable all relevant and reasonable complaints to be admitted, including first complaints.

7.7 Justice in its response considered that this option presented the best balance and allowed judges to take into account the circumstances of each case in deciding the appropriate time period.

7.8 The Centre for Crime and Justice Studies, King's College London commented that previous complaints could not be cross-examined and so should be closely monitored as hearsay.

Comments made by supporters on the other options

7.9 The Crown Prosecution Service, in expressing a preference for Option 2, considered that admitting a first complaint whenever made (as in Option 3) might lead to unreasonably made complaints being admitted. It also felt that admitting all complaints (as in Option 4) might lead to multiple complaints being admitted to bolster the content of a complaint.

7.10 The Centre for Crime and Justice Studies, King's College London agreed that multiple complaints (as in Option 4) should be excluded on the grounds that they might send the unreliable message to the jury that the more complaints there were, the more evidence there was of the defendant's guilt.

Option 3

7.11 Of the 7 respondents who expressed a preference for **Option 3**, Suffolk Constabulary considered that in the general absence of direct witnesses to a rape, there was a specific need in rape cases for evidence of complaints made by the victim to others to be admissible.

7.12 The Mission & Public Affairs Council of the Church of England preferred this option on the basis that it provided the best balance between extending the opportunity for relevant background evidence and discouraging malicious or unfair allegations.

7.13 One respondent considered that in the absence of the information that there had been a first complaint, whenever made, there would be an undesirable gap in the evidence. Another argued that prosecutions were undermined by the exclusion of evidence from the person to whom the victim has made the first complaint. However, another considered that delay in making a complaint, if unexplained, could undermine the prosecution rather than the defence.

Comments made by supporters on the other options

7.14 Of the respondents who expressed a preference for Option 3, one felt that Option 4 provided too much scope for distraction from the issues whilst the Law Society considered that it would result in long proceedings.

7.15 However, others focussed on the possibility of unfairness to the defendant under Option 4. The BMA Forensic Medicine Committee felt that Option 4 might result in unfairness to the defendant, where a complaint was made maliciously or a child might be prompted to give a preferred answer to an adult questioner. Similarly, the Law Society and Criminal Bar Association considered that Option 4 might lead to multiple complaints being admitted to bolster the content of a complaint or allowing the position to be contrived by a dishonest complainant.

7.16 Suffolk Constabulary felt that the admission of further complaints under Option 4 could have a negative impact, with the defence able to thrive on inconsistencies between the detail of the complaints.

Option 4

7.17 Two thirds of the 64 respondents who commented on this chapter (43) favoured **Option 4**. Of these, well over half (25) agreed that Option 4 reflected best of the four options the fact that rapes were often not reported for a long time for a wide variety of reasons. This view was held particularly consistently by support organisations, but not exclusively so. Professor Jennifer Temkin for example commented:
"A requirement of reasonableness even if it takes into account individual circumstances and what could be expected of this particular person misses the point. The idea should not be to penalise the complainant for not acting

reasonably. Those who have been abused or raped may not act in a way that might be regarded as reasonable for them in the particular circumstances."

7.18 There was also widespread support for the idea that all relevant evidence should be available in court and that the admission of all complaints would facilitate this. Almost half of all those who supported Option 4 (20) endorsed this view. A number referred to the jury having a "full" or "complete" picture of the facts of the case. One stated that in the general absence of witnesses to a rape, it was important that evidence of complaints made by the victim to others should be admissible. Survivors' Network considered that it was in the nature of sexual abuse that a succession of complaints could be triggered a long time after the crime. A small number of respondents also noted that Option 4 recognised complaints could be made to different people. The Mayor of London commented:
"The Mayor supports the argument that a number of complaints [as under Option 4] can combine to form a more informed picture of the assault and the trauma the victim suffered."

7.19 A significant minority (8 respondents) also went on to make the point that facts could be omitted from one complaint that could be included in another, and that it was necessary for this reason for all complaints to be admissible. For example, material could be omitted from an initial complaint which was included in later complaints. Similarly, the Centre for Law Gender and Sexuality considered that the first complaint was not necessarily the most useful. The ACPO Rape Working Group noted:
"It may take years for a victim to raise a complaint on the other hand to limit this evidence to only the first complainant limits the possibility of other details being presented in this way from later sources. The time of the 1st complaint may also be at a time when the victim themselves do not have total recall of events."

7.20 The ACPO Working Group, together with the Rose Committee and St Mary's Centre, expressed support for Option 4 but noted that inconsistencies in a complainant's account to different people could assist the defence rather than the prosecution in some cases.

7.21 Dr Penney Lewis considered that if complaints were not admitted, the jury could assume incorrectly that no earlier complaint was made, undermining the victim's credibility.

7.22 In discussing Option 4, some respondents underlined their view that section 78 of PACE, which allows complaints to be excluded on a case by case basis, would form a useful safeguard. This view was not, however, shared by all. Three respondents supported the view of the Rape Crisis Co-ordinating Group (RCCG) that guidance should also be issued to judges indicating that section 78 of PACE should not normally be used to exclude complaint evidence.

7.22 A smaller number of respondents commented on some other issues. 5 considered that by making all complaints admissible, complainants would be encouraged to report to others and thus more crimes could be reported.

7.23 ACPO's Rape Working Group observed that Option 4 would enable all available witnesses to contribute to the hearing. Similarly, Dr Kate Cook argued that the example in the consultation paper illustrated how Option 4 could help in court. The boyfriend's evidence would explain to the jury why the case had come to court – which might not be obvious in its absence - and so make the jury less likely to distrust the complaint.

7.24 One or two respondents commented on the possibility that proceedings might become longer if all complaints were admissible. The Survivors' Network remarked that it "could create a convoluted, confused prosecution". Professor John Spencer considered however that difficulties over the possible admission of redundant evidence could be dealt with by judicial case management. Mike Redmayne suggested that additional complaints could be admitted only as rebuttal of a defence argument that the first complaint was brief and as such untrue, or on the grounds of enhanced relevance.

7.25 On the question of training and resources, the Oxford Sexual Abuse & Rape Crisis Centre commented that Option 4 might lead to support organisations being asked to provide corroborating evidence, so that training and resources should be provided to them.

7.26 More generally, the Campaign to End Rape argued that not allowing late complaints would result in those who made a late complaint receiving less access to justice than those who reported soon after the event.

Comments made by supporters on the other options

7.27 5 respondents who expressed a preference for Option 4 rejected the test that the complaint should be made "as soon as could reasonably be expected" on the grounds that it implied that women who made later complaints were dishonest.

7.28 The Mission & Public Affairs Council Church of England, Mike Redmayne and the NSPCC all commented on their assessment that the requirement a complaint should be made "as soon as could reasonably be expected" was meaningless, difficult to decide, or subject to varying interpretation.

7.29 ACPO's Rape Working Group and the Nia Project criticised the Option 2 test that the complaint should be made "as soon as could reasonably be expected" on the grounds that it was open to subjective interpretation. However the Crown Prosecution Service argued that a determination by a judge as to whether a complaint was relevant under Option 3 or 4 would be a similar process.

7.30 Professor Jennifer Temkin suggested that Option 3 could lead to difficulties in working out which was the first complaint.

First complaint evidence and other crimes

7.31 As noted above, the consultation paper proposed that Options 3 and 4 should apply to ***sexual offences only***. A number of respondents commented on the issue of whether the arguments in favour of admitting late complaints were unique to sexual offences, or whether the same arguments could apply to other types of offence or to crime generally.

7.32 Some 6 respondents considered that sexual offences could be distinguished from other crimes where the lateness of complaints was concerned. However, a similar number took different views. Of these, 3 felt that rules on the admissibility of evidence could be applied consistently to all offences, not according to the kind of offence involved. Professor John Spencer commented, in rejecting all four options in the paper:
"Although this Consultation Paper is concerned with rape, the arguments in favour of admitting the previous statements of witnesses apply with equal force to prosecutions for other offences. The change I propose should be a general one, and not just limited to sexual offences: in the interests of justice and simplicity."

7.33 The Rose Committee and one other respondent considered that consideration could be given, respectively, to treating offences of physical assault or domestic abuse in the same way as sexual offences.

7.34 At the other end of the spectrum, Paul Jervis considered that ideally all hearsay should be inadmissible on the grounds that it was inherently unreliable.

The Government's Position

Sensible points were made in favour of all four options. The responses helpfully clarified that the key overarching choice is between retaining a requirement that complaints are made as soon as reasonably possible (Options 1 and 2), and the automatic admissibility of all first or first and subsequent complaints, subject to existing judicial powers of exclusion on a case by case basis (Options 3 and 4).

As can be seen from the summary, a large majority of respondents favoured Option 4, the automatic admissibility of all first and subsequent complaints in sexual offence cases. The Government recognises that there are strong arguments in favour of this option. It would enable more relevant evidence than at present to be placed before the jury and is consistent with the Government's approach to evidence that unnecessary restrictions on admissibility should be relaxed.

The Government considers that, although the requirement for a complaint to have been made "as soon as reasonably possible" could be applied flexibly, so as to admit a victim's complaints made a long time after the crime, it is difficult to envisage such complaints being admitted where there is a very long gap between the crime and the trial. It is clear from the responses, however, that in many cases, evidentially relevant complaints are indeed made to other people a considerable time after from the crime. Such complaints are likely to be excluded under the existing legislation. The Government, therefore, accepts the case for change, as envisaged under Option 4.

The law of hearsay evidence was reformed in the Criminal Justice Act 2003. Previously, first complaint evidence was only admissible in sexual offence cases. The Act removed that limitation. Under the 2003 Act, it is admissible, whatever the crime. To return to a rule applicable to a limited range of crimes only (in this case, sexual offences) would be a retrograde step in the context of the 2003 Act. Therefore the Government proposes to legislate, when Parliamentary time allows, to make complaint evidence automatically admissible, whatever the crime being tried. The existing safeguards for such evidence to be excluded on a case by case basis will be retained.

Responses to Specific Questions

Special Measures for Rape Victims

Admissibility of video-recorded statements

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?***

8.1 There were 62 responses to question 8 and 61 responses to question 9.

8.2 53 respondents agreed that the video recorded statement special measure should be implemented for adult complainants in serious sex offence cases and that the prosecutor should be able to decide whether the video is used as evidence in chief. Respondents identified a number of justifications for the use of this measure for both complainants and the wider criminal justice system:

- It is likely to enable complainants to provide a more detailed account and one in their own words
- It will improve the quality of the complainant's evidence
- The evidence is likely to be more compelling and coherent
- Complainants are likely to be less traumatised by giving evidence on video rather than live in a courtroom
- It may help encourage victims to come forward and also reduce the high attrition rates
- The integrity of the interview will be preserved as the jury will be able to see exactly what was said.

8.3 Whilst there was general agreement that the prosecutor should be able to use the video recorded statement, several notes of caution were urged. A distinction was drawn between the video recorded statement being automatically admissible and being automatically used by the prosecutor. There should be a case-by-case assessment of the witness' needs and consultation with the complainant as to whether they wish for the video to be used.

8.4 7 respondents regarded further training of the police, prosecutors and the judiciary as well as investment in equipment as being fundamental to the success of this proposal. At present, a lot of the videos contain inadmissible evidence which require substantial editing and interviews with adults may need to be more tightly controlled than those with child witnesses. The tentative research findings that large plasma screens are more effective means that instalment of these in courts should be prioritised. It is also crucial that facilities in police stations are adequate to cope with the extra demand that this extension will effect as complainants should not be made to wait hours for an interview suite to become available.

8.5 There was a call for guidance to be offered to complainants regarding the pros and cons of all of the special measures available to them. Drawbacks of giving evidence by video, such as the probability of the defendant seeing them must be made plain. The complainant should be given sufficient time to discuss their wishes with the prosecutor before he makes the decision on whether to use the video as evidence in chief. Sufficient support should be offered to complainants to help them make an informed choice about this. It was also noted that there needs to be a consistent availability of this measure across the country for all complainants to avoid a 'postcode lottery'.

8.6 Given the lack of empirical evidence on the effectiveness of video recorded evidence, 2 respondents called for further research to be conducted before making it automatically admissible. This should look into the impact of video evidence on juries and the effect on trial outcomes. The Crown Prosecution Service argued for jury research to be conducted on these issues with the use of real jurors. They recognised that this would require an amendment to section 8 of the Contempt of Court Act 1981, and if this is not realistic in the short term they recommend that 'shadow juries' be used.

8.7 Professor J.R. Spencer QC agreed that video recorded statements should be admissible in principle but felt that there was no need to amend the Youth Justice and Criminal Evidence Act 1999. Section 137 of the Criminal Justice Act 2003 already provides for this and this provision just needs to be commenced.

8.8 2 respondents also asked that the Government provide guidance on what matters need to be considered by a judge when they are considering the "interests of justice" test.

8.9 9 respondents were opposed to the automatic admissibility of the video recorded statement. The reasons put forward were:

- The courts are not adequately equipped at present to cope with this expansion
- There is "no doubt" that the impact of live evidence is substantially greater than video evidence
- The use of plasma screens may solve some of the difficulties, but the evidence is inconclusive at present and there would need to be substantial

investment if they were to be installed throughout the country at a potentially disproportionate cost

- Videos can be very lengthy which prolong trials and reduce the impact of the evidence
- Editing videos is usually required which is a lengthy and costly process. There are often delays in transcription of the videos
- The emotional state of a complainant shortly after the incident may detract from the evidence they give, and inhibit disclosure
- The way in which someone gives evidence, or the way they look (i.e. wearing 'provocative' clothing), shortly after an attack may also perpetuate the 'rape myths'
- Rather than reducing the trauma suffered by the complainant, it may have the opposite effect
- Delaying the production of a full written statement may prevent a forensic scientist from assessing the case at the earliest opportunity
- The court should consider the characteristics of the witness, such as their age, before deciding whether to admit the video as evidence. Eligibility criteria should be outlined rather than allowing it in automatically for a specific set of offences
- Evidence on video can appear to be 'stage managed'; less open to challenge and therefore undermine the 'equality of arms' principle
- A couple of respondents also questioned the compatibility of this proposal with fair trial rights given that the measure is not equally available to the defendant
- The judge should be able to decide on admissibility.

9.1 55 respondents supported the proposal to continue allowing sexual offence complainants to 'opt out' of the assistance of special measures. Many respondents were also of the view that this choice must be informed. This could be done by way of guidance given to victims in a leaflet or a video which should outline the advantages and disadvantages of the various special measures.

9.2 5 respondents noted that providing victims with a choice enables them to take back some control and gives them autonomy. 1 respondent said they should be given access to 'independent' support so that they can make a decision without "pressure" from the Prosecution Team.

9.3 6 respondents were against the proposal to retain the opt out.

9.4 The Superintendents Association were against retaining choice pointing to the fact that it affects consistency and takes away the potential danger of a witness feeling the need to be brave and face the defendant in court. Justice said that the victim should not be able to, in effect, 'veto' the use of the video if she wishes to retract the statement. The court should decide where the interests of justice lie in terms of admitting a video recorded statement in each case.

9.5 One respondent said that victims might not be adequately supported if they decide not to have the support of special measures.

Government response

The Government is committed to ensuring that all vulnerable and intimidated witnesses receive the benefit of special measures to be able to achieve their best evidence. The Government indicated in the consultation paper that it hoped to implement the existing video-recorded evidence provisions for complainants in rape and serious sex offence cases this year and this provision came into force on 1 September 2007.

When Parliamentary time permits, the Government proposes to amend the legislation to provide for automatic admissibility of video recorded statements by complainants in rape and serious sex offence cases. The Government agrees that complainants should retain their present ability to opt out of special measures and that they should be fully consulted by prosecutors before any decision is made to use a video recording in court. It also agrees that such decisions should be taken by prosecutors on a case by case basis with the aim of ensuring that the best evidence is presented to the court in each case. It recognises that before implementation of any such change it will be necessary to ensure that any necessary training needs are met.

Supplementary questions

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?***

10.1 52 respondents commented on question 10.

10.2 There was almost universal support for this proposal and more generally in favour of the use of 'warm up' questions. Many respondents commented that these questions would help relax the witness and reduce the stress of giving evidence in court and enable them to give their best evidence.

10.3 A number of respondents thought that guidance was essential to enhance the training of prosecutors and the judiciary. The guidance would need to re-enforce the need for a pre-trial meeting between the prosecutor and the witness to discuss any further questions that may be put to them during the trial. Any guidance should also refer to the need to offer the witness a chance to refresh their memory ahead of the day of trial.

10.4 A couple of respondents also recommended that a Practice Direction should be drawn up to ensure that there is consistent practice for “warm up” questions across the country.

Question 11

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

11.1 There were 56 responses to question 11.

11.2 47 of the respondents were in favour of the prosecutor being given a broader discretion to ask further relevant questions before cross-examination. Concern was expressed that should the prosecutor be given a broader discretion, then he must consult with a witness beforehand to let them know what questions he wishes to ask and why he wants to ask them. Some suggested that the victim should consent to the asking of further questions.

11.3 Different views emerged as to whether the supplementary questions should be asked whilst the video is being played, or whether they should be reserved until the jury have watched the video in full. There was a strong concern expressed by some that the video should not be paused as that would distort the picture that the jury get of the evidence, and it may be very distressing and confusing for the witness to answer further questions while the video is being played. Some respondents also argued that there should not be a re-visiting of earlier testimony to prevent repetition.

11.4 One respondent suggested that the current restrictions on questioning should be abolished completely and the prosecutor should be allowed to ask whatever he wishes.

11.5 5 respondents argued that the current provisions are adequate to allow for additional questioning and it should be left to the judge to decide what further questions, if any, are appropriate.

11.6 As an alternative, there were suggestions that instead of allowing the prosecutor to ask further questions relating to evidence which emerged after the initial statement, it should be taken by the police by way of a second interview. This will enable it to be conducted by specialist officers and provide the defence with an opportunity to know the full extent of the case against them before the day of the trial.

Question 12

- ***If so, should this be achieved by:***
  relaxation of the present restrictions but with some safeguards or criteria; or
  by a repeal of the present restrictions?

12.1 Of the 47 respondents in favour of giving the prosecutor a broader discretion, 28 felt this was best achieved by repealing the present provision, whilst 19 favoured a relaxation.

12.2 Those who favoured repeal advanced the following reasons:

- There are already sufficient safeguards in place to prevent the rules of evidence being breached, for example the prohibition on leading questions
- The prosecutor is best placed to decide what additional evidence is necessary
- Asking additional questions at trial will help the witness give their best evidence
- Judges can be trusted to control irrelevant questioning by the prosecutor and the application of flexible case management rules were a better tool than complex and prescriptive provisions in legislation.

12.3 Those who preferred option (a) argued:

- It is better to relax the current restrictions and fully evaluate the effect before deciding whether it needs to be repealed
- Repealing the restriction may lead to arguments over abuse of process which will lead to trial delays
- This will be quicker to effect than a full repeal
- It is important that the video is not abandoned, and this would be more likely following a repeal
- National guidance should be issued to outline the limits of additional questioning.

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?***

13.1 There were 35 responses to question 13 and 33 responses to question 14.

13.2 Around half of the respondents were in favour of allowing further categories of witness to take advantage of any change in the law on supplementary questions. Fourteen recommended that it should be extended to all vulnerable or intimidated witnesses (six of whom specified that it should apply to all categories of case).

13.3 A further ten respondents argued variously that the amended provisions should apply to either all vulnerable witnesses; all child witnesses or just to intimidated witnesses in serious sexual offence cases.

13.4 Others argued that it really depends on the category of the case and the particular witness. One respondent felt that the provision should not apply to children as further questioning could prolong the stress of their experience in court.

13.5 Five respondents were in favour of the extension of supplementary questions to complainants in serious sexual offence cases to be fully evaluated before any further extension was considered.

13.6 Professor J.R. Spencer QC argued that it would be better to implement sections 137 and 138 of the Criminal Justice Act 2003 and repeal section 138(1) to allow the prosecutor to ask whatever relevant questions he wishes to.

14.1 In terms of possible safeguards, the following suggestions were made:

<u>Legislative</u>

- If the proposals are to apply to children, there should be an age limit set
- It should only apply to certain categories of case
- The level of vulnerability of the witness should be considered
- The prosecutor should outline the questions and the reasons for them ahead of the trial
- The judge should decide which questions will be permitted in a voir dire.

Non-legislative

- The operation of the provision for complainants in serious sexual offence cases should be evaluated before any extension and clear benefits need to be demonstrated
- Witnesses should be able to make an informed decision about whether to consent to further questioning. Witnesses will need proper support to make this decision
- Training for lawyers and judges is essential, and there could be a system of specialist prosecutors in child witness cases and 'ticketed' judges
- The judge must control repetitive questioning
- Guidance should be issued for lawyers similar to that in *Achieving Best Evidence* regarding the types of question to ask a vulnerable witness
- A Practice Direction could be issued setting out the guidance.

Respondents also commented that there should be no cross-examination of child witnesses and that the best interests of the child should always be taken into account.

Government response

When Parliamentary time allows, the Government intends to legislate to broaden the discretion that the prosecutor has to ask supplementary questions to all vulnerable or intimidated witnesses where a video recorded statement is admitted as evidence in chief. This discretion should be subject to both legislative and non-legislative safeguards to protect the witnesses from unnecessary questions. The Government acknowledges that there is a particular need to protect child witnesses when developing these safeguards. Guidance to prosecutors will need to be revised to take account of the changes and the Government will work closely with the Judicial Studies Board to explore any need for additional judicial guidance or training.

It seems sensible that this should be achieved initially by a relaxation of the present restrictions and, once that is fully evaluated, then a decision can be made on whether to fully repeal the restriction. The Government recognises the need to ensure that implementation plans include training and guidance for frontline staff on the operation of this new procedure.

In the interim, the Government proposes to pursue the issue of guidance to promote the use of the existing provisions.

IMPACT ASSESSMENT

A Partial Public Sector Regulatory Impact Assessment was conducted in spring 2006 before the consultation paper was published. The only cost impact identified was in the form of legal aid costs arising out of the proposal on general expert evidence, in respect of which it had been intended the prosecution and defence would lead evidence. That approach is no longer envisaged and as a result the costs in question will no longer arise. It follows that the proposals are neutral insofar as cost impact on the public sector is concerned.

The proposals have a potential impact upon the public and a full Equality Impact Assessment has been carried out in accordance with arrangements in place since May 2007. This is summarised below.

Equality Impact Assessment Report

Background:

The consultation exercise "Convicting Rapists and Protecting Victims – Justice for Victims of Rape" consulted on a range of options for improving the conviction rate in rape cases, whilst not interfering with the burden of proof. The consultation paper included a partial Regulatory Impact Assessment (RIA), under arrangements applicable at the time. A full Equality Impact Assessment has since been carried out. The policy relates to PSA targets 23 and 24, "make communities safer" and "deliver a more effective, transparent and responsive Criminal Justice System for victims and the public".

As a result of the consultation exercise, it has been decided to extend the law of hearsay evidence to allow victims' complaints of rape and other crimes to police officers and others to be automatically admissible as evidence in criminal trials, subject to the judge's power to exclude them on a case by case basis. It has also been decided to proceed with proposals to strengthen "special measures" for victims of rape who give evidence in court. This has two elements – making video recorded interviews with victims automatically admissible as the prosecution evidence-in-chief, and allowing prosecutors to ask rape victims "warming up" questions in court to put them at ease before they are cross-examined on the contents of the video. The two proposals form the basis of this EIA report.

Methodology:

Reference has been made to available data on sexual offending generally, on the law of hearsay first complaint evidence as applied in court, and on the impact of "special measures" legislation for vulnerable and intimidated witnesses. The proposals relate to technical areas of trial procedure, on the law of hearsay evidence and the procedures relating to the giving of evidence in court. On the basis of the available data, it is difficult to imagine any potentially adverse impacts arising out of the proposals.

Consultation & Involvement:

A formal public consultation exercise was held in 2006, following interdepartmental discussions. Almost 100 responses were received, from a variety of organisations, particularly many stakeholder groups. The proposals have been settled following the consultation. In addition, a meeting of stakeholders was convened in April 2007 to discuss the proposals on general expert evidence.

Assessment & analysis

The following Key Findings emerged from the data collection and community engagement. The potential positive impacts of the proposals are, strengthening gender equality and reducing disabled people's disadvantage by improving the access to justice in rape cases of women and disabled groups. No adverse differential impacts were identified except by a small minority of respondents who objected to the proposals as part of the Government's wider action against rape. There is very limited information available on any potential race impact of the proposals but in principle there should be no impact. The Government will, however, consult with BME groups with a particular interest in violence against women issues to address the shortage of information in this area.

Recommendations

There is no question of the proposals being inconsistent with statutory equality requirements. Their operation will however be monitored in practice by the CPS and OCJR to ensure that unexpected impacts do not arise. It is likely that they will be reviewed some months after their entry into force as part of wider reviews of hearsay evidence and special measures legislation.

Date of EIA Report

October 2007.

Date of Publication of Results

November 2007.

Conclusions

The Government has stated its conclusions on each of the four main topics covered by the consultation paper in the relevant sections above. Overall, the Government has noted that the majority of respondents were strongly in favour of further reform in some areas. It now intends to bring forward legislation as appropriate.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than the **subject matter** of the consultation, you should contact the consultation coordinator Chris Brain by email at:

Christopher.brain2@homeoffice.gsi.gov.uk

Alternatively, you may wish to write to:

Chris Brain,
Consultation Coordinator
Performance and Delivery Unit
3rd Floor Seacole Building,
Home Office
2 Marsham Street
London
SW1P 4DF

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

Annex A

List of Respondents

ACPO National Rape Working Group
Adam Glowaski
Avon & Somerset Area Victim Liaison Team
Barnado's
British False Memory Society
British Medical Association (Medico-Legal Committee)
Campaign to End Rape
Caz Minter Wright (Crisis Point and the Rowan Centre)
Centre for Crime and Justice Studies King's College London
CentreLGS
Centrex
Chris Saltrese Solicitors
Church of England (Mission & Public Affairs Council)
Co-ordinated Action Against Domestic Abuse
Council HM Circuit Judges
Criminal Bar Association
Detective Sergeant David Swift-Rollinson
Devon & Cornwall Criminal Justice Board
Doncaster Rape & Sexual Abuse Counselling Centre
Dr Kate Cook
Dr Louise Ellison
Dr Nicole Westmarland
Dr Roxane Agnew-Davies
Dr Sarah Heke
Dr Vanessa Munro
Forensic Science Service
General Medical Council
Greater London Domestic Violence Project
Haven Paddington
Haven Whitechapel
Her Centre Woolwich
Hev
HH Judge David Wood
Jennifer Drew
Jill Saward
Julia O'Brien
Justice
Karen Palmer
Kirklees Safer Communities Service in Partnership with KRASACC
Law Society Criminal Law Committee
Liberty
Lisa Thompson (Rape & Sexual Violence Project Birmingham)
Mark Whitehead
Mayor of London
Men's Aid

Metropolitan Police Authority Race and Diversity Unit
Metropolitan Police Service Strategic Research Unit
Mike Redmayne Reader in Law LSE
Mrs S. Curtis
NSPCC
Object
Oxford Sexual Abuse & Rape Crisis Centre
Paul Jervis
Penney Lewis Reader in Law King's College London
Phil Rumney Reader Sheffield Hallam University
Police Federation of England & Wales
Police Superintendents' Association England & Wales (Crime Committee)
Professor David Ormerod
Professor J.R. Spencer QC
Professor Jennifer Temkin LLD
Rape & Sexual Abuse Support Centre (Cheshire and Merseyside)
Rape Crisis Co-ordinating Group
REACH
Redcar Rape Crisis Service
Respect
Respond, Ann Craft Trust & Voice UK
Rights of Women
Roderick I. Hunt barrister
Royal College of Obstetricians & Gynaecologists
Sapphire Independent Advisory Group
Sergeant Chris Braham Wiltshire Police
Sheffield Rape & Sexual Abuse Counselling Service
St Mary's Sexual Assault Referral Centre Manchester
Steven Moxon
Sue Peters
Suffolk Constabulary
Survivors' Network
Sutton Women's Centre
The Lilith Project (in conjunction with London Sexual Violence Action and Awareness Network)
The Magdalene Project
The NIA Project
The Rose Committee
Tyneside Rape Crisis Centre
United Kingdom Men's Movement
Victim Support
Wearside Domestic Violence Forum
Welsh Women's Aid
Women & Girls Network
Women's Aid
Women's National Commission
Women's Rape & Sexual Violence Service Hanley

There were also three replies in confidence.