

Routes to (in)justice: a research review on the reporting, investigation and prosecution of rape cases

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Section 1: Introduction and Context

This review of the literature on the reporting, investigation and prosecution of rape cases was commissioned by Her Majesty's Crown Prosecution Service Inspectorate (CPSI) to inform this inspection. The brief required addressing a number of specific questions; this edited version is presented as an overview of the current state of knowledge. The review consists of nine sections: an introduction and context setting; aims, objectives and methodology; what we know about the prevalence and reporting of rape; understanding the attrition process; reporting and initial investigation; the role of prosecutors; the court process; statute law and conclusions.

A note on language

Within a legal framework the parties in rape cases are referred to as complainant and defendant. Sociological, criminological and psychological research often uses the terms victims/survivors and perpetrators/offenders. Both sets of terms are used in this review. Complainants/victims/survivors are referred to throughout as 'she' (unless the study or data refer explicitly to male rape), since this reflects the vast majority of reported rapes and samples in research on rape. Defendants/perpetrators/offenders are referred to as male, since (apart from a very few cases involving women being accessories each year) the law in England and Wales defines rape as requiring penetration by a penis, and all research data confirms that the vast majority of sex offences are committed by men.

Rape as a public policy concern

Rape has not featured strongly as policy priority in the UK for much of the last two decades, and in many ways has been eclipsed by a strong national and international focus on domestic violence (Kelly and Regan, 2001). This situation has, however, changed somewhat in the UK in the late 1990s due to widely publicised concerns about the increasing attrition rate for reported rape cases, and the publication of proposals for the complete overhaul of sexual offences law in England and Wales (Home Office, 2000).

The national context

Whilst concerns about responses to rape were strongly articulated by women's groups in the 1970s, it was the broadcast of a now infamous television documentary of Thames Valley police interviewing a woman reporting rape in 1982 that prompted public outrage. In the aftermath policy and practice changes within the police were promoted, and sexual assault was addressed by policy bodies including the Women's National Commission (1985). The first piece of research to be published following the revelations focussed on attrition in Scotland (Chambers and Millar, 1983); it has recently been described as painting a 'devastating picture' and revealing 'the blatant mistreatment of victims by defence counsel and an acquiescent attitude on the part of prosecutors and judges' (Temkin, 2000b, p220).

These developments and government responses, alongside an overview of current research, were documented at the end of the 1980s (Smith, 1989). The most obvious changes included: an emphasis in police training on sensitive treatment; the establishment of rape examination suites; and attempts to recruit more female doctors.¹

Zsusanna Adler's study (Adler 1987) aimed to assess the impact of these and other legislative changes: whilst she was able to document increased satisfaction with the police, the attrition of cases through the system and the sense complainants had of themselves 'being on trial' continued to be evident. The work of Sue Lees and Jennifer Temkin in the 1990s continues to echo these points. The most recent study of attrition by the Home Office (Harris and Grace, 1999) revealed further decreases in the conviction rate (see also Section 4).

Alongside this explicit attention to rape and sexual assault, there have been other relevant government initiatives. The Cabinet Office policy paper *Living Without Fear* (1998) represents the first official government statement on violence against women in England and Wales and the reforms within the Youth Justice and Criminal Evidence Act 1998 contain a number directed specifically at rape cases and more general provisions with respect to vulnerable and intimidated witnesses.

The international context

The 1990s was undoubtedly the decade in which the issue of violence against women was recognised at the level of international law and policy. This has taken place through two linked processes - the continuing UN focus on women's equality and the redefinition of human rights. The World Conference on Human Rights in Vienna 1993 recognised the need to guarantee human rights in the private as well as the public sphere, and declared violence against women a fundamental violation of women's human rights. State responsibility for creating a legal and public policy framework in which all human rights can be enjoyed and exercised was reiterated. The 1994 UN Declaration on the Elimination of Violence Against Women outlines state obligations, and in the preamble stress is placed on the 'urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty and integrity and dignity of all human persons'. State responsibilities have been further developed by later international instruments, especially the Beijing Platform for Action in 1995. These and other international policy documents place a responsibility on government to uphold international standards with respect to women's human rights and violence against women.

Rape has also become a specific focus of international law through both the International Criminal Court and the more recent international tribunals under the Hague Convention (Bedont & Martinez, 1999). At the end of the twentieth century, rape and violence against women have moved into the mainstream of human rights and international law.

Rape and human rights

Much recent discussion in the UK has focussed on the European Convention of Human Rights (ECHR) being enacted as national law; making binding the responsibilities which the UK had previously under international conventions. Human rights principles fall into three main areas for states:

- a duty to avoid violating the right in question;
- a duty to protect citizens from violations of their rights;
- a duty to assist those whose rights have been violated (Combrinck, 1998).

The aspect of the Human Rights Act that has been considered most relevant to rape prosecutions is the right to a fair trial, and this has indeed been the subject of a recent House of Lords case (RvA).

¹ In two locations - Manchester and Northumbria - sexual assault centres (SARCs) were founded in hospitals. Until the last two years they remained the only examples of this kind of provision, but at least seven have now been, or are in the process of being, established. SARCS are considered core services in Australia, New Zealand and in many parts of the USA.

Far less attention has been given to the implications of human rights principles with respect to complainants. It is, however, clear that states have responsibilities to: protect women from rape through effective statute law, investigation and prosecution processes; ensure that complainants are treated with dignity and respect throughout such processes; create conditions in which women's human rights are supported through education and prevention programmes.

Human rights principles clearly create a duty to assist those who report rape, since this is an obvious violation of the right to bodily integrity. But the testimony of many survivors attests to significant shortfalls in responses, with accounts documenting feelings of betrayal and being victimised a second time (see, for example, Lees, 1997b; Victim Support, 1996). The Tasmanian Sexual Assault Task Force (1998) comment:

... the personal trauma was made intolerable when the system of response which they had assumed would be helpful to them failed them. It failed them in many ways - by a service not being available, by service providers not being responsive or skilled to meet their particular needs or by investigative and court processes which left them feeling frustrated, degraded, humiliated and violated. (p5)

Reviewing research, policy and practice across the states of Australia, Bergen and Fishwick (1995) argue that in many instances the Criminal Justice System (CJS) failed to meet principles of good administration, through matters such as delays and adjournments, lack of pre and post court support, and courtroom intimidation (see also Victim Support, 1996). Research studies suggest further that the CJS under-enforces rape statutes (Polk, 1985), and that practitioners at all levels rely on stereotypes rather than the existing knowledge base (Frohmann, 1991; Kersetter, 1990, La Free 1989, Martin and Powell, 1994). Subsequent sections will illustrate, that these stereotypes turn on the relationship between victim and perpetrator, assessments of the victim's credibility, and are justified through references to the likelihood of conviction. Whilst they may, arguably, reflect the current state of play, these orientations produce cautious decision making, which in turn serves to reinforce the status quo. In the process the reform of statute law and procedure that was designed to extend the meaning and understanding of rape is undermined (Frohmann, 1991; Temkin, 2000a).

Research on the attrition process (see, for example, Kersetter, 1990) concurs that the two major gateways within the CJS are police decisions to crime/found the case and prosecutors' decisions to support charges and initiate proceedings. Significantly more cases are lost at these points than result in acquittals in court. As later sections will outline, these decision-making points turn out to be more complex than at first glance, but they nonetheless determine 'which incidents will be taken seriously and which victims will be afforded the full redress of the criminal law' (op cit, p268).

Rape - meanings and myths

The provisions of the Violence Against Women Act in the USA locate rape as either a crime or health issue. But rape is not a crime like most, nor is it a disease. For example, most criminological analysis draws on a presumption that victims and perpetrators are most commonly strangers - but rape is a crime primarily committed between parties known to one another. The New South Wales Standing Committee on Social Issues (1996) concluded that rape was a unique crime for the following reasons:

- it is not just a physical assault, but a violation of personal intimate and psychological boundaries;
- it carries additional emotional impacts and meanings, often linked to cultural contexts;
- it is surrounded by persistent cultural myths and stereotypes;
- it is overwhelmingly a gendered crime, committed by men predominantly against women and girls but also on some boys and other men;
- the perpetrator is in the majority of cases someone the victim knows, thus the crime involves betrayal of trust;
- victimisation often results in potent and debilitating self-blame;
- it carries particular health risks and consequences - STDs, involuntary pregnancy and HIV infection;
- the process of reporting the crime and any legal case are often experienced as a form of re-victimisation.

The Scottish Executive (2000) also argue that sexual offences have elements that distinguish them from other crimes, but their focus is more legalistic:

- in no other crime does the consent of the victim play such a pivotal role;
- there is frequently a pre-existing relationship between complainant and accused, which can "divert attention from and cloud the issues of fact which relate to the crime alleged" (p6);
- sexual offences invariably take place in private, meaning that there are seldom witnesses other than the parties;
- there is often a delay in reporting which may lead to a loss of evidence;
- even where there is physical evidence it may be ambiguous;
- there is still a level of embarrassment when dealing with sexual matters in a public context.

This combination of social and legal differentiating factors means it is not possible to argue that rape should be responded to in the same way as other similar crimes; since there are no direct comparators.

The term myth has been used in relation to ideas about rape for three decades, and has various possible interpretations. Helena Kennedy makes the following acute observation:

Myths are tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change, and the law is full of mythology. Women are particularly at its mercy...mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration. (1992, p32)

Its use here refers to non-factual presumptions that serve (intentionally or unintentionally) to deny, minimise or misrepresent what we know from both research and the accounts of victims and perpetrators. The table below outlines some of the most prevalent myths and the different reality research evidence reveals.

Rape myth	Research evidence
It is committed by strangers	It is mainly committed by known men
'Real rape' happens at night, outside and involves a weapon	Rape happens at many times, most commonly inside, often involving threats and other forms of coercion
There are always injuries	A minority of reported rapes involve clear external or internal injuries
Anyone facing the possibility of rape will resist	Many do resist, many freeze through fear or shock, or decide that resistance would be futile and/or dangerous
Women 'ask for it' by their dress/behaviour/taking risks	Many sexually aggressive men deliberately target their victims, and a proportion know them very well
All victims react in the same way if they have really been raped	There are a range of responses, from extremely distressed through to quiet and controlled
To be raped is worse than being killed, or at least one of the most terrible things that can happen	Rape - defined as sex without consent - is in fact rather commonplace, and most victims choose to survive

The Scottish Executive (2000) explore the question of myths about rape, again from a more legalistic standpoint. They note the following commonplace beliefs:

- that someone who has had sex with persons A and B is more likely to have it with person C;
- someone who is 'sexually promiscuous' has less right than someone who is not to choose who they are sexual with;
- someone who is 'sexually promiscuous'¹ is generally less trustworthy, and therefore less likely to be telling the truth;
- women have a tendency to 'lead men on' and are therefore to blame if men fail to resist their physical impulses;
- when women say no they do not always mean it;
- false allegations of rape and sexual assault are more common than false allegations of other crimes.

These perceptions are considered to be: "both illogical and at odds with any system of morality which places a value on the individual's right to self-determination" (Scottish Executive, 2000, p6). Further, it is argued that they amount to forms of prejudice which, if they come into play in a trial, result in the complainant being treated with a lack of respect and in the worst cases being humiliated (op cit). However, this review will show that many of these perceptions continue to inform responses to rape.

Susan Estrich (1987), in her classic study of the legal construction of rape in the USA, uses the concept of 'real rape' to describe sexual assaults which are accepted as such by police and prosecutors, and thus vigorously prosecuted. Real rapes are those committed by strangers, outdoors and involve weapons and injury. In reality, these four conditions are rare, but they nonetheless constitute a template against which all other rapes reported to the police are measured. The work of Soothill and Walby, (1991) suggests that media reporting has served to reinforce this template, through an increasing focus on "monster" or "feature rape cases".² Pointing to the similarities (and differences) between legal and popular notions of rape is not just a question of semantics. As subsequent sections will show, they have impacts throughout the process - from the willingness to report through to decision making by police, prosecutors, judges and juries. One reason why the notion of 'date rape' has received such attention is that it implicitly challenges what will be referred to as 'the real rape template'; template here means more than stereotypes, it is a framework or model that people create on the basis of past experience, that they then use to assess whether subsequent events fit.³

Recent studies on attitudes to violence against women consistently show⁴ that there is less public awareness and changed understanding about sexual assault compared to domestic violence (see, Tasmanian Task Force, 1998; Burton et al, 1998; Regan and Kelly, 2001). Few studies on the acceptance of rape myths have been done in the UK, but a considerable number have been undertaken in the USA, where there is a tradition of research linked to juror decision making. Overall findings suggest that men are much more likely to have limited definitions of what constitutes rape, and that these attitudes affect their behaviour in simulations of jury decision making (Sinclair and Bourne, 1998). One key US study (LaFree, 1989) on the processing of reported rape cases argues that acceptance of rape myths accounted for trial outcomes more accurately than any of the evidence presented in the case.

¹ We have placed this term in quote marks, since in our view the language reflects the very value inferences that the Scottish Executive were keen to question. The term 'promiscuous' carries a negative judgement, unlike possible alternatives such as 'experienced' or 'active'.

² This may in part be an unanticipated consequence of the anonymity automatically awarded to complainants in rape cases, removing the 'human interest' element regarded by many journalists and editors as essential to media reporting.

³ This concept draws on two previous sources, Susan Estrich's concept of 'real rape' (1987) and Gary La Free's (1989) use of the sociological concept of 'typifications'.

⁴ The studies referred to here cover England, Scotland, Ireland and Australia.

This research review suggests that at each stage of the legal process stereotypes and prejudices play a part in decision making, alongside legal criteria and pragmatic actions with respect to the allocation of scarce resources. Practitioners endeavour not to pass 'weak' cases on to the next stage, performing a gatekeeping function. The feedback loop also works in reverse, with decisions in Appeal Courts reinforcing perceptions that only a proportion of cases have a realistic prospect of secure convictions.

Section 2: Aims, objectives and methods

The brief for this review was to examine UK and international research to address the following areas:

- initial responses to reports by police;
- police investigations and decision-making;
- forensic examinations;
- CPS guidance and policy on rape offences;
- CPS decision making on, and processing of, cases;
- the issue of consent - including 'drug' and 'date' rapes;
- prosecutors approach to victim's previous sexual history;
- prosecutor's approach to how the victim will give evidence;
- preparation and presentation of cases in court;
- procedure and decision making in court;
- witness care;
- explaining the attrition rate.

Decision making forms a key area of interest, but few studies from the UK address this in detail, since they have been based in the main on case files, retrospective interviews and court observation. Studies of rape survivors who choose to report are seldom prospective, attempting to track their decision-making and experience of the criminal justice system in real time.¹ Thus, some of the most critical knowledge that would illuminate specific points in the legal process is not currently available. It has been possible, however, to draw on existing knowledge and research from other jurisdictions to offer informed conjectures.

For this literature review a combination of search methods was used. The materials gathered include:

- Reference material held by the Child and Woman Abuse Studies Unit (CWASU), including that gathered for a recent EU Daphne funded project on attrition in reported rape cases across Europe (Kelly and Regan, 2001).
- Reviewing content in all editions of *Violence and Abuse Abstracts* and the journal *Violence Against Women*.
- Searches of abstracting sources, especially ASSIA and Lexis-Nexis, using a variety of key words (rape research; rape trials, rape prosecutions, sexual assault, investigating rape cases etc).
- Online searches using the search engine google.com using the same key words.
- Contacting colleagues in the USA, Canada, Australia, New Zealand, South Africa, Norway and Sweden, Scotland and Ireland for relevant published and unpublished material.

It is notable, that even in the USA, where research has exploded on violence against women in the last two decades (Schwartz, 1997), there is far less published on rape and sexual assault than domestic violence. With respect to England and Wales three names that recur: Adler; Lees and Temkin, with only the latter two continuing to publish new work in the last decade. In Scotland two detailed studies of the criminal justice system response have been conducted by three sociologists and legal scholars (Beverly Brown, Michele Burman and Lynn Jamieson). These studies sit alongside those commissioned or conducted by the Home Office and Scottish Office. Together they represent the knowledge base on reported rape cases in the UK. Alongside recent reviews of statute and

¹ A current study by CWASU funded under the Home Office Crime Reduction Programme is attempting to do this to a limited extent.

procedure in England and Wales and Scotland, considerable material was gathered from Australia, where legal reform has been both extensive, and more subject to monitoring and evaluation than any other common law jurisdiction.

Section 3: What we know about rape and patterns of reporting

It is not possible to understand the reporting of rape to the police, or the ways in which stereotypes underpin responses, without an overview of the wider knowledge base: what we now know about incidence, prevalence, the relationships between victims and perpetrators and the circumstances in which rape occurs. This data is summarised in order to locate the rapes that are reported to the police within a wider social context, including the factors that account for decisions to report and not to report. Some attention is also given to what we know about two forms of rape that have been the subject of much debate in recent years - so called date rape and drug assisted rape.

How common is rape?

Measurements of the extent of rape are of two kinds - incidence and prevalence. Incidence refers to the number of new cases within a specified time period, usually a year; prevalence is always a higher figure since it measures the proportion in a population who experience something over their lifetime. Only a proportion of these assaults will be reported to the police. To make matters confusing findings for incidence, prevalence and reported cases may or may not include child rape; some studies limit their findings to adult assaults and others do not,¹ and official figures for reported assaults in many countries include children, since there is no separate crime of child rape.

There have been far fewer studies of the prevalence of sexual assault, than domestic violence (Kelly and Regan, 2001), but it has proved easier to access relatively accurate figures for reported rapes than domestic violence, since in most jurisdictions the latter is not a specified in the criminal code. Where data does exist, figures for incidence, prevalence and reporting show significant variations across the globe, with Australia, the USA and Sweden recording high prevalence rates, and South Africa the highest for both prevalence and reporting to the police (Jewkes and Abrahams, 2000).²

Researching rape and sexual assault has proved more complex than many other forms of violence against women, and indeed using the word 'rape' in questions greatly decreases the reporting of forced sex (Schwartz, 1997). The redesign of questions in the US National Crime Victimization Study in 1992 resulted in findings four times higher than previous versions - and even now does not use the word 'rape' (Greenfield, 1997). The British Crime Survey has, until recently, not published its sexual assault findings since they were considered unreliable, although the first analysis is about to be published (Myhill & Allen, forthcoming). Methodological variations in the sample, the number and form of questions asked, the mode of inquiry (questionnaire, telephone or face-to-face interview), and the definition of rape/sexual assault used by the researchers have all been highlighted as factors affecting findings (see Schwartz, 1997 for a more detailed discussion).

Incidence and Prevalence Findings

There has been no national random sample study of either the incidence or prevalence of rape in the UK. In fact, there is only one published study that provides information on the extent of unreported rape by Kate Painter (1991). This survey involved 1007 women in 11 cities; and was primarily an attempt to quantify the extent of marital rape. The key findings include:

- 1 in 4 women reported rape or attempted rape in their lifetime.
- The most common perpetrators were current and ex-partners.
- The vast majority (91%) told no-one at the time.

¹ A further complexity is that the age boundary for adulthood can be after 15, 16 or 17.

² This research review was explicitly commissioned to explore whether the status of having the highest rates in both categories was an artifact. The authors conclude that unfortunately it is not, and note further the high levels of both child rape and gang rape in the South Africa data.

The forthcoming review of data from the British Crime Survey (Myhill & Allen) includes a minimum prevalence figure of 5%, with a previous year incidence rate of 0.4%. Whilst acknowledging that these are likely to be underestimates, this means that at least 64,000 women were raped a year at the end of the 1990s. The data also confirm that current and ex partners are the most common group of rapists, that the woman's home is the most likely location, and that less than a third told anyone at the time.

International research

Whilst there is far less research internationally on rape than other forms of violence against women; nonetheless the number of studies is not inconsiderable. This section does not critically review this field overall, but presents relevant findings from some of the most recent, respected and rigorous projects.

The prevalence study conducted by Statistics Canada in 1992 has formed a template for a new generation of studies of violence against women (Walby and Myhill, 2001). It involved a national random sample of 12,300 women and used telephone interviews. Whilst most publicity has been given to the domestic violence findings, considerable data was collected on rape and sexual assault:

- Over 1 in 3 women had experienced a sexual assault in their lifetime.
- Just under two thirds (60%) had experienced more than one assault.
- Most (81%) were committed by known men.
- Only 6% reported to the police (compared to 25% who reported an incident of domestic violence).

Reasons for not reporting were: that the police could not do anything (50%); attitudes of the police and courts (41%); and fear of further attack (33%).

The Australian Women's Safety Survey was conducted in 1996 by the Bureau of Statistics, and involved a random sample 6,300 women aged 18 and over. It produced incidence findings of 1.9 percent having experienced a sexual assault in the previous 12 months (almost five times higher than the British Crime Survey estimate). The assaults were almost exclusively perpetrated by men and whilst the largest single category of perpetrators were strangers, the combination of all the categories of known men made up over two thirds of assailants (68%) and current/ex partners and dates comprised more than half of this group. Over half of the assaulted women in the sample (59%) had told a friend, and 15 percent reported to the police.

A large scale research project *Rape in America*, was conducted by the National Victim Center and Crime Victims Research and Treatment Center in 1992. It comprised a survey of a national probability sample of 4,008 women and a survey of 370 rape crisis organisations. This study looked at prevalence and findings echo those already reported: most assaults (84%) were committed by someone known to the woman; almost two thirds (61%) were under 18 at time; and over a third (39%) reported they had been sexually assaulted more than once. Over two thirds reported no physical injuries and a tiny proportion (4%) reported sustaining serious physical injuries.

Bergen's (1995) qualitative study of marital rape showed that it is often extremely forceful and violent; a third were termed 'sadistic' (see also Easteal, 1998¹), and the majority of these women were raped frequently, ie more than 20 times. Only a third defined these incidents as rape at the time, and half of this group immediately separated. Re-definition happened when: the assaults reached a level of brutality associated with stranger rape; the woman accessed support; and/or she separated.

A more recent Violence Against Women Survey in the USA, involved a national representative sample of 8,000 women and men and was funded by the Department of Justice (Tjaden & Thoennes, 1998). A lifetime prevalence rate for completed and attempted rape amongst women was 17.6 percent. Again a large proportion of the victimisations occurred when the victim was under 18, and the majority of adult assaults (76%) involved current or ex-partners or a date.

¹ A study is cited in this paper that shows marital rapes are second only to stranger rapes in terms of the use of weapons and seriousness of injury.

In her review of studies of 'date' rape Mary Koss (2000) notes similar and higher findings in smaller studies of college students and naval recruits (see, for example Fisher et al 2000). She concludes that the trenchant criticisms of the mid-1990s - that samples were unrepresentative, female college students were uniquely vulnerable to rape, and prevalence findings wildly inconsistent - have all been 'outgrown' through the accumulation and convergence of findings.¹

Another developing strand of work in the USA has highlighted the link between adolescent pregnancy and forced sex/sexual abuse. Whilst relatively small numbers of 13-14 year-olds have had sex, significant proportions of the young women who have define the experience as forced/coercive (Donovan, 1997). This realisation has led some states to explore more rigorous application of statutory rape laws, although there is considerable disagreement on either the efficacy or effectiveness of such a strategy (op cit).

Reporting and non-reporting rates

Sexual violence, and rape in particular, is considered the most dramatically under-reported crime (American Medical Association, 1995). Whilst a number of projects have documented the proportion of rapes which are reported (see above) and explored reasons for non-reporting, rather less has been written about what prompts a report, and there is little, if anything, exploring what women are wanting and seeking when they approach the police.

The summaries below on reporting are drawn from the prevalence studies cited earlier and a series of 'phone-in' surveys used in a number of states in Australia to explore system responses to women reporting rape to the police (see Barga and Fishwick, 1995, for summaries).

Reasons for not reporting forced sex include:

- not naming the event as rape oneself;
- not thinking the police/others will define the event as rape;
- fear of disbelief;
- fear of blame;
- distrust of the police/courts;
- fear of the court process and public disclosure;²
- fear of family/friends knowing;
- fear of further attack/intimidation;
- threats by offender/his family or friends;
- divided loyalty in cases involving current/ex intimates and family members;
- language/communication issues for disabled women and migrant women.

Often it is a combination of factors that militate against reporting, and some feature more strongly for certain groups of women than others. A heightened mistrust of the police has been frequently noted, for example, among women from ethnic minorities.³ What has received less attention are the heightened concerns about others knowing and fear that they might be blamed (especially if alcohol or drugs were involved) which disproportionately affect young women. The phone-in survey in Victoria, Australia, notes that almost two thirds of cases (60%) involving strangers were reported compared to less than a quarter (21%) of those involving known men.

The primary reasons in the literature which account for decisions to report to the police are less varied, and include:

¹ Koss's study was the first to reveal the extent of coerced sex amongst female college students in the US in the early 1980s. A more recent paper (Koss and Cleveland, 1997) reports that the 15% prevalence rate for rape and 12% for attempted rape involved 80% assaults by known men and that 57% occurred in the context of a date.

² Anonymity is not guaranteed in some of the jurisdictions where research has been conducted.

³ A number of projects in the USA, however, note high rates of reporting from Black and ethnic minority women (see, for example, La Free, 1989)

- doing it automatically/it seeming the right thing to do;
- wanting to prevent attacks on others;
- wanting to prevent further attacks on oneself;
- a desire for justice/redress;
- someone else making the decision.

Factors that increase the likelihood of reporting include: the offender being a stranger; the use of force; injuries; a location in a public place or in the context of a break in; and women's informal network supporting reporting. Several studies have shown that friends are the most likely people to be told, and if they strongly communicate that what happened was not women's fault this increases reporting (Schwartz, 1997, pxiv).

This summary reveals that many of the factors which encourage and discourage official reports are explicitly or implicitly reflections of the real rape template outlined in Section 1.

With respect to the notion of 'delayed' reporting - often a factor used to suggest corroboration in legal cases - Jan Jordan's (1998) study of women reporting rape in New Zealand shows that the police were the first to be told in only 6 percent of cases. In this sample, for almost half of the reported cases (46%) someone other than the woman made the initial contact with the police.¹ In the majority of instances this took place with her consent and/or co-operation, but a minority did not make the decision to report and were catapulted into a situation not of their choosing. Whether this is a factor in some subsequent decisions to withdraw complaints has yet to be systematically studied.

The focus on reporting to the police as a route into the legal process has meant that the potential costs of this decision have emphasised those associated with formal criminal justice processes. The reasons given for not making a public disclosure reveal a much wider set of risks: the possibility of retribution from the assailant/his family/friends; disbelief and blame from members of their own network and community; an increased sense of shame; loss of support by friends and family where the assailant is part of this social network. There are, therefore, significant social and material costs² involved. Additionally, the implications for safety and protection measures, of both the data on repeat victimisation and the fact that most assailants are known, have yet to be carefully considered within responses to rape.

The decision to report to the police or not is, therefore, clearly connected to the circumstances of the assault, whether the woman defines herself as having been raped in the first instance and then whether she thinks that others will (Williams, 1984). The closer the circumstances to the real rape template the greater the likelihood that it will be reported.

Research on 'date'/acquaintance rape

It is not possible to review all the material, as it is now extensive, especially from North America. Much of the media commentary on 'date' rape has been sensationalist and ideological, resulting in research findings being contested, and considerable debate at policy levels as to whether a lesser offence should be introduced (see, for example, Harris and Grace, 1999; Micheal, 1995).³

¹ This is similar to a Scottish study (Chambers and Millar, 1983), here in 40 percent of cases someone other than the victims made the decision to report, and 17% would have preferred the police not to have been told. The interviews with victims in the study also revealed that only 29 percent made the decision to report entirely alone. See also Myhill & Allen (forthcoming).

² These may include loss of earnings and even giving up a job, and, where the rape took place in the woman's home, a need to move house.

³ In fact, where legal reform has created graduated forms of sexual assault it has been on the basis of the presence (or absence) of aggravating factors - such as weapons, multiple assailants, additional violence/injury - *not* the nature of the prior relationship between the parties.

The term 'date' rape is itself part of the problem (McColgan, 1996), representing a media driven departure from the previously accepted concept of 'acquaintance rape'. This media construction, echoed in a number of best selling books, has encouraged a view that these events are fundamentally about 'mixed messages' and 'misunderstandings' between women and men, or alternatively 'unpleasant' or 'unplanned' experiences which young women later regret. These interpretations, which are a version of the real rape template, are rather less convincing when examined from the perspective of research, including what we know about the decision to make an official report to the police (see previous section).¹ For example, making an official complaint will not protect a young woman from her parents finding out, and responsibility is usually placed on the woman for 'risk taking' whether she says sex was chosen or not. Research on marital rape (Easteal, 1998; Russell, 1990) and studies comparing the impacts of rape by strangers and acquaintances (Frazier and Seales, 1997) all point to there being no less trauma or injury where the rapist is known. In terms of betrayal of trust and disruptions to self-image, assaults by known assailants have greater impacts (op cit, p61).

In a review essay Koss and Cleveland (1997) point to social contexts, including college campuses in the USA and male peer groups, which justify and excuse coercive sex: "permissibility and acceptability appear not be constrained by the abstract concept of consent" (op cit, p7). Reviewing the research evidence they argue that the context for acquaintance rape often (but not always) involves an agreement to share some degree of intimacy. Young women think that their lack of consent to sex is then clear, whereas young men perceive it as hazy and ambiguous (op cit p.8). This could be described as 'miscommunication', but is better understood as reflecting gendered sexual meanings, in which women's refusal is interpreted through a lens of masculine expectation - a sense of being justified in 'trying it on' and seeing what happens if you 'push a little' (see also Regan and Kelly, 2001, for the kinds of pressure and coercion young Irish men thought it was legitimate to use).

The authors discuss a US study that appeared to support the 'mixed messages' idea, since a third of young women stated that they had on occasion said 'no' when they meant yes or were ambivalent. The researchers subsequently returned to their data to explore the context of young women's actions - and discovered that the numeric data disguised several contexts that did not reflect the orthodox 'date rape' scenario. The cases where young women reported saying 'no' when they meant yes were primarily playful situations in long-term relationships, where both parties had a shared understanding of the interaction. Saying 'no' in the context of ambivalence referred to uncertainties in the early stages of relationship building. Here, 'no' was a way of checking out men's intentions, and if these proved to be limited to immediate sexual access the 'no' was certainly meant and intended, their ambivalence was whether at some *future* time they might decide otherwise with respect to this individual. This re-examination of what data actually mean revealed that very few cases fit the popular construction of 'date rape'.

Some of the most current research in the USA has begun to explore the significance of alcohol, especially among young people, since a high correlation has been found between reports of forced sex (both young women reporting being forced and young men admitting to using force) and prior consumption of alcohol (ARIV, 2000; Wiehe and Richards, 1995)). This work begins from a recognition that alcohol is frequently used by men and women as an aid to relaxation and communication in contexts that are either considered 'safe' or are anxiety laden; either of which may feature in acquaintance rapes, depending on the degree of prior contact between the parties. Consumption of alcohol (and some forms of illegal drugs) also provide a route in which less responsibility is taken for sexual decision making (Norris et al, 1996); indeed a kind of non-decision making appears in young peoples' accounts: 'it just happens when you are drunk' (Regan and Kelly, 2001). However, there is rather more going here than is immediately apparent. More detailed research reveals that men's perceptions of women's use of alcohol, especially excessive drinking, is that this indicates sexual availability whatever the woman may explicitly state. Drinking by women

is read as a sign of having a reputation, which in turn is both a boon to seduction (George et al 1995), and a justification for the use of coercion; (Koss, 2000). Young men in a study based in Ireland (Regan and Kelly, 2001) admitted that if they were interested in having sex, they would target young women who were drunk, or who they could get drunk (see, also Ullman et al, 1999 with respect to the USA). Furthermore, Koss and Cleveland (1997) argue that men are open to using sexual coercion before they consume alcohol, and that they use it in a purposeful way, including to enmesh their target in a situation in which she will feel implicated. There is even a suggestion that some men deliberately target women who will fit the stereotype of 'asking for it' (Koss and Cleveland, 1997).

Drug assisted rape

Recent concerns at the use of legal and illegal drugs to facilitate sexual access have emerged. In these contexts drugs are administered secretly in order to: interfere with memory and the ability to resist, and in the most disturbing reports to create desire and involvement in a context where consent was not given to either the taking of drugs or to have sex. Whilst much has been written on the topic, there is limited reliable research; the difficulties for researchers mirror those of investigators - that accounts are complex and confused, and the parameters of the offence are as unclear for victims as they are for professionals. Peter Sturman's review for the Home Office (2000) offers some insight, and is strong on recommendations for the investigation of such cases, and the legal processing of all sexual assault cases. He argues that drug assisted rape has been wrongly elided with 'date rape', since most complainants assert they were not on 'a date' (p112).

The study draws on questionnaire data from 123 adults who identified themselves as having suffered drug assisted sexual assault. Key findings were:

- Where the level of drug significantly impairs functioning, the ability to consent is not present, and this is currently recognised in law.
- The issue has been misrepresented and linked to Rohypnol, which is not the most common drug used in either the UK or the USA.
- Alcohol [and illegal recreational drugs] has long been used as a way to decrease resistance and reluctance to sex, and the majority of other drugs seem to be mixed with alcohol (54% in the survey).
- Offenders are often known to the victim (70%) - the use of drugs may be a tool, opportunistic or deliberate and planned as part of group/serial offender modus operandi.
- Clubs and pubs are the most common location for 'drugging' (50% in the survey) followed by the home of the victim and university campuses.
- Most attacks (71%) take place at the home of the complainant or the attacker, with 21% in hotels.
- Major cities were over-represented in the sample, as were students.
- Over two thirds of victims (69%) realised that they had been assaulted within eight hours.
- Most had some memories of attack, and this may enhance over time.
- Almost half (42%) of this sample had reported to the police, and 77% did so within 48 hours of the attack.
- Major reasons for not reporting were self-blame and shame.
- Over half (54%) rated the response of the police as poor or very poor - men rated the police worse than women.
- What victims wanted from police was for them to be sympathetic (38%), believing (29%) and non-judgmental (24%).

What do we know about rape?

The data on what we know about rape question a number of the presumptions that were outlined in Section 1, and reveal that for a substantial proportion of women rape may involve repeat victimisation. Overlaps between rape and domestic violence have received limited attention in either research, or policy development,² but they may deserve greater exploration, not least with respect to the safety needs victims may need to be met in order to sustain a prosecution.

¹ St Mary's Sexual Assault Referral Centre in Manchester have noted an increase in reports of drug assisted rape over the last two years, and many have not been reported to the police because of the victim's memory of what happened has been impaired.

² Professor Betsy Stanko is currently developing analysis of these links, drawing on data held by the Metropolitan police.

¹ Looking at accounts of incidents in college sexual assault logs, a significant minority are cases where the victim could not have consented since they were so incapacitated by alcohol (Meilman & Haygood-Jackson, 1996).

Rape - defined as sex without consent - is a more common, and mundane crime than it is conventionally believed to be, with only a minority of assaults fitting the real rape template: by a stranger, outside, at night involving a weapon and injuries. The power of this stereotype, however, continues to affect how rape is defined and understood by everyone beginning with victims themselves. It is also linked to notions of blame, since the real rape scenario is the one where limited blame attaches to the woman - apart from being in the wrong place at the wrong time. Research studies in the UK and internationally, however, concur that most rapes are committed by known men; that young women are especially vulnerable to acquaintance rape; and older women to rape by current/ex partners. The fact that most rapists are known in turn means that weapons are used less often than psychological coercion, abuse of power and authority, and playing on women's fears (Bargen and Fishwick, p32).

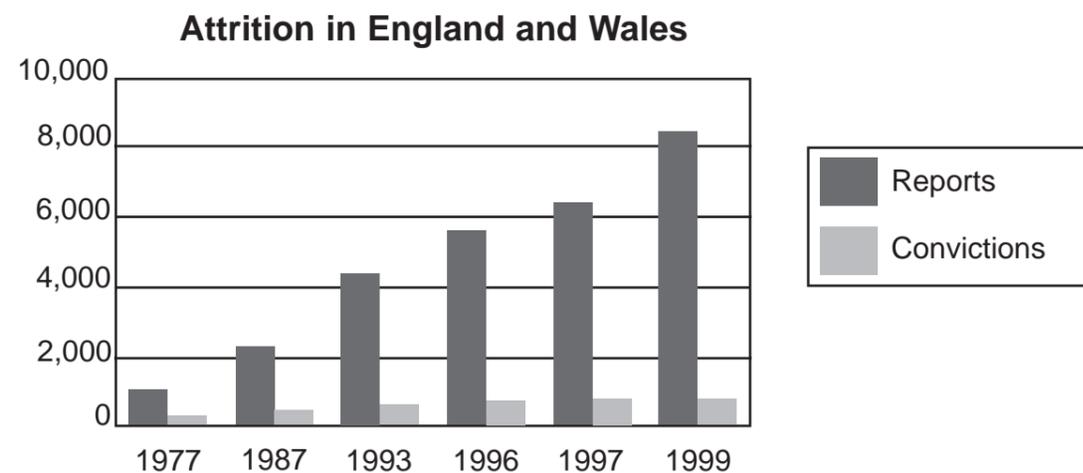
Rapes by known assailants have been variously termed 'common' or 'simple' rapes - and they are both less likely to be reported and less likely to result in successful prosecution. The attrition process (see next section) currently functions to reinforce the real rape template, as a (unintended) consequence rapes by known men continue to be minimised and trivialised, despite research evidence of both the frequency of such assaults and their negative long term impacts.

Section 4: Understanding Attrition

In this section research on attrition rates is summarised and key attrition points are identified. Later sections will explore these in more depth, drawing on studies that focus on stages in the processing of rape complaints by the CJS.

Attrition rates

The diagram below, using official statistics from the Home Office, graphically illustrates two patterns in England and Wales over the past thirty years: a continuing and unbroken increase in reporting to the police; and a relatively static number of convictions. The combination of these two trends means that whilst in 1977 one in three reported rapes resulted in a conviction, by 1999 this had fallen to one in thirteen (32% versus 7.5%). The most recently published figures are for 1999 (Ahmed, 2000): 8,500 cases were reported and 634 convictions obtained. In fact, the attrition rate is even greater, since official statistics exclude reports that are no crimed very early in the process (see Gregory and Lees, 1999 and Harris and Grace, 1999) and there will undoubtedly be a number of cases which are unrecorded! not to mention the number of convictions that are overturned on appeal.



Jennifer Temkin (1999) comments that, in the face of this evidence:

There must be a strong temptation in these circumstances to sift out the few cases which might seem likely to lead to convictions whilst moving the rest as swiftly as possible out of the system. Yet succumbing to this temptation could itself be a factor in declining conviction rates. (p37)

¹ None of the UK attrition studies have looked at under-recording by the police, although it has been well documented with respect to other crimes.

Attrition rates in other countries

In a study of attrition rates across Europe (Kelly and Regan, 2001) only the Scandinavian countries and Ireland¹ reflect precisely the same trends over time; the variations, however, were in relation to reporting trends, in virtually every country, a decline in conviction rates was evident. Whilst this suggests some core problems linking adversarial and investigative legal systems, England and Wales and Ireland had amongst the lowest rates for prosecutions and convictions.

The Senate Judiciary Committee issued a report entitled *Detours on the Road to Equal Justice* in 1993 that documented attrition in rape cases across the USA². The average conviction rate in 1990 was 12 percent. The report demonstrates disparities in how rape and other violent crimes were prosecuted, and raises the problem of 'normalisation' whereby sexual assaults are redefined as the mistakes of 'errant youth or negligent men', especially when the parties were known to one another.³ Statute reform in the 1970s and 1980s has increased neither arrest nor conviction rates, although the number of cases reported to the police continues to rise. The key attrition points identified were: arrest (62 percent of reported rapes do not result in an arrest); dismissal (of the cases that move into the system, 48 percent were dismissed before trial); and acquittal at trial.⁴ The committee note a reluctance amongst prosecutors to bring cases where the parties are known to one another - the majority of rape cases. The review, however, found references to significantly higher conviction rates in particular areas of the US, including Washington and New York. A subsequent review revealed local conviction rates across the USA ranging from 2.5% to 19.85% (Sinclair and Bourne, 1998, p576).

Four studies addressing attrition in Australia are discussed in an overview paper (Brereton, 1993), although directly comparable data is not provided for each of the four. Similar patterns to those documented for England and Wales and the USA are reported. The primary filters are the victim, in terms of the decision to report and continuing with the case, and the police in terms of the decision of whether to lay charges and their influence on the victim's decision making. Several studies also note 20-35 percent of cases being dropped by prosecutors. Guilty pleas are much lower than in other criminal cases where there was an average of 79 percent. The majority of guilty pleas in rape cases are perpetrators who made full admissions to police at first interview. Two factors had most effect on outcomes at trial: evidence of physical injury, and admissions by the defendant at some point in the process. That said, however, one study found that seven cases where there was medical evidence of injury resulted in acquittals.

Research on attrition

The table below compares five pieces of UK research (Grace et al, 1992; Chambers and Millar, 1983; Lees and Gregory, 1993; Harris and Grace, 1999; Jamieson et al 1998⁵) and data from St Mary's Sexual Assault Centre for 1996-1997⁶. It has been less than simple constructing comparative figures, since the points at which calculations were made vary in each of the original studies, and two studies include sexual offences other than rape or attempted rape (Lees and Gregory, 1993; Jamieson et al 1998). Several studies re-calculate figures from a base of 100% at each stage of the legal process, meaning that significant re-calculation has had to be done on the original data. The incompatibility of data does, however, mean that all cells are not filled.

¹ The Irish data was received after publication, so does not appear in the report.

² The committee was chaired by Senator Joseph Biden, who was responsible for introducing the Violence Against Women Act in 1995. This law has channelled billions of dollars into state responses and the voluntary sector over the last five years, addressing rape, sexual assault, sexual harassment, domestic violence, stalking, women's safety more generally and more recently trafficking in women.

³ They also note that a number of state Supreme Courts have issued reports acknowledging extensive gender bias in the legal system.

⁴ Other statistics contained in the report include: nine out of ten cases that do not result in a conviction are the result of dismissal rather than acquittal; 25% more rape cases are dismissed before trial than result in a custodial sentence; rape arrests are more likely to result in convictions for a misdemeanour than other violent crimes.

⁵ This unpublished study was a pilot exploring the feasibility of a large scale tracking project for the whole country. All sexual offences cases reported in two police areas during 1996-7, of which a minority were rape, comprise the sample. The study concluded that to track all sex offences across Scotland would prove extremely expensive.

⁶ Presented at the *Promoting the Model* conference in 1998.

All five demonstrate that the highest proportion of cases are lost at the earliest stages, with between half and two thirds dropping out before referral to prosecutors. The rate of 'no criming' remains high, despite repeated instructions from the Home Office and internally within the police that it should be limited to confirmed false allegations;¹ no study has found 'no criming' to be limited to this category. As Harris and Grace (1999) note the decrease in no criming in the 1990s has been compensated for by an increase in the 'no further action' category. The most significant contributors to early loss of cases are designation of cases as false reports and withdrawals by the victim/complainant.

Table 1: UK Research on attrition in reported rape cases

	Grace et al, 1992 <i>England & Wales</i>	Lees and Gregory, 1993* <i>England & Wales</i>	St Mary's <i>England & Wales</i>	Harris and Grace, 1999 <i>England & Wales</i>	Chambers and Millar, 1983 <i>Scotland</i>	Jamieson et al, 1998* <i>Scotland</i>
Initial sample	464	109	378	483	196	47
Police stage						
Cases lost		57%	44%	67%	46%	36%
No-crimed	45%	43%		25%	22%	
Unsolved	07%	07%		11%	24%	
NFA	10%	06%		31%		
Prosecution stage						
Referred to prosecutor		43%	30%	31%	54%	64%
Discontinued		18%	07%	08%	16%	32%
Court stage						
Prosecutions	33%	25%	24%	20%	38%	32%
Convictions for rape	19%	09%	09%	06%	15%	15%**
Conviction on other charge	08%	02%		07%	10%	04%**
Acquittal	07%	14%		07%	09%	04%**

* Data limited to the rape and attempted rape cases in the sample

** For some cases the outcomes were still unknown

Two other interesting points emerge from this comparison: an increase in the attrition rate in the more recent studies in England and Wales compared to no obvious decrease in Scotland (maintained at 15%). The higher levels of prosecution and conviction in Scotland are despite the fact that the evidential rules there still required corroboration (Jamesion et al, 1998). One factor which might be involved here is that a significant proportion of the cases in the most recent study involved children, and these were both more likely to be prosecuted and to result in convictions. However, a third of the cases in the Harris and Grace sample involved under-16s. Some comparative research is clearly needed to clarify these different outcomes.

In the next three sections we explore the processes of decision making at each of the stages outlined in this table. Reflecting on these processes Jamieson et al (1998) comment:

It is worth noting that, at each level the decision makers anticipate and are influenced in their own decisions by their judgement of the decisions that are likely to be taken at the next level of decision making. (p60-61)

¹ Defined as either where the complainant makes a clear retraction or where there is strong evidence that the report was false.

Research on attrition from other jurisdictions

Martin and Powell (1995) explore the attrition process in the USA using organisational theory, arguing that both frameworks and frames of activity create rules and routines that lead towards cases being dropped. The complex table they present (outlining the frameworks for police, medical staff, prosecutors, judges and defence lawyers) is based on interviews and analysis of 130 organisations in Florida. They argue that the most interesting research questions are why and how some organisations/jurisdictions manage to be more responsive to the needs of rape complainants than others.

A US study that includes data on attrition (Frazier and Harvey, 1996) concludes that arrests take place in 40% of reported rapes, and charges are laid for half of these, but in two thirds of cases where a felony charge is laid a conviction results. The outcome is a 10 percent conviction rate. Whilst suspects in acquaintance rape cases are more likely to be arrested (since they are easier to identify), they are less likely to be charged, and if they are charged it will be often for a less serious offence.¹ Most attrition in this sample also occurred at the earliest stages, pointing to the crucial role of the police, with evidential factors, including the withdrawal of statements featuring strongly.² For cases that reach prosecutors, decision making turns on the severity of the assault and the perceived credibility of the victim.

Key Attrition points

Current research suggests four key attrition points, and that the majority of cases are lost at the earliest stages of the process. The first stage is the decision to make an official report; estimates of the reporting rate range from a minimum of 5-25 percent, depending on the data source. Even using the highest estimate, three-quarters of cases never make it to the first hurdle. The next stage involves the initial response and investigation - reporting to the police, forensic examination, statement taking, evidence gathering and arrest and/or interviewing of suspects. At least half of cases in the UK are lost at this stage due to a combination of factors: failure to identify the suspect; designation of the case as a false report; victim withdrawal and police decisions to take no further action. The third stage involves the minority of cases that are referred to prosecutors. Whilst only 10-15 percent of all cases are discontinued by prosecutors, the proportion is much higher if it is calculated as a percentage of the cases that are referred them; using this baseline between a third and a half of referred cases are either discontinued or the charge is reduced.

Currently one in five reported rape cases reach trial in England and Wales, compared to one in three in Scotland. Of these, half or less result in a conviction for rape or attempted rape, and a third to a quarter result in acquittals; the remaining cases involve convictions for charges other than rape.

This is only part of the story, however, since patterns of attrition vary according to the characteristics of the case: the most recent UK studies concur that cases involving children are more likely to be prosecuted and to result in convictions. Zsuzsanna Adler (1987) argues six factors predict successful prosecutions: whether the victim was sexually inexperienced; whether she was 'respectable'; the absence of any consensual contact before the assault; the presence of resistance and injury; early complaint; the assailant being a stranger. In her sample, cases with all six factors had a conviction rate of 100 percent, more than three of 72 percent, two of 33 percent and no case with none of these factors resulted in a conviction. Lees and Gregory (1993) conclude that convictions were most likely where the perpetrator was a stranger, less likely where he knew the victim, and no case involving an intimate resulted in a conviction. Thus, adult rape cases have much higher attrition rates, especially if they depart from the real rape template.

Kramer (1994) notes that in the USA it is extremely rare to get a conviction where alcohol is involved, even though statute law in most states (and England and Wales) is explicit in stating that intoxication and unconsciousness nullify consent. The difficulty of obtaining convictions then feeds back down the system, ensuring that similar cases are not prosecuted unless there is additional evidence.

¹ Many states in the US have graduated degrees of rape/sexual assault.

² One US study suggests a much higher level of withdrawal of statements for rape, 61% compared to 18% for aggravated assault (Williams 1981).

In thinking about attrition points it might be worth making a distinction between cases that are lost and those which are dropped. The latter involves cases where either a police officer or prosecutor makes a clear and explicit decision to not proceed with a case, most commonly because it is considered a false complaint or because of evidential difficulties. Cases can be lost in a number of ways: through failure to identify and/or find the assailant; the withdrawal of the victim; and perhaps most obviously losing cases in court. These distinctions are relevant to strategies which seek to reduce attrition, which would benefit from clarity about which group/s of cases they are targeting, since the mechanisms which might make a difference will vary.

There is no doubt that in England and Wales attrition in reported rape cases has been increasing for over twenty years. Whilst attrition research allows us to identify the points at which cases are lost/dropped, and in some instances illuminate whether these cases have different features from those that proceed to the next level, the figures do not reveal either the decision-making processes, or the policy context in which they take place. Some light will be shed on these in the following three sections.

Section 5: The reporting and investigation phase

The critical role of police has already been noted, and is highlighted in many research studies and policy documents. The police service is literally the gateway into the criminal justice system for rape victims, regardless of the legal system in question. The reporting and investigation stage is also the point at which the largest number of reported rape cases fall out of the system, and lack of faith in the police has been recorded in many jurisdictions as a factor that discourages reporting (see Section 3). The initial responses of police officers, their skill and expertise as investigators and evidence gatherers, as well as their treatment of complainants are vital elements in criminal justice system responses. Insensitive treatment compounds feelings of powerlessness and humiliation (Campbell, 1995), and officers may use overt or covert methods to either encourage or discourage complainants from pursuing prosecution (Campbell, 1995, Kersetter and Van Winkle, 1990, La Free, 1989).

Most studies on policing point to inconsistencies within and between local services. Gilmore and Pittman (1993) recognise the inevitability of variation, whilst pointing to the serious consequences where the range of response is extensive:

No police organisation that employs a staff of many thousands to carry out a myriad of complex tasks is able to ensure that each person, on every occasion, will adopt the attitudes and behaviours that are necessary to provide an optimal service... However, the 'entry point' function that is played by the police is of such importance that a concerted effort is warranted to minimise unnecessary diversity in the police response and to maximise the quality of this response. (Gilmore and Pittman, 1993, p10)

They also note:

... the best evidence which is essential to successful prosecution can only be gleaned from the best treated complainant... Intelligent and enlightened treatment of the complainant from the human perspective thus becomes the critical key in the success of the police function of law enforcement. (op cit, p45)

In this section literature on police responses to reported rape is surveyed for the UK and other jurisdictions, including an exploration of forensic medical examinations.

Research on police responses in the UK

Professor Jennifer Temkin (1999) notes that 'it is now frequently presumed by many commentators that police practice has been transformed'. However, the research data tell a rather more complex story. The studies drawn on here use a combination of police case files, accounts by victims and interviews with police officers; most rely on more than one of these data sources.

Zsuzsanna Adler's (1987) study set out to assess whether reforms had made a difference and included surveying 103 women who had reported rape in London. The majority were satisfied with police responses, although the rate of satisfaction declined over the course of the case. Lees and Gregory's (1993) results, for a slightly later period and limited to one area of London, were broadly similar, as were the findings from Temkin's study in Sussex (1997), although higher levels of dissatisfaction were evident in this project.¹ At the level of 'victim satisfaction', there is evidence of change in a positive direction. This should not, however, be regarded as unproblematic data, since a large proportion of the victims approached declined to participate. The police represent the only easy access point for research on reported rape cases, but this may have an unintended consequence of linking perceptions of the study with the police, and as a result those with the least positive experiences disproportionately choose not to take part.

Many women are critical of the process of statement taking (Chambers and Millar, 1983; Lees and Gregory, 1993; Temkin, 1997, 1999; Victim Support, 1996). Four themes predominate: the manner of police officers; disbelief; feeling blamed; and being asked the same questions repeatedly. Chambers and Millar (1983) note that police officers took a sceptical attitude unless the case fitted the real rape template (p87), and many operated with specific expectations of how a woman should react during and following sexual assault. Departures from the expected script meant the woman's credibility was suspect (see also Lees and Gregory, 1993). They further argue that the police were interpreting the law more strictly than necessary (p91), a point made fifteen years later (although more tentatively) about England and Wales (Harris and Grace, 1999). In particular, the way police officers understood consent was not as something mutual/negotiated that placed some obligation on the accused (p92). There were a number of cases where the woman's statement made clear there was no active consent, but her prior behaviour was read by the suspect and the police as contributing to subsequent events, and thus denying her the status of 'deserving victim'.

The most recent study to explore police responses (Temkin, 1999) involved interviews with women and police officers. The most significant findings include:

- Most victims were positive about first contacts with the police, remarking on the importance of a female officer being present, the use of unmarked cars, and that they were believed and reassured (p23).
- Those who were not happy referred to disbelief and being dealt with by male officers (p23).
- Many were critical of the facilities and arrangements for statement taking in police stations (only two, less than a tenth, were taken to victim examination suites).
- Few were satisfied with the investigation of the case, some felt it had been perfunctory, others that they had not been believed and that officers were unsympathetic. Disbelief amongst CID officers was also noted by a number of police chaperons.²
- There is still a culture within the police that anticipates high levels of false allegations - a third of those interviewed estimated that at least a quarter of all reports were false, with delayed reports and 'date rapes' featuring in these accounts (see also Campbell, 1995).
- Victims who were positive about follow-up contact (a responsibility of chaperons) were those whose cases were successfully prosecuted, but there were many complaints about lack of information and contact, including not being informed their case had been dropped.³
- The chaperon system, when it worked as intended, was highly valued, but in many cases procedures were not followed and police officers themselves made a number of criticisms: poor availability; overuse of individuals; poor supervision; burnout; lack of resources to do the job effectively.⁴

¹ One problem with the knowledge base on police responses is that most of the data has been collected in London. We, therefore, know little if anything about most of England and Wales, similarly with respect to current responses in Scotland.

² This system was introduced in London almost a decade ago, police officers volunteer for special training, and on completion are designated SOIT officers. They can then act as chaperons, taking initial and full statements, organising forensic examinations and acting as the liaison and support point throughout the rest of the legal process. These duties are, however, in addition to their current job, and time to act as chaperon has to be negotiated.

³ In one case the police re-contacted a woman months later when they reassessed her case and decided she had been attacked by a serial rapist; understandably this woman was not inclined to co-operate.

⁴ Peter Sturman (2000), himself a police officer, echoes many of these concerns.

- Women who were most positive reported being believed by the police and this tended to correlate with a prompt report and being assaulted by a stranger. Conversely those who were mainly negative talked of disbelief, an uncaring attitude and laxness in the investigation.

Temkin concludes that the problems are not about lack of policy or guidelines, but rather the perspective, experiences and resources of individual police officers. Even the most committed SOIT officers can become 'burnt-out' and thus unsympathetic, as one police interviewee herself admitted, and CID officers with exemplary records can be prejudiced when it comes to rape cases. Interestingly the police officers themselves argued for specialist teams dealing with adult rape, rather than the uncoordinated system that exists at present, which was seen to be failing not only victims but also police officers (see also Sturman, 2000 and Appendix 1).

No criming and victim withdrawal

The majority of cases are lost due either to them being designated false allegations by the police or to victims withdrawing their statement. Chambers and Miller (1983) note that there was little difference between cases where the victim withdrew and those that were termed false allegations. Many of the latter involved police officers presenting alternative versions of 'what really happened', often in contexts where the woman had been drinking. In some instances this pressure resulted in withdrawal (although there were only two signed withdrawal statements on file), in others if the women indicated any agreement with the police officer's version of events this was taken as admission of a false complaint.

Lorna Smith (1989) traced no criming rates following the issuing of new guidance and found the rates had reduced from 61 percent in 1984 to 38 percent in 1986 in two London boroughs. Grace et al (1992) recorded a further reduction, but this figure is somewhat misleading since it excludes cases that were not crimed within the first month following a report (see Harris and Grace, 1999). Harris and Grace (1999) note that whilst the no criming rate has fallen, it has been replaced by an increase in the category of 'no further action', with victim withdrawals now featuring in both. They also found huge variation in no criming rates between police services, ranging from 14-41 percent of reported cases (op cit). We still lack data that accounts in detail for the factors underlying the high level of victim withdrawal.

No further action and detection

The no further action category comprises three sub-categories: cases where an offender is not identified; victim withdrawals; and cases that are deemed to have insufficient evidence.

Clearly where the rapist is not identified cases cannot proceed, and these are overwhelmingly (although not exclusively) stranger attacks. This would appear to be the most unproblematic group of lost cases. However, the most recent Home Office study notes a decline in detection (Harris and Grace, 1999), in a context where the improvements of DNA testing and evidence should have increased detection rates.

Chambers and Millar's study (1983) is one of very few in the UK to explore detection; and none discuss practice in police interviewing of suspects.¹ In this early Scottish study detected cases comprised: a third (31%) where the victim knew their attacker; a quarter (25%) where detection was due to the description provided by the victim; and a fifth (18%) who were 'caught in the act'. Police detective work was, therefore, only involved in less than a quarter of cases (23%).²

In the previous section the status of victim withdrawals was questioned. Lees and Gregory's (1993) study raises further issues where a number of the withdrawals and refusals to give evidence appear to be connected to domestic violence cases.

¹ One detailed study (Baldwin, 1993) makes no reference to sexual offences, but draws on a large number of video and audio recordings with a range of suspects. The researcher notes poor communication skills, officers being unfamiliar with the facts of the case, and officers in the main being 'nervous, ill at ease and lacking in confidence' (Ibid, p339).

² Percentages rounded, total is 97 rather than 100 percent.

The insufficient evidence cases are, in the main, those considered by the police to be 'borderline', where there is minimal evidence other than the word of the complainant and the denial by the defendant. Many of these cases are referred for advice to the CPS, and in the majority (up to 66%) the CPS advise dropping the case (see Gregory and Lees, 1999; Harris and Grace, 1999).

Cases that are referred to the CPS

Harris and Grace's (1999) work shows that cases involving under-16s, over 45s and those where there are additional levels of violence are the most likely to result in both a charge of rape and referral to the CPS for prosecution. They note further major problems in three areas with at least half of these cases not being referred to the CPS: acquaintance rapes; group/gang rapes and rapes involving women with learning disabilities.

There is limited evidence on the 'downgrading' of charges by police, but Lees and Gregory report that 20 cases (7%) in their sample of serious sexual offences were re-classified. Eighteen were charged as lesser offences: two rapes and six attempted rapes were charged as indecent assaults and nine other sexual offences were charged as non-sexual crimes.

Research from other jurisdictions

An increase in satisfaction with police responses has also been found in Australia (Bargen and Fishwick, 1995, p50-51), and correlates with three factors: the case proceeding; increased use of female officers and specialist units. Police and policy makers also universally support specialist units and increased use of female officers (Ibid). Other Australian research (see Tasmanian Task Force, p22) points to the openness of individual officers in determining whether a complaint will be laid. A study in Victoria (Heenen and McKelvie, 1993), observes that despite improvements victims felt that their needs often took second place to administrative priorities, especially when CIB¹ became involved. At this stage of the investigation they encountered disbelief, or were believed but felt they were treated like piece of evidence. A new code for the investigation of rape cases was introduced in March 1992 with guidelines that prioritised victims needs.²

The victim phone-ins conducted in several Australian states (see Section 3) were a creative route for collecting data on the process of reporting rape that avoided using the police as the access point, and revealingly have produced interesting and different findings to research in the UK. For example, the Victoria phone-in found that in half of cases where the victim withdrew, the decision was influenced by police saying that the case would not be successful (see Bargen and Fishwick, 1995, p45). David Brereton (1993) also refers to this study and argues that police defend their actions saying that they only do this where they think the evidence is weak or the victim will not cope with the strain of prosecution. He notes, though, that almost three-quarters of women whose cases did not proceed thought that the police had made the decision to drop the case, rather than themselves.

Jan Jordan's (1998) New Zealand study was explicitly conducted to assess the extent of changes from project conducted a decade earlier. Its basic conclusions were that despite changes to police procedures and training, the proportion of women satisfied with their response had not changed significantly. Those who assessed police responses positively stressed being believed, taken seriously and supported/cared for, and being given clear information throughout the process. Negative assessments were mainly associated with being disbelieved, followed by police demeanour - being cold, distant, rude and unpleasant. Some women talked of being surrounded by men and uniformed officers (p45). The majority said they preferred to have their statement taken by a female officer (p22), although it also mattered that the police officer was competent. In a subsequent study (Jordan, 2001) factors influencing withdrawal included: practical issues, such as re-locating; being questioned when exhausted, in shock or hungover; fear of the perpetrator; despair at the process; and pressure from family members. She makes the telling point that victim withdrawal, in a significant proportion of cases, signals a withdrawal of trust and confidence in the police and CJS.

¹ The equivalent of CID.

² This included clauses specifying that victims should be allowed to recount what happened in own words, that police should never presume an allegation is false, and that medical examinations should take place as soon as possible.

Echoing findings from the UK and Australia, the police focus on information sometimes prevented them from responding to women's needs as victims. Being questioned in detail about their sexual behaviour, often repeatedly and by different police officers, was widely disliked. One new issue her latest study highlights is the influence of stereotypes, and awareness of police scepticism, on victims:

Fearing disbelief and judgement, victims of rape may try to embellish their accounts, or conceal wrong doing, in order to make themselves appear more 'believable to the police'. (Jordan, 2001,p93)

The outcome was precisely the opposite, since any inconsistency, or lack of honesty, damages the woman's credibility. Inconsistencies were also the outcome of insisting on statements when women were exhausted, in shock, or otherwise unable to concentrate.

The key issues that emerged for victims in their contacts with the police were: the importance of being believed; being treated with respect and understanding; retaining some degree of control over what happened; continued information and liaison. An interesting coda to the provision of accurate information about the legal process was that a quarter of participants thought that this had been given by police officers with the explicit intention of deterring them from continuing with the case.

Two studies from the USA support and extend some of these findings. Gary La Free (1989) found that the most common reason for unfounding cases was assessments of a complainant's character; any non-conformity on her part was considered carelessness or complicity. Kersetter (1990) summarises previous research findings in the US on police decision making. Factors found to increase the likelihood of arrest and charge included: the use of a weapon and/or force; the possibility that the assailant is a serial offender; resistance by the victim; the willingness of the victim to have a medical examination and support the case; and there being another witness. The factor that decreased the likelihood of charging was a previous relationship between the parties.

His study is unusual in the literature in that the research methods included intensive participant observation of police, alongside interviews with police officers and secondary analysis of two data sets of cases from 1979 and 1981. Kersetter concludes that attrition is primarily accounted for by administrative factors - routine elements of policing that support officers in 'unfounding' (the equivalent of 'no criming') cases (including having less unsolved crimes on one's record, pressure of work etc). In his view, this is more consequential in police actions than evidential issues. The most critical finding was that the notion of 'willingness to prosecute' on the part of the victim is more complex than simply taking a statement. Decisions that appear to lie only with the complainant are actually affected by the actions and orientations of police, which are in turn driven by administrative and bureaucratic concerns, as well as judgements about the woman and the case. It may be in a police officers' interests to unfound a case, and any ambivalence on the part of a victim can become a reason to not pursue it vigorously.

The detective does not have to create the elements by which to manipulate the victim's decision; all that is required is a selective presentation of the reality, an understandable and credible reality, that confronts her... If the detective decides he would like to unfound the case in order to avoid carrying it on his record as an unsolved crime, he may attempt to convince the complainant that it is not in her interest to pursue the case. The detective may vividly portray to the complainant the personal costs involved by emphasising such things as the repeated trips to court, the inevitable delays at court, and the humiliating cross-examination by defence counsel. Conversely if the detective wishes to pursue the case but the complainant seems to be ambivalent, the detective may seek to strengthen her resolve by talking about the need for her co-operation to prevent an attack on another woman. (Kersetter, 1990, p304)

Case file records and overall attrition data cannot discriminate between attitudes of detectives that are supportive or cynically dismissive. Whilst these orientations will make a difference to the experience of complainants and how they assess the response of the police, they often produce same outcome - withdrawal.

Kersetter argues that in the earliest stages of police investigations instrumental/administrative issues predominate, whereas when cases proceed evidential issues become stronger. Evidentially cases tend to focus either on the identity of the attacker or consent. In consent cases police are more likely to pursue them where there is evidence of injury and/or the accused is in custody. They are less likely to where either the incident involves, or the initial investigation reveals, (sexually) discrediting information in relation to the victim and, in particular: her use of alcohol or drugs; her having mental health problems; her having made a previous complaint that did not result in a conviction; and the parties knowing one another.

A note on false reports

Given the importance of the category of false reports to police and public perceptions, it is rather surprising that there is very limited research on this issue, and virtually no recent work that contains data for the UK.¹ Whilst there are undoubtedly a number of reports that are false - defined as an account of something which did not happen - the key issues here are the extent to which that happens and the motives and circumstances surrounding them. Gregory and Lees (1999, p61) ask the telling question, why there is so little curiosity amongst police officers as to why a large number of women might subject themselves to the unpleasant process of reporting rape when they know their account is untrue. It is also worth asking why only one social researcher (Jordan, 2001) has explored this issue in depth.

Many commentaries note that false complaints are no higher for rape than for other crimes (see, for example, Gilmore and Pittman, 1993). One could speculate further that they are probably considerably lower than for some crimes, for example, thefts that are reported to support an insurance claim. A Danish study (Theilade and Thomsen, 1986) concluded that the majority of cases designated false reports involved women who had serious problems: mental health, domestic violence, domineering parents (see also Jan Jordan, 2001). Jan Jordan's work adds a further layer to our understanding. She highlights two additional categories of cases which are designated false reports, but which are more complex. The first involves women who are in severe distress concerning previous victimisation; the rape complaint represents a, albeit convoluted, way of gaining some recognition for their sense of violation. The second category comprises cases reported by someone other than the victim, where the initial designation is rape. Once the victim is able to provide a statement it becomes clear that this was someone else's presumption, due to her physical state, or disorientation, and that she had never made such an accusation. Despite there being no complainant, administratively these mistakes are recorded by the police as false complaints. For each of these categories police officers need guidance and support in how to respond humanely as well as alternative administrative dispositions.

Jan Jordan's research also unpicks the category of actual false complaints, demonstrating through analysis of police files and interviews with police officers, that these are invariably accusations of assaults by unidentified strangers. The popular stereotype of false complaints being accusations that name individual men, and are motivated by revenge or other personalised motives, were challenged by this detailed study. Not only this, but within the file analysis were three cases that were designated false reports which subsequently turned out be assaults by serial offenders. Additional analysis of one serial rapist case showed that an early report by a young woman who named her attacker had been discounted as a false report; the man was convicted of 24 rapes eight years later.

All research involving police officers finds that the issue of false reports is at the forefront of their minds at time of the initial report (Jamieson et al, 1998; Lees and Gregory, 1993; Temkin, 1999; Wilson, 1978). Studies in Australia, New Zealand and the USA find high levels of disbelief, with the proportion of cases officers believe to be false ranging from 10 percent to half of all official complaints (Campbell, 1995, p251; Department of Justice, 1996, p13; Jordan, 2001). Certain groups of women appear to have even greater problems with respect to belief and credibility, especially those with learning difficulties and mental health problems (see also Harris and Grace, 1999; Jordan. 2001). Unsurprisingly the cases least likely to be considered false reports are those which are close to the real rape template.

¹ The only two journal articles to be discovered in the UK, published in the 1990s, comprised a check list of factors claiming to enable distinctions between true and false complaints (McDowall, 1992) and a single case history (Gibbon, 1998).

The issue of false complaints has led to discussions in the literature of methods such as Statement Validity Analysis as a method for distinguishing between accounts (Parker and Brown, 2000, and see also Ahuja, 2001). Whilst not recommending this approach,¹ it is interesting to note that in a UK based study SVA methods were considered more accurate in assessing of the truth or falsity of 43 statements than were police officers (Parker and Brown, 2000).

It is, therefore, clear that in the UK, and elsewhere, a culture of scepticism continues to inform police responses; despite guidelines that encourage a culture of belief, unless there is strong evidence suggesting the contrary. This preoccupation with false complaints is reinforced by media reporting, and leads police officers to focus overly on the complainant and her credibility, rather than other aspects of evidence gathering. This tendency appears to be especially strong amongst (male) investigative officers. It is this context which accounts for the widespread reports of disbelief in research on complainants' experiences of reporting, and their criticisms of the attitudes and manner of investigative officers. Such orientations are unlikely to produce the best evidence, and play a part in the high level of victim withdrawals.

Some research has explored the factors that decrease scepticism. Naffine (1992) reports on a study in the USA in which the presence of a female police officer at interview increased the number of reports that were accepted. In South Australia the establishment of a specialist team decreased the number of cases designated false complaints (Bargen and Fishwick, p48). Campbell (1995) asked police officers what the strongest influence on their thinking about rape cases had been: the most powerful was working with rape victims, followed by training and department policies. The latter included a climate within the department/station in which women were respected, and where sexual harassment within the police service and rape cases were taken seriously. The author concludes that workplace cultures, norms and routine practices have a profound influence on how individual police officers respond to rape complainants.

The forensic medical examination

The forensic medical examination has two objectives: to look for and record injuries; and to look for and collect evidence that might identify the assailant. The role of DNA is critical in stranger cases, and where an assailant denies sexual contact, but these are a minority of reported cases. The fact that for two thirds of sexually active women there are no obvious external injuries and minimal internal ones makes the expertise, training and speedy availability of forensic examiners even more crucial.

Some concerns about responses to reported rapes in the early 1980s focussed on the forensic examination. Criticism was levelled, in particular, at: the lack of female police surgeons; the environment in which examinations were conducted (often in police stations); and the attitudes and manner of doctors (Women's National Commission, 1985). Chambers and Millar (1983) found major problems with delays, the manner of the doctor, including suggestions that injuries were not consistent with the woman's account and asking her to repeat the whole story again. As a result, rape examination suites were established in many areas, an examination kit developed, and attempts made in some areas to recruit more female doctors.² There has been no evaluation or monitoring of these provisions, some of which have fallen into disuse or been poorly maintained (see, Sturman, 2000). Research shows that, unlike in New Zealand (see later), there has been little if any improvement in women's assessments of this aspect of the process.

Jennifer Temkin (1998) reports that there are still very long delays and that a woman doctor cannot be guaranteed (see also Kelly et al, 1998).³ Twelve of the 14 women were wholly or partly negative

¹ There are a number of serious limitations, not least that police statements are treated as if they were an accurate transcription of a naturalistic account, rather than a version constructed in two ways - through the questions asked by police officers and being written up for evidential purposes by the police.

² Similar criticisms in other jurisdictions resulted in sexual assault centre based in a hospital becoming a key form of provision. Two such centres were established in England in the late 1980s - in Manchester and Northumbria. It has taken a decade for a few other areas to adopt this model.

³ For some women being examined by a male doctor would transgress religious and cultural laws and values.

about the medical examination (see also Lees and Gregory, 1993); a higher proportion than the 60 percent recorded in earlier research by Chambers and Miller and Adler. Across all studies four themes predominate in positive evaluations: having a female doctor; the doctor's sympathetic manner; a willingness to explain each procedure; and the presence of sympathetic third party. Negative evaluations invariably included: being examined by a male doctor; the brusque doctor's manner and attitude; the way the examination was conducted; and the examination itself. Whilst this is not simply a matter of the sex of the doctor (see also Kelly et al, 1998), the majority of women and men reporting rape prefer to be examined by a woman - unsurprisingly since in virtually every case they were sexually assaulted by a man. What victims found most difficult was doctors who 'cross-examined' them about the assault, and where the intimate processes were conducted in ways that were humiliating, degrading and unnecessarily painful. In Kelly et al's (1998) research almost a third of London police officers made explicit comments about the lack of sensitivity of forensic doctors.

Within the literature, and among doctors, there is confusion/debate about the role of the police surgeon and the medical examination, which centres on whether they are acting only/primarily in the role of evidence collector or as a physician as well. In both cases an awareness and sensitivity to the impacts and meaning of rape, and how this connects to aspects of their task (such as conducting an internal examination), are essential requirements, as is being able to assess whether any physical injuries require medical treatment.

Jennifer Temkin (1996) takes the position that the role of the police surgeon is to collect and record evidence. The police officer/s should be able to offer a sufficiently detailed outline of what the complainant says has happened in order to inform the examination; it should not be necessary for the doctor to ask for the entire account. Nor should a full medical history be taken, and it certainly should not be written on the forms where the forensic findings are recorded. She notes the frequency with which information on these forms about previous abortions and contraceptive use presents the defence with opportunities to sidestep legal restrictions on sexual history evidence. In her view the evidential aspect of the examination should be conceptually and practically separated from any medical/therapeutic element. Temkin also found that some doctors extended their role from collecting evidence to testing it, and this was particularly distressing for victims.

Kelly et al (1998) suggest that the professional tension between the forensic and therapeutic requirements is inherent in a system where the majority of female doctors undertaking forensic examinations are general practitioners (p410). Their research draws on two surveys - a national postal questionnaire of practising forensic medical examiners (FMEs) (n=994), and a study of the Metropolitan Police FME service, supplemented by 30 interviews. The majority of FMEs in the survey 'agree with complainants views that the medical examination... should have a therapeutic purpose' (Ibid, p413). However, the precise nature of this is elided between the manner in which examinations are conducted and additional medical treatment and needs, including subsequent testing for pregnancy and infections. They also echo points made by Jennifer Temkin about the competence of doctors and standard of reports (Ibid, p414). The limited availability of female doctors means that minimal assessment with respect to competence has taken place. There is also a suspicion that the technological developments in the field, particularly in the USA, such as video colposcopy, have not been routinely introduced in the UK .

The availability, skills and attitude of forensic examiners all remain issues of concern. There is an evident need here for national standards with respect to the role, content and conduct of the forensic examination, for continued recruitment and training of more female examiners, and for mandatory continued upskilling, including the latest technological developments.

Research on forensic examinations in other jurisdictions

The only international research uncovered on forensic examinations comes from New Zealand and Australia. Jan Jordan's (1998) study compared responses in 1983 with a mid 1990s sample. In the latter whilst only a minority had to wait for longer than two hours, long delays were extremely hard to cope with. In 1983 the majority of forensic examiners had been male, by the 1990s

88 percent were female. Almost all of the women who were examined by a female doctor reported being pleased and relieved about this (p68). In addition the following things were appreciated: taking care to explain procedures, especially using diagrams; being called by one's name; being talked to throughout the process; having their feelings monitored; and being asked if anything hurt or if they were comfortable.

Tasmania has a recommended Code of Practice for police that sets standards in relation to victim care and investigation, and is monitored and backed up by a comprehensive training package and specialisation (Tasmanian Task Force, 1998). This includes a state-wide forensic examiner network with co-ordinated training, common standards and protocols.

Conclusions

Research from the UK and elsewhere suggests that there are continuing problems in the encounters between police officers and victims reporting rape. The fact that over half of reported rapes do not move through the first gateway of the CJS is just the most obvious evidence of this. As Jennifer Temkin (1997) notes, 'Old practices and attitudes ... are still in evidence', guidelines are not always followed and disbelief and stereotyping persist. She also makes the point that in England and Wales improvements are most noticeable at the very early stages, where the initial contact is often with specially trained women police officers. The problems seem to increase where the investigation is taken over by CID. Susan Estrich (1997) notes that the police have considerable discretion that they exercise invisibly, and reports on additional studies demonstrating that simply including women in investigative teams decreases the number of unfounded cases (p185).

Local variation in no criming rates and practice is evident in a number of UK studies, confirming that Home Office guidance and local instructions are not being followed consistently. What is less clear is why this should be the case. It may simply reflect the inherent difficulties of ensuring consistent record keeping practices in large organisations. Alternatively, the variation may be accounted for by differential implementation of national and local policy, but there is no published information which would enable this hypothesis to be tested.¹ It may also have something to do with different circumstances in which victim withdrawals take place (see Chambers and Millar, 1983 and Kersetter, 1980). Exploration of these alternatives will be necessary if more consistent practice is to be developed, since it is clear that simply issuing policy has failed to produce the intended outcomes.

There is also variation in the timing and extent to which investigative officers seek guidance from the CPS, with some requesting advice at early stages, others just before the decision to submit the case to CPS and others 'second guessing' what they think CPS response will be. The extent to which more consistency here would affect attrition is limited, since far more cases are lost at the earliest stages through their designation as false complaints or victim withdrawal.

Effective early investigation is critical (Francis, 2000), and the research evidence points to problems with detection, the number of cases designated false complaints and the number of victim withdrawals. A number of separate and connected factors are involved:

- a continued belief in a high proportion of false reports;
- stereotypes of rape, rape victims and responses to sexual assault;
- testing the evidence - meaning in this instance testing the victim;
- intentionally or unintentionally discouraging victims from pursuing the case;
- limited development of expertise in enhanced evidence gathering, including conduct of interviews with suspects;
- second guessing the CPS with respect to which cases have a strong possibility of successful prosecution.

The research evidence further suggests that these factors result in disproportionate numbers of cases with particular features being lost/dropped at an early stage. Cases involving acquaintances

¹ By, for example, comparing areas where efforts are known to have taken place to improve responses, and/or where rape cases are dealt with by specialist teams.

are more likely to be no crimed, and those involving intimates designated no further action or discontinued by the CPS (Harris and Grace, 1999). Cases involving children under 13 and significant, additional physical violence were most likely to be referred through the CPS (op cit).

There is a need for a coherent, consistent national policy and practice framework for rape investigations, which covers initial response, statement taking, forensic examinations, interviewing suspects and preparing files for the CPS. Within this attention should be given to moving beyond the real rape template and orienting police investigations to discovering evidence that supports the allegation. The experience of the police team that investigated a serial rape case in New Zealand is worth taking heed of (Jordan, 2001). The commitment of the investigative team to the case led them to reflect on their early mistakes and what they learnt about respect for victims in the process; one senior officer commented that now:

... the key issue for me is corroboration, to a lesser, a much lesser extent, is credibility. Because professional women get attacked, prostitutes get attacked, people who have abused previously get attacked, people with criminal convictions get sexually attacked... You've got to be so careful, because sometimes you get discrepancies from genuine complaints too. It's only going through all the evidence, really, and what supports it and what doesn't. (p268 & p270)

The review also uncovered strong support inside and outside the police service for specialist units. Consideration of this policy option should, however, take cognizance of experiences in Scotland (Jamieson et al, 1998) and Ireland (Lyon, 2000) where linking sexual assault with specialist child protection units have resulted in cases involving children being prioritised. It is also worth noting a finding from La Free (1989) that, in one area of the USA, a specialist unit did improve the treatment of victims, but not the level of prosecutions. Jan Jordan (2001) makes the point that at minimum what is required are skilled supervisory officers, who understand rape and responses to it, and are able to encourage officers to see where they are drawing on stereotypes, rather than conducting a thorough investigation.

Section 6: The role of prosecutors

The role of prosecutors and their decision-making is the least researched aspect of criminal justice responses to reported rape. The UK research is limited to elements incorporated within studies of attrition, and is reliant in the main on CPS case files (Harris and Grace, 1999) or secondary analysis of other materials (Lees and Gregory, 1993; Jamieson et al, 1998). Only one study which tracked prosecutors decision-making in real time, from the USA (Frohmann, 1991), was discovered by the review. This section is, as a consequence, more sparse, indicating a serious gap in the existing knowledge base.

The role of the CPS and the principles underlying their decision making are outlined, followed by research on the process of attrition. Material relevant to the questions of pre-trial contact with complainants and specialist teams is briefly discussed, as is a study on the involvement of victims in the prosecution.

CPS role in rape cases

In England and Wales, CPS decision making is governed by the Code for Crown Prosecutors (2000), which sets out the principles under which the service operates: to ensure fair and effective prosecution; to examine each case on its own facts and merits; to be fair, independent and objective; to review, advise on and prosecute cases; and to engage in a continuing review of practice. The Code also makes transparent the principles on which decision-making rests; all referred cases must be evaluated with respect to an evidential and a public interest test. The evidential test is viewed as objective, and involves a judgement as to whether there is a realistic chance of a conviction. This, in turn, requires assessing what evidence is admissible, its reliability and whether the court will find the evidence and witnesses credible. In rape cases this objectivity often requires taking into account an evaluation of the victim's credibility, and the outcomes of similar cases in the local court. It has been argued that both of these introduce elements of subjectivity into the judgement of prosecutors. The Tasmanian Task Force note that since rape cases are considered difficult to try and win:

Reasonable prospect of conviction criteria can be used as a justification for dropping cases or reducing charges (Tasmanian Task Force, 1998, p25)

The public interest test involves weighing a number of factors about the kind of case and the likely sentence in the advent of a conviction. It is widely agreed that rape cases would rarely be discontinued on public interest grounds, although 15% of those referred to the CPS were in the Harris and Grace (1999) sample.

There is no single model within CPS offices, since they are at different stages of introducing Glidewell, and all prosecutors (this includes lawyers and case workers, who are law clerks) do a combination of case review and court work. When cases are referred they are allocated to a lawyer who conducts the initial review, and in theory should oversee the case up to trial. A proportion of cases are discontinued at the initial review stage. File maintenance and preparation is the responsibility of case workers, under the supervision of lawyers who are in turn responsible for decision making. Discontinuance decisions for rape cases require review by a senior member of staff. The creation of trials units has as one of its aims to create file ownership, but practice still varies as to whether the same staff work on cases throughout their process. It is case workers who attend trial, and whilst it is preferable that it is the staff member who has worked on the file over time, this is not always possible.

Research on discontinuance, decision making and the prosecution process

Most of the cases that are discontinued by the CPS are rejected on evidential grounds, although Harris and Grace (1999) comment that the precise reasons were seldom clear in case files. It is also likely that these are the grounds that inform CPS advice to police on cases that are subsequently designated no further action by the police. The precise processes by which this happens are somewhat unclear, since in principle consultation should involve the CPS lawyer having access to the police file, but there are references in the literature to discussions taking place over the telephone. There are also references to the fact that police officers, at the instigation of the CPS, follow up aspects of the investigation with the complainant, but there is currently no tracking of the extent or content of these processes in the literature. The evidential difficulties appear to be related to particular types of cases: those involving parties who know one another and especially cases involving young women.

One clear problem in this process is that it involves making an assessment of the complainant's credibility as a witness. Currently the CPS do not meet or see the complainant, and so in making such judgements are reliant on the opinion of the police officers involved (which may be written down as 'pen pictures'), and paper records, especially the statement. There is a clear danger here of stereotypes and subjectivity entering the process.

The small number of interviews with judges and barristers conducted for the Home Office attrition study (Harris and Grace, 1999) and Jennifer Temkin's research on barristers (2000b) both point to an impression that attrition in court is the result of an increase in 'weak' cases being prosecuted. 'Weakness' in this construction appears to refer to cases that do not fit the real rape template being taken through the system. Awareness of this opinion amongst advocates and judges must have an impact on CPS thinking, creating something of an impasse, whereby the most common rape cases are currently defined as 'weak' on the basis of their characteristics. This view, however, does not seem to be reflected in any significant increase in judge directed acquittals, although information on these is rather limited.

Selection of prosecuting counsel

The division between solicitors and barristers in the UK is unusual (and many argue anachronistic) in common law jurisdictions. Most public prosecutors offices are responsible not only for reviewing and preparing cases, but also presenting them in court. The role of the CPS in selecting counsel in rape cases has been the subject of much comment, and two research studies (Harris and Grace, 1999; Temkin, 2000b) record the opinion of barristers that in rape cases the 'wrong' counsel are

being instructed. This view is based on financial considerations, whereby the fee attached by the CPS is too low, meaning that the most experienced and respected advocates in any chambers will not take the case. This is, justifiably, compared to the fact that the defence (often also at a cost to the public purse) ensure that experienced counsel are instructed. The point here is not about fees as such, but equity between the parties, and needs to be considered in that light. Rather less comment is made on the fact that briefs are sometimes returned at very short notice, meaning that a prosecution barrister has to be found rapidly, and that however skilled they are, they will be unlikely to have enough time to prepare the case properly.

Decision making

The only detailed research on prosecutors and rape cases that the review uncovered comes from the USA. Lisa Frohmann's (1991) ethnographic study involved being based for 13 months in a public prosecutors office, and she used participant observation and informal interviews. The study concludes that case screening (equivalent to review in the CPS) acts as a gateway into the prosecution process. She argues that an invisible inner logic exists, within which decision making is embedded. In rape cases this logic relies on a number of assumptions about gender and heterosexual relationships. Victim credibility, rather than being a set of clear and objective criteria, is constructed and maintained through interactions, which in the context of the US will probably include face-to-face meetings. In practice what prosecutors are looking for is 'discredibility' - elements in the case, and the personality and history of the complainant that could be used to undermine her in court. Thus cases are assessed through an anticipated dialogue with likely defence arguments and responses of judge and jury.

Both the case screening and, where the case passes the gateway, subsequent allocation to an advocate involves prosecutors in an exercise in scepticism. They are looking for holes, discrepancies and potential ulterior motives that might discredit the case. Thus prosecutors, like the police in Kersetter's (1990) study, create potential alternative versions of the story. This process is not an objective one, and whilst Frohmann does not state this explicitly, it is one in which the real rape template plays a significant role.

Susan Estrich (1995) confirms this when she notes that in the USA any voluntary/consensual contact between the parties cuts the prosecution rate by half, and to virtually nil where there is no evidence of resistance by the complainant (p187). Prosecutors work with an understanding that juries acquit where there is any sense of 'contributory negligence' on the part of the victim. Estrich notes further that victim withdrawal becomes a self-fulfilling prophecy in contexts where the police and/or prosecutors regard the case as 'weak' or 'borderline'. This message is not lost on women who are aware that taking a rape case has many costs in the best of circumstances:

Where the prosecutor seems to think the crime is not serious or will not result in serious punishment or does not deserve his attention, this may be more than most women can endure. (p190-1)

Cases that involve prior relationships tend to be regarded as both less serious and less deserving of the attention of the CJS. The view that consent is a particularly difficult issue in 'date rape' cases belies both the commonness of its use as a defence in most prosecuted cases, and that rapes by known men can be as brutal as any other kind of rape. Indeed, it could be argued that the perception itself raises the question of whether prosecutors are conducting evidential tests on the facts of the individual case, and possibly even failing to see ways in which cases can be developed. The challenge to prosecutors is to develop evidence and strategies in trying cases that do not fit the real rape template.

Other matters of policy which are raised in the literature include the importance of informing complainants about changed charges, and acceptance of pleas, and explaining why (Victim Support, 1996). Secondly, the legal tension between the age of consent, and the fact that if a charge of rape is made in relation to a child a consent defence is in principle possible (see also Home Office, 2000). This is matter of statute, as well as prosecution policy. A decision to charge at the highest level, in this instance, is also a decision to expose a child to a particular courtroom experience.

Contact pre-trial and specialist units

There are aspects of current practice in the UK - that prosecutors do not meet the complainant and rarely carry a case through from beginning to end - which have attracted comment and even criticism. Prosecutors from other jurisdictions have expressed incredulity that any rape case could be prosecuted without meeting the complainant,¹ and such meetings are regarded as essential case preparation (Rowland, 1986 Vasschs, 1994). Linda Fairstein, head of a sex crime prosecution team in New York, notes:

The sensitivity with which lawyers handle survivors, whatever the circumstances of the crime, is as crucial as their litigating skills. The human element is what makes sexual crimes unique. Not only can victims experience a catharsis if the offender is prosecuted, a witness who is gently guided through the whole process improves our chances in the courtroom of getting a conviction. (1995, p12)

Current good practice in Tasmania involves prosecutors making rapid initial contact, meeting regularly with the complainant when preparing the case and ensuring that they are thoroughly briefed about the progress of their case (Tasmanian Task Force, p33). In New South Wales meetings are expected between complainants, prosecutors and DPP solicitors prior to the committal hearing, to ensure the complainant understands the proceedings and is prepared for them. There is also an adult sexual assault liaison officer within the DPP office. Bergen and Fishwick (1995, p101) comment that the appointment of specialist liaison officers, whose role is to inform and support complainants, results in victim witnesses who are both more prepared for, and more satisfied with, the prosecution process. Gregory and Lees (1999, p80) report that the practice in Northern Ireland, where the CPS routinely meet with the complainant to go through her statement, has reduced judge-directed acquittals, but the basis for this claim is not cited.

The Youth Justice and Criminal Evidence Act 1998 contained provisions which would allow pre-trial meetings between a victim/witness and the CPS, but are yet to be implemented. The provisions apply only to victim witnesses who have been designated intimidated or vulnerable, and it is envisaged that meetings would not be automatic, but take place only on the request of the victim. These provisions fall short of the current best practice models in other common law jurisdictions.

There is evidence from other countries that suggests that specialist prosecution teams for sexual crime (and domestic violence) decrease attrition, especially if, as in the case of the group Alice Vasschs headed in New York, they set themselves the goal of achieving convictions in cases previously deemed 'unprosecutable' (Vasschs, 1994). The prosecution team approach such cases through building evidence that goes to the victim's credit, and supports her complaint,² including using expert evidence to explain aspects such as delayed reporting, lack of resistance and reactions to rape.

Other methods recommended in the literature include vertical prosecution - with the same lawyer handling the case from initial review through to disposition (Elstein and Smith, 2000).³ This practice is believed to create both expertise in case preparation and advocacy in court (an element that could not be replicated currently in the UK) and an investment in the case outcome on the part of the prosecutor. At least one researcher has commented that the current system of prosecution in England and Wales results in 'disinterested representation' (Lees, 1997a, p58).

¹ Conversations between the author and prosecutors from the USA, Canada, Australia and Namibia.

² Interestingly a version of this practice does exist in the case conferences that the Metropolitan police Clubs and Vice Unit have with prosecution counsel. In this instance the witnesses are often women involved in prostitution; who historically have not been accorded credibility as victims in legal proceedings. The prosecution team address this explicitly, and endeavour to build both evidence and argument that enhances credibility.

³ Variations on this include the file being dealt with initially by a screening unit and then proceeding to a named prosecutor who holds it until the file is closed.

Research on the involvement of victims in the prosecution process

An innovative qualitative study by Amanda Konradi (1996) of 31 women whose cases went to trial in the USA documents their active involvement in the prosecution process. Most were continually making decisions to stay involved, but this was neither recognised nor supported. Konradi argues that women continue to act on their own behalf, but are often 'thwarted in their desire to help themselves' (p429). She found six kinds of purposeful preparation that almost all women undertook: appearance work; rehearsal; emotion work; team-building; role research; and case enhancement. The two most relevant areas for this review are team-building - done by over two thirds - and case enhancement.

Those who were able to build an effective support network felt more able to give their best evidence in court. Two kinds of support were necessary: emotional support; and informed support about legal processes and procedures. The latter was often provided by rape crisis/sexual assault centres, whereas emotional support came most often from within women's own informal networks. Konradi concludes that there is a vital role for victim advocates, but that they need to be well informed about legal process, as well as understanding the realities and impacts of sexual crime.

Case enhancement was undertaken by just under a third of the sample, and involved bringing documentation, that acted as forms of corroboration, to the attention of lawyers, or to court with them. A number also contributed material that enabled prosecutors to counter defence strategies (p422). Prosecutors varied in their response to such active engagement - most welcomed the contribution of tangible corroborative evidence, whilst few appreciated survivors offering opinion on court room strategy. One of the most significant findings in this study was that women whose cases least fitted the real rape template, and who had hesitated the longest in reporting, were 'the most active in working towards prosecution' (p427). Konradi comments that designating these women as 'reluctant witnesses' at an early stage of investigations is inaccurate, and both police and prosecutors need to recognise that 'borderline' cases are indeed prosecutable.

Conclusions

CPS decision making has resulted in more cases involving parties known to one another being prosecuted, and some of these do indeed result in convictions. But the fact remains that the majority of such cases are lost or dropped before trial. Decisions made by the police alone, by police in consultation with the CPS, and by the CPS alone all point in the same direction - the proportion of 'real rapes' increases as cases move through the legal process. Given that a considerable amount of the assessment carried out by prosecutors involves the credibility of the complainant, the fact that there is no direct contact between her and the CPS lawyer becomes even more significant. CPS lawyers have commented that the introduction of videoing the police statement would provide them with an additional resource in this respect, the question remains as to whether their orientation would be towards looking for things that go to her credit or her discredit.

One area that certainly deserves further exploration - in both research and even pilot projects - would be the extent to which enhanced evidence gathering can be developed in rape cases, both during the initial investigation and at the case review stage.

Section 7: The Trial

Three UK research projects contain material drawn from observations of trials in England (Adler, 1987; Harris and Grace, 1999; Lees, 1997), with a further evaluation of the change in the law in relation to sexual history evidence in Scotland (Brown et al, 1993). There is, however, no study of the size of *Heroines of Fortitude* (Department of Women, 1996), which tracked 150 court cases in New South Wales, nor of the detail of *Reproducing Rape* (Matoesian, 1993) and *Representing Rape* (Ehrlich, 2001), in which legal discourse in US courtrooms is meticulously analysed. We know even less about judges, lawyers and juries, although there is a recent study on barristers (Temkin, 2000b). As yet there has been no systematic study of Court of Appeal cases, even though there are a large number of appeals each year against both conviction and sentence for rape.¹

¹ Such a study is currently being undertaken by a PHD student in the Law Department at Manchester Metropolitan University.

Some of the contested issues at this stage in the process are to do with the letter of law (see Section 8) and some are procedural. Many return us to the central theme in this review - the real rape template.

Attrition in the court room

The outcomes in Harris and Grace's (1999) study of attrition reveal that of those cases that were prosecuted, two thirds resulted in a conviction for an offence, but only a quarter of the convictions were for rape or attempted rape. Of the guilty verdicts, the vast majority involved a defendant pleading guilty to lesser charges. The acquittal rate for cases that actually went to trial is highest for adult women - half of these trials resulted in an acquittal.

A recurring theme in studies that include complainants' perspectives is a sense that they are on trial, including comments that they could not distinguish between the lawyers who were prosecuting and those who were defending (Lees and Gregory, 1993; Victim Support, 1996). Helen Reeves (1997), Director of Victim Support, notes that despite amendments to the Bar Code of Conduct in the early 1990s, which allowed introductions between prosecution counsel and the complainant on the day of trial, and even recommended this as good practice, this fails to happen in many cases. Temkin's (2000b) study of barristers confirms that few routinely observe this common courtesy, and none supported any further relaxation of the rules on contact between advocates and complainants (despite recommendations by the Royal Commission on Criminal Justice in 1993). The overriding concern about not 'coaching' the victim appears to be taken to absurd levels in England and Wales, given the variety of ways prosecutors operate in other common law jurisdictions. It is also hard to see how this resistance fits with the principles in Human Rights law of treating others with respect and dignity.

Experience in court

Rape complainants rarely feel that their case/story was presented strongly, or that their reputation was protected by the prosecution; some are explicit that they felt the prosecution case was poorly represented (Chambers and Millar, 1983). Indeed some complainants point to poor case preparation with the facts of the case being misrepresented by the prosecution or discrediting information remaining unchallenged where evidence could have been provided to counter the claims (Lees, 1997a; Victim Support 1996). An analysis of media reporting (Soothill and Soothill, 1993) also suggests that prosecutors were frequently reported making fairly prejudicial comments about the victim in court. In assessments of victim satisfaction with the legal process the CPS, and prosecution barristers in particular, receive the lowest ratings of all criminal justice practitioners (see, for example, Victim Support, 1996, p53).

Jennifer Temkin's (2000b) revealing study of barristers, who have experience of both prosecution and defence, reveals some of the implacable barriers to change; not least the extent to which barristers believe many of the myths outlined in Section 1, or, at best, are willing to deploy them in the court room in the full awareness that they undermine the credibility of the complainant. Although this was a qualitative study with a relatively small sample, the participants were selected on the basis of being amongst the most experienced in rape trials, and included a significant proportion of women.

When acting for the prosecution, barristers reported difficulties in taking victims through their evidence, often due to delays and the length of time since the assault. Her appearance, behaviour and lifestyle were all viewed as obstacles in the case (p224). Indeed, many made judgmental remarks, distinguishing between deserving and undeserving victims, for example:

I mean the silly woman is prepared to be picked up by a stranger and go back for, quotes, coffee, you know, what does she expect? (p25)

¹ The possibility of pre-trial contact between the prosecution and witnesses has existed in Northern Ireland and Scotland for many years.

The real rape template was also evident in attitudes towards cases involving a previous relationship; one barrister noted that juries took the same attitude as she did - that this was not really a serious offence. This displays a prejudice towards an entire category of cases, that is not supported by the research evidence and certainly does not begin from the facts of each particular case: some rape cases involving previous partners are amongst the most violent and brutal (Easteal, 1998; Lees, 1997b).

The most senior barrister in the study argued that the low conviction rate was directly attributable to the level and quality of counsel engaged to prosecute. This was exacerbated when the CPS representative either was absent, or unfamiliar with the case file. It is worth noting that there are no mechanisms for assessing competence in the presentation of cases in court. Barristers were very critical of medical evidence - it was considered both poor in and of itself, and the doctors were viewed as having little skill in giving evidence. Too often either their written report, or their testimony provided an opportunity for sexual history evidence to be introduced by the back door.¹

In terms of acting for the defence, there was a suspicion that female barristers were often appointed as a deliberate strategy. Only a minority of those interviewed were prepared to admit that harassment of the complainant on the stand still occurred, with most arguing that this amounted to bad advocacy, and likely to lose sympathy of the jury. But Temkin herself notes:

... it was clear that every tactic short of this would be deployed if necessary, and that their approach to defending was robust to the point of ruthlessness. (2000b, p230)

The key element in defence tactics was to discredit the complainant, and this was much more important than the facts of the case. Indeed it might be deployed to focus attention away from other evidence, as this advocate acknowledges:

They're less important than undermining her personality. It sounds sinister, but that's what you're trying to do, make her sound and appear less credible. (Ibid, p231)

This might involve presenting her as foolish, and by implication blameworthy, often relying on references to some spurious 'common sense' which turns on an implicit, but never stated, presumption that men are not to be trusted. Focussing on clothing was another common tactic (see also Lees, 1997a), and of course her sexual history (see later). Most made applications under Section 2 in the full knowledge that if they were able to depict the complainant as a 'slut' this was highly likely to secure an acquittal (Temkin, 2000b, p234). Many defendants pressed for this line of defence. Indeed some of the barristers remarked that they thought sexual history evidence was almost always relevant if the defence was consent, in direct contradiction with the intent of the law. Few reported any problems in getting applications accepted. Ehrich's (2001) meticulous analysis of legal discourse notes a grammar of 'non-agency' with respect to the accused, and that the strategic actions of victims are re-interpreted as ineffective and not constituting resistance, which is then in turn used to imply consent.

Temkin concludes that barristers were, in the main, complacent about the current system, offering little if anything in terms of suggestions for improvements - the only exceptions being proposing better care for victims before and during proceedings, and ending systems like 'floating' rape cases as is current practice at the Old Bailey. Many did not support the new protections for giving evidence in the Youth Justice and Criminal Evidence Act, especially live video links, although some expressed strong support for screens. They were also split about the need for training.

This study suggests that the barristers, who were mostly women, mainly had an unchallenging attitude towards the construction of rape in the courtroom and that some shared the prejudiced assumptions that have for so long disfigured rape trials. They were deeply traditional in their approach to prosecuting. (Ibid, p240)

¹ A recent television documentary *Still Getting Away with Rape* (Channel 4, 16 March 2000) revealed defence practices of obtaining disclosure of medical records and using evidence of depression or overdoses to the discredit of complainants.

This study alone points to the need for training to address this construction of rape, based on the real rape template. Temkin also asks searching questions about the ethics of advocacy in this context where there is little questioning of the deliberate attempts to impugn women's character which draw on a set of ideas that many women barristers would resist and resent if applied to their own lives. Courtroom processes in rape cases rely on and reproduce (see also Ehrlich, 2001; Matoesian, 1993) old fashioned and contested ideas about acceptable femininity, as if they are accepted norms. Advocates have a responsibility not to deceive or mislead the court, and Temkin floats the opinion that such practices seriously misrepresent contemporary femininity and sexual mores. Also relevant here are responsibilities under the ECHR to treat others with dignity and respect their privacy.

Protections whilst giving evidence

There are, as yet, no UK data that studies these provisions for adult rape victims, and some of the possibilities have not yet been implemented. An evaluation of the introduction of screens and video link in Victoria, Australia (Heenen and McKelvie, 1993), revealed that some victims wanted to give evidence in open court. Prosecutors only made applications for the protections where they were relatively certain they would be granted. Judges who were not supportive of the measures made comments in their summing up to the effect that the jury had been placed at a disadvantage in assessing the evidence provided by complainants. Temkin's (2000b) documentation of barristers' hostility to video link suggests this will not be encouraged by the prosecution counsel, and may result in the kinds of miscommunication evident in child sexual abuse cases (Plotnikoff and Wolfson, 1995). The procedural complexities are also likely to create tensions for the CPS, especially in relation to the policy aim of creating more certainty about how they will give evidence for witnesses.

Defences to a charge of rape

There are three basic defences: 'it wasn't me'; 'it did not happen' and 'she wanted it' (Vasschs, 1994). The advent of DNA evidence means that issues of identity, and contesting sexual contact, have become less common, and in most rape cases, including those where the defendant was a stranger or knew the complainant hardly at all, a consent defence is the most common (Brown et al, 1993; Harris and Grace, 1999). In the UK, following the ruling in the Morgan case it is further possible for the defendant to plead that even if the complainant did not consent, he believed that she did (honest belief in consent). It is through the use of this defence, often in tandem with a straightforward consent defence, that sexual history evidence is often introduced.

No UK study has tracked a large number of cases to record the defences deployed, and in many cases multiple strategies might be used by lawyers. In a series of cases in Victoria, Australia, most defences relied on consent (51%), followed by a mixture of consent and belief in consent (17%) and only three pled belief in consent alone (5%). A further 11% denied any contact and the same percentage that there had been no sexual contact (Brereton, 1993). A case tracking exercise in Tasmania (Tasmanian Task Force, 1998) following an amendment to the law on consent found that the consent defence ran in 70% of 33 trials, and that despite the recent reform resistance, force and injury were still relied upon to show non-consent.

... mere submission and lack of resistance are still seen as constituting consent in spite of the legislative intent to promote the opposite view. (Ibid, p230)

Sexual history evidence

The use of sexual history evidence is one of the factors that distinguishes rape trials from almost all other criminal cases. It is also one of the areas where clear differences emerge between jurists, legislators and women's advocates (see, for example, Samuels, 2000 in relation to the most recent reform in England and Wales). The latter two groups have worked to limit admissibility, but such reform attempts appear to have had limited impact in most jurisdictions. The intention of Section 2 in England and Wales was, in the opinion of leading legal scholars, rapidly undermined (Temkin, 1993), and all studies tracking trials whether they be academic (Adler, 1987; Lees, 1997) or journalistic (Ferguson, 2000) reveal the extent to which sexual history evidence is used - either

through the formal process of application or other routes. The only systematic study in England and Wales (Adler, 1987) involved 82 trials: three-quarters of applications (75%) were successful; and sexual history evidence was present in almost two thirds (60%) of trials. More recent research for a television documentary (Ferguson, 2000) involved tracking 30 cases with adult complainants, in which there was a 33% conviction rate. Of the 15 transcripts made available, sexual history evidence was present in over half.

The most detailed study in the UK was undertaken in Scotland (Brown et al, 1993). This study involved tracking 379 trials, of which 115 were observed by the research team, for the other cases the clerk of the court completed a pro forma questionnaire. There were applications in just over a third of High Court cases - half of these referred to a prior relationship, and half to sexual reputation, a third mentioned both issues. The vast majority of applications were granted (85%), and in only a third (37%) did the prosecution argue against the application. This is not the whole story, however, because in a further quarter of cases (24%, considered an underestimate) sexual history evidence was introduced without application, and in a quarter of these cases it was introduced by the prosecution. Overall complainants were asked questions about their sexual conduct in about half of all sexual offences trials, and the acquittal rate in rape cases was 78%. Vera Baird (1998) cites a study from the USA which demonstrated that any introduction of sexual history evidence significantly increased the chances of acquittal; there is no doubt, therefore, that it has a prejudicial impact, and this is part of why the defence seeks to introduce it.

In the Scottish study defence lawyers were seldom required to seriously justify their applications, since it was taken for granted that a prior relationship was relevant, and they were allowed to slide between a range of justifications until one acceptable to the judge and the prosecution emerged. Thus neither the prosecution nor judges raised objections to admission in most cases (see also Lees, 1996 and, with reference to Australia, Law Reform Committee of Victoria, 1991). The authors note that there were less applications in Scotland than documented in England and Wales (Adler 1987), but that more of them were successful.

They conclude that there is a lack of consensus about what is relevant amongst legal practitioners, that the intentions of the legal reform were rapidly undermined, and that sexual history evidence is invariably used to 'create a smokescreen of immorality' which serves to veil those facts of the case that do not support the defence. They also note that the idea that rape cases are often 'his' word against 'hers' is a misnomer, since defendants rarely takes the stand, and if they do they are not questioned about their sexual history:¹

... the asymmetrical nature of the adversarial system means that the complainant may be more sorely tested than the accused. (Brown et al, p26)

The researchers conclude: that sexual history and sexual character evidence continued to be used without reference to the legislation; that sexual history and sexual character evidence that was admitted legitimately was often of the type, and/or had the effects, that the legislators aimed to exclude;² and that a continuing problem of more subtle character attacks, remained untouched by legislation. Indeed all the research evidence from the UK points to the intent of legal reform - to limit sexual history evidence to a minority of cases where it was directly relevant to the facts of the case, has been substantially undermined by legal and judicial practice.

¹ This may be particularly relevant where the defendant has previous charges and/or convictions for sexual offences. One proposal currently under discussion in Scotland (Scottish Executive, 2000) is that if the defence applies for sexual history evidence to be allowed with respect to the complainant, this will then allow the prosecution to introduce evidence with respect to the defendant.

² The legislation aimed to limit 'undue intimate and possibly embarrassing questioning' and suggestions "That the complainant is promiscuous and therefore a liar, the complainant consented to sex with A and B and therefore consented with C"; all these types of evidence continued to appear.

It is an open question as to whether this will be the outcome of the RvA, a case that went to the House of Lords in 2001, challenging the latest restrictions under the Youth Justice and Criminal Evidence Act. The judgement itself shows a range of opinion amongst their lordships, with some strongly supporting the intention behind the reforms, and others much more equivocal. The ruling made clear that where there is a previous relationship, this evidence may be relevant to the case, and the judge must make rulings on a case by case basis compatible with the ECHR. What the judgement fudges, however, is whether the assertion of prior relationship may be an important factual element in the case (it may or may not be disputed), enabling the context of the assault to be understood, or that it can be introduced as going to consent. If in subsequent cases it is interpreted as the latter, then one of the intentions of the legislators - to assert that consent is given (or not) in each instance of sexual intercourse - will have been undermined.

Research from other jurisdictions

The most detailed and extensive research has been undertaken in Australia. There are two studies in New South Wales - one by the Bureau of Crime Statistics and Research (Bonney, 1987) and one by the Department of Women (1996) a decade later. The first study reported a significant reduction in the number of cases where sexual history was raised, and some differences in the kinds of evidence permitted. At committal the proportion where it was raised fell from two thirds pre-reform to a third (it was admitted most often where it related to promiscuity and prostitution), and in higher court the proportion fell from just over two thirds to two fifths of cases.

Heroines of Fortitude (Department of Women, 1996) is a remarkable study that involved observing 150 court hearings and trials. The vast majority involved known men (90%), and just over a quarter (26%) pled guilty. Of the 111 trials less than a third (31%) resulted in a conviction. Some of the detail of the trial transcripts is deeply depressing, given that New South Wales is a jurisdiction which is seen internationally as having done most to limit sexual history evidence and change the conduct of rape trials.¹ In 72 trials sexual history was raised, and the evidence was admitted in two thirds of these. The context in which it was most deemed admissible was where the defence claimed the parties were linked by a recent or existing relationship, and the researchers note that 'relationship' was interpreted inconsistently by the court. Sexual reputation was raised in 12 percent of cases, with references to promiscuity, lesbianism and virginity. Furthermore, the procedures in the statute were not followed in over a third of cases where evidence was admitted.

One of the report's conclusions is that women were routinely discredited and attacked during cross-examination by biased questions that drew on stereotypes about the appropriate behaviour of women in relation to sex and sexual assault. Particularly discrediting strategies were deployed where the victim was Aboriginal, and with a higher frequency.² The old style corroboration warning - which had been made discretionary, as it now is in the UK - that it is dangerous to convict on the uncorroborated word of a complainant in rape cases - was given in 40% of cases. Thus the positive impacts that Bonney recorded in the period immediately following implementation of the reform had all but evaporated a decade later.

Similar findings are evident from the state of Victoria. In a study by the Law Reform Commission (1991), following law reform, it was found that applications were made in 31% of trials and permission granted in three-quarters, with the most common circumstances involving alleged prostitution. A subsequent study (Department of Justice, 1997) found that sexual history evidence was admitted in higher proportion of committal and trial proceedings: 65% and 70% respectively. The study concluded that courts routinely granted permission and that the law needed tightening to achieve its objectives. Tasmanian research concurs (Henning 1996), noting limited change since the law reform in 1987, with applications being invariably successful and in 45 of the 72 cases where sexual experience evidence was introduced no application for leave was made.

¹ This reputation is primarily based on an evaluation carried out shortly after legal reform was introduced (Bonney, 1987); both *Heroines of Fortitude* and Bagen and Fishwick (1995) note that the impact lessened over the years.

² There is little if any evidence with respect to how racism affects the processing of rape cases, and in particular the attrition rate, in the UK, although some tentative suggestions are made by Gregory and Lees, 1999.

Sexual history evidence, therefore, presents us with something of a paradox: repeated attempts have been made in a variety of jurisdictions to limit its use in rape trials, but none seem to have achieved the desired outcomes of legislators. This suggests that legal practitioners, in the main, do not support the intention behind legal reform and share a perception that sexual history evidence is almost always relevant in rape trials. At least one commentator (Soshnik, 1987) argues that this is in part due to judicial interpretation undermining the original intent, but that some of the problems are due to having to interpret vague and poorly worded legislation. He argues strongly for clearer articulation within statutes of the purposes of the exclusions, as he puts it: 'cogent textual accounts of the function of such provisions' (op cit, p691). Various methods have been tried from virtual total exclusion to wide judicial discretion (Soshnik, 1987), but he argues in favour of a middle way where there is some discretion within a framework of substantial statutory guidance - 'directed discretion'. In reviewing six state laws in the US, Connecticut's directed discretion is seen by Soshnik as positive since it has resulted in judicial decision-making which supported, rather than unpicked, the intention of legislators. Where the legislative purpose is clearly outlined, it spells out that such laws are inherently exclusionary, and judicial decision-making is directed to this intent.

Both Scottish and Australian researchers note the importance of making a distinction between sexual history evidence, which may on some occasions be relevant, and sexual reputation evidence, which surely is not. The Tasmanian Task Force (1998), for example, call for legislative clarification of the difference between 'experience' and 'reputation', which makes clear that evidence which goes only to credibility cannot be relevant to a fact at issue. They also call for clarification of privilege with respect to counselling notes, since disclosure here is an unwarranted invasion of privacy, which deprives complainants of their right to support and sanctuary.

Gary La Free's USA study (1989) found that the more evidence the prosecution presented the more likely a guilty verdict. He also makes the point that rape trials vary hugely according to the nature of the defence. Where this is a matter of identification or diminished responsibility the character of the complainant is hardly ever at issue. Where a consent defence is used, however, it becomes a core element, and there is a lower conviction rate. This study is one of very few to include research with jurors, and where they think the evidence is inconclusive, they make decisions on the basis of character - both that of the complainant and the defendant. It is in this context that the use of sexual history evidence needs to be explored.

Separate representation

There have been proposals in the UK (Temkin, 1993) and Ireland (Task Force, 1997), as well as in other jurisdictions, to allocate a lawyer to represent the interests of the complainant at trial or, in more radical proposals, throughout the legal process. Temkin, for example, argued that such representation should protect women's rights to anonymity and compensation, as well as from unacceptable cross-examination during the trial. An example of a more extensive proposal is that made in Victoria, Australia, (Bagen and Fishwick, 1995, p103). Here it was envisaged that a legal representative be appointed following a report to the police, who would:

- advise on options at each stage of the process;
- liaise with police and prosecutor's office;
- monitor police and prosecution handling of the case;
- represent the victim's interests in any court proceedings;
- act for the victim in court proceedings.

The proposal was rejected by the Law Reform Commission on the grounds that the purpose of a criminal trial is to determine guilt and legal representation for the complainant could confuse this. They did, however, grant that the liaison/advocacy work pre-trial could be improved by the introduction of a specially trained sexual assault worker, and there are a number of variations on this theme now operating in Australia.

The Irish proposals drew more on models from Scandinavia and Germany, where 'victim laws' have defined the status and rights of victim witnesses in criminal cases. It is, however, less than simple envisaging how practices that function within an investigative legal system can be mapped into adversarial processes.¹ That said, however, Ireland has just introduced a reform that allows complainants in rape cases to be represented in court where an application is made with respect to sexual history evidence and where the application succeeds whilst that evidence is taken.

Jury decision-making and sentencing

As long ago as 1966 Kalven and Zeisel argued that the legal elements in rape cases are frequently redefined by juries:

The jury, as we come to see it, does not limit itself to this one issue; it goes on to weigh the woman's conduct, and the prior history of the affair. (p249)

Many commentators in the USA argue that this remains the case (Frohmann, 1991), and, indeed, that the construction of rape in the courtroom ensures that this remains the case (Mateosian, 1993). Brereton (1993), with reference to Australia, concludes that juries are reluctant to convict where there is no evidence of injuries or no admissions of guilt by the defendant. Thus the real rape template carries through to the end of the process, and even affects sentencing.

The Harris and Grace (1999) study reveals that where a conviction is achieved in 20% of these cases the sentences were below the minimum proposed in the Billam guidelines. It is clear from comments made by judges and lawyers that they see these as applying to stranger rapes, not the 'other' kind they now see more of. The comments made by judges in marital rape cases (Lees, 1997b) reveal an presumption that it is by definition less traumatic to be raped by someone you know.

Sexual violence courts

The only jurisdiction where specialist courts for sexual offences have been documented and evaluated is South Africa, although many areas in the USA and Canada have experimented with this model with respect to domestic violence.² Such courts began in one area - Wynberg, Cape Town - and were a direct response to the high levels of reported sexual violence in the country, and a conviction rate of 10-20%. The number of courts were to be extended from 10 to 20 by the end of 2000; currently they are concentrated in areas with the highest reporting rates (Khan, 2000). The model involves both a special prosecutors' office and designated courts into which rape cases are funnelled. Additional elements in the more recently established courts are increasing police competence in evidence gathering, and experiments with a 'one stop shop' combining elements of a sexual assault centre and special prosecutors.

The evaluation (Stanton et al, 1997) of the Wynberg court found a significantly increased level of prosecution, and an increased conviction rate, in the cases that came before it. The evaluation concluded that the court was 'a step in the right direction', whilst pointing to remaining implementation problems, including that not all rape cases were heard in the designated courts, and the fact that procedures were not always followed. A later ethnographic study (Moult, 2000) confirmed continued inconsistency in practice and revealed an increasing turnover in the prosecutors' office due to the pressures of the work, especially the overwhelming case loads.

¹ There is, for instance, no direct equivalent of cross-examination in investigative legal systems, and the role of the complainant's lawyer in the court is primarily to present her claim for compensation which is attached to the end of the criminal trial.

² A form of domestic violence court is currently being piloted and evaluated in Leeds, and for a review of the Canadian model see Hague et al, 2001.

Pre and post trial support

The need for support for victims of rape in the aftermath of assaults has long been recognised; albeit not an arena where significant resources have been invested in specialist services (Kelly and Regan, 2001). Currently rape crisis groups and Victim Support provide immediate support, and in some cities enhanced by SARCs. In terms of support in relation to the trial process the Witness Support Service is intended to provide this, but local practices of referral and service provision vary. Many rape victims appear to fall through the holes in this network of organisations, which may or may not be well co-ordinated at local level. Even were co-ordination reliable, the model is not equivalent to the provision of sexual assault advocates who act as both liaisons between complainants and the CJS, and as a source of advice and support pre and post trial.

Conclusion

Research on barristers' opinions and observations of court cases suggests that many advocates work with a real rape template. Lees (1997b) argues, on the basis of observing trials, that prosecuting counsel were 'inept at countering myths and prejudices about women' (p57). Counsel need to be able to present a credible and creditable version of events that fits the complainant's account, and which demonstrates that rape extends beyond the limits of the stranger attack. This involves locating women's behaviour in contemporary mores, drawing on what we know about rape, including the decisions women take about their own physical and psychological survival, and explicitly challenging perceptions that behaviour that might be seen as 'risk taking' places women outside the protection of the law. For example, it is currently rare for the complainant to be asked questions about the factors that might prompt submission, rather than resistance - such as shock, embarrassment, shame, powerlessness, confusion, disbelief and previous threats/harassment. Significant benefit might also flow from advocacy that focuses on the actions of defendants, and draws on the literature about sexual offending and sexual aggression.

The documented failure of adversarial systems to deal justly and effectively with rape cases has led at least one legal practitioner to raise the possibility of judges putting questions - bringing in elements of the inquisitorial system that predominates throughout Europe (Block, 1998). Others have argued for clear rules with respect to cross-examination, especially what is and is not relevant to consent and to testing credibility (Brereton, 1993). Brereton, however, ultimately concludes that it is community attitudes to and understandings of rape which are the most critical factors affecting rape trials - from which cases make it into the court room, and to happens within it (op cit).

Section 8: Statute Law

Sexual offences law, and rape law in particular, has been subject to intense scrutiny and widespread reform over the past 25 years (see, for example, Barga and Fishwick, 1995; Schulhofer, 1998), although this has been more piecemeal in the UK than many other jurisdictions (Home Office, 2000; Kelly and Regan, 2001). Many commentators and jurists concur that reforms intended to shift the understanding of rape and remove gender bias in the interpretation of law have been largely unsuccessful.

Aspects of rape law distinguish it from other offences. For example, law on rape, unlike many other crimes, is silent about what kind of intent makes sexual acts crimes; instead the complainant's mental state is emphasised, alongside a continuing deeply ingrained distrust of women's complaints (Edwards, 1996). Consent thus becomes central,¹ again unlike many other crimes where it is legally impossible to convert an assault into a non-criminal act. As Carol Smart (1989) notes, if the prosecution cannot prove both non-consent and intent on the part of the defendant a woman is deemed to have consented to her own violation. In effect, a social recklessness standard

¹ Even in jurisdictions where rape is defined in terms of force or the threat of force, consent is still a major component in the trial. It is this fact that has led some jurists to argue that the strategy of renaming rape as sexual assault, and seeking to locate it as a crime of violence, has failed (see Schulhofer, 1998).

is applied to victims of rape, and the burden of proving lack of consent beyond reasonable doubt is difficult, since stereotypes and gendered norms of sexual behaviour assign women responsibility for deciding whether intercourse occurs. In the end rape law defines the mental element, the mens rea for rape, in terms of the social meaning of the woman's conduct, rather than the legal meaning of the man's.

Bronitt, (1995) argues that reform in New South Wales increased reporting, and created higher conviction rates, but at the cost of re-emphasising violence, prolonging trials and downgrading the seriousness of so called 'non-violent' rapes.

The centrality of consent

Many attempts at reform attempted to shift attention away from consent to the coercive circumstances (most usually legally defined as force and threat of force) in which the assault took place; the earliest and most cited being the reforms in Michigan in the mid 1970s. In most jurisdictions, however, where this route has been explored, consent has returned through the front and back door, including Appeal Court rulings (Bargen and Fishwick, 1995; Schulhofer, 1998). This has not deterred the South African Law Commission (1999) seeking to amend its legal definition of rape to 'sex obtained under coercive circumstances'.

Many legal practitioners argue that in rape cases consent has its ordinary everyday meaning - something like agreement or permission, but this reliance on, and faith in, common sense in the absence of legal principles means the grounds on which decisions are reached can only be made on the basis of dominant social attitudes, myths and customs - the very values that tolerate rape (Corbett and Larcombe, 1993, p134). Reform in Australia has taken a different route, and is followed in recent proposals in *Setting the Boundaries* (Home Office, 2000) for England and Wales, in terms of clarifying consent in statute. A variety of routes have been used (Bargen and Fishwick, 1995, Chapter 6), but the most supported is to define consent as 'free and voluntary agreement' and to include a non-exclusive list of contexts that vitiate consent within statute.

Temkin (2000a), in her appraisal of the current situation, notes that in England and Wales the legal interpretation of consent is complex and unpredictable:

The decision in *Olugboja* is radical in that it appears to seek to overturn the old approach of the common law altogether. It appears to suggest that in every case of rape, consent will be an issue for the jury to decide on the facts. Fixed categories of cases in which the law recognises that consent is absent should no longer apply. Thus even where force is used or threatened the issue of consent would remain one for the jury to decide. (p86)

Commentators opine that the distinction between consent and submission in this decision are so vague that judges and juries can have widely different views. Temkin is critical of the transmutation of issues of law into issues of fact, and argues that the law currently '...fails to meet the minimum requirement of clarity, certainty and comprehensibility' (op cit). One consequence of this vagueness, in her view, is that neither prosecutors nor juries will stray far from narrow definitions of rape as forcible violation; thus the real rape template is yet again reinforced.

The review of sexual offences law (Home Office, 2000) developed its thinking by beginning from a set of principles: justice, equality and fairness; protection of the vulnerable; and respect for sexual autonomy. It is the latter that applies particularly to adult rape. US law professor Stephen Schulhofer notes:

Sexual coercion is simply any conduct that threatens to violate the victim's *rights*. Conduct that forces a person to choose between her sexual autonomy and any of her other legally protected entitlements - rights to property, to privacy, and to reputation - is by definition improper; it deserves to be treated as a serious criminal offence. (p132)

Furthermore, if consent is to have any valid meaning it must require some form of saying yes.

By requiring affirmative permission, through words or conduct we can insist that any person who engages in intercourse shows full respect for the other person's autonomy - by pausing, before he acts, to be sure that he has a clear indication of her actual consent. (Op cit, p273)

As Jennifer Temkin has pointed out (2000a), this is not a difficult burden for the law to place on men - since the woman is present, all he has to do is ask.

Reform has, therefore, moved towards a positive consent standard which is not just about enhanced protection, but also 'a more communicative model of sexuality where 'only Yes means Yes' in the eyes of the law' (Bargen and Fishwick, 1995, p4). The language of 'free agreement' constitutes a new legal vocabulary which endeavours to widen understanding of rape, and ensure that submission or inaction are not automatically read as a form of passive consent.

This does not, however, resolve the thorny problems embedded within a consent defence, especially with respect to law in the UK. The notion of honest belief in consent (in other jurisdictions sometimes called 'mistaken belief') has been one of the most contested aspects of rape law (Home Office, 2000; Temkin, 2000a). Professor Elizabeth Sheehy, with reference to both Canadian and Australian law, suggests this defence provides an avenue for those who do not wish to call women liars, but at same time do not want to criminalise coercive male sexuality; such a judgement in effect says that the victim may have been raped but the accused is not a rapist (Sheehy, 1995, p13). The preference for subjective tests of mens rea has led many jurists to defend this position, but in many common law jurisdictions now the test is both subjective and objective - belief has to be both honest and reasonable. Even this position is not without problems, since feminist jurisprudence has pointed to the ways in which understandings of 'reasonableness' are gendered in their legal application (see, for example, Edwards, 1996); thus what is defined as objective has subjective elements.

Sexual history evidence

Currently the position with respect to admissibility of sexual history evidence in England and Wales is unclear, at least within cases where a prior relationship is claimed, and will remain so until judicial interpretations of the House of Lords judgement in *RvA* clarify the position. In this context it is worth noting the slightly different root proposed in Scotland in *Redressing the Balance* (Scottish Executive, 2000). This document reviews criticisms of previous attempts at law reform: exceptions in statute have been too broad; the restrictions do not apply to evidence introduced by the Crown; and law is not being implemented as intended. They conclude that 'rape shield laws' have tended to fail to deal with the main issue - the relevance of sexual history evidence to the charges, and many contain no requirement to demonstrate relevance.

The Scottish proposals, around which extensive consultation took place, draw on Canadian law, where following a number of appeals, the new law requires the judge to weigh the relevance and probative value of sexual history evidence against an assessment of the prejudicial effect it might have. It further requires applications in writing, and an in camera hearing. In recognition that sexual history evidence is frequently deployed in a consent defence, the Scottish Executive float the possibility of making consent a special defence that has to be declared before trial, and propose that any successful application with respect to the sexual history of the complainant will automatically mean that any previous sexual offence convictions of the defendant are also admissible as evidence.

The proposed reforms are located within a perspective that recognises the limited rights of victims in the CJS, and the ECHR principle of the right to respect for their privacy and family life. The ECHR rights are further connected to moral rights that ought to inhere for those who have been victims in the creation of a set of principles for complainants in sexual offences cases. These are, in summary:

- To be treated with respect and dignity throughout the process.
- To be entitled to security and protection from harassment and intimidation throughout the process.
- To have his or her privacy respected insofar as this is consistent with the interests of justice.
- To receive such support and assistance as he or she needs to enable him or her to give evidence fully, with confidence, and to the best of his or her ability.
- When on oath to be presumed in the first instance to be telling the truth. (Scottish Executive, 2000, p4)

Research on the impact of legal reform

One US project has used time series analysis, linking statute reform with 20,000 reported rape cases in six urban jurisdictions to assess the impact of reform (Horney and Spohn, 1991; Spohn and Horney, 1996). 'In the first paper the authors conclude that impact has been minimal, since they placed very limited constraint on the discretion exercised by all key decision-makers in the system. In only one jurisdiction was there a noticeable increase in prosecutions, and this is attributed to a local willingness to prosecute 'borderline' cases. The second paper explores the data from one area in more depth, to discover whether the reforms had more subtle impacts; in particular, whether more non-stranger rapes were prosecuted. CJS professionals believed that the possibility of prosecuting and securing a conviction in a case involving acquaintances had increased, and this was confirmed by an examination of cases.

The researchers conclude that workplace norms were more significant than reform in changing practice, and where these continued to discourage prosecution little changed (Horney and Spohn, 1991, p150). One of the most important elements in decreasing attrition was creating meaningful incentives to change cultural norms within the CJS with respect to sexual assault cases (see also Harris and Grace, 1999). The CJS officials interviewed for this project commented that there was limited incentive to change when public and media attention wanes. Effective intervention to decrease attrition, therefore, involves careful monitoring of legal reform, and public pressure where implementation undermines the legislative intent, or is half-hearted.

Smaller and more detailed evaluations of legal reform have been conducted in Australia, and one (Heenen and McKelvie, 1993) looks at changes in Victoria. They also conclude that any long-term impact will be the outcome of changing attitudes and practices within the system, rather than amending statute alone. One way of affecting such change appears to be through efforts to challenge the real rape template, in particular, where the evidence is sufficient, developing approaches to prosecute cases currently considered 'borderline'.

Section 9: Concluding thoughts

The Tasmanian Task Force end their review of CJS responses to rape noting that:

Many women who survive a sexual crime are again subjected to harm through their contact with the legal system. (1998, p33)

This harm is multi-layered, but much of it stems from the extent to which the application of rape law continues to reproduce and reinforce gender bias. For example:

... the application of 'consent' as the determining issue in the majority of rape cases is based on socially prevalent myths about sexual assault and stereotypes of female and male sexuality. These myths in effect classify some women as 'real' or 'deserving' rape victims and others as 'unrapeable'; some rapes as 'real' rapes and others as 'half won arguments' with no harm done. (Corbett and Larcombe, 1993, p133)

The research evidence marshalled in this review shows that police, prosecutors, barristers and judges agree that rape is a very serious offence, but they rarely encounter cases that fit their definition of what rape really is (see also La Free, 1989). These definitions are the foundation of attrition at all stages of the legal process; there is a hierarchy of credibility in terms of both the contexts in which sexual assaults take place and who the complainant is. For example, marital rape is considered less serious, less traumatic than rape in any other context, yet research tells us that women raped by current or ex-partners are more likely to be injured, and that these instances are only second to stranger rapes in terms of the presence of a weapon (Easteal, 1998). In many legal systems, factors - injury, use of weapons, repetition and breach of trust - which in relation other crimes (or even the same crime in a different context) are seen as aggravating, are not interpreted in this way in rape cases, and can even be used as a form of mitigation.¹

One myth that appears to affect judges and jurists is the notion of the 'non-violent rape' (Schafran, 1993). This not only minimises the violence inherent in non-consensual sex, but by implication suggests that it is physical assault and physical injury that constitute the kind of damage that the CJS ought to concern itself with. Yet, it is only a tiny minority of rape cases (4% in the Rape in America study) in which 'serious' injury occurs (Schafran, 1993). The damage that most victims report being the most difficult to recover from are impacts on one's sense of self and safety, and on one's trust and relationships with others. In terms of these measures there are few differences between stranger and non-stranger rapes; and those that do exist point to more long-lasting damage for those raped by men that they knew (Schafran, 1993).

The problem is not just one of the persistence of old myths and stereotypes, but also the emergence of new variations, the most unhelpful of which has been 'date rape'. The research evidence is now incontrovertible; most sexual assaults are committed by men who are not strangers; with ex-partners and acquaintances constituting the most significant groups. What has received (slightly) less attention is the way these categories are constructed, and how this can confuse rather than illuminate. The partner and ex-partner category, for example, includes a significant proportion of domestic violence cases, but few research projects or investigative protocols address these important connections directly. There are even case examples in the literature where the victim was instructed by counsel to not mention the physical violence in the relationship; thus making it virtually impossible for her to explain the context in which the rape took place and why she did not resist (Lees, 1997b).

The acquaintance category in the most recent (and previous) Home Office study (Harris and Grace, 1999) covers men who the victim met within the 24 hours before the rape. Gregory and Lees (1999) make a strong case for this group being included in the stranger category, since the level at which they are acquainted is minimal. They suggest that since DNA evidence now makes the 'it wasn't me' defence virtually impossible, serial rapists have changed their targeting strategy, using pubs, clubs and bars rather than outdoor public space. By engaging the woman in some form of 'consensual' contact, if the rape is reported it is then possible to use the consent defence. Whilst it is likely that some rapists have adjusted their modus operandi in this way, this hypothesis relies on sexually aggressive men having a detailed and subtle knowledge of how the legal system works. Other, simpler, factors may account for a shift in the contours of reported rapes. For example, there have been major changes in patterns of social life over the last three decades, with women, and young women in particular, having more independence financially and culturally. Many more women can be found in varied social settings, and interactions between men and women have become less formalised. These changes also mean that more women have cars, and use taxis. Thus the street and public places may simply be less successful 'hunting' grounds for predatory men. These shifts in social interaction between men and women, and in social and sexual mores, are seldom seen as the contexts in which so called 'date' rape takes place. As Aileen McColgan (1996) made clear in the title of her book, we need to take the 'date' out of rape, and pay more attention to the facts of cases and the contexts in which rape most commonly occurs.

¹ This appears to be an underlying theme in the most recent consultation paper on sentencing in rape cases from the Sentencing Review Panel.

A number of commentators, and the thread running through this review, make clear that changes in police and prosecutorial protocols, and even statute reform, will have limited impact whilst the understanding of 'real rape', 'real rapists' and 'real victims' continues to exclude the majority of forced sex. Indeed, at least one author (Taslitz, 1999) argues that some of the attempts at reform may constitute 'counterproductive regulation'; rule making which is subverted by individuals and organisations, because they do not agree with them. If the last twenty years of research tells us anything it is that new statute law, policies and protocols must be accompanied by implementation processes which seek to expand and deepen understandings of the realities of rape.

That said, however, there are a number of changes which have been proved to make a difference in some jurisdictions with respect to prosecuting rape and sexual assault, and in many others with respect to domestic violence. These include:

- enhanced evidence gathering;
- specialist police teams;
- specialist prosecution units;
- links and liaison between police and prosecutors to build cases;
- enhanced witness support and advocacy;
- involving complainants in case preparation;
- fast tracking cases;
- special case management procedures.

The shifts in domestic violence case management internationally (see Shepard and Pence, 1999) have involved the police taking responsibility for investigation, evidence gathering and charging, and prosecutors vigorously pursuing the case. It is no longer the victim's responsibility to express strong willingness to give evidence, or even her preferences, that are uppermost. The focus on victim empathy and sensitivity in rape cases may have had unintended consequences. Robyn Holder (2001) notes:

What it translates into is something like 'Going to court on sexual assault is really hard... if you don't want to face that, and we can understand that, we won't proceed'. And it doesn't.

It is clear from a range of sources that where women withdraw at this point, or express ambivalence, virtually no further investigation takes place.

Susan Estrich (1997) in her paper 'Is it rape?' draws attention to the consequences of failure to understand the ways in which rape is not the same as other violent crime.

Sometimes the failure to discriminate is discriminatory. Where there are real differences, failure to recognise and take account of them is proof of unfairness. If the defenders of the system are right in saying rape cases are treated just like assault and just like robbery and burglary, they are surely wrong in taking this as evidence of a just and fair system. The weight given to prior relationship, force and resistance and corroboration effectively allows prosecutors to define rape so as to exclude the simple case, and then justify that decision as neutral, indeed inevitable, when it is neither. (p192)

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