

The logo for Centre LGS features the text "Centre LGS" in a sans-serif font. To the right of the text is a large, stylized red swoosh that curves from the top right towards the bottom left, partially overlapping the letters "S".

Centre LGS

AHRC Research Centre for Law, Gender and Sexuality

**RESPONSE TO THE OFFICE FOR
CRIMINAL JUSTICE REFORM'S
CONSULTATION PAPER:
'CONVICTING RAPISTS AND
PROTECTING VICTIMS OF RAPE -
JUSTICE FOR VICTIMS OF RAPE'**

July 2006

CentreLGS is the Arts and Humanities Research Council Centre for Law, Gender and Sexuality.

The purpose of CentreLGS is to act as a national and international focal point for academics, practitioners and policy-makers who work in the area of gender, sexuality and the law. It consists of about 70 scholars in three institutions: the Universities of Kent, Keele and Westminster.

CentreLGS aims to support current research and develop new initiatives in this field through regular policy forums and conferences, the publication of books and articles, exchange and visiting scholar programmes, and the supervision of postgraduate research students.

SUMMARY

Centre LGS welcomes the consultation document and is sympathetic to efforts to address the persistent problems around securing justice for victims of rape. While on the whole we endorse its aims and objectives, we wish to register some concerns about the extent to which substantive change can be achieved within its analytical framework. In our view, the consultation document locates rape law within the context of the regulation of male sexuality rather than the protection of women's sexual autonomy. Its ambition is limited to relatively minor 'tinkerings' with the substantive and procedural rules of criminal law and evidence. Until we address issues of gender and sexuality which are deeply embedded in the institutional, social and cultural fabric of our society changes within the current framework of law are likely to be of little effect.

CONSULTATION RESPONSE

Before responding to the specific questions that the consultation document asks, we would like to make some general observations about the overall reform strategy. Rape is a troubling example of the limits, to date, of feminist driven engagements with law. While much has been achieved in terms of legal reform, little has been produced in the way of concrete results: the rate of reporting rape has risen dramatically over the last 30 years but the rate of conviction is below 6% of reported cases. This is among the very worst conviction rates for rape in Europe. Moreover, while feminist understandings of rape have undoubtedly infused the consciousness of many women and are clearly a factor accounting for the increase in reporting, popular understandings of rape appear to be unaccountably trapped within old pre-feminist stereotypes in which women are viewed, first and foremost, as willing recipients of male gratification and desire

It is not difficult to see why changes in law produce such limited results in such a context. The problem of rape is so deeply embedded in social and cultural constructions of (hetero)sexuality, so closely allied with core dimensions of what we understand as masculinity and femininity, that any steps which do not confront this fundamental aspect of the rape problem are likely to be, at best, modest.

Much of this is recognised by policy-makers who have focused their attention directly on 'rape myths'. A stated object of rape law reform is to counter public attitudes as played out in the criminal justice process. Hence the recent and quite proper emphasis on training prosecutors and on providing better support services for rape victims. Hence too the legal changes to the definition of rape, making it more difficult for men to argue that women who are wholly incapacitated have consented as well as placing on men some responsibility to act reasonably in forming a belief that consent has been given.

The current proposals are an extension of this strategy: clarifying the concept of capacity to avoid the regrettable results of cases like *R v Dougal*; allowing expert evidence so that the public and the jury can be better informed about how rape affects victims, including how it affects their actions and perceptions in relation to the rape itself; considering further refinement of the rules and procedures developed to limit the misuse of sexual history evidence; and extending special measures for vulnerable witnesses.

From the point of view of those seeking justice for victims of rape, there is now a real concern that the limits of law have been reached. American feminist Catharine MacKinnon has observed: 'rape is not prohibited, it is regulated' (1989, p.179). Indeed, rape law *is* about regulation. It is about drawing a line below which men should not fall in their sexual dealings with women. Rape law sets the

boundaries within which it is acceptable for men to have sex. It is about *men's* not women's sexuality: men act, women are acted upon; men force, women succumb; men are the subjects, women are the objects. This is the case even where both the parties involved are men; as has frequently been observed, the raped man is culturally feminised by the act of rape.

This sexual script is embedded in the criminal justice system and it is very difficult to see how to escape it. The government's solution is to strike a better balance between the rights of defendants and the rights of victims; but there are problems with this strategy. One problem is simply that the woman's 'right' to victim status is often the most fundamental issue of contestation; the defendant is clearly a defendant and a bearer of legal rights, but is the victim *really* a victim? A second problem lies with the pathologising tendencies which accompany victim-centred strategies. Overcome by the defendant's acts, she lacks the capacity to stand up for herself. She is inscribed by law as powerless and defeated. Many women observe that the experience of bringing a rape claim has been equivalent in terms of the devastation wrought to the rape itself (see Carol Smart, 1989). This is so even when the outcome of proceedings is positive. Entrenching victimhood in the rape process is not necessarily going to ease these problems.

One possible solution would be to engage in more *radical* criminal justice upheaval – for example, replacing adversarial proceedings with some kind of inquisitorial process, as is the case in many other European countries, most of which boast significantly higher conviction rates for rape. As long as rape remains within an adversarial process, those rape 'myths' will continue to reassert themselves in the rhetorical strategies of good defence lawyers. Another possible strategy would be to encourage greater use of civil claims against rapists (see Joanne Conaghan, 2005). In a civil claim the woman's status is that of

complainant not victim. From the outset of the process, she is recognised as an independent, fully autonomous legal person. Moreover, the woman must establish that she was raped only on the balance of probabilities. This strategy offers useful possibilities. However, it is important that rape cases are not filtered out of the criminal justice system and thus treated less seriously.

At the heart of the issue is not simply how we should play about with substantive and procedural aspects of criminal law. The issue is this: what is the harm we seek to proscribe? In law, rape is simply sex where a lack of consent can be proved. We suggest the legal harm should be understood as a violation of personhood and the moral status which personhood confers. If we understand personhood in terms of maximising our individual and collective capacity for self-realisation, then sexuality is undoubtedly of significance. We need to start from a position which places sexual autonomy at the centre of our efforts to address the problem of sexual violence. The current form of rape law should not unduly dictate new policy prescriptions.

RESPONSES TO SPECIFIC QUESTIONS

Question 1

Does the law on capacity need to be changed?

Yes. The decision in *R v Dougal* is regrettable and the publicity around it raises concern about law's ability to protect vulnerable people. The prosecution's decision not to proceed appears to be in breach of the Crown Prosecution Service's own guidance on consent and capacity (see http://www.cps.gov.uk/legal/section7/chapter_a.html). However, the problem

goes beyond prosecutorial discretion. *Setting the Boundaries* (July 2000) recommended that a person was unable to consent when 'too affected by alcohol...to give free agreement' (2.10.9) yet this is not included as an evidential presumption under the Sexual Offences Act 2003 s.75. This was apparently due to a concern, expressed by the then Home Secretary (in Hansard), about false allegations. Such concerns are, we submit, unfounded, ill-informed and inappropriately amplified by the press. We propose that alcohol or drug induced submission should be inserted into s.75.

An evidential presumption, although rebuttable, is symbolically powerful. What is more, the inclusion of self-induced intoxication prevents any hierarchy being constructed between the various and/or continuum of means (from entirely voluntary self-administration, through culturally acceptable forms of 'seduction', to the spiking of drinks) by which the victim becomes intoxicated. This is crucial since, to the extent to which The Sexual Offences Act purports to protect sexual autonomy, it is the victim's state, rather than the means by which it was achieved, that is of primary importance. This point is recognised in the context of Government initiatives complementary to the Sexual Offences Act 2003 such as the National Advertising Campaign on consent.

Question 2

Should there be a statutory definition of capacity?

Alongside the inclusion of self-induced intoxication under the list of presumptions under s.75 we support the proposal to provide a statutory definition of consent and capacity for the purposes of s.74. Historically, judgments in the area of sexual offences and consent have attracted enormous public criticism (e.g. *R v Morgan* [1976] AC 182 on the doctrinally correct definition of recklessness in rape and, more recently, *R v Brown* [1992] 2 All ER 552 on the regulation of what

were constructed as dangerous sexual practices and, what is more, dangerous sexualities). The Mental Capacity Act 2005 goes some way toward providing a statutory definition of capacity. However, in the problematic context of intoxication and consent greater clarity is needed.

Emily Finch and Vanessa Munro's research on rape suggests that, in the absence of further definition, mock jurors will interpret capacity in divergent ways, thereby creating different outcomes in factually analogous cases.

A statutory definition of capacity would be informed and underpinned by an understanding that persons engaging in sexual practices have to understand not only the nature but also the consequences of their acts (e.g. at least sexually transmitted diseases, pregnancy). Foresight of consequences, although not impossible, is unlikely in the later stages of intoxication. Assessing when this stage is reached is something the law already does in the context of the defence of intoxication in crimes of specific intent.

Question 3

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

Yes. The experiences of rape victims and the extensive range of possible reactions to rape are likely to lie outside the understanding of many jurors. Their assumptions are likely to be informed by commonly held myths about the offence. It is unlikely that asking victims to explain the reasons behind their own behaviour would be adequate, since these reasons may not be accessible to the individual victim. Expert evidence, when appropriately introduced, has the potential to counterbalance and challenge a number of the pervasive but highly

prejudicial 'rape myths' that research persistently identifies within society (and thus within the jury room).

Question 4

Do you agree with the proposal outlined in this chapter (general expert witnesses)

We welcome this proposal, particularly in so far as it seeks to inform juries about common reactions to rape and avoid unnecessary and distressing cross-examination. However, we have some reservations. Individual victims will display varieties of reaction and may not resemble the 'notional victim' envisaged in the consultation document. Further, Rape Trauma Syndrome as a category of Post Traumatic Stress Disorder, in Annex D, appears to have much in common with Battered Woman Syndrome in provocation and diminished responsibility. This has been much criticised in feminist legal writing as misrepresenting, pathologising and disempowering victims of domestic violence (see, e.g., Martha Mahoney, Katherine O'Donovan).

Question 5

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

Given the focus on psychology only a narrow range of experts will be qualified to act as expert witnesses. It would be unhelpful to restrict expert testimony to empirically validated evidence as this might exclude evidence from highly experienced case-workers about the diversity of individual victims' reactions to rape. Other jurisdictions admit evidence from experts other than psychologists

and psychiatrists in this context. The expertise of various professional groups could be usefully harnessed for the purposes of judicial training.

While the introduction of expert witness evidence may be a useful means of assisting the presentation of a balanced picture its value as a counter-measure against popular attitudes that are supportive of 'rape myths' and dubious socio-sexual stereotypes is limited. The use of expert evidence should not be thought to replace the need to target and challenge these attitudes outside the courtroom.

Question 6

Which is your preferred option (evidence of first complaint)?

Option 4.

Question 7

What are the reasons for your preference?

It is unclear why the first complaint is regarded as necessarily and inevitably the most useful. Option 4 in Chapter 5 of the consultation document is preferred. The defence can still argue that the admission of evidence should be excluded under PACE s.78.

Question 8

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

Yes.

Question 9

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

Yes. Giving evidence in the 'normal' way may be important for an individual victim. However, it is important that inferences should not be drawn from the way a victim chooses to give evidence.

Regrettably, there is no discussion in the consultation paper of providing legal representation for victims of rape in the context of questions 8 and 9.

Question 10

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

Yes

Question 11

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

Yes

Question 12

If so, should this be relaxed by:

(a)relaxation of the present restrictions but with some safeguards or criteria; or

(b)by a repeal of the present restrictions?

(a)

Question 13

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

Yes

Question 14

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

We have no specific recommendations.

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FURTHER INFORMATION

Method of Consultation

This response is the result of collaboration between Centre members across the three participating institutions in the UK. Members were invited to send their comments on the consultation to the response co-ordinator, Katherine de Gama (Keele University).

The final response was written by Professor Joanne Conaghan (University of Kent) and Katherine de Gama with valuable input from:

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