POLICY BRIEF

Institute for Policy Research

UNIVERSITY OF BATH

Court responses to rape and sexual assault in the UK

About this research

Criminal justice responses to rape and sexual assault in the UK have long been criticised for treating victims with suspicion and subjecting them to aggressive questioning (Stern, 2010). Research has shown that stereotypes about rape, for example, that those who delay reporting an incident to the police are more likely to be lying, have affected court responses (Temkin and Krahé, 2008). Victims have stated feeling as if they were the one on trial, because of the focus placed on evaluating their character and actions rather than the defendant's (Sanders and Jones, 2007). In response to these criticisms, legal professionals now receive training to counter stereotypes, new guidelines highlight the importance of considering victims' vulnerability during trial and 'special measures' have been introduced in an attempt to make giving evidence less traumatic.

Nevertheless, research conducted by Dr Olivia Smith (while at the University of Bath) has found that these measures are not having their intended effect. This brief outlines the research findings and makes recommendations for change.

Research findings in context

The inadequacies of court responses to rape have been widely reported in the media, from Frances Andrade's suicide after giving evidence in February 2013, to recent calls for further reform of the way the Criminal Justice System handles rape cases from the Director for Public Prosecutions. Primarily, the Criminal Justice System has responded to the inadequacies of court responses by enhancing training for prosecution barristers and judges, improving good practice guidelines on questioning and introducing 'special measures'.

'Special measures' have been gradually implemented since 1999 to make it easier for vulnerable or intimidated witnesses to give evidence in court. For example, the measures limit the likelihood of encounters between the rape victim and the defendant by allowing victims to give evidence via a video link from another room or from behind an opaque screen in the courtroom. In addition, the victim's police interview can be recorded and played back on DVD so the witness does not have to give their initial, primary testimony in person at court and judges can empty the public gallery while victims give evidence. Evaluations have shown that these measures have a positive impact on victim's experiences of trial (Hamlyn *et al,* 2004); however, Dr Smith's research highlights ongoing difficulties with their use.

During the period of data collection, January to October 2012, Dr Smith found that video technology used for 'special measures' routinely failed, causing delays in the trial process. This often occurred when those in court watched pre-recorded DVD evidence via a link to a DVD player in another room. The exact cause of the technical difficulties was unclear but it appeared to be rooted in the wireless link technology. Using a separate DVD player might eliminate the possibility of a fault of this kind, but this was not standard practice. Opaque screens used to shield victims from the defendant also proved ineffective: victims still had to walk past a public gallery where the defendant's friends and family could sit and, knowingly or unknowingly, intimidate the victim. In addition, despite the existence of separate waiting areas for each party, shared entrances, corridors and smoking areas resulted in encounters between the victim and the defendant or their family outside the courtroom.

Key findings

- Court responses to rape remain problematic for victims, despite some improvements in the consideration of victims' vulnerability.
- Some 'special measures', such as allowing victims to give evidence by video link, can cause delays and do not guarantee that victims will avoid intimidation.
- Stereotypes about rape and its circumstances, such as the idea that it is suspicious to have delayed reporting an incident to the police, are still exploited throughout trial and are not simply the result of ignorance on the part of barristers.
- Judges and prosecution barristers do not always intervene when cross-examination of the victim becomes irrelevant or distressing due to their own extreme interpretation of 'the right to fair trial'.

Providing enhanced training in dealing with sexual offences for prosecution barristers has been another mechanism through which the Criminal Justice System has responded to criticism. Research has highlighted that stereotypes about rape remain pervasive (Temkin and Krahé, 2008). These stereotypes include the idea that it is suspicious to have delayed reporting an incident to the police, not having physically resisted an attack, and continued contact with the defendant post-attack. There are also stereotypes about 'true' victims being visibly distressed during trial and that the victim's previous sexual history is always relevant to establishing consent in the case in question.

Dr Smith's research found that the enhanced training now provided has not reduced the prevalence of stereotypes in trials, and some evidence of ignorance on the part of legal professionals remains. Furthermore, Dr Smith observed that legal professionals used stereotypes to influence the outcome of a trial even after noting the realities of rape; and many appeared to be aware that the issues they raised were myths.

This appears to be partly due to the traditionally adversarial nature of criminal trials, which focuses on winning at any cost, and partly due to a tendency to measure the credibility of witnesses' evidence according to hypothetical scenarios in which everyone acts 'rationally'. Where there was a disparity between what was assumed by the hypothetical rational scenario and how the witnesses had actually behaved, the witnesses fell under suspicion.

Finally, the Government has repeatedly highlighted guidelines for judges and prosecution barristers about how best to consider the rights and vulnerabilities of victims at trial. These include the reiteration of a judge's responsibility to intervene if a barrister's question is irrelevant to the case, especially if it undermines the victim in the eyes of the jury or causes unnecessary distress. While a handful of judges were willing to intervene, they did so only in relation to the wording, and not the irrelevant or intrusive content, of barristers' questions. This did not indicate that legal professionals were insensitive to the need to consider victims' welfare, but that they held extreme interpretations of a fair trial as being a trial without any detriment to the defendant. In many cases, the victim's distress was viewed as an inevitable consequence of 'doing justice' and victims' rights became almost subordinate to defendants' rights.

Significantly, the European Court of Human Rights has noted that victims' rights need to be upheld at trial (Londono, 2007). Although victims do not have specific rights within the European Convention of Human Rights (ECHR), the intrusive questioning of victims has been recognised as contravening their right to private life (Article 8). Similarly, the European Court has ruled that Article 3 (right to protection against inhuman treatment) can be contravened if the Government does not provide adequate redress for victims, or if questioning at trial becomes so traumatic as to constitute intimidation or torture (Doak, 2008). While the role of the defence barrister is primarily to advance the defendant's interests and protect their right to a fair trial (Article 6), the role of the prosecuting barrister does not prioritise representing the victim's interests. As a result, the consideration of victims' and defendants' rights in England and Wales is asymmetric.

Several European Union (EU) countries are tackling this challenge by providing some form of independent representation for rape victims, often as a safeguard against misleading questions (Raitt, 2010). In the Republic of Ireland, for example, victims can have a lawyer present to ensure that questioning remains strictly relevant to the case when giving evidence about their sexual history. Such legal representation has received positive evaluations (Brienen and Hoegen, 2000) and can help prevent the disillusionment felt by victims upon realising that the prosecution does not represent them directly (Raitt, 2010).

Policy implications

In light of the above, the research has several implications for policy. These include recommendations that can be implemented almost immediately and those that will require more time and consideration. Both shorter-term and longer-term approaches to change are essential to continue improving court responses to rape.

Recommendations relating to 'special measures' and trial practicalities:

- Use a separate DVD player in the courtroom for showing pre-recorded DVD evidence-in-chief and avoid wireless video links where possible.
- Provide alternative entrances and corridors for vulnerable or intimidated witnesses to use when moving around the court building.
- Routinely empty the public gallery when vulnerable or intimidated witnesses enter and exit court.
- Introduce a pager notification system to allow victims to wait away from court buildings.

Recommendations relating to stereotypes and training:

- Develop clear good practice guidelines and practical training regarding stereotypes, rape myths, and 'hypothetical rational scenarios' for prosecution barristers.
- Create centres of good practice by developing specialist sexual violence courts with more informal atmospheres and specialised legal professionals.

Recommendations relating to victim consideration:

- Develop enhanced witness familiarisation courses, in line with the Bar Standards Board's guidelines, to be offered free of charge to vulnerable and intimidated witnesses so they know what to expect during trial.
- Develop and pilot independent legal representation for victims, although the exact form of this representation needs to be debated.
- Encourage the Court of Appeal to create guidance that clarifies how Articles 3 (right to protection from inhuman treatment), 6 (right to fair trial) and 8 (right to privacy) of the European Convention on Human Rights are to be considered in relation to trial practice, especially when they appear to contradict one another.
- Address barriers (primarily financial constraints and a lack of awareness) that prevent victims bringing 'breach of human rights' cases to court.
- Introduce national court observation schemes to enable ongoing evaluation of trial practices in rape and sexual assault cases.

Brief methodology

This research involved the first set of trial observations since the change of sexual offence laws in 2003. The researcher collected data by observing a large English Crown Court and making handwritten transcripts of 18 adult rape or sexual assault trials. This amounted to the vast majority of trials at this court involving adult victims of sexual violence during the 10 month fieldwork period from January to October 2012. The data was analysed for emerging themes, which were then discussed with front line service providers, as well as one of the observed barristers.

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