

## Rape politics, policies and practice

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# **Rape Politics, Policies and Practice: Exploring the tensions and unanticipated consequences of well-intended victim-focused measures**

Dr Anna Carline and Dr Clare Gunby

## **Abstract**

The inability of the criminal justice system to respond effectively to rape has led to numerous law and policy reforms in England and Wales. Nevertheless, difficulties remain, with problems often linked to the impact of rape myths and implementation failure. This article, however, adopts a different lens through which to explore the ongoing challenges faced by rape complainants. Drawing on interviews with 14 barristers in the North West of England, this article asks: how have rape law and policy reforms impacted practice for this group of practitioners? The findings highlight that numerous tensions emerged from these reforms. In particular, measures that were perceived to be politically driven and well-intended were often perceived to generate unanticipated negative consequences for complainants, as opposed to improving their experience. In concluding, we emphasise the importance of a close working practice between the policy maker and practitioner, in order to institute more effective responses.

**Key words:** Rape, Politics, Policies, Victims, Barristers, Criminal Justice Practice, Feminism

## **Introduction**

The inability of the criminal justice system to respond effectively to rape has led to the offence remaining high on the political agenda in England and Wales. Successive governments have implemented a plethora of substantive and procedural reforms, reviews and policy documents, all aiming to improve the criminal justice system's response (see for example CPS & Police, 2002; 2015; Home Office, 2000; 2002; 2006; Stern, 2010). As is well known, concerns exist with regards to the high attrition and low conviction rates for rape, the construction, treatment and revictimisation of complainants and the pervasive nature of rape myths and misconceptions (see for example Kelly et al., 2005; Saunders, 2012a; Stern, 2010; Temkin, 2000). However, despite substantial reform, "little really changes" when it comes to rape (Cook, 2011: 257. See also Brown, 2011).

Previous research has examined the negative consequences of adversarial justice for rape survivors, the impact of rape myths and also highlighted the problem of an ‘implementation gap’: the failure of some policies to filter down into practice (see for example Cook, 2011; Kelly et al., 2005; Lees, 2002; Stern, 2010). However, this article aims to address the following research question: to what extent, and in what ways, have rape law and policy reforms impacted practice, from the perspective of those who work daily with rape cases?<sup>1</sup> Drawing upon semi-structured interviews with 14 barristers, we highlight that, for this group of practitioners, reforms instituted to rectify historical abuses, better support complainants through the trial process and ultimately improve attrition and conviction rates, were often considered to be counterproductive in effect. Rather than aid complainants, well-intended reforms were perceived to sit in tension with the working reality of the court system. Consequently, reforms often produced unanticipated and negative consequences, including leaving complainants ill prepared for the reality of the court experience; thus contextualising why conviction and attrition rates continue to remain static.

Of particular note, barristers identified the politics of rape reform as a pivotal factor in the production of these unanticipated negative consequences. More specifically, government and policy makers were seen to draw upon and promote frequently conflicting political agendas in their responses to rape. On one hand, numerous reforms were victim-centric in focus and, to some extent, reflected feminist concerns relating to protecting and supporting rape complainants. Conversely, other measures reflected a wider law and order agenda which concentrated on crime control and increasing conviction rates. However, in practice, any attempt to accommodate these two agendas produced multiple tensions.

The article begins by providing an account of the related policy and law reforms in England in Wales. Thereafter, we situate the politics of rape reform within the broader notion of ‘the politicisation of rape’. Here, we refer specifically to the means via which rape has

been, and continues to be, constructed as a political issue. While we emphasise the pivotal role that feminist activism has played in this process of politicisation, we also highlight that a tension emerges, due to the potential for state to co-opt feminist inspired rape reforms. Subsequent to outlining the study methodology, the article examines the follow themes that emerged from the analysis of interview data: prosecutorial decision-making, challenging the complainant and the conviction rate.

In conclusion, we argue that policy tensions, co-optation and the potential for unanticipated negative consequences should not be taken to militate against ongoing endeavours to improve the system. Rather, it signals the need for continuous scrutiny as to how frequently conflicting policies operate in practice and the importance of fostering a close working relationship between practitioners and policy makers, in order to institute more effective responses. In England and Wales, no other research, to the authors' knowledge, has explored the unanticipated consequences associated with the impact of reform measures and politicisation, and situated these at the centre of rape complainants' ongoing difficulties.

### **Rape and the Criminal Justice System: Exploring Policies and Politics**

While there has been a dramatic increase in the number of rapes reported to police in England and Wales since the 1940s (Hohl & Stanko, 2015; Temkin & Krahe, 2008: 14-17), the vast majority of victims – around 89 percent – do not come forward (MOJ et al., 2013: 7). Of those cases that are reported, the rate of conviction continues to be around six per cent (MOJ et al., 2013: 7), a substantial decrease from 32 per cent in 1979 (Temkin & Krahe, 2008: 20). Feminist scholars have long highlighted a “culture of scepticism” (Kelly et al., 2005: 83), that not only impacts upon the decision to report, but that also leads to victims feeling disempowered and revictimisation by the criminal justice process (Kelly et al., 2005; Shana, 2008; 2012). This is invariably intensified by time spent in the courtroom (Lees, 2002;

Smith & Skinner, 2012). Within this context, successive governments have implemented significant law and policy reform in an attempt to improve the justice response.

In addition to updating the definition of rape to include non-consensual oral penetration (section 1), the *Sexual Offences Act 2003* introduced a statutory definition of consent (section 74) and reformed the mens rea so as to require the defendant's belief in consent to be reasonable in the circumstances, as opposed to honestly held (section 1(2)). New Labour were hopeful that these reforms would provide "greater clarity in the law as it relates to consent" in order to assist the jury (Home Office, 2002: 9) and potentially increase the number of convictions. In a bid to reduce secondary victimization, the *Youth Justice and Criminal Evidence Act 1999* restricted the admissibility of sexual history evidence (section 41) and excluded the defendant from personally cross-examining the complainant (section 38). Various special measures were also introduced, in order to support vulnerable and intimidated witnesses through the trial processes and enable them to provide their best testimony. These included video recorded evidence in chief (section 27) and allowing a witness to deliver their testimony either behind a screen (section 23) or by means of a live link (section 24),

Successive governments have, however, instigated numerous reviews, due to ongoing concerns regarding the rate of attrition and the experience of rape victims (HMCPSI & HMIC, 2002; 2007; HMIC & HMCPSI, 2012; Stern, 2010). In 2002, a joint thematic review aimed to "identify causes of the increasing attrition rate". In addition to generating 18 recommendations, which aimed to improve practice throughout the criminal justice system, the review stressed that the "treatment afforded to victims throughout the investigation process is key to the prospect of securing a conviction" (HMCPSI & HMIC, 2007: 7). These recommendations were revisited in 2007, in a second review, which highlighted that the high attrition rate was linked, in part, "to the behaviour and approach of professionals" (2007:12).

Problems included: “insensitive questioning during interviews, judgemental or disbelieving attitudes, or failure to maintain contact as the case progresses” (2007: 12). Consequently, the review emphasised, *inter alia*, “the important contribution ... a climate of belief can make to ensuring that victims remain engaged in difficult processes” (2007:12), and further stressed that the victim is to be situated at the “heart” of the criminal justice process and afforded “the highest standard of treatment and care” (HMCPSP & HMIC, 2007: 6). The ensuing 12 recommendations focused on enhancing practice throughout the system and included, for example, improved and consistent training and guidance, a review of the procedures for statement taking, the need for specialist practitioners and continuity in personnel, “full and early consultation between the IO [investigating officer] and rape specialist prosecutor” (2007: 24) and auditing the ‘no criming’ of rape allegations, to ensure compliance with Home Office Counting Rules (HMCPSP & HMIC, 2007).

In 2010, Baroness Stern was appointed to further explore how to improve reporting, attrition and conviction rates and the treatment of victims (Stern, 2012: 7). The report concludes that while the “policies are right”, their implementation was “patchy” (Stern, 2010: 8), hence many of the 21 recommendations focused upon effective implementation (Stern, 2010: 115). In addition, Stern recommended improving the development and deployment of information and statistics, with it being noted that “a wider understanding of the reality of rape” was essential to improving “the treatment of rape victims” (Stern, 2010: 119). Stern was critical of the ‘six per cent’ conviction rate statistic, arguing that focusing on this figure may unduly deter victims from reporting (Stern, 2010: 42). Consequently, it was suggested that the rate should be recalculated on the basis of those cases that proceed to trial and result in a conviction. This resulted in a rate of 58 per cent (Stern 2010, p. 43), which was broadly in line with conviction rates for some other serious offences. However, a 2013 report demonstrated that, amongst sexual offences, female rape had the lowest conviction *ratio* -

this being the “number of convictions as a proportion of the number of proceedings”, at 39.7 per cent (Ministry of Justice et al. 2013: 35). One reason for this is the downgrading of rape cases to the lesser offence of sexual assault. Furthermore, the HMIC’s rape monitoring reports continue to show high levels of no-criming (HMIC 2014, 2015. See also Hohl and Stanko 2015), which has led some to suggest that this change to computing conviction rates is little more than an alternative means of measuring success, as opposed to failure (Cook, 2011).

In addition to these reviews, steps have been taken to prosecute more cases which fall outside a narrow conceptualisation of rape (such as those where there is lack of physical injury and/or where the victim has been drinking). To this end, and following the decision in *R (on the application of B) v DPP* ([2009] EWHC 106 (Admin)), CPS policy now states that prosecutors are to adopt a “merits-based approach” – which eschews a reliance upon stereotypes - when determining whether there is “sufficient evidence to provide a realistic prospect of conviction” (CPS, 2013: 6). Accordingly, a prosecutor should not apply a “bookmaker’s approach” which is defined as a “purely predictive approach based on past experience of similar cases” ([2009] EWHC 106 (Admin): para 49-50). The concern is that such an approach may increase attrition rates, as it works against prosecuting more challenging cases such as “date rape” and/or those in which the complainant had been drinking and delayed reporting, on the basis that past prosecutorial experience may indicate that a jury would be “unwilling to convict” (Saunders, 2012a: para 18). In contrast, under the definition of the “merit-based approach”, a prosecutor is to consider whether “the evidence was sufficient to merit a conviction taking into account what [is known] about the defence case” ([2009] EWHC 106 (Admin): paras 49-50). Accordingly, prosecutors are to “proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes” (Saunders, 2012a: para 18).

### **Feminist Politics, Politicisation and Co-optation**

This overview of the policy context highlights how successive governments have endeavoured to improve the response of the criminal justice system. Nevertheless, as measures struggle to produce the effects they aim to achieve (See Cook, 2011), rape continues to be constructed as a political issue. The feminist movement has, of course, played a significant role in the politicisation of rape, and that rape is a political issue is not a problem *per se*. Feminist activism has deconstructed the public/private divide which has historically permitted the state to avoid its responsibility for the harms caused by violence against women (McGlynn, 2010). To quote the well-known phrase from Hanisch: “the personal is political” (1970: 76). This activism has engendered significant reform in terms of improvements to substantive and procedural law and, in this sense, it has been a success. At the same time, however, “nothing really changes” with regards to conviction and attrition rates (Cook, 2011), indicating a simultaneous failure (Nourse, 2000).

This “failure” may be linked to ambitious feminist endeavours which aim to use the law to destabilise the macro-level structural causes of sexual violence and/or fundamentally transform the legal system (Larcombe, 2011). Concomitantly, reform and policy development procedures tend to involve consensus and compromise (Nourse 2000), which enables the resurrection of “old norms” “in empty spaces, deliberate ambiguities, and new rhetorics” (Nourse 2000: 952). Hence, wider-reaching and more radical measures are often eschewed by the state in order to bring about ‘quick-fix’ policies and reforms. Subsequently, a law and order agenda, with its rhetoric of being tough on crime, zero-tolerance and convicting rapists, tends to dominate the reform process, and the focus remains upon more immediate, individual (offender) level actions. Throughout this process, feminist reform proposals are frequently co-opted by the state in order to garner ongoing support for penal populist



responses (Bumiller, 2008; Gruber, 2009; McGlynn, 2011; Munro, 2013). As such, rape conviction and attrition rates become part of the machinery via which political parties compete with each other over calls to be tough on crime. This, however, does little to improve the rape victim's experience of the criminal justice system.

Unease regarding the co-optation of feminist measures corresponds with wider concerns around calls to place rape victims at the heart of the criminal justice system (HMCPSI & HMIC, 2007). Whilst such approaches fit well within a reconceptualised view of victims as consumers of criminal justice services (Williams, 2002), such moves still tend to support a crime control agenda (Elias, 1993). Indeed, moves towards greater victim recognition and participation have proved contentious, with arguments waging around the theoretical and structural parameters of the adversarial system not being conducive to exercising such rights. Doak et al. (2009), for example, argue that attempts to provide a platform for participation within the adversarial system will result in inevitable difficulties for victims.

These discussions regarding co-optation highlight the difficulties of using the coercive institutions of the state to respond to violence against women, an issue which has long been acknowledged by feminist legal scholars (Smart, 1989). At the same time, it has been emphasised that ongoing engagement with the law is essential, as to do otherwise is to “cede ground to antifeminist institutions and practices” (Munro, 2007: 69). While there are undoubtedly significant pitfalls in turning to the law, it can be argued that feminists have an ethical commitment to continue to engage with the system (Carline & Easteal, 2014). Within this context, feminists have argued that justice for rape victims should not focus too narrowly upon the conviction rate (McGlynn, 2011). Accordingly, Larcombe argues that rape reforms and developments should be informed by three broad feminist aims: 1) “improving the legal story of rape”, which involves recognising the reality of sexual abuse as opposed to

reinforcing stereotypical “ideal” victim stories; 2) ensuring the position of complainant is “habitable” as opposed to “harmful” (2011: 39) which requires that a survivor is not re-victimised due to their participation in the criminal justice system; and 3) improving “institutional attitudes and practices” so that complainants are “treated with respect rather than disbelief” (2011: 34). These aims, she notes, requires the criminal justice system to “look beyond prosecution of offenders to identify qualitative and victim-centred objectives and measures” (2011: 34). At the same time, however, Larcombe notes that such aims are relatively modest in nature. Accordingly, they do not impose objectives which feminists have acknowledged to be ‘unrealistic’, for example, requiring the law “to facilitate social change to prevent rape” or to “(radically) transform itself” (2011: 34).

Consequently, Larcombe’s three feminist aims highlight the importance of developing achievable and effective reforms and policies which impact positively upon the experience of complainants. However, whilst we agree fully with Larcombe’s agenda, particularly the move away from focusing upon the conviction rate, contradictions and conflicts emerge. As the analysis of the barrister data will demonstrate, at times these three broad aims could be seen to sit in tension not only with the working reality of the criminal justice system, but also with themselves. Furthermore, for these barristers at least, such tensions and conflicts were associated with the potential for measures to produce unanticipated negative effects.

### **Exploring the Impact of Politics and Policy: Interviewing Counsel**

Semi-structured interviews were carried out with barristers (n = 14; 10 males and four females) based in the North West of England.<sup>ii</sup> The study methodology has been comprehensively outlined elsewhere (Carline & Gunby, 2011; Gunby et al., 2010), however, key considerations are reiterated again here. Although the study sample was small, the number of years of experience was extensive, ranging from seven to 34 (with a mean of 19.4

years). The majority of participants were highly experienced, five held the more senior position of grade four prosecutors and a further two sat as recorders. Twelve had defended and prosecuted rape, while two (B7 and B14) had only defended, due to their more junior status.

While the small and geographically specific nature of the study prevents any claims of generalisation, it nevertheless provides a close exploration of the working reality for a subset of barristers working in one CPS region. Further, it brings together a broad range of experience that contributes towards a wider discussion regarding the politicisation of rape, the implementation of policy initiatives and the potential negative consequences of reform measures which aim to improve the experience of rape victims. It also provides an important provisional basis upon which further research can build and, importantly, engages with legal practitioners who work on a daily basis with sexual violence cases, and as such they are able to provide unique insider perspectives (Saunders, 2012b). This work, therefore, helps to develop the limited empirical base that has previously engaged with counsel in relation to rape trials (see Carline & Gunby, 2011; Gunby et al., 2010; Kelly et al., 2006; Smith & Skinner, 2012; Temkin, 2000). As we contend throughout, it is important to continually engage with practitioners in order to develop a grounded appreciation of how measures work (or otherwise) in practice.

An interview schedule was devised which asked participants for their opinions on the effectiveness of the 2003 Sexual Offences Act, rates of conviction and attrition, the extent to which (if at all) rape cases differed from other trials and whether further changes to the law of rape were necessary. Advocates were encouraged to speak about their experiences in ways that were meaningful to them, with the interviewer responding collaboratively (Reissman, 1993). Significantly, the politics of rape reform and resulting tensions were raised by barristers as a topic for debate. All data were initially independently coded for themes by the

researchers using NVivo (Bazeley & Jackson, 2013). Codes were subsequently discussed and agreed to ensure consistency. The following three themes emerged, which are subject to analysis below: prosecutorial decision-making, challenging the complainant and the conviction rate.

### **Prosecutorial Decision-Making Processes: From Bookmakers to Merit Based?**

This first theme explores counsel's reflections regarding prosecutorial decision-making processes, particularly in relation to the "realistic prospect of conviction test." Two contradictory perspectives became apparent. While two barristers perceived the CPS to be risk averse, the majority argued that there was insufficient screening, which resulted in the prosecution of what they considered to be weak rape cases. Both practices, however, were perceived to be a consequence of the politics of rape reform and the impact of policies and practices aimed at improving the rates of attrition and conviction.

The existence of a risk-averse approach to prosecution was identified by Barrister nine (hereafter B9) and B4 in their suggestion that the CPS tended to "err on the side of caution" (B9). B9 stated that the CPS were "reviewing very, very thoroughly" and were not "afraid to...knock them back, etc., to not prosecute." This was linked to the influence of political imperatives: "It [rape] is very political ... they're gonna back away from things and not prosecute" (B9). For B4, this more cautious approach was felt to be a cultural shift away from a previous pro-prosecutorial stance, when the CPS "were prosecuting anything because they had to", because rape was thought to be a "hot topic." In contrast, B4 suggested that a case would now not proceed to trial unless there was "a 75 per cent chance of conviction", which is a more rigorous test than is required. This stricter approach was perceived to be closely linked to disquiet regarding the highly politicised conviction rate and policies

designed to increase it, suggesting that prosecutorial attitudes are prone to shift depending upon the political climate:

[The CPS are] so concerned about conviction rates and they've got so many reports to fill in when people are acquitted or whatever that they've raised the bar quite significantly. So my impression is ...speaking to CPS prosecutors and police officers, is that there's probably less cases now getting through, but actually they're trying to pick winners (B4).

In contrast, the remaining barristers argued that within both the police and the CPS, there was a “culture of running with every case” (B1). Although this was considered to be a response to, and an improvement upon, the previous “culture of scepticism” (Kelly et al. 2005: 83), it was nevertheless contemplated that the “pendulum” had swung too far. In particular, it was felt that this had resulted in a lack of screening and weak cases being pushed to trial. B10, for example, stated: “I get the impression that the CPS... that if it's rape, it's rubber-stamped... And sometimes you look at it and think, you know, well what's going on here?” Significantly, this perceived lack of screening and the pro-prosecution attitude was thought to be unique to the crime of rape:

The ... fundamental problem I have is that there is insufficient screening and courage in [screening] out patently weak cases, which is done with manslaughter and murder regularly... this is the only area of crime where there is insufficient screening, in my view (B1).

It was also implied that the CPS were focusing primarily – and unduly – upon the public interest test and paying insufficient regard to the prospect of conviction. This was perceived to be due to policies that emphasised the importance of recognising the harm of all rape, regardless of the relationship between the defendant and complainant, the presence or otherwise of injury and where the rape was committed; policies which potentially change “legal story of rape” (Larcombe, 2011). In practice, however, such policies were found to clash with those that were concerned with increasing conviction rates; while all rapes are undoubtedly damaging, they are not necessarily evidentially comparable. As such, according to the current participants, while there may have been a political will to prosecute every rape,

this often led to acquittal in cases where there were a greater number of evidential discrepancies:

I think we try a lot of cases... that perhaps, hand on heart, you think this isn't gonna get home with the jury... So in an assault case, we may say well hang on a minute, that doesn't quite add up, or you know, this detracts from that account that she's given, or he's given. Hmm, are a jury going to convict? Hmm, don't think so. Therefore, we won't proceed. When it's a rape case, there's a tendency to say, well, it's rape and therefore it's in the public interest, and therefore we'll... try it (B2).

Some counsel doubted the advantages of a more pro-prosecution approach. It was argued that it would sometimes be “braver” if the test was made “a little harsher” (B10), with it being suggested that the realistic prospective of conviction test should be applied “in a cold-hearted [way] ... like, say do we really think this has a 51% chance of a conviction here? And if not, well we should bin it” (B10). Taking the decision not to prosecute, was, in a number of instances, held to be the most just course of action, especially given the potential negative effect upon a complainant and the possibility of revictimisation:

I'm not sure sometimes, with some complainants... whether it's necessarily in their best interest if you think that the case isn't a runner, to just go through the process. I wonder sometimes if the whole trial process is actually much more damaging than something that might have happened (B2).

These insights demonstrate that, for the current set of participants, a significant tension emerged from the impact of policies aimed at improving the system's response. Further, these views support research that has identified the existence of an inverse relationship between the rates of prosecution and conviction (Angiolini, 2015: 114; Larcombe, 2011). The desire to improve the conviction rate - which resonates with the two barristers who identified a “risk averse” approach - tends to increase attrition elsewhere in the system, as only those cases that are most likely to result in a conviction are prosecuted. However, the legal story of rape remains unchallenged. At the same time, steps taken to decrease the pre-trial rate of attrition – and potentially challenge the legal story of rape – were considered to have negative ramifications for victims, due to the potential for acquittal. In

such circumstances, the aim of making the position of complainant more habitable (Larcombe, 2011: 39), is compromised.

Drawing upon research which explores prosecutorial decision-making processes, it needs to be noted, however, that barristers' assessments of the strength and weakness of cases may be influenced by stereotypes and misconceptions. As Frohmann notes, prosecutors' assessments of convictability involve "down-streaming". Namely, "an anticipation and consideration of how others (i.e. jury and defense) will interpret and respond to a case" (1997: 535). Further, as Spohn et al. demonstrate in their analysis of rape cases in the US, in order to aid their assessment of cases, prosecutors tended to develop a "perceptual shorthand", which "incorporates stereotypes of real crimes and credible victims" (2001: 208). Hence, it can be hypothesised that barristers' assessments of what amounts to a weak case may be premised upon stereotypes and misconceptions, and thus could be subject to challenge.

The differing perspectives of the study barristers also need to be contextualised within the more recent promotion of the "merits-based approach". As noted above, this approach is explicitly aimed at reducing the impact of stereotypes. Consequently, any shift from "bookmaker's" to "merits-based" assessment by the CPS may explain the differing views advanced by the barristers. The minority view that the CPS tends to "err on the side of caution" may indicate the application of the former test, as only those cases which were very likely to result in a conviction are prosecuted. Alternatively, as the merit-based approach is increasingly implemented, this may result in the prosecution of a higher number of cases that counsel *perceive* to be weak, as processes of "down-streaming" and "perceptual shorthand" inform their assessments.

Despite these barristers' concerns, there are positives in moving away from the "bookmaker's approach". A risk-averse approach to prosecution creates a negative feedback

loop, as very few cases which challenge the prototypical rape script enter into the public domain. As Munro and Kelly note, this works to reinforce “a public (and thus a potential juror(s)) conception of rape that too often retains its narrow contours” which, in turn, produces “a reluctance to convict in non-conforming cases” (2009: 295). Thus, bringing non-stereotypical cases into the public domain is essential in order to educate the public as to the realities of rape. This is, of course, a fundamental aspect of the feminist politicisation of rape: stereotypical scripts of rape and female sexuality must be challenged through the courts. However, particularly in the short term, this move is not only likely to negatively affect conviction rates, but also adversely impact upon those complainants whose cases are more challenging, and which may in turn increase revictimisation (see also Shana, 2008; 2012). Herein we see a potential conflict and contradiction in Larcombe’s three feminist aims (2011). Improving the legal story of rape will not occur over night and any attempts to do so may, in the interim, leave the position of complainant inhabitable. While this is perhaps not a completely unanticipated consequence of a well-intentioned policy, in the context of this study, it highlights the significant challenges and tensions which need to be managed in the development and implementation of responses which aim to improve the victim experience.

### **Becoming Victim: Case Investigations and Challenging Complainants**

During participants’ discussions regarding prosecutorial decision-making processes, a further theme emerged regarding the use of the term “victim.” Many participants critiqued the practice of labelling a rape complainant a “victim” at the outset of the case. For example, B7 stated “the victims, you notice that phrase is used isn’t it? That it’s always a victim.” However, the use of this label by criminal justice officials was thought to be problematic as it would give “the individual the perception that they are [a victim]” (B7). While counsels’ critique of the use of the word victim contrasts with government policy which highlights the



importance of believing complainants (HMCPSI & HMIC; 2002; 2007), it was argued that labelling a complainant a victim made “an assumption that shouldn’t be made in the investigating stage” (B7). Barristers also suggested that it may encourage an unrealistic expectation that the system worked entirely for the complainant’s benefit, and concern was expressed that victims may hold misconceptions regarding the role of, and the relationship they would have with, the prosecuting barrister (B12). Consequently, participants felt that complainants may feel let down when the reality of court was somewhat different.

These concerns voiced by barristers resonate with Hall’s (2010) argument that discourses that place the victim at the heart of the criminal justice system are difficult to accommodate in practice, and often sit in tension with the realities of the adversarial approach. Such victim-centric practices will result in difficulties for complainants (Doak et al., 2009), as unrealistic expectations tend to feed into a lack of confidence and a culture of despondency, when those expectations are not met (see also Auld, 2001 and House of Commons Justice Committee, 2009). At the same time, counsel paradoxically used the term “victim” during the interviews, suggesting that the victim-centric discourse has taken hold within the criminal justice system and has to be negotiated by practitioners themselves.

Furthermore, barristers’ unease regarding the use of the term “victim” was frequently connected to the perception that rape cases were inadequately investigated, which included a failure to sufficiently challenge the complainant. Indeed, the majority of advocates expressed disquiet regarding the extent to which a complainant’s account tended to be accepted “hook, line and sinker” (B10) during the investigative stage and not challenged until the trial.

Similarly, B7 stated:

But the way the system works is that the police have a complaint, they don’t investigate the complaint, in my view, it is not investigated. They then interview the defendant on the basis of the complaint, and a line is drawn and that defendant goes off to court. [The police]... don’t see it as part of their task to enquire into the complainant.

Consequently, it was lamented that it was “only when defence counsel challenge in the courtroom that the victim realises that things aren’t going to be as plain sailing as hitherto they’d been” (B10), which increases the possibility of revictimisation.

The historic failure of the police and the CPS to proactively build rape cases is well documented (HMCPSI & HMIC, 2002; 2007; HMIC & HMCPSI, 2012). Two advocates (B3 and B13) speculated that this may relate to a lack of financial resources: “CPS at the moment are not investigating cases. When they prepare a case they will go so far and that’s it. They will not investigate them properly... because of money” (B13). However, the failure to challenge the complainant was also linked to the politics of rape reform and the impact of policies which aimed to improve the treatment of rape victims and the rate of attrition. While historically the police had “been crass” in their approach (B7; see also Jordan, 2001), they were now cautious about probing the complainant’s statement in case they were perceived to be questioning their credibility:

But the publicity that they have faced is such that they’re very wary... about actually investigating the complaint because anything like that is immediately interpreted as questioning the victim’s credibility (B7).

Concomitantly, it was suggested that a more pro-victim approach had developed due to the culture of attempting to make proceedings as comfortable for the victim as possible “in order to get them to court” (B7). This approach was constructed by B10 as being “politically correct.” He argued that “we live in politically correct times and, rightly or wrongly, we are for the victim.” Nevertheless, as with the alleged lack of screening, counsel doubted the productivity of such practices. This was especially so in cases of rape, where a complainant’s lack of awareness of the trial process and the extent to which their testimony would be challenged was perceived to have the potential to result in unique forms of revictimisation. Indeed, it was argued that until a victim encounters somebody questioning their account it was difficult to anticipate the realities of the court experience. This was deemed to be akin to

being “thrown to the lions” (B13) and thought to hinder “as much as it helps” (B10).

Accordingly, it was felt that a complainant’s account should be challenged prior to giving testimony, as a means of better “preparing” the victim:

I think the first real challenge is when they... are being cross-examined. No one’s actually said ... ‘you’re lying here’... and you see it that they are taken aback sometimes. And then you’ve got that reaction for the first time, rather than the police officer quizzing them... they probably should challenge more (B9).

Although not suggesting a return to aggressive police questioning, B10 queried “who was served” by the current approach, particularly as the lack of screening was frequently linked to cases resulting in an acquittal:

The public aren’t served because we allowed an expensive trial. The victim isn’t served because she’s been through a traumatic experience to nil result. And a potentially innocent defendant hasn’t been served, because he’s been through the most traumatic and potentially life-changing of episodes.

In this context B10 promoted the adoption of a second police interview and drew upon developing practices with child victims:

You get the child who’s interviewed and he or she says X, Y and Z happened... then they arrest the defendant. Then he gives an account and he says A, B and C occurred. And sometimes, you get a second video interview, where they specifically deal with those issues and ask the [child to comment] upon [them]. And I have encountered, very, very rarely, but I have encountered where, once that’s been done, then a decision is made well, you know, we’re not gonna get home on this and we’re not gonna succeed in a prosecution.

B10 suggested that in this second interview detectives should, albeit not aggressively or accusatory, put any issues which had arisen when questioning the defendant, back to the complainant. Thereafter one would “make some sort of judgment as to say, well have we got 51% chance of a conviction here?” Thus, the proposal suggests further pre-charge interviews in order to screen out cases that are perceived to be weak. This approach, nevertheless, may focus unduly upon the negative aspects of cases. This has long been a critique of the system (HMCPSI & HMIC, 2002; 2007), in contrast to instituting more pro-active and creative case

building. Consequently, it may only work to increase the attrition rate and also do little to prepare the complainant for the courtroom experience.

Herein, we again can see the existence of tensions and unintended negative consequences of well-intended measures. For the current set of barristers, policies which aimed to decrease the attrition rate were considered to sit in tension with other strategies. More specifically, measures which aimed to ensure that the complainant is believed and treated with respect tended to render her/him unprepared for the realities of the courtroom experience, in particular, the challenging of their account during cross-examination. This was thought to impact negatively upon a complainant, especially if an acquittal ensued, and may lead to further revictimisation:

The feeling of let down for the rape complainant is terrific. Because the poor individual, male or female, had been pushed to the top of the hill, not told whether the case had got deep problems or is unlikely to succeed, and then when it fails, they think it's their fault (B1).

### **The Conviction Rate: “Great Electioneering” or a Jury Phenomenon?**

Respondents' discussions regarding the politics of rape reform and the impact of policies in relation to both CPS decision-making and challenging a complainant were intrinsically interwoven with their reflections regarding the conviction rate. As would be expected from past research (Kelly et al., 2005; Temkin & Krahe., 2008), there was general agreement that “stranger” or “predatory” rape cases usually resulted in a conviction, due to the lack of “relationship” between parties and the enhanced potential for forensic evidence. However, with regards to what was commonly referred to as “consent” rape (cases involving acquaintances or partners in which consent was disputed), opinion was divided.

Three barristers explicitly rejected concerns regarding the conviction rate being unduly and uniquely low in rape cases. According to B11, suggesting that the conviction rate was too low “presupposes there should be some natural rate of conviction.” B11 also resisted

the notion that juries were apt to make wrong decisions in rape cases, commenting that “they generally get it right” and questioning: “are we really saying that juries are very sensible for offences of ... assault, murder, other violence, fraud, but when it comes to sex, we don’t have sensible jurors?” In line with the Stern Review (2010), B12 argued that the “six per cent statistic” was “inaccurate and manipulated”, with it being noted that the conviction rate for those cases that were tried was “actually quite high.”

Significantly, barristers suggested that governmental concerns regarding the conviction rate contribute to the ongoing politicisation of rape. Furthermore, their views also highlight the potential for the co-optation of feminist inspired reforms. B11, for example, opined that the government, and in particular certain politicians, were “obsessed” and seemed to believe that “there’s almost like 10 steps to conviction in a rape [case].” However, B12 questioned why a jury should “as a matter of public policy” be finding rape defendants guilty. B12 further suggested that attempts to increase the conviction rate were “great electioneering,” noting that: “if you go out to people and say do you think more rapists should be in prison, who’s gonna say no?” In a similar vein, B7 lamented: “I would fear that any pressure to get more convictions isn’t necessarily a pressure to get more justice.” Hence, for these particular barristers, the government’s focus on the low conviction rate was part of an agenda to promote a law and order discourse, and consequently a means through which political parties could be seen to be getting tough on crime. This, however, sits in tension with the development and implementation of victim-centric policies. As Larcombe notes, a concern to increase convictions tends to centre upon prosecuting the offender, as opposed to meaningfully improving the treatment of complainants (2011: 34). Consequently, the needs of the victim, while drawn upon in order to support the need to increase the conviction rate, become secondary to the state’s promotion of zero tolerance and herein lies the potential for co-optation.

In contrast, five barristers expressed concern that the conviction rate for rape was uniquely low. For example, B1 stated: “the conviction rate is low; there’s no doubt about that, for rape, generally.” In contrast to the Stern Review (2010), these advocates speculated that the jury was at least partially responsible for the low rate of convictions. B6, for example, stated: “I think there is amongst juries a general reluctance to convict of rape.” A jury’s failure to convict was implied to relate to issues beyond lack of evidence and the difficulty of meeting the burden of proof. Indeed, even when a defence was considered to be evidentially “hopeless”, an acquittal was still deemed possible:

I’ve done a couple of hopeless defence cases, where it’s been almost embarrassing. And you do your best, you do your job, I’m paid to defend somebody. And then you think, when they come back and say not guilty, how? How on earth could 12 sensible people possibly come to that decision? ... And it’s bewildering sometimes how they come to make their decisions (B3).

This advocate continued to stress that “some of the results ... have been worrying, to say the least” and that they had been involved in cases “which were just bordering on the perverse in terms of decisions.”

This divergence in opinion amongst counsel could be linked to various factors, including, their individual life and work experiences, the cases they have represented, whether they tend to prosecute or defend, their personal interpretations of justice and their views regarding how best to determine the conviction rate. While we agree with Larcombe (2011) that feminist inspired reform proposals should not focus solely upon increasing the conviction rate, it is significant that some respondents had experienced cases in which an acquittal was considered “perverse.” Insights from this particular group of barristers support the significant evidence base that indicates that jurors in rape cases are influenced by extra-legal factors (Carline & Easteal, 2014; Ellison & Munro 2009, 2010a, 2010b; Finch & Munro, 2007; Kelly et al., 2005). It is, nevertheless, also important to acknowledge the earlier discussions regarding the impact of the failure to challenge a victim on their account, which

renders her/him unprepared for cross-examination and which may impact negatively upon the quality of their evidence. Hence, from the current data, it could be surmised that victim-centric policies, which forgo challenging complainants on their accounts, intertwine with extra-legal factors (for example, rape myths), to ultimately increase the likelihood of an acquittal, even in cases which were viewed to be evidentially strong. Additional research is, however, required in order to explore this proposition in recognition of the small and geographically specific sample.

### **Conclusion**

Previous research has examined the issues around the ‘implementation gap’, the influence of rape myths and the difficulties which flow from the adversarial system, particularly the problem of secondary victimisation (Lees, 2002; Stern 2010). However, this article explores the ways in which rape policies can be seen to impact upon practice. While it is not possible to generalise, due to the small and geographically specific nature of the study, the findings indicate that, for the current group of barristers, well-meaning, but politically driven policies and practices often produced unanticipated and negative effects. More specifically, measures which focused upon supporting the complainant, placing them at the heart of the system and helping them through the process, often sit in tension with other objectives, such as improving the conviction rate. Concerns were also expressed that victim-centric measures may engender unrealistic expectations and render complainants unprepared for the realities of the courtroom experience, which may ultimately increase revictimisation.

The insights of these barristers suggest that the ongoing politicisation of rape, and the associated politics of rape law reform, play a crucial part in the production of these policy tensions and unanticipated negative consequences. Moreover, the potential for state co-optation of feminist inspired measures could be seen, where the concern is to win the

electoral race of being tough on crime is prioritised over improving the experience of the rape victim.

The difficulties of instituting an effective response to the crime of rape cannot be overstated. However, while limited in scope, these findings suggest that more could be done to manage the unanticipated consequences that arise from the adoption of conflicting strategies. In England and Wales there is a continuous production of policies aimed at improving the system's response to rape (see recently: CPS & Police, 2015). However, policies are often developed without *effective* engagement with practitioners who work with rape cases on a daily basis. Consequently, there tends to be insufficient consideration with regards to how various measures, which pull in different directions, operate in the trial context. To this end, there needs to be better feedback loops between policy makers and practitioners in order to find ways to manage the tensions and ameliorate any negative consequences.

Moreover, the data points to the problems of victims feeling unprepared for the realities of the courtroom. While space does not enable a detailed analysis, two primary suggestions for responding to this concern are raised for consideration. Firstly, Ellison has put forward the use of witness preparation services, which are widely available for 'professional' witnesses, such as police officers and which involves "comprehensive pre-trial preparation" (Ellison, 2007). Such preparation may not only be beneficial in terms of improving the veracity of the evidence, but also in reducing the likelihood of secondary victimisation (Ellison, 2007: 179). Secondly, the CPS has recently published guidance regarding speaking to witnesses at court (CPS, 2016). This includes informing the witnesses as to the "general nature of the defence case where it is known", as well as explaining that the role of the defence advocate is to "put their client's case and challenge the prosecution's version of events" which may involve "suggesting the witness is mistaken or lying" (CPS,



2016). It is recognised that these approaches are not without criticism (see CPS, 2015), and both policy makers and practitioners would need to ensure that such measures operate effectively. Nevertheless, they may provide a mechanism through which to manage expectations and improve the victim's experience of the courtroom, and which future research should focus on.

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<sup>i</sup> This is not to state that rape myths and the implementation gap are not important factors. Moreover, we recognise that rape myths are embedded within and reproduced by reform measures and have been found to impact upon rates of attrition and conviction, see for example: Carline & Easteal, 2014; Ellison & Munro 2009, 2010a, 2010b; Finch & Munro, 2007; Kelly et al., 2005; Temkin & Krahe, 2008. Nevertheless, such issues are not the focus of this article.

<sup>ii</sup> Due to the small sample size, the discussion will not draw any distinction based on gender, as the results would be of little – if any - value. To this end, the word 'they' will be adopted when referring to participants.