

# Securing redress for sex crime victims

Victims of sexual offences are still being let down by the justice system despite attempts at improving effectiveness, writes **Nogah Ofer**



New laws on stalking and a recent report by HM Inspectorate of Constabulary and the Crown Prosecution Service (CPS) have highlighted the need for improvement in the investigation of rape cases, but concerns endure that victims of sexual violence, most of them women, are still failing to secure justice through the criminal justice system.

A widely quoted statistic is that six per cent of reported rapes result in a conviction. However, conviction rates for cases brought to court are in fact 58 per cent, higher than for some other serious offences. The six per cent figure represents the attrition rate and demonstrates that the overwhelming majority of rapes reported to the police do not reach the courts. Only a small proportion of reported cases are stranger rapes, and therefore in the majority of cases identification of the perpetrator is not an obstacle. Accordingly, a substantial proportion of reported rapes are brought to a conclusion by the decisions of the police and CPS.

Since a government initiative in 2002, there has been a concerted effort to improve both conviction rates and the experiences of rape victims within the criminal justice system which has seen the introduction of specialist police Sapphire Units, specially trained officers for rape complaints, victims' advisers, Sexual Assault Referral Centres, specialist rape prosecutors and a plethora of policies.

The Stern review, published in March 2010, is the latest independent review into how rape complaints are handled by public authorities. It found that while there is much good practice, the application of improved approaches is patchy with some victims still encountering old-fashioned attitudes and a service that falls short of the stated norms.

This is a relatively new and developing area of law with significant untapped potential to assist victims.

## Failure to investigate

There are several legal tools available for challenging failures in the criminal justice system on behalf of victims of sexual offences:

- articles 3 and 8 of the European Convention on Human Rights (ECHR);
- the Equality Act 2010;
- national policies; and
- judicial review challenges to prosecution decisions.

A duty arises under the ECHR to conduct an effective investigation into credible

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allegations of ill-treatment perpetrated by members of the public which amount to inhuman and degrading treatment contrary to article 3. This applies to any report to the police of a serious sexual offence.

A number of cases have been decided by the European Court of Human Rights in which breaches of article 3, and sometimes article 8, have arisen from the police and prosecutors failing to conduct proper investigations or prosecutions. *MC v Bulgaria* (2004) concerned a rape and *Opuz v Turkey* (2009) was a case of domestic violence. Examples of the European court applying this principle to assaults not involving

sexual violence are *Vasilyev v Russia* (2010) and *Begarovic v Croatia* (2009).

The only UK authority on the police's duty to investigate allegations of crime perpetrated by members of the public is *OOO and others v Commissioner of Police* [2011] EWHC 1246, in which damages were awarded for a failure by the police to open investigations into allegations of human trafficking.

Therefore, following an allegation of rape, a breach of article 3 may arise if as a result of police failures the opportunity to obtain forensic or other vital evidence has been lost, the accused can no longer be identified or apprehended, or the opportunity to secure a conviction is lost following a botched prosecution.

## Sex discrimination

Discrimination provisions cannot be used to challenge decisions not to prosecute, however this probably does not extend to police investigations.

A police decision reached on the grounds of false beliefs about female rape victims may amount to direct discrimination. For example, a report of rape dismissed on the basis that the victim had behaved sexually towards the perpetrator, had agreed to accompany him to the scene of the incident or had been drinking too heavily, may be challengeable on this basis.

Another response that may amount to

direct discrimination would be a conclusion reached due to the presentation of a victim based upon preconceptions about how female rape victims are supposed to behave. An example would be dismissing a report of a rape which has taken place a matter of hours previously because the victim is composed and does not appear distressed.

Indirect discrimination is defined in the Equality Act 2010 as occurring where a provision, criterion or practice puts a person with a protected characteristic at a disadvantage. The overwhelming majority of victims of sexual offences are female; therefore, a practice of disbelieving rape victims could amount to indirect discrimination if such an attitude is not adopted with victims of non-sexual offences.

It is generally acknowledged that disbelief towards those who report rape and the view that many allegations of rape are false are widespread within society and reflected in the attitudes of some police officers. The Stern review recognises this and, for example, the Rape and Attempted Rape Policy of Essex Police warns officers that "it is vital that victims are believed in the early stages, particularly as one of the major criticisms of the police is 'they didn't believe me'".

### Vulnerable victims

The Stern review found that a pervading theme throughout the evidence presented to its researchers was the vulnerability of many of those reporting rape. Many victims had mental health conditions or learning disabilities which made them vulnerable to having advantage taken of them.

Victims with mental health conditions are more likely to encounter reluctance to accept their accounts or even plain disbelief on the basis that the complainant is reporting delusions. Such an approach may constitute disability discrimination which is defined in section 15(1) of the Equality Act 2010 as occurring when A treats B unfavourably because of something arising in consequence of B's disability.

A broad range of national policies are of potential relevance to the investigation and prosecution of rape and sexual assault. Some key national policies (see box) and police forces will have local policies in addition.

Policies provide a helpful context and yardstick by which to assess treatment received by a victim. Many have a victim-centred approach which is not always reflected in victims' experiences.

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## Key national policies

A number of national policies provide a framework for the investigation and prosecution of rape and sexual assault. The main ones are:

- CPS Policy for Prosecuting Cases of Rape (2009)
- CPS Rape Manual (2010)
- Protocol between the police and CPS in investigation and prosecution of rape (annex F of CPS Rape Manual)
- CPS Prosecutors Pledge
- Guidance on Investigating and Prosecuting Rape, produced by the National Policing Improvement Agency on behalf of ACPO (2010)
- Code of Practice for Victims of Crime (2006)
- Witness Charter – standards of care for witnesses in the criminal justice system
- Ministry of Justice guidance: Achieving Best Evidence in Criminal Proceedings – guidance on interviewing victims and witnesses and on using special measures (March 2011)

### Challenging decisions not to prosecute

An inadequate investigation or prosecution of an allegation of rape or sexual assault cannot be the subject of a negligence claim due to the core immunity enjoyed by the police and CPS. However, a range of other causes of action may be available as discussed above.

The level of damages a victim of crime can expect to receive for failures in the criminal justice process is unclear. In *R (B) v DPP* [2009] EWHC 106 (Admin), the court awarded £8,000 for a breach of article 3 to compensate the claimant "for being deprived of the opportunity of the proceedings running their proper course and the damage to his self-respect from being made to feel that he was beyond the effective protection of the law". When failures in the investigation or prosecution have caused or exacerbated psychiatric damage, awards may be higher.

Decisions on the bringing of criminal charges should be taken in accordance with the CPS Policy for Prosecuting Cases of Rape (March 2009). This policy goes some way to counter myths about rape. It spells out that there is no requirement for the victim to have physically resisted in order to prove a lack of consent. It recognises that complaints of rape are not always made immediately and that the effects of rape may render a victim emotionally incapable of providing a written statement shortly after an attack, or even for days or weeks. In relation to the need for corroboration the policy is ambiguous, while not excluding the possibility of a prosecution in such circumstances it states that "there is the possibility that some cases may fail to meet the evidential stage of the Code for Crown Prosecutors".

Applying traditional public law principles, a decision not to prosecute may be challengeable on the basis that it contravenes a lawful policy (e.g. the Code for Crown Prosecutors or CPS Policy for Prosecuting Cases of Rape) or on the grounds of irrationality. As noted above, decisions not to prosecute cannot be challenged on grounds of discrimination.

Irrationality challenges will face a high hurdle given the broad discretion afforded by the courts to prosecutors, particularly specialist rape prosecutors, in their assessment of the view a jury is likely to take of the evidence. However, in *R v DPP ex parte Manning* (17 May 2000), while pointing out the court's deference to the prosecutor's expertise, the Lord Chief Justice also noted that "at the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied".

The advent of the Human Rights Act and anti-discrimination legislation have opened up a range of avenues for bringing challenges on behalf of victims of serious sexual assault. A number of progressive policies exist within the criminal justice system in relation to victims' rights. Legal challenges can be a valuable tool to bridge the gap between such policies and some victims' experiences on the ground.



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