

# Convicting Rapists and Protecting Victims – Justice for Victims of Rape

Response by

Barnardo's

The Children's Charity

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## Introduction

Barnardo's are contributing to this Consultation from the knowledge and understanding we have gained from helping children and young people who are most vulnerable to sexual exploitation and , separately , young people who display harmful sexual behaviour.

We welcome the Government's continuing initiatives to address sexualised violence and , in this particular consultation , to improve the outcome of rape cases through further strengthening the existing legal framework and improving care for victims and witnesses.

Our Response is structured according to the chapter headings in the Consultation.

The Response will include reference to our most recent research which links directly with the help we offer young people. I also refer to an internal consultation by our research team on the Impact of the Sexual Offences Act 2003. The consultation was carried out with appropriate service managers within Barnardo's in October 2005 and sent to the Home Office in October 2005.

As expected there are many references in the Consultation Paper to the new Sexual Offences Act 2003. It seems relevant to include some of the findings of Barnardo's internal consultation as part of this introductory paragraph and to place our response in a context of concern for safeguarding young people up to 18 year of age and, on occasions, beyond when we are meeting the needs of the most vulnerable young people:

*"Given the nature of the voluntary sector, our services are not in a position to greatly influence prosecutions; rather they work with victims of sexual crime and therefore witness the effects of such legislation upon young victims..."*

*The Sexual Offences Act is generally felt to be a positive move. It has strengthened the law, clarified it and has the potential to achieve much more than previous legislation. However it is not yet seen as achieving its aim in reducing the amount of sexual crime against young people.*

*Whilst most practitioners feel the age distinction for under 13s is a positive move this distinction itself leads to further difficulties e.g. police less likely to conduct a less rigorous investigation in cases of victims who are just over 13 than those under 13.*

*There is a real need to have some test cases publicised where the Sexual Offences Act 2003 has been used successfully."*

(Survey of the Implementation of the Sexual Offences Act 2003 – Response by Barnardo's)

## **1. Capacity in Rape cases (questions 1 & 2)**

**We consider that the law on capacity needs to be changed to take account of the particular needs of children, young people and young adults.**

**We recommend that there be a statutory definition of Capacity to serve the interests of justice for the most vulnerable young adults.**

Capacity to consent is not defined in the Sexual Offences Act 2003.

From our experience and research we are aware that there are particular issues about capacity to consent in relation to vulnerable young men and young women who become victims of serious sexual offences.

First of all there is the issue of how the police and the judiciary perceive young people who are victims of sexual exploitation and serious sexual assault including rape. In areas where protocols do not exist to protect young people from sexual exploitation then training to raise awareness of their vulnerability and how they are groomed into silence will be limited and police and the judiciary inadequately informed of their plight. Even where protocols exist as required by the statutory guidance **Working Together to Safeguard Children**, then attendance for the judiciary and police is not compulsory.

Secondly our most recent research in 10 of our specialist multi-agency services across the country **Reducing the risk : Barnardo's support for sexually exploited young people – a two year evaluation** found that half of a particular sample of 42 young people using our services had disengaged from education in their early teens. In addition, of the total number of 532 young people at initial assessment, 55% were either permanently or temporarily excluded from school, not attending school/college, or not in employment; 14% had regular but poor attendance at school/college .Almost all the young people over the age of 18 were in neither work nor education.

This paints a concerning context as we explore capacity to consent when an identified and significant number of young people in our country have disengaged from education. Consequently many of them will be socially and cognitively immature. We would therefore applaud measures to ensure that the implementation of the Sexual Offences Act offers measures to ensure adequate protection for young people at times in their lives when they are particularly vulnerable and where the context of the lives of some young people renders them particularly vulnerable.

A manager of one of our specialist services for young women who are sexually exploited recommends;

*The Law on capacity needs to include consideration of relative capacity – is the capacity of the victim to make safe choices less than that of the assailant's capacity to know what they are doing? Capacity should be measured with regard to cognitive ability.*

Thirdly there has been particular emphasis on capacity to consent and intoxication. The Consultation rightly recognises that consent is not simply about demonstrating that the complainant said 'yes' or 'no' but about the complainant having the capacity to make that decision in relation to the available choices\_at that time and in that setting . Barnardo's has ample evidence that alcohol and other noxious substances are given to young people as preparation to them being consequently sexually exploited. This may be with the consent of the young person or with stealth and without their consent .Alcohol and noxious substances are also consequently used by young people to deaden and numb their consciousness of their experience of sexual exploitation .Under these circumstances consent becomes meaningless. Any assessment of consent would need to be made within a context of sexual exploitation.

Fourthly there needs to be a fresh and informed understanding of what 'capacity' means in relation to the most vulnerable young people and young adults .In the present **Consultation Guideline – Sexual Offences Act 2003** the only reference to 'capacity' seems to relate to “ the victim with mental disorder impeding choice”. The definition needs to go far wider in order to include the needs and the capacity of the most vulnerable young people and adults so that they are properly safeguarded and their interests given rightful attention in the context of judicial proceedings.

Finally there needs to be adequate attention paid to the capacity and needs of young people over the age of 16 years. Barnardo's research highlights that there is a tension between the statutory guidance to protect young people up to the age of 18 years who are being sexually exploited and separate guidance for police officers which seems to link to the age of consent at 16 years. As a consequence many incidents of serious sexual assaults and rapes are not taken seriously. Indeed in the Consultation on Sentencing Guidelines mentioned above it is seen as a mitigating factor to sentencing that a victim aged over 16 engaged in consensual activity with the offender immediately before the offence. The context of the relationship must be part of the evidential context. If the relationship is exploitative then consent cannot be freely given by any young adult whatever their age.

## **2. Adducing General Expert Evidence in Rape Cases (questions 3, 4 and 5)**

**We welcome the introduction of general expert evidence in principle.**

**We agree with the proposal that that the expert would give evidence that is limited to alerting the court to certain information that they may not have been previously aware.**

**We make particular recommendations for young adults who are up to and including 18 years of age.**

It is our experience that the public and, indeed, members of the judiciary are not familiar with the experiences of young women and young men who are sexually exploited. Our recent research confirms that young people find it almost impossible to approach statutory services including the police and tell them about serious sexual offences. They can do it, with care, if they have the assistance of young people centred workers who have expertise and experience in working in such contexts of vulnerability.

We are concerned that in this present Consultation the call for such general expert evidence is to be restricted to Rape cases. We would strongly recommend that it be considered for all cases of serious sexual offences against young people up to the age of 18.

We are also concerned at the artificial boundary of the definition of child and adult in the present Consultation where the needs of young adults of 16 – 18 years seem to be separated from those of young people classed as children under the age of 16. In our experience of responding to young people of 16 – 18 they are equally vulnerable to sexual exploitation. Therefore any expert giving evidence in such cases needs to be expert in the needs of vulnerable young adults.

### **3. Evidence of First Complaint (questions 6 & 7)**

**Our preference is Option 4 and that all complaints are admissible in relation to sexual offences only.**

#### **The reasons for our preference are as follows:**

Since 1994 Barnardo's has focused particularly on the experience of young people who have been abused through prostitution or been sexually exploited.

Young people have shared with us how very hard it is to disclose how they have been seriously sexually assaulted or raped. The recorded comments of several young adults who we interviewed in Glasgow are common to all our services across the UK:

*"It wasn't just once .It was going on for weeks and months...but (it was for) lots of other people but other people had fear in them.*

*They had fear of the fact of actually standing up and saying it because it is a serious thing. Basically wherever I was he was like my shadow."*

*"I couldn't say anything. I felt because it was me that got me into that position, I didn't want people thinking that was what I was like."*

*"I just didn't want people to judge me."*

*“The person that that person did it to needs to feel safe again. They wouldn’t feel safe if that person was still walking the streets.”*

(Study of the sexual exploitation of looked after and accommodated young people in Glasgow)

Our knowledge of young people’s experience across the United Kingdom confirms that guidance about recognising young people as victims when they disclose serious sexual assaults is not being followed in a systematic and universal way. Unfortunately if young people are seen as displaying high risk behaviours and are sexually active then they are judged as being able to cope with serious sexual harm.

For this reason we should support all complaints being admissible as we know that attempts to disclose serious assault and rape will come at different stages and different levels. Added to this we know that victims can make an initial disclosure but then subsequently provide fuller information perhaps dependant on the reaction of the first person disclosed to or because more information is actually recovered from the memory later due to impact of trauma. The first complaint may not contain the fullest information and option 4 would allow for inclusion of later statements by the victim to be heard in court.

Option 4 would take greatest account of victim needs and circumstance .It would also ensure that as much evidence as possible is brought before the court where the merit of such evidence can be assessed.

#### **4. Special Measures for Rape Victims**

**We agree that 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. We are particularly concerned that justice is properly served in relation to young adults from 17 years whose interests are not receiving due attention.**

**We agree that victims of sex offences generally should continue to have the choice NOT to receive assistance from special measures. However our agreement is conditional as stated below and is dependant on their age and capacity**

**We agree that guidance should be issued to promote the use of existing provision for limited additional questions for the purpose of ‘warming up’ the witness particularly in serious sexual offences cases but with the provisos detailed below.**

**We agreed that the prosecutor should be given a broader discretion to ask supplementary questions in serious sexual offences cases and that this should be achieved by relaxation of the present restrictions but with the safeguards noted below.**

**We consider that Option (a) should apply to vulnerable witnesses including children and other witnesses in fear or distress and to all offences.**

**The particular safeguards we recommend are noted below.**

We note that under the Youth Justice and Criminal Evidence Act 1999 special measures were introduced to assist adult victims of sex offences, where eligible, to assist them in giving their best evidence. Children under 17 years are automatically eligible and their evidence is admissible as evidence in chief.

We note the distinction of adults being young people over 16 years of age and think it crucial that their evidence is treated with like consideration.

The video statement of all victims should be shown to the court and not left to the decision of the prosecutor. This will eliminate the risk of whether or not the video statement was shown becoming a major issue of the trial.

Given our concerns about the welfare of young adults who have been seriously sexually assaulted or raped we would agree that they should have the right not to receive assistance from special measures but stress absolutely that this right should take account of their capacity to make an informed choice.

We agree strongly that there should be provision for additional questions for 'warming up' as their experience and familiarity with the court environment may be far less than the accused. Every attempt possible should be made to level the playing field.

We would recommend that this process has a greater status than mere Guidance.

We recommend that the prosecutor should be given broader discretion to ask supplementary questions and that this is achieved by a relaxation of the present restrictions. However we would not agree with a repeal of the present restrictions as the video evidence might then come to be seen as secondary.

We consider that this relaxation of the present restrictions should apply to vulnerable witnesses and children but that every precaution is taken that the trial is not an opportunity for further abuse of the victim.

In agreeing to relaxation of restrictions for children and vulnerable witnesses we consider that the following safeguards should be in place;

- There should be no cross examination of child witnesses
- The best interests of the child or young adult should be taken into account
- There should be better training for prosecutors
- There should be tight guidelines for defence solicitors in terms of what they can ask about and their style of questioning
- Information should be given to juries as to the law and court procedure so that they do not draw undue inference from what is said or not said in video evidence to prevent video evidence being viewed as less credible or significant than the live questioning.

## REFERENCES

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