



**Home Office Consultation:
Convicting Rapists and Protecting Victims
– Justice for Victims of Rape
Response from The Lilith Project
In conjunction with the London Sexual Violence Action and
Awareness Network**

The Lilith Project

The Lilith Project was established at the beginning of 2003 as a pan-London, second tier, violence against women (VAW) agency managed by Eaves Housing for Women. Eaves Housing for Women is the largest provider of high quality, women only supported housing in London and manage a range of projects including: Eaves Women's Aid (domestic violence services) and the Poppy Project, which provides support and accommodation for women trafficked into the country for the purposes of prostitution.

The Lilith Project's remit is to raise awareness of VAW, capacity build within the VAW sector, lobby Government, share best practice and develop as a centre of expertise around VAW issues.

Lilith has a well developed track record of highlighting issues of VAW with action-oriented outcomes that enable agencies and individuals to challenge harmful practices. The project has produced research reports on issues such lap dancing and hostel provision for women in London, and will shortly release a report on rape reporting and the media. Lilith facilitates the London Sexual Violence Action and Awareness Network (SVAAN), and the Kalabash Forum, a network of BME agencies working in the VAW field. The experiences of the agencies involved in these groups forms an integral part of Lilith's response to this consultation.

Gender Statement

Rape is a form of violence against women that is embedded in women's inequality in society and myths about women's sexual behaviour. 93% of the victims of rape in London in 2004/05 were female¹. The overwhelming majority of victims of all sexual offences are women. In recognition of this, the Lilith Project response uses an explicitly gendered approach.

General Response to the Document

Lilith welcomes this consultation and the Government's continuing commitment to improving the judicial system around sexual violence. We especially welcome the recognition that 'misperceptions and myths' around 'proper' victim behaviour exist (page 17) and the willingness to challenge these myths.

¹ Metropolitan Police Force, 2006, *Rape and other sexual offences for persons accused and victims broken by gender and ethnicity by borough for FY2004-5*. Freedom of Information Request

We are concerned that more fundamental changes are needed to tackle misconceptions and inappropriate attitudes to sexual violence itself, particularly amongst the public, police and the CPS.

There are limited proposals for legislative and procedural reform of the court system, but practical measures to address women's fears would also have far reaching effects on women's willingness and ability to give evidence and so in turn conviction rates, e.g. shortening the time required for notification when a man accused of sexual offences is granted bail.

Lilith believes that that any protection and special measures offered to women who have experienced rape should be extended to all women who have experienced sexual assault, especially sexual assault by penetration, so continuing the strides taken by the Sexual Offences Act in recognising sexual assault by penetration as potentially being as damaging as rape and punishable in the same way.

Lilith would like to see changes to the language used around sexual offences. 'Serious' sexual assault implies other forms of sexual assault are not serious, even if they have a far reaching impact upon the woman who is victimised. Likewise the notion that there are 'reasonably made complaints' and 'unreasonably delayed or malicious complaints' suggests that women who do not report sexual violence or do so after a long period of time are lying. This is inaccurate and does not reflect the reality of women's experiences.

Consultation Questions

Question 1: Does the law on capacity need to be changed?

Lilith believes the law on capacity must be changed. An evidential presumption around voluntary intoxication through alcohol or other substances should be introduced. This should include voluntary intoxication by substance use as well as alcohol. Research from the U.S. found that almost 1 in 10 women are raped while too intoxicated through drugs or alcohol either to consent or resist.² The research also found that women are more likely to be raped by acquaintances than strangers or intimates when voluntarily intoxicated. Given the rise in reported rapes that are committed by acquaintances, and the suggestion that many 'date rapes' are in fact stranger rapes where the perpetrator has changed his modus operandi from ambushing to befriending women in order to rape them³, this evidential presumption is urgently needed to ensure women raped when voluntarily intoxicated receive fair redress through the criminal justice system.

Some US States have already introduced evidential presumptions around drunkenness. For example in June 2006, the state of Wisconsin clarified sexual offences legislation to say that women who have voluntarily consumed alcohol to the point of drunkenness before a sexual encounter can be judged incapable of giving consent.

The consultation document argues that disinhibition and an increased likelihood to consent are not the same as an inability to consent. If the same principle were applied when seeking consent for medical procedure, disinhibition to the extent that a person was unable to comprehend and retain information, believe it and weigh it up to arrive at a choice may be deemed inadmissible and the person requesting the consent would be considered to have acted improperly. The BMA advises that 'patients who would

² Lees, S (2002) Carnal Knowledge: Rape on Trial London: the Women's Press

³ Frone, M (2003) The role of women's substance use in vulnerability to forcible and incapacitated rape
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otherwise be competent may be temporarily incapable of giving valid consent due to factors such as fatigue, drunkenness, shock, fear, severe pain or sedation⁴.

A new evidential presumption on capacity after voluntary intoxication would serve to may increase the number of cases being taken forward and encourage women to report their experiences of sexual violence. There is considerable social stigma attached to women who use illegal substances, which could find it's way into the courtroom through the beliefs of the counsel, judge and jury. Therefore, an evidential presumption that includes voluntary consumption of both alcohol and illegal drugs would clarify that regardless of the substance causing intoxication, sexual intercourse without consent is a crime.

In order for this to be effectively implemented, training is needed to ensure members of the Police and CPS are not prejudiced against women who are attacked after consuming alcohol or other substances.

Lilith would also like to see provision within the law for capacity to consent that is constrained by experiences of violence and abuse. For instance, when a man rapes a woman within the context of domestic violence, her consent is given in what are clearly conditions of ongoing coercion and subordination. Her capacity to consent is negated by the climate of fear and threats in which the sexual encounter takes place. Consent that is given reluctantly by women in order to avoid further violence is problematic since "genuine consent requires that [her] outward behaviour is in sympathy with her internal motivations".⁵ Clearly, this is not the case when women are raped by a partner whom they fear since women's self-determination in this context is non-existent. These are also the very situations in which perpetrators are likely to deploy a defence of consent if the woman reports the rape. Criminal justice responses to rape will be more effective if they consider the settings in which rapes take place, including the context of the assault and how this has an impact on capacity to consent, whether this refers to intoxication or ongoing violence and/or pressure.⁶

Lilith would like to draw the Government's attention to the proposal in South Africa to introduce 'coercive circumstances' into rape law - situations in which the attacker has significant power over the victim - as a relevant factor in rape cases.⁷ Lilith recommend that further discussion is undertaken with relevant specialists in the field to consider whether there needs to be additional guidance in law around capacity to consent and sexual violence committed by known intimates.

⁴ British Medical Association, 2003, *Consent Toolkit* [online]. (2nd Edition). London. Available from: <http://www.bma.org.uk/ap.nsf/Content/consenttk2~card1> [Accessed 18 July 2006]

⁵ Kazan, P (1998) *Sexual Assault and the Problem of Consent in ...* French, S et al (eds) *Violence Against Women: Philosophical Perspectives* London: Cornell University Press

⁶ McKinnon, C (2006) *Are Women Human? And Other International Dialogues* London: Harvard University Press

⁷ http://www.interights.org/Legalbriefs/MCvBulgaria_expert%20report_South%20Africa.doc

An act which causes penetration is prima facie unlawful if it is committed -

- (a) in any coercive circumstances;
- (b) under false pretences or by fraudulent means; or
- (c) in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

(3) Coercive circumstances, as referred to in subsection (2)(a), include any circumstances where -

- (a) there is any use of force against the complainant or another person or against the property of the complainant or that of any other person;
- (b) there is any threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
- (c) there is an abuse of power or authority to the extent that the person in respect of whom an act which causes penetration is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

Question 2: Should there be a statutory definition of capacity?

Lilith does not believe a statutory definition of capacity is the most effective way to address this problem, as it could be too restrictive and narrow to address the complexity of factors surrounding women's ability to consent.

Lilith therefore endorses the response of the Women's National Commission that an additional evidential presumption around intoxication will be the most effective way to address capacity. Lilith also recommend that further discussion is undertaken with relevant specialists in sexual and domestic violence around the issues of capacity to consent, as detailed above.

Question 3: Would the introduction of general expert evidence be justified in principle?

Yes, Lilith welcomes the introduction of general expert evidence in principal. Lilith believes general expert evidence should also be admissible in all cases of violence against women, including those of sexual assault. Increasing levels of reported sexual assault suggest not only that more sexual assault than rape is taking place in London, but that some cases of rape are being tried as sexual assault. If sexual assault and other forms of violence against women are not included in the new proposals women would not be fully protected, which would fail to continue the strides taken by the Sexual Offences Act in recognising sexual assault by penetration as profoundly distressing and punishable in the same way as rape. We have reservations about specific aspects of the proposals, which are highlighted in our response to question 4.

Question 4: Do you agree with the proposal outlined in this chapter?

Lilith agrees with the proposals in the broadest sense, but is concerned about many aspects of the proposals, particularly the limited circumstances and subject areas in which general expert evidence will be allowed. The restrictions may impinge so much as to make the proposals ineffective. Lilith would recommend a far wider form of expert evidence which addresses myths around sexual violence, including:

- Misconceptions about women's behaviour (e.g. women should not wear revealing clothing; women who drink are responsible for being raped; rape is less likely if consensual sex has taken place).
- Media myths about gender based violence (e.g. strangers carry out most acts of sexual violence; rape always leaves physical injuries; sexual violence is the product of overwhelming sexual urges; false allegations are common).
- Information about physiological responses to trauma (i.e. 'fight or flight' responses; the reasons women don't always fight back or cry out; denial and dismissal)
- Information about perpetrators of sexual violence (i.e. they may seem 'normal', the kinds of information recalled by aggressors and victims).
- Common effects of sexual violence (possible medium - long term effects of trauma such as flashbacks, insomnia, hyper-vigilance, depression etc)

We are also concerned that the needs of the defence may cause an increase in research seeking to find results that hold women accountable for men attacking them and are therefore extremely detrimental to women.

Question 5: Are there alternative ways to present juries with a balanced picture concerning the behaviour of victims after incidents of rape?

While expert witnesses will be able to dispel myths around sexual violence and women's behaviour, they will not be able to comment on the specific behaviour and actions of individual complainants. Measures such as Victim Impact Statements will be essential to enable individual women's experiences of the aftermath of rape to be heard.

Beliefs about sexual violence, including rape myths, are deeply ingrained, and based on a larger belief system about women and their place in society, gender role and behaviour. Information regarding sexual violence, even from an expert, is unlikely to be easily accepted without a much larger framework of public awareness challenging misconceptions.

Lilith believes that continued publicity campaigns about sexual violence myths and further training for the judiciary would help to reach a position where judges can warn juries of the dangers of 'rape myths' and assist them in challenging them.

Lilith would also ask that the Sentencing Guidelines Council (SGC) document *Sexual Offences Act 2003 Consultation Guideline* is re-examined to ensure the aims and values of the SGC are broadly the same as the CPS. We are particularly concerned that 'where the victim is over the age of 16, an offender's culpability for a sexual offence will be less if the offender and victim were engaged in consensual sexual activity immediately before the offence took place'⁸. This has the potential to perpetuate the rape myth that once women have had consensual sexual activity with someone, he cannot later rape them. It may also serve as an excuse for perpetrators, as it suggests that men cannot stop once they have begun sexual activity. This information will prejudice judges and juries towards rape myths and reconsideration of this clause should form part of the way to present juries with accurate information.

The document refers to research published by the British Psychological Society that found that when judges summarised hypothetical rape cases to juries that emphasised common rape myths, jurors were more likely to find the alleged perpetrator not guilty. In light of this, Lilith recommend that the judiciary receive more intensive training than they do at present on sexual violence, rape myths and stereotypes, and that judges are held accountable for their comments and decisions through a formal and transparent disciplinary process with an independent appeals mechanism.

Question 6: Which is your preferred option?

Lilith prefers Option 4, to remove any requirement that the complaint needs to be 'as soon as could reasonably be expected' and allow all complaints to be admissible, whilst not obliging the prosecution to use all complaints.

Question 7: What are the reasons for your preference?

Option 4 recognises that women's primary motivation for reporting sexual violence may not be to the passing of time (for example she may be motivated to report the attack if she believes others are at risk, or her memories of abuse have been triggered by pregnancy or abortion). It also recognises that a woman may disclose her experiences to several different people in different settings (her partner, a healthcare professional, or police personnel) and each complaint will provide different information, all of which could be equally crucial for courts to hear. Jurors must also be given adequate background information to understand why complaints may be fragmented or have varying content.

⁸ Sentencing Guidelines Council, 2006. *Sexual Offences Act 2003 Consultation Guideline*. London.

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?

Lilith supports the wider introduction of video recorded statements and their use as evidence in chief, but strongly feels women should be offered a choice about whether or not to make a video.

On a practical level, there are not enough video suites and equipment to implement the proposals. The need to take an immediate video statement should not mean women are held at police stations for extended periods until equipment, staff, or other resources become available. If video statements are to be used as evidence in chief, the necessary equipment must be immediately available across all police stations.

If video statements are *not* used as evidence in chief, other possible problems should be considered e.g. once a video is created, even if the prosecution decide it is not favourable and do not wish to use it, it would become possible evidence for the defence.

Lilith endorses the response of the Women's National Commission to this question, especially their stance upon the use of plasma screens in courts: "If the indications about the greater immediacy of the testimony enabled by the use of large plasma screens are borne out, then these ... should be routinely used."

Question 9: Do you agree that victims of sex offences generally should continue to have the choice NOT to receive assistance from special measures?

Lilith strongly agree that special measures should be used only by choice, and as a special measure the use of a video statement should be by choice, not automatic use. We would also like to see special measures extended to cover *all* offences of violence against women.

Question 10: Do you agree that guidance should be issued to promote the use of the existing provisions for limited additional questions for the purpose of "warming up" the witness, particularly in serious sexual offence cases?

Yes, Lilith agree simple questions should be used to introduce women giving evidence in sexual violence cases. The court process is very intimidating and women may find a few moments to adjust very beneficial.

Question 11: Should the prosecutor be given a broader discretion to ask supplementary questions of the complainant in serious sexual offence cases?

Lilith agree that prosecutors should be given broader discretion to ask supplementary questions, but such questions must be carefully planned to be of most benefit to the woman.

Question 12: If so, should this be achieved by: (a) relaxation of the present restrictions but with some safeguards or criteria; or (b) by a repeal of the present restrictions?

Lilith choose option b) and endorse the Women's National Commission response to this question that We would further emphasise that women must be informed about the questions and their purpose beforehand, and given adequate time and assistance to prepare.

Question 13: Do you consider that either 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?

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?

Lilith believes that specialist organisations who work with children who have experienced sexual violence are best placed to answer the above questions.