

# **Rape Law Reform**

Policies for  
Reform Law on Rape

**Policy Paper 28**

# Contents

	Page
Summary	3
1. Introduction	5
1.1 Perceptions	5
1.2 The Liberal Democrat Approach	5
2. Reforming the Law	7
2.1 The Crime of Rape	7
2.2 Mistaken Identity	7
2.3 Mistaken Belief in Consent	8
2.4 Previous Sexual History	8
3. Modernising Procedure	10
3.1 Defendants in Person	10
3.2 The Role of the Judge	10
3.3 Late Complaints	11
4. Support for Victims	12
4.1 Recording the Complaint	12
4.2 Other Reforms	12
5. Related Issues	14
5.1 Anonymity	14
5.2 Sentencing	14

# Summary

Liberal Democrats aim to reform procedure and legislation dealing with the crime of rape. While official figures show that the reporting of cases of alleged rape have increased dramatically over the last decade, the proportion of cases successfully prosecuted has actually fallen.

Liberal Democrats seek to improve the treatment of the complainant without breaching the reasonable rights of the defendant. This means reforming the legal aspects and procedural provisions relating to the crime of rape.

## Legal Reforms

Liberal Democrats believe that the following changes will greatly facilitate the trial of rape cases:

- The law of *similar fact evidence* should be reviewed, clarified and stated in statutory form.
- The definition of rape should be amended so that, once the prosecution has proved beyond reasonable doubt that the victim did not consent, the burden shifts to the defendant to prove, on a balance of probabilities, that he honestly and reasonably believed that the victim did consent.
- The right to anonymity should be extended to the defendant as well as the victim.
- The victim's protection from being cross-examined on, or have evidence adduced on previous sexual history, except with the leave of the judge, should be extended to all sexual offences tried on indictment.

## Modernising Procedure

The current procedures governing trials of rape cases need to be adapted to provide more sensitive treatment for the complainant. Taking a case to trial is seen by too many complainants as deeply distressing and is a reason that many cases are dropped. Liberal Democrats would:

- Legislate to require a defendant who is accused of a serious sexual offence not to be allowed to defend him/herself in person, but required to use a lawyer.

This is in keeping with the European Court for Human Rights' decision that the human right to defend oneself does not mean defending oneself *in person*. Entitlement to Legal Aid would cover cases of financial hardship.

- Standardise the use of barrier screens or video links in rape cases, as currently used in child abuse cases, to reduce distress to victims caused by the proximity of the defendant.
- Make it a pre-requisite for judges to be trained in gender awareness.
- Entitle the judge to tell the jury that the lateness of a complaint cannot be read as an indication that the complaint is false.

## **Supporting Victims**

The trauma of rape is followed by two distressing stages: the process of making a complaint in the first place, and then in giving evidence and the court. Both are significant ordeals in themselves and consequently victims are often deterred from coming forward. Liberal Democrats would:

- Standardise examples of good practice at a national level including, for example, the Northumbria REACH centres which have dedicated examination facilities, specially trained staff and a policy of providing support from report stage through to the conclusion of trial.
- Give higher priority to the scheduling of rape trials, to reduce the probability of the complainant being deterred by a long wait.
- Evaluate levels of compensation in the next review of Criminal Injuries Compensation Scheme tariffs.

## **Related Issues**

Liberal Democrats wish to see a balance in preserving the best features of our judicial system and reforming the anomalies that have developed in law relating to rape. There are important elements of existing practice that must be preserved and reinforced, including:

- Life imprisonment should continue to be the maximum penalty for rape. The judge must continue to have discretion over sentencing but should adequately reflect the seriousness of the crime in the sentence passed.

# Introduction

**1.0.1 The crime of rape has the capacity to shock as few other crimes do. It is unique. A unique violation of the person. It is unique, too, in the stigma victims believe it carries and in the nature of the evidence involved. Rape has nothing to do with “sex” as society normally sees it and everything to do with violence and intimidation - one of the reasons it is so prevalent in situations of war.**

1.0.2 The violation of the person and its attendant misery is experienced by both men and women, but the incidence of reported rape for women is significantly higher. Evidence also shows that while women are reporting rape in higher numbers than in the past, the proportion of cases which have been successfully prosecuted has actually fallen. In 1985 there were 1842 recorded offences, of which 430 resulted in a conviction; by 1994, there were 5067 reported cases of which 441 resulted in a conviction - a 63 per cent fall. The proportion of reported offences which are taken to court has also fallen. More women are asking for help with a smaller chance of gaining justice for the crime.

## 1.1 Perceptions

1.1.1 The common image of rape is that of an assault in the street, or by illegal entry to a home, by a stranger, who then inflicts violence on a woman he does not know. This image is reinforced by the media attention these cases attract. The reality of rape is that it is a crime which is often committed by someone the victim knows - whether through social contact or a work

acquaintance or through an encounter in a public place.

1.1.2 It is in the more common setting, where the victim may have had social contact with the accused, that the prosecution of rape becomes more complex. The sexual history of the victim becomes a matter for conjecture in the media. In court the victim risks having their lifestyle put on trial through an attempt by the defence to create an appearance of impropriety in the victim's general behaviour. Their sexual past can be referred to in a way in which the defendant's cannot. Women who fear that their personal life and “reputation” will become the subject of public speculation are deterred from seeking remedy through reporting the crime and pursuing justice.

## 1.2 The Liberal Democrat Approach

1.2.1 For Liberal Democrats it is an essential element of justice that a victim should not suffer twice - first through the crime itself and then again through suffering humiliation and shame in court. It is our belief that the law on rape can be changed to improve the treatment of the victim without impinging on the reasonable rights of the defendant. One victim of rape asked if the courts could not “*be civilised to someone who has been through the most terrible experience of their life?*” We believe that it is possible to reform the law on rape so that both defendant and victim encounters similar standards without the victim feeling that he or she were being violated again.

1.2.2 There is a precedent for successful change in dealing with the treatment of rape victims. Over the last decade, the police have set in train a series of reforms which, through the more sensitive handling of a traumatised person, have improved their effectiveness. Measures such as training for officers, fitting special interview rooms and ensuring the presence and support of an officer of the same gender, have made victims more ready to report the crime.

1.2.3 Liberal Democrats believe that it is now the turn of the law to catch up. While confidence building measures have increased the reporting of rape, it is the treatment of complainants in court which leads to prosecutions not being followed through. The changes that we propose are intended to make the court process much less traumatic for victims of rape.

# Reforming the Law

**2.0.1 Rape often occurs in situations where some form of social interaction has occurred between the two parties involved. The law is skewed against the victim in so far that the degree of scrutiny required is generally higher than that for other crimes. A victim of burglary does not face questions in court about their propensity to lose possessions, nor the regularity with which they may forget to close the window. Their involuntary participation in the occurrence of the crime is taken for granted by the defence to a far greater degree than for the crime of rape.**

## 2.1 The Crime of Rape

2.1.1 The present definition of rape is contained in section 1 of the Sexual Offences Act 1956:

- “1 (1) It is an offence for a man to rape a woman or another man.*
- (2) A man commits rape if -*
- (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and*
- (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.”*

2.1.2 In all cases<sup>1</sup> the prosecution must prove beyond reasonable doubt, so that the jury is sure, that the defendant had

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<sup>1</sup> We do not deal here with the Law of Attempt.

intercourse with the victim and that the victim did not consent. It follows that, if one is accused of rape and pleads ‘not guilty’ there are two broad categories: mistaken identity (“*it wasn’t me*”) and the belief that the victim consented (“*it was me but I thought she/he was consenting*”)

## 2.2 Mistaken Identity

2.2.1 The main problem in mistaken identity cases is where a defendant is accused of a series of rapes with similar features. The defence will attempt to ensure that each case is tried separately - thus increasing the chance of acquittal. Under existing law, charges of rape of different victims on separate occasions by the same defendant (a serial rapist) can only be tried together if the common law rules on “similar fact evidence” apply. These rules are strict, obscure and difficult to determine: they have to be deduced from previous cases.

*“Don’t blame the players,  
change the rules.”*

- Prosecution Barrister.

2.2.2 Liberal Democrats favour a general restatement of the law with clarification of the principles of ‘similar fact evidence’. This would also assist in non rape related cases.

## 2.3 Mistaken Belief in Consent

2.3.1 A reason that the rate of convictions in rape is so low is in part due to the ‘mistaken belief’ defence. Under the present law, the prosecution must prove beyond reasonable doubt (ie so that the jury is sure), that the defendant either knew that the victim did not consent, or was reckless as to whether the victim did consent. Thus, even when the jury is sure that the defendant had intercourse with the victim, without the victim’s consent, the defence is able to raise enough doubt in the jury’s mind that the defendant *might have believed* that the victim consented (she/he was saying “no” but I thought that she/he meant “yes”). As the defendant’s state of mind is uniquely within his own knowledge, it is relatively easy for the defence to raise sufficient doubt in the jury’s mind to secure an acquittal.

*Why can courts not “be civilised to someone who has been through the most terrible experience of their lives? I felt as if I was on trial”*

- Rape Victim.

2.3.2 Liberal Democrats believe that the law should be amended so as to give better protection to complainant’s of rape and to bring it into line with modern attitudes between the sexes. We would:

- Amend the definition of consent in the 1956 Act by repealing section 1(2)(b) and substituting:

*“at the time he does not have an honest and reasonable belief that the person consents to it.”*

- Once the prosecution has proved beyond reasonable doubt, that the complainant did not consent, the burden of proof would be on the defendant to prove<sup>2</sup> that he honestly and reasonably believed that the complainant consented. This reform is on the lines of the existing law in the State of Victoria, Australia, where the burden of proving that consent was freely given is on the defendant.

In cases where the defendant has previous convictions for rape and the defence is that the defendant believed that the complainant was consenting, the prosecution (with the leave of the Judge), should be allowed to cite evidence on the previous conviction on the principle that the defendant should have been on his guard as to whether the complainant consented.

## 2.4 Previous Sexual History

2.4.1 In more than half of rape cases at trial, the defence asks for permission to question the complainant on his/her previous sexual history - seeking to create doubt in the mind of the jury as to the complainant’s life-style and attitudes. In 75 per cent of all cases where permission is sought, it is granted. While the relevant legislation indicates that the above permission would be granted as the exception rather than the rule, practice does not support this interpretation.

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<sup>2</sup> on the balance of probabilities

#### 2.4.2 Liberal Democrats would:

- Change the law, so that the rules restricting disclosure apply to any serious sexual offence - not only those narrowly defined as “rape offences”.
- Extend that protection to situations where the issue was *consent* as well as where it was *belief in consent* - there is no reason for distinguishing between the two.

2.4.3 The existing law is unfair to victims of rape in that their own sexual history can become the knowledge of the court whilst that of the defendant does not - particularly when the defendant has a history of convictions for previous sexual offences which cannot be known to the jury.

#### 2.4.4 Liberal Democrats would change court procedure to ensure that:

- Legal representatives of the prosecution and defendant are assigned prior to the ‘plea and directions’ hearing (PDH);
- Unless the plea is ‘guilty’, the defence, if intending to do so, must give notice in writing that they will be asking for leave to refer to the complainant’s previous history.
- If leave is granted, only the previous history between the complainant and the defendant should be made available, and not that between the complainant and anyone else<sup>3</sup>.

2.4.5. Liberal Democrats would amend the law<sup>4</sup>, adding a subsection “*where such leave is given, the prosecution shall be entitled to cross-examine the Defendant or adduce evidence against the Defendant on his previous sexual history*”. This would result in the jury being told of the defendant’s own sexual history.

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<sup>3</sup> this would require amendment of section 2 of the Sexual Offences (Amendment) Act 1976, by adding a subsection (5): “*Notice of intention to apply for leave under section 2 (1) of the Sexual Offences (Amendment) Act 1976 and the grounds for such application shall be given in writing to the prosecution and the court at the plea and directions hearing.*”

<sup>4</sup> Amendment of section 2 of the 1976 Act, adding a subsection (6)

# Modernising Procedure

**3.0.1 If the laws governing rape trials, and the production of evidence allowed within trials, is one reason that the victims feel as if they are the ones on trial, the procedure of the court is another.**

## 3.1 Defendants in Person

3.1.1 There have been rape trials where the victim's assailant has stood only feet away during cross-examination. Victims are on record saying that this immediacy of presence caused a distress of its own, unrelated to the nature of the questions asked. We accept that the close proximity of a defendant has an effect on the victim and would seek to remove it - this will not affect the validity of the answers or the ability to detect inconsistencies in testimony.

*"He was reliving the rape... no other woman should go through this again."*

- Rape victim, after being cross-examined in court by her attacker for six days.

3.1.2 In a recent high profile trial, a defendant cross-examined the victim at great length, wearing the clothes in which he had attacked her. This is clear abuse of trial procedure and must be stopped, but without breaching the defendant's human right to defend himself under the European Convention on Human Rights.

3.1.3 The European Court of Human Rights has twice held that the human right to defend oneself does not mean defending oneself *in person* and has upheld decisions requiring the use of a lawyer in relevant cases.

3.1.4 The Liberal Democrats would:

- Introduce legislation to require a defendant accused of a serious sexual offence to use a lawyer. If he is short of funds, he will be entitled to legal aid.
- Introduce the use of barrier screens or video links as standard practice in rape cases (as already used in child abuse cases) to reduce distress to victims caused by proximity to the defendant. Liberal Democrats do not accept the argument that video links or screens may prevent cross examination from being rigorous enough - it may suit a certain kind of lawyer better than another but will not make a substantive difference to the trial.

## 3.2 The Role of the Judge

3.2.1 Liberal Democrats find that the conduct of some trials, as supervised by judges, leaves much to be desired. While on the whole, judges work to a high standard, there are increasing inconsistencies in the conducts of trials. An incompetent or insensitive judge can, from a position of considerable power in court, bias proceedings and the character of evidence presented.

3.2.2 In trials dealing with cases of rape, an ignorance of gender related issues and basic training in the implications of rape have resulted in judges' actions or comments hitting the headlines. Liberal Democrats deplore some of the recent comments made by judges in rape cases. We would make it a pre-requisite for judges to be trained in gender awareness.

### **3.3 Late Complaints**

3.3.1 There is ample evidence that rape victims take time to find the courage to report the offence. We believe that the judge ought to be entitled to tell the jury that the fact that a complaint was not made immediately after the alleged offence took place is no indication that the complaint is false.

# Support for Victims

**4.0.1 The proposals outlined in this paper so far deal mainly with striking a balance in the court process: recognising the specific nature of rape cases, and reducing the burden on complainants without jeopardising defendants' rights. Liberal Democrats believe that it is also necessary to look at the whole process, from the offence to post-trial, to ensure that victims are supported and that the ordeal is made as tolerable as possible.**

4.0.2 The trauma of rape is followed by two distressing stages. First, there is the process of making a complaint, undergoing a medical examination and giving evidence to the police. Second, there is the court process. Both are significant ordeals in themselves and serve as disincentives to victims, who, in consequence, are deterred from coming forward.

## 4.1 Recording the Complaint

4.1.1 The process of giving details of the offence to the police and undergoing medical examination has improved considerably over the last decade. The use of women officers and independent women counsellors has assisted the process, providing for more sensitive handling of distress. However, there are still considerable variations across the country and the treatment of victims varies from one region to another.

4.1.2 Liberal Democrats wish to learn from best practice and advocate emulation of, for

example, the Northumbria REACH centres. These are specialist centres removed from police stations with dedicated examination facilities. Doctors are given ongoing specialist training in gathering evidence and in court practice to reduce the risk of evidence being dismissed. Special non-police counsellors are used. The mandate of the centre is to accept the complaint as legitimate, to provide support, keep in contact with the victim and accompany him or her to court as a means of continuing support.

## 4.2 Other Reforms

4.2.1 There are a range of other policies that may also ameliorate, to some extent, the distress experienced by rape victims in going through the process of seeking justice. These are:

- Improved guidance to police officers on how to deal with complaints that are subsequently withdrawn i.e. to examine whether the withdrawal is due to the inability of the victim to go through the trial process rather than because of complaint was erroneous.
- Higher priority for scheduling of rape trials. As the complainant is the key witness in these trials, a prolonged wait can result in the prosecution failing to bring its case due to the complainant being deterred by the wait.
- An evaluation of levels of compensation in the next review of Criminal Injuries

Compensation Scheme tariffs.

# ***Related Issues***

**5.0.1 For Liberal Democrats a balance has to be struck in preserving the best features of our judicial system and reforming the anomalies that have developed in law relating to rape. There remain certain important elements of existing practice that we would wish to preserve and reinforce.**

## **5.1 Anonymity**

5.1.1 Under existing practice, the alleged victim has anonymity but the defendant does not. It is vital that the victim is able to report a crime, and help bring the perpetrator to justice, with a minimum impact on their personal life. With intrusion by the media, a very real threat in cases of rape, anonymity is a crucial part of that protection which the process of justice can provide. However, the anonymity of the victim can be undermined when the defendant is known. Also, it is iniquitous that the defendant's name can be discussed publicly while the victim's cannot. To remedy this, we would extend anonymity to the defendant as well, until conviction is obtained.

## **5.2 Sentencing**

5.2.1 Liberal Democrats wish to see a continuation of life imprisonment as the maximum penalty in cases of rape. As at present, we would leave the sentence to the discretion of the judge, but would emphasise that the seriousness of the offence be adequately reflected in the sentence passed.

5.2.2 We are, however, opposed to the creation of 'two tiers' of offence - with the creation of a lesser offence of so-called 'date rape'. We fear that the introduction of a lower tier would send the wrong message, reducing the seriousness of the crime, do little to improve the conviction rate, and would lessen the deterrent. We do not wish to encourage the American style 'plea bargaining' of defendants pleading guilty to a lesser offence. As the fact that the defendant and victim are known to each other in many cases, does not reduce the seriousness of the offence. The seriousness of particular cases should be reflected in sentencing.

*This Paper has been approved for debate by the Federal Conference by the Federal Policy Committee under the terms of Article 5.4 of the Federal Constitution. Within the policy-making procedure of the Liberal Democrats, the Federal Party determines the policy of the Party in those areas which might reasonably be expected to fall within the remit of the federal institutions in the context of a federal United Kingdom. The Party in England, the Scottish Liberal Democrats and the Welsh Liberal Democrats determine the policy of the Party on all other issues, except that any or all of them may confer this power upon the Federal Party in any specified area or areas. If approved by Conference, this paper will form the policy of the Federal Party.*

*Many of the policy papers published by the Liberal Democrats imply modifications to existing government public expenditure priorities. We recognise that it may not be possible to achieve all these proposals in the lifetime of one Parliament. We intend to publish a costings programme, setting out our priorities across all policy areas, closer to the next general election.*

### **Working Group on Rape Law Reform**

Jo Hayes  
Russell Pyne  
David Owen-Jones  
Lynne Ravenscroft

*Staff:*  
Steve Bradford  
Kishwer Khan  
Eduardo Reyes

*Note: Membership of the Working Group should not be taken to indicate that every member necessarily agrees with every section or every proposal in this Paper.*

Comments on the paper are welcome and should be addressed to:  
Jo Hayes c/o Policy Unit, Liberal Democrats, 4 Cowley Street, London SW1P 3NB.

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