

Equality Impact Assessment Record

Name of new/ revised Policy:	Revised Policy on Dealing with Reluctant Complainers in Cases of Rape and Other Serious Sexual Offending
Purpose of Policy:	The policy sets out how COPFS will approach cases of rape and other serious sexual offending where the complainer becomes reluctant.
Lead EIA Officer:	Policy Staff
Team / Federation:	Policy Division, Operational Support, Crown Office
Email Address:	DiversityTeam@copfs.gsi.gov.uk
Others involved:	The revised policy has been discussed with a number of others during consultation including COPFS staff, police and key external stakeholders
Date Assessment Completed:	12 March 2018
Assessment Record Authorised by:	DCA

This new / revised policy was fully assessed for any equality impact based on the General Equality Duty of the Equality Act (2010).

Background Details about new policy / process

The revised internal policy sets out how COPFS will approach cases of rape and other serious sexual offending where the complainer becomes reluctant.

Given concerns around the operation of the previous policy, and in particular concerns that it didn't take proper account of continuing risk an accused may present to the complainer or other members of the public, the Law Officers instructed a policy review involving both research and consultation.

During the consultation on our approach to domestic abuse and specifically the presumption for prosecution and continuing prosecution even in the face of complainer reluctance, the COPFS approach was universally supported by stakeholders.

In the consultation with key stakeholders specifically in relation to the revised policy, stakeholders acknowledged that the criminal justice process and system could create barriers to engagement for complainers in many ways, including in terms of delays and uncertainties around trial dates due to court programming. In addition, for certain groups of victims, for example, BME women, there could be cultural factors which could make it harder for women to engage in the process and to feel safe doing so.

It was agreed that improved understanding of these barriers and the range of reasons why complainers seek to disengage would improve the response. Further, the changes envisaged by the Evidence and Procedure Review were welcomed, especially the potential of having the opportunity to pre-record and capture complainers' evidence at an earlier stage.

For the majority of stakeholders, it was acknowledged that, given the nature of the violation involved in rape, there can be some justification for regarding it differently from other charges, such as assault, but experiences and feelings around it will vary between complainers.

It was noted that many domestic abuse cases also involve very degrading and humiliating behaviours so it wasn't felt appropriate to operate such a rigid distinction or contradictory prosecution policy around domestic abuse and rape.

The risks posed to women by serial perpetrators were noted and that the impact of the current policy meant that some dangerous perpetrators were not being prosecuted, placing the complainers and other women at risk.

The significant impact for the complainer in a case which relies for corroboration on another complainer's account, in terms of the Moorov doctrine, where the implications of one complainer disengaging can mean the case involving another complainer no longer has sufficient evidence to proceed, were also noted.

It was noted that the current approach places a huge burden on the victim, often vulnerable due to the effects of the abusive behaviour, to effectively decide on the potential liberty or otherwise of the accused.

While the general consensus was that compelling a rape complainer to testify against their will would be a last resort, the majority of stakeholders felt that the approach where the complainer's views were always determinative of the decision to prosecute was not appropriate.

It was felt that each case should be carefully considered, having regard to all the relevant factors in the case and in relation to the reasons why the complainer is reluctant, and that the Crown should take the decision on whether or not to proceed, despite reluctance.

One of the key stakeholders was strongly opposed to any change in the policy. They indicated that complainers often feel let down by the criminal justice system and seek to withdraw due to concerns around the system, including the uncertainty caused by trial adjournments and floating trial diets and the adversarial process, with many complainers reporting that they find the court process traumatic. While the Evidence and Procedure Review was progress in the right direction, they felt there was still a long way to go and changes in the system needed to be made before changing our policy.

They also felt that there was not enough information about the reasons why people are reluctant and retract and this needed to be explored further to try to tackle the root of the problem rather than respond by compelling witnesses. They also felt that, with the Inspectorate of Prosecution's review into sexual offences

still ongoing, that this wasn't the time for any change.

They further indicated that while the process for feeding back to the High Court Sexual Offences Unit on issues arising in individual cases was working well, a formal feedback mechanism should be implemented to ensure victims' voices could be heard.

They further indicated that they thought compelling witnesses would result in women saying they had made up allegations, leading to the potential for more women being wrongly charged with wasting police time by making false allegations, and asked what our policy would be on that.

They were also concerned about women being arrested for failing to attend at court as witnesses and that the threat of a warrant would significantly increase anxiety and distress, risk re-traumatising complainers and would not gain best evidence from them.

While acknowledging that a significant proportion of rapes occur within domestic abuse environments, they felt that rape could be distinguished from other types of offending, where on occasions we compel witnesses to testify, due to the intimate nature of the violation and the potential for the victim's sexual history and character to be exposed and questioned during the trial.

Following careful consideration of all information obtained during the review, including the views and concerns of the stakeholders, the Law Officers decided that prosecution policy and guidance in relation to how COPFS will approach cases of rape and other serious sexual offending where the complainer becomes reluctant should be revised. The reasons for this are set out below in the Changes section.

Summary of research and consultation carried out:

In reviewing our policy and approach, we have taken account of:-

(a) research into practices in other jurisdictions, e.g. the approach of the Crown Prosecution Service (CPS) in England and Wales, which similarly requires each case to be considered on its own circumstances;

(b) relevant ECHR case law dealing with reluctant complainers and affirming the obligations of the State to protect its citizens who may be at risk of future serious harm;

(c) consultation with key stakeholders, both in relation to our related domestic abuse policy with consultation on the revised Domestic Abuse Joint Protocol but also specifically in relation to our approach to dealing with reluctant complainers in cases of rape and other serious sexual offending. Key stakeholders were consulted in respect of both consultations including Police Scotland and stakeholders from a range of victim organisations including Rape Crisis Scotland, Scottish Women's Aid, ASSIST, SafeLives and Hemat Gryffe.

(d) consultation with the head of the National Sexual Crime Unit (NSCU), Advocates Depute and prosecutors, case preparers and VIA staff from the national High Court Sexual Offences Team (HCSOT);

(e) consideration of the findings of the 2017 Inspectorate of Prosecution Review of Sexual Crime;

(f) review of a number of cases reported to Law Officers for consideration of no action on the basis of reluctance of the complainer.

Equality Ambassadors contacted:

(if none, please give reasons why)

Given the extensive level of stakeholder engagement and consultation with both internal specialists in sexual offences and with key external stakeholders who provide support and advocacy to victims of rape, other serious sexual offending and domestic abuse, including to victims within specific protected characteristic groups, it was not necessary to seek input from the Equality Advisory Group or any internal Equality Ambassadors.

The departmental expert and policy adviser in equality and inclusion was however consulted and provided useful feedback and input in relation to the revised policy and the Equality Impact Assessment.

Key issues identified: -

(Note here if you conclude there are no equality issues relating to the new / revised policy)

We acknowledge that anyone can be a victim of rape or serious sexual offending and that many victims may belong to more than one protected group. The revised policy does not discriminate and applies equally to all complainers but we acknowledge that there may be different barriers and factors present in individual cases as a result of both the protected characteristics of the complainer or their own individual circumstances, which need to be explored individually and taken into account in making decisions in cases.

We acknowledge that there are equality issues relating to this type of offending, and therefore to the revised policy. The following protected characteristics merit specific mention.

Sex:

Sex is a primary consideration in this policy. It is well documented that women are considerably more likely to be victims of rape, serious sexual offending and domestic abuse than men. The crime of rape, which involves penetration by a penis without consent, can, by the nature of the offence, only be committed by a person having a penis but persons of all genders, gender identity and sexual orientation can be victims of rape. Over the last 3 years, in terms of the Sexual Offences (S) Act 2009 charges of rape or attempted rape reported to COPFS, around 94% involved a female victim. In 2016-17, for 20% of people convicted of rape or attempted rape the crime involved domestic abuse and information from the Domestic Abuse Recorded by the Police 2015/16 publication notes that where gender information was recorded, 79% of all incidents of domestic abuse had a female victim and a male accused.

Given the gendered nature of these crime types, we acknowledge that women

are significantly more likely to be complainers in cases of rape and other serious sexual offending and will therefore be more affected by the provisions in the revised policy. At the same time, women are most likely to be at risk of continuing and future harm from perpetrators of these crimes so the policy requirements to consider all relevant factors, including risk and safety considerations for the complainer and other members of the public, are more likely to be relevant to and to benefit women.

Disability

We acknowledge that some people with disabilities are at risk of and do experience rape and other serious sexual offending. The revised policy recognises the importance of all relevant factors being considered in each case, including factors relating to individual complainers. This includes consideration of their vulnerabilities due to individual personal circumstances and health issues and any available information about the risk to or potential or likely impact on the complainer's health or wellbeing from being a witness. The revised policy indicates that regard should be had to information from a range of sources including from the complainer, a support and advocacy worker, any healthcare professional or other person with relevant information. The revised policy also acknowledges the important role support and advocacy services can provide and that if a complainer is not currently receiving support, COPFS should explore with the complainer whether they would wish to be referred to an appropriate support organisation and if so, VIA could assist in facilitating this.

Race and ethnicity:

We acknowledge that people of different races and ethnicities are at risk of and do experience rape, other serious sexual offending and domestic abuse. We also recognise that in certain ethnic minority communities the issues can be complex and victims may face additional barriers to reporting abuse, including community pressures and language barriers. The revised policy recognises the importance of all relevant factors being considered in each case, including factors relating to individual complainers. This includes consideration of their vulnerabilities due to individual personal circumstances. It is specifically acknowledged in the revised policy that complainers can become reluctant for a variety of reasons. This can include fear of the reaction of others, including family, friends, and associates of the accused and/or their community or due to concerns about the potential implications on a range of issues, including issues concerned with immigration status. We will work with individual complainers to explore and address the issues they face and will engage with agencies providing specialist support and advocacy services to the complainer or, if a complainer is not currently receiving support, will explore this with the complainer and seek to facilitate a referral to an appropriate support organisation.

Marriage and Civil Partnership:

We recognise that this is a relevant protected characteristic to this policy and that people who are married or in civil partnerships can experience rape and other serious sexual offending. The COPFS definition of domestic abuse states that "the relationship will be between partners (married, cohabiting, civil

partnership or otherwise) or ex-partners.” The revised policy specifically acknowledges that some victims of rape and other serious sexual offending will be victims of domestic abuse and that the abuse they have endured at the hands of their spouse / partner or ex-partner can have an impact upon them and be a factor in their reluctance. Domestic abuse is also highlighted in the policy as a relevant factor to be considered in terms of assessing the continuing and future risk and safety considerations for the complainant and other members of the public.

Changes made to new / revised Policy

In terms of the previous policy for dealing with reluctant complainants, while each case was considered individually on its own merits and circumstances, in practice the approach developed that the complainant’s views were effectively determinative in the decision of whether or not to prosecute, with cases almost never proceeding in the face of reluctance.

The revised policy makes clear that:-

- (i) The decision as to whether or not a case will be prosecuted is one to be taken by the Crown in the public interest;
- (ii) The attitude and views of the complainant will always be a very significant factor in the decision; and
- (iii) Prosecutors will require to weigh up carefully all relevant factors bearing on the decision, including factors relating to the complainant, the nature of the offending behaviour, risk posed to the complainant and other members of the public and other factors. This will often involve an assessment of the relative risks of prosecuting and not prosecuting.

The revised policy does not represent a fundamental shift in approach by COPFS. Each case will continue to be carefully assessed and considered on its own merits and circumstances, having regard to all the relevant factors, and there will continue to be cases which are not prosecuted due to the reluctance of the complainant.

However, the revised policy acknowledges and reflects the concerns which lead to the policy review, namely:-

- (a) The previous approach didn’t take proper account of continuing risk the accused presents to the complainant or other members of the public;
- (b) Concerns that the approach was contrary to ECHR jurisprudence which confirms the obligation of the state to protect its citizens, even if they don’t necessarily welcome that. Case law over a number of years from the European Court of Human Rights in Strasbourg indicates that a prosecution service which treats disengagement as a reason for not persisting with a prosecution, without considering all relevant factors, may be vulnerable if the accused goes on to commit further serious offences. (One of the leading authorities is *Opuz v Turkey* (2010) 50 EHRR 28);
- (c) The Crown prosecutes independently and in the public interest. In no other

areas of our work do we effectively surrender that decision-making responsibility and doing so can place significant burdens on complainers;

(d) We are dealing with increasing numbers of cases which rely for corroboration on the Moorov doctrine – where the implications of one complainer disengaging can mean the case involving another complainer no longer has sufficient evidence to proceed;

(e) In cases of domestic abuse, it's a recognised part of the dynamics of abuse that there's often high repeat victimisation and low reporting, with victims frequently becoming reluctant or disengaging for a variety of reasons often connected with the abuse or the impact of it, including fear of further abuse or loss of confidence and self-esteem and minimisation of abuse.

There are therefore sound reasons for operating a presumption to proceed in domestic abuse cases, with the presumption still being rebuttable where appropriate.

It is acknowledged that the previous policy in rape cases wasn't always fully consistent with the domestic abuse policy. The revised policy for rape cases will now be better aligned with the COPFS domestic abuse policy.

The views and concerns of stakeholders were taken into account in consideration of whether to revise the policy and it was noted that, while there was agreement on certain aspects, the views of stakeholders differed in relation to the proposed revised policy. Having carefully considered matters and taken account of concerns raised, the Law Officers decided that, for the reasons set out above, the policy required to be revised to enable proper account to be taken in individual cases of the risk posed to complainers and other members of the public and to seek to protect the public from dangerous offenders.

The views and concerns of stakeholders have however been taken into account in the contents of the revised policy, but also in relation to other relevant matters. This is reflected in the following ways:-

- The revised policy recognises that there can be many reasons why individual complainers become reluctant to be witnesses in a prosecution, including factors relating to the offence, to the criminal justice process and to other individual considerations
- It is recognised that the intimate, degrading and violating nature of rape and other cases of serious sexual offending and domestic abuse can present particular challenges, sensitivities, concerns and fears for complainers in terms of giving evidence and that complainers will often be quite vulnerable.
- The revised policy recognises that while there are strong reasons why we would not wish to compel an unwilling complainer to give evidence, each case must be carefully considered on its own merits and circumstances to decide whether it is appropriate to proceed, despite the reluctance of the complainer.
- The views of and impact on the complainer will always be very significant factors in the decision. The revised policy highlights the need to explore and address reasons for reluctance with the complainer, to seek their

views, to offer support and to take all reasonable steps to seek to re-engage them and to involve other agencies who are supporting the complainer where appropriate.

- It highlights the range of factors to be considered by prosecutors in deciding whether or not to proceed with a prosecution in the face of reluctance, including factors relating to the complainer, the nature of the offending behaviour, risk posed to the complainer and other members of the public and other relevant factors.
- While it is acknowledged that there could be circumstances where a witness warrant could be granted if a complainer refused to attend at court, this would be rare in these types of cases and very careful consideration would be given in any individual case to all relevant factors, including the vulnerability of the complainer, before a decision was taken as to whether it was appropriate to seek a warrant.
- A formal feedback process has been commenced with Rape Crisis to enable complainers to provide anonymous feedback on their experiences of the justice process and their interaction with COPFS
- COPFS guidance and process for dealing with reported allegations of wasting police time by making false rape allegations has been strengthened.
- COPFS have accepted all of the Inspectorate of Prosecution's recommendations following the Review of Sexual Crime and are actively working on implementing these in order to improve efficiency, reduce the journey time of cases and to improve communication and support for victims.
- COPFS continue to work closely with justice partners to modernise the criminal justice system and to make it more efficient and effective. The Evidence and Procedure Review is a key part of that drive to secure improvements to the way in which the justice system operates. The use of pre-recorded evidence is one way in which we can make it easier for children and vulnerable witnesses to give their evidence. The quality of the evidence is likely to be enhanced and the distress to vulnerable witnesses reduced. We are working closely with the Scottish Courts and Tribunal Service (SCTS), the Scottish Government and key stakeholders on the best ways to achieve this vision.

The revised policy improves previous practice by ensuring that prosecutorial decisions take appropriate account of all relevant factors, including crucially risk and safety considerations for the complainer and other members of the public, predominantly females, who may be at risk of harm from dangerous perpetrators of sexual violence.

We acknowledge that victims from some protected groups may face additional pressures to disengage from the prosecution process. However, we consider that the revised policy does not discriminate on the basis of belonging to one or multiple protected characteristics.

Review Process for Policy

The revised policy will be subject to ongoing review. In communicating the terms of the revised policy to COPFS staff and external stakeholders involved in the consultation process, it was made clear that we will welcome any ongoing feedback provided after the revised policy is implemented, including in relation to any individual cases to which the revised policy is being applied, so we can ensure the policy is fit for purpose. The policy can be adapted to suit future changes in law and criminal process.

SEND THIS COMPLETED FORM TO DiversityTeam@copfs.gsi.gov.uk

For further information about this impact assessment,
please contact:
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Alternatively send an email to DiversityTeam@copfs.gsi.gov.uk.

Assessment records can be made available in alternative formats
or languages on request.